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Talking Foreign Policy

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Talking Foreign Policy Transcript

Talking Foreign Policy is a one-hour radio program, hosted by the dean of Case Western Reserve University School of Law, Michael Scharf, in which experts discuss important foreign policy issues. The premier broadcast (airdate: March 1, 2012) covered the controversial use of Predator drones, humanitarian intervention in Syria, and responding to Iran's acquisition of nuclear weapons. Subsequent broadcasts have covered topics such as the challenges of bringing indicted tyrants to justice, America's Afghanistan exit strategy, the issue of presidential power in a war without end, and President Obama's second term foreign policy team. This broadcast focused on the US-North Korea Nuclear Summit.

The purpose of the radio show is to cover some of the most salient foreign policy topics and discuss them in a way that can make it easier for listeners to grasp. *Talking Foreign Policy* is recorded in the WCPN 90.3 Ideastream studio, Cleveland's NPR affiliate. Michael Scharf is joined each session with a few expert colleagues known for their ability to discuss complex topics in an easy-to-digest manner:

- The ethicist: Shannon French, director of Case Western Reserve's Inamori Center for Ethics and Excellence;
- The Asian Studies expert: Professor Tim Webster, director of East Asian Legal Studies at Case Western Reserve University;
- The international law guru: Milena Sterio, associate dean of The Cleveland Marshall College of Law; and
- The negotiator: Paul Williams, president of the Public International Law and Policy Group.

Archived broadcasts (both in audio and video format) of *Talking Foreign Policy* are available at: <https://law.case.edu/TalkingForeignPolicy>.

Talking Foreign Policy—May 24, 2018 broadcast¹

Participants

Michael Scharf

1. Transcript edited and footnotes added by Cox Center Fellows Emma Lawson, Alexander Peters, Courtney Koski, and Senior Cox Center Fellow Alexandra Mooney.

Shannon French
 Milena Sterio
 Tim Webster
 Paul Williams

SCHARF: The United States and North Korea—two countries that fought a brutal war and never made peace. No sitting US President has met with his North Korean counterpart;² but a few months ago, North Korean president Kim Jong Un warned that the whole of the United States was in range of his country’s nuclear weapons, and President Trump responded by calling Kim “Little Rocket Man” and threatening to annihilate his nation.³ Then, in a dramatic turnabout in March, the two leaders agreed to hold a historic presidential summit.⁴ But on May 24, President Trump announced that the summit was off.⁵ In this broadcast of *Talking Foreign Policy*, we’ve assembled a panel of experts on peace negotiations, national security, human rights, and Asian affairs to discuss the prospects and pitfalls for a US–North Korea Summit, right after the news.

Welcome to *Talking Foreign Policy*. I’m your host Michael Scharf, dean of Case Western Reserve University School of Law. In this broadcast, our expert panelists will be discussing the prospects for a US–North Korea Summit. For our program today, we’ve assembled a panel of experts on peace negotiations, national security, human rights, and North Korean–US diplomacy. Joining us from a studio in Washington, DC, is Dr. Paul Williams,⁶ the president of the

2. Robbie Gramer and Emily Tamkin, “Decades of US Diplomacy with North Korea: a Timeline,” *Foreign Policy*, March 12, 2018, 6:48 p.m., <https://foreignpolicy.com/2018/03/12/a-timeline-of-u-s-negotiations-talks-with-north-korea-trump-kim-jong-un-pyongyang-nuclear-weapons-diplomacy-asia-security/>.

3. Donald J. Trump (@realDonaldTrump), *Twitter*, November 30, 2017, 7:25 a.m., <https://twitter.com/realDonaldTrump/status/936209447747190784>.

4. Gramer and Tamkin, *supra* note 2.

5. Mark Landler, “Trump Pulls Out of North Korea Summit Meeting with Kim Jong-un,” *New York Times*, May 24, 2018, <https://www.nytimes.com/2018/05/24/world/asia/north-korea-trump-summit.html>. Trump subsequently changed his mind and the Summit was held on June 11, 2018. For a summary of the summit, see David Jackson, “US–North Korea Summit,” *USA Today*, June 12, 2018, <https://www.usatoday.com/story/news/politics/2018/06/11/singapore-donald-trump-kim-jong-un-denuclearization-summit/689817002/>.

6. Paul Williams, Faculty, *American University Washington College of Law*, <http://www.wcl.american.edu/faculty/pwilliams/>. Paul R. Williams holds the Rebecca I. Grazier Professorship in Law and International Relations at American University. Professor Williams teaches at the School of International Service and the Washington College of Law and also directs the joint JD/MA program in International Relations. Prior to his arrival at American University, Paul Williams served as a Senior Associate with the Carnegie Endowment for International Peace and a Fulbright Research Scholar at the University of Cambridge.

Public International Law and Policy Group—a Nobel Peace Prize nominated NGO that has provided legal counsel in a dozen peace negotiations over the past twenty-two years.⁷ Welcome to the show Paul!

WILLIAMS: Thanks, Michael. It's my pleasure.

SCHARF: And in our studio in Cleveland, I'm joined by Dr. Shannon French,⁸ a former faculty member of the US Naval Academy who now directs the Inamori International Center for Ethics and Excellence at Case Western Reserve University. She's also director of the nation's first ever master's program in military ethics.⁹ Thanks for being with us, Shannon.

FRENCH: Thanks, Michael. Happy to be here.

SCHARF: Also here with me is Professor Milena Sterio,¹⁰ the associate dean of Cleveland Marshall College of Law and renowned international law expert. It's good to see you again, Milena.

STERIO: It is great to be here.

SCHARF: And, finally, we have Professor Tim Webster,¹¹ the director of East Asian Legal Studies at Case Western Reserve University. Welcome, Tim.

WEBSTER: Thank you, Michael.

SCHARF: So, let's begin with a short refresher on US–North Korean relations. When the Korean conflict ended in 1953, there was no peace agreement—only an armistice.¹² Milena, as an international law expert, can you tell us the implications of that?

7. PILPG, accessed January 1, 2019, <https://www.publicinternationalallawandpolicygroup.org/>.

8. Shannon E. French, PhD, *Case Western Reserve University*, <https://case.edu/inamori/about-the-center/staff/shannon-french>. Prior to her involvement in CWRU School of Law, Shannon French taught ethics for eleven years at the United States Naval Academy and served as associate chair of the Department of Leadership, Ethics, and Law.

9. "Master of Arts in Military Ethics at Case Western Reserve University," *Case Western Reserve University*, accessed January 1, 2019, <http://militaryethics.case.edu/>.

10. Milena Sterio, *Cleveland-Marshall College of Law*, http://facultyprofile.csuohio.edu/csfacultyprofile/detail.cfm?FacultyID=M_STERIO. Before joining Cleveland-Marshall, Milena Sterio worked as an associate at Cleary, Gottlieb, Steen and Hamilton in New York City and as an adjunct law professor at Cornell.

11. Timothy Webster, *Case Western Reserve University School of Law*, accessed January 1, 2019, <https://law.case.edu/Our-School/Faculty/Staff/Meet-Our-Faculty/Faculty-Detail/id/1020>. Before joining Case, Timothy Webster was a lecturer at Yale Law School and senior fellow at its China Law Center. He has held visiting professorships at the University of Paris—Dauphine, National Taiwan University, and Southwest University of Political Science and Law (Chongqing, China).

12. "Armistice Agreement for the Restoration of the South Korean State (1953)," *Our Documents* 1993, accessed January 1, 2019, <https://www.ourdocuments.gov/doc.php?id=61&loc=85>.

STERIO: Sure. So, the Korean armistice agreement, which was signed in 1953, was an agreement signed by the armies of North Korea, China, and the United States, and that brought an end to the hostilities to the war that was going on in Korea at the time.¹³ However, it was not a peace treaty signed by the respected governments, meaning that there were lots of unresolved issues that did not end with the armistice.¹⁴

SCHARF: And then in the aftermath, there was a massive military buildup on both sides. There were landmines placed in the demilitarized zone, and there was a lot of negative rhetoric, right?¹⁵

STERIO: Exactly, and there was supposed to be a peace treaty. The idea at the time was basically to end the conflict, sign the armistice, and then negotiate a peace treaty. The problem is that that peace treaty was never actually negotiated. So, up to this date, there is no peace treaty for Korea.¹⁶

SCHARF: So, let's fast-forward to the year 2002. That's the year that North Korea admitted to having a nuclear weapons program, and it withdrew from the Nuclear Nonproliferation Treaty.¹⁷ Paul, can you tell us what the significance of that would be?

WILLIAMS: Well, Michael, that was hugely significant. The Nuclear Non-proliferation Treaty is essentially the cornerstone of global nuclear security.¹⁸ By exiting that treaty, North Korea was essentially signaling that it was going to go nuclear, so to speak; and it did.¹⁹ And by exiting the treaty, all bets for verification, for monitoring—those doors were all closed, and North Korea was essentially able to aggressively pursue its nuclear program.²⁰

SCHARF: Well why would it want to do that?

WILLIAMS: Deterrence? The end of the conflict between the US and North Korea, as Milena had mentioned, was an armistice, it wasn't a peace deal.

13. *Id.*

14. *Id.*

15. Joori Roh and Josh Smith, "North, South Korea Begin Removing Landmines Along Fortified Border," *Reuters* September 30, 2018, 11:22 p.m., <https://www.reuters.com/article/us-northkorea-southkorea-dmz/north-south-korea-begin-removing-landmines-along-fortified-border-idUSKCN1MB1BG>.

16. Edward Wong, "Why Is the US Wary of a Declaration to End the Korean War", *New York Times* August 13, 2018, <https://www.nytimes.com/2018/08/13/world/asia/korea-peace-treaty-trump-us.html>.

17. Gramer and Tamkin, *supra* note 2.

18. Treaty on the Non-Proliferation of Nuclear Weapons, 1 July 1968, 21 U.S.T. 483, 729 U.N.T.S. 161, <https://www.un.org/disarmament/wmd/nuclear/npt/text>.

19. Gramer and Tamkin, *supra* note 2.

20. *Id.*

American troops remain in great numbers in South Korea and have engaged in annual war gaming near the border. North Korea wanted to basically have a nuclear weapons capability in order to, one, protect itself; and two, to reshape the geo-political environment on the Korean peninsula and in Asia.²¹

SCHARF: It turns out, it wasn't just bluffing, because in 2006, North Korea announced its first successful nuclear weapons test.²² And in the following years, North Korea announced a number of additional successful tests, including the underground explosion of a hydrogen bomb.²³ Then it turned to testing long-range missiles.²⁴ Milena and Paul, how did the international community respond to these developments?

STERIO: One of the things that happened is that the United Nations Security Council adopted several resolutions related to North Korea. There actually have been a total of twenty-one resolutions on North Korea since the 1950s, but nine resolutions which imposed crippling sanctions against North Korea over the past twelve years or so, the last of which was just a few months ago.²⁵ The sanctions ended up being tightened up over the years and imposed on several sectors of the North Korean economy, including on North Korean exports. And the idea, obviously, of sanctions is to try to persuade without use of force the North Korean government to cease and desist from developing a nuclear weapons arsenal.

SCHARF: So, that was the stick. Paul, can you tell us about any carrots that were attempted?

WILLIAMS: Yeah, in addition to the sticks that Milena had mentioned, the international community launched the six-party talks—which included the United States, North Korea, South Korea, as well as China, Japan, and Russia.²⁶ And it was an off and on negotiation—and I should note that when the negotiations were off, the North Koreans were testing their nuclear weapons, their missiles, their rockets.²⁷ And in fact, just a year prior to the announcement of these talks, the North Koreans had done significant testing.²⁸

21. "Why Does North Korea Want Nukes," *Heritage* August 13, 2018, <https://www.heritage.org/insider/summer-2018-insider/why-does-north-korea-want-nukes>.

22. Gramer and Tamkin, *supra* note 2.

23. *Id.*

24. *Id.*

25. Kelsey Davenport, *UN Security Council Resolutions on North Korea, Arms Control Ass'n*, updated January 2018, <https://www.armscontrol.org/factsheets/UN-Security-Council-Resolutions-on-North-Korea>.

26. Gramer and Tamkin, *supra* note 2.

27. *Id.*

28. *Id.*

And every year since 2013, they've tested their nuclear weapons capability or further refined it, while at the same time saying they were interested in negotiations and talks to end that program.²⁹

SCHARF: Alright. So, then after Donald Trump was elected president, the leaders of the two countries began to use ever more threatening rhetoric in their conversation over Twitter and press releases. Let me provide a few quotes to give the listening audience an idea of what I'm talking about. So first, the president of North Korea, Kim Jong Un, said:

"The whole of the US mainland is within our nuclear strike range. The nuclear button is always on my table. The US must realize that this is not a threat, but reality."³⁰

Now, Donald Trump responds:

"North Korean leader Kim Jong Un just said the 'Nuclear Button is on his desk at all times.' Will someone from his depleted and food starved regime please inform him that I too have a Nuclear Button, but it is a much bigger & more powerful one than his, and my Button works!"³¹

Trump also said, "Kim Jong Un of North Korea, who is obviously a madman who doesn't mind starving or killing his people, will be tested like never before!"³² And Kim responded, "I will surely and definitely tame the deranged US dotard with fire."³³ And at that point a lot of people looked up the word "dotard." [Laughter] Trump then responds, "They will be met with fire and fury like the world has never seen."³⁴ And now, let me ask the panelists, how unusual is this kind of rhetoric to be coming from two presidents of sovereign countries in the world today? Anybody? Tim.

29. Kelsey Davenport, *Chronology of US-North Korean Nuclear and Missile Diplomacy: 2013, Arms Control Ass'n*, updated December 2018, <https://www.armscontrol.org/factsheets/dprkchron#2013>.

30. Bruce Harrison et al., "Kim Highlights 'Nuclear Button' on His Desk, Offers Olympic Talks," *NBC News*, December 31, 2017, 9:58 p.m., accessed November 4, 2018, <https://www.nbcnews.com/news/north-korea/kim-says-north-korea-s-nuclear-weapons-will-prevent-war-n833781>.

31. Donald J. Trump (@realDonaldTrump), *Twitter*, January 2, 2018, 7:49 p.m., <https://twitter.com/realdonaldtrump/status/948355557022420992?lang=en>.

32. Donald J. Trump (@realDonaldTrump), *Twitter* September 22, 2017, 5:28 a.m., <https://twitter.com/realdonaldtrump/status/911175246853664768>.

