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NORTH KOREAN TRASH BALLOONS AND INTERNATIONAL LAW

*Andrew Wolman**

INTRODUCTION

Between May 28, 2024 and August 10, 2024, North Korea reportedly sent over 2,000 trash-filled balloons across the border into South Korea.[1] During this period, North Korean authorities launched balloon barrages on twelve separate occasions, with each balloon transporting around ten kilograms of waste.[2] This waste typically included plastic bits, cigarette butts, batteries, used clothes, toilet paper, wastepaper, and vinyl.[3] The first balloon release also included human feces and, according to one report, soiled diapers, which naturally drew significant attention from global media and commentators.[4] So

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1. *See* Tong-Hyung Kim, *Seoul Says North Korea has Flown More Trash Balloons Toward South Korea*, AP NEWS (Aug. 10, 2024, 9:49 AM), https://apnews.com/article/north-korea-trash-balloons-south-korea-tensions-24d4e857a29f511aa93e6e60dc623650. The analysis in this paper was completed on August 14, 2024, and engages with the facts as they stood at that time.

2. *See* Joon Ha Park, *North Korean Trash Balloon Suspected of Igniting Forest Fire in South*, NK NEWS (Aug. 13, 2024), https://www.nknews.org/2024/08/north-korean-trash-balloon-suspected-of-igniting-forest-fire-in-south; Jeongmin Kim, *North Korea Launches More Trash Balloons Toward South Korea: JCS*, NK NEWS (June 24, 2024), https://www.nknews.org/2024/06/north-korea-launches-more-presumed-trash-balloons-toward-south-korea-jcs/.

3. *See* Hyung-Jin Kim, *North Korea Flies Trash-Carrying Balloons to South Korea in Another Retaliation Against Leafletting*, AP NEWS (June 8, 2024, 10:28 PM), https://apnews.com/article/north-korea-trash-balloons-south-4de47b4ca22790e56dd96643eb991b14; Andy Lim & Victor Cha, *Garbage, Balloons, and Korean Unification Values*, BEYOND PARALLEL (June 30, 2024), https://beyondparallel.csis.org/garbage-balloons-and-korean-unification-values/.

4. *See* Robert King, *"Crap Attack" Against South Korea: North Korea Sends Balloons Carrying Trash Across the DMZ*, THE PENINSULA (June 11, 2024), https://keia.org/the-peninsula/crap-attack-against-south-korea-north-korea-sends-balloons-carrying-trash-across-the-dmz/; Chad de Guzman, *Crap Attack: North Korea Sends Balloons Carrying Trash and Poop to South Korea*, TIME (May 30, 2024), https://time.com/6983012/north-korea-south-balloons-

far, the balloons have not caused injuries or major damage.[5] They did, however, disrupt air traffic for about three night-time hours at Incheon Airport, South Korea's largest air hub.[6]

The balloon offensive has roots in longstanding actions by South Korean activists, who for many years have launched balloons towards the North, transporting a variety of political leaflets and religious material.[7] These balloons sometimes also transported USB sticks loaded with South Korean entertainment, money, books, and even food and household goods.[8] In fact, data from the South Korean Ministry of Unification shows that activists sent at least 20 million leaflets to North Korea between 2008 and 2020, although the number of balloon launches was far less, as some South Korean balloons carried up to 50,000 leaflets each.[9] The North Korean government frequently and vehemently condemned these launches, threatening retaliation.[10] In 2018, progressive President Moon Jae In agreed to halt psychological warfare as part of negotiations aimed at easing tensions between the two Koreas, which Moon interpreted as requiring the government to

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trash-feces-propaganda/; Ajey Lele, *From Deterrence to Defecation: North Korea's Balloon Beating*, THE WIRE (June 16, 2024), https://thewire.in/world/from-deterrence-to-defecation-north-koreas-balloon-beating; Justin McCurry, *Activists Fly K-Pop USB Sticks into North Korea as 'Poo Balloon' Row Intensifies*, THE GUARDIAN (June 5, 2024, 11:54 PM), https://www.theguardian.com/world/article/2024/jun/06/north-korea-south-korea-poo-balloons-k-pop-usb-sticks-us-dollars.

5. *See* Kim, *supra* note 3.

6. *See* Jeongmin Kim, *Incheon Airport Suspends Flights after North Korean Balloons Endanger Aircraft*, NK NEWS (June 27, 2024, 12:22 AM), https://www.nknews.org/2024/06/incheon-airport-suspends-flights-after-north-korean-balloons-endanger-aircraft/.

7. *See* Eric Foley, *Why It's Better to Launch Balloons into North Korea Under the Radar*, NK NEWS PODCAST (June 27, 2024), https://www.nknews.org/category/north-korea-news-podcast/latest/eric-foley-why-its-better-to-launch-balloons-into-north-korea-under-the-radar/944646.

8. *See id.*

9. *See Anti-North Korea Leaflets*, KBS NEWS (July 9, 2020), https://world.kbs.co.kr/special/northkorea/contents/news/closeup_view.htm?lang=e&No=387411.

10. *See N. Korea Calls on Seoul to Stop Sending Propaganda Leaflets*, YONHAP NEWS (Sep. 13, 2014, 8:39 PM), https://en.yna.co.kr/view/AEN20140913002300315.

disallow the release of leaflet balloons by activists.[11] The National Assembly later passed a law prohibiting these leaflet balloons.[12] In 2023, however, the South Korean Constitutional Court ruled that the distribution of leaflets was protected under Constitutional guarantees of freedom of expression, prompting activists to resume their public leaflet balloon launches.[13] North Korea has framed its trash balloons as a functionally identical response to the leaflet balloons. Kim Jong Un's sister, Kim Yo-Jong, stated, "We have tried something they have always been doing. . . .Are the 'freedom of expression' and 'international law' defined according to the direction in which balloons fly?"[14]

North Korea's trash balloon offensive is intended to be, and clearly is, shocking and disgusting. In addition, the balloon launches pose some danger to persons and property, albeit without having yet caused significant damage. But does it violate international law? The South Korean Joint Chief of Staffs have unsurprisingly claimed that it does violate international law.[15] The United Nations, speaking through the mouthpiece of United States Army Major Mayra Nañez of the United Nations Command, has also stated that the balloons constitute a violation of international law, in addition to being a hostile act in contravention of Article 6 of the Armistice Agreement, which ended the Korean War, but is not a treaty.[16] In both cases, however, the statement did not clarify how

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11. *See* Hyung-Jin Kim, *S. Korea Bans Flying of Leaflets Toward N. Korea by Balloon*, AP News (Dec. 14, 2020, 10:04 AM), https://apnews.com/article/seoul-south-korea-north-korea-legislation-moon-jae-in-23e329d4e25a8711be1a06859613a317.

