The Sword in the Mirror – The Lawfulness of North Korea’s Use and Threat of Use of Nuclear Weapons Based on the United States’ Legitimization of Nuclear Weapons

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Abstract

This Article addresses the lawfulness of the use or threat of use of nuclear weapons by the Democratic People’s Republic of Korea (“North Korea” or “DPRK”). I address the topic from three perspectives: 1) North Korea’s own statements of the matter; 2) U.S. statements of the law as applied to its own nuclear weapons; and 3) my evaluation of the matter based on international law as stated by the United States and as found by the International Court of Justice in the Nuclear Weapons Advisory Decision.
THE SWORD IN THE MIRROR — THE LAWFULNESS OF NORTH KOREA’S USE AND THREAT OF USE OF NUCLEAR WEAPONS BASED ON THE UNITED STATES’ LEGITIMIZATION OF NUCLEAR WEAPONS

Charles J. Moxley, Jr.*

This Article addresses the lawfulness of the use or threat of use of nuclear weapons by the Democratic People’s Republic of Korea (“North Korea” or “DPRK”). I address the topic from three perspectives: 1) North Korea’s own statements of the matter; 2) U.S. statements of the law as applied to its own nuclear weapons; and 3) my evaluation of the matter based on international law as stated by the United States and as found by the International Court of Justice in the Nuclear Weapons Advisory Decision.¹

Because of the relevance of the potential effects of nuclear weapons to this legal issue, I review such facts. Because North Korea justifies its nuclear weapons program on the grounds of self-defense, I also review the history of hostilities between the United States and North Korea, and the current strategic positions of the two States.

The thesis of this Article is that the United States’ efforts to

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Professor Moxley acknowledges and thanks Fordham Law School students Lissa Schaupp, Frank Raimond, and Michael Yim, and New York attorney Brian J. McBreen for their extraordinary help in the researching and drafting of this Article.

curtail the nuclear aspirations of North Korea and other States are hampered by the United States’ unsupportable position that the use and threat of use of nuclear weapons are generally legal. Due to its legitimization of nuclear weapons and its support of the right of States broadly to withdraw from arms control agreements, the United States has largely deprived itself of law as a basis for opposing nuclear proliferation.

INTRODUCTION

North Korea, having previously espoused the unlawfulness of the use or threat of use of nuclear weapons before the International Court of Justice ("ICJ"), now asserts that it is entitled to use and threaten to use such weapons in self-defense because of the United States’ hostile actions and threats — including the U.S. policy of preemptive strike, exemplified by the recent war in Iraq.

The United States has long acknowledged the binding nature of international law, including the law of armed conflict. It has specifically acknowledged the rules of necessity, proportionality, and discrimination arising under that law which provide that: (1) it is unlawful to use weapons involving a level of force not necessary in the circumstances to achieve the military objective; (2) it is unlawful to use weapons whose probable effects upon combatant or non-combatant persons or objects would likely be disproportionate to the value of the anticipated military objective; and (3) it is unlawful to use weapons that cannot discriminate between military and civilian targets.

The United States recognizes that under the rules of necessity, proportionality, and discrimination it is unlawful for a State to use or threaten to use weapons, including nuclear weapons, whose potential effects would be uncontrollable. The United States however, puts forth the following contentions in support of its argument that the use of nuclear weapons is generally lawful:

1. There is no applicable per se rule, and accordingly, each potential use of nuclear weapons must be evaluated independently to see if it can comply with the requirements of international law, including the rules of necessity, proportionality, and discrimination.
2. The United States is able to control the effects, including the radiation effects, of nuclear weapons.
3. With its technologically advanced modern delivery systems, the United States is able to deliver nuclear weapons, particularly highly accurate low-yield weapons, with great accuracy to desired targets, avoiding excessive collateral damage to civilians, neutrals, and other protected persons and objects.
4. The effects of nuclear weapons are no worse than those of conventional weapons.
5. The radiation effects of nuclear weapons are not relevant to the lawfulness of the use of such weapons.
6. Only specifically intended effects of nuclear weapons are unlawful, so that effects that result from mere recklessness or gross negligence are not unlawful.
7. A potential use of a nuclear weapon could only be deemed unlawful in advance if it were clear that it would "necessarily" and "inevitably" lead to impermissible effects or other violations of law.
8. Only the immediate and direct effects of nuclear weapons — particularly the blast and thermal effects — need be considered in evaluating the lawfulness of the use of the weapons, so that it is unnecessary to consider other effects, such as the likely resultant escalation of use of nuclear, chemical, and/or biological weapons by one's adversaries and their allies and ultimately by oneself.
9. The collateral killing of civilians is lawful as long as the civilians are not targeted "as such."
10. Nuclear weapons may lawfully be used in reprisal.

These rationales for the U.S. nuclear program, which serve at least equally to legitimize the North Korean program, are factually and legally unfounded. Based upon the facts and law, it is clear that virtually any use of nuclear weapons, in the circumstances in which such weapons might actually be used, would be unlawful and that the policy of deterrence is unlawful.

The North Korean nuclear program is an interesting case study as to how these legal issues arise since North Korea finds itself in a strategic position analogous to that of the United States vis-à-vis the Soviet Union during the Cold War. Just as the United States was vulnerable to the overwhelming conventional
weapons capabilities of the Soviet Bloc, so too, and even more so, is North Korea vulnerable to the overwhelming conventional capabilities of the United States.

North Korea justifies its putative nuclear weapons program in part on its economic problems, specifically on the ground that it does not want to spend the greater amounts that would be necessary to develop a more powerful and reliable conventional weapons program. This implicates the emerging international law issue of whether a State may justify its use of a more indiscriminate weapon when the need for such use results from its intentional failure to have developed and maintained more indiscriminate weapons.

I. BACKGROUND TO CURRENT NORTH KOREAN NUCLEAR POSTURE

The lawfulness of North Korea's nuclear program is affected not only by the rules of customary, conventional, and other international law applicable to the use or threat of use of nuclear weapons, but also by the 1992 Joint Declaration of the Denuclearization of the Korean Peninsula ("Joint Declaration")\(^2\) between the Republic of Korea ("South Korea") and North Korea, and the October 21, 1994 Agreed Framework between the United States and North Korea (the "Agreed Framework").\(^3\)

A. Joint Declaration

The Joint Declaration provided that neither North nor South Korea would "test, manufacture, produce, possess, store, deploy, or use nuclear weapons."\(^4\) The Joint Declaration further provided that nuclear energy would be used by the two States for peaceful purposes and that neither would possess nuclear reprocessing or uranium enrichment facilities.\(^5\)

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\(^4\) See Joint Declaration, supra note 2, at § 1.

\(^5\) See id. at §§ 2-3.
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B. Agreed Framework

The Agreed Framework provided for North Korea's termination of its nuclear weapons program in exchange for financial assistance for its energy program from an international consortium, and security assurances from the United States against the threat or use of nuclear weapons by the United States. Specifically, North Korea agreed to replace its graphite-moderated reactors and related nuclear facilities with "proliferation-resistant" light water reactor power plants, to be financed by the United States, Japan, and South Korea, among others, and to continue as a party to the Treaty on the Non-Proliferation of Nuclear Weapons ("NPT").

C. NPT

The NPT provides that the five identified nuclear weapon States agree to pursue general and complete disarmament through good faith negotiations, and to refrain from transferring nuclear weapons or in any way encouraging their manufacture, and that the non-nuclear weapon States agree to forego developing or acquiring nuclear weapons. North Korea be-


8. See Agreed Framework, supra note 3, at pt. IV(1).


11. See NPT, supra note 6, art. VI.

12. See id. art. I.

13. See id. art. II; see also U.S. Dept. of State, Bureau of Nonproliferation, Treaty on
came a party to the NPT in 1985, stating that it was doing so to remove the nuclear threat from the United States, and to resolve North Korea's need for nuclear energy.

Under the NPT regime, non-nuclear weapons States are required to enter into a "safeguard agreement" with the International Atomic Energy Association ("IAEA"). North Korea delayed entering into such an agreement because of what it characterized as nuclear threats from the United States, including the United States' continued placement of nuclear weapons in South Korea, and the "Team Spirit" nuclear war exercise the United States directed against North Korea.

In 1992, North Korea entered into a safeguard agreement with the IAEA after receiving assurances from the United States that it would not use nuclear weapons against North Ko-

the Non-Proliferation of Nuclear Weapons, History, at http://www.state.gov/t/np/trty/16281.htm (stating that Iran, Iraq, and North Korea have all failed their obligations under NPT at one time or another) (last visited Apr. 7, 2004) [hereinafter History of NPT].


16. The International Atomic Energy Association ("IAEA"), which was created by the statute of the Atomic Energy Agency, 8 U.S.T. 1093 (1957), is responsible for verifying that the parties to the NPT are complying with its terms. See History of NPT, supra note 13.

17. The Team Spirit exercises were military drills held annually from 1976 until 1994, when they were suspended as part of the Agreed Framework. See South Korean Ministry Says Military Exercise Can be Revived at "Anytime", BBC Worldwide Monitoring, May 3, 1999.

18. The South Korean Ministry of Defense characterized these exercises as defensive and contended that North Korean allegations of the offensive nature of the exercises are unfounded; North Korea was reportedly invited to send representatives to attend as observers. See Ministry of National Defense, Republic of Korea, Military Exercises, available at http://www.mnd.go.kr/cms.jsp?p_id=01918010000000 (last visited Apr. 7, 2004).

rea, and after receiving representations from South Korea that there were no nuclear weapons within its borders. In entering into the agreement with the IAEA, North Korea stated that it was doing so on the premise that "none of the NPT member countries will deploy nuclear weapons on the Korean Peninsula and pose a nuclear threat to DPRK."

D. North Korea's Withdrawal from the NPT and Assertion of the Invalidity of the Joint Declaration and of the U.S. Breach of the Agreed Framework

On January 10, 2003, however, North Korea announced its immediate withdrawal from the NPT on the ground that it was "most seriously threatened" by the United States. North Korea stated that the United States had threatened it with preemptive nuclear attack and other belligerent actions such as blockades. North Korea further stated that the United States had breached the Agreed Framework by failing to provide light-water reactors ("LWRs") and suspending its promised heavy oil shipments. North Korea also alleged that the United States had "instigated even the IAEA to internationalize its moves to stifle the DPRK, thus putting into practice its declaration of a war against the

21. See id.
22. See id.


On March 12, 1993, North Korea threatened withdrawal from the NPT after the IAEA invoked its special inspection rights in response to finding that North Korea had reprocessed more plutonium than the 80 grams it had disclosed to the IAEA pursuant to the terms of its 1992 safeguards agreement. See Niksch, supra note 6, at 10.


25. See KCNA Detailed Report, supra note 14 (stating that, according to Agreed Framework, United States was to have provided North Korea with light-water reactor power plants ("LWRs"), but that thus far only basic site preparations have been made in LWR project).

26. See KCNA Detailed Report, supra note 14 (stating that on November 14, 2002, Bush administration decided to suspend December 2002 HFO shipments, abandoning last commitment it had been honoring in Agreed Framework).
DPRK.”27

North Korea stated at the time that, even though it was withdrawing from the NPT, its nuclear activities would be limited to “peaceful purposes including power generation at the present stage.”28 It further stated, “If the U.S. . . . legally assures the DPRK of its non-aggression including the non-use of nukes, the DPRK can also clear the U.S. of its security concerns.”29

In a May 12, 2003 Detailed Report, North Korea further asserted that the United States had invalidated the Joint Declaration by, inter alia, maneuvering with South Korea to “reinforce weapons by behind the screen talks,” carrying out a joint U.S.-South Korea nuclear war exercise, and introducing depleted nuclear bombs into South Korea and later deploying them in February 1997.30

In its January 22, 2003 Detailed Report, North Korea stated that the United States has repeatedly violated its obligations under the Agreed Framework, concluding that the Agreed Framework had been “undisguisedly abolished” by the United States.31

E. North Korean Announcement of Potential Nuclear Deterrent Force

North Korea stated on June 9, 2003 that, “[i]f the U.S. keeps threatening the DPRK with nukes instead of abandoning its hostile policy toward Pyongyang, the DPRK will have no option but to build up a nuclear deterrent force.”32 North Korea has, however, denied ambitions to “nuclearize” the Korean Peninsula.33

27. See id.
28. See id.
29. See id.
and purports to continue to be committed to denuclearizing the area.\textsuperscript{34}

II. THE NORTH KOREAN NUCLEAR PROGRAM

There is considerable uncertainty as to what, if any, nuclear weapons North Korea has. North Korea has reportedly stated that it has a nuclear weapons program\textsuperscript{35} and at least suggested that it has nuclear weapons.\textsuperscript{36} However, North Korea's official posture appears to be that it denies having such weapons and disputes the reports that it has admitted having them.\textsuperscript{37} As to its capability to manufacture nuclear weapons, North Korea states

\textsuperscript{34} See id.

\textsuperscript{35} See Dick K. Nanto, North Korea: Chronology of Provocations, 1950-2003, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, RL30004, at 24, available at http://www.fas.org/man/crs/RL30004.pdf (last visited Apr. 8, 2004) (reporting that on October 17, 2002 North Korea admitted to U.S. envoy James Kelly that it was pursuing nuclear weapons program and that statement was confirmed later by North Korean U.N. delegate). Information for the CRS Report was taken from South Korean and Western sources and generally is denied by the North Korean government. See Visit to Yongbyon Nuclear Scientific Research Center in North Korea: Hearing Before the Senate Comm. on Foreign Relations, 9 (Jan. 21, 2004), available at http://www.fas.org/irp/congress/2004_hr/012104hecker.pdf [hereinafter Hecker Statement] (providing statement of Siegfried S. Hecker, Senior Fellow, Los Alamos National Laboratory and reporting that Ambassador Li and Vice Minister Kim "stressed that the DPRK now has a nuclear deterrent and that U.S. actions have caused them to strengthen their deterrent.").


\textsuperscript{37} See Niksch, supra note 6, at 1 (reporting that North Korea denies that any admissions were made by Vice Foreign Minster Sok-ju to Kelly); see also N. Korea 'admits
that it has reprocessed enough nuclear fuel rods for six plutonium bombs, but denies that it has a program for enriching uranium.

U.S. officials have estimated that North Korea has approximately two nuclear weapons and enough plutonium to pro-

having nukes', supra note 36 (reporting that North Korea denies having made such admission and says United States is using it as justification for military action).

38. See David E. Sanger, North Korea Says It Has Made Fuel For Atom Bombs, N.Y. Times, July 15, 2003, at A1 (reporting that North Korean officials told Bush administration that they had produced enough plutonium to make six nuclear bombs and that they intended to move ahead quickly to turn material into weapons); see also Andrew Ward, Musharraf Retains Ties with N. Korea Despite Nuclear Scandal, Fin. Times (London), Feb. 19, 2004, at 7 (Asia-Pacific) (reporting that North Korea offered to freeze its plutonium-based program in return for compensation from the United States); Niksch, supra note 6, at 2-3.

39. See Hecker Statement, supra note 35, at 11 (reporting that officials of North Korean Ministry of Foreign Affairs stated categorically that North Korea has no program for enriching uranium and no equipment or scientific expertise to do so). See also Ward, supra note 38, at 7 (stating that "Pyongyang's denials that it possesses an HEU (highly enriched uranium) programme have emerged as a serious obstacle to the diplomatic process because the United States will not accept any settlement to end the nuclear crisis unless it includes dismantlement of the uranium enrichment facilities"); North Korea May Complete Uranium Program in 1-2 Years, Korea (Seoul) Times, Jan. 27, 2004 (stating that "[t]he U.S., however, does not seem to have hard evidence on the North Korean HEU program, although it is strongly pressuring North Korea to come clean on the issue at the next six-party talks"). North Korean Vice Minister Kim Gye Gwan has reportedly stated that North Korea has no HEU program and has chosen the plutonium path to a deterrent. See Hecker Statement, supra note 35, at 10; see also Charles L. "Jack" Pritchard, What I Saw in North Korea, N.Y. Times, Jan. 21, 2004, at A27. Jack Pritchard was a member of the January 2004 unofficial delegation to North Korea with Hecker.

The United States' position is that North Korea has stated that it has a HEU program, and that the program does in fact exist. See Niksch, supra note 6, at 1. On October 16, 2002, the second Bush administration disclosed that North Korea revealed to U.S. Assistant Secretary of State James Kelly in Pyongyang that North Korea was developing a secret nuclear weapons program based on uranium enrichment. See id. According to the Niksch report, North Korea began its clandestine uranium enrichment program after 1995 with assistance from Pakistan. See id.

duce up to five warheads. The U.S. estimates are apparently

that North Korea possessed one, possibly two nuclear weapons); David E. Sanger, Pakis-

tani Says He Saw North Korean Nuclear Devices, N.Y. TIMES, Apr. 13, 2004, at A12 [herein-

after Sanger, North Korean Nuclear Devices].

41. See Niksch, supra note 6, at 8 (reporting that in August 2001, Secretary of De-

defense Donald Rumsfeld stated that "North Korea possessed enough plutonium to pro-

duce two to three, maybe even four to five nuclear warheads"). Rumsfeld's estimate is

the largest official U.S. estimate as to the possible number of North Korean nuclear

weapons. See id.; see also Director of Central Intelligence ("DCI"), U.S. Central Intelli-

gence Agency ("CIA"), Unclassified Report to Congress on the Acquisition of Technol-

ogy Relating to Weapons of Mass Destruction and Advanced Conventional Munitions,


jan_jun2001.htm#5 (stating that during period of January 1, 2001 to June 30, 2001,

North Korea continued procurement of raw materials and components for its ballistic

missile program from various foreign sources, especially North Korean firms based in

China, and that North Korea has produced enough plutonium for one to two nuclear

weapons). An unclassified CIA paper from November 2002 stated that the assessment

that North Korea has enough plutonium for one or two weapons has not changed since

the 1990's. See Squassoni, supra note 40, at 4 (citing CIA unclassified paper on North

Korea dated November 19, 2002).

There is a general consensus that North Korea has the technology to produce plu-

tonium, that it did so at least in small quantities in the 1980's and 1990's, and is likely

doing so now. But estimates vary as to how much plutonium they can currently pro-

duce. See Wolfsthal, supra note 40.

North Korea's nuclear plant at Yongbyon reportedly can produce enough pluto-

nium for one nuclear weapon a year. See id. In 1989 North Korea shut down the plant

for over two-months, giving North Korea enough time to have removed the plutonium-

containing fuel from the facility and extracted enough plutonium for one weapon.

However, North Korea admits to having purified only 100 grams of plutonium dur-

ing this time, well short of the four kilograms required for a nuclear weapon. See id.

Wolfsthal points out that samples from the plutonium produced suggest that North

Korea's statements are not a complete picture of their nuclear program prior to the


Under the 1994 Agreed Framework, North Korea shut down its Yongbyon nuclear

plant and removed the 8000 spent fuel rods from the five MWe reactor. See Agreed

Framework, supra note 3; see also Hecker Statement, supra note 35, at 6. The 8000 rods

were placed under IAEA monitoring in exchange for two LWRs, to generate electricity

and an interim supply of heavy fuel oil until the first reactor is complete. See Agreed

Framework, supra note 3. The process of removing the rods was not completed until


inspectors were dismissed by North Korea and no one else has had access to the 8000

ods since. See id. North Korean officials stated to Hecker that they removed all 8000

fuel rods from the spent fuel storage pool and shipped them to the Radiochemical

Laboratory, a plutonium reprocessing facility. See id. They stated that they reprocessed

all 8000 spent rods in a continuous campaign from mid-January 2003 to June 2003. See

id. Hecker confirmed that the rods were no longer in the spent fuel pool. See id. The

Radiochemical Laboratory confirmed that North Korea possesses an industrial-scale

reprocessing facility in good repair. See id. at 7.

Gary Samore, a former deputy to the chief negotiator of the 1994 Agreed Frame-

work, concluded that North Korea's nuclear capacity could increase greatly in over the
based on spy satellite surveillance, inference from available information as to what North Korea has the capability of doing, and North Korea's purported statements on the matter, although additional information has recently come from the Pakistani debriefing of Dr. Abdul Qadeer Khan, the "father of the Pakistani bomb," who reportedly saw two to three North Korean plutonium nuclear devices in 1999 while selling North Korea equipment and know-how to North Korea for the enrichment of uranium. The United States apparently does not contend that it has seen such weapons. U.S. sources have acknowledged that the clandestine nature of the North Korean nuclear program, the closed nature of North Korea's society, and the fact that North Korea has apparently not tested nuclear weapons, are all reasons why it has been difficult for the United States to confirm the existence of North Korea's nuclear weapons program.

The next several years to the point where it might be able to produce eight to thirteen warheads a year. See North Korea May Complete Uranium Program, supra note 39.

42. In June 2003, U.S. satellites collected inconclusive evidence that krypton-85, a gas released during reprocessing, was being emitted from secret development facilities located near the Chinese border. See David E. Sanger, Intelligence Snarl over North Korea, INTL HERALD TRIB., Oct. 15, 2003, available at http://www.iht.com/articles/113591.html. In early 2003, U.S. spy satellites observed rods being taken away from a storage shed, but it is unclear where they were being taken. See id.; see also Wolfsthal, supra note 40; Squassoni, supra note 40 (stating that tests to detect krypton-85 were initially inconclusive but eventually suggested that some reprocessing had taken place).

Kim Dae Ho, who worked on the North Korea nuclear program for ten years until defecting in 1994, stated that the hardest part of hiding the nuclear processing plant from IAEA "was preventing the release of tell-tale krypton into the atmosphere." Jasper Becker, Building the Bomb: North Korean Exile Reveals 15 Year History of Nuclear Cheating, INDEP., Feb. 11, 2004.

43. See supra note 41 (providing support for U.S. inferences about North Korea’s nuclear program).

44. See Sanger, North Korean Nuclear Devices, supra note 40. Dr. Khan, after leading the development of the Pakistani nuclear weapons, embarked on a program of selling nuclear technology throughout the world, including to North Korea. According to Asian and American officials who have been briefed by the Pakistanis, Dr. Khan recently disclosed under Pakistani interrogation that on a trip to North Korea five years ago he was taken to a site approximately an hour out of the North Korean capital and shown "what he described as three nuclear devices." Id. See also supra note 36 and accompanying text.

Pakistan has conducted six nuclear tests and claims weapon yields as high as thirty-six kilotons ("kt"), although the Southern Arizona Seismic Observatory reports that they were more likely in the range of nine to twelve kt. See Federation of American Scientists, Pakistan Nuclear Weapons: A Brief History of Pakistan's Nuclear Program, at http://www.fas.org/nuke/guide/pakistan/nuke (Dec. 11, 2002).

45. See Untitled CIA Estimate, supra note 40. Information on North Korea's nuclear weapons production is dependent largely upon remote monitoring and defector information and has had mixed results. See Squassoni, supra note 40, at 6.

46. See Untitled CIA Estimate, supra note 40.
weapons make it difficult to know what weapons they have.\textsuperscript{47}

The United States' failure to find nuclear and other weapons of mass destruction in Iraq, notwithstanding its prior assertions on the matter, calls into question its assertions as to North Korea's nuclear weapons. Both the United States and North Korea have varying political and strategic agendas as to how they might want to posture the matter.

Independent sources add little clarity or certainty. China and South Korea have recently questioned the accuracy of U.S. intelligence as to North Korea's nuclear weapons, particularly after the U.S. intelligence failure or manipulation as to Iraq.\textsuperscript{48} Russia also questioned the matter in 1998.\textsuperscript{49} Reports from a recent unofficial delegation of U.S. nongovernmental experts,\textsuperscript{50} who were granted access to North Korean nuclear reactors, generally confirmed North Korea's capability to produce certain volumes of plutonium\textsuperscript{51} and reported the assertions of North Korean officials as to their having reprocessed some 8000 fuel rods to extract plutonium metal in 2003.\textsuperscript{52} However, the delegation was not able to confirm whether North Korea had reprocessed the fuel rods,\textsuperscript{53} whether it has a program for enriching uranium,\textsuperscript{54} whether it has the capacity to produce nuclear weapons grade materials\textsuperscript{55} or whether it has nuclear weapons at all.\textsuperscript{56}

\textsuperscript{47} See John M. Donnelly, \textit{North Korea 'Validates' Its A-Bomb Designs}, \textit{Def. Week}, Nov. 10, 2003. There is dispute as to the significance of the fact that North Korea has not tested a nuclear weapon. The CIA has reportedly concluded that it is not necessary for a country to test a nuclear weapon design in order to validate it and has reported that North Korea has conducted certain high-explosive conventional tests that could have served to validate its nuclear weapons program. Georgy Kaurov, Press Secretary of the Russian Atomic Energy Ministry, however, has stated, "[i]f North Korea did have a nuclear bomb, it would have to have been tested." \textit{Russia Rules out Possibility that Pyongyang has Nuclear Weapons}, BBC News, June 5, 1998. Such a test would have been clearly visible from space. \textit{See id.}


\textsuperscript{49} \textit{Russia Rules out Possibility that Pyongyang has Nuclear Weapons}, supra note 47.

\textsuperscript{50} \textit{See generally} Hecker Statement, \textit{supra} note 35, at 3.

\textsuperscript{51} \textit{See id.; see also} Pritchard, \textit{supra} note 39.

\textsuperscript{52} \textit{See} Hecker Statement, \textit{supra} note 35, at 3; \textit{see also} Pritchard, \textit{supra} note 39.

\textsuperscript{53} \textit{See} Hecker Statement, \textit{supra} note 35, at 3; \textit{see also} Pritchard, \textit{supra} note 39.

\textsuperscript{54} \textit{See} Hecker Statement, \textit{supra} note 35, at 11.

\textsuperscript{55} \textit{See id.} at 8, 10.

\textsuperscript{56} \textit{See id.} at 3; \textit{see also} Pritchard, \textit{supra} note 39.
III. THE NORTH KOREAN AND U.S. POSITIONS AS TO THE LAWFULNESS OF NORTH KOREA’S NUCLEAR WEAPONS PROGRAM

A. The North Korean Position

In the Nuclear Weapons Advisory Case, North Korea took the position before the ICJ that “the threat or use of nuclear weapons in any case is violation [sic] of the U.N. Charter and the existing international laws,” and that “the use of nuclear weapons by a State in a war or other armed conflict is a clear breach of its obligations under the international conventions . . . .” North Korea asserted that the use of nuclear weapons would be a breach of the Charter of the United Nations and the IAEA mandate, “which seeks that the atomic energy should only be used for peaceful purposes . . . .” Further, North Korea stated that “it is deplorable that the legality of the threat or use of nuclear weapons is debated when complete elimination of nuclear weapons is under serious discussion on the international arena.”