33. Anna Fifield, "Kim Jong Un Calls Trump a 'Mentally Deranged US Dotard,'" *Washington Post*, September 21, 2017, <https://www.washingtonpost.com/news/worldviews/wp/2017/09/21/north-korean-leader-to-trump-i-will-surely-and-definitely-tame-the-mentally-deranged-u-s-dotard-with-fire>.

34. Jonathan Ernst, "Trump Says North Korea Will Be Met with 'Fire and Fury' If It Threatens US," *Reuters*, August 8, 2017, 3:40 p.m., <https://www.reuters.com/article/us-northkorea-missiles-usa-trump/trump-says-north-korea-will-be-met-with-fire-and-fury-if-it-threatens-u-s-idUSKBN1AQ28Q>.

WEBSTER: Well, from North Korea's side, it's actually pretty common. This kind of bellicose, very floral, very over the top language is just sort of de rigueur. That's the way they communicate. You can see this parodied in popular culture from *Thirty Rock*,³⁵ the great TV show with Tina Fey, to *The Interview*, a movie starring James Franco and Seth Rogan.³⁶ So, it's no surprise that North Korea uses this kind of language. What is surprising and what is sort of unprecedented, is that we have an American president playing along. Usually, they say nothing, or occasionally they'll make an off the cuff insult. George Bush called Kim Jong Il "a pygmy,"³⁷ you know, those kinds of things. But we've never seen this sort of back and forth, and of course Trump loves the drama. He loves the angst. He loves the limelight. And that's why you have this exchange of heightened and fiery rhetoric.

SCHARF: How dangerous do you think this is? Shannon?

FRENCH: What bothers me is that it's so petulant and undignified, and it seems to not take into account the moral weight of the kinds of decisions that are on the table here. So, it comes across like a game with schoolboys, but the stakes are too high for that.

SCHARF: So, then on March 8, in the middle of all this rhetoric, President Trump announces that he is willing to sit down with Kim Jong Un for a nuclear peace summit.³⁸ Tim, as an Asian specialist, how do you explain the sudden turnabout?

WEBSTER: If you go back to the campaign trail, Trump said on a number of occasions that he would be willing to sit down and talk to Kim Jong Un.³⁹ He said he wanted to open a dialogue, he said there was no problem with that. And in making that kind of pronouncement, Trump is doing just what Obama did when Obama was a candidate in 2008.⁴⁰ Even toward the end of the Clinton administration in 2000, Clinton said, "I'm willing to go meet with Kim Jong Il," who was Kim Jong Un's father. Clinton,

35. *30 Rock*, Universal Media Studios and Universal Television, Seasons 5 and 6.

36. *The Interview*, Point Grey Pictures and LStar Capital, 2014.

37. Helene Cooper, "Bush Writes to North Korean Leader," *New York Times*, December 6, 2007, <https://www.nytimes.com/2007/12/06/world/asia/06cnd-korea.html>.

38. Gramer and Tamkin, *supra* note 2.

39. Steven Holland and Emily Flitter, "Exclusive: Trump Would Talk to North Korea's Kim, Wants to Renegotiate Climate Accord," *Reuters*, May 17, 2016, 5:03 p.m., <https://www.reuters.com/article/us-usa-election-trump-exclusive-iduskcn0y82jo>.

40. Bryon York, "Obama, without Preconditions or Preparation," *National Review*, July 23, 2008, 4:55 p.m., <https://www.nationalreview.com/corner/obama-without-preconditions-or-preparation-byron-york/>.

of course, sent Secretary of State Madeline Albright, who then met with Kim Jong Il,⁴¹ but this would have been the first meeting between sitting presidents or sitting leaders of the two countries. So, was it a big turnabout? I think once it became clear that North Korea could actually hit the US with a nuclear missile, that changed the stakes.

SCHARF: Shannon, how do you read it?

FRENCH: I agree that this move is in response to some of the technological advances by North Korea, but it also shows what I would almost want to call a weird kind of optimism on the part of President Trump—that he thinks he can make some kind of dramatic change or shift that we haven’t seen in the past, precisely by doing what hasn’t been done in the past. But, it ignores the lessons of history.

SCHARF: And Milena, do you take this at face value? Or are you more cynical?

STERIO: You can go ahead and announce a big summit, but I think if you want to be successful, if you want to actually achieve something at that summit, almost all diplomacy experts would agree that there is a ton of work that would need to be done in advance of the summit. There is so much that would need to be pre-negotiated before the summit. So, to go ahead and announce that in two weeks the President of the United States is going to meet with the President of North Korea, it’s really posturing more than anything else. And it’s unrealistic to think that in such a short time frame you can actually achieve a true peace treaty.

SCHARF: So, you never really thought that the Summit was going to happen, or not on June 12 at least.

STERIO: Well I either thought it wasn’t going to happen, or I thought if it does happen then nothing much will actually come out of it, and if anything Donald Trump could then say, “You know, I tried. I went there and I tried, and they wouldn’t agree to anything.”

SCHARF: So then on May 24, President Trump, perhaps predictably, sent the following message to Kim Jong Un, and of course he released it for wide publication in every newspaper around the world:

41. Anna Fifield, David Nakamura, and Seung Min Kim, “Trump Accepts Invitation To Meet with North Korean Leader Kim Jong Un,” *Washington Post*, March 8, 2018, https://www.washingtonpost.com/world/asia_pacific/north-korean-leader-kim-jong-un-has-invited-president-trump-to-a-meeting/2018/03/08/021cb070-2322-11e8-badd-7c9f29a55815_story.html?utm_term=.e7f7c09400ad.

“Sadly, based on the tremendous anger and open hostility displayed in your most recent statements, I feel that it is inappropriate at this time to have this long-planned meeting. Therefore, please let this letter represent that the Singapore Summit, for the good of both parties, but to the detriment of the world, will not take place.”⁴²

Trump goes on to say, “You talk about your nuclear capabilities, but ours are so massive and powerful that I pray to God that they will never have to be used.”⁴³ Kind of a thinly veiled threat there. Well when we return after our short break, our experts are going to tell us what they make of this latest turn of events, whether they think the summit ever will take place, and what’s at stake. We’ll be back in just a moment.

Welcome back to *Talking Foreign Policy*, brought to you by Case Western Reserve University and WCPN 90.3 idea stream. I’m Michael Scharf, dean of Case Western Reserve University School of Law. I’m joined today by famed peace negotiator, Dr. Paul Williams, military ethicist, Dr. Shannon French, international law guru, Associate Dean Melina Sterio, and an Asian Affairs expert, Professor Tim Webster. We’re talking today about the prospects of a US–North Korean Summit. It’s really extraordinary that two countries with such acrimonious relations seem to be at the verge of actually holding peace talks. Let me begin with Tim Webster, and ask, assuming there is going to be a summit at some point, what would the United States be getting in return for agreeing to these talks?

WEBSTER: First a word about what Kim Jong Un gets. When Donald Trump, or any other US president stands next to and appears in a photo-op with the North Korean leader, that is of tremendous propaganda value for North Korea and for the idea that Kim Jong Uung-un is of equal stature with the world’s great leaders. For Trump, the US has for decades tried to denuclearize the Korean Peninsula. The long-term goal of the US is the complete, verifiable, and irreversible denuclearization of the peninsula.⁴⁴ Recently, Kim Jong Un had suggested that they would suspend missile launches, they would suspend nuclear tests, they would dismantle one of their nuclear test sites, which they actually did today, apparently, in view

42. David E. Sanger, “Trump’s Letter to Kim Canceling North Korea Summit Meeting, Annotated,” *New York Times*, May 24, 2018, <https://www.nytimes.com/2018/05/24/world/asia/read-trumps-letter-to-kim-jong-un.html>.

43. *Id.*

44. David Welna, “Complete, Verifiable, Irreversible’ A Tough Goal For North Korea Summit,” *NPR*, June 6, 2018, 5:57 p.m., <https://www.npr.org/2018/06/06/617619192/complete-verifiable-irreversible-a-tough-goal-for-north-korea-summit>.

of journalists.⁴⁵ So, those were sort of steps seen as a path forward to a total denuclearization. But with the tossing out of the Summit recently, it's not clear that those will move forward. But the long-term strategy, the long-term plan of the US, is the complete denuclearization of the peninsula.⁴⁶

SCHARF: Well, earlier in the broadcast, Paul Williams was telling us that back in 2002, when North Korea decided to start engaging in the development of nuclear weapons,⁴⁷ North Korean leaders did that for their own protection. And I want to return to that thought with you, Paul. What was going on in the rest of the world that would have made North Korea feel that they needed nuclear weapons to protect themselves from the United States?

WILLIAMS: Well, I think the North Koreans have always been paranoid about their survivability. There was the end of the Cold War, there was the reduction of nuclear weapon stockpiles around the globe, and there was a sense that there was a changing time and that, you know, the clock was running out for dictators like Mu'ammarr Gaddhafi, Saddam Hussein, and Kim Jong Il , and that if they wanted to keep their family totalitarian regime going in North Korea, they needed some kind of bargaining chip to put on the table.⁴⁸ And nuclear weapons were the most obvious.

SCHARF: Well, Paul, what about the rhetoric and events leading to the 2003 US invasion of Iraq? Do you think those played any role?

WILLIAMS: Well, I think it was very clear at the time that the United States was willing to engage in a regime change in order to protect its strategic interests. You know there were the actions in Afghanistan,⁴⁹ the actions in Iraq,⁵⁰ there was Libya giving up its nuclear weapons around that time in exchange for economic inducements,⁵¹ and the North Koreans simply

45. Reuters, "North Korea Hosts Media To See Closing of Nuclear Site," *New York Post*, May 23, 2018, 8:02 a.m., accessed November 4, 2018, <https://nypost.com/2018/05/23/foreign-media-journey-to-see-north-korea-dismantle-nuclear-test-site/>.

46. Welna, *supra* note 44.

47. Gramer and Tamkin, *supra* note 2.

48. Erin Blakemore, "Bill Clinton Once Struck a Nuclear Deal with North Korea," *History*, April 17, 2018, <https://www.history.com/news/north-korea-nuclear-deal-bill-clinton-agreed-framework>.

49. *US Relations with Afghanistan*, US Department of State, July 26, 2018, <https://www.state.gov/r/pa/ei/bgn/5380.htm>.

50. Robert D. Kaplan and Rodger Baker, "Why North Korea Needs Nukes," *Forbes*, December 4, 2013, 12:22 p.m., <https://www.forbes.com/sites/stratfor/2013/12/04/why-north-korea-needs-nukes/#3dd478237d7b>.

51. *Id.*

thought, “We need to go nuclear in order to preserve our ‘way of life,’” as they like to call it in North Korea.

SCHARF: So, based on that, Paul, do you think there’s any real possibility that Kim Jong Un will actually give up all of his nuclear weapons, which seem to be not only the source of his power and security, but perhaps his very life?

WILLIAMS: No.

SCHARF: Care to elaborate?

WILLIAMS: Kim likes to put denuclearization on the table, and he often does that months before he conducts a dramatic test or a dramatic leap is made in their nuclear capacity. So, this whole notion of “Oh we’re willing to denuclearize” came up quite often in the six-party talks.⁵² It’s one of their talking points that they use to induce the United States. As Tim said, what does the United States want? It wants denuclearization of the Korean Peninsula. Kim says “Hey, I’ll denuclearize the Korean Peninsula, can we have a summit, can we go to Singapore, can I get a photo-op, can I get sanctions lifted, can we enter into long and tortuous negotiations which will yield me both psychological as well as economic benefit?” But, it’s going to be very, very difficult for the North Koreans to give up those weapons if they want to continue the tyrannical regime that they use to govern or oppress their people.

SCHARF: Well and there’s two ways that could go. One possibility is negotiations that go on and on and never bear fruit. The other is negotiations that bear fruit in terms of signing an agreement but then are cheated upon afterward. And let me ask Milena, our expert in international law, based on past precedent, such as in Iraq and Libya, how could the US ensure that a deal with North Korea was verifiable? What would happen if North Korea did cheat?

STERIO: So, imagine a peace treaty where North Korea agrees to gradually reduce and then destroy its arsenal of nuclear technology. There could be a verification inspection regime set up. It also depends if this is negotiated just between the United States and North Korea, or if there is an international organization involved. When it comes to other countries, there have been other international organizations involved in those verification inspection regimes. For example, the International Atomic Energy Agency⁵³ and the

52. Kelsey Davenport, *The Six-Party Talks at a Glance*, Arms Control Association, June 2018, <https://www.armscontrol.org/factsheets/6partytalks>.

53. “Overview,” *International Atomic Energy Agency*, <https://www.iaea.org/>.

comprehensive nuclear test ban treaty organization.⁵⁴ Those organizations can send inspectors to the relevant countries, and basically engage in inspection and verification. But that requires the agreement and cooperation by the relevant countries.⁵⁵ So North Korea would have to accept those inspections, and if it cheated then sanctions could be reimposed. If we're talking about US sanctions, then the US government is obviously free to reimpose sanctions. If we're talking about UN sanctions, typically the Security Council would have to vote to reimpose sanctions.⁵⁶

SCHARF: Not too long ago, something like this was tried for Syria to take away its chemical weapons.⁵⁷ How well did that work?

STERIO: Right, there is precedent here. I think the North Koreans are focused not so much on Syria but on Iraq and Libya, which you already mentioned. From the North Korean perspective, they're looking at Iraq and Libya, where there was an inspection regime put in place.⁵⁸ You could make the argument that Gadhafi, the Libyan leader in 2003, really tried to respect the investigation and verification regime related to the destruction of his chemical weapons. Ultimately, that road resulted in regime change and Gadhafi's death.⁵⁹ As for Iraq, after Saddam Hussein was weakened by the Security Council obligations that Iraq undertook after the 1991 Persian Gulf War, there was the 2003 US invasion, and Saddam Hussein was ultimately convicted and put to death.⁶⁰ From the North Korean perspective of looking at these precedents, I'm skeptical, like Paul, because I really don't see what's in it for them. Looking at these precedents, they might say, "Even if we agree now this might not work out for us so well."

54. "Who We Are," *Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization*, <https://www.ctbto.org/specials/who-we-are/>.

