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Did Kim Jong-II Break the Law - A Case Study on How North Korea Highlights the Flaws of the Non-Proliferation Regime

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I. Introduction

In Gilju, on the Sea of Japan, at 10:36am on October 9, 2006, an exclusive club gained a new member, as the Democratic People's Republic of Korea (North Korea) tested a nuclear weapon.¹ The rest of the club learned of their new member almost

¹ See Richard Johnson, *A Rogue Joins the Club*, GLOBE & MAIL (Canada), Oct. 10,

immediately, as listening posts detected the seismic event.² The other eight nations wielding nuclear weapon technology had been tipped off six days earlier when North Korea indicated it possessed a nuclear weapon that it intended to.³

North Korea's nuclear test elicited a singularity of response that has not happened since the response of "mutual assured destruction" during the Cold War. The Western powers were predictably incensed, but China's response was surprising; China, a long-time North Korea apologist, called the act "brazen" and urged Kim Jong Il to return his country to the Six Party Talks.⁴ Countries were outraged at the thought that a "rogue" nation had acquired the greatest destructive power on earth and joined the nuclear club.⁵ Furthermore, there were calls from far and wide offering suggestions on how to deal with what many believed was a breach of the non-proliferation regime. It was commonplace to assume that North Korea had seriously broken international law by acquiring nuclear weapons through a clandestine program North Korea and was therefore deserving of coercive enforcement. But a closer look at international law as it stood on the morning of October 6, 2006 reveals a much murkier picture. North Korea withdrew from the International Atomic Energy Agency (IAEA)

2006, at A11.

² See *id.*

³ See *North Korea Pledges to Test Nuclear Bomb*, CNN, Oct. 4, 2006, <http://www.cnn.com/2006/WORLD/asiapcf/10/03/nkorea.nuclear/index.html> (last visited Sept. 23, 2007).

⁴ See *North Korea Claims Nuclear Test*, BBC NEWS, Oct. 9, 2006, <http://news.bbc.co.uk/2/hi/asia-pacific/6032525.stm> (last visited Sept. 23, 2007). See also *China, U.S. Urge N. Korea to Return to Talks*, CHINA DAILY, Oct. 20, 2006, http://www.chinadaily.com.cn/world/2006-10/20/content_713303.htm (last visited Sept. 23, 2007).

⁵ See, e.g., Paul E. Boehm, *Decennial Déjà vu: Reassessing a Nuclear North Korea on the 1995 Supply Agreement's Ten-Year Anniversary*, 14 TUL. J. INT'L & COMP. L. 81, 87 (2005) (describing specific instances of North Korean state-sponsored terrorism); Glen Kessler & Steve Baker, *Bush's 'Axis of Evil' Comes Back to Haunt United States*, WASH. POST, Oct. 10, 2006 at A12 (describing how in his 2002 State of the Union Speech President Bush labeled North Korea part of an 'axis of evil'); Derwin Pereira, *Challenge of engaging a rising power; Fearing a challenge in Asia, the US is building stronger alliances and restructuring its forces*, STRAIT TIMES (Sing.), Sept. 10, 2006, available at http://app.mfa.gov.sg/pr/read_content.asp?View,5276 (last visited Sept. 4, 2007) (noting that China is building a missile shield to protect itself from rogue nations like North Korea).

in 1994⁶ and the Nuclear Non-Proliferation Treaty (NPT) in 2003.⁷ Because North Korea was not a party to the NPT when it tested its nuclear device, this comment will examine North Korea's conduct using the case study method to answer the following question about the current non-proliferation regime: did North Korea break the law or violate other international obligations in acquiring and testing nuclear weapons?

This paper is structured as a case-study, in which Part II provides a general account of the non-proliferation regime and North Korea's checkered past within it. Part III explores multilateral treaties and concepts of international law to determine if North Korea broke the law by testing a nuclear weapon. Part IV takes up the issue of enforcement and, by doing so, argues that enforcement poses serious problems for the international community.

II. Historical Background

The Nonproliferation Treaty was created on July 1, 1968⁸ in an effort to wrestle the hostility of mutual assured destruction from the hands of the superpowers by vesting the knowledge of nuclear power in an international body.⁹ The non-proliferation regime was predicated upon the nuclear "haves" sharing information about peaceful nuclear technology with the nuclear "have-nots."¹⁰ The idea was that nuclear technology could be better contained if non-nuclear states were given the benefits of

⁶ *In Focus: IAEA and DPRK*, IAEA.org, http://www.iaea.org/NewsCenter/Focus/IaeaDprk/fact_sheet_may2003.shtml (last visited Sept. 4, 2007) [hereinafter IAEA Factsheet].

⁷ Andrew Ward, *N Korea Quits Nuclear Non-Proliferation Treaty*, FIN. TIMES (London), Apr. 11, 2003, at 11.

⁸ *See* Treaty on the Non-Proliferation of Nuclear Weapons, Jul. 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 10485 [hereinafter NPT].

⁹ *See* THOMAS GRAHAM, JR & DAMIEN J. LAVERA, CORNERSTONES OF SECURITY: ARMS CONTROL TREATIES IN THE NUCLEAR ERA 99 (NEED TO ADD PUBLISHER 2003). *See also*, Bhalchandra M. Udgaonkar, *A Fissile Materials Cut-off*, in A NUCLEAR WEAPON-FREE WORLD: STEPS ALONG THE WAY 65, 65-6 (Frank Blackaby & Tom Milne ed., 2000) (detailing how the Baruch Plan, the precursor of the NPT, was altered from its original form which gave all control over nuclear technology in the world to a single international organization).

¹⁰ *See* Raju G.C. Thomas, *The Renewed NPT: Old Wine in New Bottles?*, in THE NUCLEAR NON-PROLIFERATION REGIME 1, 10 (Raju G.C. Thomas ed., 1998).

nuclear power in exchange for foregoing the development of their own nuclear programs which may have yielded nuclear weapons technology in the future.¹¹

The NPT mandates that the non-weapon states execute a safeguards agreement with the International Atomic Energy Agency.¹² The safeguards agreements outline and categorize all peaceful nuclear activities in a country.¹³ Safeguards agreements also enumerate the types assistance that the IAEA will provide in pursuing any of the nuclear power projects.¹⁴ Nuclear weapon states do not have to conclude safeguards agreements, because negotiating such a clause would have been impossible at the height of the Cold War when the NPT was drafted.¹⁵ The NPT relies on the IAEA to monitor compliance and the United Nations Security Council to enforce noncompliance.

North Korea's involvement with the non-proliferation regime began when it joined the IAEA in 1974.¹⁶ North Korea then joined the NPT as a non-nuclear weapon state in 1985.¹⁷ Monitoring by IAEA inspectors is a central part of any safeguard agreement.¹⁸ In 1993, the IAEA inspectors discovered a discrepancy in the amount of fuel at the Yongbyon nuclear facility; the IAEA concluded that North Korean could be trying to reprocess fuel.¹⁹

Reprocessing spent fuel rods from certain peaceful nuclear pursuits is aimed at creating fissile material – or the fuel for a nuclear weapon.²⁰ Fissile material can be used to fuel a slow

¹¹ *See id.*

¹² *See* NPT, *supra* note 8, art. III.

¹³ *See id.*

¹⁴ *See id.*

¹⁵ *See* Thomas, *supra* note 10.

¹⁶ IAEA Factsheet, *supra* note 7.

¹⁷ *Id.*

¹⁸ *See* Statute of the International Atomic Energy Agency art. XII sec. A(6), Oct. 23, 1956, 8 U.S.T. 1093, 276 U.N.T.S. 3 [hereinafter IAEA Statute].

¹⁹ *See* IAEA Factsheet, *supra* note 7; Bruce Cumings, *Nuclear Imbalance of Terror: The American Surveillance Regime and North Korea's Nuclear Programme*, in THE NUCLEAR NON-PROLIFERATION REGIME 207, 227 (Raju G.C. Thomas ed., 1998).

²⁰ *See Nuclear Threat Initiative, A Tutorial on Nuclear Weapons and Nuclear-Explosive Materials: Production of Nuclear-Explosive Materials*,

controlled chain reaction, which is what happens in nuclear reactors.²¹ When fission occurs rapidly a large amount of energy is released resulting in a nuclear explosion.²² There are only a few forms of fissionable material which are actually categorized as fissile material.²³ A nuclear weapons program can be based on plutonium or uranium fissile material; there is reason to believe North Korea has pursued a weapons program using both plutonium and uranium.²⁴

Obtaining fissile material is widely regarded as the most difficult step in acquiring nuclear weapons.²⁵ The rarity of fissile material is the reason the non-proliferation regime is aimed at limiting the availability of fissile material as a means to stop proliferation.²⁶

The Korean War has never technically ended,²⁷ and it is upon its vestiges that the crises with North Korea have arisen. The conflict was a microcosm of the Cold War, with the United States and South Korea squaring off in a conflict against North Korea, the USSR, and China. The Demilitarized Zone (DMZ) which separates North and South Korea stands as a reminder of how fractured the diplomatic relations are between the United States and North Korea.²⁸

http://www.nti.org/e_research/cnwm/overview/technical4.asp (last visited Sept. 4, 2007) (describing the risks and difficulties posed by the reprocessing process).

²¹ See *Nuclear Threat Initiative, A Tutorial on Nuclear Weapons and Nuclear-Explosive Materials: Nuclear Basics*, http://www.nti.org/e_research/cnwm/overview/technical1.asp (last visited Sept. 4, 2007) [hereinafter *Nuclear Basics*].

²² See *id.* (listing the five ways that a nuclear bomb does damage as: fireball, shockwave, prompt radiation, thermal energy release, and radioactive fallout).

²³ See *id.* (citing the most important isotopes as plutonium-239, uranium-233, and uranium-235).

²⁴ See Andrew Gumbel, *CIA Backpedals on Enrichment Claim*, *CANBERRA TIMES* (Australia), Mar. 3, 2007 at A16.

²⁵ See Emma Chanlett-Avery & Sharon Squassoni, *North Korea's Nuclear Test: Motivations, Implications, and U.S. Options*, CRS Report for Congress Order Code RL33709, at 11 n.20 (Oct. 24, 2006).

²⁶ See NPT, *supra* note 8, art. III sec. 2.

²⁷ See *The Korean War Armistice*, *BBC NEWS*, Jul. 23, 2003, <http://news.bbc.co.uk/2/hi/asia-pacific/2774931.stm> (last visited Sept. 23, 2007) (detailing how the simple ceasefire of July 27, 1953 left open the full resolution of hostilities).

²⁸ See *Koreas [sic] Trade Warnings Over Border*, *N.Y. TIMES*, Oct. 9, 2006 at A6

William Perry actually identifies five separate nuclear crises involving North Korea.²⁹ The Korean War was the first of these crises because both the USSR and the United States threatened to use nuclear weapons throughout the conflict.³⁰ Perry argues that North Korea engages in a predictable pattern of conduct involving its nuclear program: When it wants something, North Korea will instigate trouble by engaging in brinkmanship, inevitably leading to a nuclear showdown played out on the world theater. Following this line of reasoning, Perry would characterize North Korea's testing of their nuclear weapon as another nuclear crisis.³¹ While not diminishing the lessons of history, this comment is concerned with the way North Korea's actions since the IAEA's initial inspections in 1992 have highlighted the holes in the non-proliferation regime.