By subsequently withdrawing from the NPT and accusing the United States of having breached the Joint Declaration based on nuclear threats, North Korea appears to be invoking a theory of self-defense. North Korea stated as follows in its May 12, 2003 Detailed Report:

We will more strongly consolidate our massive self-reliant defense forces that are capable of thoroughly responding to U.S. air strikes with air strikes and U.S. ground strategies with ground strategies and thus, annihilate the aggressors at a blow. These facts clearly show that the United States is the

59. Id.
60. May 18, 1995 Letter.
61. See, e.g., DPRK Says U.S. ‘Ruptured’ Process, supra note 30. See also Pyongyang Says Disarmament Will Only Lead to Invasion, ASSOCIATED PRESS (TAIWAN NEWS), Mar. 19, 2005, available at http://www.etaiwannews.com/Asia/2004/03/19/1079661874.htm (reporting that North Korea has restated its position that inspections and disarmament will only lead to U.S. invasion, as is proven by U.S.-led invasion in Iraq).
ringleader that violated the North-South Declaration of the Denuclearization of the Korean Peninsula.\textsuperscript{62}

North Korea further stated in the \textit{Detailed Report} that "[t]he [second] Bush administration that has been systematically and extensively destroying the process of denuclearization of the Korean Peninsula, finally made it a policy in March 2002 to mount a nuclear preemptive strike against seven countries including our Republic."\textsuperscript{63} North Korea asserted:

This is a violent infringement upon the fundamental spirit of the NPT in which countries possessing nuclear weapons should not threaten other countries with nuclear weapons or use nuclear weapons; should not create a state of emergency that endangers the fundamental interests of the non-nuclear [S]tates; and exert all efforts to avoid nuclear war.\textsuperscript{64}

Contending that U.S. accusations as to North Korea's possessing weapons of mass destruction are provocative, North Korea stated:

U.S. espoused nuclear suspicion, suspicion of development of weapons of mass destruction, and suspicion of terrorism support are all to find an excuse to wage war. Also, the war in Iraq proved that sincerely accepting disarmament through so-called inspections by international agencies does not prevent war but, rather, invites war.\textsuperscript{65}

Specifically as to the war on Iraq, North Korea stated:

The bloody lesson of the war in Iraq for the world is that only when a country has physical deterrent forces and massive military deterrent forces that are capable of overwhelmingly defeating any attack by state-of-the-art weapons, can it prevent war and defend its independence and national security.\textsuperscript{66}

North Korea further asserted:

The reality shows that, under circumstances in which the United States does not show any political will or intent to abandon its hostile policy toward the DPRK, the issue of us equipping ourselves with our own physical deterrent forces is an urgent demand for preventing a nuclear war from break-

\textsuperscript{62} DPRK Says U.S. 'Ruptured' Process, \textit{supra} note 30.
\textsuperscript{63} See \textit{id}.
\textsuperscript{64} See \textit{id}.
\textsuperscript{65} See \textit{id}.
\textsuperscript{66} See \textit{id}.
ing out on the Korean Peninsula and guaranteeing peace and
security in the work.67

Reflecting what can be seen as the de facto irrelevance of
international law in light of the nuclear programs of the United
States and other nuclear powers, North Korea has stated that,
now that it has withdrawn from the NPT, it, like the other nu-
clear powers, is no longer subject to international law as to such
weapons:

Now that the DPRK is no longer bound to the safeguards ac-
cord with the International Atomic Energy Agency after its
withdrawal from the NPT the DPRK has the same legal status
as the United States and other countries possessing nuclear
weapons not bound to international law, as far as the issue of
nuclear deterrent force is concerned.68

It becomes relevant to note the economic rationale/justifi-
cation North Korea has stated for its nuclear program:

The DPRK’s intention to build up a nuclear deterrent force is
not aimed to threaten and blackmail others but reduce con-
ventional weapons under a long-term plan and channel man-
power resources and funds into economic construction and
the betterment of people’s living.
The DPRK will build up a powerful physical deterrent force
able of neutralizing any sophisticated and nuclear weap-
ons with less spending unless the U.S. gives up its hostile pol-
icy toward the DPRK.69

North Korea contends that, in exchange for its agreeing to a
moratorium on long-range missile testing and refraining from
further exporting of missiles and missile technology, it wants a
non-aggression pact and/or a new nuclear agreement with the
United States.70

67. See id.
68. See DPRK Radio Statement, supra note 32. Upon withdrawing from the NPT,
North Korea considered itself free from IAEA safeguards, stating that it now enjoyed
“the same legal status as the United States and other countries possessing nuclear weap-
ons . . . .” Charles Whelan, North Korea Admits Nuclear Weapons Drive, Blames Washington,
69. See DPRK Radio Statement, supra note 32.
70. See Niksch, supra note 6, at 1-2, 7; see also DPRK Says U.S. ‘Ruptured’ Process, supra
note 30. The North Korean position is as follows:
[W]e proposed several times to hold direct talks between the DPRK and the
United States and firmly insisted on settling the nuclear issue by concluding a
non-aggression treaty so as to by all means prevent the rupture of the process
While the United States continually has objected to North of denuclearization of the Korean Peninsula even when maneuvers to abrogate the DPRK-US Agreed Framework and scrap the North-South Joint Declaration of the Denuclearization reached the extreme. 

North Korea wants the United States to "issue security assurances, normalize bilateral diplomatic relations, refrain from hindering North Korea's 'economic cooperation with other countries' and increase food aid," in addition to completing the nuclear reactor project and resuming the fuel shipments promised under the Agreed Framework. 

North Korea reported that a visiting delegation of congressional staffers in August 1998 that it would stop its ballistic missile sales to countries such as Iran in exchange for U.S. compensation of U.S.$1 billion annually. 

In the April 2003 Beijing talks, North Korea reportedly asked that the United States: 1) provide it with energy, presumably electricity; 2) facilitate the completion of LWRs pursuant to the terms of the Agreed Framework; 3) remove North Korea from the list of terrorist countries; 4) establish full diplomatic relations with North Korea; and 5) issue a written, legal security guarantee against either a nuclear or conventional attack against North Korea. 

71. The U.S. position on North Korea's nuclear program has evolved over time. When the CIA first identified the North Korean nuclear program in the early 1980s, it did not treat the matter as cause for concern, but rather focused on North Korea's energy concerns as the rationale for its nuclear ambitions. 

The Reagan administration passed on an opportunity to address this issue when China approached the United States to broker direct talks between the United States and North Korea. 

The first Bush administration expressed concern over the developing North Korean nuclear capacities in violation of the NPT and asked China to request that North Korea abide by its commitments under the NPT regime. 

The Clinton administration pursued a strategy of direct engagement with North Korea, negotiating a number of international agreements, including the Agreed Framework in 1994 in hopes of keeping the North Korean nuclear program in check via diplomacy, international inspection, and regulatory regimes.
The first position the administration of President George W. Bush took towards the nuclear weapons program of North Korea was an extensive period of policy analysis, followed by a skeptical view of the utility of negotiation with North Korea. See Seung-Hwan Kim, Anti-Americanism in Korea, 26 Wash. Q. 109 (2002).

This policy of neglect was revised after North Korea restarted its nuclear reactor, expelled IAEA inspectors, and withdrew from the NPT. Three months subsequent to its withdrawal, North Korea, in the course of three-way talks with the United States and China, reportedly informed Assistant Secretary of State James Kelly that it possessed nuclear weapons. See supra notes 35-38 and accompanying text.

The current Bush administration then chose a policy of confrontation over engagement, referring to North Korea as a threat to the nonproliferation regime, while simultaneously making it clear that it chose to address such problems with preemptive military action. See Wade L. Huntley, Countdown on the North Korean Nuclear Crisis, 2 Strategic Insights 5, May 2003, available at http://www.ccc.nps.navy.mil/si/may03/eastAsia.asp. Secretary of State Colin Powell, however, has stated that the United States’ principal focus is a negotiated — as opposed to military — resolution to the confrontation. See Bureau of International Information Programs, U.S. Dept. of State, U.S. Seeks Diplomatic Resolution for North Korea, Powell Says, Jan. 11, 2004, at http://usinfo.state.gov/regional/ea/easec/nkoreapg.htm.

North Korea has enunciated a set of conditions for abandoning its nuclear weapons program. See supra note 70 and accompanying text. The Bush administration has responded that the United States is willing to offer a written, multilateral security agreement, “in the context of North Korea’s complete and verifiable and irreversible dismantlement of its nuclear weapons program.” Kerr, supra note 70. The administration has recently indicated more flexibility regarding whether North Korea must first dismantle all of its nuclear facilities before an agreement can be reached. See id.

While the United States has not enunciated clear criteria for a resolution of the confrontation, it has stated that it is willing to provide multilateral security arrangements, so long as North Korea begins dismantling its nuclear weapons program. In February 2004, the six parties met again to negotiate a resolution to the crises, but failed to come to a settlement on the future of North Korea’s nuclear program. See Andrew Ward, North Korea Sees Little Hope of Ending Stalemate, Fin. Times, Mar. 1, 2004, at 7. The parties agreed to hold a third round of talks in July and establish a permanent working group but North Korea has expressed doubt as to the efficacy of talks in solving the dispute over its nuclear weapons program. See id. The Bush administration has not clarified what North Korea would have to do before security assurances would be provided. As to North Korea’s demands for economic aid, the administration has made it clear that it will not provide concessions until disarmament is under way. See id.

At the same time, the United States has taken steps to strengthen its strategic position vis-à-vis North Korea. In April 2003, Deputy Assistant Secretary of Defense for East Asian and Pacific Affairs Richard Lawless, while meeting with his South Korean counterpart, announced the United States’ intention to reposition its forces, removing them from their current position along the Demilitarized Zone (“DMZ”) to south of the Han river and moving U.S. military command in the region from Seoul to Osan. See International Institute for Legal Studies, American Forces in South Korea: The End of an Era?, 9 Strategic Comments 10, available at http://www.iiss.org/stratcomfree.php?scID=277.

The military has provided three rationales for this redeployment: 1) the need for South Korean forces to take a more active role in defense of the DMZ; 2) the “tripwire”
Korea's development of nuclear weapons\textsuperscript{72} and in the past has asserted North Korea's violation of its obligations under the NPT, the Joint Declaration, the Agreed Framework, and North Korea's IAEA safeguards agreement,\textsuperscript{73} it does not appear to have based its objections on the ground that the use or threat of use of nuclear weapons is unlawful.\textsuperscript{74} The United States also has objected to North Korea's withdrawal from the NPT, but it does not appear to have set forth a legal basis for its objections.\textsuperscript{75}

conception of defense for the Korean Peninsula no longer comports with reality, since, in a conflict with South Korea, North Korea would most likely bypass traditional invasion corridors and attack with missiles and Special Forces units, making defense of the DMZ of less importance; and 3) by repositioning U.S. forces further south of the DMZ, it would make them more mobile and more convenient for deployment to nearby areas where regional conflicts are more likely. See id. Along with this repositioning, the United States will provide technology grants to the South Korean forces, upgrading their ground- and air-defense, counter-battery fire, and airborne early warning capabilities. See id.

A significant policy shift came in September 2003 when the current South Korean administration decided to push for an end to the 1954 Armistice Agreement, which previous South Korean governments saw as a linchpin to stability on the peninsula, envisaging that the end of the Armistice would mean the United States would be likely to withdraw its troops from South Korea. See South Korean Minister Says U.S. to Address North Korean Security Concerns, BBC Monitoring Int'l Reports, Sept. 27, 2003.


73. See, e.g., Richard Boucher, Spokesman, U.S. Dept. of State Press Statement on North Korea Nuclear Program (Oct. 16, 2002), available at http://www.state.gov/r/pa/prs/ps/2002/14432.htm (stating that "North Korea's secret nuclear weapons program is a serious violation of North Korea's commitments under the Agreed Framework as well as under the Nonproliferation Treaty (NPT), its International Atomic Energy Agency safeguards agreement, and the Joint North-South Declaration on the Denuclearization of the Korean Peninsula").

74. The U.S. State Department merely stated that the North Korean withdrawal from the NPT was "regrettable" and urged North Korea to dismantle its nuclear weapons program. See N. Korea Move on inter-Korean Nuclear Accord 'Regrettable' — U.S. State Department, AFX European Focus, May 13, 2003. The United States may be taking this position since it, unlike North Korea, espoused the legality of nuclear weapons before the ICJ. See supra notes 57-60 and accompanying text (setting forth North Korea's statements to ICJ as to the illegality of nuclear weapons); see also infra notes 353, 371, 377, 397, 417, 417, 430-31, 435, 447, 451, 461-63, 465-66, 477 and accompanying text (setting forth U.S. position before ICJ espousing general legality of nuclear weapons).

75. This may result from the similarity of North Korea's withdrawal from the NPT to the United States' withdrawal, on December 13, 2001, from the Anti-Ballistic Missile Systems Treaty that it signed with the Soviet Union in 1972. See Treaty Between the

Each of these withdrawals from a leading international arms control treaty was based on alleged changes in circumstances. As to North Korea's alleged basis for withdrawal from the NPT, "[e]ach Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interest of its country . . . ." See NPT, supra note 6, at art. X; see also KCNA Detailed Report, supra note 6. As to the United States' alleged basis for withdrawal from the ABM Treaty, "[e]ach Party shall, in exercising its national sovereignty, have the right to withdraw from this Treaty if it decides that extraordinary events related to the subject matter of this Treaty have jeopardized its supreme interests . . . ." Treaty on the Limitation of ABM Systems and Interim Agreement and Protocol on the Limitation of Strategic Offensive Arms, Oct. 3, 1972, U.S.-U.S.S.R., 944 U.N.T.S. 13, 11 I.L.M. 784; see also America Withdraws from ABM Treaty, supra note 75; Patricia Hewitson, Nonproliferation and Reduction of Nuclear Weapons: Risks of Weakening the Multilateral Nuclear Nonproliferation Norm 21 BERKELEY J. INT'’L L. 405, 419-20 (2003).

Upon withdrawing from the NPT, North Korea considered itself free from IAEA safeguards, stating that it now enjoyed "the same legal status as the United States and other countries possessing nuclear weapons . . . ." Whelan, supra note 68.

South Korea then reminded North Korea that the inter-Korean nuclear accord was still valid and a legal bar to North Korea's developing nuclear weapons. See N. Korea Move on inter-Korean Nuclear Accord 'Regrettable' — U.S. State Department, supra note 74.

North Korea responded that the agreement was dead and blamed Washington for its need to abrogate the arrangement. See S. Korea Says Nuclear Accord with N. Korea Still Valid, AFX-ASIA, May 19, 2003; see also Seo Hyun-Jin, N. Korea Promotes Its Stance; Declares Denuclearization Pact 'Dead', KOREA (Seoul) HERALD, May 14, 2003.


Ironically, just as North Korea justified its withdrawal from the NPT in part on alleged actions and intentions of the United States, so also the United States justified its withdrawal from the ABM Treaty in part on alleged actions and intentions of North Korea. The second Bush administration withdrew from the ABM Treaty so that the United States could pursue missile defense technologies. See, e.g., America Withdraws from ABM Treaty, supra; Patrick E. Tyler, Global Reaction to Missile Plan is Cautious, N.Y. TIMES, May 3, 2001, at A10.

The Bush administration wanted missile defense to protect against perceived dangers from "rogue nations," such as North Korea, including from the proliferation of missiles possessed by such States. See David E. Sanger, AFTER EFFECTS: STRATEGIC ARMS; Bush Issues Directive Describing Policy on Antimissile Defenses, N.Y. TIMES, May 21, 2003, at A21; see also Hewitson, supra, at 419-20 (citing Richard Boucher, Spokesman, U.S. Dept. of State, Text of Diplomatic Notes Sent to Belarus, Kazakhstan, Russia, Ukraine (Dec. 14, 2001), available at http://www.usembassy.org.uk/acda283.htm).

V. BACKGROUND TO THE U.S./NORTH KOREAN ADVERSARY RELATIONSHIP

A. Korean War

From 1905 until the end of World War II, Korea was a colony of the Japanese empire. Pursuant to U.S./Soviet agreement following the war, Korea was divided into U.S. and Soviet sectors, pending Korean independence at some unspecified time in the future. The Russians, who previously had been sweeping south through Manchuria, agreed to limit their advance at the 38th parallel. The area north of the 38th parallel was to be occupied by the Soviet Union and that to the south by the United States.

Russian forces departed North Korea peacefully, leaving behind a Stalinist regime under Kim II Sung and the North Korean Peoples' Army. Operating under a U.S. military administration directed by General Douglas MacArthur from headquarters in Tokyo, the United States backed an administration headed by Syngman Rhee, who had previously been elected president of...


This contrasted with Mr. Bolton's comment when the United States withdrew from the ABM Treaty, "There may be good and sufficient reasons to abide by the provisions of a treaty, and in most cases one would expect to do so because of the mutuality of benefits that treaties provide, but not because the United States is 'legally' obligated to do so." Burroughs, supra (citing John Bolton, Is There Really 'Law' in International Affairs, 10 TRANSNAT'L L. & CONTEMP. PROBS. 1 (2000)).

This Article does not address the point developed by Mr. Burroughs to the effect that a binding norm of international law has developed outlawing the possession of nuclear weapons or the argument that the United States is itself in breach of the NPT by not fulfilling its Article VI obligations to "pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament." Burroughs, supra.

77. See HASTINGS, supra note 76, at 27.
78. See id.
79. See id. at 43.
80. See id. at 27; see also Hickey, supra note 76, at 46.
the Korean Provisional Government while in exile and was elected South Korean president in 1948; President Rhee's openly declared aim was the imposition of national unity by force.81

After several years of border clashes,82 North Korea directly attacked on South Korea and moved its army south across the 38th parallel early in the morning of June 25, 1950.83 The North Korean army, led by Premier Kim II Sun, had eight full divisions totaling 135,000 troops, with soldiers who had served in the Chinese and Soviet World War II armies making up a large part of the force.84 The South Korean army had only 95,000 troops, who were generally less experienced.85

The North overwhelmed the South while the United States called on the Security Council to invoke the United Nations Charter branding North Korea as the aggressor. The Security Council responded and called on member states to send military assistance to South Korea.86 The Security Council's action was supported by fifty-three U.N. members, and twenty-nine of these made specific offers of assistance. The United States sent troops,87 and the British government responded by placing its

81. See Hickey, supra note 76, at 46.

82. According to Hastings' account, North Korea did not hold a monopoly as to responsibility for border incidents. See Hastings, supra note 76, at 46. One of the most serious incidents occurred in May 1949 when South Korean forces penetrated 2.5 miles into North Korean territory attacking local villages. See id.

83. See American Military History, supra note 76. But see Democratic People's Republic of Korea, The Great War for the Liberation of the Motherland — Korean War, available at http://www.korea-dpr.com/history30.htm [hereinafter The Great War for the Liberation of the Motherland] (providing brief account of North Korean perspective of Korean War). Some contend that North Korea's invasion of the South was in response to South Korean President Syngman Rhee's openly declared policy of national unity by force. According to North Korean accounts of June 25, 1950 and events leading up to that day, the United States was the aggressor, and on June 25th it began its "invasion to the north" under the directions of John Foster Dulles, Advisor to the U.S. State Department. According to this account, Dulles had President Syngman Rhee issue propaganda statements indicating that North Korea was the initial aggressor, so that the United States could invade North Korea under the flag of the U.N. See The Great War for the Liberation of the Motherland, supra.

84. See American Military History, supra note 76.

85. See id. at 25.

86. See Hickey, supra note 76, at Introduction.

87. U.S. occupation troops had only just left Korea in June 1948, on the basis that they had done all that was necessary to aid in South Korea's transition from Japanese protectorate to independent state. See Hastings, supra note 76, at 42.
Far East Fleet along the Korean coast. In total, twenty Nations sent military assistance to Korea and were led by a single United Nations commander, General Douglas MacArthur of the United States.

In mid-September 1950, General MacArthur, leading two divisions of U.N. troops, pushed the North Koreans back across the 38th parallel and proceeded deep into the north. China, in response to U.N. forces approaching its border with Korea, launched a preemiptory attack, pushing the U.N. forces south.

By January 1951, U.N. forces were defending a line well to the south of Seoul. The United States and its allies regrouped and by mid-April 1951 were back in the area of the 38th parallel, at which time China launched a spring offensive. This time the line stabilized in the general area of the 38th parallel, where it remained for the next two years.

In mid-1951 the land battle had reached a stalemate, and both sides agreed to go to the conference table for armistice talks. The negotiations continued for two years. In July 1953, an armistice was reached.

B. Armistice Agreement

The Korean Armistice Agreement ("Armistice Agreement") was signed on July 27, 1953 by the Commander-in-Chief of the United Nations Command, representing U.N. forces, and the Supreme Commander of the Korean People's Army and the Commander of the Chinese People's Volunteers, representing North Korean and Chinese forces. Providing for a cease-fire, the Armistice Agreement established a military demarcation line

88. See Hickey, supra note 76, at Introduction. The U.N.'s response was unprecedented in that it was the first time since its founding that the U.N. reacted to aggression with a decision to use force. See American Military History, supra note 76.
90. See Hickey, supra note 76, at China's Intervention.
91. See id.
92. See id.
93. See id.
94. See id.
95. See infra notes 111-16 and accompanying text.
and demilitarized zone, and created the Military Armistice Commission to supervise the Agreement.\textsuperscript{97} The Armistice Agreement was intended to be temporary, pending the parties' agreement to a peace treaty following a political conference that was set to take place within three months. The conference's goal was to resolve all outstanding questions, including the withdrawal of all foreign forces from Korea and a peaceful settlement to the Korean question.\textsuperscript{98}

But the Armistice Agreement has never been replaced with a treaty.\textsuperscript{99} In recognition of the need for a peace treaty, the North and South in late 1991 signed the Agreement on Reconciliation, Non-Aggression and Exchanges and Cooperation between South and North, and in 1992 signed the Joint Declaration.\textsuperscript{100}

C. North Korean Provocations According to the United States

Despite the Armistice Agreement, there continued to be provocations and conflicts among the parties. The U.S. Congressional Research Service ("CRS"), in a study updated in 2003, documented some 124 provocations by North Korea against South Korea, the United States, and/or Japan between June 1950 and March 2003.\textsuperscript{101}

Such provocations included infiltrations of thousands of armed agents into South Korea, followed by kidnapping and terrorism,\textsuperscript{102} attempted assassinations of South Korean President

\textsuperscript{97} See id. arts. I(1), II(A)-(B).
\textsuperscript{98} See id. art. IV.
\textsuperscript{100} See Agreement on Reconciliation, Non-Aggression and Exchanges and Cooperation Between North and South, entered into Force on Feb. 19, 1992, available at http://www.korea.net/issue/sn/summit/summit_012106.asp; see also Joint Declaration, supra note 2; Chol Gu supra note 99, at 1; Federation of American Scientists, supra note 36.
\textsuperscript{101} See Nanto, supra note 35.
\textsuperscript{102} See id. at Summary. "North Korea is reported to have infiltrated a total of 3,693 armed agents into South Korea from 1954 to 1992 . . . ." Id. at 2. North Korea was particularly active in the latter half of the 1960s with 20% of the infiltrations occurring during 1967 and 1968. See id. at Summary. In April 1996, "[o]n three occasions, a combined total of seven hundred armed North Korean troops crossed the military demarcation line into the DMZ at Panmunjom . . . in violation of the Korean Armistice Agreement ("KAA")." Id. at 13.
Park Chung Hee in 1968 and 1974; an assassination attempt on South Korean President Chun DooHwan in Rangoon, Burma (Myanmar) in 1983;\(^\text{103}\) and the mid-air bombing of a South Korean Boeing 707 passenger plane in 1987.\(^\text{104}\) In 1968, North Korea captured a U.S. surveillance ship, the U.S.S. Pueblo, killing one sailor and holding eighty-two crew members prisoner for eleven months.\(^\text{105}\) There have also been numerous direct military confrontations between North Korea and the United States over the years.\(^\text{106}\)

In June 1998, "North Korea declared its intention to continue to develop, test, and deploy missiles as a means of countering the alleged U.S. military threat."\(^\text{107}\) In October 2002, as noted above, North Korea reportedly advised U.S. envoy James Kelley "that it was pursuing a nuclear weapons development program."\(^\text{108}\) On April 24, 2003, in a roundtable discussion among representatives of China, North Korea, and the United States, North Korea reportedly admitted that it had nuclear weapons.\(^\text{109}\) The North Korean officials reportedly "claimed to have reprocessed spent fuel rods and threatened to begin exporting nuclear materials unless the United States agrees to one-on-one talks with North Korea."\(^\text{110}\)

In addition, North Korea has exported substantial numbers of ballistic missiles and related equipment and systems over the

\(^{103}\) See id. at 8-9. The explosion of a powerful bomb minutes before South Korean President Chun's arrival "killed 17 senior South Korean officials and injured 14 . . . . The explosion also killed four Burmese nationals and wounded thirty-two others." Id. Two other North Korean plots to assassinate President Chun were uncovered in 1982 and 1984. See id. at 8-9.

\(^{104}\) See id. at 10. North Korean terrorists planted a bomb on a Korean Airline Boeing 707 en route from Baghdad to Seoul, with 20 crewmembers and 95 passengers aboard, [that] exploded in midair over the Andaman Sea off the coast of Burma." Id. The North Korean motive for planting the bomb was reportedly to warn against those planning to take part in the Seoul Olympics. See id.

\(^{105}\) See id. at 4.

\(^{106}\) In April 1969, North Korean MiG jet fighters shot down an unarmed U.S. EC-121 reconnaissance plane over the Sea of Japan, about 90 miles off the North Korean coast, resulting in the loss of 31 lives; and in October 1969, four U.S. soldiers were ambushed and killed near the southern boundary of the DMZ. See id. at 5. In March 2003, four North Korean fighter jets intercepted a U.S. Air Force reconnaissance plane in international airspace over the Sea of Japan. See id. at 25-26.

\(^{107}\) Id. at 16.

\(^{108}\) Id. at 24.

\(^{109}\) See id. at 35; see also Federation of American Scientists, \textit{supra} note 36.

\(^{110}\) See Niksch, \textit{supra} note 6; see also Federation of American Scientists, \textit{supra} note 36.
past several decades, establishing it as a leading ballistic missile proliferator.\textsuperscript{111} Its markets have included Egypt, Iran, Libya, Pakistan, Syria, and the United Arab Emirates,\textsuperscript{112} yielding it hundreds of millions of dollars annually.\textsuperscript{113}

In October 2002, North Korea reportedly provided Pakistan with help in developing long range missiles, in addition to the intermediate range ballistic missiles it had supplied to Pakistan in the late 1990's,\textsuperscript{114} in exchange for centrifuge enrichment technology ostensibly intended for use in nuclear weapons.\textsuperscript{115}

North Korea’s proliferation efforts appear to be pervasive and ongoing.\textsuperscript{116} In December 2002, a North Korean ship was

\begin{footnotesize}
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\item 112. See id. Iraq would have been included as one of North Korea’s customers had the deal gone through. See Bob Drogin, \textit{Botched Iraqi Deal is Detailed: CIA Advisor Says Hussein Lost $10 Million in a Plan to Smuggle North Korean Technology That Never Went Through}, L.A. TIMES, Oct. 4, 2002 (reporting that Saddam Hussein lost $10 million in botched deal with Kim Jong Il for North Korean ballistic missile technology and other prohibited missile equipment prior to war).
\item 114. See Niksch, supra note 6, at 1. Most of North Korea’s exports are short range missiles (but it has also exported medium and possibly long range missiles). See Bermudez, supra note 111; U.S. North Korea at ‘Critical Juncture’ Over Missiles, CNN.com, available at http://www.cnn.com/world/asiafp/9811/20/korea.missiles/index.html. North Korea is believed to have provided between twelve and twenty-five complete No-Dong medium-range missiles to Pakistan in the late 1990s. See Niksch, supra note 6, at 9.
\item 115. See Squassoni, supra note 40, at 2 (quoting Pakistan’s Benazir Oversaw Korea Nuclear Deal- sources, REUTERS NEWS, Nov. 20, 2002).
\item 116. Apropos of U.S. allegations as to North Korea’s proliferation of ballistic missiles, it is interesting to review U.S. proliferation activities. The United States dominates the international market for arms. In 2002, it had worldwide sales of some “$13.3 billion, or 45.5 percent of global conventional weapons sales, a rise from $12.1 billion in 2001.” Thom Shanker, \textit{U.S. Remains Leader in Global Arms Sales, Report Says}, N.Y. TIMES, Sept. 25, 2003, at A12.
\item Kuwait was at the top of the list of all potential arms recipients with requests for $2.29 billion in weaponry that included eighty AIM-120C Advanced Medium Range Air-to-Air Missiles. See id. Ranking second and third respectively were the United Arab Emirates ("U.A.E.") and Taiwan. See id.
\end{itemize}
\end{footnotesize}
Included in the U.A.E.'s order were 237 Sea Sparrow ship-to-air missiles. See id. Taiwan ordered 290 TOW-2B anti-tank missiles with spare and repair parts, four Kidd-class guided missile destroyers, 248 SM-2 Block IIIA Standard ship-to-air missiles, 323 RGM-84L Block II Harpoon anti-ship missiles. See id.