12. *See id.*

13. *See* Wonju Yi, *Constitutional Court Strikes Down Law Banning Leaflet Distribution into N. Korea*, YONHAP NEWS (Sep. 26, 2023, 8:39 PM), https://en.yna.co.kr/view/AEN20230926008552315.

14. Je-hun Lee, *Trash Balloons Are Exercise of 'Freedom of Expression,' Says N. Korea's Kim Yo-jong*, HANKYOREH (May 30, 2024, 5:32 PM), https://english.hani.co.kr/arti/english_edition/e_northkorea/1142786.

15. *See* Jeongmin Kim, *North Korea Calls Feces-Carrying Balloons a 'Gift' to the South from Its People*, NK NEWS (May 30, 2024), https://www.nknews.org/2024/05/north-korea-calls-feces-carrying-balloons-a-gift-to-the-south-from-its-people/.

16. *See* Chad O'Carroll, *UN Command Says North Korean Trash Balloons Breach Armistice, International Law*, NK NEWS (MAY 30, 2024), https://www.nknews.org/2024/05/un-command-says-north-korean-trash-balloons-breach-armistice-international-law/.

international law had been violated. This Article explores the unanswered question.

I. VIOLATION OF SOVEREIGN AIRSPACE

It is well recognized under customary international law that every state has "complete and exclusive jurisdiction over the airspace above its territory."[17] As one scholar states, "legal control of a subjacent state over its airspace appears virtually absolute."[18] A corollary of this principle is that states exercise "complete discretion as to the admission or non-admission of any aircraft" to this airspace.[19] The principle that unauthorized overflight violates the subjacent country's territorial sovereignty as a matter of customary international law was recognized by the International Court of Justice (ICJ) in *Nicaragua v. United States of America*.[20] This principle has also been applied to balloon overflight in a number of cases.[21] Most recently, it was explicitly invoked by Canada and the United States in a much-publicized case involving Chinese balloon overflight.[22]

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17. Fernando Fiallos, *Unmanned Aircraft Systems (UAS) Engaged in International Air Transport*, *in* BEHIND AND BEYOND THE CHICAGO CONVENTION: THE EVOLUTION OF AERIAL SOVEREIGNTY 130 (Pablo Mendes de Leon & Niall Buissing eds., 2019).

18. Farooq Hassan, *A Legal Analysis of the Shooting of Korean Airlines Flight 007 by the Soviet Union*, 49 J. AIR L. & COM. 555, 567 (1984).

19. Fiallos, *supra* note 17, at 130; *see also* William J. Hughes, *Aerial Intrusions by Civil Airliners and the Use of Force*, 45 J. AIR L. & COM. 595, 596 (1980) ("It is axiomatic from this principle that no aircraft is normally entitled to enter the airspace above the territory of a foreign state without the latter's permission.").

20. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S), Judgment, 1986 I.C.J. 14, ¶¶ 251-52 (June 27) ("The principle of respect for territorial sovereignty is also directly infringed by the unauthorized overflight of a State's territory by aircraft belonging to or under the control of the government of another State … such actions constitute violations of Nicaragua's sovereignty under customary international law.").

21. *See* Kuan-Wei Chen, *The Curious Case of the Wayward Balloons, Commentaries on Air and Space Law*, MCGILL: INST. OF AIR AND SPACE L. (Feb. 8, 2023), https://www.mcgill.ca/iasl/wayward%20balloons ("There has been a long history of balloons flying into the sovereign airspace of other States, all of which were met with protest by the overflown States and/or attempts to bring them down.").

22. *See* Statement from the Minister of National Defence, Government of Canada (Feb. 4, 2023), https://www.canada.ca/en/department-national-defence/news/2023/02/statement-from-the-minister-of-national-defence.html;

Control of airspace is most prominently regulated at the international level by the Convention on International Civil Aviation (the "Chicago Convention").[23] This treaty has been ratified by both North and South Korea.[24] Article 1 of the Chicago Convention codifies the principle of sovereign airspace, affirming that "every State has complete and exclusive sovereignty over the airspace above its territory."[25]

Article 3 of the Chicago Convention then adds a touch of contradiction. On the one hand, Article 3(a) states that "[t]his Convention shall be applicable only to civil aircraft, and shall not be applicable to state aircraft."[26] On the other hand, Article 3(c) explicitly sets forth an obligation for state aircraft, namely that "[n]o state aircraft of a contracting State shall fly over the territory of another State or land thereon without authorization by special agreement or otherwise, and in accordance with the terms thereof."[27] Some authors accept the binding nature of the

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see also China Urges Calm over 'Spy' Balloon in US Airspace, BBC NEWS (Feb. 4, 2023), https://www.bbc.co.uk/news/world-us-canada-64521570 (quoting Secretary of State Anthony Blinken that the balloon overflight was "a clear violation of US sovereignty and international law"); For scholarly treatment, see Chen, *supra* note 21 ("The incursion of the balloon into foreign airspace is a violation of international law."); Wolff Heintschel von Heinegg, *Balloons are Not Always Joyful: The Legality of Downing the Chinese Spy Balloon*, ARTICLES OF WAR (May 10, 2023), https://lieber.westpoint.edu/balloons-are-not-always-joyful-legality-downing-chinese-spy-balloon/ ("There can be no doubt that the entry of a foreign State aircraft into the national airspace of another State without that State's prior authorization qualifies as a violation of territorial sovereignty.").

23. *See* Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 [hereinafter Chicago Convention].

24. *See* International Civil Aviation Organisation, *List of Parties to the Convention on International Civil Aviation* 1, 3, https://www.icao.int/secretariat/legal/List%20of%20Parties/Chicago_EN.pdf (last visited Dec. 11, 2024).

25. Chicago Convention art. 1, *supra* note 23.

26. *Id.* art. 3(a).

27. *Id.* art. 3(c).

Article 3(c) prohibition at face value.[28] Others do not.[29] Assuming that one accepts this prohibition, two questions present themselves: first, are the North Korean balloons "aircrafts"? And second, if so, are they *State* aircraft?

The first question can be answered in the affirmative. While the Chicago Convention itself lacks a formal definition of "aircraft," Annex 7 to the Chicago Convention, as agreed upon by the International Civil Aviation Organization ("ICAO"), states that an aircraft is "[a]ny machine that can derive support in the atmosphere from the reactions of the air other than the reactions of the air against the earth's surface."[30] Annex 7 further clarifies that "aircraft" includes both manned and unmanned aircraft, specifying that "[u]nmanned aircraft shall include unmanned free balloons."[31] Scholars support the conclusion that unmanned balloons are considered "aircraft."[32]

As for the second question, there is no comprehensive definition of what constitutes a "state aircraft"; however, Article 3(b) of the Chicago Convention asserts that "[a]ircraft used in military, customs and police services shall be deemed to be state

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28. *See* GBENGA ODUNTAN, SOVEREIGNTY AND JURISDICTION IN THE AIRSPACE AND OUTER SPACE 152 (2012); *see also* MICHAEL MILDE, INTERNATIONAL AIR LAW AND ICAO 63 (2008); Roncevert Ganan Almond, *The (Legal) Battle for Air Supremacy*, THE DIPLOMAT (Nov. 12, 2019), https://thediplomat.com/2019/11/the-legal-battle-for-air-superiority/.

