

論 說

# Denuclearizing the Korean Peninsula and Global Nuclear Disarmament: Some Issues on Law and Politics in the Nuclear Age

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Introduction

Part One

Denuclearization of the Korean Peninsula, and Recognition of Current  
Status in the Nuclear Age

1. How Should We Interpret the US-DPRK Summit?
2. The Situation Up to the End of 2017
3. Behind “Denuclearization and Guaranteeing Peace”

Part Two

Constitution, International Law and Crimes

1. The United States’ Manhattan Project and the Soviet Union’s nuclear  
weapons development
2. What Is the Korean War in the Context of Japan’s History?
3. A Legal Critique of the Korean War

Part Three

For a Solution to the Korean Peninsula’s Nuclear Weapons Problem

1. Status review and Challenges
2. On the Matter of Nuclear Arms on the Korean Peninsula
3. Toward a Solution for the Korean Peninsula Nuclear Weapons Issue

Part Four

Global Nuclear Disarmament

1. Global Nuclear Disarmament
2. International Crimes and Confidence Building

3. Nuclear Arms Control Under Siege  
Afterword

**Keywords**

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## Introduction

What is meant by denuclearizing the Korean Peninsula and global nuclear disarmament? And how are they related to the two agendas of regional denuclearization and global disarmament? To a legal scholar who remains outside of real nuclear politics, these questions seem very difficult to deal with, but by recognizing these difficulties, this article tries to focus on a few issues of law and politics in the nuclear age.<sup>(1)</sup>

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I wonder if the following three items might provide some useful clues.

First is that the threat and use of nuclear weapons are contrary to the right to life, and may amount to crimes under international law according to the UN Human Rights Committee (HRC). On October 30, 2018 the HRC, which is in charge of implementing the 1966 International Covenant on Civil and Political Rights (ICCPR), adopted its General Comment (GC) no. 36 relating to the right to life (Article 6 ICCPR; in para. 66)<sup>(2)</sup>. The International Court of Justice (ICJ), in its 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, confirmed the applicability of the right to life in time of armed conflict and, moreover, observed that the test of what is an “arbitrary deprivation of life” has to be determined in light of international law governing armed conflict, in particular humanitarian law.<sup>(3)</sup>

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(1) The nuclear age is the era in which technological civilization, as symbolized by nuclear weapons and nuclear power, dominates the world. The discerning scientists who witnessed the successful Trinity nuclear bomb test in New Mexico on July 16, 1945 saw “the end of the world.” But US President Truman had already spoken beforehand with Britain’s Prime Minister Churchill, and decided to use the bomb on Japan, not on Germany. Further, the bomb’s use had to precede the Soviet Union’s entry into the war against Japan under the Yalta Agreement. Thus came the dropping of the uranium bomb Little Boy on Hiroshima on August 6, and that of the plutonium bomb Fat Man on Nagasaki on August 9. Here the ignorance and irresponsibility of Truman, Stimson, and other politicians and military leaders coexist with the knowledge and foresight of Einstein and other scientists. These two groups would go on to produce a striking contrast in the way they confronted the nuclear age.

(2) General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life. CCPR/C/GC/36. Advance unedited version – OHCHR ([https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1\\_Global/CCPR\\_C\\_GC\\_36\\_8785\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf)).

(3) ICJ Reports 1996, § 25. (<http://nwp.ilpi.org/wp-content/uploads/2011/10/Legality-of-the-Threat-or-Use-of-Nuclear-Weapons1.pdf>).

Second are three statements which appeared in newspapers on August 9, 2018, the 73rd anniversary of the atomic bombing of Nagasaki. Two of the statements were from the “declaration” by Nagasaki Mayor Taue Tomihisa: (1) Taue put pressure on the Abe administration to endorse the Treaty on the Prohibition of Nuclear Weapons (TPNW, or the Nuclear Weapon Prohibition Treaty). (2) Concerning crimes against humanity, Taue made reference to the statement by the late Tsuchiyama Hideo, who had been a member of the Nagasaki Peace Declaration Drafting Committee, that senior government officials who approve of the nuclear umbrella are possible accomplices in “crimes against humanity.” (3) And concerning Article 9 of the Constitution, which bans Japan from having armed forces, Tanaka Terumi, co-chairperson of the Japan Confederation of A- & H-Bomb Sufferers, made an appeal for resolving conflicts using diplomacy based on the spirit of Article 9.<sup>(4)</sup>

Third, the April 27, 2018 “Panmunjom Declaration” from the summit meeting by the leaders of the two Koreas states that, for peace and prosperity, and especially for unification of the Korean Peninsula, South and North Korea will “actively cooperate to establish a permanent and solid peace regime on the Korean Peninsula. Bringing an end to the current unnatural state of armistice and establishing a robust peace regime on the Korean Peninsula is a historical mission that must not be delayed any further.”<sup>(5)</sup> And the June 12 Joint Statement arising from the first US-North Korea summit stated: “1. The United States and the DPRK commit to establish new U.S.-DPRK relations in accordance with

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(4) *Asahi Shimbun*, August 9-10, 2018.

(5) “South and North Korea Panmunjom Declaration on Peace, Prosperity and Reunification of the Korean Peninsula” (Submitted to the United Nations General Assembly on September 6, 2018), Ministry of Unification, Republic of Korea.

the desire of the peoples of the two countries for peace and prosperity. 2. The United States and the DPRK will join their efforts to build a lasting and stable peace regime on the Korean Peninsula. 3. Reaffirming the April 27, 2018 Panmunjom Declaration, the DPRK commits to work towards the complete denuclearization of the Korean Peninsula. 4 The United States and the DPRK commit to recovering POW/MIA remains including the immediate repatriation of those already identified.<sup>(6)</sup> The “Panmunjom Declaration” and the US-DPRK Joint Statement have brought about an historic shift from military conflict to peaceful diplomacy for the time being.

With these three items in mind, below I shall examine some issues pertaining to law and politics, such as the fundamental matters of constitution, international law, and crimes.

This article comprises four parts. The first is Denuclearization of the Korean Peninsula, and Recognition of Current Status in the Nuclear Age. The second discusses some issues on constitution, international law and crimes. Part 3 deals with issues pertaining to solutions for the Korean Peninsula’s nuclear weapons problem, and Part 4 shifts the point of view to introduce several aspects of issues related to global nuclear disarmament.

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(6) U.S.-DPRK Joint Statement (<https://www.whitehouse.gov/briefings-statements/joint-statement-president-donald-j-trump-united-states-america-chairman-kim-jong-un-democratic-peoples-republic-korea-singapore-summit/>).

## Part One

### Denuclearization of the Korean Peninsula, and Recognition of Current Status in the Nuclear Age

#### 1. How Should We Interpret the US-DPRK Summit?

The Panmunjom Declaration and the US-DPRK Joint Statement, both quoted above, have brought about an historic shift from military conflict to peaceful diplomacy for the time being.

At the US-DPRK summit, US President Trump made substantial concessions to Workers' Party of Korea Chairman Kim Jong-un that North Korea's political system will be guaranteed, and that denuclearization will be pursued in stages. One assessment is that the DPRK won "a huge victory" by simultaneously obtaining assurance that its political system will survive and that US-South Korea military exercises will be suspended.<sup>(7)</sup>

There is also a theory that China is the winner. Although the US indeed did not declare an end to the Korean War, it made a substantial concession by consenting to Kim Jong-un's demand for survival of his political system, saying that it was working on building a new relationship between the US and North Korea. What is more, the US spoke only of making efforts toward the complete denuclearization of the Korean Peninsula, and set forth no joint understanding concerning a denuclearization framework. According to this theory, it was none other

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(7) Okada, Takashi. "The US-North Korea Conference Was a 'Great Victory' for North Korea," *The Cross-Strait View*, No. 91, published June 14, 2018 ([http://www.21ccs.jp/ryougan\\_okada/ryougan\\_93.html](http://www.21ccs.jp/ryougan_okada/ryougan_93.html)) (in Japanese).

than these abstract statements that China wanted from Trump.<sup>(8)</sup>

But a reading of history turns up the expression “Pyrrhic victory.”<sup>(9)</sup> With regard to facts in the game of diplomacy, if one’s only concern is who wins, it would be hard to say that one had assessed the facts in terms of history and from a broad perspective.

My focus here is the insight that what really matters are what was not written into the Joint Statement, and what didn’t happen as a result of the US-North Korea summit. These are the insightful words of Noam Chomsky, who was voted the “world’s top public intellectual.” His insight<sup>(10)</sup> is what I want to learn from.

My position is that I support the Panmunjom Declaration by the leaders of the two Koreas, and I hope their accord is realized. That holds also for the Joint Statement of the US-North Korea summit. Further, my commentary shall proceed from the practical stance of betting on the hope that the agreements embodied in these diplomatic documents will be realized. At the same time, from an epistemological standpoint I shall try to ascertain the current state of and future outlook for the two Koreas, the Asian region, and our turbulent world in the context of the Panmunjom Declaration and the Joint Statement, and provide a background explanation for them. Finally, I will discuss what action Japanese lawyers

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(8) Dreazen, Yochi. “The big winner of the Trump-Kim summit? China,” *Vox*, June 13, 2018 (<https://www.vox.com/world/2018/6/13/17458944/trump-kim-summit-china-response-south-korea-military-drills>).

(9) Fitzgerald, Paul and Elizabeth Gould, “The Grand Illusion of Imperial Power,” *CounterPunch*, July 27, 2018 (<https://www.counterpunch.org/2018/07/27/the-grand-illusion-of-imperial-power/>).

(10) Polychroniou, C. J. “Noam Chomsky on Fascism, Showmanship and Democrats’ Hypocrisy in the Trump Era,” *Truthout*, June 20, 2018 (<https://truthout.org/articles/noam-chomsky-on-fascism-showmanship-and-democrats-hypocrisy-in-the-trump-era/>).

need to take.

## 2. The Situation Up to the End of 2017

Fred Fleitz works directly under National Security Advisor John Bolton, who had Fleitz replace National Security Council Chief of Staff Keith Kellogg. Fleitz, who had worked as a CIA analyst, had the following to say in *The Coming North Korea Nuclear Nightmare: What Trump Must Do to Reverse Obama's "Strategic Patience,"* a book published last March.

During the eight-year Obama administration the policy of “strategic patience” failed. This led to a situation in which the “rogue state” North Korea might conduct nuclear tests, develop missiles, make hydrogen bombs, and start thermonuclear war. To prevent this, the Trump administration advocated a radical change in nuclear policy. And Fleitz claims, for example, that the news that the US was preparing a “bloody nose” strike against North Korea late last year was a major factor persuading North Korea to change its nuclear strategy to diplomatic negotiations.

If this military operation had been carried out, the world would surely be thinking that it was a North Korean suicide attack. The targets would be not only US bases in South Korea, but also US bases in Japan including Kadena Air Base in Okinawa, as well as main-island bases such as Yokota Air Base, United States Fleet Activities Yokosuka, Naval Air Facility Atsugi, and Marine Corps Air Station Iwakuni. Nuclear power plants in Japan's coastal zones would likewise be perfect targets. Striking them with missiles would cause catastrophic damage equal to having been attacked with nuclear weapons.

In Chomsky's view, we have for the time being avoided such a tragic



situation on the Korean Peninsula, the Japanese archipelago, and the Okinawan islands.<sup>(11)</sup>

Already at the time of the presidential election, Trump had suggested four approaches to North Korea.

- 1 Direct dialog with the North Korean leader.
- 2 Make China apply even stronger pressure on North Korea.
- 3 Protect the US from North Korea using the Theater Missile Defense (TMD).
- 4 Use of nuclear weapons against North Korea is possible.

But Trump is not saying what means he would choose over others because, he says, he does not want the North Koreans to know.<sup>(12)</sup> As this shows, President Trump has pledged that he might use nuclear weapons against North Korea.