55. Joseph H. Beale, "The Jurisdiction of a Sovereign State," *Harvard Law Review* 36 (1923): 241, 245.

56. UN Charter art. 39-51.

57. "Russia, China Block Security Council Action On Use of Chemical Weapons in Syria," *UN News*, February 28, 2017, <https://news.un.org/en/story/2017/02/552362-russia-china-block-security-council-action-use-chemical-weapons-syria>.

58. Nigel Morris and Andrew Buncombe, "Libya Gives Up Nuclear and Chemical Weapons," *Independent*, December 20, 2003, <https://www.independent.co.uk/news/world/politics/libya-gives-up-nuclear-and-chemical-weapons-83350.html>.

59. Orde F. Kittrie, *Averting Catastrophe: Why the Nuclear Proliferation Treaty Is Losing Its Deterrence Capacity and How to Restore It*, *Michigan Journal of International Law* 28 (2007): 337, 353.

60. "This Day in History, December 13, 2003: Saddam Hussein Captured," *History*, accessed January 1, 2019, <https://www.history.com/this-day-in-history/saddam-hussein-captured>.

SCHARF: So, in both of those cases there was US use of force. You were talking about reimposition of sanctions, but shouldn't we also be talking about enforcement through force? What if North Korea cheats, the US could say, "Ah we gave them the chance, we entered into this treaty. They've cheated, and now we're going to invade. Now we're going to have forcible regime change?"

STERIO: For the use of force in international law, there are basically only two situations when a country can legally use force against another sovereign country. Those two situations are Security Council authorization or self-defense.⁶¹ With Security Council authorization, the problem is we're in this dynamic where Russia and China are often vetoing resolutions brought forth by the United States.⁶² With respect to North Korea, they might veto a resolution attempting to authorize the use of force against North Korea. In the other situation, self-defense, the United States would have to make the argument that North Korea, by not respecting the deal, whatever the deal is, is a threat to the United States and is about to somehow harm the United States. Then we can act in self-defense. That would have to be the legal argument.

SCHARF: Well, does it strengthen that legal argument to say, "Look, we tried everything. We tried negotiating a treaty, and they cheated. They've got these nuclear weapons, and we feel like our security is at stake. We've tried everything reasonable that anyone could, so now we're going to resort to force?" Does that strengthen the argument?

STERIO: If you could make the argument that North Korea was actually threatening to use nuclear weapons against the United States.

SCHARF: What about all those quotes I read just a moment ago?

STERIO: It depends on how seriously you're going to take those quotes. Are they just posturing or are they actual, real threats against the United States? There are all sorts of creative self-defense arguments that have already been made by the United States. For example, with respect to the 2003 invasion of Iraq, the United States made creative, sort of anticipatory self-defense arguments based on Iraq's alleged possession of chemical

61. UN Charter art. 4.

62. Alexander Benard and Paul J. Leaf, "Modern Threats and The United Nations Security Council: No Time for Complacency (a Response to Professor Allen Weiner)," *Stanford Law Review* 62 (2010): 1395, 1396.

weapons.⁶³ And you can certainly, you know, go there again. But, legally speaking, I think it would be a difficult argument.

SCHARF: So, we've been focusing on the nukes. But Paul and Tim, let me ask you—on the last broadcast of *Talking Foreign Policy*, we had former judge of the International Court of Justice, Tom Buergenthal, on the air with us. He compared North Korea to Nazi Germany in terms of its human rights abuses. If you remember, he said that he was part of a recent investigation of the human rights situation in North Korea.⁶⁴ He said that the atrocities were worse than what happened to him when he was in a concentration camp during World War II in Nazi Germany. So, let me ask the two of you: Should the US be insisting, if we're going to have talks with North Korea, that they include the human rights record as well as nukes?

WILLIAMS: Yes. They clearly should. The Americans should be insisting that these human rights violations be included in the talks, and that mechanisms be created in order to minimize or stop these human rights violations. We're talking about mass starvation, concentration camps, extensive torture, and executions.⁶⁵ But the reality is they won't be included in the talks. The holy grail, so to speak, of these talks is a denuclearized Korean peninsula and normalization in one of the hottest areas in which we have a strategic interest. I don't think that this administration is willing to put the human rights on the table for fear that it may scuttle a nuclear deal.⁶⁶ Although, as others have pointed out, we're not going to be able to have a long-term sustainable nuclear deal or sustainable relationship with North Korea with these ongoing starvations, mass killings, and mass torture.

SCHARF: But, if there was a hierarchy of US national interests at play here, wouldn't you say denuclearizing North Korea is way more important than achieving human rights for the people of North Korea? That that comes into play maybe a few years down the line after we've accomplished the more important goal? Could you make that argument?

63. Chris Bordelon, *The Illegality of the US Policy of Self-Defense Under International Law*, 9 *Chapman Law Review* 111 (2005): 111-112.

64. "Talking Foreign Policy: Jesner v. Arab Bank," *Case Western Reserve University School of Law*, October 27, 2017, <https://www.youtube.com/watch?v=oVD3Yify380&list=PLOWPmlciK6gkZI-Xfuk0oBc9a3aR.X2WMDandindex=3&dt=66s>.

65. Maya Salam and Matthew Haag, "Atrocities Under Kim Jong Un: Indoctrination, Prison Gulags, Executions," *New York Times*, June 11, 2018, <https://www.nytimes.com/2018/06/11/world/asia/north-korea-human-rights.html>.

66. Harold Hongju Koh, *The Foulston Seifkin Lecture: The Trump Administration and International Law*, 56 *Washburn L.J.* 413, 431 (2017).

WEBSTER: Sure. Certainly from an American perspective, the biggest threat is the nuclear threat. But if we're talking about the twenty-two million North Koreans that are living under this repressive regime, there are a separate set of strategies that need to be pursued. I would just add, and I agree with almost all that Paul said, that human rights isn't something that Trump has expressed much interest in.⁶⁷ Even prior presidencies, the Obama administration, the Clinton administration, and even George Bush—those were administrations that put a lot of emphasis on human rights. But if you go back and look at the agreements that they struck with North Korea, you never see the words “human rights.”⁶⁸ So, it's certainly a tool we can use, but if you go back, to echo what Paul said, when push comes to shove, what we're focused on, what we really need to prioritize is the denuclearization.

SCHARF: So, Shannon, you're an ethicist. How does this strike you?

FRENCH: Well, I mean, one of the overall issues here is whether or not this is like negotiating with terrorists. And, as I think about that, and think about what's on the table here, we're talking about a bad actor who has not shown any signs of improving any of his actions. Now, we have to be realistic to some extent. There's always a point—at least, we hope there will be a point—with most rogue or even terrorist regimes where they try to make a transition to be a legitimate political power. Finding that exact moment isn't easy, and one of the trickier aspects of diplomacy is recognizing when the time is right for such a transition. Think about, for example, when the United Kingdom decided to start doing quiet negotiations with Sinn Féin and the IRA.⁶⁹ But, if you begin down that route you have to realize it can't be something that is a quick, early, public move that seems to legitimize the other party before they've begun to show improvements.⁷⁰ And frankly, if we again look at history, the better approach seems to be to bring in third parties and have some early framework done where you stand off with some moral high ground to say “I can't talk to them, obviously. But hey, my friends over here are going to quietly talk to you and see if you're serious about making

67. *Id.*

68. Gramer and Tamkin, *supra* note 2.

69. James F. Clarity, “Sinn Féin Is Invited by Britain to Join New Peace Talks,” *New York Times*, August 30, 1997, <https://www.nytimes.com/1997/08/30/world/sinn-fein-is-invited-by-britain-to-join-new-peace-talks.html>.

70. David S. Jonas, *The New US Approach to the Fissile Material Cutoff Treaty: Will Deletion of a Verification Regime Provide a Way out of the Wilderness?*, *Florida Journal of International Law* 18 (2006): 597, 646.

real change,” and build very slowly. I worry deeply, as an ethicist, about what kind of message we might be sending, not just to North Korea, but to the entire world, if we say “Oh! You want to talk? Well bygones. We’re not going to worry about anything you’ve done before. Let’s see where we can get from this point.”

SCHARF: But at least the Trump administration’s position seems to be: “We will talk, and if you do not do what we want, then we will use force,” as opposed to past presidents that have said, “We will talk with you, and we will buy your cooperation with economic assistance.” There were agreements that we reached with North Korea by past administrations, where we gave them billions of dollars in economic assistance in return for their promise, which they didn’t keep, to get rid of the nuclear weapons.⁷¹ Which of those two approaches do you think is more ethical? One where you tell them, “behave or we will hurt you” or one where we say, “We will make your lives very, very, good if you behave?”

FRENCH: Well, I’m not a huge fan of either, because they’re both ways of negotiating with rogue or terrorist states. And I come back to the idea that they shouldn’t be given a seat at the table, until they make some moves and concessions. So, all of this is backwards. We’re starting with the, “If you will start to do something then these are the following consequences,” instead of just saying, “We’re going to sit here and wait for you to do something positive. Then, and only then, will we do anything meaningful.” And I would like to say that, even as I put that out there, that I don’t count as something positive some of these showy, but ultimately meaningless, moves by North Korea. Like the blowing up of these testing sites that can be reconstituted or might not be needed or were damaged anyway.⁷² That’s meaningless. That doesn’t impress me much.

SCHARF: Paul, let’s return to you to talk about the full range of carrots in the US arsenal of negotiations. In addition to just throwing money or threatening force, what other kinds of things are North Korea looking for with respect to a final peace negotiation?

71. Glenn Kessler, “Fact-Checking President Trump’s Claims About the North Korea Deal,” *Washington Post*, June 13, 2018, https://www.washingtonpost.com/news/fact-checker/wp/2018/06/13/fact-checking-president-trumps-claims-about-the-north-korea-deal/?utm_term=.d5db05d7e6c1.

72. “North Korea Nuclear Test Tunnels at Punggye-ri ‘Destroyed,’” *BBC*, May 24, 2018, <https://www.bbc.com/news/world-asia-44240047>.

WILLIAMS: Well, one of the things that is quite often forgotten is that the North Koreans are quite interested in the reunification of the Korean Peninsula. Now, when we hear this we think, “Well, why would they be interested in reunification? That would simply be the south reincorporating the North to its dynamic capitalistic society and democratic structure.” But the North actually thinks it could govern all of Korea and could incorporate the South Koreans into the regime structure of the North.⁷³ It’s also about being a regional strategic player. At the moment, Kim is isolated. He’s the one that’s seen as the bad actor. But he sees a deal with the United States as a way of bringing him tremendous political power and prestige in the region. And I think that’s been under appreciated. And in particular, returning to Tim’s point, if he gets a summit, if he gets to sort of do the foxtrot with the United States, it’s of huge value. So, you blow up a few old labs and launch platforms, you say yet again that you’re going to denuclearize, and you get to go to Singapore for a summit and get a photo op. That’s going to add huge domestic and regional influence for Kim. And then there’s economic issues.

SCHARF: Tim, Paul was talking about the reunification idea. This is not just the North’s idea. South Korea also very much wants reunification, isn’t that correct?

WEBSTER: Well, South Korea wants to reunify along the South Korean model.⁷⁴

SCHARF: Well, what if they decide to go ahead and negotiate a reunification structure? Could the US block it? Should the US block it?

WEBSTER: No, the two Korean leaders could negotiate a reunification. But then they would be looking to the Americans to pay for it. It would be hugely expensive to bring the North Korean economic infrastructure into that of South Korea, and a huge drain on the South Korean economy.⁷⁵ So, we couldn’t block it, but we’d have to pay for it.

73. Kongdan Oh, “Understanding North Korea,” *Brookings*, April 1, 2013, <https://www.brookings.edu/articles/understanding-north-korea/>.

74. Eunice Lee, *Operation ‘Denuclearification’: A Proposal for the Reunification and Denuclearization of the Korean Peninsula*, 33 *Hastings International and Comparative Law Review* (2010): 245, 272.

75. Tom Phillips, “Costly and Complicated: Why Many Koreans Can’t Face Reunification,” *The Guardian*, October 9, 2015, 2:00 p.m., <https://www.theguardian.com/world/2015/oct/09/why-many-koreans-cant-face-reunification>.

SCHARF: Well, and then there are other aspects to this. The US has a lot of troops in South Korea to protect it from the North.⁷⁶ Would the US have to pull those troops out as part of the agreement?

WEBSTER: The North Koreans are very clear that they want the American troops to leave in exchange for denuclearization.⁷⁷ And the Americans are very clear that having our troops there is crucial to our military strategic interest, both on the Korean peninsula as well as in that part of Asia. It's one of those catch-22s that is exceedingly difficult to navigate during negotiations.

SCHARF: Well it's time for another short break. When we return, we'll talk about what the details of a negotiation between the US and North Korea would look like, and what's at stake if the Summit is permanently shelved.

This is Michael Scharf, and we're back with *Talking Foreign Policy*. I'm joined today by some of the foremost experts on negotiating with rogue nations. We've been talking about the prospects of a US-North Korean Summit. In this final segment of our broadcast, I want to ask our experts what advice they would have for the negotiators if, there was, in fact, a North Korea summit. But before we talk about what should be on the negotiating table, I'd like to ask Asian Affairs expert, Tim Webster: Who should be at the negotiating table? You had mentioned earlier that China and maybe Russia should play a part. Why?

WEBSTER: I'm not sure I would say Russia. I hope Russia is not invited to the party. But I think China, as the economic, security, and military guarantor of North Korea, has to be there. North Korea doesn't exist without the economic lifeline of China. Whether you're talking about trade, loans, investment, North Korea has to have China's support to survive. And I think you also need to have South Korea at the table. At the end of April, North Korea and South Korea signed something called the Panmunjom Declaration,⁷⁸ and they said "Look, going forward, these talks will either be three-party—North Korea, South Korea, US—or four-party—North Korea, South Korea, US, and China." So, we need to understand that the

76. Tom Bowman, "Would the US Withdraw Troops from South Korea?" *NPR*, May 31, 2018, 5:08 a.m., <https://www.npr.org/sections/parallels/2018/05/31/615517016/would-the-u-s-withdraw-troops-from-south-korea>.

77. *Id.*

78. "Panmunjom Declaration for Peace, Prosperity and Unification of the Korean Peninsula," *Reuters*, April 27, 2018, 6:16 a.m., <https://uk.reuters.com/article/uk-northkorea-southkorea-summit-statement/panmunjom-declaration-for-peace-prosperity-and-unification-of-the-korean-peninsula-idukkbn1hy193>.