29. *See* von Heinegg, *supra* note 22; *see also* Bin Cheng, *The Right to Fly*, 42 TRANSACTIONS GROTIUS SOC'Y 99, 106 (1956) (reconciling articles 3(a) and 3(c) by concluding that article 3(c) is merely declaratory of customary international law).

30. ICAO, AIRCRAFT NATIONALITY AND REGISTRATION MARKS, ANNEX 7 TO THE CONVENTION ON INT'L CIVIL AVIATION art. 1 (6th ed. 2012).

31. *Id.* art 2.3; *see also* MILICA KALIĆ, SLAVICA DOŽIĆ & DANICA BABIĆ, INTRODUCTION TO THE AIR TRANSPORT SYSTEM 6 (2022) (explaining they are classified as "aerostats," aircraft which gain lift by using a buoyant gas that is lighter than air, such as helium or hydrogen.).

32. *See* RUWANTISSA ABEYRATNE, CONVENTION ON INTERNATIONAL CIVIL AVIATION: A COMMENTARY 117 (2014) ("A balloon falls within the definition of an aircraft as defined in Annex 7 to the Chicago Convention."); *see also* BENJAMYN I. SCOTT & ANDREA TRIMARCHI, FUNDAMENTALS OF INTERNATIONAL AVIATION LAW AND POLICY 36 (2019); Batuhan Betin, *Skies, Spies, and Scientific Surveys – The Legal Aspects of Chinese Unmanned Balloon Flight Over American Territory*, EJIL TALK (Mar. 6, 2023), https://www.ejiltalk.org/skies-spies-and-scientific-surveys-the-legal-aspects-of-chinese-unmanned-balloon-flight-over-american-territory/.

aircraft."[33] This list is not exhaustive, though, and scholars generally look to whether an aircraft is used by the state in public functions in order to determine whether it should be considered a "state aircraft."[34] In North Korea's case, the government released the balloons with the clear public function of antagonizing their southern neighbor.[35] The balloons would thus naturally fall into the "state aircraft" category, meaning their release into foreign airspace would require authorization, which they did not obtain.

To conclude, North Korea's balloon launches are *prima facie* violations of South Korea's sovereign airspace. Article 3(c) of the Chicago Convention appears to prohibit these balloon launches; however, even if one argues that the Chicago Convention does not impose obligations *vis a vis* state aircraft due to Article 3(a), these balloon launches would still violate customary international law, which prohibits state aircraft incursions into sovereign airspace. There is, however, a significant caveat: if North Korea's balloon barrages are considered valid countermeasures, they would not violate international law. This possibility is considered further below in Section VI.

II. GENERAL PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW

Under the "no harm" principle, states are obliged to prevent, reduce, and control significant transboundary environmental harm that arises from activities within their territory.[36] This principle famously originated in the *Trail Smelter* arbitration between Canada and the United States.[37] The International Court of Justice later endorsed this principle in the *Pulp Mills*

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33. Chicago Convention art. 3(b), *supra* note 23.

34. *See* PABLO MENDES DE LEON, INTRODUCTION TO AIR LAW 22 (10th ed. 2017).

35. *See* Jack Kim & Hyonhee Shin, *North Korea Sends Balloons Carrying Excrement to the South as a 'Gift*,' REUTERS (May 29, 2004), https://www.reuters.com/world/asia-pacific/south-korea-alert-balloons-dropping-trash-north-2024-05-29/.

36. *See generally* Owen McIntyre, *The current state of development of the no significant harm principle: How far have we come?*, 20 INT'L ENVIRON. AGREEMENTS 601, 601–618 (2020).

37. *See* Trail Smelter Case (Can. v. U.S.), 3 R.I.A.A. 1905, 1965 (1941).

and *Nuclear Weapons* decisions.[38] States reaffirmed the principle, most notably in the Stockholm Declaration and the Rio Declaration.[39] The International Law Commission (ILC) also accepted this principle in the Draft Articles on Prevention of Transboundary Harm.[40] This principle is widely accepted as binding under customary international law.[41]

Do North Korean balloon releases fall foul of this "no harm" principle? North Korean state officials clearly launched the balloons into South Korean territory, resulting in negative consequences. South Korean authorities were required to expend resources to collect and dispose of the balloons and their cargo; furthermore, the balloon releases undoubtedly caused anxiety among many South Koreans, while minor property damage has been reported costing 20.17 million won ($14,513) in Seoul and 6.61 million won ($4,756) in Gyeonggi Province between May 28, 2024, and June 12, 2024.[42] More seriously, the balloons forced South Korean authorities to briefly shut down air traffic at South Korea's main airport for approximately three

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38. *See* Pulp Mills on River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. 14, ¶ 101 (April 20); Legality of Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 29 (July 8).

39. *See* U.N. Conference on the Human Environment, *Report of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14 (June 16, 1972), at Principle 21; U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/5/Rev. 1 (June 13, 1992), at Principle 2.

40. *See Text of the Draft Articles with Commentary Thereto, in International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law (Prevention of Transboundary Harm from Hazardous Activities)*, 2001 Y.B. INT'L L. COMM'N 144, 153.

41. *See* Kirsten Schmalenbach, *States Responsibility and Liability for Transboundary Environmental Harm*, in CORPORATE LIABILITY FOR TRANSBOUNDARY ENVIRONMENTAL HARM 43, 56 (Peter Gailhofer et al. eds., 2022).

42. *See* Soo-Jung Lee, *North's Trash Balloons Rack Up Over 26 Million Won in Damage Across Greater Seoul*, KOR. JOONGANG DAILY (June 30, 2024), https://koreajoongangdaily.joins.com/news/2024-06-30/national/northKorea/Norths-trash-balloons-rack-up-over-26-million-won-in-damage-across-greater-Seoul/2079890.

hours.[43] They may also have sparked a minor forest fire near the border.[44]

The "no harm" principle, however, only prohibits "significant harm." Determining whether the negative effects of the balloon releases qualify as "significant" is a more complex issue. Given the paucity of litigation on the "no harm" principle, there is little guidance from the courts as to the legal contours of "significance."[45] Some commentators have used other terms of gravity, such as "appreciable," "substantial," or "serious" interchangeably with "significant."[46] In contrast, the ILC concluded that "significant" refers to "something more than 'detectable' but need not be at the level of 'serious' or 'substantial.'"[47] Of course, all of this parsing of terms offers limited practical help without concrete examples, which will likely emerge over time through a more developed jurisprudence that has yet to appear.

