

RESOLVING THE CONFLICT ON THE KOREAN PENINSULA BY PREVENTIVE DIPLOMACY AND THE RULE OF LAW

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ABSTRACT

Even though an armistice agreement was signed in 1953, conflict and tension exist on the Korean Peninsula. A situation on the Korean Peninsula has recently made this tension worse. A tension escalates into a serious conflict when North Korea conducts nuclear weapons or ballistic missile tests. The international community is concerned about a serious conflict on the Korean Peninsula. Meanwhile, commentators and scholars are trying to offer new strategies for resolving this conflict and building peace. This article will address and explore how a conflict on the Korean Peninsula can be resolved by preventive diplomacy and the rule of law. This article will analyze and discuss how preventive diplomacy can create negative peace or an absence of war. This article will also address how the rule of law can build positive, or sustainable,

peace in the region. This article will examine how the rule of law can maintain peace and why North Korea should consider the rule of law.

I. INTRODUCTION

Although the Korean War began more than sixty years ago and was suspended by an armistice agreement in 1953, the conflict and tension have still existed on the Korean Peninsula. All parties have tried to protect their security interests through the use of military forces. The United Nations (U.N.) has tried to resolve the conflict and establish peace in the region. Many scholars and commentators have also tried to explore a conflict resolution; yet, there is no conflict resolution on the Korean Peninsula. Recently, the conflict and tension escalated when North Korea conducted nuclear weapons and ballistic missile tests. The international community is concerned that the conflict and tension may lead to a Second Korean War.

In fact, the conflict on the Korean Peninsula can be resolved by preventive diplomacy and the rule of law. Further, both strategies can also be used to build peace in the region. Preventive diplomacy is a first step to resolve the conflict and build peace. Preventive diplomacy can prevent disputes from escalating into conflicts, or prohibit the spread of conflicts. Preventive diplomacy may escalate the conflict or tension which resulted from nuclear weapons and ballistic missile tests. Preventive diplomacy can then create negative peace, or an absence of war. Nevertheless, preventive diplomacy cannot create permanent or sustainable peace on the Korean Peninsula. The rule of law can be used as a second step to build positive, or sustainable, peace in the region. This means that there would be no conflict on the Korean Peninsula. The rule of law can address the root causes of the conflict. The rule of law can also maintain peace or establish peaceful relations between two parties. More importantly, North Korea will probably seek self-sustaining non-violence under the rule of law.

This article will mainly explore and address how preventive diplomacy and the rule of law can resolve the conflict on the Korean Peninsula. Part II of this article will discuss the history of the Korean Peninsula conflict. Part III of this article will examine how preventive diplomacy can prevent the conflict or establish negative peace in the region. In particular, it will address the definition of preventive diplomacy and the role of preventive diplomacy on the Korean Peninsula. This part will also discuss and analyze the new elements of preventive diplomacy, which consist of communication, cooperation, and confidence. Part IV of this article will consider how the rule of law builds positive or sustainable peace in the region. Since the notion of the rule of law

involves regulations, this part will discuss the role of international law on the Korean Peninsula. It will later examine the importance and definition of the rule of law. This part will discuss a difference between the rule of law and North Korea's political ideology. It will also address how North Korea adopts the rule of law to create sustainable peace on the Korean Peninsula.

II. THE HISTORY OF THE KOREAN PENINSULA CONFLICT

In 1910, Korea was occupied by Japan. Korea regained its independence after Japan surrendered to the Allies in World War II. However, after the end of World War II, the Korean Peninsula was occupied by the United States (U.S.) and the Soviet Union.¹ Both countries used the 38th parallel (38 degrees north latitude) as a temporary demarcation line to avoid accidental collisions between themselves. The Korean Peninsula was then divided at the 38th parallel into a northern area and a southern area. The United States occupied a southern area while the Soviet Union occupied a northern area. The northern and southern area each established their administration and claimed jurisdiction over the entire Peninsula. The northern area, supported by the Soviet Union, became the Democratic People's Republic of Korea, or North Korea. The southern area, supported by the United States, became the Republic of Korea, or South Korea. North Korea was a communist state; South Korea, an anticommunist state. Both North Korea and South Korea wanted to eliminate the other's government and unify Korea under their rule.²

The Korean War began on June 25, 1950 when the North Korean army crossed the 38th parallel and invaded South Korea. The North Koreans captured the South Korean capital and advanced to the southern part of the Korean Peninsula. The purpose of the invasion was to unify the Korean Peninsula by force. The United Nations Security Council disagreed with the invasion and established a joint command force to assist South Korea. The United Nations forces, consisting of troops from sixteen member states, were sent to the Korean Peninsula under its command. The United Nations forces responded to North Korea by cutting off its supply lines. The North Korean war machine collapsed, and the country had to retreat across the 38th parallel. The United Nations forces retook South Korea in September 1950. The United Nations also expanded the objective from the preservation of South Korea to reunification of the Korean Peninsula. The United Na-

1. CHRISTOPH BLUTH, *KOREA 1-2* (2008).

2. MATTHEW S. MUEHLBAUER & DAVID J. ULBRICH, *WAYS OF WARS: AMERICAN MILITARY HISTORY FROM THE COLONIAL ERA TO THE TWENTY-FIRST CENTURY* 425 (2014).

tions forces then crossed into North Korea and captured the North Korean capital. By November, the United Nations forces approached the Yalu River, the border of China and North Korea. The Chinese forces, called "volunteers," crossed the border and attacked the United Nations forces. The combined Chinese and North Korean forces recaptured the North Korean capital in December. The United Nations forces retreated below the 38th parallel. On January 4, 1951, the communist forces recaptured the South Korean capital. By March 1951, the United Nations forces pushed communist troops back across the 38th parallel again.

In July 1951, peace negotiations in the Korean Peninsula took place at the communist-controlled city of Kaesong in western South Korea. Both sides argued such issues as the exchange of prisoners of war and the exact location of the truce demarcation line that would become the new border of North and South Korea. Unfortunately, this negotiation collapsed in August 1951. Another negotiation resumed in October 1951 at the village of Panmunjom in southern North Korea. There was no substantial progress in the negotiation because neither side wanted to compromise on those issues.³ Military operations continued in the form of limited attacks, air-to-air battles, and strategic bombing campaigns.⁴ Eventually, peace negotiations proceeded again, resulting in an armistice on July 27, 1953. The armistice ended the Korean War even though it did not establish permanent peace. North and South have also been divided along a Demilitarized Zone, nearly parallel to the original border between the North and the South.⁵ Among other things, both Dulles and Eisenhower claimed that the threat of introducing nuclear weapons had played a major role in completing the agreement that ended the war.⁶ However, it is unclear whether the threat of nuclear retaliation was decisive. The severe losses that North Korea had suffered, the economic hardship in the People's Republic of China, and the expectation of reduced Soviet support in the war effort following Stalin's death seemed to be more influential at the time.⁷ Thus, the armistice ending the Korean War resulted from nonnuclear considerations.

The tension between North and South Korea has existed since 1953. There have been several incidents and clashes triggered by North

3. CARTER MALKASIAN, *THE KOREAN WAR 1950-1953* 7 (2001).

4. *Id.*

5. NAM P. SUH, *COMPLEXITY: THEORY AND APPLICATIONS* 255 (2005).

6. Michael Nacht et al., *Cross-Domain Deterrence in American Foreign Policy*, in *CROSS-DOMAIN DETERRENCE: STRATEGY IN AN ERA OF COMPLEXITY* 38 (Jon R. Lindsay & Erik Gartzke eds., 2019).

7. *Id.*

Korea.⁸ More importantly, North Korea has posed a serious threat to the Peninsula and many countries by developing and testing nuclear weapons.⁹ In fact, the North Korea nuclear development program started in the mid-1950s. North Korea gained access to advanced technologies from Moscow and its Eastern and central European satellite states.¹⁰ This included nuclear technology. In 1956, the Soviets signed an agreement to train North Korean technicians in peaceful uses of nuclear technology at Soviet nuclear research facilities.¹¹ In 1959, the Soviets signed another deal with the North Koreans to provide them with a research reactor, which was completed in 1965.¹² The North Korean nuclear weapons program began in the early 1970s. More particularly, North Korea built several gas-graphite nuclear reactors in the Soviet style to generate electricity.¹³ All produced the by-product plutonium, which could be used to manufacture hydrogen bombs.¹⁴ North Korea also established missile development programs and gained missile-related technology from China. In 1985, the Soviet Union convinced Kim Il Sung to sign the Nonproliferation Treaty (NPT), which required inspections by the U.N. International Atomic Energy Agency (IAEA) to prevent military use of nuclear material.¹⁵ From 1993-1994, North Korea did not cooperate with the IAEA inspecting nuclear facilities under the NPT. Since 2002, North Korea has withdrawn from the NPT and has tested nuclear weapons.

North Korea has developed nuclear weapons and ballistic missile programs which threaten international peace and security. Those have increased the tension between North and South Korea and have worsened the situation on the Korean Peninsula.¹⁶ The United States tried to deter North Korea from developing and testing nuclear weapons and

8. JACOB BERCOVITCH & MIKIO OISHI, *INTERNATIONAL CONFLICT IN THE ASIA-PACIFIC: PATTERNS, CONSEQUENCES AND MANAGEMENT* 17 (2010).

9. *Id.*

10. Joeeun Kim, *Rethinking the Origins of North Korea's Nuclear Program*, in *NUCLEAR SCHOLARS INITIATIVE: A COLLECTION OF PAPERS FROM THE 2014 SCHOLARS INITIATIVE* 74 (Sarah Minot ed., 2015).

11. *Id.*

12. *Id.*

13. PATRICIA BUCKLEY EBREY & ANNE WALTHALL, *MODERN EAST ASIA FROM 1600: A CULTURAL, SOCIAL, AND POLITICAL HISTORY* 498 (3d ed. 2013).

14. *Id.*

15. *Id.*

16. DAVID W. SHIN, *RATIONALITY IN THE NORTH KOREAN REGIME: UNDERSTANDING THE KIMS' STRATEGY OF PROVOCATION* 245 (2018).

other programs.¹⁷ Unfortunately, it was not successful. During 2013 and 2016, North Korea launched missile tests and prepared for new nuclear tests. Those provocations escalated the tension and conflict with five countries – the United States, China, Japan, Russia, and South Korea. However, there have been attempts to reduce the tension and establish peaceful negotiations. Recently, denuclearization negotiations with North Korea have resumed. More particularly, on April 27, 2018, Kim Jong-un, the current supreme leader of North Korea, met Moon Jae-in, the current president of South Korea, in the demilitarized zone which separates North and South Korea. They pledged to convert the armistice that ended the hostilities of the Korean War into a formal peace treaty. They also confirmed the shared goal of achieving a nuclear-free Korean Peninsula. On June 12, 2018, President Donald Trump and Chairman Kim had a meeting in Singapore, where they signaled a desire to change the United States-North Korea relationship. On February 27-28, 2019, President Trump and Kim held a second meeting in Vietnam, but both leaders disagreed over sanctions relief and denuclearization. On June 30, 2019, President Trump and Chairman Kim had a meeting in Panmunjom at the demilitarized zone. Both leaders agreed to restart nuclear negotiations.