South Koreans obviously need to have a seat at the table for this to succeed. I think what's gone unnoticed, at least in this country, is all the quiet backstage maneuvering that the current South Korean President, Moon Jae-in, has done to get us this far. So, if there is a summit it didn't come about because Trump talks big—it was made possible because South Korean President Moon Jae-in has been working like a madman. You know, go back to the Olympics and the impressive diplomatic coup d'état he pulled off by having the South and the North on the same team together, for the women's ice hockey team, and inviting North Korean leaders down to participate in the ceremonies. Those efforts I think, and even coming to Washington to council President Trump earlier this week, are what made the difference. So, South Korea, of course, needs to be at the table. It wants denuclearization as well, but as we talked about, there are a whole range of other issues South Korea would want to address in these kinds of talks.⁷⁹ I think four-party talks involving those four actors are probably the best. I think Russia is going to be a spoiler. Six-party talks also included Japan. There is a role, I suppose, for Japan here. In previous manifestations, Japan has played the role of economic advisor.⁸⁰ Japan would be there to fund the peaceful nuclear reactors that North Korea would ultimately get. But I think either three- or four-party talks are really the way to move forward on this.

SCHARF: So, Paul Williams in the last three years you've been shuttling back and forth to Geneva for the peace talks regarding Syria, and those peace talks are multi-party talks. Based on that experience, what can you tell our listeners about the pros and cons of bilateral talks versus the multi-party approach?

WILLIAMS: Well, bilateral talks are a lot easier, you can control half of the agenda, you can control half of the negotiations because you're one of two parties. When you need to develop a strategy, you only need to get your team to come to an agreement on that strategy which, as we've seen with the preparations for this potential summit, it's exceedingly difficult just to get your own team, your own secretary of state, your own national security advisor, to agree upon what are your priorities, what's the negotiation process going to look like. Tim's right, you do have to involve the Chinese, probably the Japanese, definitely the South Koreans, but that makes it exceedingly difficult, because it's essentially the North Koreans on one side negotiating with the four other members across the table, and that makes it much more

79. Suzy Kim, "Crossing Borders: A Feminist History of "Women Cross DMZ," *Fletcher Forum of World Affairs* 40 (2016): 133, 144.

80. Lee, *supra* note 74.

difficult to get to “yes” and to get to “yes” effectively where your priorities are on the table, because the Chinese, the Japanese, the South Koreans, and the Americans don’t all have the same priorities.⁸¹ They do big-picture—denuclearization⁸²—but in terms of a number of the other issues, there’s complete disagreement between the Americans and definitely the Chinese,⁸³ and there is even daylight between the US position and that of our allies the South Koreans and the Japanese.⁸⁴ So, it’s going to be complicated enough, and that only makes it more multi-dimensional.

SCHARF: So, when you’re talking about complicated peace negotiations, how all-important do you think it is that the negotiating team have a lot of experience?

WILLIAMS: Well it’s . . .

SCHARF: Do you think that’s a loaded question?

WILLIAMS: That’s a loaded question. This is not the same as negotiating a real estate deal. I think this is part of the dilemma that we’re facing here is we have a president who is very effective at a certain type of negotiation and a certain process and that’s what they’ve, you know, the tweets that you read earlier, the let’s go mano a mano, let’s meet in Singapore, let’s hash something out, that’s how you buy a hotel; it’s not how you denuclearize a country. I think what we’re going to have to have, and I think there’s people on the team that can do this, is a clear set of priorities, a clear understanding of the timeline. It could take several years of intermediate steps to denuclearize the Korean peninsula;⁸⁵ it won’t happen quickly. And you’re going to need a very

81. Jane Perlez, “Talks With North Korea? China Approves (No Matter the Outcome),” *New York Times*, March 7, 2018, <https://www.nytimes.com/2018/03/07/world/asia/north-korea-china-talks.html>.

82. Kiyoshi Takenaka and Nobuhiro Kubo, “China, Japan, and South Korea Highlight Unity Amid North Korea Moves,” *Reuters*, May 8, 2018, 8:20 p.m., <https://www.reuters.com/article/us-japan-summit/china-japan-and-south-korea-highlight-unity-amid-north-korea-moves-idUSKBN11A01T>.

83. Eleanor Albert, “The China-North Korea Relationship,” *Council on Foreign Relations*, updated March 28, 2018, <https://www.cfr.org/background/china-north-korea-relationship>.

84. Josh Smith, “Differing Views of ‘Denuclearization’ Complicate North Korea Talks,” *Reuters*, March 28, 2018, 4:05 a.m., <https://www.reuters.com/article/us-northkorea-missiles-denuclearisation/differing-views-of-denuclearization-complicate-north-korea-talks-idUSKBN1H40YI>.

85. Kelly Kasulis, “What It Will Take to Denuclearize North Korea,” *Public Radio International*, May 4, 2018, 7:45 a.m., <https://www.pri.org/stories/2018-05-04/what-it-will-take-denuclearize-north-korea>.

detailed follow-on negotiation process, we keep talking about the summit, the two folks getting together and hammering something out beyond just shutting down the reactors. What do you do with the existing nuclear material and missiles, and then who's going to pay for it? The Strategic Arms Reduction Treaty with the USSR cost the Americans two billion dollars to help the Russians get rid of some of their nuclear weapons, and it has cost another half a billion over the last ten years to monitor.⁸⁶ Are we going to pay for this?

SCHARF: Paul, how difficult do you think it makes for successful negotiations that the US doesn't currently have an ambassador to Korea, there's no current US assistant secretary of state for East Asia and the Pacific, there's no State Department expert on North Korea, that person just retired, I believe there's no arms control expert—a big chunk of the experts who normally would be involved in these kinds of negotiations have not been appointed.⁸⁷ How difficult is that going to make successful negotiations?

WILLIAMS: Okay, let's be honest, this is a real test of President Trump's mantra of "we've been getting it wrong before, there's a new sheriff in town, we're going to do things differently." So, if you were to list off these positions to the top officials on the Trump team they'd shrug their shoulders and say "yeah, yeah, but those are the guys, those are the positions, those are the institutional interests that brought us the last twenty years of failed policy in North Korea; we need fresh ideas, we need a new dynamic, we need a new process." I think we're going to find that it's not as easy as just bringing in a new team with fresh ideas, that the depth of knowledge that's required to denuclearize the Korean peninsula is substantial, and without that knowledge, and I think this recent sort of push back or this abrogation of the summit is an example of that, it's like, wow, this actually is more complicated than just negotiating over Twitter.

SCHARF: Well we do have John Bolton. Now, let me remind the listeners about John Bolton, he is someone with a lot of experience during both the

86. Susan Willett, "Costs of Disarmament—Disarming the Costs: Nuclear Arms Control and Nuclear Rearmament," UN Institute for Disarmament Research, UN Doc. UNIDIR/2003/25 (2003), <http://www.unidir.org/files/publications/pdfs/costs-of-disarmament-disarming-the-costs-nuclear-arms-control-and-nuclear-rearmament-306.pdf>.

87. Hyonhee Shin and David Brunnstorm, "US Envoy for North Korea to Retire After Trump Rejects Unconditional Talks," *Reuters*, February 26, 2018, 11:15 p.m., <https://www.reuters.com/article/us-northkorea-missiles-diplomat/senior-u-s-diplomat-for-north-korea-to-retire-iduskcn1gb0c1>.

senior and younger Bush administrations; he was assistant secretary of state for International Organization Affairs, he was ambassador to the United Nations, and he was deputy secretary of state.⁸⁸ So, this is a man with a lot of experience that has now been made the new national security advisor to the president.⁸⁹ Any of our panelists, what do you think the entrance of John Bolton into this calculus means? Tim?

WEBSTER: Sure, so another fact about John Bolton is that during his time with the younger Bush administration, the US presented evidence to the world that North Korea was not abiding by the framework that the Clinton administration had agreed to in 1994, and John Bolton rather triumphantly said “Aha, this is the hammer I have been searching for to destroy this agreement.”⁹⁰ So John Bolton is the guy on the Bush team who killed the first North Korea deal that had been in place at that time for eight years. So you have that aspect, you also have his comments last week about aspiring to a Libya model.⁹¹ We already talked about what happened to Mu’ammar Gaddhafi earlier in the program, we don’t need to revisit that, but that wasn’t a particularly helpful way to advance discussions with North Korea, especially given North Korea’s support for Gaddhafi at the time.⁹²

SCHARF: In a way, you’re being almost too diplomatic in describing this. I think that one could say that John Bolton’s statements about the Libya model fueled the response of Kim, which directly led to the president’s announcement on May 24 that he was pulling out of the talks.

STERIO: It started with John Bolton, but then also Mike Pence had said some things about that, basically referring to the Libya model which, from the North Korean perspective, is certainly not a good model because, again as I explained earlier, although you could make the argument that Gaddhafi in 2003 agreed to a regime of inspection and verification, and perhaps even abided by the terms of that deal, ultimately there was a regime change in

88. John Bolton, *The White House*, (2018), <https://www.whitehouse.gov/people/john-r-bolton/>.

89. *Id.*

90. Ankit Panda, “John Bolton Enters the Trump Administration: What to Expect,” *Diplomat*, March 23, 2018, <https://thediplomat.com/2018/03/john-bolton-enters-the-trump-administration-what-to-expect/>.

91. “Transcript: National Security Adviser John Bolton on ‘Face the Nation,’” *CBS News*, April 29, 2018, 10:30 a.m., <https://www.cbsnews.com/news/transcript-national-security-adviser-john-bolton-on-face-the-nation-april-29-2018/>.

92. Ian Traynor, “North Korean Nuclear Trade Exposed,” *Guardian News and Media*, May 23, 2004, 9:20 p.m., <https://www.theguardian.com/world/2004/may/24/northkorea.libya>.

Libya—his regime was toppled and this resulted in his death.⁹³ So if you're North Korea, you're looking at this, you see that people like John Bolton and Mike Pence are referring to this, you certainly would not be rushing to a summit in Singapore.⁹⁴

SCHARF: But wasn't this actually a giant misunderstanding? Pence, I think, described it one way, but that's not really what Bolton meant by the Libya model, is it?

STERIO: I think Bolton was actually referring just to the 2003 agreement where Libya actually agreed to dismantle its weapons of mass destruction.⁹⁵ So, I think Bolton was looking at it as like, this can actually be done, this was done once before and an authoritarian regime agreed to essentially destroy its arsenal.

SCHARF: And then it was Pence who then spun it and said this means if you don't comply, we have a regime change, and that got things off.⁹⁶

STERIO: Exactly, and that's when the North Korean Vice Minister for Foreign Affairs called Pence stupid and ignorant, and then this basically sparked Trump's response to say this is now cancelled.⁹⁷

WILLIAMS: Michael, if I could just jump in real quick, I think this highlights some of the concerns that those of us around the microphone have been expressing. I think Bolton made a serious effort at saying that there's a Libya model; in 2003 they agreed, by 2004 the Libyans were shipping the components of their weapons program to the United States in exchange for economic inducements and economic trade,⁹⁸ and that was actually working. Completely separate from that, there was the 2011 revolution in Libya,

93. Rick Noack, "How Kim-Trump Tensions Escalated: The More the US Said 'Libya,' the Angrier North Korea Got," *Washington Post*, May 24, 2018, https://www.washingtonpost.com/news/world/wp/2018/05/24/the-more-pence-and-trump-say-libya-the-angrier-north-korea-gets/?utm_term=.884e38b5f3b3.

94. Rick Noack, "A Timeline of North Korea's Backtracking on Denuclearization Talks," *Washington Post*, May 16, 2018, https://www.washingtonpost.com/news/world/wp/2018/05/16/a-timeline-of-north-koreas-backtracking-on-denuclearization-talks/?utm_term=.748bf94b35e2.

95. Noack, "How Kim-Trump Tensions Escalated," *supra* note 93.

96. Sophie Tatum and James Griffiths, "Pence: North Korea Will End Like Libya Only if 'Kim Jong Un Doesn't Make a Deal,'" *CNN*, updated May 22, 2018, 3:26 a.m., <https://www.cnn.com/2018/05/21/politics/mike-pence-fox-news-north-korea/index.html>.

97. Noack, "How Kim-Trump Tensions Escalated," *supra* note 93.

98. Barry Schweid, "Libya Ships Nuclear Parts to US," *CBS*, February 20, 2004, 1:51 p.m., <https://www.cbsnews.com/news/libya-ships-nuclear-parts-to-us/>.

which led to the regime change and the killing of Gaddhafi by his own people. I think Bolton was essentially saying “Look, if we are going to do this, here’s a roadmap,” and then others in the administration who didn’t actually grasp what had happened in 2003–2004 heard Libya and thought, “Regime change, yeah let’s go that model.” And now we have, as Milena laid out, it’s falling apart. Because the core team did not understand that there are two parts, that there’s a Libya model for denuclearization and then there’s the Libyan revolution—completely different, completely unrelated. That lack of sophistication has crippled, at least in the short-term, what was going to be a summit to denuclearize the Korean Peninsula.

SCHARF: But maybe not, everything the President tweets or says today doesn’t mean it’s going to be his position tomorrow. Paul, isn’t it possible that this is just another bargaining ploy by President Trump and that we’ll be back at the table maybe not on June 12, but soon thereafter?

WILLIAMS: It’s not a bargaining ploy, it’s stalling for time. I think there was a realization that this is exceedingly complicated, that shockingly, our team, Team America, is not prepared for this, and that the misunderstanding and recriminations have created an opportunity to basically pause and get our act together. The North Koreans have been preparing for this bilateral engagement for a really long time. We’ve been preparing for two weeks, and this gives us a couple more weeks maybe to prepare and come up with an actual plan.

SCHARF: Alright, so there’s some optimism that this is not the end of the talks. Shannon, let me go the other route, though, with you and do a thought experiment. What do you think would happen if the talks are permanently cancelled?

FRENCH: Well, I think first of all, as we’ve already experienced, we’ll see a return to very angry rhetoric on both sides, but the other things that I think that will happen are most likely that South Korea isn’t going to just give this up, so South Korea will probably try to restart the negotiations with the North and perhaps play off what has happened with the US as a way to come closer to the North or make some arrangements there. We’ll probably see more nuclear testing by Kim Jong Un as again a way of acting out in response to that, but there are other things we can expect, like a decline in US–China relations, even further. And one thing that I’m aware of from my travels to Japan is there has already been a lot of increased political pressure

in Japan to amp up their move toward rearming⁹⁹ and they've even started talking about how quickly could they become nuclear.¹⁰⁰ In light of that kind of a breakdown, and Japan is already feeling a sense of insecurity around whether they are truly protected anymore by the US, I think it would be reasonable for that worry to reemerge, that Japan is going to say, "Look we can't count on anyone, we need to make sure that we have that precious nuclear umbrella, too."