### Trump's UN speech

In his first UN speech (September 19, 2017), Trump aimed his sharpest weapon at North Korea. He stated unequivocally that “if [the US] is forced to defend itself or its allies, we will have no choice but to totally destroy North Korea.” He called Kim Jong-un “Rocket Man,” and said,

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(11) Fleitz, Fred. *The Coming North Korea Nuclear Nightmare: What Trump Must Do to Reverse Obama's 'Strategic Patience,'* The Center for Security Policy, March 9, 2018. The British daily Telegraph also reported on the “bloody nose” operation on December 20, 2017. Primarily it would have involved destroying North Korea's missile launchers, and attacking arsenals where missiles are stored. But an operation to assassinate Kim Jong-un by means of a plot would itself be a serious war crime.

(12) Glaser, Alexander and Zia Mian. “Japan and U.S. Nuclear Arms Control and Disarmament Policy Under the Trump Administration: A Look into the Cloudy Crystal Ball”, *The Asia-Pacific Journal/Japan Focus*, Volume 15, Issue 8, Number 2, Apr 15, 2017. (<https://apjif.org/-Alexander-Glaser-Zia-Mian/5028/article.pdf>).

“Rocket Man is on a suicide mission for himself and for his regime.”<sup>(13)</sup>  
“Totally destroy” here is not limited to conventional weapons because Trump does not exclude the preemptive use of nuclear weapons. This is attested by the National Security Strategy released in December 2017.<sup>(14)</sup>

The US-North Korea Summit catalyzed the great historic shift from such military operations to diplomatic negotiations.

Joseph Gerson, who has been continuously active with the American Friends Service Committee since 1976, offered an appropriate and precise assessment when he wrote, “We should appreciate South Korean President Moon Jae-in’s inspired Olympic diplomacy and that the Singapore summit prevented — at least for the time being — a catastrophic war by walking Trump back from his incendiary fire and fury nuclear threats. The summit also made it possible for Seoul and Pyongyang to proceed in ‘determining the destiny of the Korean nation on their own accord.’”<sup>(15)</sup>

One is reminded of the colonial domination of Korea by the Empire of Japan starting in 1910, and the 1950 Korean War, for which the use of nuclear weapons was considered, and which involved the “United Nations Command” (actually led by the US Empire) and the People’s Republic of

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

(14) A New National Security Strategy for a New Era, The White House, December 18, 2017 (<https://www.whitehouse.gov/articles/new-national-security-strategy-new-era/>).

(15) Gerson, Joseph. “Remembering the Atomic Bombings of Hiroshima and Nagasaki in Perilous Times.” *Truthout*, August 6, 2018 (<https://Truthout.org/articles/remembering-the-bombings-of-hiroshima-and-nagasaki-in-perilous-times/>).

China People's Volunteer Army. In September 1991 after the Cold War, both Koreas joined the United Nations, and now, in the 21st century, the peninsula is still divided into two states, while the North has armed itself with nuclear weapons. There is also the hope that Japan and North Korea will normalize their relations. Indeed these historical facts are major issues which underlay the US-North Korea summit. How is the situation perceived if these facts and issues are interpreted from the perspective of the biggest challenges of the nuclear age?

### 3. Behind "Denuclearization and Guaranteeing Peace"

#### **Two minutes before extinction of the human race**

These are extremely dangerous times for humanity. According to Joseph Gerson, this is, in its entirety, closely connected with the US continuation of preparations for a nuclear war that would wipe out humanity. This past winter the Bulletin of the Atomic Scientists set its Doomsday Clock to two minutes to midnight (i.e., human extinction), which is "the closest to apocalyptic nuclear war since 1953 and worse than during the 1962 Cuban Missile Crisis." Gerson makes the following statements, which aid the background awareness of nuclear issues. Let's look at a few paragraphs.<sup>(16)</sup>

#### **The threat to China and Russia**

One is the threat perceived by China and Russia. Gerson writes, "The Pentagon budget has been increased by an amount equal to Russia's total military budget. Despite Trump's embrace of Putin, the Pentagon's new National Strategy prioritizes preparations for great power war against China or Russia — the two countries military leaders believe threaten

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(16) Ibid.

‘American power, influence and interests.’”

He continues with this statement on the urge by the US Empire to make vassal states of allies.

“This explains the \$1.2 trillion spending plan for the new generation of US offensive nuclear weapons and their delivery systems and Trump’s new ‘Space Command’ to dominate Earth from space.”

So, what is Trump up to? “As we saw in Trump’s theatrical summitry with Kim Jong Un and with his trade war tariffs and denunciation of the European Union, in Trump’s ‘America First’ empire, the only good allies are those who know their proper place as vassals.”

I am reminded here of “Operation Unthinkable,” which would have involved launching “World War Three” against the Soviet Union by the US, Britain, and Germany. On May 22, 1945, shortly after the German surrender, British Prime Minister Winston Churchill instructed the Joint Planning Staff to prepare a plan for a surprise attack on the Soviet Union.<sup>(17)</sup>

This deep-seated anti-communist orientation reminds one of when the Entente Powers carried out a large-scale war of intervention in a bid to topple Lenin’s Bolshevik government, which had been formed in the Russian October Revolution of 1917. Britain, France, the US, and Japan believed it was necessary to defend the capitalist system against this government, and they launched a large-scale war to support the anti-Bolshevik White forces. The Bolshevik government barely won this “War to Defend the Motherland.”

### **A reflection of fear:**

Let’s return to the post-WWII period. The issue here is Gerson’s

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(17) Walker, Jonathan. *Churchill’s Third World War: British Plans to Attack the Soviet Empire*, 1945, The History Press, 2017.

recognition of what comes after the June 2018 Singapore summit meeting. About this reflection of fear, he says, “As we think about North Korea’s nuclear arsenal and the threat it poses to Japan, South Korea and other countries, we need to recognize that it reflects fear.” He also remarks on the “trauma” that begot North Korea’s nuclear weapons: “Even as we criticize Pyongyang’s hideous human rights record, we need to acknowledge that Pyongyang’s nuclear weapons grew from the trauma of Japanese conquest and colonialism, the devastating Korean War, US and South Korean regime change commitments, repeated US preparations and threats of first-strike nuclear attacks, and the failures of US diplomacy.”

Underlying the development of nuclear weapons by the Roosevelt administration was, in accordance with a proposal by Einstein, acquiring them before Nazi Germany developed them. But although Hitler had received a report on the possibility of an atomic bomb in 1942, an insufficiency of funds to prosecute the war induced him to abandon the idea of making one in the second half of 1944. The Roosevelt administration found out that the German atomic bomb threat was not real, but, having ascertained that nuclear weapons have unprecedented destructive power, and taking advantage of the fear they would induce, the administration — with the Soviet Union in mind — decided to use them as a means to dominate the postwar world. The subsequent determination of a policy by the Truman administration to use nuclear weapons against Japan instead of Germany was likewise meant to take advantage of this fear to establish a world order for global conquest.

### **Repeated mistakes by US administrations**

But Gerson itemizes the mistakes: “Add to this the Clinton and Bush I’s failures to implement the 1994 Agreed Framework, Bush II’s vetoing Kim

Dae-jung's Sunshine policy and rejection of the comprehensive agreement negotiated by former US Secretary of Defense William Perry, and the Obama administration's 'benign neglect.' ”

Concerning the significance of maintaining the Kim dynasty and North Korea's independence, Gerson cites former Defense Secretary William Perry, who was involved in negotiations, and historian Bruce Cumings: “As Perry and the renowned historian Bruce Cumings explain, the purposes of North Korea's nuclear program are to preserve the Kim dynasty and the country's independence.

Opinions are divided among the involved Americans regarding the truth of these two statements of opinion, but I lack the time for a detailed, empirical examination. However, at this time my feelings closely coincide with Gerson's clearly stated position.

### **Negotiations on “denuclearization and guaranteeing peace”**

Tensions are currently a problem for diplomacy in the Trump administration. National Security Advisor John Bolton, who advocates the “Libya method,” says that North Korea must completely denuclearize within one year, while on the other hand Secretary of State Mike Pompeo, who suggested using the “Vietnam method,” said that meaningful progress must be made within two years. Meanwhile, Trump says that for the time being there is no hurry.

In response, Kim Jong-un immediately rejected Pompeo's demand that North Korea enact serious denuclearization measures before the US relaxes its sanctions. At the same time, he demanded that the armistice agreement between North Korea and the US be changed to a peace treaty before he makes any major concessions.

Incidentally, former Los Alamos Director Siegfried S. Hecker, who has

intimate knowledge of North Korea's nuclear infrastructure, claims that it would take 15 years to completely destroy it.<sup>(18)</sup>

According to Hecker, “[DPRK diplomats] said their buildup would be of ‘limited duration’ until better relations with US were possible. They envisioned three stages in response to the US removing the nuclear threat and ending sanctions: a freeze on nuclear weapons development, disabling key facilities and nuclear weapons, and mutual diplomatic recognition.”

Upon consideration, starting negotiations for denuclearization with the enforcement of the Joint Declaration of South and North Korea on the Denuclearization of the Korean Peninsula of December 31, 1991 is recommended by experts, and I too strongly support this. Negotiations based on the principle of the two Koreas' national independence will perhaps serve as the springboard for three-party negotiations including China. Meanwhile, US-North Korea negotiations meant to give tangible form to the US-North Korea Joint Statement will probably be conducted on a level which includes high-ranking government officials, diplomats, and experts. It is too early to know whether the six-party talks including Russia will be revived. For the time being, however, there is no hope for the start of direct negotiations between Japan and North Korea because the difficulty of finding a solution to the abduction issue is holding both countries back. This is the matter they must deal with first.

### **Nuclear weapons abolition and nuclear nonproliferation**

The three statements I saw on the 73rd anniversary of the atomic bombing of Nagasaki concerned (1) the Nuclear Weapon Prohibition Treaty, (2) crimes against humanity, and (3) Article 9, which says that

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(18) Broad, William J. and Sanger, David E. “North Korea Nuclear Disarmament Could Take 15 Years, Expert Warns,” *The New York Times*, May 28, 2018.

Japan shall have no war potential. The people who made these statements give priority to abolishing nuclear weapons over nuclear nonproliferation, and they represent the hibakusha. I myself think that the world's nuclear victims, especially the atomic bombing victims, are an invaluable asset to the nuclear weapons abolition movement, and even more so to humanity.

Seen from this perspective, the Joint Statement issued at the US-North Korea summit meeting might contribute to nuclear nonproliferation, but it will certainly do nothing to abolish nuclear weapons. On the other hand, even though the Panmunjom Declaration by the leaders of the two Koreas did not specify exactly the methods and time periods for denuclearization, this does not mean that public opinion and movements aspiring to nuclear weapons abolition do not underlie the declaration. If North Korea too signs and ratifies the Nuclear Weapon Prohibition Treaty, it would be able to act in solidarity with the nuclear weapons abolition movement of the hibakusha and nonaligned nations.

## Part Two

### Constitution, International Law and Crimes

#### 1. The United States' Manhattan Project and the Soviet Union's nuclear weapons development

**Constitution:** Early in 1939, the world's scientific community discovered that German physicists had learned the secrets of splitting the uranium atom. Scientists Albert Einstein, who fled Nazi persecution, and Enrico Fermi, who escaped Fascist Italy, were now living in the United States. Einstein penned a letter to President Roosevelt urging the development of an atomic research program later that year. Roosevelt saw neither the



necessity nor the utility for such a project, but secretly agreed to proceed slowly. In late 1941, the American effort to design and build an atomic bomb received its code name — the Manhattan Project.<sup>(19)</sup>

The Manhattan Project, which spanned the years from 1942 to 1946, imbued US domestic laws. First, there was military secrecy. This allowed the president, who is also the commander-in-chief of the nation's armed forces, to pursue war outside the confines of the constitution. Next was the mobilization of more than 130,000 scientists, engineers, and workers, and also the expenditure of \$2 billion on building technological civilization, thereby creating the prototype of the military-industrial complex. The military, the government, and private enterprises formed a national-security conglomerate under a veil of secrecy. It was under this regime of control that, with an eye on the postwar global strategy against the Soviet Union, the decision was made to use the atomic bombs. The Japanese Empire, which revered the emperor, was chosen as the target of the bombs, and the hibakusha were deemed the sacrifice. Would not an apology and reparations by the US — the “bombing state” — be in order to revive human civilization and recover human dignity? The fact is that the US political constitution was deconstructed by the Manhattan Project, which formed an unofficial constitution, and that the US has had a dual constitution, one of which is dominated by a national-security conglomerate under a veil of secrecy.<sup>(20)</sup>

Nuclear weapons development by the Soviet Union was likewise conducted under strict secrecy, based on intelligence obtained from

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(19) The Editors of Encyclopaedia Britannica. “Manhattan Project,” Last Updated: January 9, 2019 (<https://www.britannica.com/event/Manhattan-Project>).