III. PREVENTIVE DIPLOMACY

A. *The Definition of Preventive Diplomacy*

In the past, the international community failed to resolve or terminate conflicts among states.¹⁸ International entities and states felt that conflict prevention could be used to maintain international peace and security. After the end of World War II, the principle of conflict prevention was established and developed by the U.N. This principle can be found in paragraph 1 of Article 1 of the U.N. Charter.¹⁹ In 1960, the

17. GREGORY J. MOORE, NORTH KOREAN NUCLEAR OPERATIONALITY: REGIONAL SECURITY & NONPROLIFERATION 32 (2014).

18. Edward C. Luck, *Prevention: Theory and Practice*, in FROM REACTION TO CONFLICT PREVENTION: OPPORTUNITIES FOR THE UN SYSTEM 252 (Fen Osler Hampson & David M. Malone eds., 2002) (“Prevention is hardly a new goal for the United Nations. Its founders had identified conflict prevention as one of its primary purposes, given the failure of the League of Nations to prevent the chain of events that lead to World War II.”).

19. See U.N. Charter art. 1, ¶ 1, stating “The Purposes of the United Nations are: (1) To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace [...]”.

term “preventive diplomacy” was first introduced by Dag Hammarskjöld, former U.N. Secretary-General.²⁰ It was described as an effort to preempt the escalation of superpower proxy wars in Third World countries into global confrontations during the Cold War.²¹ However, after the end of the Cold War, the idea of “preventive diplomacy” was developed.²² Former U.N. Secretary-General Boutros Boutros-Ghali’s 1992 report, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peacekeeping*, outlined suggestions for enabling intergovernmental organizations to respond quickly and effectively to threats to international peace and security in the post-Cold War era.²³ In particular, four major areas of activity were identified: preventive diplomacy, peacemaking, peacekeeping, and peace building.²⁴ Preventive diplomacy is then distinguished from other peace actions. Among other things, preventive diplomacy is defined as an “action to prevent disputes from arising between parties, to prevent existing disputes from escalating into conflict and to limit the spread of the latter when they occur.”²⁵ Boutros-Ghali’s view was not limited to securing peace between the United States and the Soviet Union.²⁶ His definition was much broader and aimed to prevent all types of violent conflict.²⁷ It also stopped dividing the world into two power blocs, but encouraged countries to work together for peace.²⁸

In 2001, former U.N. Secretary-General Kofi Annan proposed that “preventive diplomacy” be renamed “preventive action.”²⁹ In his opin-

20. THE UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION (UNESCO), *LONG WALK OF PEACE: TOWARDS A CULTURE OF PREVENTION* 42 (2018).

21. *Id.*

22. Luck, *supra* note 18, at 252 (“With the end of the Cold War, then, it was a logical progression for the Security Council, meeting at the summit level for the first time in 1992, to ask UN Secretary-General Boutros Boutros-Ghali to prepare an analytical report on “the capacity of the United Nations for preventive diplomacy, for peacemaking and for peacekeeping.”).

23. Tim Murithi, *Peacemaking and African Traditions of Justice and Reconciliation*, in *PEACEMAKING: FROM PRACTICE TO THEORY* 276 (Susan Allen Nan et al., 2011).

24. *Id.*

25. U.N. Secretary-General, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping*, U.N. Doc. A/47/277-S/24111 (June 17, 1992).

26. R.S. KALHA, *THE DYNAMICS OF PREVENTIVE DIPLOMACY* 2 (2014).

27. EMMA J. STEWART, *THE EUROPEAN UNION AND CONFLICT PREVENTION: POLICY EVOLUTION AND OUTCOME* 30 (2006).

28. KALHA, *supra* note 26, at 3.

29. J. Ododa Opiyo, *The Challenges of Preventive Diplomacy: The United Nations’ Post-Cold War Experiences in Africa*, AFR. CTR. FOR THE CONSTRUCTIVE RESOL. OF DISPUTES (2012), available at <http://www.accord.org.za/ajcr-issues/%EF%BF%BCthe-challenges-of-preventive-diplomacy/> (last visited Sept. 29, 2019).

ion, preventive diplomacy was used as a means to prevent human suffering and as an alternative to costly politico-military operations.³⁰ There are also several forms of action that could have useful preventive results. Those may include preventive deployment, preventive disarmament, preventive humanitarian action, and preventive peace building, as well as a wide range of actions in the fields of good governance, human rights, and economic and social development.³¹ Additionally, Kofi Annan emphasized that “preventive action” should be limited mostly to measures stated under Chapter VI of the U.N. Charter, but enforcement action under Chapter VII of the U.N. Charter must remain a legitimate means of last resort to prevent massive violations of fundamental human rights or other serious threats to peace.³²

Former U.N. Secretary-General Ban Ki Moon reconsidered the concept of preventive diplomacy.³³ He established four elements of preventive diplomacy. First, the strengthening of U.N. partnerships with all stakeholders should be emphasized.³⁴ This is because successful preventive diplomacy would require contributions of a range of actors at both the regional and international levels.³⁵ Second, the developments of preventive diplomacy should include the increasing use of international contact groups.³⁶ Progress can merely be accomplished through “partnership,” which results in a combination of influence, impartiality, capacity, and capability.³⁷ Effective preventive actions depend on the willingness of parties in the conflict to engage. Neighboring states and other institutions may contribute or become key allies. Third, the international community should continue to invest in prevention.³⁸ The global economic crisis has put new pressures on resources and responses, when successful, are highly cost-effective. Fourth, women should have a role in preventive diplomacy.³⁹

U.N. Secretary-General Antonio Guterres has focused on preventive diplomacy which has been used to respond to conflicts for decades. He has highlighted conflict prevention as the top priority for the U.N. characterized by, a comprehensive, modern, and effective operation

30. *Id.*

31. *Id.*

32. *Id.*

33. R.P. BARSTON, MODERN DIPLOMACY 248 (4th ed. 2014).

34. Opiyo, *supra* note 29.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

peace architecture, encompassing prevention, conflict resolution, peace-keeping, peace building, and long-term development – the “peace continuum.”⁴⁰ He stressed that prevention must be integrated into the three pillars of the U.N.’s work, urging staff and member states to enhance the interlink-ages between peace and security, development, and human rights.⁴¹ He has also promoted the sustaining peace vision as a new rationale and source of momentum for preventing conflicts.⁴²

However, preventive diplomacy is considered a successful and unsuccessful strategy. For example, in the Cuban Missile Crisis of 1962, preventive diplomacy could deter a nuclear confrontation between the United States and the Soviet Union.⁴³ On the other hand, preventive diplomacy was unable to deter the invasion of Iraq in 2003 and the subsequent disastrous consequences.⁴⁴ Even though the U.N. encourages or supports preventive diplomacy, conflict prevention is less successful. More particularly, there are a number of obstacles to preventive diplomacy. First, it is difficult for third parties to influence or manipulate domestic policies within the countries where a violent conflict is to be prevented.⁴⁵ This is because preventive diplomacy may require third parties to resolve conflicts by intervening in the countries. However, inappropriate intervention may violate countries’ sovereignty.⁴⁶ Second, it is difficult to find the long-term support.⁴⁷ This is because preventive diplomacy is a long, costly, and fragile process that can be easi-

40. *At Security Council, UN Chief Guterres Makes Case for New Efforts to Build and Sustain Peace*, UNITED NATIONS (Jan. 10, 2017), available at <https://www.un.org/sustainabledevelopment/blog/2017/01/at-security-council-un-chief-guterres-makes-case-for-new-efforts-to-build-and-sustain-peace/> (last visited Sept. 29, 2019); Remarks to the General Assembly High-Level Meeting on Peace building and Sustaining Peace, UNITED NATIONS (Apr. 24, 2018), <https://www.un.org/sg/en/content/sg/speeches/2018-04-24/peacebuilding-and-sustaining-peace-remarks-general-assembly> (last visited Sept. 29, 2019).

41. Adriana Erthal Abdenur & Giovanna Kuele, *Can the African Union Innovate in Conflict Prevention? Evidence from Mediation and Preventing and Countering Violent Extremism*, in CONTEMPORARY AFRICA AND THE FORESEEABLE WORLD ORDER 96 (Francis Onditi et al., 2019).

42. *Id.*

43. *Preventive Diplomacy at the United Nations*, UNITED NATIONS CHRON. (n.d.), available at <https://unchronicle.un.org/article/preventive-diplomacy-united-nations> (last visited Sept. 29, 2019).

44. Claude Rakisits, *Summary of “The Gulf Crisis: Failure of Preventive Diplomacy,” BEYOND INTRACTABILITY*, available at <https://www.beyondintractability.org/artsum/rakisits-thegulf> (last visited Sept. 29, 2019).

45. JACOB BERCOVITCH & RICHARD JACKSON, *CONFLICT RESOLUTION IN THE TWENTY-FIRST CENTURY: PRINCIPLES, METHODS, AND APPROACHES* 98 (2009).

46. *Id.*

47. *Id.*

ly derailed, especially if the root causes of the conflicts are not addressed.⁴⁸ Thus, preventive diplomacy is an expensive investment. Third, it is difficult to keep up preventive efforts even though preventive diplomacy is cheaper than massive reconstruction or humanitarian projects.⁴⁹ Preventive efforts may require the development of systematic and coordinated long-term engagement, as well as the integration of political, social, economic, military, and human rights measures.⁵⁰ Such cooperation is difficult to accomplish and costly to maintain. Fourth, it is difficult to determine whether and when preventive diplomacy is no longer needed.⁵¹ Fifth, preventive diplomacy is a lack of political will.⁵² This means that countries do not want to involve other situations or conflicts, but only focus on their interests.

B. The Role of Preventive Diplomacy on the Korean Peninsula

A question arises whether preventive diplomacy should be used on the Korean Peninsula. The situation on the Korean Peninsula is considered a “frozen conflict” that was the result of the Cold War.⁵³ The conflict is deeply complex and affects several countries in the region. The root causes of the conflict involve political ideology, divisions, discrepancy, hostility, military forces, and weapons development. Since the end of the Korean War, the conflict has hung between stalemate and escalation. There has been no peace treaty or international framework for resolving and ending a conflict. More particularly, peace on the Korean Peninsula has mainly been threatened by North Korea. The tension has recently escalated when North Korea conducted nuclear weapons and ballistic missile tests.⁵⁴ Those have posed a direct and serious threat to the peace and stability.⁵⁵ On the other hand, the United States and South Korea have responded to the threat by establishing joint military exercises and missile defense cooperation. North Korea has considered

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 99.