The United States is a member of the Missile Technology Control Regime ("MTCR") and the International Code of Conduct Against Ballistic Missile Proliferation ("ICOC"). North Korea is not a member of either organization. The MTCR was created in 1987 by seven countries including the United States to restrict the proliferation of nuclear-capable missiles and related technology. See Bureau of Nonproliferation, U.S. Dept. of State, Missile Technology Control Regime Fact Sheet, Dec. 23, 2003, available at http://www.state.gov/t/np/rls/fs/27514.htm. As of December 2003, there were thirty-three members to the MTCR and four unilateral adherents. See id. In 1993, the focus of the MTCR was expanded to include missiles for the delivery of chemical or biological weapons. See id.

The MTCR is not a treaty, but rather a voluntary agreement among its members purportedly interested in controlling missile proliferation. See id. The MTCR restricts transfers of missiles, in particular focusing on unmanned delivery systems capable of delivering a payload of 500kg a distance of at least 300km. See id. (defining missiles as "rocket systems (including ballistic missiles, space launch vehicles, and sounding rockets) and unmanned aerial vehicle systems (including cruise missile, target drones, and reconnaissance drones) capable of delivering WMD—and their related equipment and technology"). In 2003 the MTCR mandate was expanded to include preventing terrorists from acquiring missiles and missile technology. See id.

The United States also actively participated in the ICOC, which was formally brought into effect on Nov. 25, 2002 at a launching conference hosted by the Netherlands, at The Hague, and is one of the ninety-three original subscribing States. See Bureau of Nonproliferation, U.S. Dept. of State, International Code of Conduct Against Ballistic Missile Proliferation Fact Sheet, Jan. 6, 2004, available at http://www.state.gov/t/np/rls/fs/27799.htm. As of November 9, 2003, there were 111 subscribing States. The ICOC is intended to supplement the MTCR and not supplant it. It is intended to set general principles, elicit modest commitments, and establish confidence-building measures. See id.

At the ICOC launching conference, the United States made clear its support of the ICOC and MTCR, but also stated that it sees its missile defense program as another important element to protect against the dangers posed by Weapons of Mass Destruction ("WMD") and ballistic missile proliferation. See John R. Bolton, Undersecretary for Arms Control and International Security, Remarks at the Launching Conference for the International Code of Conduct Against Ballistic Missile Proliferation, The Hague, The Netherlands (Nov. 25, 2002), available at http://www.state.gov/t/us/rm/15488.htm. Bolton stated that the United States views its missile defense program as, "complementary to, and consistent with the objectives of the ICOC and the MTCR." Id.

Towards the end of his remarks at the launching conference, Mr. Bolton made specific reference to North Korea's recent violation of the NPT by its announcement that it has a program to enrich uranium. See id. Speaking of the States that did not subscribe to the ICOC, he stated, "[F]ar better to know who is actually prepared to live under its terms, and who is not. Far better to know who is truly serious about stopping the proliferation of ballistic missile technology and the risk that such technology could be used to carry weapons of mass destruction against innocent civilian populations." Id.

In addition to its sales of military supplies throughout the world, United States military hardware is located throughout the world, both on foreign bases of allies and on ships and submarines throughout the high seas.
found in the Persian Gulf carrying Scud missiles to Yemen. Recently, Nigeria has shown interest in acquiring missile technology from North Korea. According to a Nigerian government spokesman, visiting North Koreans showed Nigerian military leaders a "catalog of what they have," but "Nigeria has not taken any concrete steps in acquiring it yet." According to David Kay, a U.S. weapons inspector, North Korean dictator Kim Jong Il cheated Saddam Hussein out of $10 million in an aborted deal to smuggle ballistic missile technology and other prohibited military equipment to Iraq shortly before the recent war.

Notwithstanding being a member of the Biological Weapons Convention, which largely prohibits the possession of biological weapons, North Korea is believed to have pursued such weapons and methods through which to weaponize them since the 1960's through dual-use acquisitions, and it is currently believed to possess anthrax, cholera, plague, smallpox, and yellow fever, among others. North Korea also ostensibly has a well-developed chemical weapons program.

117. See id. at 24.
118. Editorial, Missiles for Sale: North Korea Spreading Weapons Technology to Largest African Nation, COLUMBUS (Ohio) DISPATCH, Jan. 30, 2004, at 10A.
119. See Drogin, supra note 112.
121. See DCI, supra note 41; see also Federation of American Scientists, North Korea Special Weapons Guide: Chemical Weapons Program, at http://www.fas.org/nuke/guide/dprk/cw/index.html (noting that North Korea obtained some of these chemicals from Japan through contract for delivery of agricultural chemicals, allowing them to make tabun, mustard gas and later chlorine and phosphorous-containing organic compounds). It is also believed that North Korean intelligence agents are involved in clandestine operations to acquire technology and information to aid in their chemical weapons program. See U.S. Dept. of Defense, Northeast Asia, in PROLIFERATION: THREAT AND RESPONSE (Report 1997), available at http://www.defenselink.mil/pubs/prolif/ne_asia.html.

North Korea is believed to have acquired and developed its chemical and biological weapons in part through lax export controls in China and Japan. See Taking the Risk of Mass Destruction Seriously, S. CHINA MORNING POST, Jan. 30, 2004, at 13. Recently the
Although North Korea denies possession or intent to use chemical or biological weapons, the United States and others believe that North Korea possesses large quantities of chemical and biological agents that can be delivered by missile warheads and other munitions, including "domestically produced artillery, multiple rocket launchers, mortars, aerial bombs, and ballistic missiles." As of 1998, the Federation of American Scientists had identified twenty special weapons facilities in North Korea that may be producing, storing, or developing chemical or biological weapons. South Korean intelligence sources indicate that, as of 1999, "North Korea maintained eight chemical factories, four research facilities, and six storage facilities for mass producing chemical agents." As outlined in a White Paper published by the South Korean Ministry of Defense in 1999, North Korea is estimated to have some 5,000 pounds of chemical weapons — some capable of reaching the

United States has put pressure on East Asian countries to tighten their export controls, which has prompted a multi-lateral meeting where dual-use technology export restrictions were agreed on and a system to exchange intelligence related to its trade established. See id.

The United States has severely limited the manner in which it will comply with the Chemical Weapons Convention, by prohibiting the analysis of U.S. chemical samples in laboratories outside of the United States, by asserting a Presidential right to refuse on-site inspections, and by limiting the scope of the industrial facilities that have to be declared. See Rule of Power or Rule of Law? 71 (S. Nicole Deller et al. eds., 2003). Additionally, the United States — despite fears of bioterrorism — has generally rejected efforts to strengthen the Biological Weapons Convention through the establishment of a reliable verification protocol. See id. at 76-81.


126. See DCI, supra note 41.

127. See U.S. Dept. of Defense, supra note 121.


southern tip of the Korean Peninsula. North Korea has reportedly devoted significant resources to defensive measures for protecting its population from the effects of chemical weapons, arguably to provide greater latitude for their use in combat.

On January 29, 2002, just four months after the September 11th attacks on New York and the Pentagon, President George W. Bush issued his State of the Union address setting forth, inter alia, his administration’s two objectives in the war on terror: (1) to “shut down terrorist camps, disrupt terrorist plans, and bring terrorists to justice;” and (2) to “prevent the terrorists and regimes who seek chemical, biological or nuclear weapons from threatening the United States and the world.” In his discussion of the second objective, President Bush referred to the three States at the top of his list of “regimes that sponsor terror [and threaten] America or our friends and allies with weapons of mass destruction,” as an “axis of evil.”

North Korea was named first, described by President Bush as a “regime arming with missiles and weapons of mass destruction;” next came Iran, which “aggressively pursues these weapons and actively exports terror;” and last Iraq, a “regime [that] has


The facts as to North Korea’s chemical and biological programs are less than clear because there have never been any international inspections. See Council on Foreign Relations Discussion with Gary Samore, Director of Studies and Senior Fellow for Nonproliferation, The International Institute For Strategic Studies; and Adam Ward, Senior Fellow for East Asian Security, The International Institute for Strategic Studies, Fed. News Service, Jan. 23, 2004. Under the Chemical Weapons Convention however, there is a robust inspection regime where parties have to declare their chemical weapons facilities and stockpiles and they must allow inspections of “dual-use” production facilities that could be used to create chemical weapons. See Deller, supra note 123.

131. See Federation of American Scientists, supra note 121.


133. See id. President Bush elaborated on the axis of evil in his 2003 State of the Union Address, although he never explicitly referred to it as such. See 2003 State of the Union Address, supra note 72.

134. See 2002 State of the Union Address, supra note 132.
plotted to develop anthrax, and nerve gas, and nuclear weapons for over a decade.”

President Bush went on to outline the general strategies to be followed by the United States against the threat posed by the axis of evil and States like them, including the development and deployment of an effective missile defense to protect American and its allies from attack and preemption.

David Frum and Richard Perle in their recent book, *An End to Evil*, make the case that North Korea — along with Iran, Libya, Saudi Arabia and Syria — are “terrorist states,” requiring aggressive action by the United States if it is to win the war on terror, and “we don’t have much time.” Frum and Perle support the approach of preemptive attack followed by the current Bush administration. Pursuant to this approach, which is stated to be proven by our experience with bin Laden, they contend that, “the responsible thing to do when confronted by a foreign threat is to act when we can, and the earlier the better.” They state:

135. See id.
136. See id. President Bush described the rationale for his strategy of preemption as the following: “I will not wait on events, while dangers gather. I will not stand by, as peril draws closer and closer. The United States of America will not permit the world’s most dangerous regimes to threaten us with the world’s most destructive weapons.” Id.

137. See David Frum & Richard Perle, An End to Evil: How to Win the War on Terror 98 (2003). David Frum is currently a resident fellow at the American Enterprise Institute, a contributing editor at National Review, a columnist for Canada’s *National Post*, and a regular contributor to Britain’s *Daily Telegraph* and National Public Radio. He served as special assistant to the current President Bush for economic speechwriting from Jan. 2001 to Feb. 2002, and helped coin the phrase, “axis of evil.” See Keppler Assoc.s, David Frum Biography, available at http://www.kepplerassociates.com/speakers/frum david.asp (last visited Apr. 12, 2004); Julian Borger, How I Created the Axis of Evil, *Guardian*, Jan. 28, 2003, available at http://www.guardian.co.uk/g2/story/0,3604,883621,00.html. Richard Perle served as Assistant Secretary of Defense for President Reagan, and was Chairman of the Defense Policy Board, during the current Bush administration, an advisory group to the Secretary of Defense composed of non-elected officials, until March 2003, and remains a member of that Board. In 1997, he was a founding member of the Project for the New American Century (“PNAC”), whose objective is to “rally support for American global leadership.” See PNAC, Statement of Principles (June 30, 1997), available at http://www.newamericancentury.org/statementofprinciples.htm. Other founding members and supporters of the group then included current Vice President Dick Cheney, current Secretary of Defense Donald Rumsfeld, current Assistant Secretary of Defense Paul Wolfowitz, I. Lewis Libby, current Assistant to the President and Vice President Cheney’s Chief of Staff, Florida Governor and brother of the President, Jeb Bush, and former Vice President Dan Quayle. See Letter from PNAC, to President William J. Clinton (Jan. 28, 1998), available at http://www.newamericancentury.org/iraqclintonletter.htm.

138. See, e.g., Frum & Perle, supra note 137, at 34-35.
139. Id. at 35.
Even if we could predict dangers more accurately than we can, what benefit do we gain from waiting for a threat to become more imminent? Why let an enemy grow stronger unhindered? By waiting until the last minute, we forfeit the initiative. We cast away the opportunity to act at a time and place of our choosing and gamble our security on future circumstances that may or may not be favorable to us. Quite frequently, the real motive of those who advocate delay is the hope that if we postpone action, somehow the threat will disappear on its own. This isn’t policy. It’s fantasy.\textsuperscript{140}

According to Frum and Perle, it is time for the United States to use “stronger medicine” against North Korea.\textsuperscript{141} They propose various measures as part of a decisive action by the United States to stop North Korea’s attempt to go nuclear, including: (1) a comprehensive air and naval blockade of North Korea;\textsuperscript{142} (2) an accelerated redeployment of U.S. ground troops on the Korean Peninsula (which has already begun);\textsuperscript{143} and (3) the development of detailed plans for a preemptive strike against North Korea’s nuclear facilities.\textsuperscript{144} Their stated hope is that a

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{140} See id. at 101.
\item \textsuperscript{141} See id. at 103.
\item \textsuperscript{142} See id. at 103.
\item \textsuperscript{143} See id. at 103.
\item \textsuperscript{144} See id. at 103. The preemptive strike approach has generated some support, although it is generally contrary to established international law. See, e.g., William H. Taft IV & Todd F. Buchwald, \textit{Agora: Future Implications of the Iraq Conflict: Preemption, Iraq, and International Law}, 97 AM. J. INT’L L. 557 (July 2003) (arguing that United States had firm basis for using preemptive force in Iraq, based on Iraq’s past actions and threat Iraq posed, as seen over protracted period of time). Citing President Bush’s \textit{National Security Strategy}, Taft and Buchwald argue that it would be irresponsible to ignore adversaries who “rely on acts of terror and, potentially, the use of weapons of mass destruction — weapons that can be easily concealed, delivered covertly, and used without warning.” Id. at 557 n.1 (citing The National Security Strategy of the United States of America 15 (Sept. 17, 2002), \textit{available at http://www.whitehouse.gov/nsc/nss.pdf}). But see Ivo Daalder, Policy Implications of the Bush Doctrine on Preemption, Memorandum to Members of the Council of Foreign Relations/American Society of International LawASIL Roundtable on Old Rules/New Threats, \textit{available at http://www.cfr.org/publication.php?id=5251} (distinguishing between preventative war and preemptive attack). Daalder defines “preventative war” as “a premeditated attack of one state against another, which is not provoked by any aggressive action of the state being attacked against the state initiating the conflict.” Id. In contrast, he defines a “preemptive attack” as one “launched only after the state being attacked has either initiated or has given a clear indication that it will initiate an attack.” Id. Daalder concludes that the justification for war on Iraq, a belief that Baghdad would soon acquire nuclear weapons which it would then use to threaten others, is contrary to historical precedent. See id.; see also Jane E. Stromseth, \textit{Agora: Future Implications of the Iraq Conflict: Law and Force After Iraq: A Transitional Moment}, 97 AM. J. INT’L L. 628, 638 n.50 (July 2003) (stating that “in the absence
credible build-up by the United States for a possible strike against North Korea will prompt China to assert pressure on North Korea to bring it into line. Following such an approach, the authors project in time “all of Korea will be united in liberty.”

D. U.S. Provocations According to North Korea

North Korea claims that the United States has nuclearized the Korean Peninsula and is pursuing aggressive policies throughout the world. North Korea contends that, since the signing of the Armistice Agreement, the United States has subjected North Korea to persistent and direct nuclear threats, turning “South Korea into a nuclear base [that is] a direct and crucial threat to peace on [the Korean Peninsula and Asia].”

North Korea asserts that the United States introduced nuclear weapons and related missiles and artillery systems into the area in the 1950’s after the Armistice Agreement, and readied its combat forces in the area to wage atomic warfare. This made South Korea one of the most substantial U.S. bases for forward deployed nuclear weapons in the world.

North Korea points to the fact that, on July 15, 1957, U.S. Army officials announced that combat forces would be capable of waging an atomic war from South Korea, and that in 1958, the United States announced and displayed its missile and artillery systems deployed in South Korea. North Korea states that by 1970 the United States revealed during Congressional defense of an imminent threat of attack, it would be hard to justify such action legally within the right of self-defense under the U.N. Charter as currently understood”); Lori Fisler Damrosch & Bernard H. Oxman, Agora: Future Implication of the Iraq Conflict, 97 Am. J. Int’l L. 553 (debating whether U.S. invasion of Iraq destroyed system of governance restricting use of force under U.N. Charter); John Alan Cohan, The Bush Doctrine and the Emerging Norm of Anticipatory Self-Defense in Customary International Law, 15 Pace Int’l L. Rev. 283 (2000).

145. See Frum & Perle, supra note 137, at 104.
146. See id.
147. DPRK Says U.S. ’Ruptured’ Process, supra note 30.
148. Id.
149. See id.
150. See id. North Korea contends, “[T]he United States has pursued the so-called NCND policy, under which it neither confirms nor denies the deployment of nuclear weapons. However, it has not tried to conceal the fact that it deployed nuclear weapons in South Korea but used it as a means to threaten us.” Id.
151. Id.
budget meetings that over 1,000 nuclear weapons and 64 aircraft loaded with nuclear weapons were deployed in South Korea.\textsuperscript{152} Further, it points to the U.S. Defense Department announcement in 1985 of the deployment of a nuclear missile battalion in South Korea, the first such overseas base outside of Europe.\textsuperscript{153}

North Korea contends that it has objected to the U.S. nuclearization of the Korean Peninsula\textsuperscript{154} and has engaged in "consistent efforts at denuclearization."\textsuperscript{155} As discussed above, North Korea has further alleged in recent years that the United States is threatening North Korea, such that North Korea needs a nuclear deterrent. Interestingly, North Korea does not appear to have threatened the use of chemical or biological weapons against the United States, but instead claims that the U.S. allegation that North Korea possesses such weapons is similar to the United States' insistence on North Korea's possession of nuclear weapons, simply "part of their (the United States') moves to stifle and isolate" North Korea.\textsuperscript{156}

E. U.S. Justification of its 2003 Attack on Iraq

Prior to the First Gulf War, the United States had a close relationship with Saddam Hussein and his regime.\textsuperscript{157} During the 1980's, the United States supplied Iraq with substantial military supplies and other aid.\textsuperscript{158}

The United States knew during this period that Iraq had chemical weapons and was using them against Iran and against Iraq's rebelling Kurds, but that did not appear to affect U.S. sup-

\textsuperscript{152} See id. North Korea claims that the military hardware was displayed in an airfield and made public to reporters from Tongyang, Reuters and Hap tong News Agency. See id.
\textsuperscript{153} See id.
\textsuperscript{154} See id.
\textsuperscript{155} Id.
It did not prevent the United States from providing Iraq with intelligence, planning information, bomb-assessments, and other crucial military information as to Iran. Donald H. Rumsfeld, as a special envoy of the Reagan administration, traveled to Iraq in 1984 to improve U.S. ties with President Saddam Hussein despite his use of chemical weapons.

The Reagan administration issued a public condemnation of Iraq's already verified "almost daily" use of chemical weapons against Iran and Kurdish rebels on March 5, 1984. However, days later, Secretary of State, George P. Schultz reportedly met with Iraqi diplomat, Ismet Kittani, to soften the blow and bolster the American relationship with Iraq, including business interests, Middle East diplomatic objectives, and a shared interest in preventing an Iranian victory.

In 1986, the U.N. Security Council issued a statement condemning Iraq's use of chemical weapons in the war, but the United States continued to support Baghdad militarily and politically.

In the days leading up to Iraq's 1990 invasion of Kuwait,
U.S. Ambassador April Glaspie, according to Iraqi transcripts, told Hussein that the United States "[has] no opinion on the Arab-Arab conflicts, like your border disagreement with Kuwait." The State Department did not confirm the accuracy of the Iraqi transcripts, but also did not dispute Glaspie's statement, stating that Glaspie had warned against rash actions regarding Kuwait.

In commencing the 2003 war against Iraq, the United States offered the following legal justifications: (1) that Iraq was in breach of U.N. Security Council Resolutions by continuing to seek and develop chemical, biological, and nuclear weapons, and prohibited long-range missiles; (2) that Iraq was in breach of cease-fire conditions agreed to at the end of the first Gulf War, including its purported retention of WMDs that it had agreed not to develop or possess; (3) that Iraq threatened U.S. security by aiding and harboring international terrorist organizations that threatened the United States; (4) that members of al Qaida are known to be in Iraq; and (5) that the regime of Saddam Hussein had brutalized the Iraqi people, committing gross human rights violations and crimes against humanity.

167. See Sciolino & Gordon, supra note 166.
168. See Cooley, supra note 166.
170. See March 19th Report, supra note 169.
171. See id. at 2-3.
172. See id. at 3.
In an interview with the CBS program *60 Minutes* to promote the book, *The Price of Loyalty*, Paul H. O'Neill, President George W. Bush's first Treasury Secretary, stated that President Bush had been focused on removing Saddam Hussein from power in Iraq from the start of his administration. According to O'Neill, "From the very beginning, there was a conviction that Saddam Hussein was a bad person and that he needed to go." According to the book, O'Neill was surprised that Iraq was on the top of the agenda at the very first National Security Council meeting held by President Bush, on January 30, 2001. At the second meeting, of which Saddam Hussein was also a primary topic, Secretary of Defense Donald Rumsfeld spoke of how removing Saddam Hussein would "demonstrate what U.S. policy is all about."

President George W. Bush was also apparently influenced in his desire to make war on Iraq by the fact that Iraqi officials had allegedly participated in a 1993 plot to assassinate his father, President George H.W. Bush. The current President Bush had repeatedly referred to the alleged Iraqi assassination plot against his father as part of his basis for the recent war on Iraq. While speaking before the U.N in September 2002, he made note of the plot to kill a former U.S. president, though he omitted any reference to his father's name. Also, while speaking in Houston at a fund-raiser, President Bush offered his usual

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176. See id. (quoting SUSKIND, supra note 173).


179. See id.
complaints against Iraq in discussing the threat posed by Saddam.  He then stated that much of Saddam’s hatred was directed at the United States, adding: “After all, this is the guy who tried to kill my dad.”

It was reported on November 7, 2003 that in the days before the U.S. attack on Iraq in 2003, Iraq contacted the United States, seeking to avert war. Officials of the Iraqi regime, including the Chief of Iraqi Intelligence, dispatched Imad Hage, a Lebanese-American businessman, to meet with Richard Perle as an intermediary for the U.S. Defense Department, with a message that Iraq no longer had weapons of mass destruction and was prepared to permit American troops and experts to carry out their search. Through Hage, Iraq also offered to turn over a man being held in Baghdad who was accused of being involved with the 1993 World Trade Center bombing. Hage, based on some six meetings with senior Iraqi intelligence officials, believed that the Iraqis he spoke to were desperate to avoid war and conveyed this impression to the Defense Department. Perle contacted the CIA to get their approval to meet with the Iraqis, but the CIA did not want to pursue this channel and conveyed to Perle, “Tell them that we will see them in Baghdad.”

More than a year after the U.S.-led 2003 invasion of Iraq, the United States has still not found any weapons of mass destruction in Iraq. While Secretary of Defense Donald Rumsfeld purported to believe that weapons of mass destruction will turn up, Secretary of State Colin Powell reportedly stated, “We

180. See id.
181. See id.
183. See U.S. Rejected 11th-Hour Iraqi Offer, supra note 182.
184. See id.
185. See id.
186. Risen, supra note 182 (stating that by early March, Hage characterized Iraqi’s tone as “begging”).
187. See id.
189. See U.S. Defends Iraq War As One Year Anniversary Nears, CHI. TRIB., Mar. 15, 2004, at 12.
may not find stockpiles.”¹⁹⁰ Secretary Powell, at a January 8, 2004 news conference at the State Department, further stated that he had seen no “smoking gun [or] concrete evidence” of ties between former Iraqi President Saddam Hussein and al-Qaida.¹⁹¹

A somewhat softened enunciation of the second Bush administration’s justifications was recently given by President Bush to host Tim Russert on NBC’s Meet the Press on February 8, 2004. President Bush stated that the war against Iraq to remove Saddam Hussein was justified even in the absence of weapons of mass destruction because Mr. Hussein was “a dangerous man [who] . . . had the ability to make weapons, at the very minimum.”¹⁹²

F. U.S. Position as to Nuclear Weapons in South Korea

Despite the Korean War, the U.S. nuclear presence in the Pacific was modest until 1952 when the Joint Chiefs proposed the introduction of additional weapons, fearing that if hostilities broke out a subsequent communication breakdown may make emergency transfers of weapons impossible.¹⁹³ By 1967 the United States reportedly had more than 800 nuclear weapons in South Korea,¹⁹⁴ by 1977 it had roughly 600, and by 1985 it had 151.¹⁹⁵ During 1991, the United States professedly removed its nuclear weapons from South Korea, which by then was the last forward base in the Pacific for U.S. nuclear weapons.¹⁹⁶ The current Bush administration in its 2002 nuclear posture review nonetheless affirmed its commitment to the potential use of nu-

¹⁹⁰. See id.
¹⁹⁴. See id.
clear weapons for the defense of South Korea. As recently as November 2003, Secretary of Defense Donald Rumsfeld stated that the U.S. commitment to defend South Korea from attack includes "the continued provision of a nuclear umbrella."

In a broader sense, the physical location of the United States' nuclear weapons and other military assets would seem to be of limited significance, given the size of the United States' nuclear arsenal and its ability to deliver its nuclear weapons across the world within very short time frames, as well as its extensive military assets in the Korean area.

VI. THE NORTH KOREAN STRATEGIC POSITION VIS-À-VIS THE UNITED STATES

A. Economic and Political Position

North Korea is one of the most unfortunate places on earth. Its economy is dismal, its people malnourished, its political structure repressive, and its sparse resources largely spent on the military.

North Korea's gross domestic product for 2002 is estimated at U.S.$22.26 billion, compared with U.S.$941.5 billion for South Korea. North Korea spent some U.S.$5.2 billion in 2002 on the military, as compared to South Korea's military expenditures of U.S.$13 billion in 2002.

During the 1990s, floods decimated North Korean food sup-


200. See infra notes 277-87 and accompanying text.


203. See WORLD FACTBOOK 2003: NORTH KOREA, supra note 201.

plies, inducing widespread famine,\textsuperscript{205} as political conditions amplified the shortages through inadequate distribution networks.\textsuperscript{206} Two million North Koreans, approximately 10\% of the population, died from starvation in the mid-1990s.\textsuperscript{207} North Korea's domestic needs became desperate, as it largely lost the support of its former Communist allies, Russia and China.\textsuperscript{208}

One of the last remaining Stalinist states of the Cold War, North Korea is dictatorial, centrally controlled and hierarchical. The international community has condemned North Korea's human rights record based on reports of torture, arbitrary detention and imprisonment, and suppression of freedoms of expression, religion, and movement.\textsuperscript{209} Scholars have characterized North Korea's economic policies as crimes against humanity for the systematic and widespread hunger they perpetuate.\textsuperscript{210}

In 2003, when North Korea announced plans to build a nuclear deterrent force if the United States maintained its hostile policy, North Korea indicated that it would be able to do so at a lower price than for conventional weapons. It stated that its deterrent would be "capable of neutralizing any sophisticated and nuclear weapons with less spending."