At that time, the IAEA inspectors detected a discrepancy in the levels of plutonium reportedly made and those actually present.³² The safeguards agreement allowed the IAEA to ask to send special inspectors to further investigate the origins of the reporting gap,³³ but North Korea denied them entry.³⁴

In 1993, the United States Central Intelligence Agency (CIA) made a controversial move when it provided the IAEA with spy satellite photos that confirmed that North Korea had likely reprocessed fuel.³⁵ On May 11, 1993, the IAEA referred the problem to the United Nations Security Council for action due to North Korea's non-compliance with its Safeguards Agreement.³⁶

(describing a heated exchange of gunfire at the DMZ just days after the nuclear test).

²⁹ William J. Perry, *Proliferation on the Peninsula: Five North Korean Nuclear Crises*, in 607 ANNALS AM. ACAD. POL. & SOC. SCI. 78 (2006) (identifying a second crisis in 1990 when the reactor at Yongbyon was built with the help of the Russians, *id.* at 80, the third crisis in 1994, *id.* at 81, the fourth crisis in 1998, when the North Koreans tested long-range missiles, *id.* at 82, and the fifth crisis in 2002 when the North Koreans restarted their nuclear program, *id.* at 83.).

³⁰ *See id.* at 79.

³¹ *See id.* at 84-86.

³² *See* IAEA Factsheet, *supra* note 7; Perry, *supra* note 29, at 81.

³³ *See* IAEA Factsheet, *supra* note 7.

³⁴ *See* Perry *supra* note 29, at 81.

³⁵ *See* Cumings, *supra* note 19, at 227.

³⁶ *See* IAEA Factsheet, *supra* note 7.

North Korea expelled the IAEA inspectors, dropped out of the IAEA, and threatened to leave the NPT.³⁷ With North Korea well on its way to becoming the rogue nuclear state everyone feared, the United States quickly acted to negotiate the Agreed Framework.³⁸

The Agreed Framework provided that a consortium of western states would give North Korea two modern nuclear reactors in exchange for North Korea freezing its program and allowing inspections.³⁹ Under the Agreed Framework the IAEA was to monitor compliance,⁴⁰ but North Korea never returned to the IAEA membership.⁴¹ The situation then focused on North Korea's ballistic missile capabilities for the next ten years.⁴²

During talks in October 2002, North Korea confirmed it had a clandestine nuclear program based on uranium fissile material.⁴³ The United States declared that North Korea was in violation of the Agreed Framework and they suspended shipment of fuel that had been promised.⁴⁴ In December 2002, North Korea retaliated by lifting the freeze on its plutonium program and expelling the IAEA inspectors that were monitoring the freeze.⁴⁵ The following month, North Korea announced its departure from the NPT.⁴⁶

³⁷ See Perry, *supra* note 29, at 81.

³⁸ See Agreed Framework Between the United States of America and the Democratic People's Republic of Korea, U.S.-N. Korea, Oct. 21, 1994, 34 I.L.M. 603 [hereinafter Agreed Framework].

³⁹ See *id.*, at part I. See generally, THOMAS GRAHAM, DISARMAMENT SKETCHES 235 (2002) (describing the diplomatic efforts to achieve the Agreed Framework and the author's firsthand belief that failure would have led to nuclear war).

⁴⁰ See Agreed Framework, *supra* note 38.

⁴¹ See IAEA Factsheet, *supra* note 7.

⁴² See Perry, *supra* note 29, at 82-83.

⁴³ See John S. Park, *Inside Multilateralism: The Six-Party Talks*, 28 WASH. Q., Autumn 2005, at 75, 80.

⁴⁴ See Perry, *supra* note 29, at 83-84.

⁴⁵ See *id.* at 83-84. See, Jonathan Watts, *UN Gives North Korea One Last Chance*, THE GUARDIAN (London), Jan. 7, 2003, at 11 (detailing the U.N.'s reaction to the expulsion of the inspectors and threatening referral to the Security Council).

⁴⁶ See Martin Regg Cohn, *North Korea's Nuclear Gambit*, TORONTO STAR (Can.), Jan. 12, 2003, at B1 (noting North Korea's exit from the NPT and how it is congruent with North Korea's history of not playing by the rules); *N. Korea Withdraws From*

The United States then proposed denuclearization at the Six-Party Talks in 2004.⁴⁷ The fourth round of the Talks were scheduled for October 2004, but North Korea refused to come to the negotiating table citing what one news agency reported as “a hostile climate created by the U.S.”⁴⁸ By this time, estimates were that North Korea had reprocessed enough fuel for anywhere from three to six weapons.⁴⁹ In an effort to gain bargaining leverage, North Korea somewhat confirmed the estimates and announced that it possessed nuclear weapons in February 2005.⁵⁰ The parties reconvened in July 2005⁵¹ and agreed to a statement of principles in which the United States was to give North Korea a light-water reactor in exchange for North Korea coming back to the Six-Party Talks and the NPT regime.⁵² North Korea refused to stop its nuclear program until it received the light water reactor.⁵³ The situation was tense as states like Japan feared the missile and nuclear capabilities of North Korea and the ineffectiveness of the sanctions at the time.⁵⁴

Nuclear Pact, BBC NEWS, Jan. 10, 2003, <http://news.bbc.co.uk/2/hi/asia-pacific/2644593.stm> (last visited Sept. 23, 2007).

⁴⁷ See Selig S. Harrison, *Did North Korea Cheat?*, 84 FOREIGN AFF. 99 (2005); *Seoul Admits Secret Uranium Trials*, CNN, Sept. 3, 2004, <http://edition.cnn.com/2004/WORLD/asiapcf/09/02/skorea.nukes/index.html>.

⁴⁸ See *Six-Party Talks on North Korean Nuclear Program Under Way*, RIA NOVOSTI (July 27, 2005), <http://en.rian.ru/world/20050727/40980276.html> (last visited Sept. 4, 2007).

⁴⁹ See JAMES L. SCHOFF ET AL., BUILDING SIX-PARTY CAPACITY FOR A WMD-FREE KOREA 10 (2004).

⁵⁰ See IAEA Factsheet, *supra* note 7.

⁵¹ See RIA NOVOSTI, *supra* note 48.

⁵² See *Contemporary Practice of the US Relating to International Law: Use of Force and Arms Control: U.S. and Other Powers Reach Tentative Understanding on North Korea's Nuclear Program*, 99 AM J. INT'L L. 914, 915 (John R. Crook ed., 2005) [hereinafter *Tentative Understanding*].

⁵³ See *id.* at 916.

⁵⁴ *Ex-Japan Diplomat Marks N. Korea Nukes, Missiles as 'Biggest Threat,'* KYODO NEWS SERVICE, Sept. 16, 2006, available at http://findarticles.com/p/articles/mi_m0XPQ/is_2006_Sept_18/ai_n16729901 (quoting Katsunari Suzuki, a former Japanese diplomat, as saying “but Kim Jong-il’s administration has yet to starve (due to economic assistance by China and South Korea). That explains why North Korea doesn’t show up at the six-party talks.”).

On October 9, 2006, North Korea tested a nuclear device measured at less than a kiloton.⁵⁵ As mentioned previously, world leaders reacted with surprisingly uniform outrage, as even the Chinese Ambassador to the United Nations admitted that North Korea needed to be punished.⁵⁶ At the behest of a couple of its members, the United Nations Security Council imposed sanctions on North Korea which, among other things, froze foreign North Korean bank accounts, mandated inspection of all transports in and out of the country, and placed an embargo on luxury items and things that could be used to develop its nuclear program.⁵⁷

China facilitated the resumption of the Six-Party Talks on February 8, 2007.⁵⁸ The talks resulted in the February 13th Statement, in which the United States agreed to end trade sanctions by taking North Korea off the list of state-sponsors of terror in return for North Korea's complete shutdown of its nuclear program.⁵⁹ The February 13th Statement described a process by which the objectives are to be met, and alas, the process of managing North Korea's proliferation continues.⁶⁰

III. Did North Korea Break the Law?

A preliminary matter in determining if North Korea broke any international laws by testing its nuclear device is to consider the international regime barring nuclear testing. There are a number of International Court of Justice cases, multilateral treaties, and international agreements concerning nuclear

⁵⁵ See Chanlett-Avery, *supra* note 25, at 1.

⁵⁶ See *Chinese Experts Comment on Situation After North Korean Nuclear Test*, RED ORBIT, Oct. 11, 2006, http://www.redorbit.com/news/international/689535/chinese_experts_comment_on_situation_after_north_korean_nuclear_test/index.html (last visited Sept. 23, 2007).

⁵⁷ See *List of Sanctions Against North Korea*, INDO-ASIAN NEWS SERVICE, Oct. 15, 2006, <http://www.nerve.in.biological+weapon/news:25350016452> (last visited Sept. 23, 2007).

⁵⁸ See Jim Yardley, *North Korea and Others Set to Resume Nuclear Talks*, N.Y. TIMES, Feb. 8, 2007, at A13.

⁵⁹ See *Initial Action for the Implementation of the Joint Statement*, available at *Full Text of Denuclearization Agreement*, KOREAN TIMES, Feb. 13, 2007, available at <http://times.hankooki.com/lpage/nation/200702/kt2007021320383011990.htm> [hereinafter February 13th Statement].

⁶⁰ See *id.*

technology, but the basis of the nuclear non-proliferation regime remains the Nuclear Non-Proliferation Treaty.

A. *Nuclear Non-Proliferation Treaty*

The Treaty on the Non-Proliferation of Nuclear Weapons⁶¹ came into force in 1970.⁶² It was created to keep states with nuclear weapons from spreading the technology, and by doing so keep states without the technology from acquiring it. The NPT is expressly aware of the differences between “nuclear-weapon states”⁶³ and “non-nuclear weapon states.”⁶⁴ To reach a consensus broad enough to create an instrument of the breadth of the NPT, the drafters had to assure non-nuclear weapons states that they would benefit from joining the NPT.⁶⁵ The drafters lured the non-nuclear weapon states into the treaty by offering security with prospects of disarmament and promising that the new restrictions would facilitate, rather than hinder, their own attempts to use nuclear power.⁶⁶ Additionally, in the Cold War setting, nuclear powers like the United States offered protection by pledging to be the second-strike force and return any nuclear attack on countries like Japan and South Korea; this is known as the “nuclear umbrella.”⁶⁷

Article I of the NPT confronts proliferation by obliging nuclear weapons states to agree not to transfer any nuclear weapons devices or to “assist, encourage, or induce any non-nuclear weapon State to manufacture or otherwise acquire nuclear weapons.”⁶⁸ Plainly Article I is aimed at preventing the spread of

61 NPT, *supra* note 8. GRAHAM, *supra* note 9, at 105.

62 GRAHAM, *supra* note 9, at 105.

63 See NPT, *supra* note 8, art. IX sec. 3 (defining nuclear weapons states as “one which has manufactured and exploded a nuclear weapon or other nuclear explosive device.” NPT, *supra* note 8, art. IX sec. 3.

64 It is important to note the ‘weapon’ portion of this distinction, as some countries may have nuclear power capabilities, but do not possess nuclear weapons.

