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

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Abstract

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

THE SWORD IN THE MIRROR — THE LAWFULNESS OF NORTH KOREA'S USE AND THREAT OF USE OF NUCLEAR WEAPONS BASED ON THE UNITED STATES' LEGITIMIZATION OF NUCLEAR WEAPONS

*Charles J. Moxley, Jr.**

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

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

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

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1. Advisory Opinion No. 95, *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 95, pt. VI, 35-36 (July 8, 1996) (question presented to the Court by U.N. General Assembly resolution 49/75 K, adopted on Dec. 15, 1994), available at <http://212.153.43.18/icjwww/icasess/iunan/iunanframe.htm> [hereinafter Nuclear Weapons Advisory Opinion]. The Court's decision and all but five of the fourteen individual opinions in the case are available at 35 I.L.M. 809 (1996). The remaining five, the declarations of Judges Bedjaoui, Herczegh, and Bravo and the individual opinions of Judges Guillaume and Ranjeva, appear at 35 I.L.M. 1343 (1996).

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

INTRODUCTION

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

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

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

1. There is no applicable *per se* rule, and accordingly, each potential use of nuclear weapons must be evaluated independently to see if it can comply with the requirements of international law, including the rules of necessity, proportionality, and discrimination.

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

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

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

weapons capabilities of the Soviet Bloc, so too, and even more so, is North Korea vulnerable to the overwhelming conventional capabilities of the United States.

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

I. *BACKGROUND TO CURRENT NORTH KOREAN NUCLEAR POSTURE*

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

A. *Joint Declaration*

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

2. See Joint Declaration by South and North Korea of the Denuclearization of the Korean Peninsula, Jan. 20, 1992, S. Korea-N. Korea, IAEA Doc. GOV/INF/660, Attachment (1992), 33 I.L.M. 569 (1994) [hereinafter Joint Declaration].

3. See Agreed Framework to Negotiate Resolution of the Nuclear Issue on the Korean Peninsula, S. Korea-U.S., Oct. 21, 1994, 34 I.L.M. 603 (1995), available at <http://www.kedo.org/pdfs/AgreedFramework.pdf> (last visited Apr. 20, 2004) [hereinafter Agreed Framework].

4. See Joint Declaration, *supra* note 2, at § 1.

5. See *id.* at §§ 2-3.

B. Agreed Framework

The Agreed Framework provided for North Korea's termination of its nuclear weapons program in exchange for financial assistance for its energy program from an international consortium, and security assurances from the United States against the threat or use of nuclear weapons by the United States.⁶ Specifically, North Korea agreed to replace its graphite-moderated reactors and related nuclear facilities with "proliferation-resistant" light water reactor power plants, to be financed by the United States, Japan, and South Korea, among others,⁷ and to continue as a party to the Treaty on the Non-Proliferation of Nuclear Weapons ("NPT").⁸

C. NPT

The NPT⁹ provides that the five identified nuclear weapon States¹⁰ agree to pursue general and complete disarmament through good faith negotiations,¹¹ and to refrain from transferring nuclear weapons or in any way encouraging their manufacture,¹² and that the non-nuclear weapon States agree to forego developing or acquiring nuclear weapons.¹³ North Korea be-

6. See Agreed Framework, *supra* note 3, pt. III(1); see also Larry A. Nicksch, *North Korea's Nuclear Weapons Program*, Congressional Research Service Issue Brief for Congress, IB91141, available at <http://www.fas.org/spp/starwars/crs/IB91141.pdf> (last visited April 6, 2004). The Agreed Framework represented an accommodation between Democratic People's Republic of Korea ("North Korea" or "DPRK") and the United States following North Korea's threat to withdraw from the Treaty on the Non-Proliferation of Nuclear Weapons on March 12, 1993. See *id.* at 10; see also Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 [hereinafter NPT].

7. See CHARLES J. MOXLEY, JR., *NUCLEAR WEAPONS AND INTERNATIONAL LAW IN THE POST COLD WAR WORLD* 563-64, n.11 (2000). This financing is orchestrated through the Korean Peninsula Energy Development Organization ("KEDO"). See KEDO: Promoting Peace and Stability on the Korean Peninsula and Beyond, at <http://www.kedo.org/index.asp> (last visited Apr. 7, 2004).

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

9. See NPT, *supra* note 6.

10. The five identified nuclear weapons States are China, France, Russia, the United Kingdom, and the United States. See Arms Control Fact Sheet: "The Nuclear Nonproliferation Treaty at a Glance" (Jan. 2003), available at <http://www.armscontrol.org/pdf/npt.pdf> (last visited Apr. 7, 2004). The five nuclear weapons States are the five permanent members of the United Nations Security Council. See U.N. CHARTER art. 23, para. 1.

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

12. See *id.* art. I.

13. See *id.* art. II; see also U.S. Dept. of State, Bureau of Nonproliferation, Treaty on

came a party to the NPT in 1985, stating that it was doing so to remove the nuclear threat from the United States,¹⁴ and to resolve North Korea's need for nuclear energy.¹⁵

Under the NPT regime, non-nuclear weapons States are required to enter into a "safeguard agreement" with the International Atomic Energy Association ("IAEA").¹⁶ North Korea delayed entering into such an agreement because of what it characterized as nuclear threats from the United States, including the United States' continued placement of nuclear weapons in South Korea, and the "Team Spirit" nuclear war exercise¹⁷ the United States directed against North Korea.¹⁸

In 1992, North Korea entered into a safeguard agreement with the IAEA¹⁹ after receiving assurances from the United States that it would not use nuclear weapons against North Ko-

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

14. See *Detailed Report on Circumstances of DPRK's Withdrawal from NPT*, KOREAN CENTRAL NEWS AGENCY OF DEMOCRATIC PEOPLE'S REP. OF KOREA, Jan. 23, 2003, available at <http://www.kcna.co.jp/item/2003/200301/news01/23.htm#1> (last visited Apr. 7, 2004) [hereinafter KCNA Detailed Report]. U.S. nuclear weapons were withdrawn from the Republic of Korea ("South Korea") in late 1991. See Niksch, *supra* note 6, at 9. This was one of several actions taken by the first Bush administration aimed at securing North Korea's adherence to the NPT. See *id.*

15. See KCNA Detailed Report, *supra* note 14.

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

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

18. The South Korean Ministry of Defense characterized these exercises as defensive and contended that North Korean allegations of the offensive nature of the exercises are unfounded; North Korea was reportedly invited to send representatives to attend as observers. See Ministry of National Defense, Republic of Korea, Military Exercises, available at http://www.mnd.go.kr/cms.jsp?p_id=0191801000000 (last visited Apr. 7, 2004).

19. See Democratic People's Republic of Korea-International Atomic Energy Agency: Agreement for the Application of Safeguards in Connection with the Treaty on the Non-proliferation of Nuclear Weapons, 33 I.L.M. 315 (1994); INFCIRC/403, May 1992 [hereinafter Safeguards Agreement]. Under the 1992 Safeguards Agreement, North Korea was required to report all nuclear programs to the IAEA and allow IAEA access to conduct inspections of North Korean nuclear installations and programs. See Niksch, *supra* note 6, at 10.

rea,²⁰ and after receiving representations from South Korea that there were no nuclear weapons within its borders.²¹ In entering into the agreement with the IAEA, North Korea stated that it was doing so on the premise that “none of the NPT member countries will deploy nuclear weapons on the Korean Peninsula and pose a nuclear threat to DPRK.”²²

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

On January 10, 2003, however, North Korea announced its immediate withdrawal from the NPT on the ground that it was “most seriously threatened” by the United States.²³ North Korea stated that the United States had threatened it with preemptive nuclear attack and other belligerent actions such as blockades.²⁴ North Korea further stated that the United States had breached the Agreed Framework by failing to provide light-water reactors (“LWRs”)²⁵ and suspending its promised heavy oil shipments.²⁶ North Korea also alleged that the United States had “instigated even the IAEA to internationalize its moves to stifle the DPRK, thus putting into practice its declaration of a war against the

20. See *KCNA Detailed Report*, *supra* note 14.

21. See *id.*

22. See *id.*

23. See *id.*; see also Democratic People's Republic of North Korea, Statement Regarding Withdrawal from the NPT, Jan. 10, 2003, available at http://www2.law.columbia.edu/course_00S_L9436_001/materials%20North%20Korea.shtml.

After withdrawing from the NPT, North Korea began reprocessing the 8,000 spent fuel rods that had been under IAEA safeguards. See Ted Galen Carpenter, *Outside View: Illusions on N. Korea Nukes*, UNITED PRESS INT'L, Oct. 8, 2003, available at <http://www.upi.com/view.cfm?StoryID=20031008-050533-1217r>.

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

24. See Fredric L. Kirgis, *North Korea's Withdrawal from the Nuclear Nonproliferation Treaty*, ASIL INSIGHTS, Jan. 2003, available at <http://www.asil.org/insights/insigh96.htm>.

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

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

DPRK.”²⁷

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

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

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

E. North Korean Announcement of Potential Nuclear Deterrent Force

North Korea stated on June 9, 2003 that, “[i]f the U.S. keeps threatening the DPRK with nukes instead of abandoning its hostile policy toward Pyongyang, the DPRK will have no option but to build up a nuclear deterrent force.”³² North Korea has, however, denied ambitions to “nuclearize” the Korean Peninsula³³

27. *See id.*

28. *See id.*

29. *See id.*

30. *See DPRK, KCNA's 12 May 'Detailed Report' Says US 'Ruptured' Denuclearization Process*, KOREAN CENTRAL NEWS AGENCY (“KCNA”), May 12, 2003, translated in FEDERATION OF AMERICAN SCIENTISTS: NORTH KOREA NUCLEAR WEAPONS PROGRAM, Apr. 24, 2003, available at <http://www.fas.org/nuke/guide/dprk/nuke/dprk051203.html> [hereinafter *DPRK Says U.S. 'Ruptured' Process*]; *see also* DPRK, *U.S. to Blame for Derailing Process of Denuclearisation on Korean Peninsula*, KCNA, May 13, 2003, available at <http://www.kcna.co.jp/item/2003/200305/news05/13.htm#1>.

31. *See KCNA Detailed Report*, *supra* note 14.

32. *See DPRK 'Nuclear Deterrent Force' To Be Built If US Maintains 'Hostile Policy'*, KCNA, Jun. 3, 2003, available at <http://www.fas.org/nuke/guide/dprk/nuke/dprk060903.html> [hereinafter *DPRK Radio Statement*] (translating Statement on P'yongyang Korean Central Broadcasting Station); *see also infra* notes 63-70 and accompanying text.

33. *See DPRK Says U.S. 'Ruptured' Process*, *supra* note 30.

and purports to continue to be committed to denuclearizing the area.³⁴

II. THE NORTH KOREAN NUCLEAR PROGRAM

There is considerable uncertainty as to what, if any, nuclear weapons North Korea has. North Korea has reportedly stated that it has a nuclear weapons program³⁵ and at least suggested that it has nuclear weapons.³⁶ However, North Korea's official posture appears to be that it denies having such weapons and disputes the reports that it has admitted having them.³⁷ As to its capability to manufacture nuclear weapons, North Korea states

34. *See id.*

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

36. *See* SENATE COMM. ON FOREIGN REL., 108TH CONG., NORTH KOREA: STATUS REPORT ON NUCLEAR PROGRAM, HUMANITARIAN ISSUES, AND ECONOMIC REFORMS vii (Comm. Print 2004), available at <http://www.access.gpo.gov/congress/senate/senate11cp108.html> (reporting that in discussions with Foreign Ministry officials on the North's nuclear program following a U.S. delegation's visit to Yongbyon, "Vice Foreign Minister Kim Gye-gwan claimed that, unlike Iran and Libya, North Korea actually has weapons of mass destruction[,] and that North Korea had provided the United States with evidence of their "nuclear deterrent"); *see also* Federation of American Scientists, *North Korea Special Weapons Guide: Nuclear Weapons Program, Current Status*, Apr. 24, 2003, available at <http://www.fas.org/nuke/guide/dprk/nuke/index.html> (stating that North Korean officials admitted for first time that they possessed nuclear weapons in roundtable discussion with United States and China in Beijing on April 24, 2003); George Edmonson, *North Korea Warns U.S. it has Nukes*, ATLANTA J. CONST., Apr. 25, 2003, at A1 (citing Washington Post as reporting that top North Korean negotiator pulled Kelly aside and "in effect, told him, 'We've got nukes'"); *N. Korea 'admits having nukes'*, CNN.COM, Apr. 25, 2003, available at <http://www.cnn.com/2003/WORLD/asia.pcf/east/04/24/nkorea.us/> (reporting that Bush administration sources told CNN that North Korea admitted to having at least one nuclear bomb); Niksch, *supra* note 6, at 1 (reporting that North Korean Vice Foreign Minister Kang Sok-ju reportedly not only admitted existence of North Korea's uranium enrichment program, but also told Kelly that it possesses "more powerful" weapons).

37. *See* Niksch, *supra* note 6, at 1 (reporting that North Korea denies that any admissions were made by Vice Foreign Minister Sok-ju to Kelly); *see also* N. Korea 'admits

that it has reprocessed enough nuclear fuel rods for six plutonium bombs,³⁸ but denies that it has a program for enriching uranium.³⁹

U.S. officials have estimated that North Korea has approximately two nuclear weapons⁴⁰ and enough plutonium to pro-

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

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

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

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

40. The CIA estimates that North Korea produced one or two nuclear weapons in the early 1990's prior to the Agreed Framework. See Jon Wolfsthal, *The Intelligence 'Black Hole' over North Korea*, BBC NEWS, July 17, 2003, available at <http://news.bbc.co.uk/1/hi/world/asia-pacific/3073677.stm>; Sharon A. Squassoni, *North Korea's Nuclear Weapons: How Soon An Arsenal?*, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS 4, RS 21391, available at <http://www.fas.org/spp/starwars/crs/RS21391.pdf> (quoting Secretary of State Powell as saying that "[w]e now believe they [North Koreans] have a couple of nuclear weapons and have had them for years"); see also Untitled CIA Estimate Provided to Congress on Nov. 19, 2002, available at <http://www.fas.org/nuke/guide/dprk/nuke/cia11902.html> (estimating that North Korea has had one or two plutonium bombs since 1992) [hereinafter Untitled CIA Estimate]; Nicksch, *supra* note 6, at 8 (stating that U.S. National Intelligence Council issued revised finding in December 2001,

duce up to five warheads.⁴¹ The U.S. estimates are apparently

that North Korea possessed one, possibly two nuclear weapons); David E. Sanger, *Pakistani Says He Saw North Korean Nuclear Devices*, N.Y. TIMES, Apr. 13, 2004, at A12 [hereinafter Sanger, *North Korean Nuclear Devices*].

41. See Nicksch, *supra* note 6, at 8 (reporting that in August 2001, Secretary of Defense Donald Rumsfeld stated that "North Korea possessed enough plutonium to produce two to three, maybe even four to five nuclear warheads"). Rumsfeld's estimate is the largest official U.S. estimate as to the possible number of North Korean nuclear weapons. See *id.*; see also Director of Central Intelligence ("DCI"), U.S. Central Intelligence Agency ("CIA"), *Unclassified Report to Congress on the Acquisition of Technology Relating to Weapons of Mass Destruction and Advanced Conventional Munitions*, Jan. 1 through June 30, 2001, available at http://www.cia.gov/cia/reports/721_reports/jan_jun2001.htm#5 (stating that during period of January 1, 2001 to June 30, 2001, North Korea continued procurement of raw materials and components for its ballistic missile program from various foreign sources, especially North Korean firms based in China, and that North Korea has produced enough plutonium for one to two nuclear weapons). An unclassified CIA paper from November 2002 stated that the assessment that North Korea has enough plutonium for one or two weapons has not changed since the 1990's. See Squassoni, *supra* note 40, at 4 (citing CIA unclassified paper on North Korea dated November 19, 2002).

There is a general consensus that North Korea has the technology to produce plutonium, that it did so at least in small quantities in the 1980's and 1990's, and is likely doing so now. But estimates vary as to how much plutonium they can currently produce. See Wolfsthal, *supra* note 40.

North Korea's nuclear plant at Yongbyon reportedly can produce enough plutonium for one nuclear weapon a year. See *id.* In 1989 North Korea shut down the plant for over two-months, giving North Korea enough time to have removed the plutonium-containing fuel from the facility and extracted enough plutonium for one weapon.

However, North Korea admits to having purified only 100 grams of plutonium during this time, well short of the four kilograms required for a nuclear weapon. See *id.* Wolfsthal points out that samples from the plutonium produced suggest that North Korea's statements are not a complete picture of their nuclear program prior to the reinstatement of nuclear inspections in 1992. See *id.*

Under the 1994 Agreed Framework, North Korea shut down its Yongbyon nuclear plant and removed the 8000 spent fuel rods from the five MWe reactor. See Agreed Framework, *supra* note 3; see also Hecker Statement, *supra* note 35, at 6. The 8000 rods were placed under IAEA monitoring in exchange for two LWRs, to generate electricity and an interim supply of heavy fuel oil until the first reactor is complete. See Agreed Framework, *supra* note 3. The process of removing the rods was not completed until June 2000. See Hecker Statement, *supra* note 35, at 6. In December 2002, the IAEA inspectors were dismissed by North Korea and no one else has had access to the 8000 rods since. See *id.* North Korean officials stated to Hecker that they removed all 8000 fuel rods from the spent fuel storage pool and shipped them to the Radiochemical Laboratory, a plutonium reprocessing facility. See *id.* They stated that they reprocessed all 8000 spent rods in a continuous campaign from mid-January 2003 to June 2003. See *id.* Hecker confirmed that the rods were no longer in the spent fuel pool. See *id.* The Radiochemical Laboratory confirmed that North Korea possesses an industrial-scale reprocessing facility in good repair. See *id.* at 7.