\textbf{B. North Korea's Conventional Weapons}

North Korea, a militarized State that devotes a substantial

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\item \textsuperscript{207} See Demick, supra note 205.

\item \textsuperscript{208} See Bureau E. Asian & Pac. Aff., U.S. Dep't. State, Background Note: North Korea (March 2004), available at http://www.state.gov/r/pa/ei/bgn/2792.htm.


\item \textsuperscript{210} See id.; see also Marcus, supra note 206, at 259-61 (arguing that international law of genocide and crimes against humanity criminalizes government behavior that abets or creates famine, and specifically notes North Korea as example of just such regime).

\end{itemize}
portion of its economy to the military, has an army of more than one million soldiers,\textsuperscript{212} including 120,000 special operation forces,\textsuperscript{213} and reserve forces of six million soldiers.\textsuperscript{214} Two-thirds of its troops are reportedly within sixty miles of the demilitarized zone.\textsuperscript{215}

The North Korean military reportedly has some 11,000 forward deployed artillery pieces capable of hitting South Korea,\textsuperscript{216} 500 170-millimeter guns and 200 multiple-launch rocket systems within range of Seoul,\textsuperscript{217} along with air defense weapons.\textsuperscript{218} The artillery pieces are largely hidden in caves and the missiles are on mobile launchers.\textsuperscript{219} North Korea also has an Air Force with over 1700 aircraft and a Navy with over 800 ships\textsuperscript{220} and 62 submarines.\textsuperscript{221}

U.S. characterizations of the North Korean military forces


\textsuperscript{215} See Nye, supra note 212. Seoul is less than fifty miles from the DMZ. See Andrew Stephen, \textit{And Now, the Next American War: Just When You Thought the Horizon was Cloudless, a New Conflict is Coming to a Head}, New Statesman (London), Apr. 13, 2004.


\textsuperscript{218} See Kozaryn, supra note 214.

\textsuperscript{219} See North Korean Missile Proliferation Hearing Before the Subcomm. on Int'l Security, Proliferation, & Fed. Services of the Comm. on Governmental Aff., 105th Cong. (1997) (Prepared Statement of Ju-Hwal Choi Former Official Ministry of the People's Army North Korea) (stating "[s]ince the North uses mostly mobile rocket launchers, not fixed ones, it is assumed that the North does not have fixed rocket launchers").

\textsuperscript{220} See Kozaryn, supra note 214. The DPRK also has about 3800 tanks, mainly Soviet T-54/55s and T-59s, but has recently developed the capacity to produce more modern T-62s. See Korean People's Army – Introduction, available at http://www.globalsecurity.org/military/world/dprk/army.htm (last modified Aug. 28, 2003); 1999 \textit{White Paper}, supra note 129, at pt. I.3 (stating that South Korean Ministry of National Defense says that North Korea has ninety submarines).

are mixed. The U.S. military has stated that North Korea has the largest submarine and artillery forces in the world and a “very credible conventional force.” In a report to Congress in 2000, the Secretary of Defense characterized the North Korean military threat as “formidable” and noted that its asymmetric forces are “cause for concern.”

At the same time, the United States has noted that the North Korean military has been severely affected by the country’s economic problems, such that its equipment is aging and its military production scant. The U.S. military has noted that much of the North Korean’s military equipment is technologically antiquated — particularly that of its Air Force and Navy, leaving the army as the major threat. U.S. General Leon LaPorte, Commander of U.S. forces in South Korea, has stated that “[m]uch of their equipment is aged, but they have a lot of it.” Some commentators doubt the effectiveness of North Korea’s artillery.

Some commentators have estimated that North Korea’s weapons systems are less extensive and reliable than Iraq’s before the 1991 Gulf War. North Korea reportedly does not have adequate amounts of oil to support its mechanized units, and even less to conduct proper training exercises. Most of the artillery pieces that North Korea possesses are not in range of Seoul, and the missiles it has that are capable of reaching the capital are not believed to be accurate.

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222. See Rhem, supra note 213 (citing Army General Leon LaPorte, Commander of U.S. forces in South Korea).

223. Id.


226. See Rhem, supra note 213.

227. Id. (citing Army General Leon LaPorte, Commander of U.S. forces in South Korea).


229. See id.

230. See id.

231. See id.
C. North Korea's Chemical and Biological Weapons

North Korea is believed to have chemical and biological weapons in significant numbers. It also has the missiles with which to deliver them and its military doctrine reportedly instructs the use of chemical weapons as standard munitions. North Korea has also reportedly devoted significant resources to defensive measures for protecting its population from the effects of chemical weapons, ostensibly to provide greater latitude for their use in combat. It is believed that North Korea is likely to use chemical weapons in a conflict with South Korea.

North Korea is believed to have "a sizable stockpile of chemical weapons" and to have "achieved the capability to manufacture large quantities of nerve, blister, choking, and blood agents." Specifically, North Korea is known to have "[t]ons of mustard gas and sarin," and unknown quantities of blood agents, choking gases, riot control agents and VX. U.S. intelligence believes that North Korea possesses, at the very least, between 180 and 250 tons of chemical weapons. The Nuclear Threat

232. See Hall, supra note 216; see also Saunders, supra note 217; Kozaryn, supra note 214.

233. See Chemical Weapons Program, supra note 121; Northeast Asia, supra note 121 (stating "chemical weapons may have become an integral part of North Korea's warfighting strategy."); see also Attack Across the DMZ Special Report, JANE'S INTELLIGENCE REV., Apr. 1, 1994. As early as 1947, the KPA's manual noted the utility of chemical weapons solely for their fear factor; by forcing the enemy to "suit up" in preparation of the possible use of such weapons, North Korea figures that it degrades the fighting ability of enemy units. See Chemical Overview, at http://www.nti.org/e_research/profiles/NK/Chemical/. North Korea has between 500 and 600 Scud missiles capable of striking targets throughout South Korea with chemical weapons or conventional warheads. See Saunders, supra note 217. Specifically, North Korea could use non-persistent chemical agents to break through defenses around the DMZ and persistent chemical agents against South Korean fixed military assets in rear areas. See Chemical Weapons Program, supra note 121; see also NORTH KOREA COUNTRY HANDBOOK, supra note 125 (stating that "DPRK chemical weapons would compliment conventional military power. In a surprise attack, DPRK forces are expected to use chemical weapons to demoralize defending forces, reduce their effectiveness, and deny use of mobilization centers, storage areas, and military bases without physically destroying facilities and equipment").

234. See Chemical Weapons Program, supra note 121.

235. See id. See also Chemical Overview, supra note 233 (noting "[North Korea] has traditionally viewed chemical weapons as an integral part of any military offensive"); Attack Across the DMZ Special Report, supra note 233.

236. Northeast Asia, supra note 121.


238. See Chemical Weapons Program, supra note 121.
Initiative cites official reports and testimony from North Korean defectors and stipulates that North Korea may have as much as 2500 to 5000 tons of chemical weapons.\textsuperscript{239}

North Korea is also believed to have biological weapons, including anthrax, cholera, and plague.\textsuperscript{240} In May 1996, South Korean Foreign Minister Yu Chong-ha reported that North Korea possessed approximately 5000 tons of biological and chemical weapons.\textsuperscript{241} The Federation of American Scientists, noting North Korea’s extensive production facilities, stated that this “estimate may constitute the low end of the actual stockpile.”\textsuperscript{242}

Because of North Korea’s many missiles and doctrine that instructs the use of chemical weapons as standard munitions, U.S. military planners regard North Korea as a significant asymmetrical threat.\textsuperscript{243}

D. North Korea’s Missiles

North Korea has numerous short-range missiles and a limited number of intermediate range missiles capable of delivering chemical, biological, and nuclear weapons. North Korea appears to be making progress in developing long-range missiles for the delivery of such weapons. It has one of the “largest ballistic missile forces in the Third World” with over thirty-six launchers and 700 missiles (by a 1999 report) in its arsenal.\textsuperscript{244}

North Korea reportedly has some 500 short-range missiles, including the Scud-B, Hwasong 5 and 6.\textsuperscript{245} The Hwasong 5 has a range of 320 kilometers while carrying a 1,000 kilogram warhead.\textsuperscript{246} The Hwasong 6, thanks to a lighter warhead and special stainless steel imported from Russia, has a range up to 500

\textsuperscript{239} See Chemical Overview, supra note 233.
\textsuperscript{240} See Biological Weapons Program, supra note 122.
\textsuperscript{241} See Chemical Weapons Program, supra note 121.
\textsuperscript{242} Id.
\textsuperscript{243} See Id.; Attack Across the DMZ Special Report, supra note 233.
\textsuperscript{244} See id.; Attack Across the DMZ Special Report, supra note 233.
\textsuperscript{245} See id.; Attack Across the DMZ Special Report, supra note 233.
\textsuperscript{246} See id.; Attack Across the DMZ Special Report, supra note 233.
kilometers while carrying a payload of up to 770 kilograms (1,700 pounds). These missiles are variants of the Scud missile and are regarded as thoroughly tested and reliable. North Korea's short range missiles can reach all of South Korea with nuclear, chemical or biological weapons. 

North Korea's medium range missile is the No-Dong. In development since 1988 and successfully tested in 1993, the No-Dong is designed to strike regional targets, e.g., U.S. bases in Japan, to develop a base ballistic missile system that can be used as a first stage for further developments, and to carry a first generation nuclear weapon. North Korea reportedly possesses between 50 and 100 No-Dong's, capable of carrying a 1,200 kilograms warhead 1,350 kilometers or a 1,000 kilograms warhead 1,500 kilometers. These missiles, capable of carrying chemical, biological, and nuclear warheads, can reach targets in Japan, China, and Russia.

North Korea has been developing long-range missiles, the Taepo-dong 1 and Taepo-dong 2, since the early 1990s. North Korea is believed to have made the Taepo-dong 1 "operational" by 2000, and may have built between one and ten by 1999.

247. See id. at 16.  
248. See Missiles, supra note 244.  
249. See id.; see also Hwasong 6/Scud-C, supra note 245.  
251. See Bermudez, supra note 111, at 20-21.  
252. See id. at 22-23; see also Nitsch, supra note 6, at 7. But see Missiles, supra note 244 (stating that North Korea possesses between twelve and thirty-six No-Dong missiles).  
253. See Bermudez, supra note 111, at 20.  
255. See id. at 26.  
256. See id. at 30. Operational is a relative term, and the KPA may have been using the Taepo-dong 1 earlier than 2000. See id. Since North Korea has lower standards of reliability and readiness than do Western Nations. See id.  
257. See id. at 29. But see Wright, supra note 250 (stating that any such variant of Taepo-dong 2 would be appreciable advancement in North Korea's missile technology, and would not be possible without number of significant improvements and multiple flight tests).
The Taepo-dong 1 is designed to have a range of 1,500 to 2,500 kilometers carrying an estimated payload of 1,000 to 1,500 kilograms (2,200 to 3,300 pounds). These missiles are potentially capable of reaching all U.S. bases in East Asia. To the surprise of the U.S. intelligence community, North Korea in 1998 launched a Taepo-dong 1 missile over Japan, with the intent of putting North Korea's first satellite — the Kwangmyongsong 1 — into orbit. The third stage of the missile suffered technical difficulties and did not insert the satellite into orbit. North Korea, however, did not acknowledge this failure, and contends it was a successful launch, stating that "our scientists and technicians succeeded in launching its first satellite into orbit with multi-staged delivery rockets."

The Taepo-dong 2 missiles are of concern to the United States because of the possibility that they are capable of reaching U.S. land. Media reports cite U.S. intelligence estimates that provide that, even without further flight tests, North Korean ballistic missiles would be able to strike Alaska, Hawaii, and the U.S. west coast. The Taepo-dong 2 is reportedly designed to carry a warhead of 1,000 to 1,500 kilograms a distance of 4,000 to 8,000 kilometers. Currently North Korea is not believed to have a functional version of the Taepo-dong 2.

The accuracy of missiles is generally stated in terms of circular error probability or "CEP," the radius of the circle drawn around the target in which, on average, half of the re-entry vehicles fired at the target will fall. Of North Korea's short range missiles, the Scud-B has a CEP of 450 meters, the Hwasong 5 a CEP of approximately 500-800 meters, and the Hwasong 6 a

258. See Bermudez, supra note 111, at 26.
259. See id. at 16.
260. See id. at 30.
261. See id. at 29.
262. See id.
263. Id. at 30 (quoting N. Korea Says it Launched 'Satellite', UNITED PRESS INT'L, Sept. 4, 1998).
264. See Niksch, supra note 6, at 7.
265. See Bermudez, supra note 111, at 16, 26.
266. See Missiles, supra note 244.
267. See Moxley, supra note 7, at 525 (citing KOSTA TSIPIS, ARSENAL: UNDERSTANDING WEAPONS IN THE NUCLEAR AGE 69-76 (1983)).
269. See Bermudez, supra note 111, at 11. The CEP of the Hwasong 5 is unknown,
CEP of 50 meters. Analysts are uncertain of the No-Dong's CEP; with GPS guidance it could be as small as fifty meters, but analysts believe that at the extremities of its range, the No-Dong has a CEP of as high as 2,000 to 4,000 meters. As noted, North Korea does not have completely functioning versions of the Taepo-dong one or two in its possession. The CEP of these weapons is not known, although they have been characterized as "poor."

E. South Korean Economic, Political, and Military Capability

South Korea is in far better shape than North Korea economically, politically, and militarily. Its economy is booming, its political system is effectively functioning in a democratic fashion, and its military, although substantially smaller than North Korea's, is strong and well-supplied. In addition, it is strongly allied with the United States, enjoying the U.S. economic and military umbrella.

South Korea can mobilize up to 4,500,000 troops, all excellently supplied with modern equipment, including more than

but the missile is an indigenously produced version of the Soviet R-17E, which has a CEP of 500 to 800 m. See id. at 11. Later models of the Hwasong 5 used an improved North Korea guidance system however, and may have better accuracy. See id. But see Hwasong 5/Scud-B, at http://www.fas.org/nuke/guide/dprk/missile/hwasong-5.htm (last updated May 13, 2003) (stating that Hwasong 5 has CEP of 450m).

270. See Nodong, supra note 254.

271. The KPA may have considered the Taepo-dong 1 operational as early as 1999 or 2000. See Bermudez, supra note 111, at 30. Operational, however, is a relative term, and the KPA may have been using the Taepo-dong 1 earlier than 2000 since North Korea has lower standards of reliability and readiness than do Western Nations. See id. at 30.

272. Id. at 30; see also Missiles, supra note 244. The CEP of a missile is inherently subject to surrounding circumstances. As the Navy Judge Advocate General stated, in his review of the lawfulness of the Trident I (C-4) Missile, any actual launch contains a "variation in CEP as a function of range, launch and trajectory condition . . . ." U.S. DEP'T NAVY, OFFICE OF THE JUDGE ADVOCATE GENERAL, REVIEW OF THE LEGALITY OF THE TRIDENT I (C-4) MISSILE, MEMORANDUM FOR THE CHIEF OF NAVAL OPERATIONS (OP-21), at 3 (Nov. 22, 1976) (quoting formerly restricted data, redacted version obtained under the Freedom of Information Act by Charles J. Moxley Jr.), available at http://www.nuclearweaponslaw.org/FOIA_Materials.html [hereinafter NAVY JAG TRIDENT I].


274. See id. (providing that South Korea is republic and held its first democratic elections in 1987).
1,500 strike aircraft and 3,000 tanks. The South Korean military also has two surface to surface missile battalions and 5,300 mortars.

F. U.S. Available Forces

The United States has a significant presence in the Pacific region. The Army has 37,000 troops in South Korea and extensive equipment in the country, including Patriot missile batteries, Apache helicopter squadrons, a mechanized infantry brigade, an air assault brigade, and various other units.

Aside from the 37,000 troops that patrol the DMZ, the United States has a significant presence in the Pacific region. In the vicinity of North Korea, the main U.S. naval presence is the 7th Fleet, the largest of all forward-deployed fleets in the Navy. The 7th Fleet fluctuates between forty and fifty ships, 200 aircraft and generally has about 20,000 Naval and Marine personnel attached to it. The naval vessels generally include one to two aircraft carriers, three to five Aegis guided-missile cruisers, and five to ten destroyers and frigates.

The U.S. Air Force also has a significant presence in the Pacific with the Seventh Air Force located in Korea and the Fifth in Japan. Assigned to the Seventh Air Force are the Fifty-first and Eighth Fighter Wings, with 117 planes supported by 8,300 air force personnel. The Fifty-first Fighter Wing flies the A-10 and three squadrons of F-16 fighter aircraft. Overall, the

275. See Kozaryn, supra note 214.
279. See id. Of the forty to fifty ships that traditionally comprise the Seventh Fleet, eighteen are based in Japan. See id.
280. See id.
284. See Attack Across the DMZ Special Report, supra note 233.
Pacific command has 45,000 military and civilian personnel with approximately 300 fighter and attack aircraft under its control, with additional major bases located in Hawaii and Alaska.\textsuperscript{285}

In 1991, the first Bush administration decided to withdraw U.S. nuclear weapons from South Korea, both as part of a larger effort to reduce the number of tactical nuclear weapons deployed abroad and as a step towards denuclearization of the Korean Peninsula.\textsuperscript{286} This withdrawal was completed by the early 1990’s, and since then the United States has pledged to use its other nuclear forces, including primarily ballistic missile submarines, to protect South Korea from any nuclear threat.\textsuperscript{287}

In a world where U.S. high speed bombers can take off from bases in the U.S., drop their bombs virtually anywhere in the world and return to base, where gigantic aircraft carriers can quickly bring large numbers of troops and extensive equipment to areas where they are needed, where missiles can traverse the world in a matter of minutes, the location of military assets seems secondary to a considerable extent. The result is that U.S. forces throughout the world are of significance to the strategic situation on the Korean Peninsula.

\textbf{VII. OUTCOME OF A FUTURE WAR IN KOREA}

North Korea, whatever its economic and polities infirmities, is a formidable military power. With over seven million available troops, 120,000 special operation forces, 11,000 forward deployed artillery tubes, 500 170-millimeter guns, 200 multiple-launch rocket systems, air defense weapons, mobile launchers, cave bases, 1,700 aircraft, 800 ships, 62 submarines and other military assets, North Korea has a formidable conventional military force.\textsuperscript{288}

With the addition of its apparent supplies of chemical, biological, and nuclear weapons and the means to deliver them at least at short and intermediate ranges, North Korea would also

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{285} See \textit{Pacific Air Forces}, at http://www.osan.af.mil/Facts/Pacific%20Air%20Forces.htm (last visited Apr. 6, 2004).
\item \textsuperscript{287} See Gertz, supra note 198.
\item \textsuperscript{288} See Rhem, supra note 213; see also Hall, supra note 216; Saunders, supra note 217.
\end{enumerate}
\end{footnotesize}
appear to have a potent non-conventional deterrent as well as war-fighting capability. \(^{289}\)

North Korea’s military capabilities threaten extraordinary damage on South Korean and U.S. forces in the South. Military planners have projected that in the first three months of fighting following a North Korean invasion of the South, U.S. and South Korean forces would suffer between 300,000 to 500,000 casualties, with hundreds of thousands more civilians killed. \(^{290}\) Doug Bandow of the Cato Institute has cited estimates that over 1,000,000 total casualties could be expected from a conflict with North Korea. \(^{291}\) The U.S. military’s plan for the region, Oplan 5027, envisions massive North Korean artillery and rocket bombardments of Seoul, striking with up to 500,000 shells a hour, in an effort to turn the city into a “sea of fire.” \(^{292}\) Overall, experts believe that efforts by the United States and South Korea to blunt an initial North Korean assault would be unable to prevent North Korea from inflicting an unacceptable level of damage on South Korea and U.S. forces in the area. \(^{293}\)

Nor could the United States count on being able to preemptively destroy the bulk of North Korea’s military assets — including missiles, artillery, and ground forces — since those assets are so numerous. \(^{294}\) Many of North Korea’s artillery pieces are hidden in caves and hence difficult to destroy. \(^{295}\) North Korean missiles are also mounted on mobile launchers, making them difficult to locate and strike. \(^{296}\) North Korea would likely use non-persistent chemical agents to facilitate penetration of the South Korean/U.S. defenses around the demilitarized zone and

\(^{289}\) See Chemical Weapons Program, supra note 121; Attack Across the DMZ Special Report, supra note 233.

\(^{290}\) See R. Jeffrey Smith, North Korea Deal Urged by State Dept., WASH. POST, Nov. 15, 1993, at A15.


\(^{293}\) See Saunders, supra note 217.

\(^{294}\) See id.; see also North Korean Missile Proliferation Hearing, supra note 219.

\(^{295}\) See Saunders, supra note 217; see also Barbara Demick, N. Korea’s Ace in the Hole, L.A. TIMES, Nov. 14, 2003, at A1 (explaining that North Korea has placed heavy artillery pieces in mountain bunkers that are positioned to quickly slide in and out on rails).

\(^{296}\) See Saunders, supra note 217.
persistent chemical agents against South Korean and U.S. troops and other assets in rear areas.\(^{297}\)

While recent U.S. military actions have heavily relied on air power, there appeared to be a risk that bad weather and difficult terrain on the Korean Peninsula could hamper U.S. air power, based upon experience in the first Gulf War where laser-guided bombs were severely affected by bad weather and inclement battlefield conditions such as smoke.\(^{298}\) However, the subsequent emergence of Joint Direct Attack Munitions ("JDAM") apparently has virtually nullified the effects of bad weather, due to their reliance on the Global Positioning System ("GPS") and an inertial navigation system ("INS").\(^{299}\) In addition, flight trials of an Inertial Terrain-Aided Guidance system demonstrate the ability of bombs to determine the profile of the ground from high altitudes and match this with stored three dimensional maps in real time, providing a CEP of three meters.\(^{300}\)

Nor do U.S. military planners believe the United States could count on being able to destroy or neutralize the North Korean nuclear capability. Exposed North Korean nuclear facilities would be vulnerable to attack by cruise missiles and stealth bombers, despite significant North Korean air defenses.\(^{301}\) However, North Korea has concealed and hardened a number of its nuclear facilities\(^{302}\) and would have a range of retaliatory options — from conventional attacks to the use of chemical, biological, and to the extent they have them, nuclear weapons.\(^{303}\)

Most analysts believe that, while a war with North Korea would involve substantial losses, the United States would ultimately win without the need to resort to nuclear weapons.\(^{304}\)

\(^{297}\) See Chemical Weapons Program, supra note 121.

\(^{298}\) See Smart and Smarter, JANE'S INT'L DEF. REV., Jan. 1, 2000; Attack Across the DMZ Special Report, supra note 233.

\(^{299}\) See Smart and Smarter, supra note 298.

\(^{300}\) See id.

\(^{301}\) See Saunders, supra note 217.

\(^{302}\) See id. While a number of North Korean nuclear facilities — including nuclear reactors and reprocessing plants — have been located, its reprocessing facilities, particularly those for uranium, could be operated in relatively small, underground facilities. See id. Additionally, it is most likely that any warheads North Korea possesses would be hidden in underground facilities. See id.

\(^{303}\) See id. There is also a complication in that attacking any nuclear facilities could spread radioactive material throughout the Korean Peninsula, and even as far as Japan and China. See id.

\(^{304}\) See generally Attack Across the DMZ Special Report, supra note 233; see also Hall,
The timetable for getting substantial additional U.S. forces into the region is relatively short. In addition, South Korea has recently embarked on its own program to develop missiles with a range of up to 300 kilometers, after the United States agreed to the South Korean withdrawal from the Missile Technology Control Regime.

Economically, the cost of the war would be tremendous. The South Korean economy would likely be devastated, making it impossible to rely on Korean reunification as the cure for the power vacuum in North Korea at the end of any conflict. The effects on the South Korean economy would likely have reverberating effects throughout the world.

While there is no doubt a limit to the extent to which the U.S. military can be stretched, it seems likely that the military could handle a war with North Korea even while engaged in the tail end of ones with Afghanistan and Iraq.

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supra note 216; Saunders, supra note 4; Kozaryn, supra note 214. Some have argued that North Korea would not attack the South even in circumstances where it was attacked first—acknowledging that would be suicide—but instead would use its missiles and attack U.S. bases in Japan, hoping to wedge apart the U.S.-South Korean alliance and induce South Korea to stand with the North against the United States and Japanese. See Hall, supra note 216. Dr. Marcus Noland has argued that, while the United States sees North Korea as a threat to the non-proliferation regime, South Korea sees it as a direct threat to South Korea national security, and accordingly that South Korea has a much greater incentive to avoid conflict with North Korea. See id.

305. See Hall, supra note 216.
308. The South Korean economy is a leading exporter of electronics and automobiles and in 2002 had a GDP of $941.5 billion. See WORLD FACTBOOK 2003: SOUTH KOREA, supra note 202.
309. See Paul Eckert, North Korea Says U.S. Courts Confrontation, REUTERS, Dec. 27, 2002 (citing U.S. Secretary of Defense Donald Rumsfeld). The idea that the U.S. military has the capability to fight two regional wars simultaneously is one that was articulated in the first Bush administration and carried through the Clinton administration. See Michael O’Hanlon, Has U.S. War in Iraq Slowed War on Terror?; Missions: Maintaining U.S. Military Focus on Two Wars at Once Provides Complex Challenge, BALT. SUN, Jan. 18, 2004, at 1C. This ability has been illustrated recently with the U.S. military engaging in operations in Iraq and Afghanistan simultaneously. See id. This is not to say that it has not strained U.S. military means, particularly regarding intelligence assets and linguists who had to be diverted from the fight against al-Qaida to the war in Iraq. See id. Other sources state that sophisticated electronic warfare devices and specialized munitions such as cruise missiles would become scarce. See Richter, supra note 292, at A1. But see John Diamond & Dave Moniz, Officials: Gulf Buildup Limits Options on Korea, USA TODAY, Feb. 3, 2003, at 8A. The author posits that the strains on the military are much
A. International Law Applicable to the Use of Nuclear Weapons\textsuperscript{310}

The United States acknowledges the applicability of the law of armed conflict, including the rules of necessity, proportionality, and discrimination, to the use of nuclear weapons. However, when it comes to the application of such law to nuclear weapons, the United States distorts the facts as to the effects of nuclear weapons and misstates the law.

If the facts and law were as stated by the United States, the use of nuclear weapons would indeed be lawful in many circumstances. Based upon a true statement of the facts and law, the use of nuclear weapons is unlawful in virtually all circumstances in which such weapons might actually be used.

I first review the United States’ general acknowledgment of the applicable rules of law and then demonstrate the United States’ distortion of the facts and law in applying the law. I then apply the law, as acknowledged by the United States, to the true facts as to nuclear weapons.