SCHARF: Well, let's take this scenario to the extreme. Shannon you're the author of a book titled *The Code of the Warrior*.¹⁰¹ Let's assume that things go off the rails completely, as Milena said there's maybe a legal argument the US can make for use of force, and if we do use force, what does that kind of military engagement look like? What are the casualties likely to be?

FRENCH: Well this is where it gets truly horrific, and I think that Secretary of Defense Mattis made the point with a single word; he said that if we got into a military conflict with North Korea it would be "catastrophic."¹⁰² But just to make that real, there are the obvious targets—barracks, troop concentrations, artillery, nuclear facilities, command and control, all of that can be predicted. But what we need to talk about is the human cost, and in late 2017, the Department of Defense itself did an estimate of what that human cost might be, and it estimated as a very conservative number around twenty to thirty thousand dead per day.¹⁰³ As high as six figures have been discussed.¹⁰⁴ There are one hundred thousand Americans in South Korea, both military and civilian.¹⁰⁵ So what we're talking about

99. Nobuhiro Kubo and Kiyoshi Takenaka, "Japan Urges Pressure on North Korea, Military to Seek Record Defense Spending," *Reuters*, August 22, 2017, 3:40 a.m., <https://www.reuters.com/article/us-japan-diplomacy-minister-iduskcn1b20n4>.

100. Liubomir K. Topaloff, "Japan's Nuclear Moment," *Diplomat*, April 21, 2017, <https://thediplomat.com/2017/04/japans-nuclear-moment/>.

101. Shannon E. French, *The Code of the Warrior: Exploring Warrior Values Past and Present*, (Rowman & Littlefield, 2003).

102. Dakshayani Shankar, "Mattis: War with North Korea Would Be 'Catastrophic,'" *ABC News*, August 10, 2017, 8:53 p.m., <https://abcnews.go.com/Politics/mattis-war-north-korea-catastrophic/story?id=49146747>.

103. Barbara Demick, "Escalating Tension Has Experts Simulating a New Korean War, and the Scenarios Are Sobering," *Los Angeles Times*, September 25, 2017, 3:00 a.m., <http://www.latimes.com/world/la-fg-korean-war-20170925-story.html>.

104. Franz-Stefan Gady, "What Would the Second Korean War Look Like?" *Diplomat*, April 19, 2017, <https://thediplomat.com/2017/04/what-would-the-second-korean-war-look-like/>.

105. Kim Chul-Soo, "Number of US citizens Living in South Korea Rises 30 Percent in 10 Years," *Korea Times*, July 2, 2015, <http://www.koreatimesus.com/number-of-us-citizens-living-in-south-korea-rises-30-percent-in-10-years/>.

here in real human terms is, to make a local reference, within ten days the equivalent of the population of Cincinnati would be dead. This cannot be a light decision.

SCHARF: Alright, so with that in mind, I'm much more optimistic that we're going to end up seeing the two countries get back to the peace table.

FRENCH: I certainly hope so.

SCHARF: This may be, as Paul said, just a stall while the US gets its act together. Tim, if these talks are eventually held, what do you think the benchmarks for gauging their success should be?

WEBSTER: Obviously we need to have some plan that lays out with admirable detail the steps toward complete denuclearization. That's a very long, multiple stage process, but something that spells out step-by-step, US does this, North Korea does this, US does this, North Korea does this, and so on and so forth. And I think the clearer the picture you have of what each step means, the likelier you are that both parties will actually fulfill that. We've had an agreement before with North Korea in 1994, as I mentioned, but immediately after it was signed, you had the Republican revolution, you had Newt Gingrich coming into town, and everybody including John McCain criticizing Clinton for going ahead with it.¹⁰⁶ So, if we can have some agreement on what the steps will be, a timeline perhaps, or some other very clear roadmap that spells out how we get to complete denuclearization, that I think is what we should be looking for. Then, of course, the other bugbear here is the implementation itself, and as Paul mentioned, it would be a many year timeline, and it's difficult, I think, for our politicians to think along those long timeframes.

SCHARF: Well the stakes could not be higher for the eventual US-North Korea Summit, which I think we all hope will eventually take place. We need to wrap up our program now. Paul Williams, Shannon French, Milena Sterio, and Tim Webster, thank you all for providing your insights about the prospects and pitfalls for a summit between the United States and one of its oldest adversaries. I'm Michael Scharf, you've been listening to *Talking Foreign Policy*.

106. "Mr. McCain's Risky Korea Strategy," *New York Times*, October 27, 1994, <https://www.nytimes.com/1994/10/27/opinion/mr-mccain-s-risky-korea-strategy.html>.

Talking Foreign Policy, September 17, 2018 broadcast¹

Participants

Michael Scharf

Todd Buchwald

James Johnson

Milena Sterio

Tim Webster

Paul Williams

SCHARF: Welcome to *Talking Foreign Policy*, I'm your host, Michael Scharf,² dean of Case Western Reserve University School of Law. In this broadcast, our expert panelists will be discussing the issue of responding to rogue states. For our program today, we've assembled a panel of experts on peace negotiations, national security, human rights, and war crimes. Joining *Talking Foreign Policy* for the first time is Todd Buchwald, who served as the State Department's Ambassador for Global Criminal Justice and Assistant Legal Adviser for UN Affairs, and he is currently a fellow at the Woodrow Wilson International Center for Scholars.³ I've known the ambassador since we worked together at the State Department twenty-five years ago, so I will dispense with the formalities and just say: Welcome to our show, Todd.

BUCHWALD: Great to be here.

SCHARF: And we are also joined by another new guest, James Johnson,⁴ who served as Chief of Prosecutions of the Special Court of Sierra Leone after a two-decade career in the US JAG Corps. He is currently the director of the War Crimes Research Office at Case Western Reserve University. Welcome Jim.

1. Transcript edited and footnotes added by Cox Center Fellows Nicole Divittorio, George Kamanda, Alexandria McKenna, and Alex Lilly.

2. Michael Scharf, Case Western Reserve School of Law, <https://law.case.edu/Our-School/Faculty-Staff/Meet-Our-Faculty/Faculty-Detail/id/142>. Michael Scharf is the dean of Case Western Reserve University School of Law. He has also written and published extensively in the area of international law.

3. Todd F. Buchwald, US Department of State, <https://2009-2017.state.gov/r/pa/ei/biog/251248.htm>. Prior to becoming a career lawyer in the Department's Office of the Legal Advisor, Ambassador Buchwald served in the Office of White House Counsel and as an associate at Washington law firm Wilmer, Cutler, and Pickering.

4. Jim Johnson, Case Western Reserve School of Law, <https://law.case.edu/Our-School/Faculty-Staff/Adjunct-Faculty>. Jim Johnson served as Chief of Prosecutions of the Special Court of Sierra Leone after a two-decade career in the JAG Corps. He is currently the director of the War Crimes Research Office at Case Western Reserve University.

JOHNSON: Thank you, Michael.

SCHARF: And we have two *Talking Foreign Policy* regulars back with us today. First, Dr. Paul Williams,⁵ the president of the Public International Law and Policy Group, a Nobel Peace Prize nominated NGO that has provided legal counsel in a dozen peace negotiations over the past twenty-two years. Welcome back to the show, Paul.

WILLIAMS: Michael, it's great to be back.

SCHARF: And also with us in the WCPN 90.3 Ideastream Studio is Professor Milena Sterio,⁶ who is the associate dean of Cleveland Marshall College of Law and a renowned international law expert. It's good to have you back on the program, Milena.

STERIO: It is great to be here, Michael.

SCHARF: So, let me kick things off by asking Ambassador Todd Buchwald—how would you define a rogue state?

BUCHWALD: Well, it's very interesting. It's not really a legal term and it doesn't really have a fixed meaning.⁷ For the most part, it's been used as a way to talk about states that don't abide by norms on nonproliferation of weapons of mass destruction and terrorism.⁸ That's the way it was used early on by the Clinton administration; though, at some point, the Clinton administration made a concerted effort to stop using the word because they thought it was interfering with their ability to conduct diplomacy with countries on the list,

5. Paul Williams, American University Washington College of Law, <https://www.wcl.american.edu/community/faculty/profile/pwilliams/bio>. Paul Williams is a professor at American University Washington College of Law. He is also the president of the Public International Law and Policy Group, a Nobel Peace Prize nominated NGO that has provided legal counsel in a dozen of peace negotiations over the past twenty-two years.

6. Milena Sterio, Cleveland Marshall College of Law, <https://www.law.csuohio.edu/newsevents/featuredfaculty/milena-sterio>. Milena Sterio is the associate dean of Cleveland Marshall College of Law and a renowned international law expert.

7. The definition of "rogue states" is not fixed. It once referred to states that had "failed to adhere to the rule of law." Now, "it has become an elastic catchphrase that is used to demonize behavior and rally political support." Robert S. Litwak, "A Look At...Rogue States," *Washington Post*, February 20, 2000, https://www.washingtonpost.com/archive/opinions/2000/02/20/a-look-at-rogue-states/62a19e42-433d-4915-9bbc-97c5b900603e/?utm_term=.09419533d376.

8. "Post-Cold War Policy—Isolating and Punishing "Rogue States,"" *Encyclopedia of American Foreign Policy* 2019, <http://www.americanforeignrelations.com/O-W/Post-cold-War-Policy-Isolating-and-punishing-rogue-states.html>.

like North Korea, who they engaged with.⁹ In the Bush administration, it came to be used in association with the famous Axis of Evil countries. Again, it was about terrorism and weapons of mass destruction.¹⁰ There was sort of a background noise to the whole thing—that you might be a target for regime change at some point—in the air. That was in the Bush administration. In the Trump administration, President Trump used the term when he spoke to the UN General Assembly last year, and he added Venezuela to the list.¹¹ And that was interesting because it's a different kind of rogue state. I mean, one can easily see that it's not a very comfortable state to deal with. But it was different in the sense that unlike most of the [rogue] states, its rogueness was directed internally rather than externally. So, that's the way it's used. I think, by and large, the term is still about externally directed threats.¹²

SCHARF: I think you have coined a new phrase that we may be using today, “rogueness.” So, based on the rogueness criteria, let me ask our expert panel: Which countries in the world do you all consider to be rogue states?¹³ Todd, let's start with you. What would be on your list?

BUCHWALD: I still tend to think of the states as the security threats. The security rogues. Maybe because of my background as an international lawyer, those are the states that tend to have the more immediate . . .

SCHARF: So, the worst ones on your list would be?

BUCHWALD: Well, the worst ones on the executive branch's list would still be Iran . . . you would have thought North Korea; there's sort of a strange relationship now with North Korea. But, those two are probably at the top of the list.

SCHARF: Paul, what would you add?

9. Robert S. Litwak, “A Look At...Rogue States,” *Washington Post*, February 20, 2000, https://www.washingtonpost.com/archive/opinions/2000/02/20/a-look-at-rogue-states/62a19e42-433d-4915-9bbc-97c5b900603e/?utm_term=.09419533d376.

10. Massimo Calabresi, “The Axis of Evil is it For Real?,” *Time*, February 3, 2002, <http://content.time.com/time/magazine/article/0,9171,198894,00.html>.

11. Remarks by President Donald Trump to the 72nd Session of the United Nations General Assembly, September 19, 2017, <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-72nd-session-united-nations-general-assembly/>.

12. Robert S. Litwak, “A Look At...Rogue States,” *Washington Post*, February 20, 2000, https://www.washingtonpost.com/archive/opinions/2000/02/20/a-look-at-rogue-states/62a19e42-433d-4915-9bbc-97c5b900603e/?utm_term=.09419533d376.

13. Robert Rotberg, “The Threat from Rogue States,” *Boston Globe*, November 6, 2004, <https://www.belfercenter.org/publication/threat-rogue-states>.

WILLIAMS: Oh, I would definitely keep North Korea on the list, and then I would add the triumvirate of Syria, Sudan, and Burma, or Myanmar, as they like to be called. All highly destabilizing both internally and externally.¹⁴

SCHARF: And Milena, what would you put on the list?

STERIO: For some historical perspective, you might go back to, for example, Libya under Gaddafi¹⁵—certainly at the end of that regime. And I certainly agree with both Paul and Todd regarding their lists. You might go back and say Serbia or the FRY—Federal Republic of Yugoslavia—under Milošević, as well.¹⁶

SCHARF: But not currently in either of those cases?

STERIO: Not currently.

SCHARF: Okay, and Jim: Is there anything we are leaving off?

JOHNSON: Well, I think that I might add—I don't think Paul mentioned it—Yemen. I think I might add Yemen to that list.

SCHARF: Okay. So, what about Cuba? Would any of you put Cuba on that list? Todd?

BUCHWALD: It is a funny kind of list to be put on because you don't know what it is that happens when you're on it. I think the relationship with Cuba, probably at this point, has a highly political dimension to it—but I think it really is a little bit different from the other states on the list.¹⁷

SCHARF: What about Turkey? Things are getting pretty out of control in our relations with Turkey.¹⁸ Would you put them on the list, anybody?

STERIO: I wouldn't. When I think of rogue states, I also think of states that are willing to, essentially, flagrantly act “roguely.” That might be a new word, too.

14. *Id.*

15. David E. Sanger and Judith Miller, “Libya to Give Up Arms Programs, Bush Announces,” *New York Times*, December 20, 2003, <https://www.nytimes.com/2003/12/20/world/libya-to-give-up-arms-programs-bush-announces.html>.

16. See Michael P. Scharf, “The Indictment of Slobodan Milosevic,” *ASIL Insights* 4:3 June 5, 1999, <https://www.asil.org/insights/volume/4/issue/3/indictment-slobodan-milosevic>.

17. Claire Felter and Danielle Renwick, US-Cuba Relations, Council on Foreign Relations, January 19, 2018, <https://www.cfr.org/backgrounder/us-cuba-relations>.