52. *Id.*

53. ROBERT DANIEL WALLACE, *NORTH KOREA AND THE SCIENCE OF PROVOCATION: FIFTY YEARS OF CONFLICT-MAKING* 164 (2016).

54. CHI YOUNG PAK, *KOREA AND THE UNITED NATIONS* 133 (2000).

55. *Id.* (This not only represents a challenge to the international regime of non-proliferation of nuclear weapons, but could also lead to the escalation of an arms race in the Asian region.).

joint military exercises to be the threats, escalating the tension on the Korean Peninsula.⁵⁶

Furthermore, the tension has been escalated by verbal threats or the exchange of words. Generally, verbal threats are often considered costless communication or cheap talk which may not have any effect on behavior.⁵⁷ However, verbal threats may have an effect when they can change people's minds about their goals.⁵⁸ On the Korean Peninsula, verbal threats have been used several times, but they did not escalate the tension or conflict. Until 2017, verbal threats have escalated the tension when they have been used to support their physical actions. Thus, talk is probably not cheap anymore, but it is like pouring gasoline on the fire. For example, in August 2017, the United States and South Korea were conducting annual military drills.⁵⁹ About 17,500 U.S. troops and 50,000 South Korean troops were involved in the exercises.⁶⁰ At the U.N. General Assembly on September 19, 2017, President Trump stated that "[t]he United States has great strength and patience, but if it is forced to defend itself or its allies, we will have no choice but to totally destroy North Korea."⁶¹ He also said, before using a belittling nickname for North Korean leader Kim Jong-un, "Rocket Man is on a suicide mission for himself and for his regime."⁶² Meanwhile, Ri Yongho, North Korea's foreign minister, responded to President Trump's speech, noting that "[t]here is a saying that the marching goes on even when dogs bark⁶³ [...] If he was thinking he could scare us with the sound of a dog barking, that's really a dog dream."⁶⁴ North Korea has

56. Choe Sang-Hun & Austin Ramzy, *South Korea and U.S. Begin Drills as North Wars of Rising Tensions*, N.Y. TIMES (Aug. 21, 2017), available at <https://www.nytimes.com/2017/08/21/world/asia/south-korea-us-joint-exercises.html> (last visited Sept. 29, 2019).

57. Dustin H. Tingley & Barbara F. Walter, *Can Cheap Talk Deter? An Experimental Analysis*, 55 J. CONFLICT RESOL. 994, 998 (2011).

58. *Id.* at 997.

59. *US-South Korea Hold Military Drills Amid Tension*, BBC NEWS (Aug. 21, 2017), available at <https://www.bbc.com/news/world-asia-40957725> (last visited Sept. 30, 2019).

60. *Id.*

61. David Nakamura & Anne Gearan, *In U.N. Speech, Trump Threatens to 'totally destroy North Korea' and calls Kim Jong Un 'Rocket Man,'* WASH. POST (Sept. 19, 2017), available at <https://www.washingtonpost.com/news/post-politics/wp/2017/09/19/in-u-n-speech-trump-warns-that-the-world-faces-great-peril-from-rogue-regimes-in-north-korea-iran/> (last visited Sept. 30, 2019).

62. *Id.*

63. Justin McCurry, *'Sound of A Dog Barking': North Korea Ridicules Trump Threat*, THE GUARDIAN (Sept. 20, 2017), available at <https://www.theguardian.com/world/2017/sep/21/sound-of-a-dog-barking-north-korea-ridicules-trump-threat> (last visited Sept. 30, 2019).

64. *Id.*

also increased its production of nuclear weapons and ballistic missiles. This could increase the tension on the Korean Peninsula.

Preventive diplomacy should be used to resolve the conflict and prevent serious hostilities on the Korean Peninsula. Preventive diplomacy can reduce tensions from escalating into armed violence or war between the United States and North Korea. More importantly, preventive diplomacy can prohibit or halt the nuclear weapons and ballistic missile tests. Peace built by preventive diplomacy is considered "negative" peace. Typically, negative peace refers to the temporary absence of war or direct physical violence.⁶⁵ Preventive diplomacy results in a circumstance in which no military forces and weapon development are taking place. Nevertheless, preventive diplomacy cannot resolve all the problems or build sustainable peace on the Korean Peninsula. The root causes of conflicts such as political ideology and hostility may not be resolved by preventive diplomacy. Preventive diplomacy may merely handle immediate causes which escalate tensions or lead to the conflict in the region. Since preventive diplomacy creates temporary peace, the conflict or tension may erupt again. Thus, preventive diplomacy cannot build positive peace in the region.

C. *The Elements of Preventive Diplomacy*

A question arises how preventive diplomacy can be used to resolve conflicts or prevent tensions on the Korean Peninsula. In *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peacekeeping*, Boutros Boutros-Ghali established a strategy for preventive diplomacy. It required confidence-building measures.⁶⁶ It needed early warning based on information gathering and informal or formal fact-finding.⁶⁷ It also involved preventive deployment of peacekeepers and, in some situations, demilitarized zones.⁶⁸ However, the world has changed. More particularly, the world has become alarmed not because of the North's conventional military forces, but rather because it is pursuing a nuclear weapons program combined with a ballistic missile program.⁶⁹ The classical strategy for preventive diplomacy created by Boutros-Ghali may not resolve the conflict or cease this tension effectively. Perhaps,

65. Eros Desouza et al., *Definitions of Peace and Reconciliation in Latin America*, in INTERNATIONAL HANDBOOK OF PEACE AND RECONCILIATION 99 (Kathleen Malley-Morrison et al. eds., 2013).

66. U.N. Secretary-General, *supra* note 25.

67. *Id.*

68. *Id.*

69. VICTOR D. CHA & DAVID C. KANG, NUCLEAR NORTH KOREA: A DEBATE OF ENGAGEMENT STRATEGIES 58 (2005).

the situation on the Korean Peninsula is more complex, uncertain, and unstable.⁷⁰ Some elements may not be applied to prevent the conflict or discourage hostilities in the region. For example, preventive diplomacy or the deployment of military forces has been applied to deter violence in the region. The Korean demilitarized zone or a prohibited military zone was established between North and South Korea along the 38th parallel.⁷¹ This could prevent provocation and collision between the South and the North. However, tensions have still escalated between North and South Korea. Provocation has taken place near or in the Korean demilitarized zone. For example, on April 4, 1996, North Korea announced that it would give up its demilitarized zone maintenance duties.⁷² North Korean soldiers entered the demilitarized zone and unloaded their mortars, recoilless rifles, and machine guns on their side of the joint security area.⁷³ This could increase the tension and violate the 1953 Armistice Agreement, which mandates that both sides suspend all hostile actions.⁷⁴ Thus, the new strategy for preventive diplomacy is required to resolve the conflict and maintain peace on the Korean Peninsula.

In particular, the new strategy for preventive diplomacy in the Korea Peninsula includes three elements: (1) communication, (2) cooperation, and (3) confidence.

1. Communication

Communication is a process of transferring data, information, opinion, and understanding from one person to another.⁷⁵ Communication has an important role in interaction among people.⁷⁶ Communication also has a vital role in international relations because states interact with each other in various ways. More importantly, communication is a means to resolve international conflicts. Thus, communication should

70. Tsuneo Akaha, *Introduction: Uncertainty, Complexity, and Fluidity on the Korean Peninsula*, in *THE FUTURE OF NORTH KOREA* 1-3 (Tsuneo Akaha ed., 2002).

71. REUEL R. HANKS, *ENCYCLOPEDIA OF GEOGRAPHY TERMS, THEMES, AND CONCEPTS* 42 (2011).

72. JUNGSUP KIM, *INTERNATIONAL POLITICS AND SECURITY IN KOREA* 129 (2007).

73. LARS ASSMANN, *THEATER MISSILE DEFENSE (TMD) IN EAST ASIA: IMPLICATIONS FOR BEIJING AND TOKYO* 224 (2007).

74. KIM, *supra* note 72, at 129.

75. Parissa Haghirian, *International Knowledge Transfer as a Challenge for Communities of Practice*, in *ENCYCLOPEDIA OF COMMUNITIES OF PRACTICE IN INFORMATION AND KNOWLEDGE MANAGEMENT* 234 (Elayne Coakes & Steve Clarke eds., 2005); ARUNA KONERU, *PROFESSIONAL COMMUNICATION* 25-26 (2008).

76. JAMES W. NEULIEP, *INTERCULTURAL COMMUNICATION: A CONTEXTUAL APPROACH* 376 (4th ed., 2009).

be a part of preventive diplomacy. Communication in preventive diplomacy may include negotiation, conciliation, or mediation. Negotiation is a primary process of preventive diplomacy. Negotiation is a tool to resolve conflicts and balance competing interests.⁷⁷ Negotiation is flexible and informal.⁷⁸ It can also involve more than two parties and maintain relationships among parties. Mediation refers to the involvement of a third party in efforts to reach agreement between two or more parties to a dispute.⁷⁹ Mediation could be a good choice when negotiation fails. Conciliation is a process whereby parties are assisted by a conciliator to reach an acceptable solution to the dispute.⁸⁰ A third party may provide an informal communication link between conflicting parties.⁸¹ Conciliation is different from mediation. Conciliation involves an inquiry and an investigation into the facts by a conciliator,⁸² whereas a mediator has no such authority.

On the Korean Peninsula, a negotiation has been used to resolve the conflict between North Korea and its neighbors – South Korea, Japan, China, and Russia, as well as the United States. Negotiations have been in a bilateral or multilateral form. The key objective of negotiations is to halt or dismantle North Korea's nuclear and missile programs. This is because denuclearization can prevent or reduce the escalation of tensions leading to conflicts on the Korean Peninsula. More particularly, the United States engaged in four major sets of formal nuclear and missile negotiations with North Korea: (i) the Bilateral Agreed Framework (1994-2002); (ii) the bilateral missile negotiations (1996-2000); (iii) the multilateral Six-Party Talks (2003-2009); and (iv) the Bilateral Leap Day Deal (2012).⁸³ Additionally, in June 2018, the negotiation between the United States and North Korea resumed in Singapore. However, the negotiation has stalled since the Hanoi Summit in 2019. Among other things, each negotiation has been in a form of ex-

77. BERCOVITCH & JACKSON, *supra* note 45, at 7-8.

78. JULIAN D.M. LEW ET AL., *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 13 (2003).

79. DANIELLE BESWICK & PAUL JACKSON, *CONFLICT, SECURITY AND DEVELOPMENT: AN INTRODUCTION* 100 (2d ed., 2014).

80. Ann Black, *Finding the Equilibrium for Dispute Resolution: How Brunei Darussalam Balances a British Legacy With Its Malay and Islamic Identity*, 8 *INT'L TRADE & BUS. L. REV.* 185, 195 (2003).

81. A.B. FETHERSTON, *TOWARDS A THEORY OF UNITED NATIONS PEACEKEEPING* 110 (1994).

82. MALCOLM N. SHAW, *INTERNATIONAL LAW* 773 (8th ed., 2017).

83. Mary Beth D. Nikitin et al., *Nuclear Negotiations with North Korea: In Brief*, CONGRESSIONAL RESEARCH SERVICE, available at <https://fas.org/sgp/crs/nuke/R45033.pdf> (last visited Sept. 30, 2019).

change. North Korea would halt its nuclear programs while the United States would provide economic assistance and remove sanctions or restrictions.

Unfortunately, the negotiation between the two countries is the difficult task. The negotiations often broke down because of disagreements or incompatible demands. For example, the Hanoi Summit ended in failure. The two countries had incompatible demands, so an agreement could not be reached. In the United States' version of events, North Korea agreed to dismantle the nuclear and fissile material production facilities at Yongbyon in exchange for complete sanctions relief, but the United States wanted other nuclear facilities, including covert sites, disabled as well.⁸⁴ On the other hand, the North Korean foreign minister, Ri Yong-ho, stated that North Korea had only demanded partial sanctions relief in return for closing Yongbyon.⁸⁵ He also said that the United States had wasted an opportunity that "may not come again," as Pyongyang's position would not change even if the United States sought further talks.⁸⁶ Thus, in order to conclude an agreement, the negotiation between the two countries should be designed to search for a compromise or establish the new element of the agreement which is acceptable to both sides.