65 See GRAHAM, *supra* note 9, at 103-05.

66 See generally *id.*

67 See Joseph S. Nye Jr., Editorial, *Nonproliferation After North Korea*, WASH. POST, Nov. 5, 2006, at B7.

68 NPT, *supra* note 8, art. I.

nuclear weapons.⁶⁹ All signs indicate that North Korea manufactured its nuclear weapons in-country, meaning Article I is likely inapplicable in North Korea's case.⁷⁰ However, if Article I is broadly construed, it could be used to hold any state that inadvertently assisted the manufacture of nuclear weapons by the insecurity of their own technology accountable for doing so. However, it does not appear that any state has been held accountable for aiding and abetting proliferation.⁷¹

In Article II of the NPT, non-nuclear weapon states agree not to attempt to obtain nuclear weapons or to manufacture their own.⁷² Notably absent from this section of the Treaty is a prohibition on seeking knowledge about engineering a nuclear device.⁷³ North Korea's conduct appears to violate Article II because detonation of a nuclear weapon is a clear indication that North Korea, a named non-nuclear-weapon state, has somehow "manufacture[d] or otherwise acquire[d] nuclear weapons or other nuclear explosive devices."⁷⁴

If North Korea has violated the NPT by possessing a nuclear device, the next logical question in determining if North Korea has conclusively violated the NPT is how North Korea acquired its nuclear materials and technology. If North Korea somehow bought the materials and technology after it withdrew from the NPT,⁷⁵ then it would not have technically violated Article II of the NPT so long as it was no longer a party to the treaty at the time the transaction occurred. However, many experts think it unlikely that North Korea somehow just acquired nuclear weapons

⁶⁹ *Id.*

⁷⁰ See *N. Korea Building Bombs, Its Envoy Says*, L.A. TIMES, June 9, 2005, at A4; David E. Sanger, *North Korea Says It Has Made Fuel for Atom Bombs*. See also N.Y. TIMES, July 15, 2003, at A1.

⁷¹ See Doug Saunders, *Test Puts Nuclear Salesman in Harsh Light*, GLOBE & MAIL (Canada), Oct. 11, 2006, at A1 (implicating individuals, not states, in proliferation of nuclear secrets). See also William J. Broad et al., *As Nuclear Secrets Emerge, More Are Suspected*, N.Y. TIMES, Dec. 26, 2004, at 1 (noting that North Korea, Libya, and Iran were customers of Dr. A.Q. Khan, the Pakistani scientist accused of selling nuclear technology, not accomplices).

⁷² NPT, *supra* note 8, art. II.

⁷³ *Id.*

⁷⁴ *Id.* art. II.

⁷⁵ See Cohn, *supra* note 46.

technology after it left the NPT.⁷⁶ The consensus is that North Korea has been steadily working on its program since the early 1990s⁷⁷ after an amount of spent plutonium was reported missing by the IAEA.⁷⁸ If the consensus is correct, North Korea produced its own raw materials and need only procure the technology from an outside source. Many believe North Korea received the technology through transactions with private actors, namely Dr. Khan from Pakistan.⁷⁹ Dr. Khan developed Pakistan's nuclear bomb and then went to several countries selling the technology; he did not, however, provide the raw materials.⁸⁰

The NPT's sole focus on states as the keepers of nuclear technology is arcane and creates a vast hole in the current non-proliferation regime. A reasonably narrow reading of Article II does not prohibit a state from "using the by-products of its civilian nuclear program to manufacture weapons-grade uranium and plutonium."⁸¹ If this is the case, then the time when a state is actually in violation of Article II is some time between acquiring fissile material and detonating a bomb. Though the NPT is intended to curtail proliferation, the plain language of the agreement does not allow the international community to step in until a state is a long way towards making actual weapons.⁸² As a result, many understand the current formulation of the NPT to be functionally useless.⁸³

The NPT was drafted with two things in mind: (1) fear of the danger of nuclear war and (2) understanding of the peaceful

⁷⁶ See Sharon Squassoni, *North Korea's Nuclear Weapons: Latest Developments*, Congressional Research Service Report For Congress 3-4 (Oct. 18, 2006) (detailing that North Korea has been reprocessing materials since the early 1990s).

⁷⁷ *Id.* at 4 (quoting Secretary of State Colin Powell as saying "We now believe they [North Koreans] have a couple of nuclear weapons and have had them for years" in Meet the Press on Dec. 29, 2002.).

⁷⁸ IAEA Factsheet, *supra* note 7.

⁷⁹ Broad et al., *supra* note 71.

⁸⁰ *See id.*

⁸¹ Helen H. Cousineau, *The Nuclear Non-Proliferation Treaty and Global Non-Proliferation Regime: A U.S. Policy Agenda*, 12 B.U. INT'L L.J. 407, 423 (1994).

⁸² *Id.*

⁸³ *See id.* *See also* Kal Raustiala, *Form and Substance in International Agreements*, 99 AM J. INT'L L. 581, 585 (2005) (calling the NPT a "shallow" instrument).

benefits of nuclear power.⁸⁴ Article III is drafted to prevent a peaceful nuclear power program from being converted into a nuclear weapons program,⁸⁵ because there is no technical way to limit the potential of nuclear materials to solely peaceful uses.⁸⁶ The solution offered by the NPT was to empower the IAEA to monitor the nuclear programs of every country to prevent the use of a peaceful program as a cover for a clandestine weapons program.⁸⁷ In Article III, § 1 of the NPT states that all countries will negotiate an individual system of safeguards with the IAEA that allows for the “verification of the fulfillment of its obligations assumed under this Treaty with a view to preventing diversion of nuclear energy from peaceful uses to nuclear weapons.”⁸⁸ Furthermore, the NPT provides that “Non-nuclear-weapon States Party to the Treaty [should] conclude agreements with the [IAEA].”⁸⁹ Article III puts a special restriction on the transfer of fissionable material to states that have not concluded a safeguards agreement.⁹⁰ This highlights the inherent problem with the NPT: the Treaty promotes the use and transfer of fissionable materials for peaceful means, but then runs into trouble when those materials are diverted for non-peaceful applications.

The NPT advocates the use of peaceful nuclear power. For example, Article IV states that “nothing in this Treaty shall be interpreted as affecting the inalienable right of all Parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes.”⁹¹ Moreover, the NPT goes further to actually mandate the spread of peaceful nuclear technology between signatory states.⁹² The flaw in this part of the NPT is amplified by the North Korean situation. North Korea has most

⁸⁴ NPT, *supra* note 8, preamble (“affirming the principle that the benefits of peaceful applications of nuclear technology”).

⁸⁵ *Id.* art. III.

⁸⁶ Thomas, *supra* note 10, at 6.

⁸⁷ IAEA Statute, *supra* note 18.

⁸⁸ NPT, *supra* note 8, art. III sec. 1.

⁸⁹ *Id.* art. III sec. 4.

⁹⁰ *Id.* art. III sec. 2.

⁹¹ *Id.* art. IV sec. 1.

⁹² *Id.* art. IV sec. 2, art. V.

likely made its weapons from the spent fuel reported missing by the IAEA in the early 1990s.⁹³ North Korea obtained the fuel to make fissionable material from its peaceful domestic nuclear program.⁹⁴ Because many of the materials have duly peaceful and bellicose uses, it is nearly impossible to facilitate the growth of a non-nuclear weapon country's peaceful nuclear capabilities without simultaneously advancing the threat that they become a nuclear weapon state.⁹⁵ Furthermore, as Thomas points out, the development of nuclear propulsion systems is not covered by the NPT.⁹⁶

Article X of the NPT allows the parties to withdraw from the Treaty with three months notice in the case of "extraordinary events, related to the subject matter of [the] Treaty."⁹⁷ Thomas says that the exit provision "seems to contradict the whole purpose of the NPT by providing an easy escape clause."⁹⁸ The "extraordinary events" standard provides something of a bar on the sudden removal of a state from the Treaty; however, practice indicates otherwise. North Korea flirted with exercising Article X and withdrawing in March of 1994;⁹⁹ that crisis resulted in the Agreed Framework.¹⁰⁰ Finally in January 2003, North Korea actually exercised its three-month notice and withdrew from the NPT.¹⁰¹ Given its withdrawal, North Korea cannot be technically bound by any of the provisions of the Treaty which it seemingly broke.

The legal implications of dropping out of the NPT and then specifically acting counter to it, by not only seeking but acquiring nuclear weapons, is uncertain. Instead of relying on the provisions of the Treaty to govern the violating member's conduct, the

⁹³ See Squassoni, *supra* note 76.

⁹⁴ *Id.*

⁹⁵ *Id.* at 8.

⁹⁶ Thomas, *supra* note 10, at 8-9.

⁹⁷ NPT, *supra* note 8, art. X sec. 1.

⁹⁸ Thomas, *supra* note 10, at 8.

⁹⁹ *Id.* at 4 (noting that North Korea "may have been within its legal rights to invoke Article X").

¹⁰⁰ See *infra* text accompanying note 139.

¹⁰¹ *North Korea Profile*, Nuclear Threat Initiative, http://www.nti.org/e_research/profiles/NK/index.html (last visited Sept. 23, 2007) [hereinafter NTI Profile].

international community is left to act only under customary international law. As Part III of this comment will explore, leaving the legality of nuclear proliferation up to the general practice of states opens up a number of holes in the regime. This is true largely because public international law is based almost completely on consent due to the prominence of state sovereignty.¹⁰² Accordingly, North Korea's withdrawal from the NPT makes it nearly impossible to hold them accountable under the terms of the NPT, as they have expressed their consent to no longer be bound. This begs the question: what if evidence comes out that North Korea was in violation of the NPT before January 2003? Can North Korea then be held accountable for breaching provisions of a treaty that it is not a party to at the time enforcement is sought?

By exercising Article X of the NPT, North Korea has highlighted a recurring theme throughout international law and this comment. The consensual nature of international law presents a tremendous hurdle for the non-proliferation regime and specifically the effectiveness of the NPT. How can the NPT be a successful non-proliferation tool when a state can merely opt out once obtaining nuclear weapons better serves its own interests? The NPT only seems to act as an indicator for determining whether the proliferation status quo has been maintained with reliance on the IAEA and the UN to monitor and effectuate compliance.

In 1995, Pilat and Nakhleh commented on the NPT's inability to deal with North Korea as a damning example of its weakness when saying: "North Korea is a poverty-stricken state with virtually no allies and few or no friends. Yet even in this situation, the permanent members of the Security Council were not willing to risk the mild stick of economic sanctions, let alone resort to forcible measures."¹⁰³ "The NPT contains inherently

¹⁰² See Øyvind Østerud, *Sovereign Statehood and National Self-Determination: A World Order Dilemma*, in *SUBDUING SOVEREIGNTY: SOVEREIGNTY AND THE RIGHT TO INTERVENE* 18, 19 (Marianne Heiberg ed., 1994).

¹⁰³ Joseph F. Pilat and Charles W. Nakhleh, *A Treaty Reborn? The NPT After Extension*, in *THE NUCLEAR NON-PROLIFERATION REGIME* 41, 52 (Raju G.C. Thomas ed., 1998).

weak language,”¹⁰⁴ therefore a situation has to become relatively serious before it requires action.