B. U.S. Acknowledgment of the Applicability of the Law of Armed Conflict to Nuclear Weapons\textsuperscript{311}

The U.S Constitution provides that treaties entered into by

more restrictive, and that in 2002 even Secretary Rumsfeld admitted that U.S. forces could not defeat two major regional forces at the same time, stating, “We weren’t able to meet that.” \textit{Id.} Retired Army Col. Kenneth Allard, a professor of national security at Georgetown University, said that our goal going into the latest Iraq war was to invade Iraq and contain North Korea; we “do not have enough to do both.” \textit{Id.; see also Richter, supra note 292, at A1.} Marine General Peter Pace, vice-chairman of the Joint Chiefs of Staff, said that while the outcome of a two-front war would “not be in doubt,” he said what would be at risk is the timeline you would achieve victory in; and qualified that by saying that “anything that is longer will have more risk.” \textit{Id.}

310. The analysis as to the applicable law of armed conflict is adapted in part from \textsc{Charles J. Moxley, Jr.}, \textit{Nuclear Weapons and International Law in the Post Cold War World} (2000).

the United States are "the supreme Law of the Land."\textsuperscript{312} The \textit{Air Force Manual on International Law} notes that "state and federal courts have declared international law to be part of the law of the land."\textsuperscript{313} The \textit{Air Force Manual on International Law} states that the United States is bound to follow customary international law "not because a treaty requires it, but because international law imposes the obligation on all States."\textsuperscript{314}

The United States acknowledges that the use of nuclear weapons is subject to the law of armed conflict, including the rules of proportionality, necessity, and discrimination, moderation, civilian immunity, neutrality, and humanity.\textsuperscript{315}

The \textit{Naval/Marine Commander's Handbook} states that the use of nuclear weapons "against enemy combatants and other military objectives" is subject to the following principles:

the right of the parties to the conflict to adopt means of injuring the enemy is not unlimited; it is prohibited to launch attacks against the civilian population as such; and the distinction must be made at all times between combatants and non-combatants to the effect that the latter be spared as much as possible.\textsuperscript{316}

The \textit{Naval/Marine Commander's Handbook} describes these rules as "fundamental principles" of the law of armed conflict.\textsuperscript{317}

\textsuperscript{312} See U.S. CONST. art. VI, § 2; see also LAW OF LAND WARFARE, supra note 311, at 7 (quoting U.S. CONST. art. VI, §2). My analysis of the applicable law is drawn in large measure from statements of that law by the United States.

\textsuperscript{313} A.F. Manual on Int'l Law, supra note 311, at 1-5 n.26.

\textsuperscript{314} Id. at 1-7.

\textsuperscript{315} See generally \textit{International Court of Justice: Advisory Proceedings of the Legality of the Threat or Use of Nuclear Weapons (Question Posed by the General Assembly), Written Observations on the Request by the General Assembly for an Advisory Opinion}, 7 CRIM. L.F. 401 (1996) [hereinafter U.S. ICJ Memorandum/GA App.]; \textit{Naval/Marine Commander's Handbook}, supra note 311, at 10-2; A.F. COMMANDER'S HANDBOOK, supra note 311, at 6-1. The \textit{Law of Land Warfare} states that, in the absence of a customary rule of law or international convention restricting the employment of atomic weapons, the use of such weapons cannot be deemed unlawful, although the manual appears to recognize the subjugation of the use of such weapons to the principles of moderation and necessity. See LAW OF LAND WARFARE, supra note 311, at 18; see also A.F. Manual on Int'l Law, supra note 311, at 6-1 to 6-8; U.S. Dep't. Army, 2 Int'l Law 27-161-2, at 42 (Pamp. 27-161-2, Oct. 1962); Elliott L. Meyrowitz, \textit{Prohibition Of Nuclear Weapons: The Relevance Of International Law} 223 (1990) (quoting from U.S. Dept't Army, supra).

\textsuperscript{316} \textit{Naval/Marine Commander's Handbook}, supra note 311, at 10-2.

\textsuperscript{317} See id. at 10-2.
The *Air Force Commander's Handbook*, while stating that the United States "takes the position" that the use of nuclear weapons is not unlawful, confirms that such use is "governed by existing principles of international law."\(^{318}\)

The *Air Force Manual on International Law*, while stating that "[t]he use of explosive nuclear weapons, whether by air, sea or land forces, cannot be regarded as violative of existing international law in the absence of any international rule of law restricting their employment,"\(^{319}\) similarly recognizes that such use is subject to the principles of the law of war generally.\(^{320}\) The *Air Force Manual on International Law* states that "any weapon may be used unlawfully, such as when it is directed at civilians and not at a military objective"\(^{321}\) or "to inflict unnecessary suffering."\(^{322}\)

The *Air Force Manual on International Law* states that, in comparing the military advantages to be secured by the use of a new weapon to the effects caused by the weapon, the following questions are relevant:

1. [C]an the weapon be delivered accurately to the target;
2. [W]ould its use necessarily result in excessive injury to civilians or damage to civilian objects, so as to be termed an "indiscriminate weapon;"
3. [W]ould its effects be uncontrollable or unpredictable in space or time as to cause disproportionate injury to civilians or damage to civilian objects; and
4. [W]ould its use necessarily cause suffering excessive in relation to the military purpose which the weapon serves so as to violate that prohibition.\(^{323}\)

The Army, in its *International Law Manual*, states that the "provisions of international conventional and customary law that may control the use of nuclear weapons" include:

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318. *A.F. Commander's Handbook*, *supra* note 311, at 6-1. The *Law of Land Warfare* states that, in the absence of a customary rule of law or international convention restricting the employment of atomic weapons, the use of such weapons cannot be deemed unlawful, although the manual appears to recognize the subjugation of the use of such weapons to the principles of moderation and necessity. *See Law of Land Warfare*, *supra* note 311, at 18.


320. *See id.* at 6-1 to 6-8.

321. *Id.* at 6-1.

322. *Id.* at 6-8.

323. *Id.* at 6-7.
(1) Article 23(a) of the Hague Regulations prohibiting poisons and poisoned weapons,
(2) The Geneva Protocol of 1925 which prohibits the use not only of poisonous and other gases but also of 'analogous liquids, materials or devices,'
(3) Article 23(c) of the Hague Regulations which prohibits weapons calculated to cause unnecessary suffering, and
(4) The 1868 Declaration of St. Petersburg which lists as contrary to humanity those weapons which 'needlessly aggravate the sufferings of disabled men or render their death inevitable.'

VIII. RULES OF PROPORTIONALITY, NECESSITY, AND DISCRIMINATION

A. Rule of Proportionality

The rule of proportionality prohibits the use of a weapon if its probable effects upon combatant or non-combatant persons or objects would likely be disproportionate to the value of the anticipated military objective.

The Air Force Manual on International Law states the rule against attacks “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects . . . which would be excessive in relation to the concrete and direct military advantage anticipated.”

The Naval/Marine Commander's Handbook recognizes the proportionality requirement as a customary rule of international law and describes the requirement as codified in the prohibition by Additional Protocol I of attacks causing excessive damage. The handbook states that it is not unlawful to cause “incidental injury or death to civilians, or collateral damage to civilian objects, during an attack upon a legitimate military objective,” but that such effects “must not . . . be excessive in light of the military advantage anticipated by the attack.”

324. See 2 INT'L LAw 27-161-2, supra note 315, at 42; see also Meyrowitz, supra note 315, at 223.
325. A.F. MANUAL ON INT'L LAW, supra note 311, at 5-9.
326. NAVAL/MARINE COMMANDER'S HANDBOOK, supra note 311, at 8-4; see id. at 5-7, 8-4 n.17, 8-5; see also A.F. MANUAL ON INT'L LAW, supra note 311, at 3-3.

The Naval/Marine Commander's Handbook elaborates that the law "recognizes that a certain number of noncombatants may become inadvertent victims" and permits this unavoidable destruction "when not disproportionate to the military advantage to be gained." NAVAL/MARINE COMMANDER'S HANDBOOK, supra note 311, at 6-38. The Naval/
B. Rule of Necessity

The rule of necessity provides that, in conducting a military operation, a State, even as against its adversary's forces and property, may use only such a level of force as is "necessary" or "imperatively necessary" to achieve its military objective, and that any additional level of force is prohibited as unlawful. The State must have an explicit military objective justifying each particular use of force in armed conflict and there must be a reasonable connection between that objective and the use of the particular force in question. If a military operation cannot satisfy this requirement, the State must use a lower level of force or refrain from the operation altogether.

This is a rule of customary international law memorialized in numerous conventions. Violations of this rule served as the basis of convictions at Nuremberg. It is a rule of reason, requiring that a judgment be made as much in advance as possible by appropriately responsible decision-makers in light of the reasonably available facts. The State, in planning its military operations, is required to exercise all reasonable precautions to assure that the level of force to be used is within the scope of this rule. The protection of the rule runs to combatant as well as non-combatant persons and objects.

The rule of necessity precludes the use of a particular weapon if a less destructive weapon could reasonably be expected to achieve the objective, and outlaws the use of a weapon not capable of being regulated or not in fact regulated by the user. If the military objective is to take out a particular bridge and this can be accomplished through a direct attack on the bridge, it is unlawful to launch a massive attack against the entire county to take out the bridge. If the military objective could be achieved with conventional weapons, the use of nuclear weapons, with the appreciably higher likely levels of destruction,

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Marine Commander's Handbook further states that the use of force in self-defense against armed attack or the threat of imminent armed attack rests upon the elements of necessity and proportionality. See Naval/Marine Commander's Handbook, supra note 311, at 4-10 (citing 2 Restatement (Third) § 905(1)(a), cmt. 3, at 387; 2 Restatement (Third) § 905(1)(b) & Reporters' Note 3, at 388-89; U.S. Navy Reg. 1973, art. 0915 (1973)).

The A.F. Commander's Handbook adds that "every feasible precaution should be taken to keep civilian casualties and damage to a minimum." A.F. Commander's Handbook, supra note 311, at 3-3.
would generally be unlawful. If, on the other hand, it were necessary to destroy the county to take out the bridge, the necessity requirement would ostensibly be met if the other prerequisites were present, but, even then, if taking out the bridge had minor military value compared to the level of resultant devastation, the proportionality requirement would not be met and the strike would be prohibited.

The United States recognizes this rule. The Naval/Marine Commander’s Handbook states that the law of war seeks to prevent “unnecessary suffering and destruction,” and thereby permits “only that degree and kind of force . . . required for the . . . partial or complete submission of the enemy with a minimum expenditure of time, life and physical resources.”\textsuperscript{327} The Handbook repeats that the employment of “any kind or degree of force not required” for that purpose “is prohibited”\textsuperscript{328} and quotes with approval the statement in The Hostage Case\textsuperscript{329} that the destruction of property in war “to be lawful must be imperatively demanded by the necessities of war” and that there must be some “reasonable connection between the destruction of property and the overcoming of the enemy forces.”\textsuperscript{330} The Handbook emphasizes that the protection of this rule extends to both combatants and noncombatants.\textsuperscript{331}


\textsuperscript{328} Naval/Marine Commander’s Handbook, supra note 311, at 5-5.

\textsuperscript{329} Id. at 5-4 n.6 (citing United States v. List et al., 11 TWC 1253-54 (1950)).

\textsuperscript{330} Naval/Marine Commander’s Handbook, supra note 311, at 5-4 n.6.

\textsuperscript{331} See id. at 5-3. The A.F. Manual on Int’l Law relies upon this same statement of the rule by the U.S. Military Tribunal in The Hostage Case: “The destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of international law. There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces.” A.F. Manual on Int’l Law, supra note 311, at 15-5, 15-10 n.40 (citing The Hostage Case, United States v. List et al., 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW 10, at 1253-54 (1950)).
C. Rule of Discrimination

The rule of discrimination prohibits the use of a weapon that cannot discriminate in its effects between military and civilian targets. This is a rule designed to protect civilian persons and objects. The law recognizes that the use of a particular weapon against a military target may cause unintended collateral or incidental damage to civilian persons and objects and permits such damage, subject to compliance with the other applicable rules of law, including the principle of proportionality. However, the weapon must have been intended for — and capable of being controlled and directed against — a military target, and the civilian damage must have been unintended and collateral or incidental.

Thus, if the weapon or its effects were not susceptible of being controlled and directed against a military target in the first place, the resultant damage to civilian persons and objects would not be unintended, collateral or incidental — and the use would be prohibited. Similarly, if the very purpose of the strike was to put pressure on the adversary through attacks on its population, the classic Cold War deterrence theory of “mutual assured destruction” (or “MAD”), the strike would be unlawful.

The discrimination requirement is recognized by the United States. The Air Force Commander's Handbook states that a weapon is not unlawful "simply because its use may cause incidental casualties to civilians, as long as those casualties are not foreseeably excessive in light of the expected military advantage," but that weapons that are "incapable of being controlled enough to direct them against a military objective"332 are unlawful. The Air Force Manual on International Law defines indiscriminate weapons as those "incapable of being controlled, through design or function," such that they "cannot, with any degree of certainty, be directed at military objectives."333

The Naval/Marine Commander's Handbook states that the law of war “is based largely on the distinction to be made between combatants and noncombatants”334 and hence prohibits making

332. A.F. COMMANDER'S HANDBOOK, supra note 311, at 6-1.
333. A.F. MANUAL ON INT’L LAW, supra note 311, at 6-3.
334. NAVAL/MARINE COMMANDER'S HANDBOOK, supra note 311, at 5-7. The handbook defines "noncombatants" as "those individuals who do not form a part of the
noncombatants the "object of attack" or targeting them "as such and requires that civilians be safeguarded against "injury not incidental" to attacks against military objectives.

Two of the three "fundamental principles of the law of war" identified by the Naval/Marine Commander's Handbook focus upon the requirement of discrimination:

2. It is prohibited to launch attacks against the civilian population as such.
3. Distinctions must be made between combatants and noncombatants, to the effect that noncombatants be spared as much as possible.

The Naval/Marine Commander's Handbook states that the foregoing points 2 and 3 were customary rules of international law codified for the first time in Additional Protocol I, articles 51(2) and 57(1), respectively.

IX. UNCONTROLLABILITY AS CONNOTING UNLAWFULNESS

The United States recognizes that the rules of discrimination, necessity, and proportionality prohibit the use of weapons whose effects cannot be controlled by the user.

A. Uncontrollability under Rule of Discrimination

The Air Force Commander's Handbook states that weapons that are "incapable of being controlled enough to direct them against a military objective" are unlawful. The Air Force Manual on International Law defines indiscriminate weapons as those "incapable of being controlled, through design or function," such that they "cannot, with any degree of certainty, be directed at military objectives."

In its military manuals the United States has acknowledged

armed forces and who otherwise refrain from the commission or direct support of hostile acts." Id. at 5-7.

335. Id. at 5-8.
336. Id. at 8-1; see also LAW OF LAND WARFARE, supra note 311, at 16.
337. NAVAL/MARINE COMMANDER'S HANDBOOK, supra note 311, at 5-8.
338. Id. at 8-1 (citations omitted). Principle No. 1 identified by the handbook is "[t]he right of belligerents to adopt means of injuring the enemy is not unlimited." Id. at 8-1.
339. Id. at 8-1 nn.3-4.
340. See A.F. COMMANDER'S HANDBOOK supra note 311, at 6-1.
341. A.F. MANUAL ON INT'1 LAW, supra note 311, at 6-3.
that the scope of this prohibition extends to the effects of the use of a weapon. The Air Force Manual on International Law states that indiscriminate weapons include those which, while subject to being directed at military objectives, "may have otherwise uncontrollable effects so as to cause disproportionate civilian injuries or damage." The Air Force Manual on International Law states that "uncontrollable" refers to effects "which escape in time or space from the control of the user as to necessarily create risks to civilian persons or objects excessive in relation to the military advantage anticipated." It is noteworthy that this prohibition encompasses the causing of risks, not just injury.

As a "universally agreed illustration of . . . an indiscriminate weapon," the Air Force Manual on International Law cites biological weapons, noting that the uncontrollable from such weapons "may include injury to the civilian population of other states as well as injury to an enemy's civilian population." The Naval/Marine Commander's Handbook states that such weapons are "inherently indiscriminate and uncontrollable."

The Air Force Manual on International Law further cites Germany's World War II V-1 rockets, with their "extremely primitive guidance systems" and Japanese incendiary balloons, without any guidance systems. The Manual states that the term "indiscriminate" refers to the "inherent characteristics of the weapon, when used, which renders [sic] it incapable of being directed at specific military objectives or of a nature to necessarily cause disproportionate injury to civilians or damage to civilian objects."

The Navy Judge Advocate General, in his legal analysis of the lawfulness of the Trident I (C-4) Missile, stated that "[i]ndiscriminate weapons are those which cannot be accurately directed at military objectives or those the effects of the use which are so uncontrollable as to necessarily cause disproportionate injury or damage to civilian persons or objects."
B. Uncontrollability under Rule of Necessity

The requirement that the level of force implicit in the use of a weapon be controllable and controlled by the user is a natural implication of the necessity requirement. If a State cannot control the level of destructiveness of a weapon, it cannot assure that the use of the weapon will involve only such a level of destructiveness as is necessary in the circumstances.

The *Air Force Manual on International Law* recognizes as a basic requirement of necessity “that the force used is capable of being and is in fact regulated by the user.”

C. Uncontrollability under Rule of Proportionality

If the State using a weapon is unable to control the effects of the weapon, it is unable to evaluate whether the effects would satisfy the requirement of being proportionate to the concrete and direct military advantage anticipated from the attack or to assure such limitation of effects.

The *Air Force Manual on International Law* notes that the requirement of proportionality prohibits “uncontrollable effects against one's own combatants, civilians or property.”

X. U.S. DISTORTION OF FACTS AND LAW IN APPLYING THE LAW OF ARMED CONFLICT TO NUCLEAR WEAPONS

Following are what appear to be distortions of fact and law in the United States' application of the law of armed conflict, including the rules of proportionality, necessity, and discrimination, to the use of nuclear weapons.

A. U.S. Distortion 1: That Nuclear Weapons Cannot Be Per Se Unlawful

The U.S. position, as expressed before the ICJ, is that there is no *per se* rule banning the use of nuclear weapons because the United States has not consented to any such rule, and hence that each contemplated use of such weapons must be evaluated on an *ad hoc* basis.

The United States argues that it is only bound by conventional law specifically agreed to by the United States and custom-

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350. *Id.* at 6-2.
ary law established by the practice of the community of Nations, including the Nations specially involved (according to the United States, the nuclear powers), out of a sense of obligation. The United States concludes that, since it has not agreed to a convention specifically prohibiting the use of nuclear weapons and has not refrained from their use out of a sense of obligation, such use cannot be _per se_ unlawful.351

Similarly, the Navy Judge Advocate General, in his legal analysis of the lawfulness of the Trident I (C-4) Missile, stated that the reality of "current state practice and the generally accepted rule" is that to be unlawful, a specific weapon must be specifically addressed as prohibited.352

This position is significant because it serves to justify the possession and threatened use of nuclear weapons as a general proposition and causes the possible use of the weapons to be inculcated into the military's weapons acquisitions, training, and planning.353 Given the fact that, in real world situations, decisions as to the use of nuclear weapons would likely have to be made upon extremely short notice,354 ad hoc application of law to the use of nuclear weapons effectively means that the law likely will not be applied in any meaningful way in most situations of actual use. The U.S. policy of ad hoc legal evaluation is really a policy of presumptive lawfulness.355 Applied to North

351. See Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Request for Advisory Opinion Submitted by the World Health Organization) & Legality of the Threat or Use of Nuclear Weapons (Request for Advisory Opinion Submitted by the General Assembly of the United States), Verbatim Record, Public Sitting Held Nov. 15, 1995, 10 a.m., President Bedjaoui presiding, CR 95/34, at 49-50 [hereinafter ICJ Hearing, Nov. 15, 1995]. In its arguments before the ICJ, the United States acknowledged that scientific evidence could justify a total prohibition of nuclear weapons if it demonstrated the unlawfulness of all such uses: "[S]cientific evidence could only justify a total prohibition on the use of nuclear weapons if such evidence covers the full range of variables and circumstances that might be involved in such uses." _Id_.

352. See Navy JAG Trident I, _supra_ note 272, at 12 (citing W. T. Mallison, Jr., _The Laws of War and the Juridical Control of Weapons of Mass Destruction in General and Limited Wars_, 36 _Geo. Wash. L. Rev._ 308, 331 (1967); see also Myres S. McDougal & Florentino P. Feliciano, _Law and Minimum World Public Order; The Legal Regulation of International Coercion_ 100 n.83 (1961); William O'Brien, _Legitimate Military Necessity in Nuclear War_, 2 _World Polity_ 35, 100 n.83 (1960)).


354. See _id_. at III-10

355. See Joint Chiefs of Staff, _Doctrine for Joint Nuclear Operations_ (Joint
Korea, this policy would ostensibly mean that it is perfectly lawful for North Korea to pursue a nuclear program and to threaten to use, and ultimately to use, such weapons in many circumstances.

The problem with the U.S. position is that it overlooks the existence of other sources of international law, including general principles of law. It ignores the fact that the United States has recognized that the broad rules of the law of armed conflict — such as the rules of proportionality, necessity, and discrimination — apply to nuclear weapons and that *per se* rules can arise from them.

Once the applicability of such rules is acknowledged, the United States, like any other State, is bound by their application regardless of whether it agrees with the particular application. Neither the consensual basis of international law nor the principle of sovereignty limits the application of established rules of law. If the use of nuclear weapons is *per se* unlawful under those principles, the United States, North Korea, any other State are subject to such unlawfulness fully as much as if they had signed a convention or purposefully joined in the formation of custom to that effect.

The Air Force Manual on International Law states that the use of a weapon may be unlawful based not only on "expressed
prohibitions contained in specific rules of custom and convention,” but also on “those prohibitions laid down in the general principles of the law of war.”

Similarly, in discussing how the lawfulness of new weapons and methods of warfare is determined, *The Air Force Manual on International Law* states that such determination is made based on international treaty or custom, upon “analogy to weapons or methods previously determined to be lawful or unlawful,” and upon the evaluation of the compliance of such new weapons or methods with established principles of law, such as the rules of necessity, discrimination, and proportionality.

*The Air Force Manual on International Law* notes that the International Military Tribunal at Nuremberg in the case of the *Major War Criminals* found that international law is contained not only in treaties and custom but also in the “general principles of justice applied by jurists and practiced by military courts.”

*The Air Force Manual on International Law* further states that the practice of States “does not modify” the legal obligation to comply with treaty obligations since such obligations are “contractual in nature.”

The Army’s *Law of Land Warfare* states that “[t]he conduct of armed hostilities on land is regulated by the law of land warfare which is both written and unwritten.”

The United States recognizes “analogy” as well as “general principles” as sources of the law of armed conflict. *The Air Force Manual on International Law* states:

The law of armed conflict affecting aerial operations is not entirely codified. Therefore, the law applicable to air warfare must be derived from general principles, extrapolated from the law affecting land or sea warfare, or derived from other sources including the practice of states reflected in a wide variety of sources.

*The Air Force Manual on International Law* notes that *per se*
unlawfulness is not limited to prohibitions established in treaties or customary law:

[A] new weapon or method of warfare may be illegal, per se, if it is restricted by international law including treaty or international custom. The issue is resolved, or attempted to be resolved, by analogy to weapons or methods previously determined to be lawful or unlawful.\(^{364}\)

Based on the foregoing, it seems clear that the use of nuclear weapons can be unlawful per se regardless of whether there is a treaty or custom establishing such unlawfulness.

Assuming that the use of nuclear weapons may be per se unlawful under the rules of proportionality, necessity, and discrimination, the question arises as to what the criteria are for the application of a per se rule. The United States contended,\(^{365}\) in a position that the ICJ ostensibly accepted sub silentio,\(^ {366}\) that 100% illegality — the unlawfulness of all uses of nuclear weapons — would be necessary before a rule of per se illegality could arise. However, the Court's approach may have been affected by the wording of the question referred to it by the General Assembly: "Is the threat or use of nuclear weapons in any circumstance permitted under international law?"\(^ {367}\)

The law on this point does not appear to be settled. Opinions of individual judges of the ICJ on the issue differed greatly. Judge Higgins in her dissenting opinion assumed that 100% certainty must be present for there to be per se illegality:

I do not . . . exclude the possibility that such a weapon could be unlawful by reference to the humanitarian law, if its use could never comply with its requirements — no matter what specific type within that class of weapon was being used and no matter where it might be used.\(^ {368}\)

Judges Shahabuddeen and Weeramantry reached the oppo-

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364. Id. at 6-7.
366. See Nuclear Weapons Advisory Opinion, supra note 1, at 822, ¶ 42; 823, ¶ 48; 829, ¶ 95; see also id. at 936-37. ¶¶ 27-33 (Higgins, J., dissenting); id. at 922, ¶¶ 6(xi)-6(xii) (Weeramantry, J., dissenting); id. at 869 (Shahabuddeen, J., dissenting).
367. Id. at 819 ¶ 20.
368. Id. at 936, ¶ 26 (Higgins, J., dissenting). See also id. at 836, 839, 840, 842 (Schwebel, J., dissenting).
site conclusion. Judge Shahabuddeen stated, "in judging of the admissibility of a particular means of warfare, it is necessary, in my opinion, to consider what the means can do in the ordinary course of warfare, even if it may not do it in all circumstances."\(^{369}\)

Judge Weeramantry, addressing the issue from the perspective of nuclear decision-making, concluded that nuclear weapons should be declared illegal in all circumstances, with the proviso that if such use would be lawful "in some circumstances, however improbable, those circumstances need to be specified."\(^{370}\)

**B. U.S. Distortion 2: That the Effects of Nuclear Weapons are Controllable**

At the ICJ, the United States did not retrench on the applicability of the controllability requirement, but rather argued the matter on a factual level, asserting that nuclear weapons — or at least the type of nuclear weapons whose legality the United States defended — are controllable.

Without arguing the lawfulness of the use of strategic nuclear weapons or even of a substantial number of tactical weapons or of a small number of such weapons in urban areas, the United States asserted the possible lawfulness of the use of a small number of highly accurate low-yield nuclear weapons (ostensibly tactical weapons) directed against non-urban targets, arguing that the effects of such attacks could be so limited and controlled as to be lawful.

John H. McNeill, the U.S. Senior Deputy General Counsel, Department of Defense, told the Court:

The argument that international law prohibits, in all cases, the use of nuclear weapons appears to be premised on the incorrect assumption that every use of every type of nuclear weapon will necessarily share certain characteristics which contravene the law of armed conflict. Specifically, it appears to be assumed that any use of nuclear weapons would inevitably escalate into a massive strategic nuclear exchange, resulting automatically in the deliberate destruction of the population centers of opposing sides . . . .

Nuclear weapons, as is true of conventional weapons, can be

\(^{369}\) *Id.* at 869 (Shahabuddeen, J., dissenting).

\(^{370}\) *Id.* at 915 (Weeramantry, J. dissenting).
used in a variety of ways: they can be deployed to achieve a wide range of military objectives of varying degrees of significance; they can be targeted in ways that either increase or decrease resulting incidental civilian injury or collateral damage; and their use may be lawful or not depending upon whether and to what extent such use was prompted by another belligerent’s conduct and the nature of the conduct.\textsuperscript{371}

Noting that it has been argued that nuclear weapons are inherently indiscriminate in their effect and cannot reliably be targeted at specific military objectives, McNeill stated, “This argument is simply contrary to fact. Modern nuclear weapon delivery systems are, indeed, capable of precisely engaging discrete military objectives.”\textsuperscript{372}

Alluding to the assumptions made by the World Health Organization (“WHO”) in its 1987 study as to the effects of nuclear weapons, McNeill objected to the “four scenarios” depicted by the WHO as “highly selective” in that they addressed “civilian casualties expected to result from nuclear attacks involving significant numbers of large urban area targets or a substantial number of military targets.”\textsuperscript{373} But no reference is made in the report to the effects to be expected from other plausible scenarios, such as a small number of accurate attacks by low-yield weapons against an equally small number of military targets in non-urban areas.\textsuperscript{374}

Reinforcing the point as to “other plausible [low-end use] scenarios,” McNeill stated that such plausibility “follows from a fact noted in the WHO Report by Professor Rotblat: namely, that ‘remarkable improvements’ in the performance of nuclear weapons in recent years have resulted in their ‘much greater accuracy,’”\textsuperscript{375} stating that such scenarios “would not necessarily raise issues of proportionality or discrimination.”\textsuperscript{376}

In its memorandum to the ICJ, the United States stated that, through the technological expertise of “modern weapon designers,” it is now able to control the effects of nuclear weapons — specifically, “to tailor the effects of a nuclear weapon to deal with

\textsuperscript{371} ICJ Hearing, Nov. 15, 1995, supra note 351, at 68-69.
\textsuperscript{372} Id. at 70.
\textsuperscript{373} Id. at 71.
\textsuperscript{374} Id.
\textsuperscript{375} Id.
\textsuperscript{376} Id.
various types of military objectives." It has been argued that nuclear weapons are unlawful because they cannot be directed at a military objective. This argument ignores the ability of modern delivery systems to target specific military objectives with nuclear weapons, and the ability of modern weapons designers to tailor the effects of a nuclear weapon to deal with various types of military objectives. Since nuclear weapons can be directed at a military objective, they can be used in a discriminate manner and are not inherently indiscriminate.