The negotiation between two countries has stalled because North Korea has not relied on the negotiation processes. Instead, North Korea has acted against the negotiation process. More particularly, when North Korea was not satisfied with the deals, it conducted nuclear or missile tests during the round of negotiations. This could impede the negotiation process and escalate tensions in the region. For example, on February 29, 2012, the United States and North Korea unveiled an agreement, dubbed the "Leap Day Deal."⁸⁷ North Korea promised a moratorium on nuclear and long-range missile tests and allowed new in-

84. *North Korean Nuclear Negotiations 1985-2019*, COUNCIL ON FOREIGN REL., available at <https://www.cfr.org/timeline/north-korean-nuclear-negotiations> (last visited Sept. 30, 2019).

85. Julian Borger, *Vietnam Summit: North Korea and US Offer Differing Reasons for Failure of Talks*, THE GUARDIAN (Mar. 1, 2019), available at <https://www.theguardian.com/world/2019/feb/28/vietnam-summittrump-and-kim-play-down-hopes-of-quick-results-nuclear-talks> (last visited Sept. 30, 2019).

86. *Id.*

87. Andrew Quinn, *Insight: Obama's North Korea Leap of Faith Falls Short*, REUTERS (Mar. 30, 2012), available at <https://www.reuters.com/article/us-korea-north-usa-leap/insight-obamas-north-korean-leap-of-faith-falls-short-idUSBRE82T06T20120330> (last visited Sept. 30, 2019).

ternational inspections.⁸⁸ The United States also announced that the two countries would hold further talks to finalize details of a “target U.S. program consisting of an initial 240,000 metric tons of nutritional assistance.”⁸⁹ The U.S. statement emphasized a range of issues, including the United States’ continued commitment to the 1953 Armistice Agreement.⁹⁰ However, on March 16, 2012, North Korea announced plans for a new satellite launch in April using ballistic missile technology.⁹¹ In April 2012, North Korea launched an “earth observation satellite,” which violated the U.N. Security Council resolution.⁹² The United States suspended its portion of the Leap Day Deal arrangement because the launch violated the terms of the agreement.⁹³

Furthermore, when North Korea failed to win concessions in the negotiations, it carried on the nuclear test or adopted strategies designed to increase the threat of military aggression.⁹⁴ This would result in the collapse of nuclear deals and increase tensions in the region. For instance, the Six-Party Talks, involving China, Japan, North Korea, Russia, South Korea, and the United States, were launched in August 2003. The talks established the objective of a nuclear-free Korean Peninsula and set in motion the Korean peace process.⁹⁵ The talks went through several rounds. However, negotiations stalled when the U.S. Treasury Department targeted the Banco Delta Asia (BDA) in Macau as a “willing pawn for the North Korean government to engage in corrupt financial activities.”⁹⁶ This also led to the freezing of \$25 million worth of North Korean accounts at the BDA and efforts to shut down its hard

88. Julia Masterson, *Chronology of U.S.-North Korean Nuclear and Missile Diplomacy*, ARMS CONTROL ASS'N, available at <https://www.armscontrol.org/factsheets/dprkchron> (last visited Sept. 30, 2019).

89. Nikitin et al., *supra* note 83.

90. *Id.*

91. IAN JEFFRIES, NORTH KOREA, 2009-2012: A GUIDE TO ECONOMIC AND POLITICAL DEVELOPMENTS 653 (2013).

92. Justin McCurry, *North Korea Rocket Launch: UN Security Council Condemns Latest Violation*, THE GUARDIAN (Feb. 7, 2016), available at <https://www.theguardian.com/world/2016/feb/07/north-korea-launches-long-range-rocket-it-claims-is-carrying-a-satellite> (last visited Sept. 30, 2019).

93. Nikitin et al., *supra* note 83.

94. HEATHER ELKO MCKIBBEN, STATE STRATEGIES IN INTERNATIONAL BARGAINING: PLAY BY THE RULES OR CHANGE THEM? 44 (2015).

95. Seung-Ho Joo, *Russia and the North Korean Nuclear Crisis*, in NORTH KOREA'S SECOND NUCLEAR CRISIS AND NORTHEAST ASIAN SECURITY 137 (Seung-Ho Joo & Tae-Hwan Kwak eds., 2016).

96. Mike Chinoy, *Six Party Talks: The Least Band Alternative*, 38 NORTH (Feb. 10, 2011), available at <https://www.38north.org/2011/02/six-party-talks/> (last visited Sept. 30, 2019).

currency accounts around the world.⁹⁷ On October 9, 2006, North Korea tested a nuclear device for the first time. The Six-Party Talks resumed in February 2007. When negotiations began, North Korea pledged to begin dismantling its nuclear programs in exchange for the resumption of food and fuel aid.⁹⁸ North Korea also received 50,000 tons of fuel in exchange for allowing IAEA inspections of its facilities and shutting down production of fissile materials.⁹⁹ The Six-Party Talks collapsed in 2008 when North Korea did not allow IAEA inspectors to have access to its nuclear facilities, which was followed by a slowing of benefits from other countries.¹⁰⁰ After the collapse of the Six-Party Talks, North Korea shifted its policy away from the Six-Party Talks and toward more concerted effort to develop its nuclear weapons capability.¹⁰¹ On May 25, 2009, North Korea tested its nuclear device.¹⁰² North Korea also announced that it would perform a more powerful nuclear test.

The negotiations on the Korean Peninsula demonstrate a cyclical pattern: (1) North Korean provocation; (2) conflicts or tensions; (3) negotiations and package deals; and (4) the collapse of the nuclear deals.¹⁰³ The international community, especially the United States, is exploring new negotiating strategies. Among other things, the United States still emphasizes that the goal of diplomacy with North Korea is the “complete, verifiable, and irreversible denuclearization of the Korean Peninsula in a peaceful manner.”¹⁰⁴ The negotiations are also based on a basic bargain of economic benefits and sanctions removal in exchange for nuclear weapons and missile dismantlement. However, it is unlikely that North Korea will give up its nuclear weapons or ballistic missile programs easily. This is because nuclear weapons and ballistic

97. *Id.*

98. TOM LANSFORD, HISTORICAL DICTIONARY OF U.S. DIPLOMACY 194 (2007).

99. *Id.*

100. Nikitin et al., *supra* note 83.

101. *Id.*

102. Mimi Dougherty et al., *North Korea's Nuclear Test and its Aftermath: Coping with the Fallout*, NTI (June 25, 2009), available at <https://www.nti.org/analysis/articles/north-koreas-nuclear-test-aftermath/> (last visited Sept. 30, 2019).

103. Bong-Geun Jun, *Cyclical Patterns of North Korean Nuclear Crises and Solution: A South Korean Perspective*, in ASSESSMENT OF THE NUCLEAR PROGRAMS OF IRAN AND NORTH KOREA 63 (Jungmin Kang ed., 2013).

104. *Joint Statement between the United States and the Republic of Korea*, WHITE HOUSE, available at <https://www.whitehouse.gov/briefings-statements/joint-statement-united-states-republic-korea/> (last visited Sept. 30, 2019).

missiles can assure security in its regime.¹⁰⁵ North Korea does not have to rely on Russia and China for its own security. North Korea can use its nuclear weapons and ballistic missiles to protect itself. Nuclear weapons also provide diplomatic leverage for North Korea.¹⁰⁶ More particularly, its nuclear program has been used to extract concessions from the other countries, especially the United States. North Korea believes that its nuclear weapons can help the country to acquire the prestige which comes with the status. Meanwhile, it is unclear whether the United States will insist on joint military exercises as a precondition before the negotiations begin.¹⁰⁷ North Korea would reject dialogue on denuclearization unless joint military exercises do not exist.¹⁰⁸ Recently, the United States and South Korea have conducted joint military drills. Therefore, the negotiation in the Korean Peninsula will be more difficult and take longer time.

The process of the negotiation between the United States and North Korea has also relied on an incorrect approach. Typically, approaches to negotiations include a position-based approach and an interest-based approach. A position-based approach focuses on what each party needs.¹⁰⁹ Each party identifies his position and negotiates from his position.¹¹⁰ Each party also defends his position by using power or influence to win against another party.¹¹¹ Some techniques such as manipulation, threat, or deception are frequently used in this approach. A position-based approach then results in win-lose or lose-lose outcomes.¹¹² On the other hand, an interest-based approach focuses on parties' interests rather than positions.¹¹³ It includes cooperation between parties to identify interests and solve problems together.¹¹⁴ Parties es-

105. YOUNG WHAN KIH & HONG NACK KIM, NORTH KOREA: THE POLITICS OF REGIME SURVIVAL 169 (2014).

106. Siegfried S. Hecker, *Lessons Learned from the North Korean Nuclear Crises*, in THE SURVIVAL OF NORTH KOREA: ESSAYS ON STRATEGY, ECONOMICS, AND INTERNATIONAL RELATIONS 224 (Suk Hi Kim et al. eds., 2011).

107. Nikitin et al., *supra* note 83.

108. *North Korea Launches Two 'projectiles' into the Sea*, DW (June 8, 2019), available at <https://www.dw.com/en/north-korea-launches-two-projectiles-into-the-sea/a-49903822> (last visited Oct. 1, 2019).

109. JUDITH DWYER, COMMUNICATION FOR BUSINESS AND THE PROFESSIONS: STRATEGIES AND SKILLS 83 (5th ed., 2012).

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 85.

114. JOHN JESTON & JOHAN NELIS, BUSINESS PROCESS MANAGEMENT: PRACTICAL GUIDELINES TO SUCCESSFUL IMPLEMENTATIONS 278 (2d ed., 2010).

establish solutions to meet their similar and different interests.¹¹⁵ There also is mutual openness and information sharing to better understand each other's needs and concerns. An interest-based approach thus results in win-win outcomes which bring benefits to both parties.¹¹⁶ On the Korean Peninsula, the negotiations are based on an interest-based approach. Both countries find a creative solution in a problem-solving process. The interests of both countries are also identified or explored. More importantly, both countries exchange their interests to create the win-win situation. In this case, North Korea dismantles its nuclear and missile programs while the United States pledges to lift economic sanctions and provides economic assistance. Win-win outcomes can resolve conflicts and eliminate tensions, leading to peace in the Korean Peninsula. The successful example of the interest-based approach was the 1994 Agreed Framework. It was considered a win-win arrangement which created temporary peace in the region during 1994-2002.

However, the negotiations between the United States and North Korea have switched from an interest-based approach to a position-based approach. Although the exchange of interests is the key element of the negotiations, the two countries focus and hold their position to gain concessions. Their capabilities and interests have also been used as motivation which underpins their position. In particular, since North Korea has been recognized as one of nuclear-weapon states and the world's largest conventional military forces, the country has become more aggressive. North Korea has also been in a stronger position in the negotiations while talks have been in the certain issues for decades. North Korea knows exactly what the United States and other countries want. Discussing the same issues does not work anymore. Recently, despite the pressure of massive economic sanctions, North Korea disagreed with President Donald Trump's "grand bargain" of irreversible and immediate denuclearization for significant relief in the Hanoi Summit.¹¹⁷ After the collapse of the Hanoi Summit, there is no sign of new incentive to change North Korea's strategies. Instead, North Korea has conducted a test of a new type of short-range ballistic missile on August 15, 2019. If North Korea holds its position, the negotiation will result in a lose-lose situation. This means that conflicts and tensions will still exist on the Korean Peninsula. Thus, the United States needs

115. MARTIN A. FREY, *ALTERNATIVE METHODS OF DISPUTE RESOLUTION* 91 (2002).

116. DWYER, *supra* note 109, at 86.

117. Ferial A. Saeed, *A Republican Paradigm Shift on North Korea: Prospects and Implications*, 38 NORTH (July 26, 2019), available at <https://www.38north.org/2019/07/fsaeed072619/> (last visited Oct. 1, 2019).

to change its policy to deal with North Korea. The United States should find new strategies to generate the new negotiation based on an interest-based approach.