Gary Samore, a former deputy to the chief negotiator of the 1994 Agreed Framework, concluded that North Korea's nuclear capacity could increase greatly in over the

based on spy satellite surveillance,⁴² inference from available information as to what North Korea has the capability of doing,⁴³ and North Korea's purported statements on the matter, although additional information has recently come from the Pakistani debriefing of Dr. Abdul Qadeer Khan, the "father of the Pakistani bomb," who reportedly saw two to three North Korean plutonium nuclear devices in 1999 while selling North Korea equipment and know-how to North Korea for the enrichment of uranium.⁴⁴ The United States apparently does not contend that it has seen such weapons. U.S. sources have acknowledged that the clandestine nature of the North Korean nuclear program,⁴⁵ the closed nature of North Korea's society,⁴⁶ and the fact that North Korea has apparently not tested nuclear

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

42. In June 2003, U.S. satellites collected inconclusive evidence that krypton-85, a gas released during reprocessing, was being emitted from secret development facilities located near the Chinese border. *See* David E. Sanger, *Intelligence Snarl over North Korea*, INT'L HERALD TRIB., Oct. 15, 2003, available at <http://www.iht.com/articles/113591.html>. In early 2003, U.S. spy satellites observed rods being taken away from a storage shed, but it is unclear where they were being taken. *See id.*; *see also* Wolfsthal, *supra* note 40; Squassoni, *supra* note 40 (stating that tests to detect krypton-85 were initially inconclusive but eventually suggested that some reprocessing had taken place). Kim Dae Ho, who worked on the North Korea nuclear program for ten years until defecting in 1994, stated that the hardest part of hiding the nuclear processing plant from IAEA "was preventing the release of tell-tale krypton into the atmosphere." Jasper Becker, *Building the Bomb: North Korean Exile Reveals 15 Year History of Nuclear Cheating*, INDEP., Feb. 11, 2004.

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

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

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

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

46. *See* Untitled CIA Estimate, *supra* note 40.

weapons make it difficult to know what weapons they have.⁴⁷

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

Independent sources add little clarity or certainty. China and South Korea have recently questioned the accuracy of U.S. intelligence as to North Korea's nuclear weapons, particularly after the U.S. intelligence failure or manipulation as to Iraq.⁴⁸ Russia also questioned the matter in 1998.⁴⁹ Reports from a recent unofficial delegation of U.S. nongovernmental experts,⁵⁰ who were granted access to North Korean nuclear reactors, generally confirmed North Korea's capability to produce certain volumes of plutonium⁵¹ and reported the assertions of North Korean officials as to their having reprocessed some 8000 fuel rods to extract plutonium metal in 2003.⁵² However, the delegation was not able to confirm whether North Korea had reprocessed the fuel rods,⁵³ whether it has a program for enriching uranium,⁵⁴ whether it has the capacity to produce nuclear weapons grade materials⁵⁵ or whether it has nuclear weapons at all.⁵⁶

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

48. See John Wolfsthal, *Crying Wolf on Iraqi WMD Costs U.S. Credibility on North Korea*, CHRISTIAN SCI. MONITOR, Jan. 29, 2004; see also Stephen Collinson, *U.S. Credibility on North Korea on Line After Iraq Intelligence Fiasco*, AGENCE FRANCE-PRESSE, Feb. 1, 2004.

49. *Russia Rules out Possibility that Pyongyang has Nuclear Weapons*, *supra* note 47.

50. See generally Hecker Statement, *supra* note 35, at 3.

51. See *id.*; see also Pritchard, *supra* note 39.

52. See Hecker Statement, *supra* note 35, at 3; see also Pritchard, *supra* note 39.

53. See Hecker Statement, *supra* note 35, at 3; see also Pritchard, *supra* note 39.

54. See Hecker Statement, *supra* note 35, at 11.

55. See *id.* at 8, 10.

56. See *id.* at 3; see also Pritchard, *supra* note 39.

III. *THE NORTH KOREAN AND U.S. POSITIONS AS TO THE LAWFULNESS OF NORTH KOREA'S NUCLEAR WEAPONS PROGRAM*

A. *The North Korean Position*

In the Nuclear Weapons Advisory Case, North Korea took the position before the ICJ that “the threat or use of nuclear weapons in any case is violation [sic] of the U.N. Charter and the existing international laws,”⁵⁷ and that “the use of nuclear weapons by a State in a war or other armed conflict is a clear breach of its obligations under the international conventions”⁵⁸ North Korea asserted that the use of nuclear weapons would be a breach of the Charter of the United Nations and the IAEA mandate, “which seeks that the atomic energy should only be used for peaceful purposes”⁵⁹ Further, North Korea stated that “it is deplorable that the legality of the threat or use of nuclear weapons is debated when complete elimination of nuclear weapons is under serious discussion on the international arena.”⁶⁰

By subsequently withdrawing from the NPT and accusing the United States of having breached the Joint Declaration based on nuclear threats, North Korea appears to be invoking a theory of self-defense.⁶¹ North Korea stated as follows in its May 12, 2003 *Detailed Report*:

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

57. Letter from Pak Gil Yon, Ambassador and Permanent Representative to the U.N., DPRK, to Mohammed Sedjaoui, President, International Court of Justice (May 18, 1995), available at http://212.153.43.18/icjwww/icasas/iunan/iunan_ipleadings/iunan_ipleadings_199506_WriStats_01_Korea.pdf (last visited Apr. 10, 2004) [hereinafter *May 18, 1995 Letter*].

58. Letter from Kim Yong Nam, Minister of Foreign Affairs, DPRK, to Bernard Noble, Deputy-Registrar, International Court of Justice (Jan. 26, 1994), available at http://212.153.43.18/icjwww/icasas/ianw/ianw_pleadings/ianw_ipleadings_199409_WriStats_02_Korea.pdf (last visited Apr. 10, 2004) [hereinafter *Jan. 26, 1994 Letter*].

59. *Id.*

60. *May 18, 1995 Letter*.

61. See, e.g., *DPRK Says U.S. 'Ruptured' Process*, *supra* note 30. See also *Pyongyang Says Disarmament Will Only Lead to Invasion*, ASSOCIATED PRESS (TAIWAN NEWS), Mar. 19, 2005, available at <http://www.etaiwannews.com/Asia/2004/03/19/1079661874.htm> (reporting that North Korea has restated its position that inspections and disarmament will only lead to U.S. invasion, as is proven by U.S.-led invasion in Iraq).

ringleader that violated the North-South Declaration of the Denuclearization of the Korean Peninsula.⁶²

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

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

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

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

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

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

North Korea further asserted:

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

62. *DPRK Says U.S. ‘Ruptured’ Process*, *supra* note 30.

63. *See id.*

64. *See id.*

65. *See id.*

66. *See id.*

ing out on the Korean Peninsula and guaranteeing peace and security in the work.⁶⁷

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

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

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

The DPRK's intention to build up a nuclear deterrent force is not aimed to threaten and blackmail others but reduce conventional weapons under a long-term plan and channel manpower resources and funds into economic construction and the betterment of people's living.

The DPRK will build up a powerful physical deterrent force capable of neutralizing any sophisticated and nuclear weapons with less spending unless the U.S. gives up its hostile policy toward the DPRK.⁶⁹

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

67. *See id.*

68. *See DPRK Radio Statement, supra* note 32. Upon withdrawing from the NPT, North Korea considered itself free from IAEA safeguards, stating that it now enjoyed "the same legal status as the United States and other countries possessing nuclear weapons . . ." Charles Whelan, *North Korea Admits Nuclear Weapons Drive, Blames Washington*, AGENCE FRANCE PRESSE, June 9, 2003, at Int'l News.

69. *See DPRK Radio Statement, supra* note 32.

70. *See* Niksch, *supra* note 6, at 1-2, 7; *see also* DPRK Says U.S. 'Ruptured' Process, *supra* note 30. The North Korean position is as follows:

[W]e proposed several times to hold direct talks between the DPRK and the United States and firmly insisted on settling the nuclear issue by concluding a non-aggression treaty so as to by all means prevent the rupture of the process

IV. THE U.S. POSITION⁷¹

While the United States continually has objected to North

of denuclearization of the Korean Peninsula even when maneuvers to abrogate the DPRK-US Agreed Framework and scrap the North-South Joint Declaration of the Denuclearization reached the extreme.

Id.; see also Paul Kerr, *U.S. and North Korea at Impasse Over Talks*, ARMS CONTROL TODAY, Jan./Feb. 2004, available at http://www.armscontrol.org/act/2004_01-02/NK.asp. North Korea wants the United States to "issue security assurances, normalize bilateral diplomatic relations, refrain from hindering North Korea's 'economic cooperation with other countries' and increase food aid," in addition to completing the nuclear reactor project and resuming the fuel shipments promised under the Agreed Framework. See *id.*; see also Gady A. Epstein & Mark Matthews, *North Korea Lays out Nuclear Intent; Envoy's at Beijing Talks Told North Korea Will Test Bomb, Prove it Can Deliver One; U.S.: 'Exactly what we expected'; Diplomats from Russia, South Korea, Japan 'Taken Aback'; Chinese 'Angry'*, BALTIMORE SUN, Apr. 29, 2003, at 1A (reporting North Korea seeks non-aggression pact from United States in return for abandoning its nuclear weapons program); Edmonson, *supra* note 36.

North Korea reportedly told a visiting delegation of congressional staffers in August 2003 that it would stop its ballistic missile sales to countries such as Iran in exchange for U.S. compensation of U.S.\$1 billion annually. See Niksch *supra* note 6, at 8. In the April 2003 Beijing talks, North Korea reportedly asked that the United States: 1) provide it with energy, presumably electricity; 2) facilitate the completion of LWRs pursuant to the terms of the Agreed Framework; 3) remove North Korea from the list of terrorist countries; 4) establish full diplomatic relations with North Korea; and 5) issue a written, legal security guarantee against either a nuclear or conventional attack against North Korea. See Niksch, *supra* note 6, at 3. North Korea reportedly stated that in exchange, it would dismantle its nuclear weapons program as the final step. See *id.*

71. The U.S. position on North Korea's nuclear program has evolved over time. When the CIA first identified the North Korean nuclear program in the early 1980s, it did not treat the matter as cause for concern, but rather focused on North Korea's energy concerns as the rationale for its nuclear ambitions. See Robert A. Wampler, *North Korea and Nuclear Weapons: The Declassified U.S. Record*, Apr. 25, 2003, available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB87/>.

The Reagan administration passed on an opportunity to address this issue when China approached the United States to broker direct talks between the United States and North Korea. See *id.* Interestingly, it was then-Assistant Secretary of State for East Asian and Pacific Affairs, Paul Wolfowitz's ideological opposition to any Chinese Intervention that prevented pursuit of the idea. See CHINA CONFIDENTIAL: AMERICAN DIPLOMATS AND SINO-AMERICAN RELATIONS 1945-1996 (Nancy Bernkopf Tucker ed., 2001).

The first Bush administration expressed concern over the developing North Korean nuclear capacities in violation of the NPT and asked China to request that North Korea abide by its commitments under the NPT regime. See *id.* Simultaneously, the United States was also pressuring South Korea to give priority to denuclearization as a requisite for Korean reunification. See *id.*

The Clinton administration pursued a strategy of direct engagement with North Korea, negotiating a number of international agreements, including the Agreed Framework in 1994 in hopes of keeping the North Korean nuclear program in check via diplomacy, international inspection, and regulatory regimes. See Agreed Framework, *supra* note 3; see also Tyler Marshall, *Threat from N. Korea is Growing GOP*

Warns; Security: Report, Faulting Clinton Engagement Policy, Says Asian Nation Continues to Develop Nuclear Capability, L.A. TIMES, Nov. 4, 1999, at A4.

The first position the administration of President George W. Bush took towards the nuclear weapons program of North Korea was an extensive period of policy analysis, followed by a skeptical view of the utility of negotiation with North Korea. See Seung-Hwan Kim, *Anti-Americanism in Korea*, 26 WASH. Q. 109 (2002).

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

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

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

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

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

The military has provided three rationales for this redeployment: 1) the need for South Korean forces to take a more active role in defense of the DMZ; 2) the "tripwire"

Korea's development of nuclear weapons⁷² and in the past has asserted North Korea's violation of its obligations under the NPT, the Joint Declaration, the Agreed Framework, and North Korea's IAEA safeguards agreement,⁷³ it does not appear to have based its objections on the ground that the use or threat of use of nuclear weapons is unlawful.⁷⁴ The United States also has objected to North Korea's withdrawal from the NPT, but it does not appear to have set forth a legal basis for its objections.⁷⁵

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

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

72. Regarding North Korea and its nuclear weapons program, President George W. Bush, in his 2003 State of the Union address, stated, "[N]uclear weapons will bring only isolation, economic stagnation, and continued hardship. The North Korean regime will find respect in the world and revival for its people only when it turns away from its nuclear ambitions." President George W. Bush, *State of the Union Address* (Jan. 28, 2003), available at <http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html> [hereinafter 2003 State of the Union Address].

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

74. The U.S. State Department merely stated that the North Korean withdrawal from the NPT was "regrettable" and urged North Korea to dismantle its nuclear weapons program. *See N. Korea Move on inter-Korean Nuclear Accord 'Regrettable' — U.S. State Department*, AFX EUROPEAN FOCUS, May 13, 2003. The United States may be taking this position since it, unlike North Korea, espoused the legality of nuclear weapons before the ICJ. *See supra* notes 57-60 and accompanying text (setting forth North Korea's statements to ICJ as to the illegality of nuclear weapons); *see also infra* notes 353, 371, 377, 397, 417, 430-31, 433, 447, 451, 461-63, 465-66, 477 and accompanying text (setting forth U.S. position before ICJ espousing general legality of nuclear weapons).

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

United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, 26 U.S.T. 1334, available at <http://www.state.gov/www/global/arms/treaties/abm/abm2.html> [hereinafter ABM Treaty]; see also *America Withdraws from ABM Treaty*, BBC NEWS, available at <http://news.bbc.co.uk/1/hi/world/americas/1707812.stm> (Dec. 13, 2001).

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

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

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

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

News sources cited the end of the inter-Korean nuclear accord as the last legal barrier to the North Korean nuclear program. See *id.*; see also *S. Korea Says Nuclear Accord with N. Korea Still Valid*, *supra* note 75; *U.S.-N.Korea Tension Grows*, AP/CBS NEWS, May 14, 2003, available at <http://www.cbsnews.com/stories/2003/05/14/world/main53845.shtm>.

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

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

Alternatively, another reason for the U.S. pursuit of missile defense is to permit the United States to intervene in regional hot spots without fear of retaliation against U.S. territory. Nick Childs, *Analysis: Uncertain End to ABM Treaty*, BBC NEWS, June 13, 2002.

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

A. Korean War

From 1905 until the end of World War II, Korea was a colony of the Japanese empire.⁷⁶ Pursuant to U.S./Soviet agreement following the war, Korea was divided into U.S. and Soviet sectors, pending Korean independence at some unspecified time in the future.⁷⁷ The Russians, who previously had been sweeping south through Manchuria, agreed to limit their advance at the 38th parallel.⁷⁸ The area north of the 38th parallel was to be occupied by the Soviet Union and that to the south by the United States.

Russian forces departed North Korea peacefully, leaving behind a Stalinist regime under Kim II Sing and the North Korean Peoples' Army.⁷⁹ Operating under a U.S. military administration directed by General Douglas MacArthur from headquarters in Tokyo,⁸⁰ the United States backed an administration headed by Syngman Rhee, who had previously been elected president of

When North Korea withdrew from the NPT, John Bolton, Undersecretary of State for Arms Control and International Security, stated, "[I]t is hard to see how we can have conversations with a government that has blatantly violated its agreements." John Burroughs, *Nonproliferation Treaty Applies to Both North Korea and United States*, in *BOMBS AWAY!*, Spring 2003, available at <http://lcnp.org/pubs/BASpring03/article3.htm> (citing *North Korea Says Nuclear Program Can Be Negotiated*, N.Y. TIMES, Nov. 3, 2002, at A1).

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

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

76. See MAX HASTINGS, *THE KOREAN WAR* 25 (1987); see also Michael Hickey, *The Korean War: An Overview*, available at http://www.bbc.co.uk/history/war/coldwar/korea_hickey_01.shtml. See generally AMERICAN MILITARY HISTORY: ARMY HISTORICAL SERIES, OFFICE OF THE CHIEF MILITARY HISTORY, UNITED STATES ARMY ch. 25, available at <http://www.army.mil/cmh-pg/books/amh/AMH-25.htm>.

77. See HASTINGS, *supra* note 76, at 27.

78. See *id.*

79. See *id.* at 43.

80. See *id.* at 27; see also Hickey, *supra* note 76, at 46.

the Korean Provisional Government while in exile and was elected South Korean president in 1948; President Rhee's openly declared aim was the imposition of national unity by force.⁸¹

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

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

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

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

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

84. See AMERICAN MILITARY HISTORY, *supra* note 76.

85. See *id.* at 25.

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

87. U.S. occupation troops had only just left Korea in June 1948, on the basis that they had done all that was necessary to aid in South Korea's transition from Japanese protectorate to independent state. See HASTINGS, *supra* note 76, at 42.

Far East Fleet along the Korean coast.⁸⁸ In total, twenty Nations sent military assistance to Korea and were led by a single United Nations commander, General Douglas MacArthur of the United States.⁸⁹

In mid-September 1950, General MacArthur, leading two divisions of U.N. troops, pushed the North Koreans back across the 38th parallel and proceeded deep into the north.⁹⁰ China, in response to U.N. forces approaching its border with Korea, launched a preemptory attack, pushing the U.N. forces south.⁹¹

By January 1951, U.N. forces were defending a line well to the south of Seoul.⁹² The United States and its allies regrouped and by mid-April 1951 were back in the area of the 38th parallel, at which time China launched a spring offensive. This time the line stabilized in the general area of the 38th parallel, where it remained for the next two years.⁹³

In mid-1951 the land battle had reached a stalemate, and both sides agreed to go to the conference table for armistice talks. The negotiations continued for two years.⁹⁴ In July 1953, an armistice was reached.⁹⁵

B. *Armistice Agreement*

The Korean Armistice Agreement (“Armistice Agreement”) was signed on July 27, 1953 by the Commander-in-Chief of the United Nations Command, representing U.N. forces, and the Supreme Commander of the Korean People’s Army and the Commander of the Chinese People’s Volunteers, representing North Korean and Chinese forces.⁹⁶ Providing for a cease-fire, the Armistice Agreement established a military demarcation line

88. See Hickey, *supra* note 76, at Introduction. The U.N.’s response was unprecedented in that it was the first time since its founding that the U.N. reacted to aggression with a decision to use force. See AMERICAN MILITARY HISTORY, *supra* note 76.

89. See WALTER G. HERMES, UNITED STATES ARMY IN THE KOREAN WAR: TRUCE TENT AND FIGHTING FRONT 67 (Stetson Conn ed., 1966), available at <http://www.army.mil/cmh-pg/books/korea/truce/fm.htm>.