Given this lack of guidance, it is hard to come to an entirely secure conclusion, but certainly, the property damage reported to date likely would not be considered "significant" in the context of South Korea's wealthy economy. While the closure of Incheon Airport had real and potentially more significant economic effects, quantifying the impact of a population reluctant to go outside due to fear of the balloons proves more challenging.[48] For now, the most one can conclude is that North Korean balloon releases are unlikely to have violated the "no harm" principle

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43. *See Incheon Airport Briefly Shuts Down Runways Because of North Korea Trash Balloons*, REUTERS (June 26, 2024), https://www.reuters.com/world/asia-pacific/incheon-airport-briefly-shuts-down-runways-because-north-korea-trash-balloons-2024-06-26/.

44. As of August 13, authorities had not yet definitively attributed the fire to North Korean balloons. *See* Park, *supra* note 2.

45. *See* Jacqueline Peel, *Unpacking the Elements of A State Responsibility Claim For Transboundary Pollution*, *in* TRANSBOUNDARY POLLUTION 52 (S. Jayakumar et. al. eds., 2015).

46. René Lefeber, *Responsibility not to Cause Transboundary Environmental Harm, in* ELGAR ENCYCLOPEDIA OF ENVIRONMENTAL LAW VOL. VI: PRINCIPLES OF ENVIRONMENTAL LAW 98 (Michael Faure ed., 2018).

47. *Text of the Draft Articles with Commentary Thereto, in International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law, supra* note 40, at 152.

48. The ILC has also said that "detrimental effects must be susceptible of being measured by factual and objective standards." *Id.* at 152.

because North Korea's actions have not yet caused significant harm, especially in the absence of personal injuries or serious property damage. Of course, the calculation of harm will change over time if balloon releases continue, particularly if North Korea begins deploying more hazardous cargo or further flight disruptions occur.

III. THE BASEL CONVENTION

Beyond general environmental principles, North Korean balloon releases may also fall afoul of environmental treaty law, namely the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (the "Basel Convention").[49] The Basel Convention which both North and South Korea have ratified, regulates transboundary movements of hazardous and "other" wastes in order to ensure that such wastes are "managed and disposed of in an environmentally sound manner."[50]

Article 4 of the Basel Convention strictly requires that states obtain the prior informed consent of any recipient state before transporting covered wastes across borders.[51] In the case of North Korea's balloon releases, South Korea clearly did not consent to receive the garbage. There has also been transboundary movement, which can include transportation by air, land, or sea.[52] The question of liability hinges on whether the material transported by balloon qualify as hazardous or "other" waste.[53] The specific material considered as hazardous waste are

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49. *See generally* U.N. Environmental Programme Conference of Plenipotentiaries on the Global Convention on the Control of Transboundary Movements of Hazardous Wastes, *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, U.N.E.P. Doc. IG.80/3 (Mar. 22, 1989) [hereinafter Basel Convention].

50. *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes*, U.N. ENV'T PROGRAMME (Dec. 9, 2011), https://www.unep.org/resources/report/basel-convention-control-transboundary-movements-hazardous-wastes.

51. *See* Basel Convention, *supra* note 49, art. 4. The prior informed consent requirement is arguably also a part of customary international law. *See* KATHARINA KUMMER, INTERNATIONAL MANAGEMENT OF HAZARDOUS WASTES: THE BASEL CONVENTION AND RELATED LEGAL RULES 21 (1995).

52. *See* Basel Convention, *supra* note 49, arts. 2(3), 2(9).

53. "Other waste" is a separate category that is subject to the same prior informed consent requirement as hazardous waste. *See id.* at art. 6(1)

listed in Annex I and VIII, along with other material classified as "hazardous waste" by the domestic legislation of the state of export, transit, or import.[54] Material classified as "other waste" is listed in Annex II.[55]

Based on published reports, some of the cargo carried by the North Korean trash balloons likely falls into each category.[56] The balloons have reportedly transported waste batteries.[57] This could qualify as "hazardous waste" under Annex VIII of the Basel Convention.[58] Many other items carried by the balloons could likely be classified as "household waste," listed in Annex II of the Basel Convention as "other waste."[59] This includes used diapers, cigarette butts, used clothing, and co-mingled waste paper.[60] Some plastics, which the balloons have also carried, could be considered either "hazardous" or "other waste," depending on their characteristics.[61] In short, one can conclude that North Korea's balloon releases contravene the terms of the Basel Convention in addition to the Chicago Convention.

IV. USE OF FORCE

Under the modern *jus ad bellum*, Article 2(4) of the United Nations Charter prohibits states from using force against other states unless doing so in self-defense or pursuant to United Nations Security Council authorization; however, neither is

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54. *See id.* at art. 1(1).

55. *See id.* at art. 1(2).

56. *See* Kim, *supra* note 3; Lim & Cha, *supra* note 3.

57. *See* Kim, *supra* note 3.

58. Waste material types that are listed in Annex VIII List A and that are relevant to battery consumption and recycling include: A1160 - waste lead acid batteries, whole or crushed, A1170 - unsorted waste batteries excluding mixtures of only list B batteries, and A1180 - waste electrical and electronic assemblies or scrap containing components such as accumulators and other batteries included on list. *See* Basel Convention*, supra* note 49, annex VIII.

59. *See id.* at art. (1)2, annex II.

60. According to UNEP, "[t]he presence of biodegradable constituents in household waste demands care in their recovery treatment and disposal. Until the pathogens present in the waste have been either destroyed or die, there is always the possibility of the waste presenting a threat to human health (toxicity) and the environment (ecotoxicity) by virtue of their presence." U.N. Env't Programme, Basel Convention Technical Guidelines on Wastes Collected from Households, ¶ 26, U.N. Sales No. E.02.III.D.208 (2002).

61. *See* Basel Convention*, supra* note 49, annex II, annex VIII.

applicable in the case of North Korea's balloon launches.[62] A few commentators argue that the Article 2(4) prohibition is not applicable to inter-Korean relations because there is still an unfinished armed conflict ongoing due to the lack of a peace treaty concluding the Korean War.[63] However, this is misguided: the mainstream—and surely correct—view is that the use of force is prohibited by Article 2(4) if it violates armistice lines or other lines of demarcation established by some form of peace settlement.[64]

The question, then, is whether the balloon releases constitute a "use of force."[65] Among academics, there is considerable debate as to whether there is a minimum gravity threshold below which a state's small-scale forcible act would not be found to constitute a prohibited use of force under Article 2(4) of the United Nations Charter. Olivier Corten and Mary Ellen O'Connell argue in favor of a *de minimus* threshold.[66] Tom Ruys disagrees.[67] As a matter of state practice, it seems clear that unauthorized overflight is not viewed as a prohibited "use of force," at least absent meaningful damage to the subjacent state. For example, state responses to drone intrusions support a conclusion that while these activities violate the territorial sovereignty of the target

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62. *See* U.N. Charter art. 2(4).