2. Cooperation

According to the Oxford Dictionary, “cooperation” means “the action or process of working together to the same end.”¹¹⁸ Cooperation can also be defined as a situation where parties agree to work together to produce new gains for each of the participants unavailable to them by unilateral action.¹¹⁹ The term “cooperation” has an important role in international relations because it can resolve joint problems or global conflicts. In preventive diplomacy, cooperation is a means of promoting or requiring countries or institutions to work together to resolve conflicts or prevent disputes from escalating into conflicts. In this circumstance, international conflicts exist, and a single country cannot resolve or prevent international conflicts by itself. A group of countries is then required to cooperate and participate in a resolution or prevention. Such cooperation results in peace, stability, security, and good governance. Those benefits are shared among participants and are given to the international community.

Cooperation on preventive diplomacy has been introduced in regionalism. Cooperation could prevent or resolve inter-and intra-state conflicts by peaceful means.¹²⁰ It could also promote peace building in a region. Recently, cooperation on preventive diplomacy has been a part of the broader process of U.N. cooperation with regional and sub-regional organizations.¹²¹ The Security Council has also held meetings to discuss cooperation with regional organization for maintaining international peace and security, including preventive measures.¹²² For instance, at its fourth meeting away from headquarters, held in Nairobi in 2006, the Security Council sought to intensify cooperation with the

118. *Definition of Cooperation in English*, OXFORD DICTIONARY, available at lexico.com/en/definition/cooperation (last visited Oct. 1, 2019).

119. WILLIAM ZARTMAN & SAADIA TOUVAL, INTERNATIONAL COOPERATION: THE EXTENTS AND LIMITS OF MULTILATERALISM 1 (2010).

120. Valery Ferim, *African Solutions to African Problems*, in THE AFRICAN UNION TEN YEARS AFTER: SOLVING AFRICAN PROBLEMS WITH PAN-AFRICANISM AND THE AFRICAN RENAISSANCE 146 (Mammo Muchie et al. eds., 2013) (Regional groupings can be an instrumental path to political stability, economic growth, the consolidation of democracy and hence decrease the propensity for conflict.).

121. BERTRAND G. RAMCHARAN, PREVENTIVE DIPLOMACY AT THE UN 194 (2008).

122. *Id.*

peace and security institutions of the African Union and discuss cooperation between the Union and the U.N. on the situation in Darfur.¹²³

On the Korean Peninsula, cooperation can bring the hostile parties to agreement. Cooperation can resolve conflicts or reduce tensions. Cooperation can also build or strengthen relationships between North Korea and other countries. Relationships based on cooperation help countries work together to bring peace, stability, and security to the region. Cooperation is not limited to denuclearization, as it extends to economic relations. Effective cooperation should be based on agreement rather than enforcement. Effective cooperation should also provide win-win outcomes rather than competition in the region. Furthermore, cooperation consists of several countries – South Korea, Japan, China, Russia, the United States, and North Korea. Bilateral and multilateral cooperation has then been established on the Korean Peninsula. However, bilateral cooperation is more effective than multilateral cooperation. Bilateral cooperation is less complicated than multilateral cooperation, and North Korea prefers bilateral relations or cooperation with the United States.¹²⁴ Perhaps North Korea views the United States as the most important and influential player in the conflict. Dealing with the United States directly and bilaterally would resolve the conflict. More importantly, North Korea would obtain the removal of sanctions and other restrictions on its interactions with the United States.¹²⁵ The normalization of relations with the United States would also help North Korea gain economic assistance or benefits. For example, the Agreed Framework established a road map to improve ties between the United States and North Korea.¹²⁶ The Agreed Framework required the termination of nuclear weapon development in North Korea.¹²⁷ In exchange, the United States offered to move toward normalization of political and economic relations and aid in the construction of two North Korean nuclear power reactors, subject to IAEA safeguards and based on existing Western light-water design.¹²⁸ The Agreed Framework established bilateral political and economic relations or cooperation be-

123. *Id.*

124. Nikitin et al., *supra* note 83.

125. *Id.*

126. CHARLES K. ARMSTRONG, *THE KOREAS* 101 (2d ed., 2013).

127. THOMAS GRAHAM, JR. & DAMIEN J. LAVERA, *CORNERSTONES OF SECURITY: ARMS CONTROL TREATIES IN THE NUCLEAR ERA* 1268 (2003).

128. *Id.*

tween two countries. It also temporarily reduced tensions on the Korean Peninsula.¹²⁹

Unlike bilateral cooperation, multilateral cooperation did not work well on the Korean Peninsula. In fact, countries established multilateral cooperation to deal with North Korea's nuclear challenge through three stages: (i) the Korean Peninsula Energy Development Organization (KEDO); (ii) the Four-Party Talks; and (iii) the Six-Party Talks. The KEDO was created by the United States, Japan, and South Korea.¹³⁰ The KEDO provided for the implementation of other measures required to meet the objectives of the Agreed Framework.¹³¹ The planned aid consisted of the construction of two light-water nuclear reactors (LWRs) and the provisions of 500,000 metric tons of heavy fuel oil annually while the reactors were built.¹³² U.S. contributions covered only heavy fuel oil shipments and KEDO administrative costs.¹³³ The KEDO produced important positive externalities. It also increased security and reduced the threat of proliferation in North Korea for a decade. The KEDO was considered successful cooperation. On the other hand, the Four-Party Talks and the Six-Party Talks failed to create effective cooperation in the region. This may be because each party in the talks had its own objective and found it hard to compromise with one another. More particularly, in the Four-Party Talks, South Korea, China, the United States, and North Korea agreed to reduce tensions on the Korean Peninsula and replace the 1953 Armistice Agreement with a peace treaty.¹³⁴ The Four-Party Talks had six plenary sessions where North Korea repeatedly maintained that the Four-Party Talks deal with the two issues of U.S. troop withdrawal and the conclusion of a peace treaty between the United States and North Korea.¹³⁵ While South Korea maintained that it wanted to discuss those issues that were easily resolved, North Korea insisted that the two issues – the withdrawal of U.S. troops and a Washington-Pyongyang peace treaty – be resolved

129. Amy E. Smithson, *North Korea: A Case in Progress*, in *THE POLITICS OF POSITIVE INCENTIVES IN ARMS CONTROL* 101 (Thomas Bernauer & Dieter Ruloff eds., 1999).

130. ANTHONY DIFILIPPO, *US-JAPAN-NORTH KOREA SECURITY RELATIONS: IRREPRESSIBLE INTERESTS* 24 (2013).

131. CHARLES L. PRITCHARD, *FAILED DIPLOMACY: THE TRAGIC STORY OF HOW NORTH KOREA GOT THE BOMB* 41 (2007).

132. Mark E. Manyin & Mary Beth D. Nikitin, *Foreign Assistance to North Korea*, in *THE NORTH KOREAN THREAT* 81 (Douglas C. Lovelace, Jr. ed., 2017).

133. *Id.*

134. Tae-Hwan Kwak, *The Six-Party Nuclear Talks and the Korean Peninsula Peace Regime Initiative: A Framework for Implementation*, in *THE UNITED STATES AND THE KOREAN PENINSULA IN THE 21ST CENTURY* 36 (Tae-Hwan Kwak & Seung-Ho Joo eds., 2006).

135. *Id.*

first.¹³⁶ Thus, the four participants in the talks failed to agree on agenda items for discussion at the Four-Party Talks.

In some cases, military cooperation can raise tensions, triggering conflicts on the Korean Peninsula. More specifically, a joint military exercise between South Korea and the United States can increase the tension and disturb bilateral relations with North Korea. Typically, the United States and South Korea joint military exercise is cooperation designed to enhance the ability of the two countries to carry out military operations. The joint military exercises may also be used as a strategy to reduce North Korea's aggression or brinkmanship. However, North Korea considers these joint military exercises as a threat or preparation for war.¹³⁷ North Korea has responded to the military drills by conducting armed attacks. For example, South Korea and the United States began the annual Hoguek joint military exercises in November 2010.¹³⁸ North Korea considered the exercise as a preparation for a combined armed attack on the country.¹³⁹ North Korea warned that it would not tolerate firing in what it regarded as its territorial water.¹⁴⁰ South Korea's forces went ahead with live-ammunition military exercises in waters off Baengyeong Island and Yeonpyeong Island within South Korean-held territory below the Northern Limit Line.¹⁴¹ North Korea conducted a rock artillery attack on Yeonpyeong Island.¹⁴² North Korea fired approximately 120 rockets while South Korea responded with eighty rounds of artillery.¹⁴³ This was the first artillery exchange after the end of the Korean War, escalating the tension in the region.¹⁴⁴

Recently, North Korea has responded with missile launches. This could eventually interrupt bilateral cooperation and negotiations between the United States and North Korea. For example, after the collapse of the Hanoi Summit in February 2019, President Trump and Chairman Kim met each other at the inter-Korean border, or the demili-

136. *Id.*

137. Thomas Maresca, *U.S., South Korea Start Military Drills Amid 'Second War' Threats from Pyongyang*, USA TODAY (Aug. 21, 2017), available at <https://www.usatoday.com/story/news/world/2017/08/21/u-s-south-korea-military-drills/585250001/> (last visited Oct. 1, 2019).

138. Tae-Hwan Kwak, *The Denuclearization of the Korean Peninsula through the Six-Party Talks*, in NORTH KOREA AND SECURITY COOPERATION IN NORTHEAST ASIA 13 (Tae-Hwan Kwak & Seung-Ho Joo eds., 2014).

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. WALLACE, *supra* note 53, at 114.

144. *Id.*

tarized zone, in June 2019 and agreed to resume working-level negotiations. However, South Korea and the United States held their annual joint military exercises in August 2019, despite warnings from North Korea that the drills could derail fragile nuclear diplomacy.¹⁴⁵ North Korea was ramping up its weapon tests, including two test firings of a new rocket artillery system in the same month.¹⁴⁶ North Korea also expressed frustration over the continuance of the military drills because the country considered the joint practices as a rehearsal for invasion.¹⁴⁷ This could slow down the pace of nuclear negotiations and the peace processes.¹⁴⁸

3. Confidence

Confidence is an important component of preventive diplomacy. More significantly, preventive diplomacy can be exercised successfully only when there is a strong foundation of trust or confidence among parties involved.¹⁴⁹ However, trust or confidence is difficult to create especially when parties are engaged in conflict and when each side tends to emphasize the differences between itself and the other side.¹⁵⁰ Deception, manipulation, and suspicion are obstacles to create trust or confidence between parties. The term “confidence-building measures” then needs to be established and developed. In fact, the idea of confidence-building measures was first introduced in the European arms control during 1970s.¹⁵¹ Confidence-building measures were implemented in the Helsinki Final Act of 1975.¹⁵² Confidence-building measures also had a critical role in the bilateral arms control agreements between the United States and Russia. This could decrease tensions and improve the relations of the two countries during the Cold War.