90. See Hickey, *supra* note 76, at *China’s Intervention*.

91. See *id.*

92. See *id.*

93. See *id.*

94. See *id.*

95. See *infra* notes 111-16 and accompanying text.

96. See Text of the Korean War Armistice Agreement, July 27, 1953, available at <http://news.findlaw.com/hdocs/docs/korea/kwarmagr072753.html>. The Armistice Agreement is purely a military document. No Nation is a signatory.

and demilitarized zone, and created the Military Armistice Commission to supervise the Agreement.⁹⁷ The Armistice Agreement was intended to be temporary, pending the parties' agreement to a peace treaty following a political conference that was set to take place within three months. The conference's goal was to resolve all outstanding questions, including the withdrawal of all foreign forces from Korea and a peaceful settlement to the Korean question.⁹⁸

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

C. *North Korean Provocations According to the United States*

Despite the Armistice Agreement, there continued to be provocations and conflicts among the parties. The U.S. Congressional Research Service ("CRS"), in a study updated in 2003, documented some 124 provocations by North Korea against South Korea, the United States, and/or Japan between June 1950 and March 2003.¹⁰¹

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

97. *See id.* arts. I(1), II(A)-(B).

98. *See id.* art. IV.

99. *See* Pak Chol Gu, *Replacement of the Korean Armistice Agreement: Prerequisite to a Lasting Peace in the Korean Peninsula*, 4 DPRK PERSPECTIVES ON ENDING THE KOREAN ARMISTICE (1997), available at http://www.nautilus.org/fora/security/4a_DPRKonKA.html.

100. *See* Agreement on Reconciliation, Non-Aggression and Exchanges and Cooperation Between North and South, entered into Force on Feb. 19, 1992, available at http://www.korea.net/issue/sn/summit/summit_012106.asp; *see also* Joint Declaration, *supra* note 2; Chol Gu *supra* note 99, at 1; Federation of American Scientists, *supra* note 36.

101. *See* Nanto, *supra* note 35.

102. *See id.* at *Summary*. "North Korea is reported to have infiltrated a total of 3,693 armed agents into South Korea from 1954 to 1992 . . ." *Id.* at 2. North Korea was particularly active in the latter half of the 1960s with 20% of the infiltrations occurring during 1967 and 1968. *See id.* at *Summary*. In April 1996, "[o]n three occasions, a combined total of seven hundred armed North Korean troops crossed the military demarcation line into the DMZ at Panmunjom . . . in violation of the Korean Armistice Agreement ("KAA)". *Id.* at 13.

Park Chung Hee in 1968 and 1974; an assassination attempt on South Korean President Chun DooHwan in Rangoon, Burma (Myanmar) in 1983;¹⁰³ and the mid-air bombing of a South Korean Boeing 707 passenger plane in 1987.¹⁰⁴ In 1968, North Korea captured a U.S. surveillance ship, the U.S.S. Pueblo, killing one sailor and holding eighty-two crew members prisoner for eleven months.¹⁰⁵ There have also been numerous direct military confrontations between North Korea and the United States over the years.¹⁰⁶

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

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

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

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

105. *See id.* at 4.

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

107. *Id.* at 16.

108. *Id.* at 24.

109. *See id.* at 35; *see also* Federation of American Scientists, *supra* note 36.

110. *See* Niksch, *supra* note 6; *see also* Federation of American Scientists, *supra* note 36.

past several decades, establishing it as a leading ballistic missile proliferator.¹¹¹ Its markets have included Egypt, Iran, Libya, Pakistan, Syria, and the United Arab Emirates,¹¹² yielding it hundreds of millions of dollars annually.¹¹³

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

North Korea's proliferation efforts appear to be pervasive and ongoing.¹¹⁶ In December 2002, a North Korean ship was

111. See Joseph S. Bermudez, *A History of Ballistic Missile Development in the DPRK*, 12 OCCASIONAL PAPER, No. 2, at 1 (Monterey Inst. of Int'l Stud. 1999), available at <http://cns.miis.edu/pubs/opapers/op2/op2.pdf> (last visited Apr. 12, 2004).

112. See *id.* Iraq would have been included as one of North Korea's customers had the deal gone through. See Bob Drogin, *Botched Iraqi Deal is Detailed: CIA Advisor Says Hussein Lost \$10 Million in a Plan to Smuggle North Korean Technology That Never Went Through*, L.A. TIMES, Oct. 4, 2002 (reporting that Saddam Hussein lost \$10 million in botched deal with Kim Jong Il for North Korean ballistic missile technology and other prohibited missile equipment prior to war).

113. See Andrew Ward, *Trade Ties Grow Between Two Koreas*, FIN. TIMES, Dec. 10, 2003, at 2; see also Douglas Frantz, *North Korea's Nuclear Success is Doubtful: Experts Question U.S. Claims About North's Atomic Abilities, Warning a Showdown Based on Dubious Evidence Could Further Damage Trust*, L.A. TIMES, Dec. 9, 2003, at A1 (stating that selling missiles and related technology is North Korea's chief source of hard currency).

114. See Niksch, *supra* note 6, at 1. Most of North Korea's exports are short range missiles (but it has also exported medium and possibly long range missiles). See Bermudez, *supra* note 111; U.S. North Korea at 'Critical Juncture' Over Missiles, CNN.COM, available at <http://www.cnn.com/world/asiapcf/9811/20/korea.missiles/index.html>. North Korea is believed to have provided between twelve and twenty-five complete No-Dong medium-range missiles to Pakistan in the late 1990s. See Niksch, *supra* note 6, at 9.

115. See Squassoni, *supra* note 40, at 2 (quoting *Pakistan's Benazir Oversaw Korea Nuclear Deal*—sources, REUTERS NEWS, Nov. 20, 2002).

116. Apropos of U.S. allegations as to North Korea's proliferation of ballistic missiles, it is interesting to review U.S. proliferation activities. The United States dominates the international market for arms. In 2002, it had worldwide sales of some "\$13.3 billion, or 45.5 percent of global conventional weapons sales, a rise from \$12.1 billion in 2001." Thom Shanker, *U.S. Remains Leader in Global Arms Sales, Report Says*, N.Y. TIMES, Sept. 25, 2003, at A12.

In 2002, the Pentagon had an estimated \$15.534 billion in proposed conventional arms transfer agreements with twenty-nine countries. See ARMS CONTROL ASSOC., PROPOSED U.S. ARMS EXPORT AGREEMENTS FROM JANUARY 1, 2002 TO DECEMBER 31, 2002, available at <http://www.armscontrol.org/factsheets/armexp2002.asp> (last visited Apr. 12, 2004).

Kuwait was at the top of the list of all potential arms recipients with requests for \$2.29 billion in weaponry that included eighty AIM-120C Advanced Medium Range Air-to-Air Missiles. See *id.* Ranking second and third respectively were the United Arab Emirates ("U.A.E.") and Taiwan. See *id.*

Included in the U.A.E.'s order were 237 Sea Sparrow ship-to-air missiles. *See id.* Taiwan ordered 290 TOW-2B anti-tank missiles with spare and repair parts, four Kidd-class guided missile destroyers, 248 SM-2 Block IIIA Standard ship-to-air missiles, 323 RGM-84L Block II Harpoon anti-ship missiles. *See id.*

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

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

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

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

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

In addition to its sales of military supplies throughout the world, United States military hardware is located throughout the world, both on foreign bases of allies and on ships and submarines throughout the high seas.

found in the Persian Gulf carrying Scud missiles to Yemen.¹¹⁷ Recently, Nigeria has shown interest in acquiring missile technology from North Korea. According to a Nigerian government spokesman, visiting North Koreans showed Nigerian military leaders a “catalog of what they have,” but “Nigeria has not taken any concrete steps in acquiring it yet.”¹¹⁸ According to David Kay, a U.S. weapons inspector, North Korean dictator Kim Jong Il cheated Saddam Hussein out of \$10 million in an aborted deal to smuggle ballistic missile technology and other prohibited military equipment to Iraq shortly before the recent war.¹¹⁹

Notwithstanding being a member of the Biological Weapons Convention, which largely prohibits the possession of biological weapons,¹²⁰ North Korea is believed to have pursued such weapons and methods through which to weaponize them since the 1960's through dual-use acquisitions,¹²¹ and it is currently believed to possess anthrax, cholera, plague, smallpox, and yellow fever, among others.¹²² North Korea also ostensibly has a well-developed chemical weapons program.¹²³

117. *See id.* at 24.

118. Editorial, *Missiles for Sale: North Korea Spreading Weapons Technology to Largest African Nation*, COLUMBUS (Ohio) DISPATCH, Jan. 30, 2004, at 10A.

119. *See* Drogin, *supra* note 112.

120. *See* Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, 26 U.S.T. 571, 1015 U.N.T.S. 163 (1972) [hereinafter Biological Warfare Convention]. North Korea joined on March 13, 1987.

121. *See* DCI, *supra* note 41; *see also* Federation of American Scientists, *North Korea Special Weapons Guide: Chemical Weapons Program*, at <http://www.fas.org/nuke/guide/dprk/cw/index.html> (noting that North Korea obtained some of these chemicals from Japan through contract for delivery of agricultural chemicals, allowing them to make tabun, mustard gas and later chlorine and phosphorous-containing organic compounds). It is also believed that North Korean intelligence agents are involved in clandestine operations to acquire technology and information to aid in their chemical weapons program. *See* U.S. Dept. of Defense, *Northeast Asia*, in PROLIFERATION: THREAT AND RESPONSE (Report 1997), available at http://www.defenselink.mil/pubs/prolif/ne_asia.html.

122. *See* Federation of American Scientists, *North Korea Special Weapons Guide: Biological Weapons Program*, available at <http://www.fas.org/nuke/guide/dprk/bw/index.html> (last visited Apr. 12, 2004).

123. North Korea is not a signatory to the Chemical Weapons Convention. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Senate Treaty Doc. 103-21, 32 I.L.M. 800 (1993), available at http://www.opcw.org/html/db/cwc/eng/cwc_frameset.html.

North Korea is believed to have acquired and developed its chemical and biological weapons in part through lax export controls in China and Japan. *See Taking the Risk of Mass Destruction Seriously*, S. CHINA MORNING POST, Jan. 30, 2004, at 13. Recently the

Although North Korea denies possession or intent to use chemical or biological weapons,¹²⁴ the United States and others believe that North Korea possesses large quantities of chemical and biological agents¹²⁵ that can be delivered by missile warheads and other munitions,¹²⁶ including “domestically produced artillery, multiple rocket launchers, mortars, aerial bombs, and ballistic missiles.”¹²⁷ As of 1998, the Federation of American Scientists had identified twenty special weapons facilities in North Korea that may be producing, storing, or developing chemical or biological weapons.¹²⁸ South Korean intelligence sources indicate that, as of 1999, “North Korea maintain[ed] eight chemical factories, four research facilities, and six storage facilities for mass producing chemical agents.”¹²⁹ As outlined in a White Paper published by the South Korean Ministry of Defense in 1999, North Korea is estimated to have some 5,000 pounds of chemical weapons — some capable of reaching the

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

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

124. *See Sheer Sophism*, KOREAN CENTRAL NEWS AGENCY OF DEMOCRATIC PEOPLE’S REPUBLIC OF KOREA, Mar. 28, 1999, *available at* <http://www.kcna.co.jp/item/1999/9903/news03/28.htm>.

125. *See* John R. Bolton, U.S. Under Secretary for Arms Control and International Security, *Beyond the Axis of Evil: Additional Threats from Weapons of Mass Destruction*, Remarks to the Heritage Foundation (May 6, 2002), *available at* <http://www.state.gov/t/us/rm/9962.htm> (stating that North Korea has developed biological weapons and that United States believes that North Korea has stockpiled chemical weapons). *See also* U.S. DEPT. OF DEFENSE, NORTH KOREA COUNTRY HANDBOOK: MARINE CORPS INTELLIGENCE ACTIVITY 41-42 (May 1997), *available at* <http://www.fas.org/nuke/guide/dprk/nkor.pdf> (last visited Apr. 16, 2004).

126. *See* DCI, *supra* note 41.

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

128. Federation of American Scientists, *North Korea Special Weapons Guide: Special Weapons Facilities*, *available at* <http://www.fas.org/nuke/guide/dprk/facility/index.html>.

129. Ministry of National Defense, Republic of Korea, *White Paper 1999*, pt. 1, ch. 3, sec. 3, *available at* <http://www.mnd.go.kr/english/html/02.htm>.

southern tip of the Korean Peninsula.¹³⁰ North Korea has reportedly devoted significant resources to defensive measures for protecting its population from the effects of chemical weapons, arguably to provide greater latitude for their use in combat.¹³¹

On January 29, 2002, just four months after the September 11th attacks on New York and the Pentagon, President George W. Bush issued his State of the Union address setting forth, *inter alia*, his administration's two objectives in the war on terror: (1) to "shut down terrorist camps, disrupt terrorist plans, and bring terrorists to justice,"¹³² and (2) to "prevent the terrorists and regimes who seek chemical, biological or nuclear weapons from threatening the United States and the world."¹³³ In his discussion of the second objective, President Bush referred to the three States at the top of his list of "regimes that sponsor terror [and threaten] America or our friends and allies with weapons of mass destruction," as an "axis of evil."¹³⁴

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

130. See The Henry L. Stimson Center, *North Korean Chemical and Biological Weapons Threats Elaborated*, 3 CBW CHRON. 1, Feb. 2000, available at <http://www.stimson.org/cbw/?sn=cb20020113258>. See also Charles Lee, *U.S., S. Korea Conduct Military Exercise*, UNITED PRESS INT'L, Oct. 26, 1999. In 1996, Jane's Intelligence Review estimated that during peacetime North Korea was capable of producing 4,500 tons of chemical weapons annually, expanded to 12,000 tons in wartime. See *Armed Forces: North Korea*, JANE'S SENTINEL SECURITY ASSESSMENT, Feb. 5 2004.

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

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

132. See President George W. Bush, *State of the Union Address* (Jan. 29, 2002), available at <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html> [hereinafter 2002 State of the Union Address]. In his discussion of the first objective, President Bush lauded Pakistan and President Musharraf for "now cracking down on terror." *Id.*

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

134. See 2002 State of the Union Address, *supra* note 132.

plotted to develop anthrax, and nerve gas, and nuclear weapons for over a decade.”¹³⁵ President Bush went on to outline the general strategies to be followed by the United States against the threat posed by the axis of evil and States like them, including the development and deployment of an effective missile defense to protect American and its allies from attack and preemption.¹³⁶

David Frum and Richard Perle in their recent book, *An End to Evil*, make the case that North Korea — along with Iran, Libya, Saudi Arabia and Syria — are “terrorist states,” requiring aggressive action by the United States if it is to win the war on terror, and “we don’t have much time.”¹³⁷ Frum and Perle support the approach of preemptive attack followed by the current Bush administration.¹³⁸ Pursuant to this approach, which is stated to be proven by our experience with bin Laden, they contend that, “the responsible thing to do when confronted by a foreign threat is to act when we *can*, and the earlier the better.”¹³⁹ They state:

135. *See id.*

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

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

138. *See, e.g.*, FRUM & PERLE, *supra* note 137, at 34-35.

139. *Id.* at 35.

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

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

140. *Id.*

141. *See id.* at 101.

142. *See id.* at 103.

143. *See id.* at 103.

144. *See id.* at 103-104. The preemptive strike approach has generated some support, although it is generally contrary to established international law. *See, e.g.,* William H. Taft IV & Todd F. Buchwald, *Agora: Future Implications of the Iraq Conflict: Preemption, Iraq, and International Law*, 97 AM. J. INT'L L. 557 (July 2003) (arguing that United States had firm basis for using preemptive force in Iraq, based on Iraq's past actions and threat Iraq posed, as seen over protracted period of time). Citing President Bush's *National Security Strategy*, Taft and Buchwald argue that it would be irresponsible to ignore adversaries who "rely on acts of terror and, potentially, the use of weapons of mass destruction — weapons that can be *easily concealed, delivered covertly, and used without warning.*" *Id.* at 557 n.1 (citing *The National Security Strategy of the United States of America* 15 (Sept. 17, 2002), available at <http://www.whitehouse.gov/nsc/nss.pdf>). *But see* Ivo Daalder, Policy Implications of the Bush Doctrine on Preemption, Memorandum to Members of the Council of Foreign Relations/American Society of International LawASIL Roundtable on Old Rules/New Threats, available at <http://www.cfr.org/publication.php?id=5251> (distinguishing between preventative war and preemptive attack). Daalder defines "preventative war" as "a premeditated attack of one state against another, which is not provoked by any aggressive action of the state being attacked against the state initiating the conflict." *Id.* In contrast, he defines a "preemptive attack" as one "launched only after the state being attacked has either initiated or has given a clear indication that it will initiate an attack." *Id.* Daalder concludes that the justification for war on Iraq, a belief that Baghdad would soon acquire nuclear weapons which it would then use to threaten others, is contrary to historical precedent. *See id.*; *see also* Jane E. Stromseth, *Agora: Future Implications of the Iraq Conflict: Law and Force After Iraq: A Transitional Moment*, 97 AM. J. INT'L L. 628, 638 n.50 (July 2003) (stating that "in the absence

credible build-up by the United States for a possible strike against North Korea will prompt China to assert pressure on North Korea to bring it into line.¹⁴⁵ Following such an approach, the authors project in time “all of Korea will be united in liberty.”¹⁴⁶

D. U.S. Provocations According to North Korea

North Korea claims that the United States has nuclearized the Korean Peninsula and is pursuing aggressive policies throughout the world.¹⁴⁷ North Korea contends that, since the signing of the Armistice Agreement, the United States has subjected North Korea to persistent and direct nuclear threats, turning “South Korea into a nuclear base [that is] a direct and crucial threat to peace on [the Korean Peninsula and Asia].”¹⁴⁸

North Korea asserts that the United States introduced nuclear weapons and related missiles and artillery systems into the area in the 1950’s after the Armistice Agreement, and readied its combat forces in the area to wage atomic warfare.¹⁴⁹ This made South Korea one of the most substantial U.S. bases for forward deployed nuclear weapons in the world.¹⁵⁰

North Korea points to the fact that, on July 15, 1957, U.S. Army officials announced that combat forces would be capable of waging an atomic war from South Korea, and that in 1958, the United States announced and displayed its missile and artillery systems deployed in South Korea.¹⁵¹ North Korea states that by 1970 the United States revealed during Congressional defense

of an imminent threat of attack, it would be hard to justify such action legally within the right of self-defense under the U.N. Charter as currently understood”); Lori Fisler Damrosch & Bernard H. Oxman, *Agora: Future Implication of the Iraq Conflict*, 97 AM. J. INT’L L. 553 (debating whether U.S. invasion of Iraq destroyed system of governance restricting use of force under U.N. Charter); John Alan Cohan, *The Bush Doctrine and the Emerging Norm of Anticipatory Self-Defense in Customary International Law*, 15 PAGE INT’L L. REV. 283 (2000).