The NPT, as originally signed, was only to last 25 years,¹⁰⁵ but at the 1995 review conference it was renewed indefinitely.¹⁰⁶ Many of the limitations of the NPT were apparent at the 1995 review conference, but for political reasons, the NPT was renewed without amendment.¹⁰⁷

B. North Korea and the International Atomic Energy Agency (IAEA)

The IAEA was created as a part of the original idea of the NPT – namely, that the gift of nuclear technology would be deposited in an international organization that controls its proliferation.¹⁰⁸ More specifically, Article III (B)(2) of the IAEA Statute commands the IAEA to control fissionable material to ensure it is only used for peaceful purposes.¹⁰⁹ The IAEA is analogous to an American administrative agency, as it is charged with helping all countries reap the benefits of peaceful nuclear power while monitoring compliance to avoid further nuclear weapons proliferation.¹¹⁰ Article II of the IAEA Statute specifically charges the organization to “accelerate and enlarge the contribution of atomic energy to peace, health and prosperity throughout the world,” while assuring that atomic energy is not used for any military purpose.¹¹¹ Though it still operates under its dual role; but, as far as non-proliferation is concerned it is the

¹⁰⁴ Cousineau, *supra* note 81, at 422-24.

¹⁰⁵ NPT, *supra* note 8, art. X § 2.

¹⁰⁶ Thomas, *supra* note 10, at 1. *See also* Cousineau, *supra* note 81, at 437 (arguing that the NPT should have been renewed for set periods and that indefinite renewal means it will never be strengthened).

¹⁰⁷ *See* Thomas, *supra* note 10, at 1 (explaining that India had just stopped the Comprehensive Test Ban Treaty from even getting a non-binding resolution out of the UN General Assembly, therefore simply renewal of the NPT was valued over comprehensive change).

¹⁰⁸ NPT, *supra* note 8, art. III.

¹⁰⁹ IAEA Statute, *supra* note 18, art. III (D)(2).

¹¹⁰ *See generally id.*

¹¹¹ *Id.* art. II.

IAEA's duty to monitor the nuclear programs in all signatory countries that is of greatest concern.

The NPT requires all of the nations to negotiate and conform with a "safeguards agreement" with the IAEA;¹¹² essentially this is an appraisal of safety regulations that must be applied to the nuclear assets within a country. The IAEA promulgates general regulations for the various kinds of nuclear facilities and incorporates them into a specific safeguards agreement for each country.¹¹³

The IAEA is charged with monitoring compliance with the safeguards agreements to assure that the nuclear operation is peaceful¹¹⁴ and all safety regulations are being followed.¹¹⁵ The IAEA appoints inspectors who "shall have access at all times to all places and data and to any person who by reason of his occupation deals with materials, equipment, or facilities which are required by this Statute to be safeguarded."¹¹⁶ Though Article XII(A)(6) does note that the agreement of the country matters¹¹⁷ and Article III(D) commands the IAEA to respect state sovereignty,¹¹⁸ the inspectors have relatively unfettered access to nuclear facilities, records, and personnel.¹¹⁹ The IAEA includes this access as a provision of the safeguards agreement, thus satisfying the assent provision of Article XII(A)(6).¹²⁰ North Korea has expelled IAEA inspectors on at least two occasions. One such time was in June 1994¹²¹ only to have them return to monitor as a part of the Agreed Framework.¹²² North Korea again expelled inspectors in

¹¹² NPT, *supra* note 8, art. III.

¹¹³ IAEA Statute, *supra* note 18, art. III sec. A(5)-(6).

¹¹⁴ *Id.* art. XII sec. A(1).

¹¹⁵ *Id.* art. XII sec. A(2).

¹¹⁶ *Id.* art. XII sec. A(6).

¹¹⁷ *Id.*

¹¹⁸ *Id.* art. III sec. D.

¹¹⁹ IAEA Statute, *supra* note 18, art. XII(A)(6).

¹²⁰ *Id.*

¹²¹ Perry, *supra* note 29, at 81; IAEA Factsheet, *supra* note 7.

¹²² Agreed Framework, *supra* note 38, § I(3); *See also* IAEA Factsheet, *supra* note

December 2002 upon deciding to restart its plutonium enrichment program.¹²³

Because of North Korea's rocky history with the IAEA, there are still questions about their culpability under the IAEA Statute. North Korea joined the IAEA in 1974.¹²⁴ In 1993, the IAEA received satellite photos from the CIA from which officials were able to determine that North Korea had reprocessed fuel, in violation of its safeguards agreement as a non-nuclear weapon state.¹²⁵ This confrontation caused North Korea to withdraw from its membership in the IAEA on June 13, 1993.¹²⁶ Although IAEA inspectors did regain admission to North Korea under the 1994 Agreed Framework, as of now, North Korea has not rejoined the IAEA.¹²⁷

The question then becomes similar to that of liability under the NPT: Can North Korea be held in breach of their agreements by testing the nuclear device at Gilju in 2006 if it was no longer party to the IAEA treaty? Article XVIII(e) is the only IAEA provision addressing withdrawal. It states, "[w]ithdrawal by a member from the Agency shall not affect its contractual obligations entered into pursuant to article XI or its budgetary obligations for the year in which it withdraws."¹²⁸ It is a logical stretch to interpret Article XVIII(e) as imposing a duty upon a withdrawing state to conform with many of the IAEA's safeguards as a contractual matter even though it is no longer actually a party to the Treaty.¹²⁹ Therefore, it seems that if North Korea is found to have violated its obligations under Article XI, even after its withdrawal, it ought to be and can be held liable for that violation.

¹²³ Perry, *supra* note 29, at 83-84. See also NTI Profile, *supra* note 101.

¹²⁴ IAEA Factsheet, *supra* note 7.

¹²⁵ Cumings, *supra* note 19, at 226.

¹²⁶ IAEA Factsheet, *supra* note 7.

¹²⁷ Under the recently concluded agreement from the Six-Party Talks, North Korea agrees to comply with their safeguards agreement and to rejoin the IAEA. However, a healthy skepticism of this promise is warranted as North Korea promised the same in thing in December 2002.

¹²⁸ IAEA Statute, *supra* note 18, art. XVIII(e).

¹²⁹ *Id.*

Article XI addresses IAEA undertakings to help develop peaceful nuclear technology and secure fissionable material.¹³⁰ In order to prove that North Korea is liable for a violation under Article XI by testing its nuclear arsenal, it must be established that Article XI actually applies. In other words, it must be established that North Korea's nuclear program started out as an official IAEA project.¹³¹ At present, it is difficult to discern whether this can be proven. Presumably the fuel used in the bomb detonated in October was the fuel North Korea has reprocessed since 1994.¹³² Under this assumption, North Korea's nuclear program would likely qualify as an IAEA project due to the Agency's pre-1993 work with the country.¹³³ However, if the material came from another party or a secret facility maintained without the help of the IAEA, then it is unlikely to be found to be an IAEA project under Article XI.¹³⁴

North Korea would also invariably challenge the application of a Treaty provision after it had specifically withdrawn from the Treaty. By the IAEA's own statute, any dispute over the statute or its interpretation will then go to the International Court of Justice.¹³⁵

While few know the current status of North Korea's nuclear program, it is clear that North Korea has been in violation of the IAEA in some form since the early 1990s.¹³⁶ As a result, the nuclear test in October 2006 obviously confirms many of the IAEA's previous contentions, but, because of North Korea's withdrawal from the IAEA statute, it is unclear whether this law would actually add another layer of culpability.

C. *The Agreed Framework of 1994*

Officially known as "The Agreed Framework Between the United States of America and the Democratic People's Republic

¹³⁰ *Id.* art. XI.

¹³¹ *Id.* art. XI(A).

¹³² See Chanlett-Avery, *supra* note 25.

¹³³ IAEA Factsheet, *supra* note 7.

¹³⁴ The safeguards agreement with North Korea applied only to the three sites. *Id.*

¹³⁵ IAEA Statute, *supra* note 18, art. XVII sec. A.

¹³⁶ See IAEA Factsheet, *supra* note 7.

of Korea,”¹³⁷ this agreement defused tensions in 1994 after North Korea withdrew from the IAEA and threatened to withdraw from the NPT.¹³⁸ The four articles of the Agreed Framework addressed discrete problems. Article I provided that an international consortium will give two light water reactors¹³⁹ and alternative energy sources in exchange for North Korea’s freezing graphite-motivated reactors.¹⁴⁰ Article II emphasized “the full normalization of political and economic relations.”¹⁴¹ Article III supports cooperation with South Korea to ensure the denuclearization of the Korean Peninsula,¹⁴² and assures North Korea that the United States will not attack with nuclear weapons.¹⁴³ Finally, Article IV addressed the strengthening of the non-proliferation regime, including that North Korea would remain in the NPT¹⁴⁴ and comply with IAEA Safeguards and inspections after “a significant portion of the LWC [light water reactor] project is completed.”¹⁴⁵

The Agreed Framework applied to the “5MW(e) reactor, the Radiochemical Laboratory (reprocessing), the fuel fabrication plant and the partially built 50 and 200MW(e) nuclear power plants.”¹⁴⁶ The agreement allowed the IAEA to monitor spent fuel and it was this monitoring that revealed that North Korea had likely produced weapons-grade plutonium.¹⁴⁷ Because of the inspections mandated by the Agreed Framework, the IAEA has fifteen year old evidence showing that the fuel for the weapon that was tested could have come from these facilities. North Korea has

¹³⁷ Agreed Framework, *supra* note 38.

¹³⁸ IAEA Factsheet, *supra* note 7.

¹³⁹ For technical reasons, light water reactors make it hard to manufacture nuclear weapons. *NORTH KOREA'S NUCLEAR THREAT; Japan could build N-weapons, but...*, DAILY YOMIURI (Tokyo, Jap.), March 22, 2007 (describing how Japan’s efforts to build a bomb would be thwarted by their dependence on light water reactors).

¹⁴⁰ Agreed Framework, *supra* note 38, art. I.

¹⁴¹ *Id.* art. II.

¹⁴² *Id.* art. III(2-3).

¹⁴³ *Id.* art. III(1).

¹⁴⁴ *Id.* art. IV(1).

¹⁴⁵ *Id.* art. IV (2) & (3).

¹⁴⁶ IAEA Factsheet, *supra* note 6.

¹⁴⁷ GRAHAM, *supra* note 9, at 1269.

acknowledged its clandestine nuclear operation since 2002, but the possibility remains that they still maintain other secretive other nuclear facilities.¹⁴⁸ Unfortunately, however, because the Agreed Framework is so narrowly cabined in the types of facilities that are within its bounds, North Korea may not have technically violated it. A more important question is whether the international consortium's failure to deliver on the terms of the agreement may have somehow relieved North Korea of its obligations.