In preventive diplomacy, confidence-building measures are designed to lower uncertainty, reduce the anxiety, and eliminate the mis-

145. Kim Tong-Hyung, *US, South Korea Prepare Military Drills Despite North's Ire*, AP NEWS (Aug. 5, 2019), available at <https://www.apnews.com/9833b64b2c944311bf9e296ba3a0dcbd> (last visited Oct. 1, 2019).

146. *Id.*

147. *Id.*

148. *Id.*

149. RAMCHARAN, *supra* note 121, at 202.

150. BERCOVITCH & JACKSON, *supra* note 45, at 94.

151. Emily B. Landau, *Assessing the Relevance of Nuclear CBMs to a WMD Arms Control Process in the Middle East Today*, in *WMD ARMS CONTROL IN THE MIDDLE EAST: PROSPECTS, OBSTACLES AND OPTIONS* 29 (Harald Müller & Daniel Müller eds., 2016).

152. *Id.*

perceptions inherent in any unstable structure.¹⁵³ They also strive to reduce the escalation of tensions between the conflicting parties.¹⁵⁴ When parties have confidence in each other's intentions, various events that could likely trigger the emergence of violent conflict can be prevented from materializing.¹⁵⁵ Therefore, reducing and managing tensions between parties by fostering a relationship of trust or confidence is an important requirement for conflict prevention. Four types of measures can also be adopted: (1) Joint and explicit declaration on an internationally accepted code of conduct (respect for noncombatants, prohibiting the use of chemical and biological weapons, etc.); (2) Agreement on information exchange and increased communication to assuage each party's fears about military intentions and activities; (3) Observations and inspections, through the exchange of military officers or the use of low-orbiting satellites, to ensure genuine transparency of intentions; and (4) Mutual agreement on measures of constraints (each party in a potential conflict binds itself not to use force under some specified circumstances, to ban certain kinds of weapons, or to establish buffer zones).¹⁵⁶ All these measures can prevent the escalation of conflicts or tensions.

Building trust or confidence is a difficult task on the Korean Peninsula. North Korea's relationship with the United States and South Korea has been marked by conflicts and mistrust since 1945. Several confidence-building measures such as communication and constraints have been applied to reduce the escalation of conflicts or tensions. Nevertheless, trust or confidence between the two parties has not taken place. Instead, provocation between the two parties exists in the region. Provocation can result in mistrust and escalate the tension. North Korea has provoked the international community and the United States with nuclear weapons and ballistic missile tests. On the other hand, the United States has provoked North Korea with the joint military drills. This has escalated conflicts or tensions because North Korea believes that the joint military drills are the rehearsal for invasion.¹⁵⁷ North Korea has responded to the joint military drills by firing missiles. Therefore, effective negotiation and trust cannot be created easily when provocation has still been used as a strategy on the Korean Peninsula.

153. BERCOVITCH & JACKSON, *supra* note 45, at 94.

154. *Id.*

155. *Id.*

156. *Id.*

157. Peter Stublely, *North Korea Launches Two Missiles as South Korea and US Military Exercises Begin*, INDEP. (Aug. 6, 2019), available at <https://www.independent.co.uk/news/world/asia/north-korea-missile-us-trump-kim-jong-un-japan-a9040626.html> (last visited Oct. 1, 2019).

Mistrust can result from a negative belief, uncertainty, and self-isolation. Korea has had a long history of self-isolation.¹⁵⁸ After the end of the Korean War, North Korea became one of the most isolated countries in the world, with one of the world's most repressive regimes.¹⁵⁹ The government of North Korea strictly prohibits its citizens from travelling to even the nearest town in the country without permission.¹⁶⁰ North Korea also relies on a self-supporting national economy.¹⁶¹ Since North Korea confronts economic difficulties,¹⁶² it needs assistance from the United States and South Korea.¹⁶³ However, North Korea believes that South Korea and the United States are the enemies that cause problems on the Korean Peninsula.¹⁶⁴ After the collapse of the Soviet Blocs in the 1990s, North Korea was alone.¹⁶⁵ The survival of North Korea as a state is at risk, and the collapse of its regime is possible.¹⁶⁶ Thus, North Korea does not trust South Korea and the United States. In addition, North Korea does not trust foreigners because they may take advantage of its weakness and vulnerability.¹⁶⁷ North Korea establishes a set of practical policy applications to minimize foreign in-

158. Charlotte Alfred, *How North Korea Became So Isolated*, HUFFINGTON POST (Oct. 17, 2014), available at https://www.huffpost.com/entry/north-korea-history-isolation_n_5991000 (last visited Oct. 1, 2019) (The Choson dynasty, which ruled Korea from the 14th to early 20th century, kept the country isolated from the outside world, both as a way to fend off foreign invasions and out of a belief in the superiority of its Confucian culture. Contacts with foreigners and foreign travel were banned, and after a series of invasions, the Choson rulers limited interaction with even neighboring China and Japan.).

159. FRED M. SHELLEY, *NATION SHAPES: THE STORY BEHIND THE WORLD'S BORDERS* 502 (2013).

160. C.H.R. Res. 2005/11, U.N. Doc. E/CN.4/RES/2005/11 (Apr. 14, 2005).

161. ADAM CATHCART ET AL., *CHANGE AND CONTINUITY IN NORTH KOREAN POLITICS* 3 (2016).

162. Steve Hanke, *North Korea's Economic Crisis – What Crisis?*, FORBES (Apr. 4, 2018), available at <https://www.forbes.com/sites/stevehanke/2018/04/24/north-koreas-economic-crisis-what-crisis/#5b3e0373437a> (last visited Oct. 1, 2019).

163. Choe Sang-Hun, *Trump Supports Food Aid for North Korea, South says*, N.Y. TIMES (May 7, 2019), available at <https://www.nytimes.com/2019/05/07/world/asia/trump-north-korea-food-aid.html> (last visited Oct. 1, 2019).

164. Haruki Wada, *Envisioning a Northeast Asian Community: Regional and Domestic Factors to Consider*, in *REGIONAL COOPERATION AND ITS ENEMIES IN NORTHEAST ASIA: THE IMPACT OF DOMESTIC FORCES* 47 (Edward Freidman & Sung Chull Kim eds., 2007) (North Korea has regarded the United States as its main enemy – as the chief threat to its security. During the Cold War era, the United States, the ally of South Korea, was a nuclear superpower. Consequently, North Korea felt that its safety could be secured only under the nuclear umbrella of the Soviet Union.).

165. HOWARD JISOO RYU, *ORDERLY KOREA UNIFICATION: WITH THE GUARANTEE OF STABILITY IN EAST ASIA* 19 (2007).

166. *Id.*

167. KIHl & KIM, *supra* note 105, at 28.

fluence. North Korea limits trade and transportation links with other countries and tightly restricts the circumstances under which foreigners may enter the country and interact with local citizens.¹⁶⁸ Foreigners can expect their communications to be monitored by North Korean officials.¹⁶⁹ This skepticism and distrust toward the outside world is also part of the North Korean attitude and policy toward South Korea.¹⁷⁰ North Korea then pursues a strategy of divide and conquer in the South through its united front campaign involving alliance with North Korean sympathizers and opposition political forces in the South.¹⁷¹

Mistrust also occurs when parties do not act in good faith or do not implement an agreement. Each party may be suspicious of the other. On the Korean Peninsula, the United States found that North Korea often broke agreements or promises to terminate its nuclear and missile programs. A breach of agreements or promises results in mistrust between the two countries. For example, in 1994, North Korea and the United States entered into an Agreed Framework with the goal of freezing and discontinuing North Korea's nuclear programs. However, the Agreed Framework was considered a monument to the highest levels of mistrust between two countries.¹⁷² North Korea used loopholes of the Agreed Framework to develop other weapons and take more advantages from the United States. In August 1998, North Korea tested a long-range ballistic missile over Japan, which undermined the Agreed Framework.¹⁷³ The United States had additional negotiations to end all North Korean nuclear weapons activities and long-range ballistic missile testing, production, deployment and export in exchange for lifting sanctions, normalizing relations, and providing a security guarantee.¹⁷⁴ The Agreed Framework then broke down in December 2002 when the United States determined that North Korea had secretly pursued nuclear weapons.¹⁷⁵ North Korea also said it had a right to build nuclear weapons for defensive purposes.

168. INTERNATIONAL BUSINESS PUBLICATIONS, *NORTH KOREA: INVESTMENT AND BUSINESS GUIDE* 276 (2002).

169. *Id.*

170. KIHLE & KIM, *supra* note 105, at 28.

171. *Id.*

172. CHARLES LIPSON, *RELIABLE PARTNERS: HOW DEMOCRACIES HAVE MADE A SEPARATE PEACE* 148 (2013).

173. Nikitin et al., *supra* note 83.

174. *Id.*

175. *Factbox: History of Failure: Efforts to Negotiate on North Korean Disarmament*, REUTERS (Mar. 6, 2018), available at <https://www.reuters.com/article/us-northkorea-missiles-talks-factbox/factbox-history-of-failure-efforts-to-negotiate-on-north-korean-disarmament-idUSKCN1G12PQ> (last visited Oct. 1, 2019).

Since the level of conflicts and mistrust is very high, negotiations may not be successful. More particularly, when both parties would hedge their bets, the process of denuclearization and peace building will not go forward. Instead, the process will move backward and become more difficult. Perhaps, in order to build trust or confidence on the Korean Peninsula, China as a third party is required to participate in the situation. China is North Korea's closest ally while North Korea heavily relies on China.¹⁷⁶ In this case, the United States must communicate with China about building confidence or trust with North Korea. China may convince North Korea that the United States will not transform North Korea's regime, but respect its national sovereignty. The United States and South Korea's joint military exercises should not exist in the region. More importantly, China must convince North Korea to implement or comply with an agreement. Conducting nuclear tests or firing ballistic missiles may not be the right resolution, but instead make the situation worse. Among other things, the role of China is to convince North Korea and build trust between the two countries. China does not have a role in pressuring or influencing North Korea. This is because trust or confidence is based on belief that the other side is trustworthy and is willing to reciprocate cooperation. Pressure or influence does not create trust or confidence between the two parties, but may result in the escalation of the conflict or tension. Thus, peace may not occur in the region.

IV. THE RULE OF LAW

A. *The Role of International Law on the Korean Peninsula*

After the conflict or tension is terminated by preventive diplomacy, peace will likely exist on the Korean Peninsula. Such peace may be characterized as negative peace or the absence of violence. However, the conflict or tension can erupt again. Peace should then be carried out as an ongoing process even though preventive diplomacy can halt the escalation of the conflict or tension. This means that, in addition to negative peace, positive peace should be established in the region. Positive peace refers to an absence of structural violence and a presence of factors which promote peace.¹⁷⁷ Positive peace can eliminate the root

176. MORSE TAN, NORTH KOREA, INTERNATIONAL LAW AND THE DUAL CRISES: NARRATIVE AND CONSTRUCTIVE ENGAGEMENT 79 (2015).

177. JEAN DE DIEU BASABOSE, ANTI-CORRUPTION EDUCATION AND PEACEBUILDING: THE UBUPFURA PROJECT IN RWANDA 64 (2019); Barbara A. Kidney, *Promoting Peace: Some Perspectives from Counseling Psychology*, in THE PSYCHOLOGY OF PEACE PROMOTION:

causes of the conflict and create peaceful relations between North Korea and the United States.¹⁷⁸ Positive peace can also prevent violence or maintain peace on the Peninsula.