18. Colin Dwyer and Larry Kaplow, “What’s the Deal with The Deepening Dispute Between US And Turkey?” *NPR*, August 13, 2018, <https://www.npr.org/2018/08/13/638162581/whats-the-deal-with-the-deepening-dispute-between-u-s-and-turkey>.

SCHARF: So, like, invading another country, sending Internet attacks into other countries. . .

STERIO: Invading another country, using chemical weapons, and things of that sort.

SCHARF: What about Russia?

STERIO: Well, Russia actually is very good at using international law rhetoric to justify its actions. Russia doesn't stand up and say, "Oh we don't care about international law."

SCHARF: So, is a rogue state only one that says, "We don't care about the rules?"

STERIO: Well, the other difference I think is if we are defining "rogue-ness," are we talking about it from the United States perspective, or are we talking about it from some objective, global perspective?

SCHARF: What's the difference?

STERIO: Well, there is a difference. There are states that are clearly threats, perhaps, to the US. And when we talk about, for example, Turkey, you might say, "Okay, US-Turkey relations are really at a low point right now. But from a global perspective, I don't think Turkey is on the same level as Syria, for example, or some of these other states."

SCHARF: Okay. So, focusing on those states that are threats to the United States that you've listed. Paul Williams: Why should the US care, particularly about these countries?

WILLIAMS: Well, I think, Michael, there are two reasons why the United States should care about rogue states. The first is that they directly impact our security. The United States has security interests woven throughout the globe, and when you have states—either by the strict definition of rejecting the norms relating to terrorism, or as the broader definition of "rogue-ness" that we seem to be establishing here—this impacts our ability to maintain the security of the United States and our allies.¹⁹ So, for instance, with North Korea and its nuclear weapons, you know it has the ability to annihilate South Korea and Japan and possibly the ability to strike the United

19. Mara Karlin, "After 7 Years of War, Assad has Won in Syria: What's Next for Washington?," *Brookings Institution*, February 13, 2018, <https://www.brookings.edu/blog/order-from-chaos/2018/02/13/after-7-years-of-war-assad-has-won-in-syria-whats-next-for-washington/>.

States. Syria is pushing millions of refugees into Lebanon, Jordan, Turkey and into Europe—it's highly destabilizing.²⁰ Turkey might not be rogue, but is certainly on the verge of being destabilized, and there are security consequences.²¹ So, the states acting outside the bounds of the normative structure that the Americans have worked for over the decades to create substantially impacts our interests. Second, I think it's important to add that if they impact their own populations as well, that's also something Americans used to—and should continue to—care about. Burma has pushed out seven hundred thousand of their own civilians into Bangladesh. And some would call this—what they've been doing—genocide.²² This is something that may not impact our security interests, but we should care about it.

SCHARF: Okay, so with most of the countries we have been talking about, it's the government itself that is acting roguish. What about those countries where there are terrorists, or rebels, or pirates that are operating freely because they are failed states? Milena, do you think there is a difference between a rogue state and a failed state?

STERIO: Sure. I think definitely there is a difference, as you correctly stated. Most of these rogue states that we just mentioned are ruled by governments that have effective control over the territory of those states. A few years ago, maybe Syria was in a different category, but right now President Assad has control over most of the Syrian territory.²³ Other presidents of the states that we have mentioned have control over their territory. A failed state, to the contrary, is a state where the government no longer exercises effective control over their territory, which then allows groups like non-state actors, terrorists, pirates, rebels, and narco-traffickers to operate with impunity.²⁴ And the classical example of a failed state would be Somalia,

20. Kemal Kirişçi, Jessica Brandt, and M. Murat Erdoğan, "Syrian Refugees in Turkey: Beyond the Numbers," *Brookings Institution*, June 19, 2018, <https://www.brookings.edu/blog/order-from-chaos/2018/06/19/syrian-refugees-in-turkey-beyond-the-numbers/>.

21. Sebnem Koser Akcapar, "Turkey Stands Between Europe and the Next Refugee Crisis," *New York Times*, September 25, 2018, <https://www.nytimes.com/2018/09/25/opinion/syria-idlib-refugees-turkey-war-erdogan-putin-assad.html>.

22. "Myanmar Rohingya: What You Need to Know About the Crisis," *BBC*, April 24, 2018, <https://www.bbc.com/news/world-asia-41566561>.

23. Mara Karlin, "After 7 Years of War, Assad Has Won in Syria: What's Next for Washington?," *Brookings Institution*, February 13, 2018, <https://www.brookings.edu/blog/order-from-chaos/2018/02/13/after-7-years-of-war-assad-has-won-in-syria-whats-next-for-washington/>.

24. Failed States, Global Policy Forum, accessed November 1, 2018, <https://www.globalpolicy.org/nations-a-states/failed-states.html>.

where—about ten years ago—pirates were basically free to roam because there was no effective government oversight.²⁵

SCHARF: So, whether we are talking about a failed state or a rogue state, let me ask the ambassador: When is it better for the US to act in concert with others through the UN or NATO, and when do you feel it's necessary for the United States to consider acting on its own?

BUCHWALD: Well, I think in principle, it's always better to act with others and in as large a coalition as possible. If you have this picture of a rogue state as a state that is playing out of the accepted lines, if you're in concert with others, it's clear you're able to more clearly demonstrate where those lines are. So, if we're the only one saying, "You're playing outside the lines," it doesn't resonate nearly as much as if the entire international community makes that claim. Now, when you talk about the international community, it's a concept; you can't touch the international community. You could be talking about the UN General Assembly or the UN Security Council; if it's a situation in Europe, you could be talking about NATO.²⁶ There are times, however, when it won't be possible to act multilaterally, and I think the United States will always reserve to itself at least the prospect of acting unilaterally, if for no other reason than you have to reserve that prospect as part of the campaign of building a multilateral coalition.

SCHARF: And I think you're mostly talking about use of economic sanctions and use of force. Let me turn to Jim Johnson. As an international prosecutor, when should prosecution of leaders of rogue states be considered and pursued?

JOHNSON: Well, first, Michael, let me just state that your question assumes that there might be an international tribunal or some judicial body that is capable of carrying out a prosecution. Unfortunately, in many instances—you look around the world today—with leaders this may not be the case. But there is clearly the precedent developed by Nuremberg and reinforced by modern tribunals that makes it clear: war crimes and crimes against humanity are committed by individuals. As a head of state, you are responsible; and, as a head of state, you have no immunity from international crimes. So, indeed, you can be prosecuted. And when you're looking at when you

25. Hassan Barise, "Somalia—Where Pirates Roam Free," *BBC*, November 11, 2005, <http://news.bbc.co.uk/2/hi/africa/4424264.stm>.

26. Ian Black, "NATO Alerted to Dangers of Rogue States," *Guardian*, November 1, 2018, <https://www.theguardian.com/world/2001/sep/27/afghanistan.terrorism20>.

should be prosecuted—I'm a prosecutor and that's first and foremost in my mind—I believe that when there are reasonable grounds to believe that a leader has committed a war crime or crime against humanity, that action should be taken toward the prosecution of that leader. Beyond that, you also are going to want to look at the gravity of the crimes that have been committed. The location of the victims is also relevant. Are they internal or external? These are some of the kinds of things that you look at, I think, when you are prosecuting a leader.

SCHARF: Well, we are almost out of time for our first segment. When we return, we will focus our discussion on the case study of Syria, the greatest humanitarian crisis facing the world in the last decade.²⁷ We'll be back in just a moment.

Welcome back to *Talking Foreign Policy*, brought to you by Case Western Reserve University and WCPN 90.3 Ideastream. I'm Michael Scharf, the dean of the Case Western Reserve University School of Law. I'm joined today by the former US Ambassador for Global Criminal Justice, Todd Buchwald; the international prosecutor who convicted Liberian president Charles Taylor for war crimes, Jim Johnson; famed peace negotiator, Dr. Paul Williams of the Public International Law and Policy group; and an international law guru, Associate Dean Milena Stereo of Cleveland Marshall College of Law. We are talking today about the challenges of responding to rogue states. In this segment of our show, I'd like to focus the group's attention on the crisis in Syria. Since the beginning of the civil war there in 2011, the Assad regime has killed and displaced millions of people, and on several occasions the regime has used chemical weapons in opposition-controlled areas. Syria has become the greatest humanitarian crisis of our time.²⁸ Let me begin by asking Ambassador Todd Buchwald: Why hasn't the UN Security Council been able to take action to respond to the growing crisis in Syria?

BUCHWALD: Under the UN Charter, if the Security Council takes a decision, all UN member states—basically every country in the world—is under a legal obligation to accept and carry out the decision.²⁹ That's Article

27. "Syria: The Biggest Humanitarian Crisis of Our Time," *Amnesty International*, November 1, 2018, <https://www.amnesty.org.nz/take-action/syria-crisis>.

28. Eyder Peralta, "UN: Syrian Crisis Is 'Biggest Humanitarian Emergency of Our Era,'" *NPR*, August 29, 2014, <https://www.npr.org/sections/thetwo-way/2014/08/29/344219323/u-n-syrian-refugee-crisis-is-biggest-humanitarian-emergency-of-our-era>.

29. "What is the Security Council?," *United Nations Security Council*, accessed November 4, 2018, <http://www.un.org/en/sc/about/>.

25 of the UN Charter.³⁰ The UN Security Council has five permanent members: the United States, the United Kingdom, France, China, and Russia. And the way the Charter is structured, a decision can only be taken if all five of the permanent members concur in that decision.³¹ And, of course, in the last several years Russia—acting as protector of the Syrian client state—has vetoed a number of resolutions, including a resolution to refer the situation in Syria to the International Criminal Court and a variety of other resolutions related to Syria that were favored by us and many other countries.³²

SCHARF: So, what is it about Syria that Russia likes so much? They do have a port in Tartus; is that important to them?³³

BUCHWALD: Yes that's important to them. What's also important to them is their influence in the area, and I think it's partly a way to demonstrate that they have to be met on their terms. There have been lots of proposals to get around—lots of ideas for getting around—the Russian veto.³⁴ There are ideas to amend the Charter of the United Nations to take away or limit the use of the veto. The political reality is that I don't think there's a way around it. The Security Council veto is hard-baked into the Charter. I think in the reality of that, leaders—more and more—will come to other ways of organizing international efforts. In Syria it's hard to do anything effective because the Syrians, basically, are winning the war, and that's the reality that lawyers and policymakers in Washington are having a hard time dealing with.³⁵

SCHARF: But the US has taken matters into its own hands: on April 6, 2017, the US fired fifty-six cruise missiles at a Syrian airbase after Syria

30. Repertory of Practice of United Nations Organs Supplement, Supplement No. 10 (2000–2009), http://legal.un.org/docs/?path=../repertory/art25/english/rep_supp10_vol3_art25.pdf&lang=E.

31. "United Nations Security Council Fast Facts," *CNN*, March 28, 2018, <https://www.cnn.com/2013/09/03/world/united-nations-security-council-fast-facts/index.html>.

32. Syria: Does Russia Always Use a Veto at the UN Security Council?, *BBC*, April 16, 2018, <https://www.bbc.com/news/world-43781954>.

33. Frank Gardner, "How Vital is Syria's Tartus Port to Russia?," *BBC*, June 27, 2012, <https://www.bbc.com/news/world-middle-east-18616191>.

34. Louis Charbonneau, "Dozens of Nations Back French Appeal to Limit Use of UN Veto," *Reuters*, September 30, 2015, <https://www.reuters.com/article/us-un-assembly-veto-idUSKCN0RU30V20150930>.

35. "Why Assad is Winning the War in Syria," *PBS*, April 14, 2018, <https://www.pbs.org/newshour/show/why-assad-is-winning-the-war-in-syria>.

deployed sarin gas in the town of Khan Shaykhun near Damascus.³⁶ And then, on April 14, 2018, the UK, the US, and France together fired a hundred and five cruise missiles at Syrian chemical weapons production and storage facilities after the Syrian government deployed chlorine gas in the Damascus suburb of Duma.³⁷ Milena, do most governments and legal experts believe that these air strikes were lawful under international law given the Security Council's paralysis because of Russia's veto?

STERIO: I think that most governments and legal experts, as of now, do not believe that these airstrikes were lawful under international law because international law has a very basic norm, which is a prohibition on states to use force against other states. The only two well-accepted, well-recognized exceptions to that ban are situations where there is Security Council approval for the use of force and self-defense.³⁸ And, as Todd just told us regarding Syria, there is no Security Council authorization, nor will there be one in the near future, because of the Russian and, perhaps, Chinese veto.³⁹ So the Security Council is a no-go in this situation. And it's very hard for the US, the UK, and France to argue that they acted in self-defense because Assad was using the chemical weapons only against Syrian citizens, in areas where there were no US, UK, or French forces nearby. One argument that some scholars, and I know you, Michael, are starting to talk and write about this, is this idea that humanitarian intervention is another exception to this ban on the use of force.⁴⁰ And so, unless we're willing to accept this idea of humanitarian intervention without Security Council authorization as an exception to the use of force, it is hard to legally justify the airstrikes.

SCHARF: People have been talking about this for almost twenty years. Paul, for example, you participated in the negotiations at Rambouillet to try to avert the Kosovo conflict. And after the 1999 NATO airstrikes against Serbia to halt the ethnic cleansing of the Kosovo Albanians, the

36. Michael R. Gordon, Helene Cooper, and Michael D. Shear, "Dozens of US Missiles Hit Air Base in Syria," *New York Times*, April 6, 2017, <https://www.nytimes.com/2017/04/06/world/middleeast/us-said-to-weigh-military-responses-to-syrian-chemical-attack.html>.

37. "Syria Air Strikes: US and Allies Attack 'Chemical Weapons Site,'" *BBC*, April 14, 2018, <https://www.bbc.com/news/world-middle-east-43762251>.

38. UN Charter, art. 2, para. 4; UN Charter, art. 51.

39. "Syria War: Russia and China Veto Sanctions," *BBC*, February 28, 2017, <https://www.bbc.com/news/world-middle-east-39116854>.

40. Sarah Almutkhtar, "Most Chemical Attacks in Syria Get Little Attention. Here Are 34 Confirmed Cases," *New York Times*, April 13, 2018, <https://www.nytimes.com/interactive/2018/04/13/world/middleeast/syria-chemical-attacks-maps-history.html>.

UN did endorse something called the “responsibility to protect,” or R2P doctrine.⁴¹ Does that doctrine permit unilateral humanitarian use of force like the airstrikes on Syria?