145. See FRUM & PERLE, *supra* note 137, at 104.

146. See *id.*

147. DPRK Says U.S. ‘Ruptured’ Process, *supra* note 30.

148. *Id.*

149. See *id.*

150. See *id.* North Korea contends, “[T]he United States has pursued the so-called NCND policy, under which it neither confirms nor denies the deployment of nuclear weapons. However, it has not tried to conceal the fact that it deployed nuclear weapons in South Korea but used it as a means to threaten us.” *Id.*

151. *Id.*

budget meetings that over 1,000 nuclear weapons and 64 aircraft loaded with nuclear weapons were deployed in South Korea.¹⁵² Further, it points to the U.S. Defense Department announcement in 1985 of the deployment of a nuclear missile battalion in South Korea, the first such overseas base outside of Europe.¹⁵³

North Korea contends that it has objected to the U.S. nuclearization of the Korean Peninsula¹⁵⁴ and has engaged in “consistent efforts at denuclearization.”¹⁵⁵ As discussed above, North Korea has further alleged in recent years that the United States is threatening North Korea, such that North Korea needs a nuclear deterrent. Interestingly, North Korea does not appear to have threatened the use of chemical or biological weapons against the United States, but instead claims that the U.S. allegation that North Korea possesses such weapons is similar to the United States’ insistence on North Korea’s possession of nuclear weapons, simply “part of their (the United States’) moves to stifle and isolate” North Korea.¹⁵⁶

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

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

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

152. *See id.* North Korea claims that the military hardware was displayed in an airfield and made public to reporters from Tongyang, Reuters and Hapting News Agency. *See id.*

153. *See id.*

154. *See id.*

155. *Id.*

156. Federation of American Scientists, *North-South Korea: Cautious Optimism Builds in Advance of June Summit — Foreign Media Reaction*, May 3, 2000, at <http://www.fas.org/news/dprk/2000/www0m03.htm>; *see also* North Korea Denies U.S. Official’s Assertion on Biological Weapons, BBC MONITORING INT’L REPORTS, Sept. 10, 2002.

157. *See Shaking Hands with Saddam Hussein: The U.S. Tilts Toward Iraq, 1980-1984*, in NAT’L SECURITY ARCHIVE ELECTRONIC BRIEFING BOOK NO. 82 (Joyce Battle ed. Feb. 25, 2003), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB82/>.

158. *See* Christopher Marquis & Thom Shanker, *The Struggle For Iraq: Documents; Rumsfeld Made Iraq Overture in ’84 Despite Chemical Raids*, N.Y. TIMES, Dec. 23, 2003, at A10.

port.¹⁵⁹ It did not prevent the United States from providing Iraq with intelligence, planning information, bomb-assessments, and other crucial military information as to Iran.¹⁶⁰ Donald H. Rumsfeld, as a special envoy of the Reagan administration, traveled to Iraq in 1984 to improve U.S. ties with President Saddam Hussein despite his use of chemical weapons.¹⁶¹

The Reagan administration issued a public condemnation of Iraq's already verified "almost daily" use of chemical weapons against Iran and Kurdish rebels on March 5, 1984.¹⁶² However, days later, Secretary of State, George P. Schultz reportedly met with Iraqi diplomat, Ismet Kittani, to soften the blow and bolster the American relationship with Iraq, including business interests, Middle East diplomatic objectives, and a shared interest in preventing an Iranian victory.¹⁶³

In 1986, the U.N. Security Council issued a statement condemning Iraq's use of chemical weapons in the war,¹⁶⁴ but the United States continued to support Baghdad militarily and politically.¹⁶⁵

In the days leading up to Iraq's 1990 invasion of Kuwait,

159. *See id.* (reporting that during Iran-Iraq war, United States secretly provided Iraq with combat assistance, even after Saddam Hussein's use of chemical weapons against Iraqis was widely known); *see also* Michael Dobbs, *U.S. Had Key Role in Iraq Buildup: Trade in Chemical Arms Allowed Despite Their Use on Iraqis, Kurds*, WASH. POST, Dec. 30, 2002, at A1 (stating that in 1987, State Department reports noted chemical attacks on Kurds, but U.S. policy was to do nothing because it would be "counter-productive" in influencing Iraq).

160. *See* Dobbs, *supra* note 159.

161. *See id.* (reporting that Rumsfeld traveled to Iraq to persuade Iraqi officials that United States was eager to improve ties with President Hussein, despite his use of chemical weapons).

162. *See id.*

163. *See id.*

164. *See* U.N. SCOR, 41st Sess., 2666th mtg., at 11, Res. 582 (1986), *available at* <http://www.un.org/Docs/scres/1986/scres86.htm>. U.N. specialists unanimously concluded that chemical weapons were used by Iraqi forces on many occasions against Iranian forces. *See id.* The Security Council strongly condemned Iraq's continued use of chemical weapons. *See id.* As early as 1983, the Reagan administration was also aware that Iraq had used gas against the Kurds and that Iraq had developed a chemical weapons production capability, acquired "primarily from Western firms, including possibly a U.S. foreign subsidiary." Battle, *supra* note 157 (citing to de-classified U.S. Dept. of State Action Memorandum to Lawrence S. Eagleburger, from Jonathan T. Howe, on the Iraqi Use of Chemical Weapons, Nov. 21, 1983).

165. *Saddam's Iraq: Key Events, Iran-Iraq War, Chemical Warfare, 1983-1988*, BBC NEWS, at http://news.bbc.co.uk/1/shared/spl/hi/middle_east/02/iraq_events/html/chemical_warfare.stm.

U.S. Ambassador April Glaspie, according to Iraqi transcripts, told Hussein that the United States “[has] no opinion on the Arab-Arab conflicts, like your border disagreement with Kuwait.”¹⁶⁶ The State Department did not confirm the accuracy of the Iraqi transcripts, but also did not dispute Glaspie’s statement,¹⁶⁷ stating that Glaspie had warned against rash actions regarding Kuwait.¹⁶⁸

In commencing the 2003 war against Iraq, the United States offered the following legal justifications: (1) that Iraq was in breach of U.N. Security Council Resolutions by continuing to seek and develop chemical, biological, and nuclear weapons, and prohibited long-range missiles;¹⁶⁹ (2) that Iraq was in breach of cease-fire conditions agreed to at the end of the first Gulf War, including its purported retention of WMDs that it had agreed not to develop or possess;¹⁷⁰ (3) that Iraq threatened U.S. security by aiding and harboring international terrorist organizations that threatened the United States;¹⁷¹ (4) that members of al Qaida are known to be in Iraq; and (5) that the regime of Saddam Hussein had brutalized the Iraqi people, committing gross human rights violations and crimes against humanity.¹⁷²

166. See *Confrontation in the Gulf: Excerpts From Iraqi Document on Meeting With U.S. Envoy*, N.Y. TIMES, Sept. 23, 1990, at A1; see also Elaine Sciolino & Michael R. Gordon, *Confrontation in the Gulf: U.S. Gave Iraq Little Reason Not to Mount Kuwait Assault*, N.Y. TIMES, Sept. 23, 1990, at A1; John K. Cooley, *It’s Time to Think Straight About Saddam*, INT’L HERALD TRIB., Dec. 23, 1997, at 8.

167. See Sciolino & Gordon, *supra* note 166.

168. See Cooley, *supra* note 166.

169. See U.S. White House, Report in Connection With Presidential Determination Under Public Law 107-243, at 2-3 (Mar. 19 2003), available at <http://usinfo.state.gov/topical/pol/terror/03031910.htm> [hereinafter March 19th Report]. Throughout the seven years that Iraq allowed inspections, “it repeatedly obstructed access to sites designated by the United Nations Special Commission (“UNSCOM”) and the International Atomic Energy Agency (“IAEA”).” *Id.* at 3. In 1998, Iraq’s obstructed UNSCOM inspectors by restricting access to “presidential palaces” and refused to cooperate with inspections led to “Desert Fox,” which led to a three-day bombing campaign by the United States and British forces. See *Saddam’s Iraq: Key Events, Iraq Under Sanctions, Desert Fox 16-19 December 1998*, BBC, at http://news.bbc.co.uk/1/shared/spl/hi/middle_east/02/iraq_events/html/desert_fox.stm; see also Authorization for Use of Military Force Against Iraq Resolution, Pub. L. 102-1 (1991); Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002). See generally Raymond W. Copson, *Iraq War: Background and Issues Overview*, CRS REPORT FOR CONGRESS, RL 31715, available at http://www.usembassy.at/en/download/pdf/iraq_war1.pdf (last visited Apr. 15, 2004).

170. See March 19th Report, *supra* note 169.

171. See *id.* at 2-3.

172. See *id.* at 3.

In an interview with the CBS program *60 Minutes* to promote the book, *The Price of Loyalty*, Paul H. O'Neill, President George W. Bush's first Treasury Secretary, stated that President Bush had been focused on removing Saddam Hussein from power in Iraq from the start of his administration.¹⁷³ According to O'Neill, "From the very beginning, there was a conviction that Saddam Hussein was a bad person and that he needed to go."¹⁷⁴ According to the book, O'Neill was surprised that Iraq was on the top of the agenda at the very first National Security Council meeting held by President Bush, on January 30, 2001.¹⁷⁵ At the second meeting, of which Saddam Hussein was also a primary topic, Secretary of Defense Donald Rumsfeld spoke of how removing Saddam Hussein would "demonstrate what U.S. policy is all about."¹⁷⁶

President George W. Bush was also apparently influenced in his desire to make war on Iraq by the fact that Iraqi officials had allegedly participated in a 1993 plot to assassinate his father, President George H.W. Bush.¹⁷⁷ The current President Bush had repeatedly referred to the alleged Iraqi assassination plot against his father as part of his basis for the recent war on Iraq.¹⁷⁸ While speaking before the U.N in September 2002, he made note of the plot to kill a former U.S. president, though he omitted any reference to his father's name.¹⁷⁹ Also, while speaking in Houston at a fund-raiser, President Bush offered his usual

173. See Richard W. Stevenson, *Bush Sought to Oust Hussein From Start, Ex-official Says*, N.Y. TIMES, Jan. 12, 2004, at A11. *But see* Richard W. Stevenson, *Bush Disputes Ex-Official's Claim That War With Iraq Was Early Administration Goal*, N.Y. TIMES, Jan. 13, 2004, at A22 [hereinafter Stevenson, *Bush Disputes Ex-Official's Claim*]. See generally RON SUSKIND, *THE PRICE OF LOYALTY: GEORGE W. BUSH, THE WHITE HOUSE, AND THE EDUCATION OF PAUL O'NEILL* (2004). Secretary O'Neill cooperated extensively on the book, turning over 19,000 documents from his years as Treasury Secretary, including transcripts of National Security Council Meetings.

174. Stevenson, *Bush Sought to Oust Hussein From Start, Ex-official Says*, *supra* note 173, at A11.

175. See Stevenson, *Bush Disputes Ex-Official's Claim*, *supra* note 173, at A22.

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

177. See *U.S.-Iraq Relations 1990-1998: President Bill Clinton on Retaliation for Iraqi Plot to Assassinate President George H.W. Bush* (C-Span broadcast, June 26, 1993), available at <http://www.c-span.org/iraq/history.asp>; see also David Von Drehle & R. Jeffrey Smith, *U.S. Strikes Iraq for Plot to Kill Bush*, WASH. POST, June 27, 1993, at A1.

178. See John King, *Bush Calls Saddam 'The Guy Who Tried to Kill my Dad'*, CNN.COM, Sept. 27, 2002, available at <http://www.cnn.com/2002/ALLPOLITICS/09/27/bush.war.talk/>.

179. See *id.*

complaints against Iraq in discussing the threat posed by Saddam.¹⁸⁰ He then stated that much of Saddam's hatred was directed at the United States, adding: "After all, this is the guy who tried to kill my dad."¹⁸¹

It was reported on November 7, 2003 that in the days before the U.S. attack on Iraq in 2003, Iraq contacted the United States, seeking to avert war.¹⁸² Officials of the Iraqi regime, including the Chief of Iraqi Intelligence, dispatched Imad Hage, a Lebanese-American businessman, to meet with Richard Perle as an intermediary for the U.S. Defense Department, with a message that Iraq no longer had weapons of mass destruction and was prepared to permit American troops and experts to carry out their search.¹⁸³ Through Hage, Iraq also offered to turn over a man being held in Baghdad who was accused of being involved with the 1993 World Trade Center bombing.¹⁸⁴ Hage, based on some six meetings with senior Iraqi intelligence officials, believed that the Iraqis he spoke to were desperate to avoid war¹⁸⁵ and conveyed this impression to the Defense Department.¹⁸⁶ Perle contacted the CIA to get their approval to meet with the Iraqis, but the CIA did not want to pursue this channel and conveyed to Perle, "Tell them that we will see them in Baghdad."¹⁸⁷

More than a year after the U.S.-led 2003 invasion of Iraq, the United States has still not found any weapons of mass destruction in Iraq.¹⁸⁸ While Secretary of Defense Donald Rumsfeld purported to believe that weapons of mass destruction will turn up,¹⁸⁹ Secretary of State Colin Powell reportedly stated, "We

180. *See id.*

181. *See id.*

182. *See U.S. Rejected 11th-Hour Iraqi Offer to Avert War, Sources Say; An Intermediary and Bush Officials Recount Attempt at a Deal. White House Plays Down Effort*, L.A. TIMES, Nov. 7, 2003, at A15 [hereinafter *U.S. Rejected 11th-Hour Iraqi Offer*]; *see also* James Risen, *Iraq Offered U.S. a Deal as the War Loomed*, INT'L HERALD TRIB., Nov. 7, 2003, at 1.

183. *See U.S. Rejected 11th-Hour Iraqi Offer*, *supra* note 182.

184. *See id.*

185. *See id.*

186. Risen, *supra* note 182 (stating that by early March, Hage characterized Iraqi's tone as "begging").

187. *See id.*

188. *See Bush Aids Defend War*, CBS/AP, Mar. 14, 2004, available at <http://www.cbsnews.com/stories/2004/03/18/iraq/main607182.shtml>.

189. *See U.S. Defends Iraq War As One Year Anniversary Nears*, CHI. TRIB., Mar. 15, 2004, at 12.

may not find stockpiles.”¹⁹⁰ Secretary Powell, at a January 8, 2004 news conference at the State Department, further stated that he had seen no “smoking gun [or] concrete evidence” of ties between former Iraqi President Saddam Hussein and al-Qaida.¹⁹¹

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

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

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

190. See *id.*

191. See *No Proof Links Iraq, al-Qaida, Powell Says*, NBC, MSNBC AND NEW SERVICES, Jan. 08, 2004, available at <http://msnbc.msn.com/id/3909150/>.

192. See *Bush and Kerry Frame Contrasts of Race Ahead: As Democrat Adds to Wins, President Defends Policies In Rare TV Appearance*, WALL ST. J., Feb. 9, 2004, at A1 (quoting President Bush).

193. See Robert S. Norris et al., *Where They Were*, 55 BULL. ATOMIC SCIENTISTS 6, 26-35 (1999), available at <http://www.bullatomsci.org/issues/1999/nd99/nd99norris.html>.

194. See *id.*

195. See *id.*; Robert S. Norris & William M. Arkin, *Nuclear Notebook: U.S. Nuclear Weapons Locations*, 51 BULL. ATOMIC SCIENTISTS 6 (1995), available at <http://www.thebulletin.org/issues/nukenotes/nd95nukenote.html>.

196. See Norris et al., *supra* note 193. See also Benjamin Friedman, *Nuclear Issues, Fact Sheet: North Korea’s Nuclear Weapons Program*, CTR. FOR DEF. INFO., Jan. 23, 2003, at <http://www.cdi.org/nuclear/nk-fact-sheet.cfm>.

clear weapons for the defense of South Korea.¹⁹⁷ As recently as November 2003, Secretary of Defense Donald Rumsfeld stated that the U.S. commitment to defend South Korea from attack includes “the continued provision of a nuclear umbrella.”¹⁹⁸

In a broader sense, the physical location of the United States’ nuclear weapons and other military assets would seem to be of limited significance, given the size of the United States’ nuclear arsenal and its ability to deliver its nuclear weapons across the world within very short time frames,¹⁹⁹ as well as its extensive military assets in the Korean area.²⁰⁰

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

A. *Economic and Political Position*

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

North Korea’s gross domestic product for 2002 is estimated at U.S.\$22.26 billion,²⁰¹ compared with U.S.\$941.5 billion²⁰² for South Korea. North Korea spent some U.S.\$5.2 billion in 2002 on the military,²⁰³ as compared to South Korea’s military expenditures of U.S.\$13 billion in 2002.²⁰⁴

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

197. See Donald H. Rumsfeld, Nuclear Posture Review Report [Excerpts] Submitted to Congress on Dec. 31, 2001, at 1, GLOBALSECURITY.ORG (Jan. 8, 2002), available at <http://www.globalsecurity.org/wmd/library/policy/dod/npr.htm>; see also Charles J. Moxley, *2002 Nuclear Posture Review Strategic and Legal Ramifications*, Apr. 16, 2002, available at http://www.nuclearweaponslaw.org/2002_NPR_Moxley.pdf (last visited April 15, 2004).

198. Bill Gertz, *Nukes Option by U.S. in Korea*, WASH. TIMES, Nov. 18, 2003, available at <http://www.washtimes.com/national/20031117-115816-2478r.htm>.

199. See CHARLES J. MOXLEY, JR., *NUCLEAR WEAPONS AND INTERNATIONAL LAW IN THE POST COLD WAR WORLD* 501-514 (2000) (citing Robert S. Norris & Williams M. Arkin, *U.S. Strategic Nuclear Forces, End of 1998; Abstract*, 55 BULL. ATOMIC SCIENTISTS 1, 78-79 (1999)).

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

201. CIA, *WORLD FACTBOOK 2003: NORTH KOREA* (2003), available at <http://www.cia.gov/cia/publications/factbook/geos/kn.html> (last modified Dec. 18, 2003).

202. CIA, *WORLD FACTBOOK 2003: SOUTH KOREA*, available at <http://www.cia.gov/cia/publications/factbook/geos/ks.html> (last modified Dec. 18, 2003).

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

204. See *WORLD FACTBOOK 2003: SOUTH KOREA*, *supra* note 202.

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

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

In 2003, when North Korea announced plans to build a nuclear deterrent force if the United States maintained its hostile policy, North Korea indicated that it would be able to do so at a lower price than for conventional weapons. It stated that its deterrent would be "capable of neutralizing any sophisticated and nuclear weapons with less spending."²¹¹

B. North Korea's Conventional Weapons

North Korea, a militarized State that devotes a substantial

205. See *Where Famine Stalks the Land*, BBC NEWS, Nov. 30, 2000, available at <http://news.bbc.co.uk/1/hi/world/asia-pacific/1048557.stm>; see also Barbara Demick, *A Small Problem Growing; Chronic Malnutrition has Stunted a Generation of North Koreans. The Crises is at the Heart of Debate Over Food Aid to the Isolated Nation*, L.A. TIMES, Feb. 12, 2004, at A1.