Generally, the peace treaty on the Korean Peninsula would establish the formal end to the Korean War. Although the peace treaty can create peace in the region, it may not be sufficient to build positive or sustainable peace. The peace treaty may not be able to resolve the root causes of the conflict. North Korea may eventually violate the peace treaty. A question may arise how relevant countries and the international community establish positive peace on the Korean Peninsula. In this circumstance, international law, especially the NPT and international humanitarian law, should be used as a tool to create positive peace and maintain peace in the region. International law should also be used together with the peace treaty. In fact, the purpose of international law is to promote or maintain peace and security.¹⁷⁹ International law also consists of rules and principles governing the relations and dealings of nations with each other, as well as the relations between states and individuals, and relations between international organizations.¹⁸⁰ Under international law, countries are required to conduct themselves peacefully in all relations with other countries. Such peaceful relations are considered positive peace. Like general international law, the NPT is regarded as the cornerstone of the global nuclear non-proliferation regime and an essential foundation for the pursuit of nuclear disarmament.¹⁸¹ The NPT is designed to prevent the spread of nuclear weapons, to further the goals of nuclear disarmament and general and complete disarmament, and to promote cooperation in the peaceful

GLOBAL PERSPECTIVES ON PERSONAL PEACE, CHILDREN AND ADOLESCENTS, AND SOCIAL JUSTICE 45 (Mary Gloria C. Njoku et al. eds., 2019).

178. TUBA TURAN, POSITIVE PEACH IN THEORY AND PRACTICE: STRENGTHENING THE UNITED NATIONS'S PRE-CONFLICT PREVENTION ROLE 3-4 (2015) (Positive peace is defined as sustainable intra-state peace. Positive peace can also be defined as a lasting condition of non-violence within a state that is not imposed by force, but which is rather generated and maintained by the intrinsic dynamics of the given society. In other words, positive and sustainable intra-state peace signifies a society that is capable of 'self-sustaining' non-violence and the conditions of peace through its non-coercive internal dynamic and/or through the non-coercive engagements or facilitation efforts of external parties that would not contravene the self-determination of the given population.).

179. CECILIA MARCELA BAILLIET & KJETIL MUJEZINOVIC LARSEN, PROMOTING PEACE THROUGH INTERNATIONAL LAW 1-2 (2015).

180. *International Law*, LEGAL INFO. INST., available at https://www.law.cornell.edu/wex/international_law (last visited Oct. 1, 2019).

181. Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 (entered into force Mar. 5, 1970) [hereinafter NPT].

uses of nuclear energy.¹⁸² International humanitarian law is described as “a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict.”¹⁸³ International humanitarian law limits the use and the threat of use of weapons, including nuclear weapons.¹⁸⁴ International humanitarian law regulates the conduct of hostilities and protects the victims of armed conflicts.¹⁸⁵ Both the NPT and international humanitarian law result in positive or sustainable peace. They can also create peaceful relations among countries and maintain peace in the international community. The violation of the NPT, international humanitarian law, or international law can result in conflicts or violence in the international community.

North Korea is one of 193 member states of the United Nations and is bound by international law. North Korea has signed several treaties and conventions such as the Paris Agreement, the Basel Convention, the Geneva Declaration on Armed Violence and Development, and the Genocide Convention. As such, North Korea has obligations under international treaties and conventions. However, North Korea has violated peace treaties and conventions. For instance, North Korea signed the NPT as a non-nuclear weapon state in December 1985.¹⁸⁶ Although North Korea announced that it withdrew from the NPT, its withdrawal is not complete.¹⁸⁷ The NPT still applies to North Korea. In accordance with Article X of the NPT, a member country can withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country.¹⁸⁸ A member country will have to give notice of such withdrawal to all other member countries to the Treaty and to the United Nations Se-

182. *Id.*

183. *What is International Humanitarian Law?*, INT'L COMMITTEE OF THE RED CROSS (Dec. 31, 2014), available at <https://www.icrc.org/en/document/what-international-humanitarian-law> (last visited Oct. 1, 2019).

184. *Weapons*, INT'L COMMITTEE OF THE RED CROSS (Nov. 30, 2011), available at <https://www.icrc.org/en/document/weapons> (last visited Oct. 1, 2019).

185. *International Law on the Conduct of Hostilities: Overview*, INT'L COMMITTEE OF THE RED CROSS (Oct. 29, 2010), available at <https://www.icrc.org/en/document/conduct-hostilities> (last visited Oct. 1, 2019).

186. JITA MISHRA, *THE NPT AND THE DEVELOPING COUNTRIES* 119 (2008).

187. HALL GARDNER, *AVERTING GLOBAL WAR: REGIONAL CHALLENGES, OVEREXTENSION, AND OPTIONS FOR AMERICAN STRATEGY* 149 (2007) (North Korea announced it would withdraw from the NPT, but it did not offer explanations as to what extraordinary event justified its withdrawal from the treaty without following the requirements of article 10.1.).

188. *See* NPT, *supra* note 181, at art. X, stating “Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country [...]”

curity Council three months in advance.¹⁸⁹ North Korea has not done this, so the NPT applies to its action.¹⁹⁰ Moreover, Article II of the NPT requires each non-nuclear-weapon state not to manufacture nuclear weapons or other nuclear explosive devices.¹⁹¹ Apparently, North Korea conducted nuclear weapons tests several times. It is unlikely that North Korea tested its nuclear weapons without manufacturing them.¹⁹² Thus, North Korea has violated the NPT.

North Korea is bound by customary international humanitarian law.¹⁹³ Although customary international humanitarian law does not depend on the consent of the country, it is presumed to bind all members of the international community.¹⁹⁴ Customary international humanitarian law is then binding upon armed groups who are not affiliated with any state.¹⁹⁵ Nuclear threats and any use of such weapons can then violate the principles of customary international humanitarian law beyond the NPT.¹⁹⁶ According to the International Court of Justice's advisory opinion, *Legality of the Threat or Use of Nuclear Weapons* (Nuclear Weapons Case), the Court concluded that "[a] threat or use of nuclear weapons should also be compatible with the requirements of international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law."¹⁹⁷ More importantly, the majority of the Court also affirmed "[t]he threat or use of

189. *Id.* Article X of the NPT continues, "[...] It shall give notice of such withdrawal to all other parties to the Treaty and to the United Nations Security Council three months in advance. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests."

190. Morse Tan, *International Humanitarian Law and North Korea: Another Angle for Accountability*, 98 MARQ. L. REV. 1147, 1172 (2015).

191. NPT, art. II (Each non-nuclear-weapon State Party to the Treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapon or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices.).

192. Tan, *supra* note 190, at 1173.

193. Customary international humanitarian law is a set of rules that come from a general practice accepted as law. It is not necessary for a State to formally accept a rule of custom in order to be bound by it, as long as the overall State practice on which the rule is based is widespread, representative and virtually uniform.

194. JONATHAN CROWE & KYLIE WESTON-SCHEUBER, *PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW* 26 (2013).

195. *Id.*

196. Tan, *supra* note 190, at 1174.

197. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (July 8).

nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law..."¹⁹⁸ Therefore, North Korea has violated customary international humanitarian law because nuclear weapons and ballistic missile tests are considered the violation of international humanitarian law. This can also affect both negative and positive peace in the international community.

A question may arise why North Korea has not complied with the NPT and international humanitarian law. First, North Korea has violated the NPT and international humanitarian law because its national identity and policy contradict international rules. North Korea has pursued the "military first policy or *Songun*" which gives priority to the military affair.¹⁹⁹ Under *Songun*, North Korea primarily focuses on developing nuclear weapons rather than on improving its citizens' lives although millions of North Koreans continue to suffer and die from starvation, poverty, and repression of the regime.²⁰⁰ *Songun* then results in the violation of the NPT and international humanitarian law. Second, North Korea may not find interests or benefits from the NPT and international humanitarian law. Unlike national law, international law does not have enforcement mechanism.²⁰¹ Countries comply with international law when they can gain interests or benefits from international law.²⁰² On the other hand, countries may not fully comply with international law when interests or benefits are not sufficient, or countries gain nothing. North Korea has not gained primary interests or benefits from the NPT and international humanitarian law when it complies with them. Instead, North Korea may only gain ancillary interests or secondary benefits such as nonviolence from the NPT and international humanitarian law. Such ancillary interests or secondary benefits may not be able to help the country. North Korea has then chosen to violate international rules to strengthen its potential even though the international community would criticize the country. Nevertheless, North Korea

198. *Id.*

199. Terence Roehrig, *The Roles and Influence of the Military, in* NORTH KOREA IN TRANSITION: POLITICS, ECONOMY, AND SOCIETY 56 (Kyung-Ae Park & Scott Snyder eds., 2013).

200. AHLAM LEE, NORTH KOREAN DEFECTORS IN A NEW AND COMPETITIVE SOCIETY: ISSUES AND CHALLENGES IN RESETTLEMENT, ADJUSTMENT, AND THE LEARNING PROCESS 15 (2016).

201. BONITA MEYERSFELD, DOMESTIC VIOLENCE AND INTERNATIONAL LAW 252 (2010) (International law lacks traditional enforcement mechanisms and there is no international policing authority that can compel states to comply with their international obligations.).

202. Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2632 (1997).

would halt its nuclear development when it gains primary interests or benefits. For example, North Korea conducted nuclear tests in 2006, violating the NPT and international humanitarian law. In February 2007, a nuclear deal was signed in Beijing, under which North Korea – in exchange for heavy fuel oil or equivalent aid – agreed to shut down and seal its nuclear reactors. Third, North Korea has used nuclear weapons to gain international acceptance and recognition. Even though North Korea is an isolated country, it has sought international acceptance and recognition by conducting nuclear weapons tests. North Korea also wants to obtain its status as a nuclear weapon state.²⁰³ Instead, North Korea's actions constitute a threat to international peace and security, violating the NPT and international humanitarian law. North Korea is directly and recklessly challenging the international community.²⁰⁴ More importantly, North Korea increases tensions and undermines stability on the Peninsula. Thus, North Korea does not find international acceptance and recognition, but creates deeper isolation from the rest of the world.

B. The Importance of the Rule of Law

In order to create positive peace or maintain peace on the Korean Peninsula, North Korea will have to comply with the NPT and international humanitarian law. A question may arise as to which instrument should be used to make North Korea comply with the NPT and international humanitarian law. In this case, the rule of law can be used as an important tool to comply with the NPT and international humanitarian law. In fact, the rule of law can build positive peace and maintain peace on the Korean Peninsula. The rule of law also promotes fairness and good governance which may address the root causes of the conflicts between the United States and North Korea.

The rule of law does not have a single agreed definition,²⁰⁵ and its meaning varies.²⁰⁶ Its definitions and principles have been developed

203. Sung Chull Kim, *North Korea's Nuclear Doctrine and Revisionist Strategy*, in ENTERING THE NEW ERA OF DETERRENCE: NORTH KOREA AND NUCLEAR WEAPONS 41 (Sung Chull Kim & Michael D. Cohen eds., 2017).