Characterizing the effects of nuclear weapons as controllable indeed takes away much of the legal objectionability of the weapons. If the United States can reliably deliver nuclear weapons to their intended targets and control the effects, including the radiation effects, of the weapons, nuclear weapons would appear to be just another weapon. On this basis, there would appear to be nothing wrong with North Korea's having such weapons, threatening to use them, and potentially using them in many circumstances.

The ICJ in its Nuclear Weapons Advisory Decision did not reach this issue of the controllability of the effects of nuclear weapons. The Court determined that, because of the potential of nuclear weapons to destroy civilization and the entire ecosystem of the planet, the use of nuclear weapons would generally be unlawful, but that it was not in possession of sufficient facts to evaluate whether use of nuclear weapons (ostensibly, precision low-yield tactical ones) could be lawful in extreme circumstances of self-defense when a State's survival was at stake.378


378. See Nuclear Weapons Advisory Opinion, supra note 1, at 829, ¶ 91 (citing United Kingdom, Written Statement, at 40, ¶ 3.44, 75, ¶ 4.2(3), 53, ¶ 3.70 and United States of America, Oral Statement, CR 95/34, at 89–90), 830, ¶ 96, 831 ¶ 105(E). Judges Weeramantry and Higgins in their dissenting opinions pointed to the ambiguity introduced by the Court's use of the word "generally." See id. at 881, ¶ c(ii) (Weeramantry, J., dissenting), 936 para. 25 (Higgins, J., dissenting).

Judge Weeramantry in his dissenting opinion in the WHO Advisory Opinion proceeding noted that it is the Court's job to make findings as to disputed facts. Judge Weeramantry cited the Court's observation in the Advisory Opinion on Namibia that "to enable a court to pronounce on legal questions, it must also be acquainted with, take into account and, if necessary, make findings as to the relevant factual issues." WHO Advisory Opinion, 1996 I.C.J. 68, at 161 (Weeramantry, J., dissenting) (citing I.C.J. Reports 1971 at 27). Judge Weeramantry further noted the contentions made by Finland to the effect that:

[The] legality of the use of nuclear weapons can only be determined in re-
The Court stated that it did not have sufficient facts to determine the validity of the argument of the United States and other nuclear weapons States to the effect that highly accurate low-yield tactical nuclear weapons could be used in such a way as to limit and control their effects.\footnote{379} 

The facts which the Court found to be missing ostensibly had to do with the likely effects of the use of low-yield tactical nuclear weapons and the risk of escalation. The Court first noted the view expressed by the United Kingdom in its written submission to the Court, and the United States in its oral argument:

The reality . . . is that nuclear weapons might be used in a wide variety of circumstances with very different results in terms of likely civilian casualties. In some cases, such as the use of a low yield nuclear weapon against warships on the High Seas or troops in sparsely populated areas, it is possible to envisage a nuclear attack which caused comparatively few civilian casualties. It is by no means the case that every use of nuclear weapons against a military objective would inevitably cause very great collateral civilian casualties.\footnote{380}

The Court then noted the contrasting view of other States:

\[\text{R} \]ecourse to nuclear weapons could never be compatible with the principles and rules of humanitarian law and is therefore prohibited. In the event of their use, nuclear weapons would in all circumstances be unable to draw any distinction between the civilian population and combatants, or between civilian objects and military objectives, and their ef-

\footnote{379. See Nuclear Weapons Advisory Opinion, supra note 1, at 829, ¶ 91 (citing United Kingdom, Written Statement, at 53, ¶ 3.70 and United States of America, Oral Statement, CR 95/34, at 89–90), 92, 94.}

\footnote{380. Id. at 829 ¶ 91 (citing United Kingdom, Written Statement, at 53 ¶ 3.70; United States of America, Oral Statement, CR 95/34, at 89–90).}
ffects, largely uncontrollable, could not be restricted, either in time or in space, to lawful military targets. Such weapons would kill and destroy in a necessarily indiscriminate manner, on account of the blast, heat and radiation occasioned by the nuclear explosion and the effects induced; and the number of casualties which would ensue would be enormous. The use of nuclear weapons would therefore be prohibited in any circumstance, notwithstanding the absence of any explicit conventional prohibition.\textsuperscript{381}

While concluding that it was unable to resolve these polar factual positions, the Court noted that the proponents of legality had failed to substantiate their position as to the possibility of limited use, without escalation, of low level nuclear weapons or even of the potential utility of such use if it were possible:

\begin{quote}
[N]one of the States advocating the legality of the use of nuclear weapons under certain circumstances, including the 'clean' use of smaller, low yield tactical nuclear weapons, has indicated what, supposing such limited use were feasible, would be the precise circumstances justifying such use; nor whether such limited use would not tend to escalate into the all-out use of high yield nuclear weapons. This being so, the Court does not consider that it has a sufficient basis for a determination of the validity of this view.\textsuperscript{382}
\end{quote}

While the ICJ did not reach the issue, it seems clear, based on available information as the radiation effects of nuclear weapons, that the U.S. position that it can control such effects is unfounded. Neither before the ICJ nor ostensibly in any other publicly available source has the United States presented any evidence that it can control the radiation effects of nuclear weapons, and there would appear to be no such evidence. While it is true that the low yield tactical nuclear weapons that the United States defended before the ICJ would release less radiation than higher yield nuclear weapons, the low yield weapons release substantial radiation\textsuperscript{383} — and that radiation is uncontrollable in

\textsuperscript{381} Id. at 829, ¶ 92.
\textsuperscript{382} Id. at 829, ¶ 94.
\textsuperscript{383} See id. at 921 nn.183-84 (citing GEN. COLIN POWELL, A SOLDIER'S WAY 324 (1995)) ("No matter how small these nuclear payloads were, ... [it] would be crossing a threshold. Using nukes at this point would mark one of the most significant military decisions since Hiroshima ... I began rethinking the practicality of those small nuclear weapons."); see also BULL. ATOMIC SCIENTISTS, May 1985, at 35, 37.
terms of how it will spread.\textsuperscript{384}

The U.S. position as to the controllability of the spread of radiation from an exploded nuclear weapon appears to ignore the following essentially incontrovertible facts:

- Radiation is a defining feature of nuclear weapons. All nuclear weapons emit radiation when detonated.\textsuperscript{385}
- Radiation is inimical to life and cumulative in its buildup and effects, surviving in the environment and genetically in human and other life forms typically for many years (as to some elements, for thousands of years).\textsuperscript{386}
- The spread of radiation from the detonation of nuclear weapons could not be controlled or predicted since radia-

\begin{footnotesize}
\textsuperscript{384} See Nuclear Weapons Advisory Opinion, supra note 1, at 904.

\textsuperscript{385} See id. at 821-22, ¶ 35. See generally Doctrine for Joint Nuclear Operations, supra note 355.

For further discussions of the effects of nuclear weapons, see, e.g., WHO Advisory Opinion, supra note 378, at 115-26 (Weeramantry, J., dissenting); id. at 173-80 (Koroma, J., dissenting). Judge Weeramantry in that proceeding further pointed out differences between the effects of conventional and nuclear weapons: “The use of conventional weapons in war does not spread disease. It does not cause genetic deformities. It does not imperil crops. It does not cause intergenerational climatic effects which imperil the global food supply.” Id. at 147 (Weeramantry, J., dissenting).

Judge Shahabuddeen stated: “[T]he use of nuclear weapons could result, even in the case of neutral countries, in destruction of the living, in sickness and forced migration of survivors, and in injury to future generations to the point of causing serious illness, deformities and death, with the possible extinction of all life.” Nuclear Weapons Advisory Opinion, supra note 1, at 873 (Shahabuddeen, J., dissenting); see also Dep’t. Army et al., NATO Handbook on the Medical Aspects of NBC Defensive Operations A MedP-6(B) at I.1 (1996) [hereinafter NATO Handbook on the Medical Aspects of NBC Defensive Operations] (adopted as Army Field Manual 8-9, Navy Medical Publication 5059, A.F. Joint Manual 44-151); Doctrine for Joint Theater Nuclear Operations, supra note 357, at I-1-I-2; Nuclear Weapons Advisory Opinion, supra note 1, at 865 (Shahabuddeen, J., dissenting); United Nations Department for Disarmament Affairs, Nuclear Weapons: A Comprehensive Study 6-8 (1991).

\end{footnotesize}
tion is dispersed in the environment by forces such as the winds, the waters, the soil, animals, plants, and genetic effects, as well as vagaries as to the point of delivery of the weapon in relation to the surface and applicable environmental factors.387

- Radiation cannot discriminate between friend and foe, combatant and noncombatant, adversary and neutral, one's own population and forces and those of the enemy.388

- Radiation from the Hiroshima and Nagasaki bombs, from atomic testing, and from the Chernobyl releases have caused and continue to cause substantial and widespread injury to human health and other life and may be expected to continue to do so for generations to come.389


388. See Doctrine for Joint Theater Nuclear Operations, supra note 353, at II-7; Nuclear Weapons Advisory Opinion, supra note 1, 35 I.L.M. at 829, ¶ 95; id. at 863-64 (Shahabuddeen, J., dissenting) (quoting Javez Perez de Cuellar, Statement at the University of Pennsylvania, 24 March 1983, in 6(1) Disarmament 91); Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons – Declarations and Separate Opinions Not Reproduced at 35 I.L.M. 809 (1996), at 1347, ¶ 20 (declaration of President Bedjaoui); Nuclear Weapons Advisory Opinion, supra note 1, 35 I.L.M. at 839 (Schwebel, J., dissenting); id. at 904 (Weeramantry, J., dissenting); id. at 931-32 (Koroma, J., dissenting); id. at 834 (Fleischhauer, J., separate opinion).

389. See Nuclear Weapons Advisory Opinion, supra note 1, at 821-22, ¶ 35; see also id. at 864 (Shahabuddeen, J., dissenting); NATO Handbook on the Medical Aspects of NBC Defensive Operations, supra note 385, at I.1.3 §§ 303(c), at 320; Nuclear Weapons: A Comprehensive Study, supra note 385, at 79-84. It is estimated that only half of the suffering would be over as of the end of the war itself: "A failure to achieve [social and economic] viability . . . would result in many additional deaths, and much additional economic, political, and social deterioration. This postwar damage could be as devastating as the damage from the actual nuclear explosions." The Effects of Nuclear War, supra note 387, at 5. See John W. Gofman, Radiation and Human Health 298-99 (1983) (estimating that the plutonium fallout will cause a total of 104,460 lung cancer deaths in the United States, and 950,000 world wide). Investigators have also concluded that the mortality rates during the 1950-1965 atomic testing period stopped getting better after decades of improvement. When atomic testing was banned, the mortality rate improved once again. See Jay Gould et al., Deadly Deceit: Low-Level Radiation, High-Level Cover Up 15, 92 (1990); see also Marvin S. Soroos, Preserving the Atmosphere as a Global Commons, 40 Envt., Mar. 1998, at 6; United Nations Sci. Committee on the Effects of Atomic Radiation, Ionizing Radiation: Sources and Biological
Outside the courtroom, the United States recognizes the potential uncontrollability of the effects of nuclear weapons. This can be seen from the Chairman of the Joint Chief's Joint Pub 3-12, Doctrine for Joint Nuclear Operations, setting forth the current operational planning for the integrated use by U.S. forces of nuclear weapons in conjunction with conventional weapons:391 "[T]here can be no assurances that a conflict involving weapons of mass destruction could be controllable or would be of short duration. Nor are negotiations opportunities and the capacity for enduring control over military forces clear."392

As noted by Judge Shahabuddeen in his dissent in the Nuclear Weapons Advisory Decision, the United States, in ratifying the Treaty of Tlatelolco, subscribed to the following statement of preamble as to the indiscriminate and excessive injury caused by nuclear weapons:

The preamble to the 1967 Treaty of Tlatelolco, Additional Protocol II of which was signed and ratified by the five [nuclear weapons States, including the United States] declared that the Parties are convinced.

That the incalculable destructive power of nuclear weapons has made it imperative that the legal prohibition of war should be strictly observed in practice if the survival of civilization and of mankind itself is to be assured.

That nuclear weapons, whose terrible effects are suffered, indiscriminately and inexorably, by military forces and civilian population alike, constitute, through the persistence of the radioactivity they release, an attack on the integrity of the human species and ultimately may even render the whole earth uninhabitable.393

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390. See The Effects of Nuclear War, supra note 387, at 22–25, 81; Nuclear Weapons Advisory Opinion, supra note 1, at 868, 870, 879 (Weeramantry, J., dissenting).

391. See Doctrine for Joint Nuclear Operations, supra note 355, at i, 1-2; see also Moxley, supra note 7, at 585-605.

392. Doctrine for Joint Nuclear Operations, supra note 355, at i, 1-6, 1-7 (emphasis omitted).

The extreme and disproportionate effects threatened by nuclear weapons are acknowledged by the U.S. military in their operational policy, training, and planning. The *Nuclear Weapons Joint Operations* Manual states:

US nuclear forces serve to deter the use of WMD ["weapons of mass destruction," including chemical, biological, and nuclear weapons] across the spectrum of military operations. From a massive exchange of nuclear weapons to limited use on a regional battlefield, US nuclear capabilities must confront an enemy with risks of unacceptable damage and disproportionate loss should the enemy choose to introduce WMD into a conflict.\(^{394}\)

Similarly:

[S]omeday a nation may, through miscalculation or by deliberate choice, employ these weapons... [A]n opponent may be willing to risk destruction or disproportionate loss in following a course of action based on perceived necessity, whether rational or not in a totally objective sense. In such cases deterrence, even based on the threat of massive destruction, may fail.\(^{395}\)

The Navy Judge Advocate, in his reviews of the lawfulness of the Trident I (C-4) Missile and the Tomahawk Cruise Missile, recognized the potential uncontrollability of escalation resulting from the use of nuclear weapons and described the U.S. military in light of such uncontrollability. With respect to the Trident I, he stated that "[i]f escalation cannot be controlled, the United States objective is to maximize the resultant political, economic and military power of the United States relative to the enemy in the postwar period in order to preclude enemy domination. This is to be accomplished by: [following items, labeled a, b, and c, are completely redacted in the declassified, released version].\(^{396}\) For the Tomahawk, he stated that, if escalation cannot be controlled, the Tomahawk is meant to cause the "[d]estruction of those enemy political, economic and military resources critical to the enemy's postwar power and influence

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395. *Id.*
and national and military recovery."397 This is inconsistent with the rule which the Navy Judge Advocate acknowledges in the same document that "[t]hat the only legitimate object which States should endeavor to accomplish during was is to weaken the military force of the enemy."398

As to the radiation effects, the Navy Judge Advocate General, in his review of the lawfulness of the Trident I (C-4) Missile; and the Tomahawk, noted the significance of where the weapon detonates, vis-à-vis the ground. As to the Trident I, he stated, that "[t]he optimum height of burst against hard targets . . . may result in radioactive fallout contamination downwind from ground zero."399 As to the Tomahawk, he stated that attacking a hard target with a nuclear Tomahawk requires a close to the ground air burst, resulting in "significant [post-detonation] radioactive fallout."400

C. U.S. Distortion No. 3: That the United States Can Hit Desired Targets with Great Accuracy

As noted above, the United States has argued that it can now target nuclear weapons with great accuracy.401 Based on publicly available information, it similarly appears that at least some of the North Korean missile delivery systems are capable of considerable accuracy.402

While such contentions as to the physical accuracy of particular missile systems may be accurate, they overlook the fact that such accuracy is merely of a statistical nature, referring to the fact that modern U.S. missiles are generally capable of extreme


398. NAVY JAG TOMAHAWK, supra note 397, at 17 (emphasis omitted) (citing the St. Petersburg Declaration renouncing the Use, in Time of War, of Explosive Projectiles under 4000 Grammes Weight, November 29/December 11, 1868, I A. J. INT’L L. Supp. 95 (1907)).

399. JAG TRIDENT I, supra note 272, at 6.

400. NAVY JAG TOMAHAWK, supra note 397, at 6.


402. See supra notes 267-72 and accompanying text.
accuracy.\textsuperscript{403} A high percentage of missiles launched can be expected to strike within a close distance of their intended targets.\textsuperscript{404}

However, the accuracy of any particular missile is uncertain and no one can know where it might end up.\textsuperscript{405}

Variables affecting this matter are legion, including: the weather; gravitational effects; the accuracy of test or computational assumptions as to how the missile will perform and as to the location and nature of the target; the extent to which the launch was programmed and implemented correctly to reach the target; the extent to which the mechanical and electronic equipment in the missile functions as intended; the effect of the detonation of other nuclear or other weapons on performance; and the height at which the warhead detonates.\textsuperscript{406}

The United States reportedly achieved an overall accuracy level of some 82\% in the Gulf War with its BG-109 Tomahawk cruise missiles, but that was only an average, with some missions


\textsuperscript{404} See David Fulghum, Clashes with Iraq Continue After Heavy Air Strike, Aviation Week & Space Tech., Jan. 22, 1993, at 38.

\textsuperscript{405} See Moxley, supra note 45, at 525-27, nn.7-17, and accompanying text; see also United States General Accounting Office, Report To Congress: Operation Desert Storm: Evaluation of the Air War 5–7 (July 1996); BBC Summary of World Broadcasts, Sept. 7, 1998 [hereinafter BBC Summary]; Pakistan — Cruise Missile Found Near Pakistan Nuclear Test Site, FT Asia Intelligence Wire, Aug. 24, 1998 [hereinafter Pakistan — Cruise Missile Found].

\textsuperscript{406} See ICJ Hearing, Nov. 15, 1995, supra note 351, at 80 (citing the Secretary-General's 1990 Report on nuclear weapons, at 75, ¶ 290); Tsipis, supra note 270, at 72-76; Ashton B. Carter, Sources of Error and Uncertainty, in Managing Nuclear Operations 611–39 (1987). As the United States, through its attorney McNeill, argued to the ICJ, the effects of nuclear weapons depend on such factors as “the explosive yield and height of the burst of individual weapons, on the characteristics of their targets, as well as on climatic and weather conditions,” ICJ Hearing, Nov. 15, 1995, supra note 351, at 80 (citing the Secretary-General's 1990 Report of Nuclear Weapons, at 75, ¶ 290), and on “the technology that occasions how much radiation the weapon may release, where, in relation to the earth's surface it will be detonated, and the military objective at which it would be targeted.” Id. at 89. As to the significance of such factors, McNeill argued, “These differences, distinctions and variables cannot be ignored; they are critical to the appropriate legal analysis.” Id. at 87.
achieving a near perfect success rate and one mission obtaining a rate of only 67%.407

With the U.S. attacks on terrorist bases in Afghanistan and Sudan in 1998, some missiles reportedly ended up in the wrong country, for example, Pakistan.408

Similarly, in the 1999 Kosovo operation, there were numerous missile strikes that ended up at the wrong targets, both because of weapons and human error, including intelligence error.409

Delivery of nuclear weapons by bomber, while having the advantage that a bomber may generally be recalled before releasing its weapons,410 is subject to equipment, pilot, and situational

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407. See Fulghum, supra note 404, at 38; see also Stanley Kandebo, Operation Desert Storm—Tomahawk Missiles Excel in First Wartime Use, 134 AVIATION WEEK & SPACE TECH, no. 3, at 61 (Jan. 21, 1991).


According to a Pakistani foreign ministry spokesman, the two missiles ending up in Pakistan had been fired from U.S. ships 120 nautical miles off the coast of Pakistan, purportedly within the country’s territorial waters, and landed near the sites where Pakistan had tested nuclear weapons on May 28 and 30, 1998. See Mackinnon, Pakistan, supra, at 8. Thus, the missiles that went astray had not even been sent a long distance.

A third unexploded warhead with its cruise missile delivery vehicle was reportedly found in Afghanistan. See BBC SUMMARY, supra note 405 (Taliban said ready to sell unexploded US cruise missile “to any country”).

It is sobering that these deviations from targeting could occur in an operation where the United States apparently went to great lengths to achieve accuracy and precision, even to the point, in planning an attack on a chemical plant in Sudan, of modeling the “likely plume of [the] attack beforehand, using such factors as weather conditions, the building’s structure and properties of the suspected chemicals inside.” See John-Alex Romano, Combating Terrorism and Weapons of Mass Destruction: Reviving the Doctrine of a State of Necessity, 87 GEO. L.J. 1023 (Apr. 1999) (quoting Eugene Robinson & Dana Priest, Reports of U.S. Strikes’ Destruction Vary; Afghanistan Damage ‘Moderate to Heavy’; Sudan Plant Leveled, WASH. POST, Aug. 22, 1998, at A1).


410. See DOCTRINE FOR JOINT THEATER NUCLEAR OPERATIONS, supra note 353, at 13–15; see also John F. McCarthy, Jr., The Case for the B-1 Bomber, 1 INT‘l SECURITY, No. 2, Fall 1976, 78, 84–85; PAUL BRACKEN, THE COMMAND AND CONTROL OF NUCLEAR FORCE 6 (1983) (“Never has there been a Soviet–American confrontation during this modern period . . . The Cuban missile crisis of 1962 was the highest level alert ever declared by
error. In U.S. operations in Afghanistan, the U.S. military accidentally bombed a wedding party and a cluster of Canadian soldiers.411 During the recent invasion of Iraq, Iraqi officials claimed that air strikes hit two crowded Baghdad markets, and a missile hit a Syrian bus.412 Stephen Younger, the head of the Defense Threat Reduction Agency, recently stated that poor intelligence hampers the effectiveness of precision-guided munitions.413

While certain of the more modern U.S. aircraft are extraordinarily fast and ostensibly have the capability of eluding radar detection, aircraft are inherently subject to pursuit, radar and human error — and hence to substantial risk factors as to accuracy of delivery.414 These limitations on accuracy of delivery obviously impose limitations on nuclear operations not present as to conventional weapons where the implications of weapons going astray are much less serious.415 Even if the warhead is delivered accurately at the target, its performance is subject to its correct functioning.416 No doubt the accuracy of delivery of the

the United States.”). At the height of the crisis, the U.S. nuclear alert level was raised to Defense Condition 2, one stage before full thermonuclear war. Strategic Air Command authorized nuclear-armed B-52 bombers to fly past their fail-safe points to preplanned targets in the Soviet Union before being recalled. See id.

411. Max Boot, Sparing Civilians, Buildings and Even the Enemy, N.Y. TIMES, Mar. 30, 2003. The article states that even smart bombs miss their targets “7 percent to 10 percent of the time.” Id.

412. See id.


414. See As Strikes Mount, supra note 409; see also Price, supra note 409; KOSTA TsIPIS, supra note 267, at 68–76, 114–15, 121–296; The Doctrine for Joint Theater Nuclear Operations, supra note 353, at 13–15.

Reportedly the “success level of the United States’ most advanced fighters” is less than the 83% overall success rate that the Navy attained with its BG-109 Tomahawk cruise missiles (conventional) during the 1991 Gulf War. See Fulghum, supra note 404, at 38.


416. See KOSTA TsIPIS, supra note 267, at 68–76.

The Navy Judge Advocate General, in his review of the lawfulness of the Tomahawk Cruise Missile, acknowledged that targeting of the missile involves questions as to the “probability” of the missile performing as planned, all subject to the unknown effects of possible “enemy action.” Navy JAG Tomahawk, supra note 397, at 5.
North Korean systems are subject to at least as much uncertainty.

D. U.S. Distortion No. 4: That the Effects of Nuclear Weapons Are No Worse than Those of Conventional Weapons

The United States took the position before the ICJ that the effects of nuclear weapons are essentially comparable to the effects of conventional weapons. McNeill argued:

It is true that the use of nuclear weapons would have an adverse collateral effect on human health and both the natural and physical environments, but so too can the use of conventional weapons. Obviously, World Wars I and II, as well as the 1990-1991 conflict resulting from Iraq’s invasion of Kuwait, dramatically demonstrated that conventional war can inflict terrible collateral damage to the environment. The fact is that armed conflict of any kind can cause widespread, sustained destruction; the Court need not examine scientific evidence to take judicial notice of this evident truth.\(^417\)

This position, as applied to North Korea, would seem to be as misguided as it is unfounded. It would seem to be indisputable that nuclear weapons threaten far greater damages than conventional weapons. The ICJ described the “unique characteristics” of nuclear weapons:

The Court . . . notes that nuclear weapons are explosive devices whose energy results from the fusion or fission of the atom. By its very nature, that process, in nuclear weapons as they exist today, releases not only immense quantities of heat and energy, but also powerful and prolonged radiation. According to the material before the Court, the first two causes of damage are vastly more powerful than the damage caused by other weapons, while the phenomenon of radiation is said to be peculiar to nuclear weapons. These characteristics render the nuclear weapon potentially catastrophic. The destructive power of nuclear weapons cannot be contained in


either space or time. They have the potential to destroy all civilization and the entire ecosystem of the planet.

The radiation released by a nuclear explosion would affect health, agriculture, natural resources and demography over a very wide area. Further, the use of nuclear weapons would be a serious danger to future generations. Ionizing radiation has the potential to damage the future environment, food and marine ecosystem, and to cause genetic defects and illness in future generations.

36. In consequence... it is imperative for the Court to take account of the unique characteristics of nuclear weapons, and in particular their destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to generations to come.418

The effects of nuclear weapons were described further in dissenting opinions of individual Judges of the ICJ. Judge Weeramantry stated that “[a] 5-megaton weapon would represent more explosive power than all of the bombs used in World War II and a twenty-megaton bomb more than all of the explosives used in all of the wars in the history of mankind.”419 Judge Weeramantry also noted the electromagnetic pulse as a further effect of the use of nuclear weapons, stating that this very sudden and intensive burst of energy throws all electronic devices out of action, including communications lines, such as nuclear command and control centers. The judge noted that the electromagnetic pulse caused by a nuclear explosion of some 400 kilometers altitude “can instantly put out of service the greater part of semiconductor electronic equipment in a large country, such as the United States, as well as a large part of its energy distribution networks, without other effects being felt on the ground.”420

418. See Nuclear Weapons Advisory Opinion, supra note 1, at ¶¶ 34-35, 35 I.L.M. at 821–22; see also NATO HANDBOOK ON THE MEDICAL ASPECTS OF NBC DEFENSIVE OPERATIONS, supra note 385, at I.1 ¶ 102(a); INTERNATIONAL PHYSICLANS FOR THE PREVENTION OF NUCLEAR WAR, supra note 386; Carl Sagan, Nuclear War and Climatic Catastrophe: Some Policy Implications, 62 FOREIGN AFF. 257, 273 (Winter 1983/1984). See generally The Effects of Nuclear War, supra note 387, at 16–17 (it is estimated that only half of the suffering would be over as of the end of the war itself: “A failure to achieve [social and economic] viability... would result in many additional deaths, and much additional economic, political, and social deterioration. This post war damage could be as devastating as the damage from the actual nuclear explosions”). Id. at 5.