WILLIAMS: Well Michael, my sense is that we’re very close to having international acceptance of a legal doctrine which permits the unilateral use of force. As Todd has pointed out, Security Council authorization is hard-baked into the UN Charter, but it’s being rampantly abused by the Russians to provide cover for states like Syria that are committing mass atrocities against their civilians—you know, four, maybe five hundred thousand killed by the regime.⁴² Milena properly pointed out that the doctrine was created to allow for states to intervene when a country was unable or unwilling to protect its population, or where it was actually, in fact, carrying out those atrocities. The early versions of R2P require Security Council authorization. But, I think we’ve seen in Kosovo there was a humanitarian intervention by NATO with no Security Council authorization.⁴³ We’ve now had two interventions: first, by the Americans, and then by the Americans along with the French and the British in Syria, where there was no Security Council authorization.⁴⁴ I think the flagrant violation of its responsibilities by Russia at the UN, coupled with this increasing trend of countries massacring their own civilians, is definitely tipping the scales in the direction of some type of souped-up responsibility to protect, which will no longer require authorization by the Security Council. And quite frankly, Mike, that day cannot come soon enough.

SCHARF: So, about seventy countries around the world chimed in with support of the US/UK/French air strikes on Syria last April. The only countries that were against it, quite frankly, were Russia and Syria, and then China joined in.⁴⁵ Does this overwhelming support—and other factors—indicate

41. “Responsibility to Protect, UN Office on Genocide Prevention and the Responsibility to Protect,” accessed November 4, 2018, <http://www.un.org/en/genocideprevention/about-responsibility-to-protect.html>.

42. “Note to Correspondents, Transcripts of Press Stakeout by United Nations Special Envoy for Syria, Mr. Staffan de Mistura,” *United Nations Secretary-General*, April 22, 2016, <https://www.un.org/sg/en/content/sg/note-correspondents/2016-04-22/note-correspondents-transcript-press-stakeout-united>.

43. Djamchid Montaz, “NATO’S ‘Humanitarian Intervention’ in Kosovo and the Prohibition of the Use of Force,” *International Committee of the Red Cross* 837, March 31, 2000, <https://www.icrc.org/eng/resources/documents/article/other/57jqcr.htm>.

44. “Syria: Does Russia Always Use a Veto at the UN Security Council?,” *BBC*, April 16, 2018, <https://www.bbc.com/news/world-43781954>.

45. Hannah Elis-Peterson, et al., “World Reacts to Overnight Strikes on Syria by US, UK,

that something is changing, as Milena pointed out? Let's unpeel the onion and see how this new case might be different than other cases. So, first of all, let me ask the panelists at large: Does it matter that this case was about chemical weapons use and the targets were chemical weapons facilities, as opposed to—in the other cases—other types of crimes against humanity where the targets were broad military and governmental targets? In the Serbia case, they just bombed anything that was a military target, right?⁴⁶ So, does that make a difference, Todd?

BUCHWALD: I think, whether rightly or wrongly, with the way international law works it does make a difference. I think clearly something's changing, and peoples' willingness to accept this kind of thing is way higher, and goes up more and more, because of all the atrocious behavior we see in Syria. Whether a new legal rule emerges is not necessarily the same question. When you look at the way the president talked about what he had authorized, he didn't really talk about it in terms of humanitarian intervention concepts. He talked about it in terms—like you're talking about—of the special threat that weapons of mass destruction pose to US security.⁴⁷ He's dealing with it in a situation where US troops are already in the theater. And it seems to me that, in a not completely elegant way he's groping for a self-defense kind of explanation for what he's doing. But what's interesting is that he's justifying what he's doing by an appeal to a humanitarian doctrine. But some scholars have opined that if the real rationale were humanitarian intervention, there were probably ways to save more lives than bombing those chemical facilities. If the idea is to get your most humanitarian bang for the buck, this wasn't it. There's a different explanation for why this happened. That's at least one way to look at it.

SCHARF: Milena?

STERIO: The other thing that I would mention that's really important regarding this particular intervention in April 2018 is the rhetoric used by the states—particularly the UK. The UK government specifically talked about humanitarian intervention and how this was legal under that doc-

and French Forces," *Guardian*, April 14, 2018, <https://www.theguardian.com/world/2018/apr/14/airstrikes-syria-world-reacts-bombing-us-uk-french-forces>.

46. Brent Sadler and Christiane Amanpour, "NATO Attack on Yugoslavia Begins," *CNN*, March 24, 1999, <http://www.cnn.com/WORLD/europe/9903/24/kosovo.strikes/>.

47. "Full Transcript of Trump's Address on Syria Airstrikes," *Washington Post*, April 13, 2018, https://www.washingtonpost.com/news/post-politics/wp/2018/04/13/full-transcript-of-trumps-address-on-syria-airstrikes/?utm_term=.c0ded632ac11.

trine.⁴⁸ When you go back to the Kosovo case, the State Department was very explicit that Kosovo was *sui generis*; it wasn't supposed to create any kind of a precedent. They said "these were unique circumstances. We're not arguing that humanitarian intervention is actually legal." In the Kosovo case, others talked about how that intervention was legitimate but not legal, and there was moral authority for it even if there wasn't legal authority.⁴⁹ Now, the UK government is saying: "This is humanitarian intervention, this is legal." And the US government is basically making statements like, "We're in complete agreement with the UK."⁵⁰

SCHARF: Let me ask you, so Nikki Haley, the ambassador to the United Nations from the United States, said that at the Security Council there is a doctrine in international law that if a country adopts another country's position or other group's positions—if they ratify it—they can be held to be responsible for it. Isn't this the kind of language that Nikki Haley used when she said, "We are in lockstep and in complete agreement with the UK"? Isn't that close to a case of adoption under that doctrine?⁵¹ The adoption doctrine was once used in the International Court of Justice in the case of Iran's adoption of the student protestors' attack and takeover of the US embassy. The International Court of Justice said the government of Iran is now responsible because they applauded that action, and because they said that they agreed with it. How is this any different?⁵² Todd?

BUCHWALD: I think Nikki Haley's words reflected a sort of purposeful ambiguity. "We're in lockstep with them" is another way of just saying we were supportive of our allies. If you go back to the 1999 NATO intervention in Serbia, that is when the United Kingdom first said that humanitarian

48. "UK's Theresa May Tells Lawmakers: Syria Strikes Were Legal and Moral," *NBC*, April 16, 2018, <https://www.nbcnews.com/news/world/uk-s-theresa-may-tells-lawmakers-syria-strikes-were-legal-n866386>.

49. See David Lefkowitz, "On Moral Arguments against a Legal Right to Unilateral Humanitarian Intervention," *Public Affairs Quarterly* 20 (April 2006): 115, <http://www.jstor.org/stable/40441432>.

50. Steven A. Engel, "Memorandum Opinion for the Counsel to the President, April 2018 Airstrikes against Syrian Chemical-Weapons Facilities," May 31, 2018, slip opinion, <https://www.justice.gov/olc/opinion/file/1067551/download>.

51. Nicole Gaouette, "Richard Roth and Elizabeth Joseph, Haley Says US 'Locked and Loaded,' Prepared to Maintain Pressure on Syria," *CNN*, April 14, 2018, <https://www.cnn.com/2018/04/14/politics/un-meeting-syria-strikes/index.html>.

52. See United States Diplomatic and Consular Staff in Tehran (*US v. Iran*), Judgment, *ICJ Reports 1980* (May 24, 1980): 3, <https://www.icj-cij.org/files/case-related/64/064-19800524-JUD-01-00-EN.pdf>.

intervention was lawful.⁵³ The UK used the doctrine again to justify the imposition of no-fly zones to protect Kurds and Shi'ites in Iraq. They had their theory, which was a humanitarian intervention theory. And the US had its own theory, which was not based on humanitarian intervention. To me, what I see going on is a long history of the United States coming up with a different rationale, other than humanitarian intervention, to justify its actions. For it to be real customary international law, state officials are going to have to stand up and say, clearly, "This is what we think."

SCHARF: Paul, what do you think?

WILLIAMS: Michael, I think the Brits have this right. The Brits realize that in today's world, you're going to need to engage in humanitarian intervention in cases like Kosovo and cases in Syria for your own national security and also just to protect, quite frankly, humanity. The Americans, for decades, have been dodging this question. The silliness of "It's illegal, but it's legitimate" and any possible rationale we could come up with. Quite frankly, it's time for the US government—and I think the Trump administration to a degree, has—to embrace that doctrine. The US Department of Justice Office of Legal Counsel opinion on the Syria airstrikes talked about the relationship between the humanitarian catastrophe from use of chemical weapons against civilians and US security interests, so the United States is inching toward humanitarian intervention. But it's time for the Americans to be serious; we are doing humanitarian intervention. Let's create a legal framework, like the British have, for those interventions. Let's do it in a limited circumstance, with limited scope, with as little force as possible, but let's create a legal framework around it. Let's not have it run free range around the globe because that's when the Russians, the Chinese, and others will take advantage of a wobbly legal doctrine.

SCHARF: I will note that Harold Koh, who was the former legal advisor at the State Department, has chastised both the Democratic and Republican administrations of the United States for not being specific when they do humanitarian intervention and doing, instead, what Todd was describing⁵⁴—having these factors, and saying it's sui generis, which means there's

53. Marc Weller, "Syria Air Strikes: Were they Legal?," *BBC*, April 14, 2018, <https://www.bbc.com/news/world-middle-east-43766556>.

54. See Harold Koh, "Humanitarian Intervention: Time for Better Law," *AJIL Unbound* 11 (October 2, 2017): 287, <https://www.cambridge.org/core/journals/american-journal-of-international-law/article/humanitarian-intervention-time-for-better-law/05B23622D7C19B2B3BF4BD05D693BD0F/core-reader>.

no precedent, just “this is an exceptional case.” Koh said the risk of the US approach is that other countries will abuse the precedent because the US is creating a very amorphous precedent. It’s not that they’re creating no precedent, which is what—I think—the US hopes is happening. Instead, they are creating a precedent, but it’s one where they are letting the genie out of the bottle and people can interpret it in all different ways. I think that’s what you’re getting at. Is that right, Paul?

WILLIAMS: Yes, the Russians have used a version of this humanitarian intervention for their intervention in South Ossetia, Abkhazia, Crimea, and eastern Ukraine. None of those are humanitarian interventions that would be justified by the UK rationale.⁵⁵

SCHARF: But the answer is not to say, then, that there shouldn’t be any humanitarian interventions, but to cabin it off with some very precise rules.

WILLIAMS: Right.

STERIO: Well Michael, Russia is citing the Kosovo precedent,⁵⁶ although the State Department is saying it’s not a precedent.⁵⁷

SCHARF: This is Harold Koh’s point.

STERIO: Exactly. And Harold Koh said that we, as lawyers, shouldn’t be—I think he called us “potted plants.”⁵⁸ That it is our duty to get out there.

SCHARF: Get out there first and articulate clear doctrine.

STERIO: Exactly.

WILLIAMS: We’re creating precedent—let’s stop pretending we’re not creating precedent.

SCHARF: So, one of the lawyers in the studio is an international prosecutor. Let me bring Jim Johnson back into the conversation. Jim, what is being done to pave the way for war crimes trials of President Assad and others in

55. Marc Weller, “Analysis: Why Russia’s Crimea Move Fails Legal Test,” *BBC*, March 7, 2014, <https://www.bbc.com/news/world-europe-26481423>.

56. Irina Filatova, “The Kosovo Precedent,” *Guardian*, February 23, 2008, <https://www.theguardian.com/commentisfree/2008/feb/23/thekosovoprecedent>.

57. *Id.*

58. Harold Koh, “Syria and the Law of Humanitarian Intervention (Part III–A Reply),” *EJIL: Talk!*, October 12, 2013, <https://www.ejiltalk.org/syria-and-the-law-of-humanitarian-intervention-part-iii-a-reply/>.

Syria that are using chemical weapons, that are using barrel bombs, that are torturing people—and seem to be getting away with it?⁵⁹

JOHNSON: Well, Michael, as we mentioned a few minutes ago, one of the concerns right now is that for many of these leaders of rogue regimes, there is no option to prosecute them—as in the case of Syria.⁶⁰

SCHARF: What about the European countries that have launched prosecutions of Syrians based on universal jurisdiction in their national courts?⁶¹ Is that working?

JOHNSON: There have been some cases brought against lower figures, but they have not pursued a case against President Assad as he is protected by head of state immunity. And when you look from an international perspective, there does not seem to be an option to prosecute him.⁶² Attempts to either create an ad hoc tribunal or to refer this case to the International Criminal Court have been vetoed by Russia and others in the Security Council. But that doesn't mean that steps are not being taken. The most critical element of cases of war crimes and crimes against humanity is to get in and to collect and preserve the evidence.

SCHARF: And that's being done?

JOHNSON: That is being done, and initiatives are taking place to help that process along. First, really, since the start of the war in Syria, several NGOs have been attempting to collect and gather evidence in Syria and, most importantly, to preserve that evidence. And, now, the United Nations has taken steps. The General Assembly has established the International Independent and Impartial Mechanism, which has been created to collect, collate, and preserve evidence of war crimes in Syria—so that eventually if there is a prosecution that can indeed take place, it will.⁶³ You look at the

59. Terry Atlas, “Hawkish Advisors Get Key Trump Roles,” *Arms Control Association*, May 1, 2018, <https://www.armscontrol.org/act/2018-05/news/hawkish-advisers-get-key-trump-roles>.

60. Eliza Mackintosh, “War Crimes Prosecutor Quits Syria Inquiry Over UN Inaction,” *CNN*, August 7, 2015, 7:57 a.m., <https://www.cnn.com/2017/08/07/middleeast/syria-war-crimes-investigator-del-ponte-resigns/index.html>.

61. Maria Elena Vignoli, “These Are the Crimes We Are Fleeing: Justice For Syria in Swedish and German Courts,” *Human Rights Watch*, October 3, 2017, <https://www.hrw.org/report/2017/10/03/these-are-crimes-we-are-fleeing/justice-syria-swedish-and-german-courts>.

62. *Id.*

63. G.A. Res. 71/248, December 21, 2016.

killing fields of the Khmer Rouge in Cambodia, for example: it was thirty years after they fell from power that Cambodia finally created a tribunal that could try the genocide in Cambodia.⁶⁴

SCHARF: Meanwhile, if countries are getting impatient about prosecutions, I do note that Pulitzer prize winning journalist Bob Woodward's new book said that the White House had considered, seriously, the assassination of President Assad.⁶⁵ Let me turn to Paul: What's your take on that? What are the pros and cons of using assassination as a policy tool against rogue leaders?