204. S. MAHMUD ALI, *ASIA-PACIFIC SECURITY DYNAMICS IN THE OBAMA ERA: A NEW WORLD EMERGING* 28 (2012).

205. CHRISTOPHER MAY, *THE RULE OF LAW: THE COMMON SENSE OF GLOBAL POLITICS* 33 (2014).

206. Marise Cremona, *Regional Integration and the Rule of Law: Some Issues and Options*, in BRIDGES FOR DEVELOPMENT: POLICIES AND INSTITUTIONS FOR TRADE AND INTEGRATION 137 (Robert Devlin & Antoni Estevadeordal eds., 2003).

by many legal scholars and institutions.²⁰⁷ Among other things, the rule of law can simply mean that government officials and citizens are bound by and abide by the law.²⁰⁸ Recently, the U.N. Secretary-General has also described the rule of law as:

[A] principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure before the law, accountability to the law, fairness in the application of law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.²⁰⁹

This is an important definition of the rule of law. It constitutes the elements of transparency, accountability, equality before the law, an independent judiciary, and protection of human rights. Based on this definition, the rule of law can also establish peace and security in two aspects. First, the rule of law requires all people or governments to be accountable to effective laws. This creates social justice, equality, economic equity, equal protection, and impartial enforcement of law. More importantly, this can bring peace and security to society. Second, the rule of law promotes and protects human rights. When human rights are protected and guaranteed by laws, peace and security occurs in society. Instead, there are no peace and security where human rights are violated. Peace and security are then connected to human rights.

207. See *Rule of Law*, WORLD BANK, available at <http://info.worldbank.org/governance/wgi/pdf/rl.pdf> (last visited Sept. 19, 2019) (the World Bank's definition of the rule of law states that it "captures perceptions of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence"); see also *What is the Rule of Law?*, WORLD JUST. PROJECT, available at <https://worldjusticeproject.org/about-us/overview/what-rule-law> (last visited Sept. 19, 2019) (describing the rule of law as based on four universal principles: (1) "Accountability: The government as well as private actors are accountable under the law;" (2) "Just Laws: The laws are clear, publicized, and stable; are applied evenly; and protect fundamental rights, including the security of persons and contract, property, and human rights;" (3) "Open Government: The process by which the laws are enacted, administered, and enforced are accessible, fair, and efficient;" and (4) "Accessible Justice: Justice is delivered timely by competent, ethical, and independent representatives and neutrals who are accessible, have adequate resources, and reflect the makeup of the communities they serve.").

208. Brian Z. Tamanaha, *The Rule of Law and Legal Pluralism in Development*, in LEGAL PLURALISM AND DEVELOPMENT: SCHOLARS AND PRACTITIONERS IN DIALOGUE 34 (Brian Z. Tamanaha et al. eds., 2012).

209. *What is the Rule of Law?*, UNITED NATIONS, available at <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/> (last visited Oct. 1, 2019).

This definition should not be limited to national systems but should also apply in international relations. In the U.N. Secretary-General's report *Strengthening and Coordinating United Nations Rule of Law Activities*, the rule of law was given a further definition:

At the international level, the rule of law accords predictability and legitimacy to the actions of States, strengthens their sovereign equality and underpins the responsibility of a State to all individuals within its territory and subject to its jurisdiction. Full implementation of the obligations set forth in the Charter of the United Nations and in other international instruments, including the international human rights framework, is central to collective efforts to maintain international peace and security, effectively address emerging threats and ensure accountability for international crimes.²¹⁰

Like the rule of law, the elements of the international rule of law include compliance, implementation, predictability and transparency, peace and security, the equal application of the law, the protection of human rights, and the settlement of disputes. Those elements can create positive peace or prevent conflicts. They can also strengthen or maintain peaceful relations with other countries. More particularly, compliance is an important element of the international rule of law. This is because international law determines state behavior and establishes state obligations.²¹¹ International law comprises of rules to which all states have consented.²¹² States are then legally bound to comply with the rules.²¹³ In other words, compliance with international law is an observance of obligations. When states comply with international law, peace exists in the international community.

C. North Korea and the Rule of Law

The rule of law is incompatible with North Korea's political ideology. North Korea relies on the *Juche* idea, or the man-centered ideology: "Man is the master of everything and decides everything. It is the man-centered world outlook to materialize the independence of the popular masses and also a political philosophy which elucidates the the-

210. U.N. Secretary-General, *Strengthening and Coordinating United Nations Rule of Law Activities*, ¶ 4, U.N. Doc. A/68/213 (July 29, 2013).

211. HANS Kelsen, *PRINCIPLES OF INTERNATIONAL LAW* 22 (1959); PRUE TAYLOR, *AN ECOLOGICAL APPROACH TO INTERNATIONAL LAW: RESPONDING TO CHALLENGES OF CLIMATE CHANGE* 63-65 (1998).

212. DAVID ARMSTRONG ET AL., *INTERNATIONAL LAW AND INTERNATIONAL RELATIONS* 93 (2d ed., 2012).

213. HERMANN MOSLER, *THE INTERNATIONAL SOCIETY AS A LEGAL COMMUNITY* 67 (1980).

oretical basis of politics that leads the social development correctly.”²¹⁴ Being “the master” means that man rules the world and his own destiny.²¹⁵ “Decide everything” means that man plays the decisive role in transforming the world and in shaping his destiny.²¹⁶ The “popular masses” are the masters of revolution and construction, and they are also the motive forces of revolution and construction.²¹⁷ Under the *Juche* idea, a revolutionary party, government, and army are the most powerful political weapon for guaranteeing a revolutionary cause – its beginning, progress, and victory.²¹⁸ The party ensures the leader’s guidance over the revolution and construction.²¹⁹ It also leads the masses to fulfill their responsibilities and role as the masters of the revolution and construction in loyal support of the party and the leader.²²⁰ Therefore, the *Juche* turns the leader into an absolutist, supreme leader.²²¹ On the other hand, the rule of law is based on the idea: “a free society should be governed by laws rather than men.”²²² The rule of law also connects to liberal democracy and the protection of human rights. The essence of the rule of law is the sovereignty or supremacy of law over man or individual will.²²³ The rule of law insists that every person – irrespective of rank and status in society – be subject to the law.²²⁴ For the citizen, the rule of law is both prescriptive – dictating the conduct required by law – and protective of citizens – demanding that government acts according to law.²²⁵ The rule of law is then the opposition of the rule of power or arbitrary power.²²⁶

214. DERMOT HUDSON, IN DEFENCE OF JUCHE KOREA 42 (2018).

215. Li Yongchun, *North Korea’s Guiding Ideology and Its Impact*, in CHINA AND NORTH KOREA: STRATEGIC POLICY PERSPECTIVES FROM A CHANGING CHINA 228 (Carla P. Freeman ed., 2015).

216. *Id.*

217. *Id.*

218. Kim Jong Un, *Comrade Kim Il Sung is the Eternal Leader of Our Party and Our People*, in STUDY OF THE JUCHE IDEA 7 (Int’l Inst. Juche Idea ed., 2013).

219. *Id.*

220. *Id.*

221. James F. Person, *North Korea’s Chuch’e Philosophy*, in ROUTLEDGE HANDBOOK OF MODERN KOREAN HISTORY 217 (2016).

222. FRIEDRICH KRATOCHWIL, THE PUZZLES OF POLITICS: INQUIRIES INTO THE GENESIS AND TRANSFORMATION OF INTERNATIONAL RELATIONS 126 (2011).

223. HILAIRE BARNETT, CONSTITUTIONAL & ADMINISTRATIVE LAW 44 (10th ed., 2013).

224. *Id.*

225. *Id.*

226. COLIN TURPIN & ADAM TOMKINS, BRITISH GOVERNMENT AND THE CONSTITUTION: TEXT AND MATERIALS 77 (6th ed., 2007).

In fact, the rule of law is important to North Korea. Even China has applied the rule of law to build the country into a modern socialist country.²²⁷ The rule of law will have a vital role when North Korea wants to pursue economic reform or development. More particularly, the rule of law is a foundation for a market economy, which provides an essential environment for the creation and preservation of wealth, economic security and well-being, and the improvement of the quality of life.²²⁸ The rule of law is essential for economic growth and development.²²⁹ The rule of law creates certainty, confidence, stability, security, and predictability which are necessary for sustainable economic growth and social development.²³⁰ The rule of law also secures property and contract rights – the fundamental building blocks of market economies.²³¹ Thus, if North Korea wants to open up its highly centralized socialist economy or transform its economy into a market economy, the rule of law is a key element in achieving this goal. Further, North Korea is regarded as one of the worst countries for foreign investors.²³² North Korea has poor infrastructure, frequent policy reversals, high potential risks, and a totalitarian regime.²³³ If North Korea wants to attract foreign investors, it will have to establish the rule of law as a new economic policy. The rule of law can eliminate obstacles by creating a guarantee and confidence for foreign investors. Under the rule of law, people or investors can be sure that their benefits will not be lost or stolen.

In international relations, North Korea should rely on the international rule of law by complying with the NPT and international humanitarian law. Compliance with the NPT and international humanitarian law can cause positive or sustainable peace on the Korean Peninsula. In addition to positive peace, the international rule of law may help North Korea normalize relations with other countries. It also helps North Korea gain international acceptance and recognition. When peace exists in

227. LIN LI, *BUILDING THE RULE OF LAW IN CHINA* 1 (2017).

228. Samuel Bufford, *International Rule of Law and the Market Economy – An Outline*, 12 SW. J.L. & TRADE AM. 303 (2006).

229. Gary Goodpaster, *Law Reform in Developing Countries*, in *LAW REFORM IN DEVELOPING AND TRANSITIONAL STATES* 106 (2007).

230. *Id.*

231. Takehiko Nakao, *Economic Development in Asia and Rule of Law*, ASIAN DEV. BANK (June 10, 2013), available at <https://www.adb.org/news/speeches/economic-development-asia-and-rule-law> (last visited Oct. 1, 2019).

232. YEONGSEOP RHEE & PATRICK MESSERLIN, *NORTH KOREA AND ECONOMIC INTEGRATION IN EAST ASIA* 102 (2019).

233. *Id.*

the region, the international community will appreciate and admire North Korea for complying with international law. Countries around the world will be willing to establish relations with North Korea.

V. CONCLUSION

Even though the Armistice Agreement was signed in 1953, there is still conflict on the Korean Peninsula. Recently, a conflict or tension has increased because North Korea has conducted nuclear weapons and ballistic missile tests. The Korean Peninsula has then been considered an area of a serious conflict. The international community raises concerns about a serious conflict which likely leads to war. Indeed, there have been several attempts to resolve the conflict and create peace in this region. Several theories were developed and applied to the Korean Peninsula. Among other things, preventive diplomacy and the rule of law can be used to resolve the conflict and build peace in the region. Preventative diplomacy can reduce the serious conflict and prevent it from spreading. Preventive diplomacy can also create negative peace or an absence of violence. This may not be sufficient for the Korean Peninsula. In addition to preventive diplomacy, the rule of law must be used to build positive peace or maintain peace in the region.

The rule of law is a difficult issue because it contradicts the *Juche* idea or North Korea's political ideology. Nowadays, the rule of law is an essential element in many countries around the world. The rule of law creates certainty, equality, predictability, confidence, and human rights protection. China, for example, has built or improved the rule of law to promote economic growth. More importantly, China has also created a modern socialist country under the rule of law. Like China, North Korea should consider or adopt the rule of law along with the *Juche* idea. The rule of law is an important element if North Korea wants to open up its highly centralized socialist economy. Additionally, the international rule of law can help North Korea gain international acceptance and recognition if the country complies with the NPT and international humanitarian law.