(20) On a theoretical genesis of a dual constitution, see Ernst Fraenkel, *The Dual State : A Contribution to the Theory of Dictatorship*, E.A. Shils and Introduction by Jens Meierhenrich. (Oxford university press, 2017: first edition1941).

scientists who participated in the Manhattan Project. The USSR prioritized investment of funds, industrial capacity, and human resources for nuclear weapons development. It also used prisoners to extract uranium ore from old mines in the former Czechoslovakia. Here too, nuclear weapons silenced the law. Although we have partial knowledge about the machinations and spy networks used by international bankers to block a US monopoly on nuclear weapons, the true story is still unknown even since the Soviet Union's breakup.<sup>(21)</sup>

## 2. What Is the Korean War in the Context of Japan's History?

**International Law:** The approximately 45-year Meiji era (1868-1912) coincides roughly with what historian Eric Hobsbawm called "The Age of Capital" (1848-1878) and "The Age of Empire" (1878-1914). To Japan, it was "The Age of War." Japan "dumped Asia and joined Europe," and imported the German constitution. It also fought the Sino-Japanese War and the Russo-Japanese War, which were by nature proxy wars over the hegemony of the UK and the US. Seen from another perspective, India under the East India Company's rule, Qing China from the second half of the 19th century through the early 20th century, and others were typical parts of the unofficial British Empire.<sup>(22)</sup>

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(21) Secret Cities Of The Manhattan Project: Declassified Research Documents! (<https://www.youtube.com/watch?v=Y7urGJYBmYI>).

*From Major Jordan's Diaries - The Truth about the US and USSR* ([https://archive.org/stream/FromMajorJordansDiaries-TheTruthAboutTheUsAndUssr/FromMajorJordansDiaries-TheTruthAboutTheUsAndUssr\\_djvu.txt](https://archive.org/stream/FromMajorJordansDiaries-TheTruthAboutTheUsAndUssr/FromMajorJordansDiaries-TheTruthAboutTheUsAndUssr_djvu.txt)).

(22) Gallander, John and Robinson, Ronald. "The Imperialism of Free Trade," *The Economic History Review*, second series, Vol. VI, No. 1, 1953. This theory overturned the classical view of empire propounded by Hobson and Lenin, in which political domination and economic units coincide, and heavily influenced Wallerstein and his world systems theory.

Several events happened under the Meiji Imperial Government, including the argument for conquering Korea, which was supposed to have opened Korea with military force, the Taiwan Expedition, and the Ganghwa Island Incident, which led to the signing of the Japan-Korea Treaty of 1876. Later, Japan and Korea entered into the Japan-Korea Treaty (August 1910), in which the Empire of Japan annexed the Korean Empire.<sup>(24)</sup>

The legal aspects of the colonial issue involve a global controversy over the legality and validity of the 1910 Japan-Korea Annexation Treaty. There was an international conference dealing with this matter, and one theory posits that, owing to a strong initiative by South Korea, it was held with the intent of eliciting international recognition of South Korea's claim that the treaty was illegal. But for reasons including the lack of support by British experts on international law for the theory that illegal means invalid, it was not possible to obtain an international consensus that the treaty was illegal as well as invalid. University of Derby professor Anthony Carty argued that, at the time of the treaty, there is doubt even as to whether international law existed, and that it was difficult to find a law that was sufficient to determine whether a certain treaty was legal or not. Cambridge University professor James Crawford apparently observed

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(23) The call for a punitive military expedition against Korea arose when Meiji Japan notified Korea that a new Japanese government had been established, and sought diplomatic relations, but Korea sought to keep its borders closed and refused. Behind this lay the interpretation of the ancient Japanese texts *Kojiki* and *Nihon Shoki* to mean that ancient Japan had the right of dominion over the Korean Peninsula, because of which some Japanese advocated an expedition to Korea. This thinking was also incorporated into the *Sonnō-Jōi* ("Revere the Emperor and Expel the Barbarians") movement.

(24) Caprio, Mark. *Japanese Assimilation Policies in Colonial Korea, 1910-1945*. University of Washington Press, 2009, pp. 82-83.

that in view of the customary international law of the day, the treaty could not be called “invalid” even if there had been major procedural flaws because it was recognized by Britain, the US, and other powers.<sup>(25)</sup>

However, these professors’ theories were aligned with the current of thought which legalized colonial rule by the British Empire. In today’s world, where the responsibility for colonial rule is being called to account, it stands to reason that the theory advocated by former Japanese colony South Korea would challenge the international law interpretation which defends imperialism. This is an achievement of Japan–South Korea joint research based on the stance that illegal means null and void.<sup>(26)</sup>

The approximately 106-year period (1912–2018) comprising Japan’s Taisho, Showa, and Heisei eras coincides with the age of Pax Americana, although Japan’s modern history cannot be clearly demarcated by this term because there is a complicated relationship with the imperial powers including the UK, US, and France, as well as Germany and Italy. The capitalist world and socialist countries were convulsed by two world wars. With the acceptance of the Potsdam Declaration, the Japanese military surrendered unconditionally in the Asia-Pacific War, and the Empire of Japan surrendered to the Allies (September 2, 1945).

By means of military power with a monopoly on nuclear weapons and a political and economic strategy which included “liberating colonies,” the

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(25) “Conference to discuss legality of the treaty, in Japan–Korea Treaty of 1910” ([https://en.wikipedia.org/wiki/Japan%E2%80%93Korea\\_Treaty\\_of\\_1910](https://en.wikipedia.org/wiki/Japan%E2%80%93Korea_Treaty_of_1910)).

(26) Sasakawa, Norikatsu and Yi Tae-jin, eds. and auths. *Korea Annexation and the Present Era: Reexamination and International Joint Research Based on History and International Law*, Tokyo, Akashi Shoten, December 2008 (in Japanese); Sasakawa, Norikatsu and Byeon Yeongho, gen. eds., Do Jong-hwan, ed. and auth. *One Hundred Years since the Forced Annexation of Korea: History and Unfinished Business — International Joint Research*, Tokyo, Akashi Shoten, August 2013 (in Japanese).

US reorganized the British Empire's global hegemony system and made itself into the hegemon. Allies such as the USSR, China, and India were then excluded from the Treaty of Peace with Japan (Treaty of San Francisco) with the US, UK, and other Western nations. Because this came under the Security Treaty Between the United States and Japan, this time period is also known as the "peace era" in Japanese history, but to Okinawa it is the "American age." Therefore, Japan under the US occupation was a de facto participant in the Korean War, and profited from the "special procurement benefit."

### 3. A Legal Critique of the Korean War

Why was the Japanese Empire's colony of Korea bisected? There are several possible theories,<sup>(27)</sup> but the division of Korea could be seen as the initial maneuver in the US strategy to contain the Soviet Union in Asia, which came at about the time of the Japanese Empire's surrender. In early research one can find the assertion that the US and USSR had agreed in advance on the 38th parallel, but it is now maintained that no such agreement was made at any meeting of the Allies, including the Yalta Conference. At the October 19-30, 1943 Moscow Conference attended by the foreign ministers of the US, UK, and USSR, it was decided, with regard to the occupation and governing of "enemy states" such as Japan, Germany, and Italy, that even among the Allied Powers, the nation that directly occupied an enemy state militarily would have full control in running its occupation. Shortly thereafter at the Cairo Conference, the

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(27) Cumings, Bruce. *Origins of the Korean War*, Vol. 1 (Princeton University Press, 1981). Although North Korea insists that South Korea started the war by invading the North, other theories are that it was a civil war for reunification, or that it just happened. Cumings' book sparked this controversy, and is called "revisionist" by scholars in the field.

leaders of the US, UK, and the Republic of China recognized Korea's independence (Cairo Declaration, November 27, 1943). However, in a private meeting between Roosevelt and Stalin during the Yalta Conference (February 8, 1945), Roosevelt sought agreement from Stalin that a trusteeship of Korea would have to last at least 20 to 30 years. But no mention was ever made of dividing Korea. Stalin replied that the shorter the trusteeship period, the better, and that he was not thinking of dividing the country.<sup>(28)</sup>

However, on August 9, 1945 the Soviet Union launched an invasion in the northern part of the Korean Peninsula based on the Yalta Agreement. To prevent a situation in which the Soviet military alone occupied the Korean peninsula, it was decided that the US would propose dividing and occupying the peninsula to the USSR. The Americans hastily developed a proposal in the State-War-Navy Coordinating Committee to provisionally divide the country at 38 degrees north latitude, and it was approved by President Truman. MacArthur presented the proposal to the Soviets, and on August 16 Stalin gave his tacit consent. On the following day, it was determined under General Order No. 1 that Japanese troops north of the 38th parallel would surrender to Soviet forces (the Red Army), and those to its south would surrender to American forces. This order was communicated to Japan, which had accepted the Potsdam Declaration, and in Japan, after the signing of surrender documents on September 2, the Imperial Headquarters issued an order to follow this course of action.

The US in September 1947 resolved to pursue the matter of forming a Korean Government in the UN framework. Under UNGA Res 112 (II) of November 14, 1947 the UN General Assembly established the UN Temporary Commission on Korea (UNTCOK) that was to observe

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(28) Ibid.

elections for a Korean National Assembly. Because the Soviet Union disputed the General Assembly's competence to observe the elections (see Art. 107 UN Charter), the USSR refused to cooperate with what it regarded as an illegal body, and elections were held on May 10, 1948 in South Korea alone.

In 1948, amid the Cold War between the US and Soviet Union, the Korean Peninsula became two countries: the Republic of Korea (ROK, usually known as South Korea, August 15) and the Democratic People's Republic of Korea (DPRK, usually known as North Korea, September 9). At that time the UN supported the US, and also intervened in South Korean elections.

In the Korean War (1950-1953) a multinational force consisting primarily of the US military went into action as the "United Nations Command" (UNC) under a UN General Assembly resolution. At the same time the People's Republic of China, which had been founded only a short time prior on October 1, 1949, also entered the war with the People's Volunteer Army as its battle force. Between the US and South Korea there was the Mutual Defense Assistance Agreement of January 1950.

The three-year war exacted tragic sacrifices and colossal monetary losses from the soldiers of the involved countries, including North Korea and China, and South Korea and the US, as well as on innocent noncombatants. Although this article will not delve into that matter, the Jeju Island atrocity followed from the decision about north-south division and elections; the decision by the Security Council to go to war, entrusting full military and political powers to the US on its behalf, was probably a breach of its own charter and thus illegal. Also the UN destruction of dams, dykes, and livelihood infrastructure should be seen as criminal, perhaps genocidal.

An armistice-signing ceremony was held on July 27, 1953. The agreement was signed by Lieutenant General Mark W. Clark, commander of the United Nations Command; Peng Dehuai, commander of the China People's Volunteer Army; and Kim Il-sung, supreme commander of the Korean People's Army. South Korea did not join the agreement. The battle line at the time of the armistice, which was near the 38th parallel, was thus recognized as the Military Demarcation Line.