419. 35 I.L.M. at 887 (Weeramantry, J., dissenting).

420. Id. at 873 (citing Dictionnaire Encyclopedique D’Electronique).
Judge Weeramantry discussed the long-term nature of the effects of radiation:

The effects upon the eco-system extend, for practical purposes, beyond the limits of all foreseeable historical time. The half-life of one of the by-products of a nuclear explosion — plutonium 239 — is over twenty thousand years. With a major nuclear exchange it would require several of these “half-life” periods before the residuary radioactivity becomes minimal. Half-life is “the period in which the rate of radioactive emission by a pure sample falls by a factor of two.”

The following table gives the half-lives of the principal radioactive elements that result from a nuclear test.

<table>
<thead>
<tr>
<th>Nuclide</th>
<th>Half-life</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cesium 137</td>
<td>30.2 years</td>
</tr>
<tr>
<td>Strontium 90</td>
<td>28.6 years</td>
</tr>
<tr>
<td>Plutonium 239</td>
<td>24,100 years</td>
</tr>
<tr>
<td>Plutonium 240</td>
<td>6,570 years</td>
</tr>
<tr>
<td>Plutonium 241</td>
<td>14.4 years</td>
</tr>
<tr>
<td>Americium 241</td>
<td>432 years</td>
</tr>
</tbody>
</table>

Theoretically, this could run to tens of thousands of years. At any level of discourse, it would be safe to pronounce that no one generation is entitled, for whatever purpose, to inflict such damage on succeeding generations. \(^\text{421}\)

With respect to the argument that Hiroshima and Nagasaki show that nuclear war is survivable, Judge Weeramantry noted not only that the bombs used in Hiroshima and Nagasaki were not of more than 15 kilotons explosive power, but also that the use of those bombs ended the war, occurred in a context where the target country was not a nuclear power, and there were no other nuclear powers to come to Japan's assistance, all situations unlikely to characterize any future use of such weapons. \(^\text{422}\)

Judge Koroma stated:

According to the material before the Court, it is estimated that more than 40,000 nuclear warheads exist in the world today with a total destructive capacity around a million times greater than that of the bomb which devastated Hiroshima. A single nuclear bomb detonated over a large city is said to be

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421. Id. at 888 (quoting 9 ENCYC. BRITANNICA MICRopaEDIA (1992 ed.); id. at 893 (citing RADIOECOLOGY (Holm ed., 1995)).
422. Id. at 895.
capable of killing more than 1 million people. These weapons, if used massively, could result in the annihilation of the human race and the extinction of human civilization. Nuclear weapons are thus not just another kind of weapon; they are considered the absolute weapon and are far more pervasive in terms of their destructive effects than any conventional weapon.423

Judge Shahabuddeen quoted Javier Perez de Cuellar, Secretary-General of the United Nations, to similar effect:

The world's stockpile of nuclear weapons today is equivalent to 16 billion tons of TNT. As against this, the entire devastation of the Second World War was caused by the expenditure of no more than 3 million tons of munitions. In other words, we possess a destructive capacity of more than a 5,000 times what caused 40 to 50 million deaths not too long ago. It should suffice to kill every man, woman and child 10 times over.424

The U.S. Joint Chief of Staff's Joint Nuclear Operations manual recognizes that "the use of nuclear weapons represents a significant escalation from conventional warfare."425 The manual states: "The fundamental differences between a potential nuclear war and previous military conflicts involve the speed, scope, and degree of destruction inherent in nuclear weapons employment, as well as the uncertainty of negotiating opportunities and enduring control over military forces."426 Since nuclear weapons have greater destructive potential, in many instances they may be inappropriate.427 The Joint Nuclear Operations manual further recognizes: "The immediate and prolonged effects of WMD—including blast, thermal radiation, prompt (gamma and neu-

423. 35 I.L.M. at 934 (Koroma, J., dissenting).
424. 35 I.L.M. at 863–64 (Shahabuddeen, J., dissenting) (quoting de Cuellar, supra note 388, at 91).
425. DOCTRINE FOR JOINT NUCLEAR OPERATIONS, supra note 355, at II-1, II-6, II-7.
426. Id. at I-6. The manual further stated:
Terminating a global war involving the use of large numbers of WMD on both sides and the degradation and or destruction of their central means of control could be vastly more difficult than ending a theater or regional nuclear conflict involving the relatively constrained use of a limited number of nuclear weapons. In the latter case, war-termination strategies may more readily lead to a cessation of hostilities, assuming that the belligerents' interests in war termination are mutual.

Id.
427. DOCTRINE FOR JOINT THEATER NUCLEAR OPERATIONS, supra note 353, at v–vi.
tron) and residual radiation—pose unprecedented physical and psychological problems for combat forces and noncombatant populations alike. 428

The U.S. Joint Chief of Staff's *Joint Theater Nuclear Operations* manual similarly states:

Nuclear weapons are unique in this analysis [as to "the long-standing targeting rules of military necessity, proportionality, and avoidance of collateral damage and unnecessary suffering] only in their greater destructive potential (although they also different from conventional weapons in that they produce radiation and electromagnetic effects and, potentially, radioactive fallout). 429

E. U.S. Distortion No. 5: That the Radiation Effects of Nuclear Weapons Are Not Relevant to the Lawfulness of the Use of the Weapons

The United States contends that the radiation effects of nuclear weapons need not be taken into consideration in evaluating whether the use of the weapons would be lawful since radiation is a natural effect of nuclear weapons, not something intentionally added by the United States to make nuclear weapons more destructive. In its memorandum to the ICJ, the United States argued:

[The prohibition against unnecessary suffering] was intended to preclude weapons designed to increase the injury or suffering of the persons attacked beyond that necessary to accomplish the military objective. It does not prohibit weapons that may cause great injury or suffering if the use of the weapon is necessary to accomplish the military mission. For example, it does not prohibit the use of anti-tank munitions which must penetrate armor by kinetic-energy or incendiary effects, even though this may well cause severe and painful burn injuries to the tank crew. By the same token, it does not prohibit the use of nuclear weapons, even though such weapons can produce severe and painful injuries. 430

430. U.S. ICJ Memorandum/GA App., supra note 315, at 420 (citing *Law of Land Warfare*, supra note 311, at 18). The memorandum noted that the prohibition against unnecessary suffering has been applied, for example, to lances with barbed tips and
U.S. attorney McNeill stated the point specifically in oral argument: "The unnecessary suffering principle prohibits the use of weapons designed specifically to increase the suffering of persons attacked beyond that necessary to accomplish a particular military objective."431

By this position, the United States in effect is telling North Korea that under international law, it may use nuclear weapons without considering the radiation effects of such weapons upon civilians, enemy forces, neutrals, or anyone else.

The United States cited no support for this requirement, which appears to be contrary to the United States' general statement of the requirements of the rule of necessity, as well as to its statements of the rules of discrimination and proportionality.432 It would seem clear, as a matter of law, that, in evaluating the lawfulness of a use of nuclear weapons, a State is required to consider all of the effects, including the radiation effects.

F. U.S. Distortion No. 6: That Only Specifically Intended Effects of Nuclear Weapons Are Unlawful

The United States argued before the ICJ that uses of nuclear weapons causing unlawful effects would only be unlawful if the State using the weapons specifically intended the unlawful effects. U.S. attorney McNeill stated in his oral argument:

The argument that international law prohibits, in all cases, the use of nuclear weapons appears to be premised on the incorrect assumption that every use of every type of nuclear weapon will necessarily share certain characteristics which contravene the law of armed conflict. Specifically, it appears to be assumed that any use of nuclear weapons would inevitably escalate into a massive strategic nuclear exchange, resulting automatically in the *deliberate* destruction of the population centers of opposing sides.433

The U.S. argument that the destruction of an enemy's population center must be "deliberate" to be unlawful appears to assume that violations of the law of war must be intentional, as

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432. *See supra* notes 315-50 and accompanying text.
opposed to grossly negligent or reckless. Such a limitation, as applied to North Korea or any State, would appear to greatly limit the scope of the law of armed conflict. This argument is also contrary to settled law. As the Nuremberg proceedings exemplified, individuals, not States, are potentially put in prison or executed.States can, and historically have been, subject to damages and reparations, but, in contemporary international law, the focus of war crimes trials is on the responsible individuals.

The United States recognized a very broad range of potential criminal liability of individuals for war crimes, including not only for activity of an intentional nature, but also for reckless, grossly negligent, and even negligent conduct. Specifically, the United States has recognized that States are subject to war crimes culpability without regard to mental state; individuals are subject to culpability based not only on recklessness, but also on gross negligence; and commanders are subject to culpability based on mere negligence or something approaching it.

Thus, The Air Force Manual on International Law goes on to state that *mens rea*, or a guilty mind, at the level of purposeful behavior or intention or at least gross negligence, is required for individual, as opposed to State, criminal responsibility. The


437. See id. at 15-3, 15-8 n.13 (citing James Molony Spaight, Air Power and War Rights 57, 58 (1947)).

438. See id. at 15-2 to 15-3; see also The Law of Land Warfare, supra note 311, at 178; The A.F. Commander's Handbook, supra note 311, at 8-1; The Naval/Marine Commander's Handbook, supra note 311, at 6-5, 6-5 n.13 (citing United States v. Wilhelm List et al., 9 TWC 127 (1950)); Cherif Bassouini & Peter Manikas, The Law of the International Criminal Tribunal for the Former Yugoslavia 361, 362 (1996) (citing The High Command Case, 2 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1949) (This case is also known as United States v. Wilhelm von Leeb)).

manual quotes Spaight's statement of the rule:

In international law, as in municipal law intention to break the law—mens rea or negligence so gross as to be the equivalent of criminal intent is the essence of the offense. A bombing pilot cannot be arraigned for an error of judgment...it must be one which he or his superiors either knew to be wrong, or which was, in se, so palpably and unmistakably a wrongful act that only gross negligence or deliberate blindness could explain their being unaware of its wrongness.\textsuperscript{440}

As to commander liability, a commander is responsible to maintain and prevent violations of the law of war by subordinates and can be liable based on such violations.

\textit{The Air Force Manual on International Law} states that “[c]ommand responsibility for acts committed by subordinates arises when the specific wrongful acts in question are knowingly ordered or encouraged.”\textsuperscript{441} The manual states that the commander is also responsible “if he has actual knowledge, or should have had knowledge” that his subordinates “have or are about to commit criminal violations, and he culpably fails to take reasonably necessary steps to ensure compliance with the law and punish violators thereof.”\textsuperscript{442}

\textit{The Naval/Marine Commander’s Handbook} quotes the United States Military Tribunal’s decision in \textit{The Hostages} case for the proposition that the commander is charged with available information even if not personally aware of same:

Want of knowledge of the contents of reports made to him (i.e., to the commander general) is not a defense. Reports to commanding generals are made for their special benefit. Any failure to acquaint themselves with the contents of such reports, or a failure to require additional reports where inadequacy appears on their face, constitutes a dereliction of duty which he cannot use in his behalf.\textsuperscript{443}

The handbook states that the responsibility of a commanding officer “may be based solely upon inaction” and that it is “not always necessary to establish that a superior knew, or must be

\textsuperscript{440} Id. at 15-8 n.13.
\textsuperscript{441} Id. at 15-3, 15-9 n.23 (citations omitted).
\textsuperscript{442} Id. at 10, 15-2 to 15-3; see also \textit{Law of Land Warfare}, supra note 311, at 178.
\textsuperscript{443} \textit{Naval/Marine Commander’s Handbook}, supra note 311, at 6-5 n.13 (quoting \textit{United States v. Wilhelm List et al.}, 9 \textit{Trials of War Criminals Before the Nuremberg Military Tribunals} 127 (1950)).
presumed to have known of the offense committed by his subordinates.\textsuperscript{444} "While a commander may delegate some or all of his authority, he cannot delegate responsibility for the conduct of the forces he commands."\textsuperscript{445}

In upholding the defendant's conviction in the \textit{Yamashita} case, the U.S. Supreme Court ostensibly saw commander responsibility as a way of dealing with the risk of wanton acts by troops against protected persons:

The question then is whether the law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, and whether he may be charged with personal responsibility for his failure to take such measures when violations result. It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders of or efforts of their commanders would almost certainly result in violations which it is the purpose of the law of war to prevent.\textsuperscript{446}

It is also clear that the law of armed conflict generally recognizes recklessness and other mental states less than strict intentionality as a basis for war crimes liability.\textsuperscript{447} The Geneva conventions extensively provide for criminal culpability for violations committed willfully,\textsuperscript{448} a state of mind broadly recognized

\begin{itemize}
\item \textsuperscript{444} \textit{Id.} at 6 n.13.
\item \textsuperscript{445} \textit{Id.} at 6-6.
\item \textsuperscript{446} \textit{In re Yamashita}, 327 U.S. 1, 15 (1946).
\item \textsuperscript{447} \textit{See} International Committee of the Red Cross, Commentary on Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1997, Part V: Execution of the Conventions and of This Protocol: Section II—Repression of Breaches of the Conventions and of this Protocol, Art. 85 — Repression of Breaches of This Protocol, \textit{available at} \text{www.icrc.org/ihl.nsf} (last visited Apr. 16, 2004) [hereinafter International Committee of the Red Cross].
\end{itemize}
as encompassing recklessness. The law of armed conflict similarly recognizes criminal culpability for acts of wantonness and of "wanton destruction," acts also not reaching the level of strict intentionality.

Similarly, in imposing war crimes culpability for "an attack which may be expected to cause" certain impermissible effects, as prescribed, for example, in Protocol I to the Geneva Conventions, Article 51(5), or for acts that are "intended, or may be expected, to cause" certain impermissible effects, as prescribed, in Protocol I, Article 35(3), the law again recognizes potential culpability for war crimes committed with a mental element of less than strict intentionality.

While the ICJ did not address this issue in its Nuclear Weapons Advisory Decision, several of the judges in their individual decisions did. Judge Weeramantry, in his dissenting opinion, rejected the notion that there is no State responsibility for the effects of nuclear weapons — "by-products" or "collateral damage" — that are not specifically intended:

Such results are known to be the necessary consequences of the use of the weapon. The author of the act causing these consequences cannot in any coherent legal system avoid legal responsibility for causing them, any less than a man careening in a motor vehicle at a hundred and fifty kilometers per hour

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449. See International Committee of the Red Cross, supra note 447.
451. Paust, supra note 450, at 438-41 (citations and emphasis omitted).
through a crowded market street can avoid responsibility for
the resulting deaths on the ground that he did not intend to
call the particular person who died.\textsuperscript{452}

Judge Weeramantry added: "The plethora of literature on
the consequences of the nuclear weapon is so much part of com-
mon universal knowledge today that no disclaimer of such
knowledge would be credible."\textsuperscript{453}

To the argument that the rule of moderation — the prohi-
bition of the use of arms "calculated to cause unnecessary suffer-
ing" — requires specific intent ("calculation"), Judge Weera-
mantry cited the "well-known legal principle that the doer of an
act must be taken to have intended its natural and foreseeable
consequences."\textsuperscript{454} He also stated that reading into the require-
ment such a requirement of specific intent would not "take into
account the spirit and underlying rationale of the provision — a
method of interpretation particularly inappropriate to the con-
struction of a humanitarian instrument."\textsuperscript{455} He added that nu-
clear weapons "are indeed deployed 'in part with a view to utiliz-
ing the destructive effects of radiation and fall-out.'"\textsuperscript{456}

G. U.S. Distortion No. 7: That A Potential Use Of A Nuclear
Weapon Could Only Be Deemed Unlawful In Advance If It Were
Clear That It Would "Necessarily" And "Inevitably" Lead To
Impermissible Collateral Effects

The United States argued to the ICJ that the unlawful ef-
facts of the use of nuclear weapons would have to be necessary
and inevitable effects of such weapons for the use to be unlawful.
As noted above, U.S. attorney McNeill argued:

The argument that international law prohibits, in all cases,
the use of nuclear weapons appears to be premised on the
incorrect assumption that every use of every type of nuclear
weapon will necessarily share certain characteristics which
contravene the law of armed conflict. Specifically, it appears
to be assumed that any use of nuclear weapons would inevita-
bly escalate into a massive strategic nuclear exchange, result-

\textsuperscript{452} 35 I.L.M at 901 (Weeramantry, J., dissenting).
\textsuperscript{453} Id.
\textsuperscript{454} Id. at 48.
\textsuperscript{455} Id.
\textsuperscript{456} Id. (citing Ian Brownlie, Some Legal Aspects of the Use of Nuclear Weapons, 14
Int'l & Comp. L. Q. 445 (1965)).
ing automatically in the deliberate destruction of the population centers of opposing sides. 457

This formulation of the law gives North Korea great leeway to use nuclear weapons without considering unlawful effects that are likely but not inevitable, essentially taking such effects out of the equation in evaluating the lawfulness of a particular use of nuclear weapons.

The United States, however, cites no legal authority for so limiting the applicable law and there would appear to be none. The rules of discrimination, necessity, and proportionality, as articulated by the United States itself, contain no such requirement that unlawful effects be necessary and inevitable. 458

To the contrary, the United States has recognized that the rules of discrimination, necessity, and proportionality are rules of reason, 459 subject to application on an objective not a subjective basis. 460 As such, the rules are to be applied in light of all reasonably available information and based on what is reasonable in the circumstances.

When considering the meaning and requirements of the rules of discrimination, necessity, and proportionality, the United States appears essentially to have taken the position that unlawful effects that are likely should be taken into consideration, 461 obviously a far more demanding standard than necessity and inevitability. In its memorandum to the ICJ, the United States argued:

Whether an attack with nuclear weapons would be disproportionate depends entirely on the circumstances, including the nature of the enemy threat, the importance of destroying the objective, the character, size and likely effects of the device, and the magnitude of the risk to civilians. Nuclear weapons are not inherently disproportionate. 462

457. ICJ Hearing, Nov. 15, 1995, supra note 351, at 68.
458. See supra notes 340-44, 367-68 and accompanying text.
460. See Moxley, supra note 7, at 62; NAVAL/MARINE COMMANDER'S HANDBOOK, supra note 311, at 6-5, 6-5 n.12.
461. See supra notes 325-50 and accompanying text.
H. U.S. Distortion No. 8: That Only Direct Effects Need Be Considered

The United States further takes the position that only the direct or "automatic" effects of the use of nuclear weapons need be considered. This position appears to give considerable leeway to North Korea and other States to use nuclear weapons without consideration of the likely indirect effects, such as escalatory uses of biological, chemical, and/or nuclear weapons by one's adversary or its allies or indeed by oneself in preemptive or actual response to one's adversary or its allies.

The United States provides no legal authority for limiting the relevant effects to those that are automatic and there would appear to be no such authority. To the contrary, the law seems clear that all possible effects that may reasonably be anticipated must be considered.464

I. U.S. Distortion No. 9: That the Collateral Killing of Civilians Is Lawful as Long as the Civilians Were Not Targeted "As Such"

The United States argued before the ICJ that collateral injury to civilians incidental to an attack on a military target is acceptable as long as the civilians are not targeted "as such." The United States argued that the rule of civilian immunity "would not be violated by the use of nuclear weapons to attack targets that constitute legitimate military objectives . . . ." The Air Force Manual on International Law quotes the articulation of this rule — "[t]hat it is prohibited to launch attacks against the civilian population as such" — from United Nations Resolution 2444 (XXIII), recognized by the United States as "an accurate declaration of existing customary law."468

The Navy Judge Advocate General, in his review of the law-

463. ICJ Hearing, Nov. 15, 1995, supra note 351, at 68 (emphasis added).
464. NAVAL/MARINE COMMANDER'S HANDBOOK, supra note 311, at 6-5, 6-5 n.12; MOXLEY, supra note 7, at 6-54, 61-62, 65.
466. Id. at 416.
467. THE A.F. MANUAL ON INT'L LAW, supra note 311, at 5-7 (emphasis added).
468. Id. (citing Arthur Rovine, Contemporary Practice of the United States Relating to International Law, 67 AM. J. INT'L L. 118, 122-25 (1973) (quoting DOD, General Counsel, Letter to the Effect that Resolution 2444 is "declaratory of existing customary international law").
fulness of the Trident I (C-4) Missile, stated the U.S. memorably, "Nuclear attack planning is not directed towards civilian population or residential structures per se, although substantial injury/damage to population and residential structures may result from targeting to accomplish [the national strategic objectives pursued by employment of the weapons]."469

This argument, if valid, would give North Korea wide leeway in killing civilians through attacks on military targets. However, this interpretation of the limited scope of civilian immunity is questionable.

The "as such" principle is based on the medieval doctrine of double effect, whereby necessary and foreseen but unintended evil effects of an otherwise good action are accepted on the ground that they were not intended.470

This doctrine, useful as it may be as a philosophical matter for distinguishing between various kinds of actions, seems fatally anachronistic when made to bear the weight of the lawfulness of nuclear weapons use. The extreme destruction likely to result from nuclear weapons ostensibly has a legal and moral content transcending the niceties of intentionality. In any event, to the extent intentionality is relevant; the principles of commander and other individual liability would seem to trump this medieval doctrine.

This over-used and poorly understood doctrine even by its own terms does not appear to justify the use of nuclear weapons. One of the elements of the doctrine is that the actor does not use the evil effect as an end or as a means to an end.471 Yet the United States, like other nuclear nations, is not only threatening, but also, in the case of use, would be using, the "evil effect," the


470. See Moxley, supra note 7, at 363-65 nn.43-45, 387-88, nn.2-3 and accompanying text; see also id. at 353-66, 387-96; St. Thomas Aquinas, Summa Theologiae, I-II, Quest. 64, art. 7; Stephen R. Latham, Aquinas and Morphine: Notes on Double Effect at the End of Life, 1 DePaul J. Health Care L. 625, 633 (1997); D. W. Bowett, Self-Defence in Int'l Law 10 (1958).

excessive and indiscriminate injury to the enemy's non-combatants and other protected persons and objects, since the doctrine of deterrence by its terms threatens such excessive and disproportionate effects.\textsuperscript{472}

As stated previously, the Joint Chief of Staff's \textit{Joint Nuclear Operations} manual states that "the US nuclear capabilities must confront an enemy with risks of unacceptable damage and disproportionate loss should the enemy choose to introduce WMD into a conflict"\textsuperscript{473} and that the adversary is in the position of "risk[ing] destruction or disproportionate loss."\textsuperscript{474}

The principle of double effect also includes a requirement of proportionality between the evil effect and the direct effect, here the achieving of the military objective.\textsuperscript{475} Accordingly, the principle of double effect, on this basis as well, would be unavailable to provide a legal justification for the effects of the use of nuclear weapons unless the proportionality rule could be complied with.

Hence, the "as such" rule, based not only upon its terms but also upon its underlying rationale and the developments in weapons and law since the Middle Ages, is ostensibly not applicable to nuclear or other weapons of mass destruction. The established substantive rules of law, with their requirements as to mental state, govern.

Nuclear weapons will have effects on protected persons and objects. The Navy Judge Advocate General, in his review of the lawfulness of the Tomahawk Cruise Missile, stated: "Collateral fatalities/injuries associated with a nuclear warhead attack against military or industrial targets will result."\textsuperscript{476}

\textbf{J. U.S. Distortion No. 10: That Nuclear Weapons May Lawfully Be Used in Reprisal}

The United States argued before the ICJ that, even if the

\textsuperscript{472} See \textit{Doctrine for Joint Nuclear Operations}, supra note 355, at I-1, I-2; Michael Walzer, supra note 471, at 153, 273–83 (1968); Facothey, supra note 471, at 113 n.1.

\textsuperscript{473} Doctrine for Joint Nuclear Operations, supra note 355, at I-1 (emphasis omitted).

\textsuperscript{474} Id. at I-2.

\textsuperscript{475} See Moxley, supra note 7, at 353-67; see also Model Penal Code § 3.02, cmt. 3, at 14–15 (A.L.I. 1985).

\textsuperscript{476} Navy JAG Tomahawk, supra note 397, at 7.
use of nuclear weapons were deemed *per se* unlawful, such weapons could still be used in reprisal:

Even if it were to be concluded—as we clearly have not—that the use of nuclear weapons would necessarily be unlawful, the customary law of reprisal permits a belligerent to respond to another party's violation of the law of armed conflict by itself resorting to what otherwise would be unlawful conduct.\textsuperscript{477}

While the United States recognized that a reprisal must be proportionate to the other side's violation,\textsuperscript{478} it impliedly argued that many uses of nuclear weapons could satisfy such a requirement and constitute a lawful reprisal. This position gives great leeway to North Korea and other States as to the circumstances in which nuclear weapons might lawfully be used. This position is not legally tenable. As discussed above, the use of a weapon cannot satisfy the test of proportionality if the effects of the

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Ironically, to an extent MAD is still U.S. policy. The U.S. position is that it is entitled to target civilians in circumstances when reprisals are appropriate. Col. Charles J. Dunlap, Jr. (USAF), Judge Advocate, U.S. Strategic Command, Offutt Air Force Base, Nebraska, in a 1997 article, stated:

Legal advisors should likewise be aware that while the U.S. does not target populations *per se*, it reserves the right to do so under the limited circumstances of belligerent reprisal. The U.S. (along with other declared nuclear powers) insists that Protocol I to the Geneva Conventions does not apply to nuclear weapons. Hence, prohibitions contained in Protocol I forbidding reprisals against civilians are not, in the U.S. view, applicable to nuclear operations.

*Id.* at 163.

Secretary of Defense Perry described MAD:

I would liken MAD to two men holding revolvers and standing about 10 yards away and pointing their revolvers at each others' head, and the revolvers are loaded, cocked, their fingers are on the trigger, and then to make matters worse they're shouting insults at each other. And that characterized MAD, which was what we had to control this arms race—this nuclear terror during all the periods of the Cold War.


\end{footnotesize}
weapon cannot be controlled.\footnote{See supra note 350 and accompanying text.} In addition, the action taken in reprisal must be "taken in the last resort, in order to prevent the adversary from behaving illegally in the future"\footnote{A.F. Manual on Int'l Law, supra note 311, at 10-3, 10-6 n.12 (quoting United States v. Ohlendorf, 4 Trials of War Criminals Before the Nuremberg Military Tribunals 493 (1950)); see also A.F. Commander's Handbook, supra note 311, at 8-1, 8-4(b); Law of Land Warfare, supra note 311, at 177.} and "may not significantly exceed the adversary's violation either in violence or effect."\footnote{Id. at 10-5.}

The probabilities are overwhelming that a second use of nuclear weapons would be designed to punish the enemy and, not incidentally, in the case of a substantial nuclear adversary, to use one's own nuclear assets before they could be preemptively struck by the adversary, and to attempt to preemptively strike the adversary's nuclear assets (many of which would likely be "co-located" with civilian targets) before they could be used. Even assuming adequate command and control, crucial decisions would have to be made within a very short time and would likely be dictated largely by existing war plans contemplating nuclear weapons use. The notion of a second strike as limited to the legitimate objectives of reprisal seems oxymoronic.