206. See David Marcus, *Famine Crimes in International Law*, 97 AM. J. INT'L L. 245, 259-61 (2003).

207. See Demick, *supra* note 205.

208. See BUREAU E. ASIAN & PAC. AFF., U.S. DEP'T. STATE, BACKGROUND NOTE: NORTH KOREA (March 2004), available at <http://www.state.gov/r/pa/ei/bgn/2792.htm>.

209. *Report of the Fifty-Fourth Session of the Executive Committee of the High Commissioner's Programme*, U.N. Ex. Comm. High Comm. Prog., 54th Sess., U.N. Doc. A/AC.96/987 (Oct. 10, 2003).

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

211. DPRK 'Nuclear Deterrent Force' to be Built if US Maintains 'Hostile Policy,' KOREAN CENT. NEWS AGENCY, June 3, 2003, available at <http://www.fas.org/nuke/guide/dprk/nuke/dprk060903.html>. See also *North Korea's Nuclear Threat*, WORLD PRESS REV., available at <http://www.worldpress.org/Asia/1233.cfm>.

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

The North Korean military reportedly has some 11,000 forward deployed artillery pieces capable of hitting South Korea,²¹⁶ 500 170-millimeter guns and 200 multiple-launch rocket systems within range of Seoul,²¹⁷ along with air defense weapons.²¹⁸ The artillery pieces are largely hidden in caves and the missiles are on mobile launchers.²¹⁹ North Korea also has an Air Force with over 1700 aircraft and a Navy with over 800 ships²²⁰ and 62 submarines.²²¹

U.S. characterizations of the North Korean military forces

212. See Joseph Nye, *Defusing the North Korean Threat*, *FIN. TIMES* (London), Jan. 18, 2000, at 13.

213. See Kathleen T. Rhem, *North Korean Military 'Very Credible Conventional Force'*, *AM. FORCES PRESS SERVICE*, Nov. 18, 2003, available at http://www.defenselink.mil/news/Nov2003/n11182003_200311181.html (citing Gen. Leon LaPorte, USA, Commander of U.S. forces in South Korea).

214. See Linda D. Kozaryn, *Despite Progress, North Korea Poses Major Threat*, *AM. FORCES PRESS SERVICE*, Apr. 3, 2001, available at http://www.defenselink.mil/news/Apr2001/n04032001_200104031.html

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

216. See Eleanor Hall, *North Korea a Greater Threat than Iraq: Analyst*, *WORLD TODAY* (ABC Local Radio Broadcast, Australia, Feb. 13, 2003), available at <http://www.abc.net.au/worldtoday/s783676.htm>.

217. See Phillip C. Saunders, *Military Options for Dealing with North Korea's Nuclear Program*, *CENTER FOR NONPROLIFERATION STUDIES*, Jan. 27, 2003, available at <http://cns.miis.edu/research/korea/dprkmil.htm>

218. See Kozaryn, *supra* note 214.

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

220. See Kozaryn, *supra* note 214. The DPRK also has about 3800 tanks, mainly Soviet T-54/55s and T-59s, but has recently developed the capacity to produce more modern T-62s. See *Korean People's Army - Introduction*, available at <http://www.globalsecurity.org/military/world/dprk/army.htm> (last modified Aug. 28, 2003); 1999 *WHITE PAPER*, *supra* note 129, at pt. 1(3).

221. See *Navy*, at <http://www.fas.org/nuke/guide/dprk/agency/navy.htm> (last updated Mar 1, 2000). *But see* 1999 *WHITE PAPER*, *supra* note 129, at I.1.3 (stating that South Korean Ministry of National Defense says that North Korea has ninety submarines).

are mixed. The U.S. military has stated that North Korea has the largest submarine and artillery forces in the world²²² and a “very credible conventional force.”²²³ In a report to Congress in 2000, the Secretary of Defense characterized the North Korean military threat as “formidable” and noted that its asymmetric forces are “cause for concern.”²²⁴

At the same time, the United States has noted that the North Korean military has been severely affected by the country’s economic problems, such that its equipment is aging and its military production scant.²²⁵ The U.S. military has noted that much of the North Korean’s military equipment is technologically antiquated — particularly that of its Air Force and Navy, leaving the army as the major threat.²²⁶ U.S. General Leon LaPorte, Commander of U.S. forces in South Korea, has stated that “[m]uch of their equipment is aged, but they have a lot of it.”²²⁷ Some commentators doubt the effectiveness of North Korea’s artillery.²²⁸

Some commentators have estimated that North Korea’s weapons systems are less extensive and reliable than Iraq’s before the 1991 Gulf War.²²⁹ North Korea reportedly does not have adequate amounts of oil to support its mechanized units, and even less to conduct proper training exercises.²³⁰ Most of the artillery pieces that North Korea possesses are not in range of Seoul, and the missiles it has that are capable of reaching the capital are not believed to be accurate.²³¹

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

223. *Id.*

224. Press Advisory, U.S. DEP’T. DEFENSE, REPORT ON THE MILITARY SITUATION ON THE KOREAN PENINSULA § 2 (Sept. 22, 2000), available at <http://www.dod.mil/news/Sep2000/>.

225. See John E. McLaughlin, North Korea: Engagement or Confrontation, Remarks at Texas A&M Conference (Apr. 17, 2001), available at <http://usinfo.state.gov/topical/pol/arms/stories/01042301.htm>.

226. See Rhem, *supra* note 213.

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

228. See Yihong Chang & James Foley, *Pyongyang Goes for Broke*, JANE’S INTELLIGENCE REV., Mar. 1, 2003, at 36-40.

229. See *id.*

230. See *id.*

231. See *id.*

C. North Korea's Chemical and Biological Weapons

North Korea is believed to have chemical and biological weapons in significant numbers. It also has the missiles with which to deliver them²³² and its military doctrine reportedly instructs the use of chemical weapons as standard munitions.²³³ North Korea has also reportedly devoted significant resources to defensive measures for protecting its population from the effects of chemical weapons, ostensibly to provide greater latitude for their use in combat.²³⁴ It is believed that North Korea is likely to use chemical weapons in a conflict with South Korea.²³⁵

North Korea is believed to have "a sizable stockpile of chemical weapons" and to have "achieved the capability to manufacture large quantities of nerve, blister, choking, and blood agents."²³⁶ Specifically, North Korea is known to have "[t]ons of mustard gas and sarin," and unknown quantities of blood agents, choking gases, riot control agents and VX.²³⁷ U.S. intelligence believes that North Korea possesses, at the very least, between 180 and 250 tons of chemical weapons.²³⁸ The Nuclear Threat

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

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

234. See *Chemical Weapons Program*, *supra* note 121.

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

236. *Northeast Asia*, *supra* note 121.

237. See Rebecca MacKinnon, *N. Korea's Bio-Chem Warfare Threat*, CNN.COM, Mar. 3, 2003, available at <http://www.cnn.com/2003/WORLD/asiapcf/east/03/02/nkorea.cbw/>.

238. See *Chemical Weapons Program*, *supra* note 121.

Initiative cites official reports and testimony from North Korean defectors and stipulates that North Korea may have as much as 2500 to 5000 tons of chemical weapons.²³⁹

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

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

D. North Korea's Missiles

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

North Korea reportedly has some 500 short-range missiles, including the Scud-B, Hwasong 5 and 6.²⁴⁵ The Hwasong 5 has a range of 320 kilometers while carrying a 1,000 kilogram warhead.²⁴⁶ The Hwasong 6, thanks to a lighter warhead and special stainless steel imported from Russia, has a range up to 500

239. See *Chemical Overview*, *supra* note 233.

240. See *Biological Weapons Program*, *supra* note 122.

241. See *Chemical Weapons Program*, *supra* note 121.

242. *Id.*

243. See *id.*; *Attack Across the DMZ Special Report*, *supra* note 233.

244. See Bermudez, *supra* note 111, at 1. *But see Missiles*, at <http://www.fas.org/nuke/guide/dprk/missile/index.html> (last updated May 13, 2003) (citing North Korea as having roughly 536 missiles).

245. See *Missiles*, *supra* note 244; Bermudez, *supra* note 111, at 16; *Hwasong 6/Scud-C*, at <http://www.fas.org/nuke/guide/dprk/missile/hwasong-6.htm> (last updated May 13, 2003) (citing Gen. Thomas Schwartz, Commander-in-Chief United Nations Command/Combined Forces Command and Commander, U.S. Forces Korea in 2000, estimating that North Korean ballistic missile inventories included over 500 short range missiles).

246. See Bermudez, *supra* note 111, at 11.

kilometers while carrying a payload of up to 770 kilograms (1,700 pounds).²⁴⁷ These missiles are variants of the Scud missile²⁴⁸ and are regarded as thoroughly tested and reliable.²⁴⁹ North Korea's short range missiles can reach all of South Korea with nuclear, chemical or biological weapons.²⁵⁰

North Korea's medium range missile is the No-Dong. In development since 1988 and successfully tested in 1993, the No-Dong is designed to strike regional targets, e.g., U.S. bases in Japan, to develop a base ballistic missile system that can be used as a first stage for further developments, and to carry a first generation nuclear weapon.²⁵¹ North Korea reportedly possesses between 50 and 100 No-Dong's,²⁵² capable of carrying a 1,200 kilograms warhead 1,350 kilometers or a 1,000 kilograms warhead 1,500 kilometers.²⁵³ These missiles, capable of carrying chemical, biological, and nuclear warheads, can reach targets in Japan, China, and Russia.²⁵⁴

North Korea has been developing long-range missiles, the Taepo-dong 1 and Taepo-dong 2, since the early 1990s.²⁵⁵ North Korea is believed to have made the Taepo-dong 1 "operational" by 2000,²⁵⁶ and may have built between one and ten by 1999.²⁵⁷

247. *See id.* at 16.

248. *See Missiles, supra* note 244.

249. *See id.*; *see also Hwasong 6/Scud-C, supra* note 245.

250. *See* David C. Wright, *Assessment of North Korea's Nuclear Weapons Program*, UNION OF CONCERNED SCIENTISTS, Feb. 25, 2003, available at http://www.ucsusa.org/global_security/missile_defense/page.cfm?pageID=603. The range required of a North Korean missile to reach U.S. bases in Japan and major Japanese cities would be 1000-1500 km. *See* Bermudez, *supra* note 111, at 16; *see also* Niksch, *supra* note 6, at 7.

251. *See* Bermudez, *supra* note 111, at 20-21.

252. *See id.* at 22-23; *see also* Niksch, *supra* note 6, at 7. *But see* *Missiles, supra* note 244 (stating that North Korea possesses between twelve and thirty-six No-Dong missiles).

253. *See* Bermudez, *supra* note 111, at 20.

254. In 2002 the Department of Defense noted that North Korea fielded No-Dong missiles able to strike U.S. forces based in Japan. *No-Dong*, at <http://www.fas.org/nuke/guide/dprk/missile/nd-1.htm> (last updated May 13, 2003). *See also* Bermudez, *supra* note 111, at 16.

255. *See id.* at 26.

256. *See id.* at 30. Operational is a relative term, and the KPA may have been using the Taepo-dong 1 earlier than 2000. *See id.* Since North Korea has lower standards of reliability and readiness than do Western Nations. *See id.*

257. *See id.* at 29. *But see* Wright, *supra* note 250 (stating that any such variant of Taepo-dong 2 would be appreciable advancement in North Korea's missile technology, and would not be possible without number of significant improvements and multiple flight tests).

The Taepo-dong 1 is designed to have a range of 1,500 to 2,500 kilometers carrying an estimated payload of 1,000 to 1,500 kilograms (2,200 to 3,300 pounds).²⁵⁸ These missiles are potentially capable of reaching all U.S. bases in East Asia.²⁵⁹ To the surprise of the U.S. intelligence community,²⁶⁰ North Korea in 1998 launched a Taepo-dong 1 missile over Japan, with the intent of putting North Korea's first satellite — the Kwangmyong-song 1 — into orbit.²⁶¹ The third stage of the missile suffered technical difficulties and did not insert the satellite into orbit.²⁶² North Korea, however, did not acknowledge this failure, and contends it was a successful launch, stating that “our scientists and technicians succeeded in launching its first satellite into orbit with multi-staged delivery rockets.”²⁶³

The Taepo-dong 2 missiles are of concern to the United States because of the possibility that they are capable of reaching U.S. land. Media reports cite U.S. intelligence estimates that provide that, even without further flight tests, North Korean ballistic missiles would be able to strike Alaska, Hawaii, and the U.S. west coast.²⁶⁴ The Taepo-dong 2 is reportedly designed to carry a warhead of 1,000 to 1,500 kilograms a distance of 4,000 to 8,000 kilometers.²⁶⁵ Currently North Korea is not believed to have a functional version of the Taepo-dong 2.²⁶⁶

The accuracy of missiles is generally stated in terms of circular error probability or “CEP,” the radius of the circle drawn around the target in which, on average, half of the re-entry vehicles fired at the target will fall.²⁶⁷ Of North Korea's short range missiles, the Scud-B has a CEP of 450 meters,²⁶⁸ the Hwasong 5 a CEP of approximately 500-800 meters,²⁶⁹ and the Hwasong 6 a

258. See Bermudez, *supra* note 111, at 26.

259. See *id.* at 16.

260. See *id.* at 30.

261. See *id.* at 29.

262. See *id.*

263. *Id.* at 30 (quoting *N. Korea Says it Launched 'Satellite'*, UNITED PRESS INT'L, Sept. 4, 1998).

264. See Niksch, *supra* note 6, at 7.

265. See Bermudez, *supra* note 111, at 16, 26.

266. See *Missiles*, *supra* note 244.

267. See MOXLEY, *supra* note 7, at 525 (citing KOSTA TSIPIS, ARSENAL: UNDERSTANDING WEAPONS IN THE NUCLEAR AGE 69-76 (1983)).

268. See *Scud-B Shahab-1*, at <http://www.fas.org/nuke/guide/iran/missile/shahab-1.htm> (last updated May 13, 2003).

269. See Bermudez, *supra* note 111, at 11. The CEP of the Hwasong 5 is unknown,

CEP of 50 meters. Analysts are uncertain of the No-Dong's CEP; with GPS guidance it could be as small as fifty meters, but analysts believe that at the extremities of its range, the No-Dong has a CEP of as high as 2,000 to 4,000 meters.²⁷⁰ As noted, North Korea does not have completely functioning versions of the Taepo-dong one or two in its possession.²⁷¹ The CEP of these weapons is not known, although they have been characterized as "poor."²⁷²

E. *South Korean Economic, Political, and Military Capability*

South Korea is in far better shape than North Korea economically, politically, and militarily. Its economy is booming,²⁷³ its political system is effectively functioning in a democratic fashion,²⁷⁴ and its military, although substantially smaller than North Korea's, is strong and well-supplied. In addition, it is strongly allied with the United States, enjoying the U.S. economic and military umbrella.

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

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

270. *See Nodong*, *supra* note 254.

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

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

273. *See BUREAU E. ASIAN & PAC. AFF., U.S. DEP'T. STATE, BACKGROUND NOTE: SOUTH KOREA* (Mar. 2003), *available at* <http://www.state.gov/r/pa/ei/bgn/2800.htm> (providing that South Korea has per capita GNP of U.S.\$10,000 and is twelfth largest economy in world).

274. *See id.* (providing that South Korea is republic and held its first democratic elections in 1987).

1,500 strike aircraft and 3,000 tanks.²⁷⁵ The South Korean military also has two surface to surface missile battalions and 5,300 mortars.²⁷⁶

F. U.S. Available Forces

The United States has a significant presence in the Pacific region. The Army has 37,000 troops in South Korea and extensive equipment in the country, including Patriot missile batteries, Apache helicopter squadrons, a mechanized infantry brigade, an air assault brigade, and various other units.²⁷⁷

Aside from the 37,000 troops that patrol the DMZ, the United States has a significant presence in the Pacific region. In the vicinity of North Korea, the main U.S. naval presence is the 7th Fleet, the largest of all forward-deployed fleets in the Navy.²⁷⁸ The 7th Fleet fluctuates between forty and fifty ships, 200 aircraft and generally has about 20,000 Naval and Marine personnel attached to it.²⁷⁹ The naval vessels generally include one to two aircraft carriers, three to five Aegis guided-missile cruisers, and five to ten destroyers and frigates.²⁸⁰

The U.S. Air Force also has a significant presence in the Pacific with the Seventh Air Force located in Korea and the Fifth in Japan.²⁸¹ Assigned to the Seventh Air Force are the Fifty-first and Eighth Fighter Wings, with 117 planes supported by 8,300 air force personnel.²⁸² The Fifty-first Fighter Wing flies the A-10²⁸³ and three squadrons of F-16 fighter aircraft.²⁸⁴ Overall, the

275. See Kozaryn, *supra* note 214.

276. *Orders of Battle and Major Equipment: South Korea and North Korea*, at <http://www.globalsecurity.org/military/world/rok/orbat-comp.htm>.

277. See *U.S. Forces Order of Battle – 17 March 2004*, at <http://www.globalsecurity.org/military/ops/korea-orbat.htm>.

278. See U.S. NAVY, COMMANDER, U.S. SEVENTH FLEET, FORWARD PRESENCE, at <http://www.c7f.navy.mil/New/Pages/Forward%20presence.html>.

279. See *id.* Of the forty to fifty ships that traditionally comprise the Seventh Fleet, eighteen are based in Japan. See *id.*

280. See *id.*

281. See *U.S. Security Strategy for the East Asia-Pacific Region*, at <http://www.usa.or.th/services/docs/reports/ussec1.htm>. Additional forces would be available in a short period of time. See *Attack Across the DMZ Special Report*, *supra* note 233.

282. See *7th Air Force*, at <http://www.osan.af.mil/Facts/7th%20Air%20Force.htm> (last modified Apr. 2003).

283. See *History of Osan Air Base, Republic of Korea*, at <http://www.osan.af.mil/Facts/Osan%20Air%20Base.htm> (last modified Apr. 2003).

284. See *Attack Across the DMZ Special Report*, *supra* note 233.

Pacific command has 45,000 military and civilian personnel with approximately 300 fighter and attack aircraft under its control, with additional major bases located in Hawaii and Alaska.²⁸⁵

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

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

VII. *OUTCOME OF A FUTURE WAR IN KOREA*

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

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

285. See *Pacific Air Forces*, at <http://www.osan.af.mil/Facts/Pacific%20Air%20Forces.htm> (last visited Apr. 6, 2004).

286. See Robert A. Wampler, *North Korea and Nuclear Weapons: The Declassified U.S. Record*, available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB87> (Apr. 25, 2003).