But because this was not the end of the war, nominally the parties are still at war; the United Nations Command was not disbanded and still exists, and peace treaties have not been concluded between the two Koreas or between North Korea and the US. In this war China expedited the modernization of its military by means of the Sino-Soviet Treaty of Friendship, Alliance and Mutual Assistance. China entered into the Sino-North Korean Mutual Aid and Cooperation Friendship Treaty with North Korea, and that relationship has lasted for over 50 years. However, China's alliance with the USSR was dissolved a few years later owing to the Sino-Soviet split. This changing environment led North Korea to systematize its Juche (self-reliance) ideology. Meanwhile, the Mutual Defense Treaty Between the United States and the Republic of Korea was signed in October 1953 and entered into force in November 1954.

## **Crimes**

Three kinds of crimes could be mentioned here.

### **One: United Nations Activities**

This extends from the legality of Security Council Resolutions 82, 83, and 84 (1950), to General Assembly competence in the area of maintaining peace and security, and jus in bello questions on further legal development



including Security Council voting procedure. If the UN is guilty of multiple illegalities in its interventions in Korea 1947–1953, it is natural to proceed by asking about the implications of United Nations criminality.<sup>(29)</sup>

## Two: War Crimes

With regard to the Korean War, I want to make special mention of Curtis LeMay, commander of the Strategic Air Command. He relentlessly conducted indiscriminate bombings of North Korean cities, agricultural dams, and rural areas, and caused the deaths of 2 million people, corresponding to 20% of the population. This number is far greater than the 500,000 people killed in his scorched-earth tactics on Japanese cities.<sup>(30)</sup>

In April 1951, Commander-in-Chief of the United Nations Command Douglas MacArthur proposed to President Truman that the US use the atomic bombs on Mainland China to attack China and the USSR, which were behind North Korea, but Truman did not permit the use of the bombs.<sup>(31)</sup> His reasoning was that atomic bombs at that time exploded above ground, and were not suited to destroying railroads, tunnels, bridges, and the like, which limited their military effectiveness. And there were other reasons such as: There was a danger of total war with China and the

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(29) Constantin, Dana, “Korean War (1950–53).” Published under the auspices of the Max Planck Foundation for International Peace and the Rule of Law under the direction of Rüdiger Wolfrum. last updated: October 2015 (<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e57>).

(30) Harden, Blaine. “The U.S. war crime North Korea won’t forget,” *Washington Post*, March 24, 2015 ([https://www.washingtonpost.com/opinions/the-us-war-crime-north-korea-wont-forget/2015/03/20/fb525694-ce80-11e4-8c54-ffb5ba6f2f69\\_story.html?noredirect=on](https://www.washingtonpost.com/opinions/the-us-war-crime-north-korea-wont-forget/2015/03/20/fb525694-ce80-11e4-8c54-ffb5ba6f2f69_story.html?noredirect=on)).

(31) “Truman, MacArthur, and the Korean War,” Constitutional Rights Foundation, Summer 2001 (<http://www.crf-usa.org/bill-of-rights-in-action/bria-17-3-b-truman-macarthur-and-the-korean-war.html>).

USSR, and if atomic bombs were used against China following their use in Japan, it might be seen as racial prejudice in which they are used only against Asians.<sup>(32)</sup>

### Three: Genocide

In March 1952, the IADL issued a Report on U.S. Crimes in Korea during the Korean War. Signs of the Times states, “The IADL Commission unanimously found that the United States was guilty of crimes against humanity during the Korean War and that there was a pattern of behaviour which constitutes genocide.” It goes on to quote the conclusion of the 2001 Korea International War Crimes Tribunal:

The Members of the International War Crimes Tribunal find the accused Guilty on the basis of the evidence against them: each of the nineteen separate crimes alleged in the Initial Complaint has been established to have been committed beyond a reasonable doubt. The Members find these crimes to have occurred during three main periods in the U.S. intervention in and occupation of Korea.<sup>(33)</sup>

## Part Three For a Solution to the Korean Peninsula’s Nuclear Weapons Problem

### 1. Status review and Challenges

In July of 2017, the Nuclear Weapon Prohibition Treaty was adopted at

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(32) “Why did President Truman dismiss General MacArthur?” Harry S. Truman Library & Museum (<https://www.trumanlibrary.org/trivia/macarth.htm>).

(33) *American forces guilty of genocide in the Korean War according to 1952 IADL report*, June 4, 2018 (<https://www.sott.net/article/387570-American-forces-guilty-of-genocide-in-the-Korean-War-according-to-1952-IADL-report>).

the UN headquarters in New York, and a campaign seeking its entry into force is now in progress. But the nuclear powers (P5), as well as the military alliance comprising NATO, Japan, South Korea, Australia, and others, which reside under the nuclear umbrella, oppose the treaty itself. North Korea has continued nuclear tests and missile launches in opposition to the attitude taken by this alliance. UN Secretary-General António Guterres issued a red alert to the world in his New Year's Address, but at the beginning of the year talks were held between the two Koreas. Will there be a freeze on nuclear testing and missile launches by North Korea, and a freeze on US-South Korea joint military exercises? If both are realized, we may see a new phase in which the world accepts a nuclear-armed North Korea. But perhaps it would be said that this is mere wishful thinking, the stated reason being that the nuclear superpower America, which leads the "real world of nuclear weapons," will dismiss out of hand Obama's wish for a world free of nuclear weapons, and start a long-term nuclear arms race.

How should legal experts operating under the Japanese Constitution regard this situation? It seems to me that the social responsibility of legal experts is being put to the test once again. Karaki Junzo, a recipient of the Japan Art Academy Prize, penned A Memorandum on the "Social Responsibility of Scientists" (Chikuma Shobo, 1980) in the last few years of his life. Some time later C. G. Weeramantry, who would subsequently become a judge of the International Court of Justice, likewise called for a ban on nuclear weapons research and inquired into the social responsibility of scientists in his book *Nuclear Weapons and Scientific Responsibility* (Longwood, 1987). With these facts in mind, I would like to closely examine the matter set forth in the title.

## 2. On the Matter of Nuclear Arms on the Korean Peninsula

### **Juche ideology, nuclear tests, and missile development**

After the fighting ceased, the US military did not withdraw as stipulated in the Armistice Agreement, instead deploying tactical nuclear weapons in South Korea and remaining there. The conduct and continuation of ROK-US joint military exercises in conjunction with nuclear forces has heightened the tension between the US and North Korea. At the 20th Congress of the Communist Party of the Soviet Union in February 1956, Nikita Khrushchev delivered a speech denouncing Stalin. Following that event, the Sino-Soviet split became apparent.

**Juche ideology:** It was in this context that the thesis saying North Korea's guiding principle is Juche ideology emerged. It is an ideology which sees the true nature of human beings as independence, creativity, and consciousness, and which seeks to establish a socialist society that brings about the flowering and development of human nature.<sup>(34)</sup> But in reality it combined with the military-first policy. This policy puts the military before the party and the state, and regards the Korean People's Army as the main force for building socialism. The constitutional amendment of 2009 expressly stated that the military-first policy is a guiding ideology along with Juche ideology.

**Nuclear testing:** In 1956 North Korea reached a basic accord with the USSR on nuclear power development, and sent several scientists to that country's Joint Institute for Nuclear Research in Dubna. The USSR provided North Korea with the IRT-2000 nuclear research reactor, a small experimental nuclear reactor which was built in Yongbyon. In 1962 North

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(34) Kamakura, Takao. *Korean Peninsula: Reading the Crisis of War*, Hakuohsha, p. 189, 2010, Part II, "Theory and Thought," also deals with this.

Korea decided on a full-out effort to develop nuclear weapons, and the following year it asked the Soviets to help, but the Soviets maintained the position that their cooperation for nuclear power was limited to peaceful use. However, North Korea was dead set on having nuclear weapons, and in 1964 it sought assistance from China, which had atomic bombs, but was again turned down.<sup>(35)</sup>

Incidentally, it is asserted that North Korea's nuclear weapons program can be divided into the following four stages using the nuclear weapon type as the criterion. First stage: Basic knowledge acquisition and training (1956–1980). Second stage: Implementation of a domestic plutonium production program (1980-1994). Third stage: The time period during which the plutonium program was frozen (however, North Korea secretly worked on uranium enrichment; 1994-2002). Fourth stage: The period up to the present, in which North Korea openly resumed nuclear activities (2002–present). The North currently claims that its hydrogen bomb testing was a total success.

**Missile development:** North Korea's missile development garnered attention with a 1993 experiment in which it launched the medium-range ballistic missile (MRBM) Rodong-1 (Hwasong-7) toward the Sea of Japan. It was thought to have fallen into the sea about 350 km north of Japan's Noto Peninsula, but later it was suggested that it might have flown over Japan and fallen into the Pacific Ocean. Another claimed intent of this experiment was that it was to show Iran the missile's reliability, and trade the Rodong for Iranian oil. On June 11, about two

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(35) Lee, Jae-Bong. "US Deployment of Nuclear Weapons in 1950s South Korea & North Korea's Nuclear Development: Toward Denuclearization of the Korean Peninsula." *The Asia-Pacific Journal*, February 17, 2009, Volume 7, Issue 8, Number 3 (<https://apjif.org/~Lee-Jae-Bong/3053/article.html>).

weeks after the launch, the US and North Korea issued a Joint Statement in which North Korea stated its intention to continue abiding by the Non-Proliferation Treaty (NPT).

At the time of the 2006 tests, there were 200 missiles. North Korea said that in a mine shaft it was systematically producing rockets with a 1,500-km range. In April 2012 North Korea said that the purpose of Bright Star-3 Unit 1 was to launch a satellite, and it argued that the Outer Space Treaty, which promises its parties equal use of space for peaceful purposes, takes precedence over the UNSC resolution that forbids missile launches by North Korea.

Following the 2016 launches, 2017 brought the launches of Hwasong-12, Hwasong-14, and Hwasong-15. Hwasong-15 was launched in the predawn hours of November 29. It reached an altitude of 4,475 km and traveled a distance of 950 km, coming down inside Japan's exclusive economic zone in the Sea of Japan. It attained an altitude of about 4,500 km, which was the highest for a North Korean ballistic missile, but if it had been launched along a normal trajectory, its range would have been 13,000 km. It is said to be the first North Korean ballistic missile to be within range of the entire United States, including the eastern seaboard. Hwasong-15 can carry a very large nuclear warhead, and North Korea declared this to be "the completion of the nation's nuclear force."

On the afternoon of the 29th the United Nations Security Council held a public emergency meeting. At the meeting, US Ambassador to the UN Nikki Haley pointed out that this ICBM launch "brings us closer to war." She warned that if it comes to war "the North Korean regime will be utterly destroyed," once again showing that the US would not rule out the use of military force. She demanded cutting off diplomatic and trade relations, and limiting military, scientific, technological, and commercial

cooperation with North Korea in an effort to isolate that country. She also called upon the UN to cut off North Korea's voting rights and other privileges in the UN, and asked other countries to fully implement existing sanction resolutions. In response, China's Deputy Permanent Representative Ambassador Wu Haitao expressed concerns about and opposition to the missile launches, but also emphasized the importance of a diplomatic solution through dialog. China and Russia once again proposed a halt to US-South Korean joint military exercises in exchange for a halt to North Korea's missile development<sup>(36)</sup>.

### 3. Toward a Solution for the Korean Peninsula Nuclear Weapons Issue

December 12, 1985: North Korea accedes to the nuclear Nonproliferation Treaty (NPT) but does not complete a safeguards agreement with the International Atomic Energy Agency (IAEA). Under Article III of the NPT, North Korea has 18 months to conclude such an arrangement. In subsequent years, North Korea links adherence to this provision of the treaty to the withdrawal of U.S. nuclear weapons from South Korea.

January 20, 1992: The two Koreas sign the South-North Joint Declaration on the Denuclearization of the Korean Peninsula. Under the declaration, both countries agree not to "test, manufacture, produce, receive, possess, store, deploy or use nuclear weapons" or to "possess nuclear reprocessing and uranium enrichment facilities."<sup>(37)</sup> They also agree to mutual inspections for verification.

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(36) UNS/RES/2397, December 22, 2017.