In addition, the United States, while it disputes the applicability to nuclear weapons of the limitations upon reprisals imposed by Protocol I,\footnote{See Moxley, supra note 7, at 93-94 n.274-77, 150-51 n.127-29, 228-29, nn.246-49 and accompanying text.} recognizes that the law of armed conflict, including that as to reprisals, is subject to the limitations inherent in the purposes of the law of armed conflict, such as preserving civilization and the possibility of the restoration of the peace, purposes that would likely be exceeded by the use of nuclear weapons.

Even if it were assumed that certain second uses of nuclear weapons, although otherwise unlawful, might be legitimized as reprisals, such legitimization, like the lawfulness of the limited use of a small number low-yield nuclear weapons in remote areas asserted by the United States before the ICJ, would only affect a small portion of the potential uses for nuclear weapons contemplated by U.S. policy and planning. It would leave unaffected the unlawfulness of the vast bulk of potential uses and virtually
the totality of likely possible uses, including first uses against biological, chemical, and conventional weapons targets, second uses intended to defeat and destroy the enemy, disproportionate second uses, and other high-mega-tonnage nuclear strikes with likely extreme effects.

XI. AGENDA BETWEEN THE UNITED STATES AND NORTH KOREA

It is difficult to be certain of the true agenda between North Korea and the United States. The background as to the post-World War II division of Korea, the Korean War of 1950-1953, and the Cold War position of North Korea as a member of the Soviet camp no doubt partially explain the current situation. Unlike Eastern Europe, Russia, and to a large extent, China, North Korea, even more so than Cuba, has not yet come in out of the cold.483

The question presents itself whether, when North Korea says it wants a non-aggression pact and economic support,484 it might mean what it is saying. If the United States were willing to bring North Korea under the umbrella of its economic and military systems, would the North Korean situation largely resolve itself?

While North Korea is an arms proliferator, exporting missiles to States unfriendly to the United States, such as Iran and Libya,485 it is not clear that North Korea's conduct is worse than that of other States with which the United States maintains amicable relations. These states include Pakistan, with its actual nuclear weapons and its ostensible permitting of actual exports of nuclear weapons technology;486 Saudi Arabia, ostensibly a major breeding ground of international terrorism, including the 9/11

484. See supra note 70 and accompanying text.
485. See supra note 112 and accompanying text.
attacks; and Iraq in the 1980's with its actual use of chemical weapons against Iran and the Kurds.

With the end of the Cold War, the U.S. military and the supporting industrial complex lost much of their reason for being, at least at the level they were then constituted. The world appeared to be facing the prospect of substantial demilitarization. This diminution of the military appeared to be happening for a number of years, at least to some extent.

At the time of demilitarization, the thought occurred to many that, if an enemy did not emerge, the industrial, military, and political systems of the United States would find an enemy. President Dwight D. Eisenhower had long previously warned of the risks of the development of this kind of thinking.

The United States' antagonism with Iraq starting in the early 1990s seemed to have many of the earmarks of such a contrived instigation of military antagonism. Saddam Hussein had long been the friend and ally of the United States, going back to the early 1980s. The United States supported him in many of

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488. See supra notes 158-64 and accompanying text.


492. See supra notes 156-63 and accompanying text.
his ventures, including his 1980-1988 war against Iran.\textsuperscript{493} Indeed, it was revealed as recently as December 2003 that, during the Reagan administration, the United States aided Iraq's war against Iran while knowing Iraq was using chemical weapons on the Iranians, as well as on Kurdish rebels.\textsuperscript{494} It was revealed in Iraqi transcripts of a meeting on July 25, 1990 between U.S. Ambassador Glaspie and Saddam Hussein that Glaspie had signaled to Hussein that the United States would not seriously object if Hussein invaded Kuwait.\textsuperscript{495}

Similarly, there are numerous indications that the United States' 2003 attack on Iraq was initiated without substantial imminent need or justification and possibly on a contrived and preconceived basis.\textsuperscript{496}

If anything, the measured response of the United States to North Korea's renewed nuclear weapons program could be read by North Korea and other States as confirming the wisdom of acquiring such weapons. The question remains whether the United States would so readily have attacked Iraq in 2003 if Iraq possessed nuclear weapons.

\textbf{XII. NORTH KOREA'S POTENTIAL USE AND THREAT OF USE OF NUCLEAR WEAPONS}

Given that North Korea, like any State, has a right of self-defense, may North Korea resort to nuclear weapons for such self-defense? While there is some ambiguity in its decision,\textsuperscript{497} the ICJ in its Nuclear Weapons Advisory Decision determined that the exercise of self-defense is subject to humanitarian law: "[A] use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law."\textsuperscript{498}

The ICJ further noted that if a weapon is unlawful, the fact

\textsuperscript{493} See supra notes 157-60 and accompanying text.
\textsuperscript{495} See supra notes 165-67 and accompanying text.
\textsuperscript{496} See supra notes 171-89 and accompanying text.
\textsuperscript{497} MOXLEY, supra note 7, at 174-84.
\textsuperscript{498} Nuclear Weapons Advisory Opinion, supra note 1, at ¶ 42.
that it is used for lawful self-defense or other lawful purpose does not immunize the unlawfulness:

39. [Articles 51 and 42] do not refer to specific weapons. They apply to any use of force, regardless of the weapons employed. The Charter neither expressly prohibits, nor permits, the use of any specific weapon, including nuclear weapons. A weapon that is already unlawful per se, whether by treaty or custom, does not become lawful by reason of its being used for a legitimate purpose under the Charter.499

Thus, the question, which was not reached by the Court, becomes whether the use of nuclear weapons is potentially lawful in any circumstance? For the reasons set forth above, I submit that the use of nuclear weapons would be unlawful in virtually any situation, given their extreme destructiveness and the uncontrollability of their effects.

If the use of nuclear weapons is unlawful, it would appear that the threat of such use is also unlawful. The ICJ in the Nuclear Weapons Advisory Case stated the rule as to threats as follows: “If an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to that law.”500

The Court further appeared to find that the policy of deterrence, and indeed possibly even the mere possession of nuclear weapons, would be unlawful if the actual use of the nuclear weapons would be unlawful. The Court stated:

47. In order to lessen or eliminate the risk of unlawful attack, states sometimes signal that they possess certain weapons to use in self-defence against any state violating their territorial integrity or political independence. Whether a signaled intention to use force if certain events occur is or is not a “threat” within Article 2, paragraph 4, of the Charter depends upon various factors. If the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2, paragraph 4.

499. Id. at ¶ 39.
500. Id. at ¶ 78, 35 I.L.M. at 827 (emphasis added); but see Lord Advocate's Reference No. 1 of 2000 [Mar. 30, 2001], 2001 SCCR 296; 2001 SC 143, Misc 11/00 H.C.J. (Scot.), ¶¶ 86, 96 (The Scottish High Court of Justiciary, in a case involving a challenge to the United Kingdom's policy of nuclear deterrence, concluded that that State's policy of deterrence was not specific enough to constitute a threat under international law); see also Charles J. Moxley, Jr., The Unlawfulness of the United Kingdom's Policy of Nuclear Deterrence, JURIDICAL REVIEW, Part 6, 2001; John Burroughs, The ILLEGALITY OF THREAT OR USE OF NUCLEAR WEAPONS 32-37 (Lit Verlag, Münster Germany 1997).
Thus it would be illegal for a state to threaten force to secure territory from another state, or to cause it to follow or not follow certain political or economic paths. The notions of "threat" and "use" of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal — for whatever reason — the threat to use such force will likewise be illegal. In short, if it is to be lawful, the declared readiness of a state to use force must be a use of force that is in conformity with the Charter. For the rest, no state — whether or not it defended the policy of deterrence — suggested to the Court that it would be lawful to threaten to use force if the use of force contemplated would be illegal.

48. Some states put forward the argument that possession of nuclear weapons is itself an unlawful threat to use force. Possession of nuclear weapons may indeed justify an inference of preparedness to use them. In order to be effective, the policy of deterrence, by which those states possessing or under the umbrella of nuclear weapons seek to discourage military aggression by demonstrating that it will serve no purpose, necessitates that the intention to use nuclear weapons be credible. Whether this is a "threat" contrary to Article 2, paragraph 4, depends upon whether the particular use of force envisaged would be directed against the territorial integrity or political independence of a state, or against the Purposes of the United Nations or whether, in the event that it were intended as a means of defence, it would necessarily violate the principles of necessity and proportionality. In any of these circumstances the use of force, and the threat to use it, would be unlawful under the law of the Charter.501

The United States in its appearances before the Court did not dispute the unlawfulness of a threat to commit an unlawful act and indeed appeared to recognize that the policy of deterrence constitutes a threat to use nuclear weapons. U.S. lawyer Michael J. Matheson, in his oral argument to the Court, stated:

[E]ach of the Permanent Members of the Security Council has made an immense commitment of human and material resources to acquire and maintain stocks of nuclear weapons and their delivery systems, and many other States have decided to rely for their security on these nuclear capabilities. If these weapons could not lawfully be used in individual or

501. Nuclear Weapons Advisory Opinion, supra note 1, at 823, ¶¶ 47-48 (emphasis added). The ICJ further stated in Paragraph 67 of its opinion (35 I.L.M. at 826) that it did not intend to pronounce upon the practice known as the "policy of deterrence." ld. at ¶ 67, 35 I.L.M. at 826.
collective self-defense under any circumstances, there would be no credible threat of such use in response to aggression and deterrent policies would be futile and meaningless. In this sense, it is impossible to separate the policy of deterrence from the legality of the use of the means of deterrence. Accordingly, any affirmation of a general prohibition on the use of nuclear weapons would be directly contrary to one of the fundamental premises of the national security policy of each of these many states.502

XIII. WISDOM OF U.S. POLICY OF NUCLEAR DETERRENCE

Because of its own nuclear program and policy of deterrence, the United States is in the continuing position of legitimizing nuclear weapons — and hence inevitably legitimizing them in the hands of North Korea and other States. A better course for the United States would be to recognize the unlawfulness of nuclear weapons and to start the process of de-legitimizing nuclear weapons.

While progress in the development of international law is reflected in the fact that biological and chemical weapons have been largely banned by international convention and ostensibly by international customary law,503 it cannot be said pragmatically that these bans have been effectively implemented. Not only is it believed that there are at least sixteen States currently having chemical weapons and eight States having biological weapons, as well as numerous additional States readily capable of acquiring them,504 but also the United States, through the current Bush administration, has resisted the imposition of an inspection regime on the Biological Weapons Convention505 and, through numerous administrations, has ostensibly circumvented both the Biological and Chemical Weapons Conventions.506

503. See Deller, supra note 123.
505. See Deller, supra note 123.
506. See Federation of American Scientists, supra note 128 and accompanying text.
It seems unrealistic to expect that the States of the world will ever agree to an effective ban on chemical and biological weapons as long as the United States is supporting — indeed asserting — the legitimacy of nuclear weapons.

This leads to a dangerous world, ostensibly more dangerous than the Cold War world, given the loss of coherency and control imposed by the Cold War strategic situation. Biological and Chemical weapons are extremely dangerous. Some credible sources have concluded that, in circumstances favorable to the attacker, biological weapons have the potential to cause as much injury as nuclear weapons. A small amount of a toxin or virus could poison substantial portions of the population of any U.S. city through only a few droplets placed in the water supply or through aerosol sprayed into the air.

The underlying technical information as to biological and chemical weapons, including information as to ingredients and to production technology — is more available and much less complex than that for nuclear weapons. The underlying materials, many of which have other innocent applications, are

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508. See Kagan & O’Connor, supra note 507. The delivery through aerosol of “[l]ess than ten pounds of anthrax” could have the effect of destroying “a city the size of Albuquerque.” Anne Boyle, Biological Weapons Still Pose a Serious Threat, Sandia Labs Researcher Says, ALBUQUERQUE TRIB., Aug. 7, 1997, at A6.

509. See Gertz, supra note 198. "Highly advanced communications are putting such weapons know-how in the hands of anyone with a computer and modem. 'The ingredients for sarin and other chemical weapons are easily accessible over the Internet,' said Sen. Sam Nunn (D. Ga.), the senior Democrat on the Senate Armed Services Committee, 'as is information about biological weapons and even instructions on how to make a nuclear device.'” Id.
likewise generally more available,\textsuperscript{510} and the prerequisites for acquiring, implementing, and setting up the necessary production facilities and processes are less daunting.\textsuperscript{511}

Biological and chemical weapons programs are also less expensive,\textsuperscript{512} smaller,\textsuperscript{513} less technically intensive,\textsuperscript{514} and easier to disguise.\textsuperscript{515} Because of such factors and also the greater proliferation that has already occurred, as well as the number of the States possessing such weapons, and the number of times such weapons have actually been used,\textsuperscript{516} the risks of biological and chemical weapons proliferation are substantial, from States, the

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\item \textsuperscript{510} See Proliferation of Weapons of Mass Destruction, supra note 507, at 6. "Virtually all the equipment underlying production of biological and toxin agents has civil applications and has become widely available as fermentation technology, and the pharmaceutical and biotechnology industries more generally, have spread worldwide." Id.
\item \textsuperscript{511} See id. at 1. "Barring a shortcut, such as the direct acquisition of nuclear materials usable in weapons, the infrastructure required to produce nuclear weapons is considerably more difficult and expensive than for either biological or chemical weapons. Mass production of lethal chemicals requires a greater investment than that of biological weapons, but is not nearly as expensive or challenging as production of nuclear materials." Id.
\item \textsuperscript{512} It is often said that biological and chemical weapons are a poor man's nuclear weapons, because they are appreciably cheaper, more accessible and substantially easier to deliver. See Boyle, supra note 508; see also Thomas Graham, Conventional Response; Nuclear Stance Could Worsen Chem-Bio Threat, Defense News, Feb. 23, 1998/Mar. 1, 1998, at 31.
\item \textsuperscript{513} See David Rohde, Standoff With Iraq: The Inspections, N.Y. Times, Feb. 12, 1998, at A6. ("In a 1996 report on biological weapons, the Center for Strategic and Int'l Studies, a public policy research institution in Washington, D.C., warned that it was easy for a would-be terrorist to assemble biological weapons — using commercial equipment with a capacity of 130 gallons"). Chemical weapons generally require somewhat larger production facilities that would be visible from the air. See Boyle, supra note 508.
\item \textsuperscript{514} See Boyle, supra note 508 ("Anybody who has taken Microbiology 202 can make a biological weapon . . . . Sophisticated lab equipment and exotic materials are not needed. You can brew up a biological weapon in a small brewer—like one you'd use for homemade beer").
\item \textsuperscript{515} See Gertz, supra note 198. A Nation or group gains tremendous flexibility if it chooses a biological weapons program: "Unlike chemical weapons programs, which require the use of large scale industrial equipment and possession of precursor chemicals, BW weapons do not need to be stockpiled. Nations can keep small quantities or even sample cultures on hand in freeze-dried form. Cultures can be mass produced at any time." Id. With biological weapons, "the threat resists taming because the weapons are easy to make and their production is hard for international monitors to detect." Boyle, supra note 508.
\item \textsuperscript{516} Moxley, supra note 7, at 630-31.
\end{itemize}
black market, terrorist organizations, and other criminal sources. Because they are lighter and smaller, bacteriological and chemical weapons are also easier to deliver.

It is noteworthy that the fundamental reason biological and chemical weapons have been outlawed by convention is the vast destructiveness to human life and the uncontrollability of their effects.

The U.S. policy of legitimizing nuclear weapons, and inevitably biological and chemical weapons, would appear to be con-

517. See Gertz, supra note 198. "Samples of deadly viruses needed for starting BW programs can be obtained on the international black market. U.S. counterproliferation officials are especially concerned that BW starter cultures could be smuggled out of the territory of the old Soviet Union by scientists looking to make money." Id. "The number of [N]ations capable of developing and possessing WMD is steadily increasing. Developing nations are receiving these weapons or means to develop them through technology transfer, overt or covert direct transfer, or support to belligerent groups or governments." Joint Doctrine for Nuclear, Biological and Chemical (NBC) Defense, supra note 512, at I-1.

518. "Crude dissemination of biological agents in an aerosol cloud can be performed with commercially available equipment, such as an agricultural sprayer mounted on a truck, ship, or airplane." Proliferation of Weapons of Mass Destruction, supra note 507, at 6.

For at least the next decade, few if any [States actively working to develop weapons of mass destruction] will be able to deliver such weapons more than a thousand kilometers or so in a reliable and timely manner. . . . Despite there current limitations in long-range military delivery systems, however, proliferate states—at least in principle—can threaten any country on earth using unconventional means (e.g., covert or disguised delivery systems such as a ship or truck).

Id. at 4. A chemical or biological weapon can be delivered by "even a suitcase." Id. at 3. "[A] given quantity of certain lethal microorganisms would probably kill even more people if spread effectively by human agents than if by a missile." Id. at 3.

In addition, the proliferation of ballistic missiles, such as the Soviet-made SCUD systems, has increased the risks of the potential use of chemical or biological weapons. See Joint Doctrine for Nuclear, Biological, and Chemical (NBC) Defense, supra note 512, at I-3. "Ballistic missiles offer potential proliferators several advantages in delivering NBC weapons . . . The potential for coercion is, perhaps, the long-range ballistic missile's greatest value to proliferators . . . [to] threaten distant cities and . . . distract and tie up military resources." 1997 Counterproliferation Program Review Committee Report to Congress 3-8 (1997).

519. As a "universally agreed illustration of . . . an indiscriminate weapon," The A.F. Manual on Int'l Law cites biological weapons, noting that the uncontrollable effects from such weapons "may include injury to the civilian population of other states as well as injury to an enemy's civilian population." See id. at 6-3. The manual further states that the "wholly indiscriminate and uncontrollable nature of biological weapons has resulted in the condemnation of biological weapons by the international community, and the practice of states in refraining from their use in warfare has confirmed this rule." Id.
trary to the national interest of the United States, certainly more so in the current era than during the Cold War.

In the Cold War era, the United States permitted itself to be in an inferior position to the Soviets in terms of conventional weapons and resorted to nuclear weapons to redress the balance.\textsuperscript{520} In the current era, the United States has overwhelming conventional weapons superiority and is facing the threat of nuclear weapons from militarily-inferior nations.\textsuperscript{521}

XIV. IRONY THAT NUCLEAR WEAPONS, IN THE NUCLEAR WORLD NOW FAVORED BY THE UNITED STATES, COULD BE LAWFUL FOR NORTH KOREA WHILE BEING UNLAWFUL FOR THE UNITED STATES

As noted above, North Korea, as an economic justification for its nuclear weapons program, relied upon the fact that pos-

\textsuperscript{520} See \textit{NSC-68 in American Defense Policy} 288 (Schuyler Forester & Edward N. Wright eds., 1990) [hereinafter \textit{NSC-68}]. Per NSC-68, the classic American policy statement on the necessity of countering Soviet conventional superiority in Europe with American nuclear superiority approved by President Truman in 1950, the United States would not renounce the first-use of nuclear weapons given its "present situation of relative unpreparedness in conventional weapons." \textit{Id.}

\textit{See also Lawrence Freedman, The Evolution of Nuclear Strategy} 71 (1989). Under NSC-68,

[u]ntil conventional forces had been built up, the United States had no choice but to rely on its nuclear arsenal, and extend its breathing space by maintaining, for as long as possible, a clear superiority in nuclear capabilities over the Soviet Union. The imbalance in conventional capabilities meant that the United States was not even able to hold back nuclear weapons as a last resort.


\textit{Cf.}


\textsuperscript{521} Moxley, \textit{supra} note 7, at 485, 493-94 nn.48-52 and accompanying text.
scessing nuclear weapons will enable it to avoid greater expenditures for conventional weapons, thereby enabling it to commit more of its resources to civilian needs.\textsuperscript{522} Ironically, the United States gave this same economic justification for its nuclear weapons program during the Cold War, as it permitted the Soviet Union to become more powerful in conventional weapons and relied on nuclear weapons for defense and deterrence.\textsuperscript{523}

However, there is an emerging issue in international law as to whether, under such rules as discrimination, necessity, and proportionality, a State may intentionally forswear development and procurement of a reasonably available less destructive and more discriminating weapon and then use a more destructive and blunderbuss weapon, in circumstances where the lesser weapon would have been sufficient had it been available.

The issue has recently come up in the context of high-tech \textit{smart} weapons the United States has used in its most recently military engagements, including in the Iraq and Kosovo conflicts. Specifically, the question has become whether the United States, or other States in similar situations, may lawfully use old-fashioned dumb weapons for missions that could be accomplished through the use of smart weapons, with appreciably less risk of collateral injury to protected persons and objects.\textsuperscript{524}

The point is established beyond question that a State may not use nuclear weapons if the use of conventional weapons

\textsuperscript{522} See supra note 69 and accompanying text. North Korea's factual assumption that nuclear weapons are cheaper than conventional weapons will likely turn out to be mistaken, given the United States' experience as to the indirect costs of nuclear weapons, including the ongoing costs of storing and disposing of associated toxic and radioactive waste and the costs of dismantling nuclear weapons systems and disposing of surplus nuclear materials. See also MOXLEY, supra note 7, at 548 n.44 and accompanying text; Stephen I. Schwartz, \textit{Introduction, in Atomic Audit} 4 (Stephen I. Schwartz ed., 1998).

\textsuperscript{523} See id. (quoting S. Conc. Res. 46, 82 Cong. 1 sess., introduced September 18, 1951, and referred to the Joint Committee on Atomic Energy). Resolution 46 stated in its preamble: "The cost of military fire power based on atomic bombs is hundreds of time cheaper, dollar for dollar, than conventional explosives." Id. at 4-5; see also id. at 2 n.3.

would suffice to accomplish the military mission. Given that the rule of necessity is a rule of reason, to be applied based upon an objective consideration of all available facts, it would seem that a State has an obligation, to the extent feasible, to maintain sufficient conventional weapons as not to run the risk of bringing upon itself the necessity to use nuclear weapons when conventional weapons would have sufficed.

This becomes a very significant legal point in the real world. Given the capability of today’s high-tech nuclear weapons, the United States is essentially in the position of being able to achieve with conventional weapons virtually any military mission for which it might previously have felt the need to resort to nuclear weapons.

The same is not true of North Korea. With the United States as its enemy, North Korea is ostensibly in a position

525. The A.F. Commander’s Handbook states that, in making the proportionality determination, the commander must decide, “in the light of all the facts known . . . whether to adopt any alternative method of attack to further reduce civilian casualties and damage.” A.F. COMMANDER’S HANDBOOK, supra note 311, at 3-3

THE A.F. MANUAL ON INT’L LAW states that application of the proportionality test requires consideration “whether some alternative form of attack would lessen collateral damage and casualties.” THE A.F. MANUAL ON INT’L LAW, supra note 311, at 5-9.

The manual adds that “[t]hose who plan or decide upon an attack” must “[t]ake all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians, and damage to civilian objects.” Id. at 5-9.

Thus, the determination of proportionality with respect to the use of nuclear weapons includes a comparison of the probable results of using conventional as opposed to nuclear weapons. See MOXLEY, supra note 7, at 359-46, 141-42, 472-77 nn.27-36 and accompanying text. See also 1996 DOCTRINE FOR JOINT THEATER NUCLEAR OPERATIONS, supra note 353, at vii–viii, II-7.

The rules of discrimination and necessity similarly require that nuclear weapons could not be used if conventional weapons would suffice. See MOXLEY, supra note 7, at 57, 42 n.87, 51-53 nn.108-09, 57 n.129, 60 n.140, and accompanying text.

526. See MOXLEY, supra note 7, at 53 n.112, 54-55 nn.116-20, 56 n.126, 60 n.138, 62 n.142, 95 n.283 and accompanying text.

527. See id. at 49 n.104, 53 n.112, 54-55 nn.114-120, 61 n.139 and accompanying text.

528. See id. at 57, 42-43 nn.87-90, 668 n.56, 695-98 nn.157-69, 737 n.30, 738 n.34, 769-70 nn.173-79 and accompanying text.

529. See GARY W. LANE, NEW CONVENTIONAL WEAPONS, REDUCING RELIANCE ON A NUCLEAR RESPONSE TOWARD AGGRESSORS (2002); MOXLEY, supra note 7, at 53 nn.110-12, 56 n.128, 633-50. See also id. at 400-01 nn.15-17, 633 n.1, 637 nn.13-14, 641-45 nn.37-52; NATIONAL DEFENSE PANEL, TRANSFORMING DEFENSE: NATIONAL SECURITY IN THE 21ST CENTURY 51 (Dec. 1997); David Learmount, Smart Bombs in Demand, FLIGHT INT’L, June 9, 1999; William J. Perry, Desert Storm and Deterrence, 70 FOREIGN AFF., no. 4, Fall 1991, at 66.
whereby, even if it spent every last penny of its national budget on conventional weapons, leaving nothing for civilian purposes, it would be unable to defend itself with conventional weapons against the United States.\textsuperscript{530} On such a basis, the use of nuclear weapons, if it is ever potentially lawful, as the United States asserts, could arguably be lawful for North Korea, but not for the United States.\textsuperscript{531}

This, in a sense, dramatizes the tragic dimension of the current Bush administration’s nuclear adventurism, threatening specific States, including China, Iran, Iraq, Libya, North Korea, Russia, and Syria, with nuclear attack and preparing contingency plans to attack them, while expanding its nuclear arsenal and lowering the threshold as to the circumstances in which it would use such weapons.\textsuperscript{532} The United States is legitimizing weapons — virtually assuring their proliferation — that the United States does not need and would likely never use, but which certain other States and organizations might well use against us. Rather than genuinely trying to curtail these weapons, the United States is taking the risk of legitimizing its own destruction.

The tragedy is the squandering of a hegemony that could be directed towards the construction of a safer world for one and all.

\textbf{CONCLUSION}

Given North Korea’s repressiveness, economic desolation, weapons proliferation practices, and hostility to the United States, a nuclear North Korea is of great concern. Circumstances are readily imaginable in which North Korea might sell

\textsuperscript{530} This year the U.S. Defense Department has requested $401.7 billion for its fiscal year 2005 budget. \textit{See Defense Department Announces 2005 Budget Request, available at http://www.defenselink.mil/releases/2004/nr20040123-0263.html} (last visited Apr. 16, 2004). This is compared to North Korea, whose GDP for 2002 is 22.26 billion. \textit{See World Factbook 2003: North Korea, supra note 201.}


or barter nuclear weapons and/or related equipment, materials and know-how to terrorist States and groups.

Nuclear weapons are extremely dangerous and are and should be unlawful. The United States' legitimization of these weapons flies in the face of the law of armed conflict and is against the United States' own interest. Nonetheless, as long as the United States advocates the lawfulness of the use of these weapons and follows the policy of nuclear deterrence, the United States will be in no position to object on legal grounds to North Korea’s nuclear program and policy of deterrence or that of other States or adversary groups with nuclear ambitions.

The threat posed by the nuclear weapons regime propagated by the United States is intertwined with the threat posed by biological and chemical weapons. As long as the United States legitimates nuclear weapons, biological and chemical weapons, the “poor Nation’s nuclear weapons,” will be de facto legitimized.

An opportunity may be present to bring North Korea into a more productive relationship with the family of nations. There is no reason to maintain this remaining vestige of the Cold War and every reason to throw North Korea the lifeline that may form the catalyst for transforming its society.

The United States must find the wisdom to overcome the forces of militarization warned of by President Eisenhower. Whatever truth may be present in the suggestion that our military industrial system seeks to expand itself and find occasions for the use of force must be faced and this tendency put under control.

The United States should recognize the unlawfulness of the use and threat of use of nuclear weapons and embark on the process of de-legitimizing them. While the process will likely take decades and be challenging, with effort progress can be made. Absent effort, it seems inevitable that proliferation and the related risks will increase.