63. *See* Angela Semee Kim, *Marking the 70th Anniversary of the Korean Armistice Agreement: A Means to Peace*, 32 INT'L J. KOR. UNIFICATION STUD. 125, 127 (2023) ("absent a peace treaty, a justification to use force continues to exist for both Koreas."); *see also* Gordon G. Chang, *Korean War II*, WALL ST. J. (June 30, 2009), https://www.wsj.com/articles/SB124630239100769427.

64. *See* ERIN POBJIE, PROHIBITED FORCE: THE MEANING OF 'USE OF FORCE' IN INTERNATIONAL LAW 95 (2024); Claus Kreß, *The State Conduct Element*, in THE CRIME OF AGGRESSION: A COMMENTARY 433 (2017); *see also* Martin Wählich, *Peace Settlements and the Prohibition of the Use of Force*, in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 976 (2015).

65. *See* U.N. Charter art. 2(4).

66. *See* OLIVIER CORTEN, THE LAW AGAINST WAR: THE PROHIBITION ON THE USE OF FORCE IN CONTEMPORARY INTERNATIONAL LAW 55 (2010); Mary Ellen O'Connell, *The Prohibition of the Use of Force*, in RESEARCH HANDBOOK ON INTERNATIONAL CONFLICT AND SECURITY LAW: JUS AD BELLUM, JUS IN BELLO AND JUS POST BELLUM 99 (2013).

67. *See* Tom Ruys, *The Meaning of "Force" and the Boundaries of the Jus Ad Bellum: Are "Minimal" Uses of Force Excluded from UN Charter Article 2 (4)?*, 108 AM. J. INT'L L. 159, 180-81 (2014).

state, they do not constitute a prohibited use of force.[68] While drone overflight is not precisely analogous to garbage balloons, they seem of roughly the same level of severity. Thus, if the North Korean balloons continue to produce minimal harm, it would be improper to consider them as a breach of the prohibition on the use of force.

V. INTERNATIONAL HUMANITARIAN LAW

Finally, it is worth examining international humanitarian law, which, in theory, could apply even absent a violation of Article 2(4) of the United Nations Charter. There is a long history of balloons being used as weapons in times of armed conflict, and indeed, such use was prohibited in the Hague Declarations of 1899 and 1907.[69] These early treaties were, however, intended to be temporary.[70] In any case, they were not ratified by North Korea, South Korea, or an undivided Korea as existed at the time.[71] Nevertheless, there is little doubt that an attack by unmanned (and uncontrolled) balloon during an armed conflict would violate international humanitarian law, as the attacker would be unable to control whether the balloons would deliver their cargo to a civilian or military target, thus violating

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68. *See* Joshua Cornthwaite, *Can We Shoot Down That Drone? An Examination of International Law Issues Associated with the Use of Territorially Intrusive Aerial and Maritime Surveillance Drones in Peacetime*, 52 CORNELL INT'L L. J. 475, 523-24 (2019).

69. *See* Declaration (IV,1), to Prohibit, for the Term of Five Years, the Launching of Projectiles and Explosives from Balloons, and Other Methods of Similar Nature, July 29, 1899, 32 Stat. 1389; Declaration Prohibiting the Discharge of Projectiles and Explosives from Balloons, Oct. 18, 1907, 36 Stat. 2439.

70. The 1907 Declaration was intended to remain in force until the Third Peace Conference, which never took place, meaning that the treaty is still in force today. *See id.*; Declaration (IV,1), to Prohibit, for the Term of Five Years, the Launching of Projectiles and Explosives from Balloons, and Other Methods of Similar Nature, *supra* note 69.

71. *See IHL Treaties – Hague Declaration (IV1) prohibiting Projectiles from Balloons, 1899 Ratification*, ICRC, https://ihl-databases.icrc.org/en/ihl-treaties/hague-decl-iv-1-1899/state-parties (last visited Nov. 1, 2024); *IHL Treaties – Hague Declaration (XIV) on Explosives from Balloons, 1907 Ratification*, ICRC, https://ihl-databases.icrc.org/en/ihl-treaties/hague-decl-xiv-1907/state-parties (last visited Nov. 1, 2024).

the prohibition on indiscriminate attacks contained in Article 51(4)(a) of Additional Protocol I to the Geneva Conventions.[72]

The critical question concerning the North Korean balloon releases would be whether these actions, in fact, constitute attacks during armed conflict when international humanitarian law applies. They do not, for two reasons. First, the balloon releases do not take place during an armed conflict. A few scholars have argued that a state of armed conflict in the Korean peninsula remains in place because there has been no effective cessation of hostilities at the end of the Korean War.[73] However, this is unconvincing. According to Article 3 of Additional Protocol I, "[t]he application of the Conventions and of this Protocol shall cease, in the territory of Parties to the conflict, on the general close of military operations."[74] Military operations ceased as the time of the Armistice agreement, and it would be implausible to deny the effectiveness of this cessation due to the occasional violent act that has permeated inter-Korean relations since that time. This conclusion that there is no ongoing conflict for the purposes of international humanitarian law has been embraced by other prominent scholars, including Dapo Akande and Yoram Dinstein.[75]

Alternatively, one could question whether the balloon releases were, in fact, a first resort to armed force between North and South Korea, thus creating a new armed conflict and leading to the applicability of international humanitarian law. There is no

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72. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 51(4)(a), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; Both North and South Korea are parties to Additional Protocol I. *See IHL Treaties – Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, Ratification*, ICRC, https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/state-parties (last visited Nov. 2, 2024).

73. *See* Morse Tan, *International Humanitarian Law and North Korea: Another Angle for Accountability*, 98 MARQ. L. REV. 1147, 1165; Scott Morris, *America's Most Recent Prisoner of War: The Warrant Officer Bobby Hall Incident*, THE ARMY LAW., Sept. 1996, at 3, 14.

74. Additional Protocol I art. 3(b), *supra* note 72.

75. *See* Dapo Akande, *The Korean War has Resumed!! (Or so we are told)*, EJIL TALK (July 22, 2009), https://www.ejiltalk.org/the-korean-war-has-resumed-or-so-we-are-told/; YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 44 (4th ed., 2005).

treaty-based definition for "armed force" in the corpus of international humanitarian law.[76] It is clear that bombing, shelling, or troop deployments would qualify as the use of "armed force."[77] The North Korean balloons, on the other hand, have not yet led to personal injuries or significant property or environmental damage, and indeed this does not seem to be their intent. Where there are no intended or actual deaths, injuries, or property damage, either direct or indirect, it would be illogical to label an action as the use of "armed force."[78]

Second, the balloon releases are not "attacks," a term which Additional Protocol I defines as "acts of violence against the adversary, whether in offence or in defence."[79] Simply put, the balloon releases are, so far, not "violent" acts. According to Yoram Dinstein, "[v]iolence transcends acts that cause only passing vexation or irritation. Violence entails (i) loss of life or other serious harm to human beings; and/or (ii) destruction of, or tangible damage to, property." [80] While this may change over time, the North Korean balloon releases are currently more in the realm of vexation and irritation, with no harm to human beings and minimal property damage.