(37) Chronology of U.S.-North Korean Nuclear and Missile Diplomacy, by Kelsey Davenport, Arms Control Association, December 2018 (<https://www.armscontrol.org/>).

**Korean nuclear crisis (I) 1993-1994**

Here I want to review the background and breakdown of the 1994 US-North Korea Agreed Framework. Against the backdrop of the 1991 collapse of the Cold War system, US satellite photographs gave cause for suspicions about North Korean nuclear development in 1993. On February 9, International Atomic Energy Agency (IAEA) Director-General Hans Blix called for a special inspection in North Korea. In March Kim Il-sung announced North Korea's withdrawal from the NPT, and a hair-trigger crisis situation ensued. But the US and North Korea reached an agreement at a meeting in Geneva on October 21, 1994. America's strategic objectives were having the DPRK freeze the nuclear development program it had been running up to that time; replacing heavy water reactors, which produce plutonium, with light water reactors, which present little concern for nuclear proliferation; and gradually proceeding toward the normalization of relations between the US and DPRK. This agreement was neither a treaty that required approval of the US Senate, nor a legally binding administrative agreement, but it was a bilateral nonbinding political commitment to which the UNSC pays attention. But by the time it was signed by Kang Sok-ju and Robert Galicia, the Korean nuclear crisis (I) (1993-1994) and the grave situation described below had occurred. North Korea made known its intention to withdraw from the NPT and delivered the required 90-day advance notice (actually it suspended the withdrawal notification on the 89th day). The US had announced a plan for a military buildup in nearby countries including Japan and South Korea, and for using military force to bomb the Yongbyon nuclear facility. On this occasion the Japanese people's right to know was also infringed because Japan's Prime Minister Hata Tsutomu asked the US not to announce their plan for



military action to the Japanese.

After this came the February 1995 release of the Nye Report, which sought market democracy and market opening from North Korea. Then in 2000 came the Armitage Report (I), which directed Japan to conduct national emergency legislation. Based on the argument that North Korea was a threat, Japan crafted such legislation. Meanwhile, there was little progress in fulfilling the US desire to have Japan and South Korea cover the costs for light water reactors, and there was strong criticism of the Agreed Framework in the US Congress. Additionally, it was said that the prevailing view in the US was that the North Korean regime would collapse from within. Under these circumstances domestic and international conditions remained unmet, and ultimately the parties did not keep their promise under the Agreed Framework to provide light water reactors by 2002. In October 2002 the US declared the Agreed Framework cancelled.

### **Korean nuclear crisis (II) 2002-2018**

During the fourth stage of the DPRK's nuclear testing, which started in 2002, the six-party talks were held. On September 17, 2002 the Japan-North Korea Summit Meeting and the Japan-DPRK Pyongyang Declaration confirmed that the parties would observe all applicable international agreements to achieve a comprehensive solution to nuclear issues on the Korean Peninsula. The "six parties" are the US, South Korea, North Korea, China, Russia, and Japan. In total nine meetings were held in Beijing from the first round in August 2003 to the sixth round in March 2007, but no meetings have been held since then. Due to space limitations, this article cannot discuss the course of the six-party talks or their failure. At a Japan-Russia summit meeting in April 2017,

President Putin proposed resuming the six-party talks, but Prime Minister Abe expressed a dismissive view. That December Moon Chung-in, a special advisor to President Moon Jae-in, proposed an idea for five country-talks involving China, Russia, Japan, the US, and South Korea, but excluding North Korea.

What is the latest in the fourth stage of nuclear testing? It is perhaps the September 3, 2017 declaration that hydrogen bomb testing was a perfect success, which preceded the November 29 launch of the Hwasong-5. North Korea performed a nuclear test at its Punggye-ri Nuclear Test Site in Punggye-ri Village, Kilju County, North Hamgyong Province. On that day the North Korean state-run Korean Central Television announced the perfect success of a hydrogen bomb test for arming intercontinental ballistic missiles. It was the sixth nuclear test since 2006. About one week later, on September 11, the UN Security Council unanimously passed a resolution on North Korea sanctions in which the US made a few concessions to gain the approval of China and Russia. The draft resolution included a complete ban on oil shipments to North Korea, and expressly permitted the use of “all necessary measures” by states when inspecting sanctioned vessels.<sup>(38)</sup>

**Comment one on Test & Sanction:** On October 9, 2006 North Korea conducts an underground nuclear test near the village of Punggye. On October 14 The UN Security Council adopts Resolution 1718. The measure imposes additional sanctions on commerce with Pyongyang, widening the range of prohibited transactions beyond those banned under Resolution 1695.<sup>(39)</sup>

Did North Korea break the law or violate other international obligations

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(38) UNS/RES/2375, 11 September 2017.

(39) Note 37. Chronology of U.S.-North Korean Nuclear and Missile Diplomacy.

in acquiring and testing nuclear weapons? A paper written by Matthew Liles is structured as a case-study in which he explores multilateral treaties and concepts of international law to determine if North Korea broke the law by testing a nuclear weapon. He takes up the issue of enforcement and, by doing so, argues that enforcement poses serious problems for the international community. The paper says that 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. Although the new agreement, if carried out, would 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.<sup>(40)</sup>

More than ten years passed since this paper described correctly that “the new agreement,” if carried out, is only a stop-gap measure.

**Comment two on Test & Sanction:** On November 24, 2018 The UN Security Council issues a sanctions waiver to allow an Inter-Korean joint field study on connecting their railroads to go forward.<sup>(41)</sup>

On November 8, 2018, Reuters World News reported as follows: The Security Council has “unanimously boosted sanctions on North Korea since 2006... China and Russia have said the council should reward Pyongyang for the “positive developments” after U.S. President Donald Trump and North Korean leader Kim Jong-un met in June and Kim

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(40) Liles, Matthew. “Did Kim Jong-II Break the Law — A Case Study on How North Korea Highlights the Flaws of the Non-Proliferation Regime,” 33 N.C.J. Int'l L. & Com.Reg.103 (2007).

(41) Note 37. Chronology of U.S.-North Korean Nuclear and Missile Diplomacy.

pledged to work toward denuclearization. But the United States and other Western powers have said sanctions must be enforced until there is full denuclearization. U.S. Ambassador to the United Nations Nikki Haley has also accused Russia of cheating on U.N. sanctions on North Korea.<sup>(42)</sup>

“A U.S. congressional commission said on Wednesday that China appears to have relaxed enforcement of sanctions on North Korea and called on the Treasury Department to provide a report on Chinese compliance within 180 days.”<sup>(43)</sup>

**Reflections:** In January 2018 my thoughts on the Korean nuclear crisis turned to whether it is possible that North Korea would freeze its nuclear testing and missile launches, and whether, additionally, the US and South Korea would freeze their joint military exercises. I focused on these two possibilities while examining the information and findings. Although it was a simple approach, I explored the pessimistic and optimistic views. Starting with the pessimistic view, there is North Korea’s military-first policy. When Kim Jong-il ruled the country, the DPRK was under the total direction and rule of the National Defense Commission, and the party’s leadership in particular was only nominal. The Stockholm International Peace Research Institute says that as of 2017 North Korea has between 10 and 20 nuclear weapons. It is unlikely that North Korea will give up this military expansion program. But the optimistic view holds that in the Kim Jong-un era, military decision-making has been the

(42) Nichols, Michelle. “Russia asks U.N. Security Council to discuss North Korea sanctions Thursday.” Reuters World News, November 8, 2018 (<https://www.reuters.com/article/us-northkorea-sanctions-un/russia-asks-u-n-security-council-to-discuss-north-korea-sanctions-thursday-idUSKCNINC2Q7>).

(43) Brunnstrom, David. “China appears to relax North Korea sanctions: report to U.S. Congress,” Reuters World News, November 15, 2018 (<https://www.reuters.com/article/northkorea-usa-congress/china-appears-to-relax-north-korea-sanctions-report-to-u-s-congress-idINKCN1NJ391>).

province of the Central Military Commission of the Workers' Party of Korea since the June 29, 2016 abolition of the National Defense Commission. What is more, there might also be some room to find a way out of difficulty via a new economic strategy of cooperation with China, Russia, and Japan.<sup>(44)</sup>

The US presents greater difficulties with respect to situation awareness and forecasting. The pessimistic view is that the neocons will place emphasis on Asia and guide a military strategy for global domination. In fact, it is said that within the Trump administration as well, financial interests, the military-industrial complex, and neocons are the dominant forces (note the National Security Strategy 2017, which uses the phrase "preserving peace through strength"<sup>(45)</sup>). But for Trump, who holds fast to his "America first" policy, one option is perhaps an approach which adopts a flexible stance toward North Korea and alleviates the military base burden on South Korea, which is the optimistic view. It is important to transcend the simple pessimist-optimist formula, and to have the anti-war/peace movement adopt a practical perspective which forcefully demands freezing or halting US-South Korean joint military exercises.

The next question concerns the perception of nuclear weapons. Experts say that the hydrogen bomb is a second-generation nuclear weapon. Modernization of nuclear weapons has already resulted in the third and fourth generations, and their research and development are advancing further. North Korea has developed hydrogen bombs and ICBMs, but is still far below the level of the advanced nuclear powers.

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(44) McCormack, Gavan. "North Korea and a Rules-Based Order for the Indo-Pacific, East Asia, and the World," *The Asia-Pacific Journal*, 15 November 2017. Volume 15, Issue 22, Number 3 (<https://apjpf.org/2017/22/McCormack.html>).

(45) U.S.A. National Security & Defense. Issued on December 18, 2017.

There is also the prediction that the US will deviate from its previous nuclear deterrence strategy and carry out a North Korea bombing operation, but this is not very sensible. As such, could not one say that the North Korean nuclear crisis (Ⅱ) is just an illusory crisis?<sup>(46)</sup>

Third, efforts by the six-party talks to use China's diplomatic and economic strength to impose sanctions on North Korea and deter it from developing nuclear weapons have failed. Strengthening such sanctions and further bolstering the missile defenses of South Korea and Japan are not sufficient conditions, and it would likely be impossible to gain China's cooperation. Such being the case, an approach using economic, political, and diplomatic solutions that do not rely on war would indeed be the correct choice. Is it not the case that so far no one has tried proper diplomacy, and that the diplomacy employed until now has not been suitable for the North Korean regime?<sup>(47)</sup>

Fourth, what measures can be taken to resolve this dispute? The camps that constitute this dispute are, in terms of the Korean Peninsula's geopolitical environment, the US, South Korea, Taiwan, and Japan on one side, and North Korea, China, and Russia on the other. In terms of dispute-resolution objectives, the priority aims are: (1) Changing the 1953 Armistice Agreement. North Korea has wanted to replace that agreement with a peace agreement, and negotiations for it should be first on the agenda. (2) Normalization of diplomatic relations. Embassies should be established in the US, Japan, and North Korea. (3) Denuclearizing the

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(46) Mecklin, John. "Commentary: The North Korean nuclear 'crisis' is an illusion," Reuters, September 12, 2017 (<https://www.reuters.com/article/us-mecklin-nkorea-commentary/commentary-the-north-korean-nuclear-crisis-is-an-illusion-idUSKCN1BM2HA>).

(47) Hecker, Siegfried S. "What to Make of North Korea's Latest Nuclear Test?" (<https://www.38north.org/2016/09/shecker091216/>).

Korean Peninsula. Making this the precondition for negotiations ended in failure.

It is important to set these three aims in order of priority and respect that priority. In trying to achieve a peaceful resolution, the first requirement is dialog without preconditions, not involvement by force. Actions taken should be the freezing of nuclear testing and missile launches by North Korea, and the freezing of US-South Korea joint military exercises. My vision was that these freezes will transition to total cessation through negotiations, and then further proceed to a peaceful structural transformation. Additionally, matters reached through negotiations would probably be effective if there were also UN inspections. And as the Preamble to The Nuclear Weapons Prohibition Treaty recognizes, these initiatives must be backed by broadening, sustainable cooperation between theory and movement — between experts and grassroots activists.