D. I.C.J. Decision on the Legality of the Threat or Use of Nuclear Weapons

By resolution, the General Assembly of the United Nations certified a question to the International Court of Justice (I.C.J.) requesting an advisory opinion on the legality of the use of nuclear weapons.¹⁴⁹ The I.C.J. surveyed international law to determine whether the use, or threatened use, of nuclear weapons is specifically allowed or prohibited.¹⁵⁰

The term "use" would have to be very broadly construed for it to cover the testing of a nuclear weapon. The Court mentions various international agreements controlling the acquisition of nuclear weapons, however it mainly focuses on the use, or threatened use, of nuclear weapons in an armed conflict.¹⁵¹ Even though the United States and North Korea are still at war because a peace treaty ending the Korean War has not been signed,¹⁵² it would be a very tenuous claim to say that the testing of a nuclear weapon constitutes "use" in an armed conflict.

The I.C.J. interpreted Article 2 paragraph 4 of the U.N. Charter¹⁵³ and determined that "it would be illegal for a State to threaten force to secure territory from another State, or to cause it

¹⁴⁸ See Perry, *supra* note 29, at 83.

¹⁴⁹ G.A. res. 49/75, ¶ K, U.N. Doc. A/RES/49/75 (Dec. 15, 1994).

¹⁵⁰ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8).

¹⁵¹ See *id.*

¹⁵² Harrison, *supra* note 47, at 99.

¹⁵³ U.N. Charter art. 2, para. 4 (reading "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.").

to follow or not follow certain political or economic paths.”¹⁵⁴ William Perry has identified a trend in North Korea’s behavior: the beleaguered nation threatens to keep its nuclear program going every four year to correspond with the midterm elections in the United States.¹⁵⁵ It has become standard operating procedure to placate North Korea with aid and fuel in hopes of exercising some level of control over the State’s conduct.¹⁵⁶ The United States has been complicit in buying off North Korea’s good behavior for years,¹⁵⁷ but under the I.C.J.’s ruling, the inherent threat of North Korea’s possession or use of nuclear weapons could be enough to violate international law.¹⁵⁸ This is true because the I.C.J. has acknowledged the argument that possession of nuclear weapons “may indeed justify an inference of preparedness to use them.”¹⁵⁹

If North Korea’s test does not constitute “use” then could it possibly be a “threat?” North Korea’s leadership has said it would use nuclear weapons defensively in the case of an external attack.¹⁶⁰ It is difficult to sustain the argument that mere possession of the weapons is a distinct threat because there is no immediacy, and no single country is squarely in the crosshairs. Furthermore, it is unlikely that any entity would enforce the notion that it is unlawful for a nation to state its intent to respond to a nuclear strike with a reciprocal nuclear strike. This is the principle underlying the doctrine of mutually assured destruction and the bases of the United States’ promise to defend South Korea and Japan with nuclear weapons if necessary.¹⁶¹ It is highly unlikely that North Korea’s domestic subterranean test of its nuclear

¹⁵⁴ Legality of the Threat or Use of Nuclear Weapons, *supra* note 142.

¹⁵⁵ Perry, *supra* note 28, at 78.

¹⁵⁶ *Id.* at 83.

¹⁵⁷ Legality of the Threat or Use of Nuclear Weapons, *supra* note 150, at 83.

¹⁵⁸ *Id.* at 246-47.

¹⁵⁹ *Id.* at 246.

¹⁶⁰ Richard Sisk, *World Trembles as Despot Goes Ballistic, North Korea Unleashes Blast and Could Hit Button on a Second*, DAILY NEWS (New York), Oct. 10, 2006, at 7 (quoting North Korean Ambassador Pak Gil Yon as saying that the nuclear tests afford his country “a powerful, self-reliant defense capability to counter any U.S. threat”).

¹⁶¹ Kwan Wing Kin, *US Vows to Protect Allies Against N. Korea*, STRAITS TIMES (Singapore), Oct. 19, 2006.

arsenal would be considered the kind of use or threat that is addressed in this case.

The I.C.J. recognizes the importance of international disarmament, but it specifically refuses to acknowledge that simply possessing nuclear weapons is illegal.¹⁶² The I.C.J. likens nuclear weapons to weapons of mass destruction, which it recognizes have been outlawed in specific multi-lateral instruments.¹⁶³ It then notes that no specific instrument has been adopted to outlaw the possession of nuclear weapons.¹⁶⁴ The Court notes that the discriminatory nature of the NPT accepts the possession of nuclear weapons by the states, and therefore cannot be seen as criminalizing their possession. However, the Court notes that this reading is contrary to the disarmament provisions of the NPT.¹⁶⁵ The Court unanimously ruled that “there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.”¹⁶⁶ Under this logic, a case could likely be made that North Korea, by acquiring nuclear weapons, has acted counter to its obligation to act in good faith to disarm. This would be a rather tenuous claim as the current climate for nuclear disarmament has soured. The stall in disarmament defeats the likelihood that North Korea can be held accountable under this line of logic for two reasons: (1) the general practice of states militates against this interpretation of the NPT, and (2) instituting actions of this sort work against the interests of nuclear weapons states.

North Korea has repeatedly asserted that it was developing nuclear weapons to thwart an American attack.¹⁶⁷ The I.C.J. narrowly supports the possible use of nuclear weapons in self-defense. It has ruled that:

¹⁶² Legality of the Threat or Use of Nuclear Weapons, *supra* note 142 at 252.

¹⁶³ *Id.* at 248.

¹⁶⁴ *Id.* at 249 (noting that though there have been some specific instruments there have not been any broadly adopted agreements like the other prohibitions on weapons of mass destruction).

¹⁶⁵ *Id.* at 263.

¹⁶⁶ *Id.* at 267.

¹⁶⁷ See Frank Ching, *Giving Pyongyang the Bomb*, SOUTH CHINA MORNING POST (China), Dec. 14, 2006 at 18; Sisk, *supra* note 160.

...the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law; However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defen[s]e, in which the very survival of a State would be at stake...¹⁶⁸

Essentially, the I.C.J. recognizes that because the NPT allows certain countries to possess nuclear weapons, it seems that there must be some instances where they could be used and thus, international law likely does not wholly outlaw the threat or use of nuclear weapons.¹⁶⁹

Another concern is the limited precedential value of an advisory opinion.¹⁷⁰ Technically, advisory opinions are, by their nature, non-binding. These opinions can only be made binding by a separate agreement.¹⁷¹ However, if it is the United Nations General Assembly that commissioned the advisory opinion, a case can be made that it has precedential value because the General Assembly is comprised of many nations.¹⁷² In reality, the Court would likely follow the advisory opinion, but it could find the opinion to have limited application.

Another factor to consider when assessing the applicability of I.C.J. case law as precedent is the Preamble of the 1907 Hague Convention IV known as the Martens Clause.¹⁷³ This Clause has been summarized to say that "in a situation not specifically covered by treaty, belligerents and others remain under protection of the rule of the principles of law of nations, as they result from the usages established among civilized peoples, from the laws of

¹⁶⁸ Legality of the Threat or Use of Nuclear Weapons, *supra* note 150, at 266.

¹⁶⁹ *Id.* at 253.

¹⁷⁰ SHABTAI ROSENNE, ROSENNE'S THE WORLD COURT: WHAT IT IS AND HOW IT WORKS 83 (Terry D. Gill et. al, 5th ed., 1995).

¹⁷¹ *Id.* at 256.

¹⁷² U.N. Charter, *supra* note 153, art. 9.

¹⁷³ Hague Convention IV Respecting the Laws and Customs of War on Land, preamble, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 619.

humanity, and the dictates of the public conscience.”¹⁷⁴ Therefore, should North Korea be brought to the I.C.J. to be held accountable for testing a nuclear weapon, it would not only be held to the letter of their agreements but also to the general practice of states. Given this, the I.C.J.’s advisory opinion can be applied to North Korea to the extent that it represents a comprehensive review of both statutory and customary international law regarding the use or threat of use of nuclear weapons. Assuming the advisory opinion on the *Legality of the Use or Threatened Use of Nuclear Weapons* represents an international consensus, it can be applied as an expression of customary international law which indicates that there is no general trend holding that the use of nuclear weapons is per se prohibited and that nuclear weapons may legally be used in extreme instances of self-defense.¹⁷⁵

The United States specifically rejected this expanded reading of the Martens Clause, taking the position that there is no rule against the use of nuclear weapons.¹⁷⁶ The United States said that the Martens Clause “does not independently establish the illegality of nuclear weapons, nor does it transform public opinion into rules of customary international law.”¹⁷⁷ Under the approach taken by the United States, it is nearly impossible to apply the Martens Clause and thus apply customary international law, and conclude that North Korea has acted unlawfully by testing a nuclear weapon.

This may be a completely tenable position for other areas of international law, but it has limited application as applied to nuclear proliferation. The Martens Clause could be applied to keep North Korea from skirting international law by withdrawing from and acting just outside the bounds of the NPT, but the United States’ position specifically limits the Clause to treaty interpretation. If the NPT is the treaty in question then it cannot

¹⁷⁴ CHARLES J. MOXLEY, JR., NUCLEAR WEAPONS AND INTERNATIONAL LAW IN THE POST COLD WAR WORLD, 123 (2000) (quoting an I.C.J. Hearing from Nov. 15, 1995).

¹⁷⁵ This is known as the ‘rule of necessity.’ See *id.* at 124-25.

¹⁷⁶ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion Verbatim Record, 1996 I.C.J. 78-80 (Nov. 15, 1995), available at http://www.I.C.J.-cij.org/I.C.J.www/icasess/iunan/iunan_cr/iUNAN_iCR9534_19951115.PDF (last visited Sept. 23, 2007) [hereinafter Hearings].

¹⁷⁷ *Id.* at 78.

apply because North Korea has specifically withdrawn from it.¹⁷⁸ This is problematic because the other agreements that would tend to prohibit North Korea from having nuclear weapons are not treaties. The expanded reading of the Martens Clause incorporates public reaction to international law so that if a large number of states think an action is illegal, then it becomes illegal. Though the narrow reading advocated by the United States may protect the rights of minority states in some instances, it has no place in the case of nuclear proliferation where the stakes are much higher. But this point, while technically interesting, may not actually be significant or even relevant because in any instance where there is a wide consensus that an action is illegal, states alleging the violation can simply approach the UN General Assembly or Security Council with their grievances.

E. Nuclear Tests Cases and the Principle of Good Faith

The common law method of assessing legality is to find an analogous case and couch your decision on the precedential value of the previous decision. North Korea is not the first country to test a nuclear device nor would it be the first state hauled before the International Court of Justice for conducting such a test. In 1974, New Zealand and Australia took France to the I.C.J. in separate actions seeking to stop nuclear testing in the Southern Pacific Ocean.¹⁷⁹ France had informed the countries that it intended to stop atmospheric tests, and New Zealand and Australia wanted an assurance that further testing would not occur.¹⁸⁰ The cases did not reach the question of whether nuclear testing, in and of itself, is against international law.¹⁸¹ The Court did note that New Zealand and Australia had causes of action because there was some modicum of radioactive fallout from the atmospheric tests over the ocean upon the territories and waters of those

¹⁷⁸ This has interesting implications if North Korea is going to comply with the new agreement which requires them to rejoin the NPT. Further, the question remains as to what happens when North Korea resigns a treaty it has already broken.

¹⁷⁹ Nuclear Tests Case (N.Z. v. Fr.), 1974 I.C.J. 457 (Dec. 20); Nuclear Tests Case (Austl. v. Fr.), 1974 I.C.J. 253 (Dec. 20).