VI. COUNTERMEASURES

On its face, therefore, the North Korean balloon releases breach Basel Convention and Chicago Convention rules. However, are they nevertheless permissible as a legitimate countermeasure? In short, countermeasures are responses to another state's prior breach of international law that preclude the wrongfulness of action that otherwise violates international law.[81] The purpose of a countermeasure is to induce the state

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76. *See* Cordula Droege, *Get off my Cloud: Cyber Warfare, International Humanitarian Law, and the Protection of Civilians*, 94 INT'L. REV. RED CROSS 533, 546 (2012).

77. *See id.* at 546.

78. INTERNATIONAL LAW ASSOCIATION, FINAL REPORT ON THE MEANING OF ARMED CONFLICT IN INTERNATIONAL LAW 2 (2010) ("at least two characteristics are found with respect to all armed conflict: 1.) The existence of organized armed groups 2.) Engaged in fighting of some intensity.").

79. Additional Protocol I art. 49, *supra* note 72.

80. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 2 (3rd ed., 2016).

81. *See* International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries art. 22, UN

responsible for the initial breach of international law to end their breach (if it is ongoing), and to repair any damages caused by their breach.[82]

For an action to qualify as a legitimate countermeasure, however, it must comply with several substantive and procedural conditions that seek to limit abuse. These principles are most prominently laid out in the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts. Countermeasures must be in response to a prior breach of international law.[83] In addition, there must be a prior demand by the injured state to cease the violation and, if necessary, repair its effects.[84] Arguably, the victim state must offer to negotiate the dispute before taking countermeasures.[85] Countermeasures must not violate the *jus ad bellum*, nor international humanitarian law protections of non-combatants.[86] Finally, the countermeasures themselves must be proportionate, temporary, and reversible.[87] As will be seen, all the conditions appear to be fulfilled here, although this conclusion could of course change in the future if, for example, North Korean balloons start transporting more hazardous material.

A. Prior Breach

The first step in the analysis must be identifying whether North Korea's balloon releases responded to a prior breach of international law. North Korean authorities have consistently indicated that the trash balloons are being launched in response to the release of balloons by South Korean activists towards North Korea.[88] Did these South Korean releases constitute a

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GAOR, 56th Sess, Supp 10, Ch 4, UN Doc A/56/10 (2001). [hereinafter Articles on State Responsibility].

82. *See id.* commentary to art. 22, para 1.

83. *See id.* art. 49(1).

84. Case Concerning the Gabčikovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. 7, ¶ 84 (Sept. 25).

85. *See* Articles on State Responsibility art. 52(1)(b), *supra* note 81.

86. *See id.* art. 50(1).

87. *See id.* arts. 49(2) (requiring temporariness), 49(3) (requiring reversibility), 51 (requiring proportionality).

88. *See* Kathleen Magramo & Gawon Bae, *North Korea Says It is Halting Sending Trash Balloons to South Korea After Hundreds More Float Over Border*, CNN (June 2, 2024), https://edition.cnn.com/2024/06/02/asia/north-

breach of international law? For the same reasons as discussed above, the South Korean balloons would not be seen as a "use of force" or "armed force" in contravention of the *jus ad bellum* or *jus in bello*.[89] They will not have violated the Basel Convention, because their cargo, consisting largely of political and religious leaflets, is not "waste," nor will they have violated the customary international law "no harm" principle, as there is no credible evidence that South Korean balloons have led to significant harm of any kind (a DPRK spokesperson claimed that the South Korean balloon leaflets led to North Korea's Covid outbreak, but this is implausible).[90]

That leaves the question of sovereign airspace violation to consider. There is a key analytical difference between the South Korean activists' leaflet balloons and the North Korean trash balloons. While North Korean state actors conducted North Korea's balloon launches, the South Korean leaflet balloons were released by civil society activists. This distinction has been highlighted by defenders of South Korean leaflet balloon releases.[91]

The question of state obligations concerning civilian aircraft entering another state's air space without permission came to the force in 1983 after the downing of Korean Air Lines flight 007 by the Soviet Armed Forces, after it unexpectedly intruded into the former Soviet Union's air space.[92] All of the 269 passengers and crew died, and the resulting outcry led to the passage of a protocol amending the Chicago Convention to

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korea-trash-balloons-intl-hnk/index.html (quoting DPRK Vice-Defense Minister Kim Kang Il); Hyung-Jin Kim, *North Korea Says It Will Stop Sending Trash Balloons as South Korea Vows Strong Retaliation*, AP NEWS (June 2, 2024), https://apnews.com/article/north-korea-south-balloons-trash-1b65c87f53613b4d4738486d19b454d4.

89. *See supra* Section IV.

90. *See North Korea's Kim Yo Jong Rejects South Korean President Yoon Suk-yeol's 'Foolish' Offer of Aid in Exchange for Denuclearisation*, AP NEWS (Aug. 19, 2022), https://www.abc.net.au/news/2022-08-19/north-korea-rejects-south-korean-aid/101351026.

91. *See* O'Carroll, *supra* note 16 (Eric Foley, CEO of the NGO Voice of the Martyrs Korea).

92. *See* Chrystel Erotokritou, *Sovereignty Over Airspace: International Law, Current Challenges, and Future Developments for Global Aviation*, 4(5) INQUIRIES J. 1, 2 (2012).

ensure the safety of civil air passengers.[93] South Korea ratified this protocol in February 1984 and it entered into force in 1998.[94] While the new protocol mainly dealt with the obligation to refrain from the use of force on civil aircraft, Article 3 bis(d) also specified that "[e]ach contracting State shall take appropriate measures to prohibit the deliberate use of any civil aircraft registered in that State or operated by an operator who has his principal place of business or permanent residence in that State for any purpose inconsistent with the aims of this Convention."[95]

Is South Korea violating Article 3 bis by permitting activists to release leaflet balloons into North Korea? As discussed above, there is little doubt that unmanned balloons are classified as "aircraft" in the Chicago Convention. There is also little doubt that by purposefully sending their balloons into North Korean airspace without permission, the activists are using the balloons for a purpose inconsistent with the aims of the Chicago Convention, in particular Article 8, which states that "[n]o aircraft capable of being flown without a pilot shall be flown over the territory of a contracting State without special authorization by that State and in accordance with the terms of such authorization."[96] As Ruwantissa Abeyratne notes, "purpose inconsistent with the aims of this Convention' in Article 3 bis ha[s] a wider meaning and covers breaches of the law and public order of the overflown State by foreign civil aircraft."[97]

The critical issue, then, is whether South Korea has taken "appropriate measures" to prevent the leaflet balloon launches. One could argue that attempts to prohibit or discourage balloon launches would not, in fact, be "appropriate" because they would violate freedom of expression protections and run counter to the human rights imperative of providing information and religious material to a closed and unfree country. Several United Nations

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93. *See* Protocol Relating to an Amendment to the Convention on International Civil Aviation (Article 3 bis), May 10, 1984, 2122 U.N.T.S. 337.