Although my optimistic view is not necessarily fully realized now, it would be good to say here that I support the two Koreas request that the UN circulate the Panmunjom Declaration, and I hope their accord is realized. That holds also for the second Joint Statement of the US-North Korea summit in the near future. And my commentary shall proceed from the practical stance of betting on the hope that the agreements embodied in these diplomatic documents will be realized despite of any difficulty. At the same time, from an epistemological standpoint I shall seek the current state of and future outlook for the two Koreas, the Asian region, and our turbulent world in the context of the Panmunjom Declaration and the Joint Statement. Our next agenda will be an examination of some issues

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(48) Galtung, Johan. “Trauma, Drama: What Does North Korea Really Want?” ([https://www.youtube.com/watch?v=hJ\\_EGnLOAuY](https://www.youtube.com/watch?v=hJ_EGnLOAuY)).

of global nuclear disarmament which are relevant to denuclearizing the Korean Peninsula.

## Part Four Global Nuclear Disarmament

### 1. Global Nuclear Disarmament

#### **Securing Our Common Future: An Agenda for Disarmament December 2018**

“The only sure way to eliminate the threat posed by nuclear weapons is to eliminate the weapons themselves,” says UN Secretary-General António Guterres.<sup>(49)</sup> The Agenda considers nuclear weapons in the framework of “disarmament to save humanity.” Guterres calls for supports extending the norms against nuclear weapons, and in that regard appeals to States that possess nuclear weapons to affirm that a nuclear war cannot be won and must never be fought. The agenda proposes preparing for a world free of nuclear weapons through a number of risk-reduction<sup>(50)</sup> measures.

“Measures for elimination and destruction — terms most directly synonymous with ‘disarmament’ — have been employed at all levels, from weapons of mass destruction to landmines. They are pursued to accomplish many objectives, including to maintain stability, restore international peace and security, reduce the cost of military expenditures, uphold humanitarian principles and prevent armed conflict.”<sup>(51)</sup>

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(49) International Day for the Total Elimination of Nuclear Weapons. September 2018 (<http://www.un.org/en/events/nuclearweaponelimination/>).

(50) *Securing Our Common Future: An Agenda for Disarmament*. December 2018. Office for Disarmament Affairs, New York, December, 2018 (<https://www.un.org/disarmament/sg-agenda>).



This Agenda for Disarmament continues: “The objectives and language of disarmament need to evolve together with our conceptions of security. General and complete disarmament, a term coined nearly a century ago, remains the ultimate objective of the United Nations in the field of disarmament. It is now critical for the international community to reconceptualize this fundamental goal so that disarmament actions, making use of all the measures available, clearly contribute to human, national and collective security in the 21st Century.”<sup>(52)</sup>

“Today more than 14,500 nuclear weapons remain. Countries possessing such weapons have well-funded, long-term plans to modernize their nuclear arsenals... As of 2018, while the number of deployed nuclear weapons has appreciably declined since the height of the Cold War, not one nuclear weapon has been physically destroyed pursuant to a treaty. In addition, no nuclear disarmament negotiations are underway. Meanwhile, the doctrine of nuclear deterrence persists as an element in the security policies of all possessor states and many of their allies.”<sup>(53)</sup>

“In recent years, there has been growing frustration amongst Member States regarding what is perceived as the slow pace of nuclear disarmament. This frustration has been put into sharper focus with growing concerns worldwide over the catastrophic humanitarian consequences of the use of even a single nuclear weapon, let alone a regional or global nuclear war.”<sup>(54)</sup>

Concerning an axiom that a nuclear war cannot be won and must never be fought, I think it is worth taking seriously the opinion written by Co-

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(51) Ibid. pp. 11-12.

(52) Ibid.

(53) International Day for the Total Elimination of Nuclear Weapons, September 26, 2018 (<http://www.un.org/en/events/nuclearweaponelimination/>).

(54) Ibid.

Founder of Global Zero Bruce G. Blair, and Senior Advisor of Global Zero Jon Wolfsthal, in the *Washington Post*. They note that the resignation of Secretary of Defense Jim Mattis “seems to be provoking unease, especially considering how dangerous our nuclear command arrangements are.” “It is well past time for the system to be reformed to ensure that it hews to our Constitution and mitigates as much as possible the very real risks associated with a renewed arms competition with Russia.” “Congress can and should prohibit any president from using nuclear weapons first. The incoming chairman of the House Armed Services Committee, Rep. Adam Smith (D-Wash.), proposed such legislation last year.” However, because I know how seriously American constitutionalism has been broken in the nuclear age, it sounds ironic to say, “Only laws can constrain such a dangerous prospect. It is well past time for our country to take control of the nuclear chain of command.”<sup>(55)</sup>

### Let’s Stop Taking Doomsday to the Bank

UN General Assembly Resolution 1653 says in part: “Any state using nuclear or thermo-nuclear weapons is to be considered as violating the Charter of the United Nations, as acting contrary to the laws of humanity and as committing a crime against [hu] mankind and civilization.”<sup>(56)</sup>

“One is the new B61 gravity bomb (model 12) now being developed by more than a dozen US companies that are gratuitously taking doomsday

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(55) Blair, Bruce and Wolfsthal, Jon. “Trump can launch nuclear weapons whenever he wants, with or without Mattis: No defense secretary can stop an impulsive president.” *The Washington Post*, December 23, 2018 (<https://www.washingtonpost.com/outlook/2018/12/23/trump-can-launch-nuclear-weapons-when-ever-he-wants-with-or-without-mattis/?noredirect=on>).

(56) UNRES1653 (XVI) 24 November 1961, Declaration on the Prohibition of the Use of Nuclear and Thermo-Nuclear Weapons.

preparations to the bank.

“The National Nuclear Security Administration hired the contractors to design, test, build and maintain the B61-12s (a gravity bomb dropped from fighter jets and heavy bombers), set for mass production in 2020. The biggest weapons profiteers in the world are cashing in on the B61 project. Addresses and phone numbers of the nuclear war grifters are listed below in case readers want to directly give them some grief. These are some of the nuclear holocaust hucksters.”<sup>(57)</sup>

## The New Arms Race

### SIPRI: Nuclear weapons are still being developed

In its 2018 annual report, the Stockholm International Peace Research Institute (SIPRI) has criticized the ongoing development of new nuclear weapons. According to SIPRI, “14,465 nuclear weapons still exist, in the hands of just nine states: the US, Russia, Britain, France, China, India, Pakistan, Israel and North Korea.” Of these, 3,750 were deployed with operational forces. “Nearly 2000 of these are kept in a state of high operational alert,” says SIPRI. Although these are only nine countries, they do not intend to give up their nuclear weapons. “The vision of a world without nuclear weapons is history,”<sup>(58)</sup> the annual report says.

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(57) LaForge, John. “Let’s Stop Taking Doomsday to the Bank,” *Duluth Reader Weekly*, Jan. 3, 2019. Some of the nuclear holocaust hucksters include Consolidated Nuclear Security Corp, Orbital ATK, Inc., Boeing, Lockheed Martin, Sandia National Laboratory, Bechtel National, Inc., Honeywell, Integrated Technology Corp, Longenecker & Associates, Inc., and Lockheed Martin, et al. ([http://duluthreader.com/articles/2019/01/02/15594\\_lets\\_stop\\_taking\\_doomsday\\_to\\_the\\_bank](http://duluthreader.com/articles/2019/01/02/15594_lets_stop_taking_doomsday_to_the_bank)).

(58) Werkhäuser, Nina. “SIPRI: Nuclear weapons are still being developed,” *Deutsche Welle* (<https://www.dw.com/en/sipri-nuclear-weapons-are-still-being-developed/a-44266892>).

“The United States is investing a lot of money in the modernization of its nuclear arsenal. By 2026 it plans to have spent \$400 billion (€344 billion). However, smaller countries like India and Pakistan are also engaged in a kind of “strategic arms race.” They are both developing new nuclear weapons and enlarging their production capacities for fissile material. Nuclear weapons thus remain a core element of the nuclear powers’ national defense strategies.”<sup>(59)</sup>

“In view of the current tensions between the United States and Russia,” Shannon Kile, head of SIPRI’s nuclear weapons project, “says it is unclear how effective international agreements will be in future in controlling nuclear weapons.” “What concerns me at the moment is the fact that the political-strategic relationship between the United States and Russia has collapsed — and between them these two countries possess 92 percent of all nuclear weapons,” he says.<sup>(60)</sup>

“This also affects arms control. When important disarmament agreements like the New START treaty expire in the coming years, nuclear weapons experts fear that new treaties may not be made to replace them. There would then be no contractual limitations whatsoever on weapons arsenals.”<sup>(61)</sup>

“As a SIPRI expert, Kile has been observing the nine nuclear states for a long time now. He expressed surprise at one development in particular: the technical advances North Korea has demonstrated in its nuclear weapons and long-range ballistic missile tests in the past 12 months. He says it remains to be seen whether the meeting between the North Korean leader Kim Jong Un and US President Donald Trump really will

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(59) Ibid.

(60) Ibid.

(61) Ibid.

lead to North Korean nuclear disarmament.

“I’m a bit skeptical about it,” he says, but adds that the meeting has opened the door for further trust-building measures.<sup>(62)</sup>”

### Policy for Ploughshares Fund

Since Donald Trump was elected two years ago, he “has called for new and more ‘usable’ nuclear weapons.” He wants to abandon key arms control agreements, “and Congress has been plowing ahead with a \$2 trillion shopping spree to rebuild the Cold War nuclear arsenal. There has been essentially no effective check on this excessive and dangerous spending,” Tom Collina, Director of Policy for Ploughshares Fund said.<sup>(63)</sup>

“Without real oversight, pro-nuclear bomb enthusiasts have had a free hand to promote Trump’s new ‘low-yield’ warhead for Trident missiles; to undermine crucial international agreements like the Intermediate-Range Nuclear Forces (INF) Treaty; and to push for high-cost missile, submarine and bomber programs that we do not need.<sup>(64)</sup>”

“Once these programs get off the ground, they become too big to stop. If we don’t act soon, we will be locked in to an excessive Cold War-style arsenal for the next 50 years. As new US weapons are built, and Russia responds in kind, we will find ourselves back in an arms race that only defense contractors can win.<sup>(65)</sup>”

Rep. Adam Smith (D-Wash.) “has introduced a bill to make it US policy to never launch nuclear weapons first in a conflict. Other bills

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(62) Ibid.

(63) Collina, Tom, “Dem-led House can return sanity to nuclear weapons debate” (<https://www.ploughshares.org/issues-analysis/article/dem-led-house-can-return-sanity-nuclear-weapons-debate>).

(64) Ibid.

(65) Ibid.

would prohibit the first use of nuclear weapons without congressional approval.

“These fixes would put legal limits on the president’s ability to launch nuclear weapons unilaterally, without provocation, and would provide a tremendous safeguard to our democracy and our national security.”<sup>(66)</sup>

## 2. International Crimes and Confidence Building

**UN Human Rights Committee:** The threat and use of nuclear weapons are contrary to the right to life, and may amount to a crime under international law, says the UN Human Rights Committee. The clause devoted to nuclear weapons became paragraph 66 and reads as follows:

66. The threat or use of weapons of mass destruction, in particular nuclear weapons, which are indiscriminate in effect and are of a nature to cause destruction of human life on a catastrophic scale is incompatible with respect for the right to life and may amount to a crime under international law.<sup>(67)</sup>

The International Court of Justice (ICJ), “in its 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, confirmed the applicability of the right to life in time of armed conflict and, moreover, observed that the test of what is an “arbitrary deprivation of life” has to be determined in light of international law governing armed conflict, in particular humanitarian law.”<sup>(68)</sup>

Second, the HRC considers nuclear weapons as indiscriminate in effect and of a nature to cause destruction of human life on a catastrophic scale and, therefore, incompatible with right to life. The ICJ, in its 1996

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(66) Ibid.

(67) Note 2, General comment No. 36 (2018).

(68) Note 3, ICJ Reports 1996, § 25.