¹⁸⁰ Nuclear Tests Cases, *supra* note 182.

¹⁸¹ Though this is an adversarial case, France objected to jurisdiction and did not appear. Nuclear Test Case (Austl. v. Fr.), *supra* note 179, at 256.

states.¹⁸² The test North Korea conducted is distinguishable because it was subterranean.¹⁸³ Further, North Korea's test isn't even in violation of what is known colloquially as the "Partial Test Ban Treaty."¹⁸⁴ However, the *Nuclear Tests Cases* do reveal the alternative theory of 'good faith' which could apply to North Korea.

The I.C.J. noted that the theory of good faith is "one of the basic principles governing the creation and performance of legal options, whatever their source."¹⁸⁵ Read another way, the principle of good faith holds that once a legal obligation is created, states have a good faith responsibility to carry them out. The *Nuclear Tests Cases* identify a legal duty that requires a state to keep its promises so that "interested States may... place confidence in them."¹⁸⁶ The rationale for the principle of good faith is simple—states should be able to put credence in what other states say they will do. The actual enforceable legal principle of good faith comes from promissory estoppel, in which a country relies to its detriment on the promises of another country.

The simplest form of the principle of good faith is exhibited when the heads of two states exchange promises. The states are now obligated to perform their obligations to the best of their ability. The I.C.J. broadened the principle of good faith in the *Nuclear Tests Cases* when it commented on "the binding character of an international obligation assumed by unilateral declaration."¹⁸⁷ In the case of a unilateral declaration, a head of state – or other agent or organ of the state with the power to bind the state – makes an announcement of the state's intent to do something and, by doing so, creates a reasonable reliance among the members of the international community that it will honor that pledge. Later in the opinion, the Court clearly held that the principle applies to truly unilateral declarations by stating that "to

¹⁸² *Nuclear Tests Case (N.Z. v. Fr.)*, *supra* note 179, at 475.

¹⁸³ Johnson, *supra* note 1.

¹⁸⁴ Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space And Under Water, Oct. 10, 1963, 14 U.S.T. 1313, 480 U.N.T.S. 43.

¹⁸⁵ *Nuclear Tests Case (N.Z. v. Fr.)*, *supra* note 179, at 473.

¹⁸⁶ *Id.* at 473.

¹⁸⁷ *Id.*

have legal effect, there is no need for these statements to be addressed to a particular State, nor [is] acceptance by any other State required.”¹⁸⁸

Under this framework, to derive a legal right of reliance from a unilateral declaration under the doctrine of good faith, the promising country must: (1) make a declaration, (2) which represents its clear intention, (3) to limit its own ability to act.¹⁸⁹ The Court limited the application in one respect: statements made in negotiation of an agreement are exempt from the doctrine.¹⁹⁰ The very nature of negotiations would be undercut if the good faith principle was read so as to immediately bind to terms once a state announced them. In applying the principle of good faith to the *Nuclear Tests* cases, the I.C.J. found that by making statements orally and in correspondence, France was bound to stop its nuclear tests in 1974.¹⁹¹

Applying the principle of good faith to the North Korean nuclear test would initially seem to give rise to an action for promissory estoppel because North Korea has indicated its intent to refrain from obtaining or testing nuclear weapons on numerous occasions.¹⁹² In concluding the 1994 Agreed Framework with the United States, North Korea agreed to freeze its nuclear program.¹⁹³ Testing a nuclear device would indicate that North Korea had violated its declaration to freeze its nuclear programs. But, this is not necessarily true if North Korea had already created its nuclear arsenal by 1994, which is a possibility according to former Secretary of State Colin Powell.¹⁹⁴ Additionally, North Korea made it clear that it was removing the freeze and re-starting its nuclear program in December 2002.¹⁹⁵ Does this specific acknowledgement of its intent to act violate the Agreed

¹⁸⁸ *Id.* at 474.

¹⁸⁹ *Id.* at 472.

¹⁹⁰ *Nuclear Tests Case (N.Z. v. Fr.)*, *supra* note 179, at 476.

¹⁹¹ *Id.* at 474-75.

¹⁹² *See* NPT, *supra* note 8; Agreed Framework, *supra* note 38; February 13th Agreement, *supra* note 59.

¹⁹³ Agreed Framework, *supra* note 38, art. I(3) & art. IV.

¹⁹⁴ *See* Squassoni, *supra* note 76.

¹⁹⁵ NTI Profile, *supra* note 101.

Framework of 1994 act contrary to good faith or does it conform to it?

The initial reading would support the idea that by unfreezing its program, North Korea was specifically acting against its good faith obligation to fulfill the Agreed Framework. The United States asserted that it was a breach.¹⁹⁶ However, the Agreed Framework is an agreement and not a treaty, meaning the application of the rules that of treaty interpretation is more ambiguous.¹⁹⁷ This does not render the doctrine of good faith inapplicable because as the Court in the Nuclear Tests Cases notes, the principle applies to legal obligations “whatever their source.”¹⁹⁸ But the application of the principle of good faith to North Korea’s obligations under the Agreed Framework does raise questions about the limits of the doctrine. Does an agreement like the Agreed Framework, without a clause for the termination of the agreement, when coupled with the principle of good faith bind North Korea in compliance for perpetuity? Or in the alternative, can North Korea comply with the principle of good faith by changing its intentions and making a completely new declaration – in this case that it will unfreeze its nuclear program?

There is a more recent instance where good faith could be applied to find North Korean liability. In September 2005, after North Korea announced that it had manufactured a nuclear weapon, North Korea and the United States issued a statement that they had reached a deal pursuant to which North Korea agreed to rejoin Six-Party Talks, rejoin the NPT, and to comply with IAEA Safeguards.¹⁹⁹ However, the next day, North Korea clarified its position by stating that it would not honor the agreement until it received the light water reactor promised by the United States in return for their compliance.²⁰⁰ One year later, North Korea tested its nuclear device.²⁰¹ Is this a violation of North Korea’s good faith duty to honor its joint statement with the United States? Or

¹⁹⁶ Harrison, *supra* note 47.

¹⁹⁷ GRAHAM, *supra* note 9, at 1268.

¹⁹⁸ Nuclear Tests Case (N.Z. v. Fr.), *supra* note 179, at 473.

¹⁹⁹ NTI Profile, *supra* note 101.

²⁰⁰ Tentative Understanding, *supra* note 52, at 916.

²⁰¹ Johnson, *supra* note 1.

does North Korea's noncompliance indicate that the agreement was tentative and fell apart on the particulars? Recall that the doctrine of good faith does not apply to statements made in negotiations.²⁰²

Did the western consortium breach the agreement by not providing the light-water reactor in a timely fashion? If so, the breach of the Agreement occurred before North Korea breached its own obligations in retaliation. If the other parties breached first, holding North Korea accountable under the good-faith theory is much harder because good-faith was already breached by the other party.

North Korea has said multiple times that it would abandon its nuclear program. Through its failure to disarm, North Korea has violated the principle of good faith set forth in the *Nuclear Tests Cases*. The holding in those cases is integral to any attempt to hold North Korea accountable for the nuclear tests based on the doctrine of good faith and their previous promises to disarm. Secondly, the *Nuclear Tests Cases* represent an instance in which the I.C.J. delivered a ruling on liability for nuclear testing despite one party being absent and objecting to jurisdiction.²⁰³ The case against North Korea is not iron clad because of the limits of the good faith doctrine in circumstances where a state repeatedly changes its stances and intentions. Enforcement is also a thorny issue because it is unclear what kind of recourse would result from a breach of good faith.

The explicit provisions of the February 13th Agreement show that the parties understand the relative weakness of 'good faith.' In the February 13th Agreement, the parties did not leave as many things up to good faith execution as in previous agreements. In the new agreement, the parties describe the incremental irreversible shutdown of North Korea's nuclear program with specific deadlines.²⁰⁴ The six parties are, given history, rightfully reticent about North Korea's ability to fulfill any long-term commitments. At the time of writing this comment, the

²⁰² See *Nuclear Tests Case (N.Z. v. Fr.)*, *supra* note 179, at 476.

²⁰³ *Id.* at 460. This aspect will be discussed again below in the section on means of enforcement. See *infra* text accompanying notes 218-75.

²⁰⁴ February 13th Statement, *supra* note 59.

talks were resuming after they were threatened with issues over unfreezing North Korean funds.²⁰⁵

F. North-South Joint Declaration on Denuclearization of the Korean Peninsula

In 1992, North Korea and the Republic of Korea (South Korea) declared their joint resolve to “eliminate the danger of nuclear war through denuclearization of the Korean Peninsula.”²⁰⁶ The North-South Joint Declaration contains a specific promise from both states to not test or manufacture nuclear weapons.²⁰⁷ Through application of a collateral theory - the good faith obligation to abide by unilateral declarations that limit a State’s actions - the Declaration would be explicitly defied by testing a nuclear weapon.

Two questions arise: (1) is the declaration is still valid and (2) do the legal rights derived from it give rise to an actionable claim? It is obvious that South Korea and the United States believe that the declaration is still binding, as they have made compliance with the promises therein a stipulation of the new agreement.²⁰⁸ The question then becomes what kind of legal rights and remedies are available to South Korea. Like many of the other agreements discussed, the matter would likely have to be referred to the International Court of Justice or some other dispute resolution body provided for in Article 33 of the UN Charter. Given the nature of the conflict and the provisions of the UN Charter, generally, and Article 33, specifically, it is highly unlikely that South Korea can force North Korea to comply. It is clear that the declaration gives each country the right to be free of nuclear threat from the other; the remedy it provides if this right is infringed is less clear. Moreover, assuming a remedy is available, can South Korea show it has been damaged by North Korea’s breach? In the *Nuclear Tests Cases*, New Zealand and Australia were able to show that there was tangible injury from nuclear

²⁰⁵ Maureen Fan, *Deal on Funds Removes Hurdle to N. Korea Talks*, WASH. POST, Mar. 19, 2007, at A09.

²⁰⁶ Joint Declaration of the Denuclearization of the Korean Peninsula, N. Korea-S. Korea, Jan. 20, 1992, 33 I.L.M. 569 [hereinafter the North-South Joint Declaration].

²⁰⁷ *Id.* at Part 1.

²⁰⁸ February 13th Statement, *supra* note 59.

fallout; here, the injury here is more amorphous.²⁰⁹ South Korea would have to sue on the right to be free from the threat of nuclear weapons from North Korea. Given that the two are still technically still at war, as the Korean War is only at a ceasefire,²¹⁰ this threat is relatively tangible, but the form of damages to be awarded is much less clear. Under the aforementioned principle of good-faith, North Korea has the obligation to comply with the North-South Joint Declaration,²¹¹ but in not exercising good faith can it be compelled to do so or can monetary damages be somehow assessed? The I.C.J. can refer the matter to the United Nations Security Council, but, as referenced later, this is highly unlikely.²¹²

Because North Korea has withdrawn from the NPT and the IAEA, the likelihood it could be held in violation of either agreement is minimal. North Korea is in blatant violation of its Safeguards Agreement and the North-South Joint Declaration on Denuclearization of the Korean Peninsula.²¹³ There also seems to be a general breach of the good-faith duty not to proliferate that North Korea undertook by repeatedly promising to shutdown its program and forego the development of nuclear weapons. But no matter how weak or strong the legal argument for holding North Korea culpable is, it becomes moot if the nature of international law makes enforcement impossible.