287. See Gertz, *supra* note 198.

288. See Rhem, *supra* note 213; see also Hall, *supra* note 216; Saunders, *supra* note 217.

appear to have a potent non-conventional deterrent as well as war-fighting capability.²⁸⁹

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

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

289. See *Chemical Weapons Program*, *supra* note 121; *Attack Across the DMZ Special Report*, *supra* note 233.

290. See R. Jeffrey Smith, *North Korea Deal Urged by State Dept.*, WASH. POST, Nov. 15, 1993, at A15.

291. See Doug Bandow, *N. Korea is No Place to Apply Iraq Lessons*, L.A. TIMES, Apr. 22, 2003, at B13.

292. Paul Richter, *North Korea Crises; Two-Strategy Faces Test; Battling North Korea Amid Iraq Conflict Could Mean Longer Fighting and More Casualties*, L.A. TIMES, Feb. 13, 2003, at A1.

293. See Saunders, *supra* note 217.

294. See *id.*; see also *North Korean Missile Proliferation Hearing*, *supra* note 219.

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

296. See Saunders, *supra* note 217.

persistent chemical agents against South Korean and U.S. troops and other assets in rear areas.²⁹⁷

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

Nor do U.S. military planners believe the United States could count on being able to destroy or neutralize the North Korean nuclear capability. Exposed North Korean nuclear facilities would be vulnerable to attack by cruise missiles and stealth bombers, despite significant North Korean air defenses.³⁰¹ However, North Korea has concealed and hardened a number of its nuclear facilities³⁰² and would have a range of retaliatory options — from conventional attacks to the use of chemical, biological, and to the extent they have them, nuclear weapons.³⁰³

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

297. See *Chemical Weapons Program*, *supra* note 121.

298. See *Smart and Smarter*, *JANE'S INT'L DEF. REV.*, Jan. 1, 2000; *Attack Across the DMZ Special Report*, *supra* note 233.

299. See *Smart and Smarter*, *supra* note 298.

300. See *id.*

301. See *Saunders*, *supra* note 217.

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

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

304. See generally *Attack Across the DMZ Special Report*, *supra* note 233; see also Hall,

The timetable for getting substantial additional U.S. forces into the region is relatively short.³⁰⁵ In addition, South Korea has recently embarked on its own program to develop missiles with a range of up to 300 kilometers, after the United States agreed to the South Korean withdrawal from the Missile Technology Control Regime.³⁰⁶

Economically, the cost of the war would be tremendous. The South Korean economy would likely be devastated, making it impossible to rely on Korean reunification as the cure for the power vacuum in North Korea at the end of any conflict.³⁰⁷ The effects on the South Korean economy would likely have reverberating effects throughout the world.³⁰⁸

While there is no doubt a limit to the extent to which the U.S. military can be stretched, it seems likely that the military could handle a war with North Korea even while engaged in the tail end of ones with Afghanistan and Iraq.³⁰⁹

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

305. See Hall, *supra* note 216.

306. See Don Kirk, *U.S. to Back Seoul's Plan for Extended Missile Force*, INT'L HERALD TRIB., July 13, 2000, at 1.

307. See Bruce Bennett & Nina Hachigian, *Don't Try Regime Change in North Korea*, INT'L HERALD TRIB., Jan. 31, 2004.

308. The South Korean economy is a leading exporter of electronics and automobiles and in 2002 had a GDP of \$941.5 billion. See WORLD FACTBOOK 2003: SOUTH KOREA, *supra* note 202.

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

A. *International Law Applicable to the Use of Nuclear Weapons*³¹⁰

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

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

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

B. *U.S. Acknowledgment of the Applicability of the Law of Armed Conflict to Nuclear Weapons*³¹¹

The U.S Constitution provides that treaties entered into by

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

310. The analysis as to the applicable law of armed conflict is adapted in part from CHARLES J. MOXLEY, JR., *NUCLEAR WEAPONS AND INTERNATIONAL LAW IN THE POST COLD WAR WORLD* (2000).

311. I base my statements of the law herein primarily on the United States' own statement of the law, as stated in U.S. military manuals and in the memoranda and oral arguments presented to the International Court of Justice in the Nuclear Weapons in the Nuclear Weapons Advisory Opinion, *supra* note 1, at 809. Military manuals relied on include: International Law Department of the Center for Naval Warfare Studies, U.S. Naval War College, UNITED STATES DEPARTMENT OF THE NAVY ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (1987) [hereinafter *NAVAL/MARINE COMMANDER'S HANDBOOK*]; U.S. Dep't. A.F., *COMMANDER'S HANDBOOK ON THE LAW OF ARMED CONFLICT* (Air Force Pamphlet 110-34, 1980) [hereinafter *A.F. COMMANDER'S HANDBOOK*]; U.S. Dep't. A.F., *INT'L LAW — THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS* (A.F. Pamphlet 110-31, 1976)

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

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

The *Naval/Marine Commander's Handbook* states that the use of nuclear weapons “against enemy combatants and other military objectives” is subject to the following principles:

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

The *Naval/Marine Commander's Handbook* describes these rules as “fundamental principles” of the law of armed conflict.³¹⁷

[hereinafter A.F. MANUAL ON INT'L LAW]; U.S. Dep't. Army, THE LAW OF LAND WARFARE (FM27-10/18 July 1956) with Change No. 1 (July 15, 1976) [hereinafter LAW OF LAND WARFARE].

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

313. A.F. MANUAL ON INT'L LAW, *supra* note 311, at 1-5 n.26.

314. *Id.* at 1-7.

315. See generally *International Court of Justice: Advisory Proceedings of the Legality of the Threat or Use of Nuclear Weapons (Question Posed by the General Assembly), Written Observations on the Request by the General Assembly for an Advisory Opinion*, 7 CRIM. L.F. 401 (1996) [hereinafter U.S. ICJ Memorandum/GA App.]; NAVAL/MARINE COMMANDER'S HANDBOOK, *supra* note 311, at 10-2; A.F. COMMANDER'S HANDBOOK, *supra* note 311, at 6-1. The *Law of Land Warfare* states that, in the absence of a customary rule of law or international convention restricting the employment of atomic weapons, the use of such weapons cannot be deemed unlawful, although the manual appears to recognize the subjugation of the use of such weapons to the principles of moderation and necessity. See LAW OF LAND WARFARE, *supra* note 311, at 18; see also A.F. MANUAL ON INT'L LAW, *supra* note 311, at 6-1 to 6-8; U.S. DEP'T. ARMY, 2 INT'L LAW 27-161-2, at 42 (Pamp. 27-161-2, Oct. 1962); ELLIOTT L. MEYROWITZ, PROHIBITION OF NUCLEAR WEAPONS: THE RELEVANCE OF INTERNATIONAL LAW 223 (1990) (quoting from U.S. DEPT'T ARMY, *supra*).

316. NAVAL/MARINE COMMANDER'S HANDBOOK, *supra* note 311, at 10-2.

317. See *id.* at 10-2.

The *Air Force Commander's Handbook*, while stating that the United States "takes the position" that the use of nuclear weapons is not unlawful, confirms that such use is "governed by existing principles of international law."³¹⁸

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

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

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

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

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

319. A.F. MANUAL ON INT'L LAW, *supra* note 311, at 6-5.

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

321. *Id.* at 6-1.

322. *Id.* at 6-8.

323. *Id.* at 6-7.

- (1) Article 23(a) of the Hague Regulations prohibiting poisons and poisoned weapons,
- (2) [T]he Geneva Protocol of 1925 which prohibits the use not only of poisonous and other gases but also of 'analogous liquids, materials or devices,'
- (3) Article 23(c) of the Hague Regulations which prohibits weapons calculated to cause unnecessary suffering, and
- (4) [T]he 1868 Declaration of St. Petersburg which lists as contrary to humanity those weapons which 'needlessly aggravate the sufferings of disabled men or render their death inevitable.'³²⁴

VIII. RULES OF PROPORTIONALITY, NECESSITY, AND DISCRIMINATION

A. Rule of Proportionality

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

The *Air Force Manual on International Law* states the rule against attacks "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects . . . which would be excessive in relation to the concrete and direct military advantage anticipated."³²⁵ The *Naval/Marine Commander's Handbook* recognizes the proportionality requirement as a customary rule of international law and describes the requirement as codified in the prohibition by Additional Protocol I of attacks causing excessive damage. The handbook states that it is not unlawful to cause "incidental injury or death to civilians, or collateral damage to civilian objects, during an attack upon a legitimate military objective," but that such effects "must not . . . be excessive in light of the military advantage anticipated by the attack."³²⁶

324. See 2 INT'L LAW 27-161-2, *supra* note 315, at 42; see also MEYROWITZ, *supra* note 315, at 223.

325. A.F. MANUAL ON INT'L LAW, *supra* note 311, at 5-9.

326. NAVAL/MARINE COMMANDER'S HANDBOOK, *supra* note 311, at 8-4; see *id.* at 5-7, 8-4 n.17, 8-5; see also A.F. MANUAL ON INT'L LAW, *supra* note 311, at 3-3.

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

B. *Rule of Necessity*

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

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

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

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

The *A.F. COMMANDER'S HANDBOOK* adds that "every feasible precaution should be taken to keep civilian casualties and damage to a minimum." *A.F. COMMANDER'S HANDBOOK*, *supra* note 311, at 3-3.

would generally be unlawful. If, on the other hand, it were necessary to destroy the county to take out the bridge, the necessity requirement would ostensibly be met if the other prerequisites were present, but, even then, if taking out the bridge had minor military value compared to the level of resultant devastation, the proportionality requirement would not be met and the strike would be prohibited.

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

327. NAVAL/MARINE COMMANDER'S HANDBOOK, *supra* note 311, at 5-5 (citing Lt. Col. William Fenrick, USMC, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MIL. LAW REV. 91 (1982); Solf A. Waldemar, *Protection of Civilians Against the Effects of Hostilities Under the Customary International Law Protocol I*, 1 AM. U.J. INT'L L. & POL'Y 117, 128-35 (1986)); *see also* NAVAL/MARINE COMMANDER'S HANDBOOK, *supra* note 311, at 6-38; A.F. MANUAL ON INT'L LAW, *supra* note 311, at 6-1. As to the demanding nature of the necessity requirement in the *jus ad bellum* context of self-defense, The *Naval/Marine Commander's Handbook* quotes the requirement of U.S. Navy Regulations, 1990, Article 0915, that the right of self-defense must be exercised only "as a last resort" and then only "to the extent *absolutely necessary* to accomplish the end required." NAVAL/MARINE COMMANDER'S HANDBOOK, *supra* note 311, at 4-10.

328. NAVAL/MARINE COMMANDER'S HANDBOOK, *supra* note 311, at 5-5.

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

330. NAVAL/MARINE COMMANDER'S HANDBOOK, *supra* note 311, at 5-4 n.6.

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

C. *Rule of Discrimination*

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

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

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

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

332. A.F. COMMANDER'S HANDBOOK, *supra* note 311, at 6-1.

333. A.F. MANUAL ON INT'L LAW, *supra* note 311, at 6-3.

334. NAVAL/MARINE COMMANDER'S HANDBOOK, *supra* note 311, at 5-7. The handbook defines “noncombatants” as “those individuals who do not form a part of the

noncombatants the “object of attack”³³⁵ or targeting them “as such”³³⁶ and requires that civilians be safeguarded against “injury not incidental” to attacks against military objectives.³³⁷

Two of the three “fundamental principles of the law of war” identified by the *Naval/Marine Commander’s Handbook* focus upon the requirement of discrimination:

2. It is prohibited to launch attacks against the civilian population as such.
3. Distinctions must be made between combatants and non-combatants, to the effect that noncombatants be spared as much as possible.³³⁸

The *Naval/Marine Commander’s Handbook* states that the foregoing points 2 and 3 were customary rules of international law codified for the first time in Additional Protocol I, articles 51(2) and 57(1), respectively.³³⁹

IX. UNCONTROLLABILITY AS CONNOTING UNLAWFULNESS

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

A. Uncontrollability under Rule of Discrimination

The *Air Force Commander’s Handbook* states that weapons that are “incapable of being controlled enough to direct them against a military objective” are unlawful.³⁴⁰ The *Air Force Manual on International Law* defines indiscriminate weapons as those “incapable of being controlled, through design or function,” such that they “cannot, with any degree of certainty, be directed at military objectives.”³⁴¹

In its military manuals the United States has acknowledged

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

335. *Id.* at 5-8.

336. *Id.* at 8-1; see also LAW OF LAND WARFARE, *supra* note 311, at 16.

337. NAVAL/MARINE COMMANDER’S HANDBOOK, *supra* note 311, at 5-8.

338. *Id.* at 8-1 (citations omitted). Principle No. 1 identified by the handbook is “[t]he right of belligerents to adopt means of injuring the enemy is not unlimited.” *Id.* at 8-1.

339. *Id.* at 8-1 nn.3-4.

340. See A.F. COMMANDER’S HANDBOOK *supra* note 311, at 6-1.

341. A.F. MANUAL ON INT’L LAW, *supra* note 311, at 6-3.

that the scope of this prohibition extends to the *effects* of the use of a weapon. The *Air Force Manual on International Law* states that indiscriminate weapons include those which, while subject to being directed at military objectives, "may have otherwise uncontrollable effects so as to cause disproportionate civilian injuries or damage."³⁴² The *Air Force Manual on International Law* states that "uncontrollable" refers to effects "which escape in time or space from the control of the user as to necessarily create risks to civilian persons or objects excessive in relation to the military advantage anticipated."³⁴³ It is noteworthy that this prohibition encompasses the causing of risks, not just injury.

As a "universally agreed illustration of . . . an indiscriminate weapon," the *Air Force Manual on International Law* cites biological weapons, noting that the uncontrollable from such weapons "may include injury to the civilian population of other states as well as injury to an enemy's civilian population."³⁴⁴ The *Naval/Marine Commander's Handbook* states that such weapons are "inherently indiscriminate and uncontrollable."³⁴⁵

The *Air Force Manual on International Law* further cites Germany's World War II V-1 rockets, with their "extremely primitive guidance systems" and Japanese incendiary balloons, without any guidance systems.³⁴⁶ The Manual states that the term "indiscriminate" refers to the "inherent characteristics of the weapon, when used, which renders [sic] it incapable of being directed at specific military objectives or of a nature to necessarily cause disproportionate injury to civilians or damage to civilian objects."³⁴⁷

The Navy Judge Advocate General, in his legal analysis of the lawfulness of the Trident I (C-4) Missile, stated that "[i]ndiscriminate weapons are those which cannot be accurately directed at military objectives or those the effects of the use which are so uncontrollable as to necessarily cause disproportionate injury or damage to civilian persons or objects."³⁴⁸

342. *Id.*

343. *Id.* (emphasis omitted).

344. *Id.*

345. NAVAL/MARINE COMMANDER'S HANDBOOK *supra* note 311, at 10-19 n.49.

346. A.F. MANUAL ON INT'L LAW, *supra* note 311, at 6-3.

347. *Id.* at 6-9 n.7.

348. NAVY JAG TRIDENT I, *supra* note 272, at 9 (citing A.F. MANUAL ON INT'L LAW, *supra* note 311, paras. 6-3, 6-3.c).

B. *Uncontrollability under Rule of Necessity*

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

The *Air Force Manual on International Law* recognizes as a basic requirement of necessity "that the force used is capable of being and is in fact regulated by the user."³⁴⁹

C. *Uncontrollability under Rule of Proportionality*

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

The *Air Force Manual on International Law* notes that the requirement of proportionality prohibits "uncontrollable effects against one's own combatants, civilians or property."³⁵⁰

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

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

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

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

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

349. A.F. MANUAL ON INT'L LAW, *supra* note 311, at 1-6.

350. *Id.* at 6-2.

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

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

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

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

352. See NAVY JAG TRIDENT I, *supra* note 272, at 12 (citing W. T. Mallison, Jr., *The Laws of War and the Juridical Control of Weapons of Mass Destruction in General and Limited Wars*, 36 GEO. WASH. L. REV. 308, 331 (1967); see also MYRES S. MCDUGAL & FLORENTINO P. FELICIANA, LAW AND MINIMUM WORLD PUBLIC ORDER; THE LEGAL REGULATION OF INTERNATIONAL COERCION 100 n.83 (1961); William O'Brien, *Legitimate Military Necessity in Nuclear War*, 2 WORLD POLITY 35, 100 n.83 (1960)).

353. See generally JOINT CHIEFS OF STAFF, JOINT PUB 3-12.1, DOCTRINE FOR JOINT THEATER NUCLEAR OPERATIONS (Joint Pub. 3-12.1, Feb. 9, 1996), available at http://www.dtic.mil/doctrine/jel/new_pubs/jp3_12_1.pdf (last visited Apr. 6, 2004) [hereinafter 1996 DOCTRINE FOR JOINT THEATER NUCLEAR OPERATIONS].

354. See *id.* at III-10

355. See JOINT CHIEFS OF STAFF, DOCTRINE FOR JOINT NUCLEAR OPERATIONS (JOINT

Korea, this policy would ostensibly mean that it is perfectly lawful for North Korea to pursue a nuclear program and to threaten to use, and ultimately to use, such weapons in many circumstances.

The problem with the U.S. position is that it overlooks the existence of other sources of international law, including general principles of law. It ignores the fact that the United States has recognized that the broad rules of the law of armed conflict — such as the rules of proportionality, necessity, and discrimination — apply to nuclear weapons³⁵⁶ and that *per se* rules can arise from them.³⁵⁷

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

The Air Force Manual on International Law states that the use of a weapon may be unlawful based not only on “expressed

Pub 3-12, Dec. 15, 1995), available at http://www.dtic.mil/doctrine/jel/new_pubs/jp3_12.pdf (last visited Apr. 6, 2004) [hereinafter 1995 DOCTRINE FOR JOINT NUCLEAR OPERATIONS]. The DOCTRINE FOR JOINT NUCLEAR OPERATIONS was a reissue (with minor adjustments) to a 1993 manual of the same name and Joint Publication number. See JOINT CHIEFS OF STAFF, DOCTRINE FOR JOINT NUCLEAR OPERATIONS (Joint Pub. 3-12, April 29, 1993) [hereinafter 1993 DOCTRINE FOR JOINT NUCLEAR OPERATIONS].