WILLIAMS: Wow, that'd be the ultimate humanitarian intervention. It's highly dangerous, it's highly unpredictable, and it's highly destabilizing. I think this would be a return to the bad old days of targeting individual leaders, which is something—although we're quite extensively engaged in targeting terrorist leaders—we've very much moved away from the days of targeting heads of state. To do so without a plan for state building, or without a plan for an alternative government, could be very dangerous and very destabilizing, and wouldn't accomplish the objective of stopping the atrocities on the ground.

SCHARF: And I suppose it could turn the globe into a version of the Old West, where countries are just trying to assassinate each other's leaders left and right?

WILLIAMS: Yes.

SCHARF: Right, now there is a taboo against that.

WILLIAMS: There is a taboo, and that taboo supports our strategic interests.

SCHARF: Alright, well, it's time for another short break. When we return, we'll talk about some of the other rogue regime flashpoints around the world. Back in a moment.

This is Michael Scharf and we're back with *Talking Foreign Policy*. I'm joined today by some of the world's foremost experts on dealing with rogue nations. In this final segment of our broadcast, I want to ask our experts to discuss some of the other states that the Trump administration has labeled

64. See Wolfgang Form, "Justice 30 Years Later? The Cambodian Special Tribunal for the Punishment of Crimes against Humanity by the Khmer Rouge," *Journal of Nationalism and Ethnicity* 37, no. 6 (November 2009): 889.

65. Ben Jacobs, "Trump 'Wanted Assad Assassinated': Key Claims in Bob Woodward's Book," *Guardian*, September 4, 2018, <https://www.theguardian.com/us-news/2018/sep/04/donald-trump-bob-woodward-fear-syria-assad-claims>.

as rogue regimes, starting with Iran.⁶⁶ Paul Williams: Tell us why Iran should be on our radar as a rogue state.

WILLIAMS: Well, Mike, if we were to employ Todd's rogueness scale, we'd find that the Iranians are at the top of the scale. When the Iranians aren't busy attempting to build nuclear weapons or ballistic missile delivery systems for those nuclear weapons, they're overseeing tens of thousands of elite Iranian troops operating in Syria, fighting against the Syrian opposition, and committing atrocities against the Syrian people. They're also funding and directing Hezbollah and their operations inside Syria.⁶⁷ They're heavily engaged in Yemen, providing assistance and weapons to the Houthis.⁶⁸ They're providing ballistic missiles to the Houthis in Yemen that can reach Riyadh—and have reached Riyadh, the capital of Saudi Arabia.⁶⁹ They still maintain a vast terrorist network throughout the Middle East and North Africa.⁷⁰ They basically are a highly destabilizing actor in the region.

SCHARF: Alright, well, the Iranians do sound, from that description, like the bad boys of the Middle East. We, until recently, had an Iranian nuclear accord, which the United Nations and the inspectors said was actually working.⁷¹ Milena, why did the United States pull out of that?

STERIO: The Iranian nuclear accord, which was signed back in 2015, provided essentially that Iran was temporally halted in its production of

66. "At UN, Trump Singles out 'Rogue' Nations North Korea and Iran," *New York Times*, September 19, 2017, <https://www.nytimes.com/2017/09/19/world/americas/united-nations-general-assembly.html>.

67. Matthew Levitt, "Hezbollah Finances: Funding the Party of God," *Washington Institute for Near East Policy*, February 2005, <https://www.washingtoninstitute.org/policy-analysis/view/hezbollah-finances-funding-the-party-of-god>.

68. Farzin Nadimi and Michael Knights, "Iran's Support to Houthi Air Defenses in Yemen," *Washington Institute for Near East Policy*, April 4, 2018, <https://www.washingtoninstitute.org/policy-analysis/view/irans-support-to-houthi-air-defenses-in-yemen>.

69. Stephen Kalin, "Saudi Arabia Intercepts Missile over Riyadh: Al Arabiya," *Reuters*, April 11, 2018, 10:47 a.m., <https://www.reuters.com/article/us-saudi-security/saudi-arabia-intercepts-missile-over-riyadh-al-arabiya-iduskbn1hi28k>.

70. Carol Morello, "Terrorism is Down Worldwide, But State Department Says Iran Maintains 'Near-Global Reach'," *Washington Post*, September 19, 2018, https://www.washingtonpost.com/world/national-security/terrorism-is-down-worldwide-but-state-department-says-iran-maintains-near-global-reach/2018/09/19/fc3a85b1-dbac-4496-a295-b78599cd6720_story.html?utm_term=.c0376a1bb32e.

71. Erin Cunningham, "Iran Adhering to Nuclear Deal with World Powers, UN Watchdog Says," *Washington Post*, August 31, 2017, https://www.washingtonpost.com/world/iran-adhering-to-nuclear-deal-with-world-powers-un-watchdog-says/2017/08/31/cb408e7d-bc9a-4874-bbdf-001f919a8c86_story.html?utm_term=.6a1f32f20b59.

enriched uranium for military purposes. The accord was going to be valid for fifteen years. In exchange for that, there was an easing and lifting of UN sanctions against Iran.⁷² So, Iran had, definitely, a financial incentive to stay in the agreement. President Trump, back when he was candidate Trump, pretty often talked about the Iran agreement as a bad deal that he wanted to pull out of. And now he has announced that the US is indeed pulling out.⁷³ There doesn't seem to be a Plan B, so it's unclear what happens now in terms of US policies vis-à-vis Iran. In terms of explaining why he pulled out of the agreement, some commenters think it was all about undermining President Obama's legacy. If you view the Iran agreement as one of the high points of the Obama presidency, it has to do with undermining that.⁷⁴ Also, it has to do with turning more strategically toward our allies such as Israel, and perhaps Saudi Arabia,⁷⁵ and the influence of some more hawkish advisors in the Trump administration, such as, for example: Mike Pompeo, who is now secretary of state, and John Bolton, who is now the national security advisor.⁷⁶

SCHARF: You said there didn't seem to be a Plan B, but prior to being appointed to the position of national security advisor, John Bolton did publicly advocate Israeli airstrikes against Iran's nuclear facilities.⁷⁷ Ambassador Todd Buchwald: What would be the pros and cons of either US or Israeli airstrikes against those nuclear facilities?

BUCHWALD: Well, there are actual examples of the Israelis attacking nuclear reactors in Iraq in 1981, a reactor called Osirak.⁷⁸ At that time, the United States actually condemned the Israelis, with President Reagan

72. William J. Broad and Sergio Pecanha, "The Iran Nuclear Deal—A Simple Guide," *New York Times*, January 15, 2015, <https://www.nytimes.com/interactive/2015/03/31/world/middleeast/simple-guide-nuclear-talks-iran-us.html>.

73. Catherine Lucey and Josh Lederman, "Trump Declares US Leaving 'Horrible' Iran Nuclear Accord," *Chicago Tribune*, May 8, 2018, <https://www.chicagotribune.com/news/nationworld/politics/ct-iran-nuclear-deal-20180508-story.html>.

74. Anthony Zurcher, "Three Reasons Behind Trump Ditching Iran Deal," *BBC*, May 8, 2018, <https://www.bbc.com/news/world-us-canada-4390237>.

75. "Iran Nuclear Deal: Winners and Losers from Trump's Decision to Quit," *BBC*, May 9, 2018, <https://www.bbc.com/news/world-middle-east-44055174>.

76. Terry Atlas, "Hawkish Advisors Get Key Trump Roles, Arms Control Association," May 1, 2018, <https://www.armscontrol.org/act/2018-05/news/hawkish-advisers-get-key-trump-roles>.

77. Vaughn P. Shannon, "US Reaction to the 2009 Iranian Election: The End of 'Regime Change' Politics," *Journal of Iranian Research and Analysis* 26, vol. 2 (2009): 47, 55.

78. David K. Shipler, "Israeli Jets Destroy Iraqi Atomic Reactor; Attack Condemned by US and Arab Nations," *New York Times*, June 9, 1981, <https://www.nytimes.com/1981/06/09/world/israeli-jets-destroy-iraqi-atomic-reactor-attack-condemned-us-arab-nations.html>.

mitigating a little bit by saying the Israelis believed what they were doing was right. However, there was a clear condemnation.⁷⁹ There was another attack by the Israelis in 2007—same idea, though it wasn't acknowledged until much later.⁸⁰ It's a hard situation. I think that legal concepts will only dictate to a certain degree—and not that great of a degree—what country's decisions will be in using force in situations where they feel themselves under existential threat. But, as a practical matter, if you're thinking about something like this, you'd have to think through the situation. Can the reactors be destroyed? What are the benefits? What are the costs? How are you going to mitigate the costs? And—very importantly—how is the world going to react even if you can pull it off? And where you will end up on the rogueness scale? I think it's a lot easier to say—when you're out of government—that this is a good idea, than to be in government and do it. I suspect that this is not really in the cards for the foreseeable future.

SCHARF: I hope you're right about that. Paul Williams: Let's go to a slightly different part of the globe. You've been involved in peace negotiations in both Yemen and the Sudan. Can you bring us up to date on what the situation is in those countries and what policy options you would recommend for the United States with regard to them?

WILLIAMS: As Todd pointed out, now that we're all out of government, we have lots of leeway to recommend policy options. So, I've got a few there. Both Yemen and Sudan have become never-ending wars. In Yemen, in particular, you've got a three- or four-way conflict by the parties in Yemen. But it's been a spill-in conflict with the Iranians and the Saudis heavily engaged in supporting the parties, and the Americans, the British, and the French providing a lot of weapons to our allies: the Saudis, the UAE, and others that are engaged.⁸¹ There are two problems with Yemen. One, there's no momentum for a peace process. Two, our allies—the Saudis—have incredibly bad aim,

79. Steven R. Weisman, "Regan Asserts Israel Had Cause to Mistrust Iraq," *New York Times*, June 17, 1981, <https://www.nytimes.com/1981/06/17/world/regan-asserts-israel-had-cause-to-mistrust-iraq.html>.

80. Stephen Farrell, "Israel Admits Bombing Suspected Syrian Nuclear Reactor in 2007, Warns Iran," *Reuters*, March 20, 2018, 11:13 p.m., <https://www.reuters.com/article/us-israel-syria-nuclear/israel-admits-bombing-suspected-syrian-nuclear-reactor-in-2007-warns-iran-iduskbn1gx09k>.

81. The Editorial Board, "Why are US Bombs Killing Civilians in Yemen?", *New York Times*, August 28, 2018, <https://www.nytimes.com/2018/08/28/opinion/us-yemen-saudi-arabia-trump-civilian-casualties.html>.

and thousands of civilians have been killed by American-made weapons.⁸² It's time to bring an end to the conflict in Yemen. The Americans have a lot of leverage that they can put on the Saudis and the others to be serious about engaging the peace process. And, with the continued sanctions on Iran, there's also international leverage to get the Iranians to be serious. But, it's going to have to be the Americans, and their allies, that pressure our allies to come to the table and negotiate peace. In Sudan, we've got nearly thirty years of conflict—this is the Darfur genocide, and it continues.⁸³ There's also expanded conflict in Southern Kordofan and Blue Nile.⁸⁴ This is a case where we actually have a tribunal that's engaged. The International Criminal Court has indicted the president of Sudan for crimes against humanity, and yet he wanders the globe unencumbered.⁸⁵ We need to be serious about putting pressure on countries like South Africa—and other countries which host president al-Bashir in the face of the International Criminal Court's arrest warrant—and threaten sanctions if they do not send Omar al-Bashir to the ICC to stand trial for crimes against humanity and genocide. Until we are serious about ending these conflicts and use the leverage that we have, we are going to see these wars continue without end—with continued genocide, crimes against humanity, and civilian casualties.

SCHARF: Let me bring Jim in on that question. So, Jim Johnson: You have prosecuted a head of state, Charles Taylor, of Liberia, at the Special Court for Sierra Leone. As Paul mentioned, al-Bashir, the president of the Sudan, has been indicted for genocide, and he just pops over to neighboring countries. He's even gone as far as China.⁸⁶ They allow him to come in as an honored guest. The International Criminal Court screams and yells, "He's under indictment, you have to arrest him, you have to send him to us," and nothing happens. The International Criminal Court takes the case to the Security Council and says, "You're the Security Council, you sent

82. *Id.*

83. Mohamed Nureldin Abdallah, "Sudan Events of 2017," *Human Rights Watch*, September 23, 2017, <https://www.hrw.org/world-report/2018/country-chapters/sudan>.

84. *Id.*

85. "Where Can Sudan's President Omar al-Bashir Go Now?," *BBC*, June 15, 2015, <https://www.bbc.com/news/world-africa-33140917>.

86. "Beijing Defends Sudan President Bashir's Presence at China-Africa Summit," *Agencia Efe*, September 3, 2018, <https://www.efe.com/efe/english/portada/beijing-defends-sudan-president-bashir-s-presence-at-china-africa-summit/50000260-3737446>.

this case to us, do something!” And they don’t do anything.⁸⁷ What does this tell us about the state of international criminal justice?

JOHNSON: Well, Michael, it doesn’t necessarily tell us anything good. States have always and will continue to act in what they see is their best interest. One of the largest impediments that the modern international tribunals have had from the start—when you look at the Yugoslavia Tribunal, the Rwandan Tribunal, our tribunal, and now the ICC—is getting states to live up to their obligations to these tribunals. It took us three years to bring Charles Taylor into our custody after we indicted him.⁸⁸

SCHARF: Well, fortunately international criminal law is patient and persistent. We’re out of time. Todd Buchwald, Jim Johnson, Paul Williams, and Milena Sterio—thank you for your insights! This is Michael Scharf and you’ve been listening to *Talking Foreign Policy*.

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87. Toby Sterling, “ICC Reports Jordan to UN Security Council for Not Arresting Sudan’s Bashir,” *Reuters*, December 11, 2017, <https://www.reuters.com/article/us-icc-sudan-jordan/icc-reports-jordan-to-u-n-security-council-for-not-arresting-sudans-bashir-iduskbn1e516c>.

88. Craig Timberg, “Liberia’s Taylor Found and Arrested,” *Washington Post*, March 30, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/29/AR2006032900879.html>.