IV. Who Enforces the Law?

After determining that there are some legal theories – albeit fewer than it would first appear – under which North Korea can be held accountable for its nuclear weapon test, the focus turns to who can make a determination that North Korea has violated international law and then takes measures to enforce the law. Valid enforcement of international law is based on consensus-building. Given the dire need for enforcement of the law of

²⁰⁹ See Nuclear Test Case (Austl. v. Fr.), *supra* note 179, at 258; Nuclear Tests Case (N.Z. v. Fr.), *supra* note 179, at 462.

²¹⁰ See generally Military Armistice in Korea and Temporary Supplemental Agreement, July 27, 1953, 4 U.S.T. 230, T.I.A.S. 2782.

²¹¹ See *supra* text accompanying note 206.

²¹² See *infra* text accompanying note 250.

²¹³ See *supra* text accompanying note 206.

nuclear non-proliferation, not just any coalition, but an expedient and effective one, is required. This section is devoted to the question of who can hold North Korea accountable for the breaches of international law that were discussed in the previous section.

A. *The International Atomic Energy Agency*

The IAEA, like a government agency in the United States, is charged with the general administration of its area of the law but it must look elsewhere to enforce its determinations. Coming from Eisenhower's "Atoms for Peace" speech,²¹⁴ the IAEA was founded in 1957 and has a secretariat, a Board of Governors, and a team of inspectors which are authorized to adopt safeguards and monitor compliance.²¹⁵

There are only a couple of minor actions that the IAEA can, of its own volition, take against violating states of its own volition. These actions are mainly limited to the suspension of IAEA membership privileges.²¹⁶ The harshest penalty the IAEA can impose by itself is reserved for a repeated violated as set forth in Article XIX(b).

A member which has persistently violated the provisions of this Statute or of any agreement entered into by it pursuant to this Statute may be suspended from the exercise of the privileges and rights of membership by the General Conference acting by a two-thirds majority of the members present and voting upon recommendation by the Board of Governors.²¹⁷

The IAEA is charged with monitoring compliance and fostering cooperation, but its only explicit means of enforcement comes from its duty to submit reports to the United Nations General Assembly and the Security Council.²¹⁸ Upon submission

²¹⁴ IAEA.org, *History of the IAEA*, <http://www.iaea.org/About/history.html> (last visited Sept. 24, 2007).

²¹⁵ *Id.*

²¹⁶ IAEA Statute, *supra* note 18, art. XIX.

²¹⁷ *Id.* art. XIX(b).

²¹⁸ *Id.* art. III(B)(4).

of its reports, actual enforcement is conducted by the United Nations.²¹⁹

The implications of the lack of expedience and power to address breaches of Safeguard Agreements are quite detrimental to the effectiveness of the non-proliferation regime. On two separate occasions, the IAEA has determined that North Korea was in violation of its safeguards. The first time occurred in 1992, when, after inspecting North Korea facilities, the IAEA detected a discrepancy in the amount of material declared and the amount produced by the search.²²⁰ From this discrepancy, the IAEA determined that North Korea had likely been trying to reprocess spent fuel in order to create materials needed to develop a nuclear weapon. In February 1993, the IAEA Board of Governors passed a resolution demanding that North Korea allow special inspections of the two sites they suspected of housing the clandestine nuclear program – which it would confirm nine years later.²²¹ This resolution infuriated North Korea, who then threatened to withdraw from the NPT, citing, among other reasons, that the IAEA was violating North Korea's sovereignty at the behest of the United States.²²² This exemplifies a critical weakness in the non-proliferation regime and a central question of international legal enforcement in general: how can international legal enforcement continue to respect state sovereignty while assuring compliance with crucial safety agreements such as the NPT?

Respect for state sovereignty originated with the creation of the nation-state, specifically, in the Treaty of Westphalia.²²³ Østerud describes sovereignty as having a substantive component which allows “the authorities of each state to be their own master,” and formal a component that “demands freedom from outside

²¹⁹ *Id.*

²²⁰ IAEA Factsheet, *supra* note 7.

²²¹ *Id.* (noting the October 2002 announcement that North Korea has nuclear weapons).

²²² *See* Perry, *supra* note 29.

²²³ Treaty of Westphalia: Peace Treaty Between the Holy Roman Emperor and the King of France and Their Respective Allies, Oct. 24, 1648, available at <http://fletcher.tufts.edu/multi/texts/historical/westphalia.txt> (last visited Sept. 24, 2007). The treaty ending the Thirty Year's War is commonly credited with creating the current international system because it emboldened the idea of a sovereign nation-state. *Id.*

interference.”²²⁴ International law is completely consent based because of the doctrine of state sovereignty.²²⁵ Most of the major foundational documents of international law acknowledge the centrality of sovereignty and consent.²²⁶ Most centrally, the United Nations Charter bases its organization on “the sovereign equality of all its Members.”²²⁷ The Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations recognizes the “consensual nature of treaties and their ever-increasing importance as a source of international law.”²²⁸ The Vienna Convention on the Law of Treaties describes how a state can consent to be bound by a treaty and by so doing cede a sliver of its sovereign immunity away in the sense that a state agrees to act in a certain way.²²⁹

The unanswered question is what happens when a state explicitly expresses its consent to no longer be bound, as North Korea has done several times.²³⁰ North Korea manifested its intent to no longer be subject to the IAEA through its withdrawal in 1994 – though later consented to IAEA monitoring in the Agreed Framework.²³¹ More recently, North Korea withdrew from the NPT, and by testing a nuclear weapon, acted specifically against the aims, if not the letter, of the NPT.²³² There is nothing within the governing documents of the IAEA to prevent a state from using its IAEA membership to gain peaceful nuclear technology and then opt out of the organization when the state wants to utilize the technology to create a nuclear weapon. As mentioned earlier, the IAEA then can suspend its assistance, but in regards to proliferation, this punishment is essentially moot.

²²⁴ Østerud, *supra* note 102, at 19.

²²⁵ *See id.* at 18-23.

²²⁶ *Id.*

²²⁷ U.N. Charter, *supra* note 154, art. 2, para. 1.

²²⁸ Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations preamble, Mar. 21, 1986, 25 I.L.M. 543.

²²⁹ *Id.* art. 11-17.

²³⁰ North Korea has done this by dropping out of the NPT and the IAEA and then specifically acting against those treaties. *See generally* IAEA Factsheet, *supra* note 7.

²³¹ Agreed Framework, *supra* note 38, at 605.

²³² *See supra* sec. III(a).

Disputes under the IAEA statute are referred by statute to the International Court of Justice.²³³ Finally, the IAEA can submit its reports to the UN General Assembly or Security Council.²³⁴ After further review, it will be obvious that the impetus for enforcement falls almost solely on the Security Council. This makes the means of finding culpability duplicative, and essentially dependent upon the whim of the Security Council.²³⁵

B. *The International Court of Justice*

The International Court of Justice, as the “principal judicial organ of the United Nations,”²³⁶ is the court of last resort for states to settle disputes over international law and treaty construction.²³⁷ As previously mentioned, there are several instances when the International Court of Justice can rule on the substantive law of a particular non-proliferation treaty. Disputes over the IAEA Statute, for example, are settled in the I.C.J.²³⁸ Furthermore, the I.C.J. would likely be the forum for any charge of breaching an international agreement such as the North-South Joint Declaration on the Denuclearization of the Korean Peninsula, the 1994 Agreed Framework, or the newly signed deal which gives North Korea fuel for destroying its manufacturing capabilities.

In the *Nuclear Tests Cases*, the French challenged the jurisdiction of the Court to hear such cases when one party fails to appear. The Court clarified its jurisdiction and role by saying the following:

...the Court possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute...²³⁹

²³³ IAEA Statute, *supra* note 17, art. XIX(b).

²³⁴ *Id.* art. XII(c).

²³⁵ *See infra* sec. IV(c).

²³⁶ U.N. Charter, *supra* note 154, at art. 92.

²³⁷ Statute of the International Court of Justice, art. 34(1), Jun. 26, 1945, 59 Stat. 1031 [hereinafter I.C.J. Statute].

²³⁸ IAEA Statute, *supra* note 18, art. XVII(A).

²³⁹ Nuclear Tests Case (Austl. v. Fr.), *supra* note 179, at 259.

The I.C.J.'s jurisdiction is essentially as wide as discretion will allow provided the interested parties are states.²⁴⁰ The International Court of Justice will undertake treaty interpretation and application of customary international law to make a determination. But getting a verdict is merely half of the job, as the judgment must then be enforced. As a part of the United Nations, most states are party to the I.C.J. Statute and thus the rulings of the Court are honored as a matter of comity.²⁴¹ However, there is nothing compelling states to honor I.C.J. judgments for the same consent and sovereignty reasons previously mentioned about the IAEA.²⁴² Article 94 of the UN Charter indicates that United Nations members "under[take] to comply with the decision of the International Court of Justice in any case to which it is a party."²⁴³ Though, admittedly, the matter would likely have to be of supreme significance for a country to thwart the structure of the United Nations and be willing to suffer the consequences. Although it would be terrible policy to bypass the U.N., there is still nothing compelling compliance.

Functionally, however, the I.C.J. rarely has a party succeed in appealing to the Security Council for enforcement of one of its rulings, as it is empowered to do under Article 94(2).²⁴⁴ Many member countries only look to the I.C.J. when it suits them. Recently the United States Supreme Court weakened the I.C.J.'s expanse in *Sanchez-Llamas v. Oregon*, where it said that the I.C.J. has no *stare decisis* value.²⁴⁵ Though entrenched within the United Nations, the position of the I.C.J. is still uncertain, making the responsibility for assessing nuclear liability in a body of suspect reach at least somewhat untenable. Furthermore, the idea that the I.C.J. can uniformly create some sort of customary international nuclear proliferation law is quite doubtful. With the inherently weak and inconsistent language of the NPT, and the

²⁴⁰ See generally I.C.J. Statute, *supra* note 237, art. 34-48.

²⁴¹ See *id.*

²⁴² See *supra* sec. IV(a).

²⁴³ U.N. Charter, *supra* note 154, art. 94(1).

²⁴⁴ See generally DAVID SCHWEIGMAN, THE AUTHORITY OF THE SECURITY COUNCIL UNDER CHAPTER VII OF THE UN CHARTER: LEGAL LIMITS AND THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE (2001).