While the references to use of nuclear weapons against enemy combatants and for other military objectives could be said to imply a more nuanced position, such a nuanced reading itself seems overly theoretical for this kind of operational document. The core of the policy, as communicated to the military by this authoritative document, appears to be that of the legality of the use of nuclear weapons. DOCTRINE FOR JOINT NUCLEAR OPERATIONS *supra*, at II-1. The *Doctrine for Joint Nuclear Operations* provides:

If conflicts arise between the contents of this publication and the contents of Service publications [presumably, the publications of any one service], this publication will take precedence . . . unless the Chairman of the Joint Chiefs of Staff, normally in coordination with other members of the Joint Chiefs of Staff, has provided more current and specific guidance.

Id. at i.

356. The United States has recognized these rules as arising under customary and treaty law and general principles of law. See MOXLEY, *supra* note 7, at 133 n.77, 136-39 nn.88-91 (proportionality), 124-25 nn.54-56 (necessity), 125-29 nn.57-65 (moderation and discrimination), 146-48 nn. 111-19 (neutrality), 85-87 nn.246-52.

357. See A.F. MANUAL ON INT’L LAW, *supra* note 311, at 6-7.

prohibitions contained in specific rules of custom and convention," but also on "those prohibitions laid down in the general principles of the law of war."³⁵⁸

Similarly, in discussing how the lawfulness of new weapons and methods of warfare is determined, *The Air Force Manual on International Law* states that such determination is made based on international treaty or custom, upon "analogy to weapons or methods previously determined to be lawful or unlawful," and upon the evaluation of the compliance of such new weapons or methods with established principles of law, such as the rules of necessity, discrimination, and proportionality.³⁵⁹

The Air Force Manual on International Law notes that the International Military Tribunal at Nuremberg in the case of the *Major War Criminals* found that international law is contained not only in treaties and custom but also in the "general principles of justice applied by jurists and practiced by military courts."³⁶⁰

The Air Force Manual on International Law further states that the practice of States "does not modify" the legal obligation to comply with treaty obligations since such obligations are "contractual in nature."³⁶¹

The Army's *Law of Land Warfare* states that "[t]he conduct of armed hostilities on land is regulated by the law of land warfare which is both written and unwritten."³⁶²

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

The law of armed conflict affecting aerial operations is not entirely codified. Therefore, the law applicable to air warfare must be derived from general principles, extrapolated from the law affecting land or sea warfare, or derived from other sources including the practice of states reflected in a wide variety of sources.³⁶³

The Air Force Manual on International Law notes that *per se*

358. *Id.* at 6-1.

359. *See id.* at 6-7.

360. *Id.* at 1-6.

361. *Id.* at 1-15 n.35.

362. *LAW OF LAND WARFARE*, *supra* note 311, at 3.

363. *A.F. MANUAL ON INT'L LAW*, *supra* note 311, at 1-7.

unlawfulness is not limited to prohibitions established in treaties or customary law:

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

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

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

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

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

Judges Shahabuddeen and Weeramantry reached the oppo-

364. *Id.* at 6-7.

365. See ICJ Hearing, Nov. 15, 1995, *supra* note 351, at 71; A.F. MANUAL ON INT'L LAW, *supra* note 311, at 6-3, 6-7; NAVAL/MARINE COMMANDER'S HANDBOOK, *supra* note 311, at 10-2.

366. See Nuclear Weapons Advisory Opinion, *supra* note 1, at 822, ¶ 42; 823, ¶ 48; 829, ¶ 95; see also *id.* at 936-37. ¶¶ 27-33 (Higgins, J., dissenting); *id.* at 922, ¶¶ 6(xi)-6(xii) (Weeramantry, J., dissenting); *id.* at 869 (Shahabuddeen, J., dissenting).

367. *Id.* at 819 ¶ 20.

368. *Id.* at 936, ¶ 26 (Higgins, J., dissenting). See also *id.* at 836, 839, 840, 842 (Schwebel, J., dissenting).

site conclusion. Judge Shahabuddeen stated, “in judging of the admissibility of a particular means of warfare, it is necessary, in my opinion, to consider what the means can do in the ordinary course of warfare, even if it may not do it in all circumstances.”³⁶⁹

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

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

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

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

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

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

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

369. *Id.* at 869 (Shahabuddeen, J., dissenting).

370. *Id.* at 915 (Weeramantry, J. dissenting).

used in a variety of ways: they can be deployed to achieve a wide range of military objectives of varying degrees of significance; they can be targeted in ways that either increase or decrease resulting incidental civilian injury or collateral damage; and their use may be lawful or not depending upon whether and to what extent such use was prompted by another belligerent's conduct and the nature of the conduct.³⁷¹

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

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

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

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

371. ICJ Hearing, Nov. 15, 1995, *supra* note 351, at 68-69.

372. *Id.* at 70.

373. *Id.* at 71.

374. *Id.*

375. *Id.*

376. *Id.*

various types of military objectives."³⁷⁷ It has been argued that nuclear weapons are unlawful because they cannot be directed at a military objective. This argument ignores the ability of modern delivery systems to target specific military objectives with nuclear weapons, and the ability of modern weapons designers to tailor the effects of a nuclear weapon to deal with various types of military objectives. Since nuclear weapons can be directed at a military objective, they can be used in a discriminate manner and are not inherently indiscriminate.

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

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

377. U.S. ICJ Memorandum/GA App., *supra* note 315, at 416.

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

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

[T]he legality of the use of nuclear weapons can only be determined in re-

The Court stated that it did not have sufficient facts to determine the validity of the argument of the United States and other nuclear weapons States to the effect that highly accurate low-yield tactical nuclear weapons could be used in such a way as to limit and control their effects.³⁷⁹

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

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

The Court then noted the contrasting view of other States:

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

spect of specific circumstances, for there can be a large number of potential situations — e.g., first use, counter use, different practices of targeting, different types of nuclear weapons — and [that] the Court cannot hypothesize about all these possibilities.

WHO Advisory Opinion, 1996 I.C.J. 68, at 161 (citing Written Statement of Finland at 4).

The Court's language — "scarcely reconcilable" — seems hedged, perhaps the product of drafting compromise. The Court went on to state: "Nevertheless, the Court considers that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance." Nuclear Weapons Advisory Opinion, *supra* note 1, at 829, ¶ 95.

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

380. *Id.* at 829 ¶ 91 (citing United Kingdom, Written Statement, at 53 ¶ 3.70; United States of America, Oral Statement, CR 95/34, at 89–90).

fects, largely uncontrollable, could not be restricted, either in time or in space, to lawful military targets. Such weapons would kill and destroy in a necessarily indiscriminate manner, on account of the blast, heat and radiation occasioned by the nuclear explosion and the effects induced; and the number of casualties which would ensue would be enormous. The use of nuclear weapons would therefore be prohibited in any circumstance, notwithstanding the absence of any explicit conventional prohibition.³⁸¹

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

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

While the ICJ did not reach the issue, it seems clear, based on available information as the radiation effects of nuclear weapons, that the U.S. position that it can control such effects is unfounded. Neither before the ICJ nor ostensibly in any other publicly available source has the United States presented any evidence that it can control the radiation effects of nuclear weapons, and there would appear to be no such evidence. While it is true that the low yield tactical nuclear weapons that the United States defended before the ICJ would release less radiation than higher yield nuclear weapons, the low yield weapons release substantial radiation³⁸³ — and that radiation is uncontrollable in

381. *Id.* at 829, ¶ 92.

382. *Id.* at 829, ¶ 94.

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

terms of how it will spread.³⁸⁴

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

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

384. See Nuclear Weapons Advisory Opinion, *supra* note 1, at 904.

385. See *id.* at 821-22, ¶ 35. See generally DOCTRINE FOR JOINT NUCLEAR OPERATIONS, *supra* note 355.

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

Judge Shahabuddeen stated: "[T]he use of nuclear weapons could result, even in the case of neutral countries, in destruction of the living, in sickness and forced migration of survivors, and in injury to future generations to the point of causing serious illness, deformities and death, with the possible extinction of all life." Nuclear Weapons Advisory Opinion, *supra* note 1, at 873 (Shahabuddeen, J., dissenting); see also DEP'T. ARMY ET AL., NATO HANDBOOK ON THE MEDICAL ASPECTS OF NBC DEFENSIVE OPERATIONS A MEDP-6(B) at I.1 (1996) [hereinafter NATO HANDBOOK ON THE MEDICAL ASPECTS OF NBC DEFENSIVE OPERATIONS] (adopted as Army Field Manual 8-9, Navy Medical Publication 5059, A.F. Joint Manual 44-151); DOCTRINE FOR JOINT THEATER NUCLEAR OPERATIONS, *supra* note 357, at I-1-I-2; Nuclear Weapons Advisory Opinion, *supra* note 1, at 865 (Shahabuddeen, J., dissenting); UNITED NATIONS DEPARTMENT FOR DISARMAMENT AFFAIRS, NUCLEAR WEAPONS: A COMPREHENSIVE STUDY 6-8 (1991).

386. See NATO HANDBOOK ON THE MEDICAL ASPECTS OF NBC DEFENSIVE OPERATIONS, *supra* note 385, at I.1; Nuclear Weapons Advisory Opinion, *supra* note 1, at 873 (citing DICTIONNAIRE ENCYCLOPEDIQUE D'ELECTRONIQUE), 888 (citing RADIOECOLOGY (1995)) (Weeramantry, J., dissenting). See generally INTERNATIONAL PHYSICIANS FOR THE PREVENTION OF NUCLEAR WAR, BRIEFING BOOK ON NUCLEAR WAR (1992) [hereinafter INTERNATIONAL PHYSICIANS FOR THE PREVENTION OF NUCLEAR WAR]. Numerous major studies during the Cold War attempted to quantify the casualties that could be expected from limited nuclear attacks. Several found that civilian casualties from a Soviet counterforce strike on the United States would result in virtually as many deaths from radiation as from direct blast. See William Daugherty et al., *The Consequences of "Limited" Nuclear Attacks on the United States*, 10 INT'L SECURITY, Winter 1986, at 35; Frank N. von Hippel et al., *Civilian Casualties from Counterforce Attacks*, 259 SCI. AM., Sept. 1988, at 42; Barbara G. Levi et al., *Civilian Casualties from "Limited" Nuclear Attacks on the USSR*, 12 INT'L SECURITY, Winter 1987/1988, at 168.

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

- Radiation cannot discriminate between friend and foe, combatant and noncombatant, adversary and neutral, one's own population and forces and those of the enemy.³⁸⁸
- Radiation from the Hiroshima and Nagasaki bombs, from atomic testing, and from the Chernobyl releases have caused and continue to cause substantial and widespread injury to human health and other life and may be expected to continue to do so for generations to come.³⁸⁹

387. See Nuclear Weapons Advisory Opinion, *supra* note 1, at 821–22, ¶ 35; see also *id.* at 905, 910 (Weeramantry, J., dissenting); *id.* at 932 (Koroma, J., dissenting); DOCTRINE FOR JOINT THEATER NUCLEAR OPERATIONS, *supra* note 357, at III-2, III-3; CHARLES KEGLEY & EUGENE WITTKOPF, *THE NUCLEAR READER: STRATEGY, WEAPONS, WAR* 320–26 (1985); NATO HANDBOOK ON THE MEDICAL ASPECTS OF NBC DEFENSIVE OPERATIONS, *supra* note 385, at 320; OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, *THE EFFECTS OF NUCLEAR WAR* 113 (May 1979) [hereinafter *THE EFFECTS OF NUCLEAR WAR*]; 8 CHARLES S. GRACE, *NUCLEAR WEAPONS: PRINCIPLES, EFFECTS AND SURVIVABILITY* 29–30 (1994); TSIPIS, *supra* note 267, at 44-74, 115-295.

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

389. See Nuclear Weapons Advisory Opinion, *supra* note 1, at 821–22, ¶ 35; see also *id.* at 864 (Shahabuddeen, J., dissenting); NATO HANDBOOK ON THE MEDICAL ASPECTS OF NBC DEFENSIVE OPERATIONS, *supra* note 385, at I.1.3 §§ 303(c), at 320; NUCLEAR WEAPONS: A COMPREHENSIVE STUDY, *supra* note 385, at 79–84. It is estimated that only half of the suffering would be over as of the end of the war itself: “A failure to achieve [social and economic] viability . . . would result in many additional deaths, and much additional economic, political, and social deterioration. This postwar damage could be as devastating as the damage from the actual nuclear explosions.” *THE EFFECTS OF NUCLEAR WAR*, *supra* note 387, at 5. See JOHN W. GOFMAN, *RADIATION AND HUMAN HEALTH* 298-99 (1983) (estimating that the plutonium fallout will cause a total of 104,460 lung cancer deaths in the United States, and 950,000 world wide). Investigators have also concluded that the mortality rates during the 1950–1965 atomic testing period stopped getting better after decades of improvement. When atomic testing was banned, the mortality rate improved once again. See JAY GOULD ET AL., *DEADLY DECEIT: LOW-LEVEL RADIATION, HIGH-LEVEL COVER UP* 15, 92 (1990); see also Marvin S. Soroos, *Preserving the Atmosphere as a Global Commons*, 40 *ENV'T.*, Mar. 1998, at 6; UNITED NATIONS SCI. COMMITTEE ON THE EFFECTS OF ATOMIC RADIATION, *IONIZING RADIATION: SOURCES AND BIOLOGI-*

- With escalation, the levels of radiation will increase.³⁹⁰

Outside the courtroom, the United States recognizes the potential uncontrollability of the effects of nuclear weapons. This can be seen from the Chairman of the Joint Chief's *Joint Pub 3-12, Doctrine for Joint Nuclear Operations*, setting forth the current operational planning for the integrated use by U.S. forces of nuclear weapons in conjunction with conventional weapons:³⁹¹ "[T]here can be no assurances that a conflict involving weapons of mass destruction could be controllable or would be of short duration. Nor are negotiations opportunities and the capacity for enduring control over military forces clear."³⁹²

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

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

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

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

CAL EFFECTS 19 (1982); Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space, and under Water, 2 I.L.M. 889 (1963); NAT'L ACADEMY OF SCI., NUCLEAR ARMS CONTROL: BACKGROUND AND ISSUES 190-95 (1985). See generally G. T. SEABORG, KENNEDY, KRUSHCHEV, AND THE TEST BAN (1981).

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

391. See DOCTRINE FOR JOINT NUCLEAR OPERATIONS, *supra* note 355, at i, I-2; see also MOXLEY, *supra* note 7, at 585-605.

392. DOCTRINE FOR JOINT NUCLEAR OPERATIONS, *supra* note 355, at i, I-6, I-7 (emphasis omitted).

393. Treaty for the Prohibition of Nuclear Weapons in Latin America ("Treaty of Tlatelolco"), Feb. 14, 1967, 22 U.S.T. 762, 634 U.N.T.S. 762, 6 I.L.M. 521; see also Nu-

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

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

Similarly:

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

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

clear Weapons Advisory Opinion, *supra* note 1, at 863-64 (Shahabuddeen, J., dissenting) (quoting from Treaty of Tlatelolco).

394. DOCTRINE FOR JOINT NUCLEAR OPERATIONS, *supra* note 355, at I-2 (emphasis omitted).

395. *Id.*

396. NAVY JAG TRIDENT I, *supra* note 272, at 7.

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

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

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

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

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

397. U.S. Dep’t of Navy, Office of the Judge Advocate General, Memorandum for the Assistant Secretary of the Navy (Research & Development), Review of the Legality of the TOMAHAWK Cruise Missile 12 (Jan. 6, 1977) [hereinafter NAVY JAG TOMAHAWK], available at http://www.nuclearweaponslaw.org/FOIA_Materials.html (last visited Apr. 16, 2004) (formerly restricted data, redacted version obtained under the Freedom of Information Act by Charles J. Moxley, Jr.).

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

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

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

401. ICJ Hearing, Nov. 15, 1995, *supra* note 351, at 71; U.S. ICJ Memorandum/GA App., *supra* note 315, at 23.

402. See *supra* notes 267-72 and accompanying text.

accuracy.⁴⁰³ A high percentage of missiles launched can be expected to strike within a close distance of their intended targets.⁴⁰⁴

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

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

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

403. See TSIPIS, *supra* note 270, at 139; MOXLEY, *supra* note 45, at 506 n.8 and accompanying chart (regarding US weapons' CEPs); see also Kosta Tsipis, *Cruise Missiles*, SCI. AM., Feb. 1977, 20–29; 1 THOMAS B. COCHRAN ET AL., NUCLEAR WEAPONS DATABOOK, UNITED STATES NUCLEAR FORCES AND CAPABILITIES 118, 146 (1984); Nick Cook & John Boatman, *USAF Lifts Veil on 'Secret' ACM*, 14 JANE'S DEFENSE WEEKLY 549, no. 13, Sept. 29, 1990; *AGM-129 Advanced Cruise Missile*, FAS, at <http://www.fas.org/nuke/guide/usa/bomber/acm.htm>; Robert S. Norris & William M. Arkin, *U.S. Strategic Nuclear Forces End of 1998; Abstract*, 55 BULL. ATOMIC SCIENTISTS, no. 1, Jan. 1999.

404. See David Fulghum, *Clashes with Iraq Continue After Heavy Air Strike*, AVIATION WEEK & SPACE TECH., Jan. 25, 1993, at 38.

405. See MOXLEY, *supra* note 45, at 525–27, nn.7–17, and accompanying text; see also UNITED STATES GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESS: OPERATION DESERT STORM: EVALUATION OF THE AIR WAR 5–7 (July 1996); BBC SUMMARY OF WORLD BROADCASTS, Sept. 7, 1998 [hereinafter BBC SUMMARY]; *Pakistan — Cruise Missile Found Near Pakistan Nuclear Test Site*, FT ASIA INTELLIGENCE WIRE, Aug. 24, 1998 [hereinafter *Pakistan — Cruise Missile Found*].

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

achieving a near perfect success rate and one mission obtaining a rate of only 67%.⁴⁰⁷

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

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

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

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

408. See BBC SUMMARY *supra* note 405; *2nd Unexploded U.S. Missile Found In Pakistan*, THE COM. APPEAL (Memphis, TN), Aug. 30, 1998, at A2; see also John Diamond, *US Strikes May Not Be The Last, Warns Pickering*, BIRMINGHAM (Ala.) POST, Aug. 22, 1998, at 8; Ian Mackinnon, *Pakistan Defuses US Cruise Missile*, THE SCOTSMAN (Edinburgh), Aug. 25, 1998, at 8 [hereinafter Mackinnon, *Pakistan*]; *Pakistan—Cruise Missile Found*, *supra* note 405; Louise Branson, *US Bombs “Terrorist Bases,”* STRAITS TIMES (Singapore), Aug. 22, 1998, at 1.

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

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

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

409. See *As Strikes Mount, So Do Errors*, WASH. TIMES, May 11, 1999, at A1 [hereinafter *As Strikes Mount*]; Joyce Price, *Pentagon Regrets “Embassy Error,”* WASH. TIMES, May 9, 1999, at C10; Bill Gertz & Rowan Scarborough, *Inside the Ring*, WASH. TIMES, May 14, 1999, at A9.