94. State Parties to the Protocol Relating to an Amendment to the Convention on International Civil Aviation: Article 3 bis, ICAO, https://www.icao.int/secretariat/legal/List%20of%20Parties/3bis_EN.pdf (last visited Dec. 11, 2024 (listing the parties who ratified the amendment).

95. Protocol Relating to an Amendment to the Convention on International Civil Aviation (Article 3 bis), *supra* note 93.

96. Chicago Convention art. 8, *supra* note 23.

97. ABEYRATNE, *supra* note 32, at 93.

Special Rapporteurs have criticized South Korea's prior leaflet balloon ban on human rights grounds as a violation of South Korean activists' freedom of expression.[98] Mainstream international human rights activists have agreed.[99] These interventions should not be hastily dismissed, yet it is important to recall the law that they were objecting to. The 2021 anti-leaflet law did not explicitly prohibit unauthorized violations of airspace; rather, it prohibited "disseminating leaflets, etc." by any means, with "leaflets, etc." defined as "leaflets, items (including propaganda materials, printed materials, and auxiliary memory devices), and monetary or other property benefits."[100] The law also prohibited loudspeaker broadcasting and visual media posting along the military demarcation line.[101] In brief, the law targeted a particular type of expression, namely activists' statements to the North Korean public. From an international law perspective, an appropriately tailored balloon policy would not single out any particular type of speech but would instead prohibit all unauthorized violations of North Korea's sovereign airspace. This would have no bearing on other potential ways of delivering information to North Korea, like radio broadcasts, loudspeakers, or visual media. It would be difficult to claim that such a content-neutral law would violate international freedom of expression protections (whether instated by South Korea or any other country) merely because unauthorized balloons could be or have been used to transmit political and religious materials.

Of course, there may nevertheless be powerful ethical arguments in favor of South Korea violating North Korea's sovereign airspace in the name of human rights—notably, the right to information of North Korean citizens—by continuing to

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98. *See* Dong-woo Chang, *S. Korea Rebuts U.N. Special Rapporteurs' Concerns over Seoul's Anti-Leaflet Law*, YONHAP NEWS (July 10, 2021), https://en.yna.co.kr/view/AEN20210710002700315.

99. *See* Jason Strother, *Seoul Bans Anti-North Korea Leaflet Drops*, VOA NEWS (Dec. 15, 2020), https://www.voanews.com/a/east-asia-pacific_seoul-bans-anti-north-korea-leaflet-drops/6199586.html; *South Korea: Scrap Bill Shielding North Korean Government*, HUM. RTS. WATCH (Dec. 5, 2020), https://www.hrw.org/news/2020/12/05/south-korea-scrap-bill-shielding-north-korean-government.

100. Development of Inter-Korean Relations Act arts. 4.5, 24.1(3), Act No. 17763, Dec. 29, 2020 (S. Korea).

101. *See id.* art. 24.1(1)-(2).

allow leaflet balloon launches. Indeed, scholarly advocates of unilateral humanitarian intervention put forth similar arguments that human rights imperatives can justify infringements of another state's sovereign territory, even without United Nations Security Council authorization.[102] However, these types of unilateral interventions were never well accepted at the international level, even when countering extreme human rights violations such as genocide.[103] As such, it is hard to imagine that the international community would consider it appropriate to allow violations of sovereign airspace in the name of promoting North Korean citizens' access to political or religious material.

It is also possible to prove that South Korea violated customary international law by allowing activists to launch leaflet balloons that violated North Korea's sovereign right to control its airspace. This would, in brief, rely on the general principle endorsed by the ICJ in its *Corfu Channel* judgment, that it is "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."[104]

B. Prior Demand

If one accepts that the South Korean state is responsible for the activists' violation of North Korean airspace, the next question is whether North Korea has issued a demand to South Korean authorities to stop such activities prior to engaging in

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102. *See* Michael Reisman, *Coercion and Self-Determination. Construing Charter Article 2(4)*, 78 AMER. J INT'L L. 642, 643 (1984); FERNANDO TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 151 (3rd edn., 2005); Martha Brenfors & Malene Petersen, *The Legality of Unilateral Humanitarian Intervention: A Defence*, 69 NORDIC J. INT'L L. 449, 497 (2001).

103. *See* William Magnuson, *The Responsibility to Protect and the Decline of Sovereignty: Free Speech Protection Under International Law*, 43 VANDERBILT J. TRANSNAT'L L. 255, 290 (2010) ("the position of free speech in the international system remains subordinate to state sovereignty."); Gareth Evans, 'The Responsibility to Protect: Rethinking Humanitarian Intervention,' Address to the American Society of International Law (Apr. 1, 2004); Theresa Reinold, *The Responsibility to Protect – Much Ado About Nothing?*, 36 REV. INT'L STUD. 55, 68 (2010) ("Very few states are ready to admit that the international community's responsibility to protect may be exercised unilaterally, if the Security Council does not live up to its responsibility.").

104. Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. 4, 22 (Apr. 9).

countermeasures. In this case, it is quite clear that they have done so. North Korea has repeatedly and vociferously condemned the leaflet balloons for years. For example, in a 2014 statement conveyed to the United Nations, North Korea complained that the leaflet balloon launches "perpetrated in South Korea under the patronage of the puppet authorities are hideous crimes against humanity and human rights as they are a grave violation of international law."[105] In 2020, North Korean authorities destroyed a liaison office allegedly in retaliation for the leaflet launches, arguing these were a violation of the 2018 Panmunjom Declaration, in which each side agreed to avoid hostile acts.[106] In 2021, Kim Jong Un's sister, Kim Yo Jong, called the leaflet launches a "serious provocation against our state," to which South Korean authorities were "giving silent approval."[107]

C. Offer to Negotiate and Notification of Countermeasures

According to Article 52 of the Articles on State Responsibility, the injured state is required to "notify the responsible State of any decision to take countermeasures and offer to negotiate with that State."[108] North Korea has regularly notified South Korea in general (and customarily exaggerated) terms that they would respond violently to continued leafletting.[109] As for negotiations, the leaflet balloons were an important part of talks between North and South Korea in 2018, which culminated in the joint

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105. Letter from the Permanent Rep. of the Democratic People's Republic of Korea to the President of the United Nations Human Rights Council (Nov. 13, 2014), U.N. Doc A/HRC/27/G/12, at ¶ 3.

106. *See* Joshua Berlinger et al., *North Korea Blows up Liaison Office in Kaesong Used for Talks with South*, CNN (June 16, 2020), https://edition.cnn.com/2020/06/16/asia/north-korea-explosion-intl-hnk/index.html.