²⁴⁵ *Sanchez-Llamas v. Oregon*, 126 S.Ct. 2669, 2684 (2006).

limited *res judicata* effect of the I.C.J., as noted by Rosenne in his treatise on the World Court, it seems very unlikely that the I.C.J. is the first place to turn when wanting to address a breach of international non-proliferation agreements.²⁴⁶

C. *The United Nations Security Council*

In order to properly delve into effectiveness of the UN Security Council as an enforcement mechanism, a short exploration of the source of the Council's power is necessary. Article 7 of the United Nations Charter creates six principal organs,²⁴⁷ of which the Security Council is decidedly the most powerful. The Council's power comes from its ability to act with the full force of all the members of the United Nations when it comes to "the maintenance of international peace and security."²⁴⁸ The actions of the Council do not have to be submitted to any other organ for approval and the United Nations members have specifically rejected revisions that would give other organs more oversight.²⁴⁹ Article 25 of the UN Charter states that "the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."²⁵⁰ Schweigman notes that the power of the Security Council came as a lesson of the past, concluding that "the drafters of the Charter were cautious to avoid charging another toothless organ as the League [of Nations] Council had been, with the supervision of international peace and security."²⁵¹

The strength and validity of the executive powers of the Security Council become immediately relevant during a nuclear crisis. The Security Council was designed to address this kind of case swiftly. The Security Council can be directly implicated when (1) the IAEA comes to it with a report of breach of a

²⁴⁶ ROSENNE, *supra* note 172, at 129.

²⁴⁷ In addition to the Security Council, these organs are: the International Court of Justice, the Economic and Social Council, the Secretariat, and the Trusteeship Council. U.N. Charter, *supra* note 154, art. 7.

²⁴⁸ *Id.* art. 24.

²⁴⁹ See SCHWEIGMAN, *supra* note 244, at 27-28.

²⁵⁰ U.N. Charter, *supra* note 154, art. 25.

²⁵¹ SCHWEIGMAN, *supra* note 244, at 31.

Safeguards Agreement or (2) a party to an I.C.J. judgment comes forward seeking enforcement.

The Security Council responded quickly to North Korea's nuclear test by unanimously adopting Resolution 1718 which condemned the nuclear test, demanded that North Korea return to the NPT and Six-Party Talks, froze some funds going in and out of the country, and froze the import and export of some luxury goods from the country.²⁵² Each member of the Security Council denounced North Korea's nuclear test, and, to the Security Council's credit, the pressure has led to the current agreement with North Korea in which it has agreed to irreversibly dismantle its nuclear program in return for fuel.²⁵³ However, if nuclear weapon proliferation is analogized as an incurable disease, then the damage has been done by allowing it to spread. This new agreement addresses future production by securing an agreement to dismantle the manufacturing program. However, it says nothing about disarmament – and there is no indication that it ever will. The United States and the Russian Federation have all but abandoned their disarmament programs, so it is very unlikely that they would ask North Korea to disarm lest they make the case why they should not do the same.

D. The United States

It is highly doubtful that the United States would take unilateral action against North Korea should it be determined that it has violated international law. This comment is not intended to tackle the issue of the validity of unilateral action for a perceived violation of international law. The actions in Afghanistan in 2001 and Iraq in 2003 provide recent evidence that unilateral enforcement may be possible, but other scholars are currently attacking this issue. There is little to no political support domestically or internationally for such an action.²⁵⁴

²⁵² S.C. Res. 1718, U.N. Doc. S/RES/1718 (Oct. 14, 2006).

²⁵³ See February 13th Statement, *supra* note 59.

²⁵⁴ See generally Cynthia Tucker, *Americans Wanted to Believe Bush's Sales Pitch for Invasion of Iraq*, BALTIMORE SUN, Oct. 23, 2006, at 15A (describing the American public's skepticism toward acting unilaterally after the invasion of Iraq).

E. Six-Party Talks and Multilateral Conflict Resolution

In 2002, armed with evidence of North Korea's clandestine nuclear program, the United States declared North Korea in violation of the 1994 Agreed Framework.²⁵⁵ The United States accordingly stopped its shipment of fuel oil to North Korea, who retaliated by reversing the freeze process it had started under the Agreed Framework. The United States refused to engage in bilateral talks with North Korea citing the breach of the freeze. As a result, China brokered negotiations between the two in April 2003.²⁵⁶ The talks were expanded to include Russia, South Korea, and Japan by the time the first true Six-Party Talks commenced in Beijing in August 2003.²⁵⁷ The Six-Party Talks proceeded on a road map by the Chinese by which the input of all parties was surveyed and then a schedule was set for resolution of the issue of North Korean nuclearization.²⁵⁸

After North Korea tested its nuclear weapon, the Chinese called for renewed Six-Party talks.²⁵⁹ The fifth round of Six-Party Talks made the biggest leap forward and resulted in the Agreement of February 13th.²⁶⁰ The tangible objectives of the new agreement involve: the irreversible shutdown of the nuclear facility at Yongbyon, a complete North Korean nuclear inventory, talks to normalize diplomatic relations between North Korea and the United States, normalization of diplomatic relations with Japan, and economic aid and compensation for North Korea.²⁶¹ The agreement calls this an "initial phase," during which working groups were created to implement the steps within the following 60 days.²⁶²

²⁵⁵ See Harrison, *supra* note 47, at 99.

²⁵⁶ See John S. Park, *Inside Multilateralism: The Six-Party Talks*, 28 WASH. Q., Autumn 2005, at 75.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ See Joshua Kurlantzick, *China Buys the Soft Sell*, WASH. POST, Oct. 15, 2006, at B3.

²⁶⁰ See generally February 13th Statement, *supra* note 59 (noting that the agreement that was recorded on Feb. 13, 1007 was a result of the fifth round of Six-Party Talks).

²⁶¹ *Id.*

²⁶² *Id.*

The Six-Party Talks are set to reconvene on March 19, 2007 to hear reports from the working groups on the progress of implementing the stipulations.²⁶³ North Korea and the United States are meeting in monumental talks that are aimed at achieving the following: normalizing diplomatic relations, U.S. recognition of North Korea, removal of North Korea from the list of states that sponsor terrorism, and loosening of sanctions which will allow North Korea to have access to the International Monetary Fund, the World Bank, and its frozen bank accounts.²⁶⁴ Though these rounds of talks might seem like real progress, optimism must be tempered by the lessons of the past. These independent multilateral talks are, in a sense, a form of enforcement by member states of international legal organizations without the constraints of the UN Security Council where the veto rules.²⁶⁵ It was under the auspices of renewed cooperation that North Korea decided to reverse course and thwart non-proliferation efforts in 1994, 2002, and 2006²⁶⁶ – and there was little to no legal incentive to curb this erratic behavior.

The Six-Party Talks are a unique chance to curb North Korea's nuclear program, and the February 13th Agreement gives hope that there will be tactile resolution of the matter. However, the Six-Party talks are a unique association of regional political actors who have come together to solve this particular problem.²⁶⁷ Acting outside tactile international law to solve the problem of a state acting outside of international law seems much more like a stop-gap measure than a rule worth adopting.

Even more disturbing is the fact that the nuclear security of the world rests on the impetus of a few states willing to bribe a state like North Korea that has shown a willingness to skirt international law. How feasible is it to think that the United States must convene regional security talks to buy off Iran or Venezuela should either country “go nuclear?” Problems of this sort are why

²⁶³ *Id.*

²⁶⁴ *See id.*

²⁶⁵ *See generally* SCHWEIGMAN, *supra* note 236 (discussing the structure of the UN Security Council).

²⁶⁶ *See* Perry, *supra* note 28; IAEA Factsheet, *supra* note 7.

²⁶⁷ *See generally* February 13th Statement, *supra* note 59 (describing the steps to implement the denuclearization plan).

international organizations such as the United Nations and the IAEA should have clear and comprehensive guidelines along with unyielding support to fulfill their missions.²⁶⁸ The United States' unwillingness to lend full support to worldwide efforts like the Anti-Ballistic Missile Treaty, the International Criminal Court, and the Kyoto Protocol have helped solidify the weak ground on which international law is laid down and enforced.²⁶⁹ And though the areas addressed by those efforts may be much easier to neglect, nuclear weapon proliferation must be addressed with comprehensive multilateral action backed up by the full breadth of nations. Nuclear proliferation is different and the stakes are higher. Clear legal rules supported by the practice of nations are needed to shape the actions of possible lawbreakers and enforcers alike. Relying on the formation of an ad hoc coalition every time a new nuclear threat arises displays the kind of woeful uncertainty that has led to North Korea's possession of a nuclear weapon.

V. Conclusions

This paper is not meant to defend the position that North Korea acted lawfully by testing a nuclear weapon in October 2006, nor it is necessarily meant to condemn it. In March 2005, President Bush said:

We cannot allow rogue states that violate their commitments and defy the international community to undermine the NPT's fundamental role in strengthening international security. We must therefore close the loopholes that allow states to produce nuclear materials that can be used to build bombs under the cover of civilian nuclear programs. For international norms to be effective, they must be enforced.²⁷⁰

The aim of this paper has been to point out how North Korea has highlighted the loopholes of the current nuclear non-proliferation

²⁶⁸ SCHOFF, *supra* note 49, at 48.

²⁶⁹ See Lawrence Martin, *Continental Divide: When it Comes to Treaties We Care*, GLOBE & MAIL (Can.), Mar. 23, 2006, at A23.

²⁷⁰ President George W. Bush, Statement (March 7, 2005), in *Contemporary Practice of the US Relating to International Law: Use of Force and Arms Control: U.S. and Other Powers Reach Tentative Understanding on North Korea's Nuclear Program*, 99 AM J. INT'L L. 715, 715 (John R. Crook ed., 2005).

regime, making the system ineffective when dealing with a diplomatically savvy rogue state. And as an ancillary point, this paper hopefully conveys how alarming it is that the politics surrounding the Comprehensive Test Ban Treaty have aligned such that the major actors have been unwilling to address the problems underlying a flawed NPT and have instead renewed it in perpetuity and by so doing condemned the international community to use an ad hoc approach to protecting the world from the proliferation of the nuclear weapons.

In its current form, the nuclear non-proliferation regime can be opted in and out of when it suits a country, and though that may be tolerable for other agreements, such fluidity is disturbing when the widespread safety of the world is involved. Theories of culpability for acquiring, and, in North Korea's case, testing nuclear weapons are heavily limited by the overriding concern for sovereignty and the weakness of 'good faith.'

Even if a viable legal theory is settled upon, the question of enforcement is prominent. Given the previously mentioned concerns over sovereignty, the course of action should come from the U.N. Security Council; however, this too has its limitations. The much-coveted veto power of the Security Council members means that the body can only act to stem nuclear mischief with complete consensus. A level of skepticism should color any reliance on the ability of multilateral diplomatic efforts like the Six-Party Talks to deal with situations where proliferation is threatened.

The February 13th Agreement brings North Korea back into the fold and offers short-term hope that this particular crisis can be defused,²⁷¹ but the damage has already been done. An unstable state has been allowed to obtain nuclear weapons. The non-proliferation regime has failed. The disarmament movement in general has completely stopped, with the Russians and Americans halting the scheduled depletion of their nuclear arsenals.²⁷² Although the new agreement, if carried out, would

²⁷¹ *But see* Rowan Callick, *North Korea Quits Nuclear Talks*, AUSTRALIAN, Mar. 23, 2007 (reporting that the current round of talks has hit a snag and the North Koreans have left).

²⁷² *See generally* GRAHAM, *supra* note 39 (noting the stagnation of the disarmament movement and calling for nuclear weapons countries like the U.S. and Russia to take a

irreversibly set back North Korea's nuclear weapon manufacturing program, it is only a stop-gap measure as one of the most schizophrenic nations on earth now possesses the capability to eradicate life en masse or to sell that capability to the highest bidder.

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