Advisory Opinion, stated that “[t]he destructive power of nuclear weapons cannot be contained in either space or time.”

In the same line, the preamble of the TPNW reads as follows (par. 4) : “Cognizant that the catastrophic consequences of nuclear weapons cannot be adequately addressed, transcend national borders, pose grave implications for human survival, the environment, socioeconomic development, the global economy, food security and the health of current and future generations, and have a disproportionate impact on women and girls, including as a result of ionizing radiation…”

“Third, the GC considers that use and threat of nuclear weapons may amount to crimes under international law,” writes Daniel Rietiker, Swedish professor of international law. “I explained elsewhere why I think that different provisions of war crimes and crimes against humanity under the Rome Statute may come into play regarding the use of nuclear weapons. I also suggest that such use could also amount to genocide, if denoting a specific intent to destroy, in whole or part, one of the groups mentioned in Article 6 of the Rome Statute.”<sup>(69)</sup>

This message seems to have some sympathies in common, as we will see later, even though it deals with the threat of nuclear weapons instead of their use.

### **Statutes of the International Criminal Court (ICC)**

“The ICC already prohibits the use of weapons that would violate the rules on distinction and proportionality,” says Torbjørn Graff Hugo of

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(69) Rietiker, Daniel. “Threat and use of nuclear weapons contrary to right to life, says UN Human Rights Committee,” November 7, 2018 (<https://safna.org/2018/11/07/threat-and-use-of-nuclear-weapons-contrary-to-right-to-life-says-un-human-rights-committee/>).

ILPI's Weapons of Mass Destruction (WMD) Project. "An explicit reference to nuclear weapons use would create the impression that such use is not covered by the existing provisions in the ICC. In addition, such a move would constitute a legislative undertaking that might undermine the ICC's legitimacy in the long run."<sup>(70)</sup> He also says, "During the final rounds of negotiations of the Statutes in 1998, proponents of an inclusion contended that the use of both chemical and biological weapons were already prohibited under international law and that the use of nuclear weapons had been deemed to be 'generally contrary to the rules of international law' by the International Court of Justice in 1996."<sup>(71)</sup>

The proposal by several states and NGOs was eventually dropped. The failure to include any specific reference to any WMDs was openly lamented by a number of states, including Mexico.<sup>(72)</sup> The first Review Conference of the Statutes was held in Kampala, Uganda in 2010.<sup>(73)</sup> On November 2009 Mexico presented a draft resolution for an amendment to the Statutes, by which the use or threat to use nuclear weapons would be included in the definition of war crimes under Article 8 of the Statutes. Once again, however, the proposal received only limited support, and Mexico eventually withdrew the draft resolution as it became clear that consensus would not be reached.<sup>(74)</sup>

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(70) Graff, Hugo Torbjørn. "The ICC & nuclear weapons," Policy Paper No. 2/2012 ([http://nwp.ilpi.org/?p=1480#\\_ftn1](http://nwp.ilpi.org/?p=1480#_ftn1)).

(71) See Art. 105, (1), E of the 1996 Advisory Opinion of the ICJ.

(72) Including India, Mexico, Cuba, Sudan on behalf of the Arab group, Egypt, Bangladesh, and Benin. For a more detailed account of the process, see J. Burroughs (1999) (<http://lcn.org/global/icc.htm>).

(73) The ICC Review Conference: Kampala 2010 and Official version of Aggression amendment (<http://iccreviewconference.blogspot.com/>).

(74) Cf. Nystuen, Gro, ed. *Nuclear Weapons Under International Law*, Cambridge University Press, 2014. This book has some pertinent chapters in Part III



## **An Open Letter to the International Criminal Court**

Nevertheless, last year there was an open letter which claimed that the threat of nuclear weapons is a genocide conspiracy against North Korea.

“In response to what in our considered opinion are criminal actions, Dr. Graeme MacQueen, Founder and former Director of the Centre For Peace Studies, at McMaster University, and I, felt it necessary to send the following Open Letter to the Prosecutor of the International Criminal Court on January 23 [2018].”

“Embarrassment and shock at President Trump’s threats against North Korea have been widespread and have led to a serious discussion in the US as to whether Mr. Trump is mentally fit to govern. However, the threats of Mr. Trump and his secretary of defense go well beyond the US domestic sphere and have direct implications for other countries, including Canada.

“Article 6 of the Rome Statute of the International Criminal Court states that genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.”

“Since there is clear evidence that the crime of genocide is being discussed openly and that plans are being made to carry it out against the people of the DPRK by US leaders and since, in these circumstances and with full knowledge of these threats and plans, US allies, including Canada, are cooperating with the US government and meeting to discuss actions to be taken against North Korea, and since these allies of the US appear to be ignoring international law, the Charter of the United Nations

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International criminal law: 8-Use of nuclear weapons as genocide, a crime against humanity or a war crime, 9-Use of nuclear weapons as an international crime and the Rome Statute of the International Criminal Court.

and the Rome Statute, it is necessary that an investigation be conducted by your office to consider the evidence and to prosecute if there is evidence of a crime.

“The United States of America is no longer a member of the ICC. However, it is bound by the Charter of the United Nations to keep the world peace, is party to the Genocide Convention, and was a sponsor of the International Criminal Court.”

The authors then wrote: “We ask that the Office of the Prosecutor open an investigative file in this matter and, in addition, use your voice as Prosecutor and the moral imperative your office claims to represent to avoid genocide and to condemn as grave violations of international criminal law the announced intentions and actions of the nations mentioned above.”<sup>(75)</sup>

While this open letter to the ICC will not be well-received by the people at large in the Western world, some people of the South might on the contrary welcome these activities and, in reaction to the suggestion that “we urge others to do the same,” be encouraged to take action in line with “trusting in the justice and faith of the peace-loving peoples of the world.”

### Confidence building

There are already several proposals for US-DPRK trust-building measures.<sup>(76)</sup>

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(75) Black, Christopher. *New Eastern Outlook*, January 26, 2018 (<https://journal-neo.org/2018/01/26/the-genocide-conspiracy-against-north-korea-an-open-letter-to-the-international-criminal-court/>).

(76) SIPRI & CSS, *Building Confidence on the Korean Peninsula, 2007* (<https://www.sipri.org/sites/default/files/files/misc/SIPRI07Korea.pdf>); Sokolsky, Richard, July 27, 2018 Commentary, *Foreign Affairs* (<https://carnegieendowment>).

North Korea says US must ‘completely eliminate’ its nuclear arsenal first as peace talks reach new low.

“When we talk about the Korean Peninsula, it includes the territory of our republic and also the entire region of (South Korea) where the United States has placed its invasive force, including nuclear weapons. When we talk about the complete denuclearization of the Korean Peninsula, it means the removal of all sources of nuclear threat, not only from the South and North but also from areas neighboring the Korean Peninsula.<sup>(77)</sup>”

On the other hand, President Trump says, “Kim said in a New Year’s Day address that North Korea would take a ‘new path’ in nuclear talks if the U.S. didn’t relax its sanctions. He also said he’d be willing to meet Trump again. The president [Trump] responded to a speech with a tweet focusing on the prospect of a second meeting.<sup>(78)</sup>”

Having recognized the difficulty that these remarks show, I would say that the US-DPRK meeting has opened the door for further trust-building measures. It is true that confidence building is essential, fundamental, and indispensable for a successful advance “to establish new US-DPRK relations in accordance with the desire of the peoples of the

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org/2018/07/27/road-map-for-demilitarizing-north-korea-pub-76941); Choe Sang-Hun, “U.S. Isn’t Holding Up Its End of Nuclear Deal, North Korean Envoy Charges,” August, 4, 2018 (<https://www.nytimes.com/2018/08/04/world/asia/north-korea-us-nuclear-deal.html>).

(77) Withnall, Adam. “North Korea says US must ‘completely eliminate’ its nuclear arsenal first as peace talks reach new low,” *The Independent*, December 20, 2018 (<https://www.independent.co.uk/news/world/asia/north-korea-us-talks-nuclear-weapons-eliminate-disarmament-trump-kim-jong-un-a8692031.html>).

(78) “President Trump Says North Korea’s Kim Jong Un Has Sent Him Another ‘Great Letter,’” *Time*, January 3, 2019 (<http://time.com/5492536/donald-trump-kim-jong-un-letter/>).

two countries for peace and prosperity.” The DPRK could feel the obligation “to commit to work towards the complete denuclearization of the Korean Peninsula.”

Nevertheless, I know a distinguished scholar who proposed that “nuclear balancing would mean stability.”<sup>(79)</sup>

Concerning this topic, a review by Campbell Craig of Cardiff University says that “Ken Waltz became preoccupied with the problem of nuclear war after 1979. Perhaps it was a kind of atonement for the rationale, and implications, of the Structural Realism he created.”<sup>(80)</sup>

Although this remark on Kenneth Waltz’s neorealism does not legitimize the idea that “North Korea would take a ‘new path’ in nuclear talks” for maintaining its nuclear state policy, nuclear weapons exist in the hands of North Korea, along with eight other states: Israel, India, Pakistan, and the P5: the US, Russia, Britain, France, and China. Therefore, we would need to create new trust-building measures.

I shall avail myself of a different opportunity to write about the international legal debate on trust-building measures, and about the aspects of a diplomacy which complies with the have-no-military Article<sup>(81)</sup> 9.

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(79) Waltz, Kenneth N. “Why Iran Should Get the Bomb: Nuclear Balancing Would Mean Stability,” *Foreign Affairs*, Vol. 91, No. 4 (JULY/AUGUST 2012), pp. 2-5 (<https://www.foreignaffairs.com/articles/iran/2012-06-15/why-iran-should-get-bomb>).

(80) Article Review Forum 59 on “How Realism Waltzed Off: Liberalism and Decisionmaking in Kenneth Waltz’s Neorealism.” September 9, 2016 ([https://issforum.org/articlereviews/59-waltz#Review\\_by\\_Campbell\\_Craig\\_Cardiff\\_University](https://issforum.org/articlereviews/59-waltz#Review_by_Campbell_Craig_Cardiff_University)).

(81) “Mahathir warns against revision of Japan’s pacifist Constitution,” *Japan Times*, September 29, 2018 (<https://www.japantimes.co.jp/news/2018/09/29/national/politics-diplomacy/malaysian-leader-mahathir-mohamad-warns-revising->

### 3. Nuclear Arms Control Under Siege

On October 20, President Trump announced the intent to withdraw from the INF Treaty. “It is important to preserve the INF Treaty and to extend or revise New START, which limits long-range nuclear forces and expires in 2021, so that an arms control structure remains in place between the US and Russia... Senators Merkley, Warren, Gillibrand, Markey, Wyden, Sanders, and Feinstein have introduced the Prevention of Arms Race Act of 2018 (S. 3667). It erects several high barriers to spending on production of INF Treaty-violative missiles and declares a sense of the Senate that ‘President Trump’s announcement of the intent of the United States to withdraw from the INF Treaty, without proper consultation with Congress, is a serious breach of Congress’s proper constitutional role as a co-equal branch of government.’”<sup>(82)</sup>

In October Jacqueline Cabasso, LCNP advisor, told to the First Committee of the UN General Assembly, “The United States has introduced a proposal called ‘Creating the Conditions for Nuclear Disarmament’ (‘the CCND approach’).”<sup>(83)</sup> “But the US has it backwards. We advocate an approach we’re calling ‘Creating the Conditions for International Peace and Human Security’ (the CCIPHS approach) ... The statement addresses US-Russian nuclear arms racing, the need to implement the multilateral agreement limiting Iran’s nuclear program despite US violation of the agreement, and the potential for a solution

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japans-pacifist-constitution/).

(82) “The Right to Life Versus Nuclear Weapons,” International Association of Lawyers Against Nuclear Arms (<https://myemail.constantcontact.com/LCNP-eNews-The-Right-to-Life-Versus-Nuclear-Weapons.html?aid=VeczwQ1pFRc&oid=1114995572407>).