107. Min Chao Choy, *North Korea's Kim Yo Jong Slams Recent Leaflet Launches as 'Serious Provocation,'* NK NEWS (May 1, 2021), https://www.nknews.org/2021/05/north-koreas-kim-yo-jong-slams-recent-leaflet-launches-as-serious-provocation/.

108. Articles on State Responsibility art. 52, *supra* note 81.

109. *See* Tong-Hyung Kim, *North Korea Threatens to Respond to Anti-Pyongyang Propaganda Leaflets with a 'Shower of Shells,'* AP News (Nov. 8, 2023, 1:41 AM), https://apnews.com/article/north-korea-leaflets-border-shells-11fc28c9b824b8673a0c7e3cd7391e05.

'Panmunjom Declaration' wherein the two countries agreed to cease "all hostile acts and eliminating their means, including broadcasting through loudspeakers and distribution of leaflets, in the areas along the Military Demarcation Line."[110] This would presumably discharge North Korea's requirement to negotiate. Observers assert that the continued launching of leaflet balloons despite the negotiated commitments in the Panmunjom Declaration has contributed significantly to the deterioration of relations between the two Koreas in the ensuing years.[111] It is also worth noting that during the drafting of the Articles on State Responsibility, several countries objected to requiring an offer to negotiate prior to using countermeasures, including South Korea, which argued that any burden of initiating negotiations should lie on the responsible state, rather than the injured state.[112]

D. International Humanitarian Law and Jus ad Bellum Violations

As discussed above, North Korea's balloon launches do not, thus far, violate international humanitarian law or Article 2(4) of the United Nations Charter because they do not constitute an "attack" or a "use of force."[113] This conclusion is, of course, subject to revision should more hazardous balloon cargo be used in the future.

E. Proportionality

Article 51 of the Articles on State Responsibility states that countermeasures must be proportional to the harm suffered by the injured state.[114] The ICJ affirmed the importance of this

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110. *Full declaration of North and South Korean summit,* CNN (Apr. 27, 2018, 6:10 AM), https://edition.cnn.com/2018/04/27/asia/read-full-declaration-north-south-korea/index.html.

111. *See* Jongsoo Lee, *It Is High Time to Engage North Korea*, THE DIPLOMAT (Apr. 19. 2024), https://thediplomat.com/2024/04/it-is-high-time-to-engage-north-korea/.

112. *See* James Crawford et al., *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading*, 12 EUR. J. INT'L L. 963, 982, n.71 (2001).

113. *See* U.N. Charter art. 2(4).

114. *See* Articles on State Responsibility art. 51, *supra* note 81.

condition in the *Gabčikovo-Nagymaros* case.[115] It is not a requirement of precise equality, but rather that the harm produced by a countermeasure be "somewhat equivalent to the injury suffered."[116] According to the *Air Services Agreement* tribunal, the proportionality calculation should be guided by "the importance of questions. . .arising from the alleged breach" as well as injuries suffered.[117] Countermeasures are not required to involve the same kind of obligation as that which was breached originally, but "those that do are more likely to satisfy the proportionality requirement."[118]

Taking this guidance into account, North Korea's trash balloon launches are not clearly disproportionate to the activist balloon launches that make up South Korea's initial violation of international law. The obligations North Korea breached are of the same kind as those initially breached by South Korea and have not led to markedly greater injury. They have even been (facetiously) justified on the same basis as the South Korean launches, as the exercise of "freedom of expression."[119]

F. Temporary

Article 49(2) of the Articles of State Responsibility limits countermeasures to the non-performance of obligations "for the time being," which is characterized in the commentary as being of a temporary nature.[120] The North Korean authorities have indicated that their balloon launches are temporary, and will cease when South Korea halts South Korean activists from

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115. *See* Case Concerning the Gabčikovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. 7, ¶¶ 83-7 (Sept. 25).

116. *See* Talita Dias, *Countermeasures in International Law and Their Role in Cyberspace*, CHATHAM HOUSE (May 23, 2024), https://www.chathamhouse.org/2024/05/countermeasures-international-law-and-their-role-cyberspace/02-conditions-taking.

117. *See* Air Services Agreement (U.S. v. Fr.), 18 R. Int. Arb. Awards 417, 443-44 at ¶ 83 (1978).

118. Tom Ruys, *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, *in* RESEARCH HANDBOOK ON UN SANCTIONS AND INTERNATIONAL LAW 34 (2016).

119. *See* Yi, *supra* note 13.

120. *See* Report of the International Law Commission to the General Assembly, 53 U.N. GAOR Supp. No. 10, at 1, U.N. Doc. A/56/10 (2001), *reprinted in* [2007] 2 Y.B. Int'l L. Comm'n 129-130, A/CN.4/SER.A/2001/Add.1 (Part 2).

launching leaflets across the shared border.[121] It is important to note that North Korean balloon launches temporarily ceased from June 26, 2024, until July 18, 2024.[122] The North Korean balloon launches only resumed when South Korean activists launched additional leaflets.[123] Thus, the North Korean balloon launches appear to be a temporary policy; however, this conclusion may be undermined if, for example, North Korea were to continue launching garbage balloons even after South Korea cracks down on activist leaflet launches.

G. Reversible

Finally, Article 49(3) of the Articles on State Responsibility requires that countermeasures be, so far as possible, reversible, such that they "permit the resumption of performance of the obligation in question."[124] The reversibility requirement would not be drawn into question by North Korea's balloon launches, which can be stopped at any time without lasting damage being caused.

CONCLUSION

As this analysis has shown, North Korea's balloon launches should not be characterized as violations of international law. It is important to acknowledge that North Korea's actions demonstrate its disregard for significant international legal obligations, namely the obligation to respect sovereign airspace and to refrain from transporting hazardous and other waste into another country without that country's consent. Nonetheless, North Korea claims that its actions are legitimate countermeasures—undertaken in response to South Korea's violation of international law by allowing activists to launch leaflet balloons into its sovereign airspace.

To be clear, the South Korean balloon launches are undertaken for entirely laudable reasons: to provide information

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121. *See* Kim, *supra* note 3; Magramo & Bae, *supra* note 88 (citing North Korean statement that the balloon launches are "strictly a responsive act").

122. *See* Kim, *supra* note 6; Joon Ha Park, *North Korea Launches Suspected Trash Balloons Toward South, First Since June*, NK NEWS (July 18, 2024), https://www.nknews.org/2024/07/north-korea-launches-suspected-trash-balloons-toward-south-first-since-june/.

123. *See* Magramo & Bae, *supra* note 88.

124. *See* Articles on State Responsibility art. 49(3), *supra* note 81.

to an utterly closed society, to facilitate free worship, and perhaps to encourage dissent in the face of atrocious human rights violations.[125] The balloon leaflets show ordinary North Koreans that an alternative life is possible. Nevertheless, by allowing such launches, South Korea violates important international legal norms. Other means should be used to convey information to North Korea.

125. *See* Foley, *supra* note 7.