(83) Ibid.

linking peace, development and disarmament on the Korean Peninsula.”<sup>(84)</sup>

### Proposal for denuclearizing the Korean Peninsula

Concerning the potential for denuclearizing the Korean Peninsula, I will introduce two proposals.

The first is ICAN’s five steps to denuclearize the Korean Peninsula. This proposal recognizes the risk of nuclear use and the unacceptable humanitarian consequences of such use. Secondly, it requires both the DPRK and ROK to reject nuclear weapons by joining the Treaty on the prohibition of Nuclear Weapons (TPNW). Thirdly, under the TPNW, the DPRK would work with a competent international authority to develop and implement a time-bound, verifiable, and irreversible plan for the total elimination of its nuclear-weapon program. Fourthly, the CTBT is an essential and effective step in the denuclearization process, and CTBTO is pertinent in the verification of the closure of the DPRK test-site. Fifthly, Once the DPRK’s nuclear-weapon stockpile is destroyed — i.e. once the DPRK’s nuclear weapons have been destroyed according to the disarmament plan negotiated in the context of the TPNW — the DPRK should rejoin the NPT as a non-nuclear weapon state.

Because of the fact that this proposal was drafted before the US-DPRK summit, and in light of the Joint Statement, it seems inadequate to make any comment on trust-building measures, and therefore it lacks mention that the United States itself must commit itself to working towards the complete denuclearization of the Korean Peninsula.

The second proposal is The Peace Depot’s new project: “Toward a Northeast Asia Nuclear Weapon Free Zone: Citizen’s Watch for a Fair Implementation of Korean Peninsula Denuclearization Agreements” (in

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(84) Ibid.

short: “Citizen’s Watch on the Implementation of Korean Denuclearization Agreements”) announced on Nov. 14, 2018. The project is meant to help successful implementation of the historic agreements for peace on the Korean Peninsula and beyond.

This project has five phased benchmarks:

Phase 1) DPRK: freeze of known nuclear arsenals, intermediate- and long-range missiles, and related facilities

US and ROK: declaration to end the Korean War and continued suspension of large-scale US-ROK joint military exercises

Phase 2) DPRK: disablement of frozen facilities and acceptance of inspections for disablement

US and ROK: acceptance of inspections of the ROK’s nuclear facilities and US military bases, and partial lifting of sanctions

Phase 3) DPRK: declaration of nuclear arsenals, plutonium and enriched uranium stockpiles, and establishment of the DPRK liaison office in Washington, D.C.

US and ROK: starting negotiations on a peace and nonaggression treaty, and establishment of the US liaison office in Pyongyang, and further partial lifting of sanctions

Phase 4) DPRK: submission of the comprehensive list of nuclear programs, and acceptance of inspections on requested sites

US and ROK: conclusion of a peace and nonaggression treaty, and further lifting of sanctions

Phase 5) DPRK: starting dismantlement of nuclear weapons, intermediate- and long-range missiles, and fissile material production facilities under international inspection, and establishment of the DPRK embassy in Washington, D.C.

US and ROK: establishment of the US embassy in Pyongyang, and

lifting of all sanctions.

My frank opinion on this proposal is that “US and ROK: establishment of the US embassy in Pyongyang, and lifting of all sanctions” and “conclusion of a peace and nonaggression treaty, and further lifting of sanctions” should come first.

## Afterword

### **Declaration by the Japanese government of North Korean statehood:**

What action should Japanese lawyers take concerning the normalization of Japan-North Korea relations now in the wake of the two summits between the two Koreas and between the US and North Korea?

After the end of the Cold War on September 17, 1991, the two Koreas (the Republic of Korea and the Democratic People’s Republic of Korea) were allowed to join the United Nations by a unanimous vote, including Japan, but even now the Japanese government does not recognize North Korea as a state, even while tacitly recognizing that North Korea effectively controls the territory north of the Armistice Line that bisects the Korean Peninsula. According to the government’s view, the reason for non-recognition is that although North Korea fulfills the conditions of a state under international law, it lacks “the will and capability to comply with international law.”

But if one considers this in comparison with South Korea, it seems there was a pre-established decision not to recognize North Korea. That decision was excused with an unnatural explanation by foreign-affairs or legal bureaucrats. All of the 192 countries that Japan currently recognizes are deemed to have “the will and capability to comply with international law.” Why is North Korea an exception? At this point in time, 28 years



after North Korea joined the UN, it seems doubtful that there is any convincing rationale for this under international law. It seems to me that Japanese lawyers should at this time endeavor to have the Japanese government change its interpretation and application of positive international law pertaining to sovereignty, peace, and human rights.

### The Constitution of Japan

I would like to present my argument anew from the perspective of the Japanese Constitution, which prohibits the defeated nation of Japan from maintaining war potential and does not recognize the right of belligerency. It also affirms that all the peoples of the world have the right to live in peace. Japan's Constitution is an international instrument which pledges these things to not only the victor countries, but also the peoples of the war-victim countries. I shall present my view on the problems involved in the denuclearization and establishment of peace on the Korean Peninsula.

Arriving late at the annual debates which began at the UN General Assembly on September 25, US President Trump stated, "We reject the ideology of globalism, and we embrace the doctrine of patriotism."<sup>(85)</sup> The leaders of European and Mideast countries argued against him, while China and Russia forcefully headed him off.<sup>(86)</sup> According to this article's analysis, "America First" is a component of anti-globalism in the Global

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(85) UN News. "US President Trump rejects globalism in speech to UN General Assembly's annual debate," September 25, 2018 (<https://news.un.org/en/story/2018/09/1020472>).

(86) Horner, Rory, et. al. "How anti-globalisation switched from a left to a right-wing issue — and where it will go next," *The Conversation*, January 26, 2018 (<https://theconversation.com/how-anti-globalisation-switched-from-a-left-to-a-right-wing-issue-and-where-it-will-go-next-90587>).

North: “A big switch has occurred, and today’s backlash against globalization emerged from concerns about its impacts in the Global North.”

In fact, the economic sanctions that the US has imposed on China should actually be called “economic war,” and it is perhaps correct to see the sanctions as part of the global strategy to tear down and rebuild the order for international cooperation, including the UN, which has been led by the US since after the Second World War. The act of “America-First” President Trump attending the UN General Assembly and delivering a speech should perhaps be, depending on one’s point of view, considered a “comedy.”

As a matter of fact, by placing the task of denuclearization and establishment of peace on the Korean Peninsula into the context of US-China hegemonic competition, we can gain a certain awareness and try to find an historic solution. It is a logic which we can discern in the light of the history of the Chinese and Korean struggle of resistance against Western imperialism. The Japanese Empire, having weathered the political strife following the Meiji Restoration, chose the “Dump Asia, Join Europe” route and joined the Western imperialism camp. By this means Japan came to rule the Korean Peninsula and to infringe the lives, persons, and assets of the colonials. What is more, Japan treated the Koreans cruelly by robbing them of their pride with the “Create Surnames and Change Given Names” policy. With Japan’s loss in August 1945, Japan’s imperial government and its support establishment should have discharged its colonial-rule responsibilities with respect to the resulting division of the Korean Peninsula and the ensuing Korean War, but the Allied leaders including Truman and Stalin, who had fought against the Axis powers of Japan, Germany, and Italy, concluded a

postwar resolution which did not question Japan's responsibility for its colonial rule. During the Korean War the US, along with the UK, France, and other parties, concluded the Treaty of Peace with Japan in San Francisco. As such, the Soviet Union and China, as well as Britain's colony India and other places, did not even sign the treaty. I shall mention in passing that Japanese intellectuals of the day called this "one-sided peace," and vigorously called upon the government to conclude "total peace."

Upon consideration, we should know that it was precisely the system created by the San Francisco Treaty, which excluded the USSR and China, that created the reasons why the interests and rights of the people who are the sovereigns of the Korean Peninsula are still not properly recognized. From this, one can see that liberation from what might be called "the yoke of San Francisco" remains to be done for both Japanese and Koreans.

Here I shall narrow my focus to the matter of denuclearization and establishment of peace on the Korean Peninsula. To achieve this aim with diplomacy including economic sanctions but not military threats may, as geopolitical realists generally see it, be summarily dismissed as a mere optimistic hope. But it is a fact that the UN Security Council has repeatedly passed economic-sanction resolutions against North Korea for its nuclear and missile development. The hegemon behind those resolutions, however, is the nuclear superpower America, which leads the real world of nuclear weapons. The Trump administration rejects even the public stance of Trump's predecessor Obama, which was to strive for a nuclear-free world, and it is engaging in a long-term nuclear arms race. Its military strategy regarding nuclear weapons is a "tailored deterrence strategy," and it has declared that the US will make first use of nuclear

weapons even in conventional warfare including against enemies' cyber attacks. One can find this in places such as Remarks by President Trump in State of the Union Address and Defense Secretary Mattis' 2018 Nuclear Posture Review. US scholar of peace studies Michael T. Klare says that "a twenty-first-century version of the Cold War (with dangerous new twists) has begun." The long war against terrorism is drawing to a close, and the Pentagon has decided to undertake a "three-front geopolitical struggle to resist Chinese and Russian advances in Asia, Europe, and the Middle East."<sup>(87)</sup>

However, I see no place in Klare's article where he digs deeply into the war policy meant to bring about regime change in Iran. Concerning the US implementation of war policy for the current phase in which Iran is next after North Korea, one must, as Klare points out, delve into the annual posture statements of regional commanders in the Mideast.

Denuclearizing the Korean Peninsula has become a realistic project now that the 21st-century Cold War has begun. It is not simply a matter of denuclearizing North Korea; rather, it means making the Korean Peninsula into a nuclear-free zone, and includes the withdrawal of US forces in South Korea. This is clear from the press conference held after the signing of the US-North Korea Joint Statement. In other words, after Trump expressed his gratitude to South Korea's President Moon Jae-in and to his professed friend, Japan's Prime Minister Abe, who helped bring about the US-North Korea summit meeting, he stated that the agreement is beneficial to the world and to China. But then he said that Japan and South Korea will help foot the bill for denuclearization: "I think South

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(87) Klare, Michael T. "Could the Cold War Return With a Vengeance?" *Tom Dispatch*, April 3, 2018 ([http://www.tomdispatch.com/post/176406/tomgram%3Amichael\\_klare%2C\\_the\\_new\\_%22long\\_war%22/](http://www.tomdispatch.com/post/176406/tomgram%3Amichael_klare%2C_the_new_%22long_war%22/)).

Korea will do it. I think China — I think, frankly, China will help out. I think that Japan will help out. No, I don't think the United States is going to have to spend.<sup>(88)</sup> However, it is especially noteworthy that he mentioned the suspension of US-South Korea military exercises and the future withdrawal of US forces from South Korea.

Indeed, building peace in Northeast Asia, and further, pursuing peace and prosperity in Eurasia and the world will not happen without hope. But at the same time, it would also be possible that Trump's America First doctrine will be pushed aside by the globalism of Trump's three-G administration.<sup>(89)</sup>

And yet, the multitude seeks a reason for living.<sup>(90)</sup> And as long as the multitude seeks that, people must have human dignity and the hope of survival because they cannot live if they discard them. I want to foster the thinking that wagers on the fiction of this hope.

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(88) "Who Will Pay for N. Korea's Denuclearization?" *Chosunilbo*, June 4, 2018 ([http://english.chosun.com/site/data/html\\_dir/2018/06/04/2018060401675.html](http://english.chosun.com/site/data/html_dir/2018/06/04/2018060401675.html)).

(89) "Three Gs: Generals, Goldman and Gazillionaires — Incoming Trump Administration the Richest in History," *Jiji Press*, December 14, 2016 (<https://blog.goo.ne.jp/raymiyatake/e/90534a0ddef55e7f0846c0549b714f68>) (in Japanese). The three Gs refers to Trump administration officials being chosen from generals, Goldman Sachs, and gazillionaires. Three persons each were chosen from former generals and Goldman Sachs.

(90) Hardt, Michael and Negri, Antonio. *Multitude: War and Democracy in the Age of Empire*, Penguin Books, 2005.