410. See DOCTRINE FOR JOINT THEATER NUCLEAR OPERATIONS, *supra* note 353, at 13–15; see also John F. McCarthy, Jr., *The Case for the B-1 Bomber*, 1 INT’L SECURITY, No. 2, Fall 1976, 78, 84–85; PAUL BRACKEN, THE COMMAND AND CONTROL OF NUCLEAR FORCE 6 (1983) (“Never has there been a Soviet–American confrontation during this modern period . . . The Cuban missile crisis of 1962 was the highest level alert ever declared by

error. In U.S. operations in Afghanistan, the U.S. military accidentally bombed a wedding party and a cluster of Canadian soldiers.⁴¹¹ During the recent invasion of Iraq, Iraqi officials claimed that air strikes hit two crowded Baghdad markets, and a missile hit a Syrian bus.⁴¹² Stephen Younger, the head of the Defense Threat Reduction Agency, recently stated that poor intelligence hampers the effectiveness of precision-guided munitions.⁴¹³

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

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

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

412. *See id.*

413. *See* Roxana Tiron, *Poor Intelligence Hampers Precision Weapon Performance*, NAT’L DEF., Mar. 1, 2004.

414. *See* *As Strikes Mount*, *supra* note 409; *see also* Price, *supra* note 409; KOSTA TSIPIS, *supra* note 267, at 68–76, 114–15, 121–296; THE DOCTRINE FOR JOINT THEATER NUCLEAR OPERATIONS, *supra* note 353, at 13–15.

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

415. *See* KOSTA TSIPIS, *supra* note 267, at 68–76, 114–15, 121–296; *see also* INTERNATIONAL PHYSICIANS FOR THE PREVENTION OF NUCLEAR WAR, *supra* note 386 (quoted in Peter Weiss, et al., *Draft Memorial in Support of the Application by the World Health Organization for an Advisory Opinion by the Court of International Justice of the Legality of the Use of Nuclear Weapons Under International Law, Including the W.H.O. Constitution*, reprinted in 4 TRANSNAT’L L. & CONTEMP. PROBS. 721, 729–32 (1994)).

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

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

North Korean systems are subject to at least as much uncertainty.

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

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

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

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

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

417. ICJ Hearing, Nov. 15, 1995, *supra* note 351, at 71.

While the damage caused by the Iraqi attack on Kuwait caused extensive environmental damage, within less than ten years such effects have largely been dissipated. See Tiffani Y. Lee, *Environmental Liability Provisions under the U.N. Compensation Commission: Remarkable Achievement with Room for Improved Deterrence*, 11 *GEO. INT'L ENVTL. L. REV.* 209 (1998); Kyle Pope, *Prognosis Good for Oil Fields*, *HOUS. CHRON.*, Feb. 23, 1991; Kuwait: Pollution Control Equipment Market, Industry Sector Analysis, Dept. of State, 1998 (for samples of the Kuwaiti damage assessment).

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

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

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

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

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

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

420. *Id.* at 873 (citing DICTIONNAIRE ENCYCLOPEDIQUE D'ELECTRONIQUE).

Judge Weeramantry discussed the long-term nature of the effects of radiation:

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

Nuclide	Half-life
Cesium 137	30.2 years
Strontium 90	28.6 years
Plutonium 239	24,100 years
Plutonium 240	6,570 years
Plutonium 241	14.4 years
Americium 241	432 years

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

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

Judge Koroma stated:

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

421. *Id.* at 888 (quoting 9 ENCYC. BRITANNICA MICROPAEDIA (1992 ed.); *id.* at 893 (citing RADIOECOLOGY (Holm ed., 1995)).

422. *Id.* at 895.

capable of killing more than 1 million people. These weapons, if used massively, could result in the annihilation of the human race and the extinction of human civilization. Nuclear weapons are thus not just another kind of weapon; they are considered the absolute weapon and are far more pervasive in terms of their destructive effects than any conventional weapon.⁴²³

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

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

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

423. 35 I.L.M. at 934 (Koroma, J., dissenting).

424. 35 I.L.M. at 863-64 (Shahabuddeen, J., dissenting) (quoting de Cuellar, *supra* note 388, at 91).

425. DOCTRINE FOR JOINT NUCLEAR OPERATIONS, *supra* note 355, at II-1, II-6, II-7.

426. *Id.* at I-6. The manual further stated:

Terminating a global war involving the use of large numbers of WMD on both sides and the degradation and or destruction of their central means of control could be vastly more difficult than ending a theater or regional nuclear conflict involving the relatively constrained use of a limited number of nuclear weapons. In the latter case, war-termination strategies may more readily lead to a cessation of hostilities, assuming that the belligerents' interests in war termination are mutual.

Id.

427. DOCTRINE FOR JOINT THEATER NUCLEAR OPERATIONS, *supra* note 353, at v-vi.

tron) and residual radiation—pose unprecedented physical and psychological problems for combat forces and noncombatant populations alike.”⁴²⁸

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

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

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

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

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

428. DOCTRINE FOR JOINT NUCLEAR OPERATIONS, *supra* note 355, at II-7.

429. DOCTRINE FOR JOINT THEATER NUCLEAR OPERATIONS, *supra* note 353, at I-1 (emphasis omitted).

430. U.S. ICJ Memorandum/GA App., *supra* note 315, at 420 (citing LAW OF LAND WARFARE, *supra* note 311, at 18). The memorandum noted that the prohibition against unnecessary suffering has been applied, for example, to lances with barbed tips and

U.S. attorney McNeill stated the point specifically in oral argument: "The unnecessary suffering principle prohibits the use of weapons designed specifically to increase the suffering of persons attacked beyond that necessary to accomplish a particular military objective."⁴³¹

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

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

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

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

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

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

bullets that are irregularly shaped, scored or coated with a substance that would unnecessarily inflame a wound. U.S. ICJ Memorandum/GA App., *supra* note 315, at 420 n.65.

431. ICJ Hearing, Nov. 15, 1995, *supra* note 351, at 72.

432. See *supra* notes 315-50 and accompanying text.

433. ICJ Hearing, Nov. 15, 1995, *supra* note 351, at 68 (emphasis added).

opposed to grossly negligent or reckless. Such a limitation, as applied to North Korea or any State, would appear to greatly limit the scope of the law of armed conflict. This argument is also contrary to settled law. As the Nuremberg proceedings exemplified, individuals, not States, are potentially put in prison or executed.⁴³⁴ States can, and historically have been, subject to damages and reparations, but, in contemporary international law, the focus of war crimes trials is on the responsible individuals.⁴³⁵

The United States recognized a very broad range of potential criminal liability of individuals for war crimes, including not only for activity of an intentional nature, but also for reckless, grossly negligent, and even negligent conduct. Specifically, the United States has recognized that States are subject to war crimes culpability without regard to mental state;⁴³⁶ individuals are subject to culpability based not only on recklessness, but also on gross negligence;⁴³⁷ and commanders are subject to culpability based on mere negligence or something approaching it.⁴³⁸

Thus, *The Air Force Manual on International Law* goes on to state that *mens rea*, or a guilty mind, at the level of purposeful behavior or intention or at least gross negligence, is required for individual, as opposed to State, criminal responsibility.⁴³⁹ The

434. See A.F. MANUAL ON INT'L LAW, *supra* note 311, at 15-2; see also IAN BROWNIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 150-71 (1963), Matthew Lippman, *Crimes Against Humanity*, 17 B.C. THIRD WORLD L.J. 171, 189-201 (1997) (International Law and Human Rights Edition); Mark Allan Gray, *The International Crime of Ecocide*, 26 CAL. W. INT'L L.J. 215, 265 (1996) (citing Geoff Gilbert, *The Criminal Responsibility of States*, 39 INT'L & COMP. L.Q. 345, 357, 366 (1990)); Report of the Commission to the General Assembly on the work of its forty-sixth session, U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/49/10 (1994), at 348-49.

435. See BROWNIE, *supra* note 434, at 133-49; TELFORD TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY 82-88 (1970).

436. See A.F. MANUAL ON INT'L LAW, *supra* note 311, at 15-2

437. See *id.* at 15-3, 15-8 n.13 (citing JAMES MOLONY SPAIGHT, AIR POWER AND WAR RIGHTS 57, 58 (1947)).

438. See *id.* at 15-2 to 15-3; see also THE LAW OF LAND WARFARE, *supra* note 311, at 178; THE A.F. COMMANDER'S HANDBOOK, *supra* note 311, at 8-1; THE NAVAL/MARINE COMMANDER'S HANDBOOK, *supra* note 311, at 6-5, 6-5 n.13 (citing *United States v. Wilhelm List et al.*, 9 TWC 127 (1950)); CHERIF BASSIOUNI & PETER MANIKAS, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 361, 362 (1996) (citing *The High Command Case*, 2 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 (1949) (This case is also known as *United States v. Wilhelm von Leeb*)).

439. THE A.F. MANUAL ON INT'L LAW, *supra* note 311, at 15-2, 15-8 n.13 (citing SPAIGHT, *supra* note 437, at 57-58 (1947)).

manual quotes Spaight's statement of the rule:

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

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

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

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

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

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

440. *Id.* at 15-8 n.13.

441. *Id.* at 15-3, 15-9 n.23 (citations omitted).

442. *Id.* at 10, 15-2 to 15-3; see also *LAW OF LAND WARFARE*, *supra* note 311, at 178.

443. *NAVAL/MARINE COMMANDER'S HANDBOOK*, *supra* note 311, at 6-5 n.13 (quoting *United States v. Wilhelm List et al.*, 9 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 127 (1950)).

presumed to have known of the offense committed by his subordinates."⁴⁴⁴ "While a commander may delegate some or all of his authority, he cannot delegate responsibility for the conduct of the forces he commands."⁴⁴⁵

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

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

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

444. *Id.* at 6 n.13.

445. *Id.* at 6-5.

446. *In re Yamashita*, 327 U.S. 1, 15 (1946).

447. *See* International Committee of the Red Cross, Commentary on Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1997, Part V: Execution of the Conventions and of This Protocol: Section II—Repression of Breaches of the Conventions and of this Protocol, Art. 85 — Repression of Breaches of This Protocol, available at www.icrc.org/ihl.nsf (last visited Apr. 16, 2004) [hereinafter International Committee of the Red Cross].

448. *See id.* at ¶ 3474; Amnesty International — Report — IOR 40/10/98 May 1998 United Nations, The International Criminal Court Making the Right Choices — Part V Recommendations to the Diplomatic Conference, available at www.amnesty.it/campaign/icc/library/aidocs/IOR401098.html (last visited Apr. 16, 2004); *see also* THE A.F. MANUAL ON INT'L LAW, *supra* note 311, at 15-1 to 15-2; 15-8 n.12 (quoting Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, adopted Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, adopted Aug. 12, 1949, 75 U.N.T.S. 85, and other Geneva Conventions).

as encompassing recklessness.⁴⁴⁹ The law of armed conflict similarly recognizes criminal culpability for acts of wantonness and of “wanton destruction,” acts also not reaching the level of strict intentionality.⁴⁵⁰

Similarly, in imposing war crimes culpability for “an attack which may be expected to cause” certain impermissible effects, as prescribed, for example, in Protocol I to the Geneva Conventions, Article 51(5), or for acts that are “intended, or may be expected, to cause” certain impermissible effects, as prescribed, in Protocol I, Article 35(3), the law again recognizes potential culpability for war crimes committed with a mental element of less than strict intentionality.⁴⁵¹

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

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

449. See International Committee of the Red Cross, *supra* note 447.

450. See International Criminal Tribunal for the Former Yugoslavia, Statute of the International Tribunal, *as amended* May 13, 1998, adopted May 25, 1993, art. 3(b), *available at* <http://www.un.org/icty/basic/statut/statute.htm> (last visited Apr. 16, 2004); Jordan J. Paust, *International Law Association — American Branch: Committee on a Permanent International Criminal Court: The Preparatory Committee’s “Definition of Crimes” — War Crimes*, 8 CRIM. L.F. 431, 438–41 (1997) (emphasis omitted) (citing U.N. Doc. A/CONF. 95/15 (1980), *reprinted in* 19 I.L.M. 1523); Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704 & Add. 1 (1993), Annex, arts. 2(d), 3(b); *Prosecutor v. Karadzic*, Case No. IT-95-5-I (Int’l Trib. for Former Yugo., Indictment, July 24, 1995), at 27, 41, 44; Report of the International Law Commission on Its Second Session, June 5–July 29, 1950, 5 U.N. GAOR, Supp. No. 12, at 11–14, at 99, U.N. Doc. A/1316 (1950); 11 TRIALS OF WAR CRIMINALS 757 (1948); Report of Justice Robert H. Jackson to the President of the United States, released June 7, 1945, *reprinted in* PAUST ET AL., INT’L CRIMINAL LAW at 1027; Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, Apr. 24, 1863, arts. 16, 44, [Lieber Code]; Responsibilities Commission of the Paris Peace Conference, List of War Crimes (1919); Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, adopted Aug. 12, 1949, art. 50-51, 75 U.N.T.S. 31, *available at* <http://www.icrc.org/ihl.nsf> (last visited Apr. 16, 2004).

451. Paust, *supra* note 450, at 438–41 (citations and emphasis omitted).

through a crowded market street can avoid responsibility for the resulting deaths on the ground that he did not intend to kill the particular person who died.⁴⁵²

Judge Weeramantry added: "The plethora of literature on the consequences of the nuclear weapon is so much part of common universal knowledge today that no disclaimer of such knowledge would be credible."⁴⁵³

To the argument that the rule of moderation — the prohibition of the use of arms "calculated to cause unnecessary suffering" — requires specific intent ("calculation"), Judge Weeramantry cited the "well-known legal principle that the doer of an act must be taken to have intended its natural and foreseeable consequences."⁴⁵⁴ He also stated that reading into the requirement such a requirement of specific intent would not "take into account the spirit and underlying rationale of the provision — a method of interpretation particularly inappropriate to the construction of a humanitarian instrument."⁴⁵⁵ He added that nuclear weapons "are indeed deployed 'in part with a view to utilizing the destructive effects of radiation and fall-out.'⁴⁵⁶

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

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

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

452. 35 I.L.M at 901 (Weeramantry, J., dissenting).

453. *Id.*

454. *Id.* at 48.

455. *Id.*

456. *Id.* (citing Ian Brownlie, *Some Legal Aspects of the Use of Nuclear Weapons*, 14 INT'L & COMP. L. Q. 445 (1965)).

ing automatically in the deliberate destruction of the population centers of opposing sides.⁴⁵⁷

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

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

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

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

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

457. ICJ Hearing, Nov. 15, 1995, *supra* note 351, at 68.

458. See *supra* notes 340-44, 367-68 and accompanying text.

459. See MOXLEY, *supra* note 7, at 43-44, 61-62, 65.

460. See MOXLEY, *supra* note 7, at 62; NAVAL/MARINE COMMANDER'S HANDBOOK, *supra* note 311, at 6-5, 6-5 n.12.

461. See *supra* notes 325-50 and accompanying text.

462. U.S. ICJ Memorandum/GA App., *supra* note 315, at 416; LAW OF LAND WARFARE, *supra* note 311, at 5.

H. *U.S. Distortion No. 8: That Only Direct Effects Need Be Considered*

The United States further takes the position that only the direct or “automatic” effects of the use of nuclear weapons need be considered.⁴⁶³ This position appears to give considerable leeway to North Korea and other States to use nuclear weapons without consideration of the likely indirect effects, such as escalatory uses of biological, chemical, and/or nuclear weapons by one’s adversary or its allies or indeed by oneself in preemptive or actual response to one’s adversary or its allies.

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

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

The United States argued before the ICJ that collateral injury to civilians incidental to an attack on a military target is acceptable as long as the civilians are not targeted “as such.”⁴⁶⁵ The United States argued that the rule of civilian immunity “would not be violated by the use of nuclear weapons to attack targets that constitute legitimate military objectives”⁴⁶⁶

The Air Force Manual on International Law quotes the articulation of this rule — “[t]hat it is prohibited to launch attacks against the civilian population *as such*”⁴⁶⁷ — from United Nations Resolution 2444 (XXIII), recognized by the United States as “an accurate declaration of existing customary law.”⁴⁶⁸

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

463. ICJ Hearing, Nov. 15, 1995, *supra* note 351, at 68 (emphasis added).

464. NAVAL/MARINE COMMANDER’S HANDBOOK, *supra* note 311, at 6-5, 6-5 n.12; MOXLEY, *supra* note 7, at 43-44, 61-62, 65.

465. U.S. ICJ Memorandum/GA App., *supra* note 315, at 415-16; LAW OF LAND WARFARE, *supra* note 311, at 4.

466. *Id.* at 416.

467. THE A.F. MANUAL ON INT’L LAW, *supra* note 311, at 5-7 (emphasis added).

468. *Id.* (citing Arthur Rovine, *Contemporary Practice of the United States Relating to International Law*, 67 AM. J. INT’L L. 118, 122-25 (1973) (quoting DOD, General Counsel, Letter to the Effect that Resolution 2444 is “declaratory of existing customary international law”)).

fulness of the Trident I (C-4) Missile, stated the U.S. memorably, "Nuclear attack planning is not directed towards civilian population or residential structures per se, although substantial injury/damage to population and residential structures may result from targeting to accomplish [the national strategic objectives pursued by employment of the weapons]."469

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

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

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

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

469. Navy JAG Trident I, *supra* note 271, at 7-8.

470. See MOXLEY, *supra* note 7, at 363-65 nn.43-45, 387-88, nn.2-3 and accompanying text; see also *id.* at 353-66, 387-96; ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE*, I-II, Quest. 64, art. 7; Stephen R. Latham, *Aquinas and Morphine: Notes on Double Effect at the End of Life*, 1 DEPAUL J. HEALTH CARE L. 625, 633 (1997); D. W. BOWETT, *SELF-DEFENCE IN INT'L LAW* 10 (1958).

471. See MOXLEY, *supra* note 7, at 388-89 nn.3-5 and accompanying text; see also AUSTIN FAGOTHEY, S.J., *RIGHT AND REASON, ETHICS IN THEORY AND PRACTICE* 107-08 (1963); MICHAEL WALZER, *JUST AND UNJUST WARS, A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 129, 153 (1968) (citing DOUGHERTY, *GENERAL ETHICS: AN INTRODUCTION TO THE BASIC PRINCIPLES OF THE MORAL LIFE ACCORDING TO ST. THOMAS AQUINAS* 65-66 (1959)); John C. Ford, S.J., *The Morality of Obliteration Bombing, in WAR AND MORALITY* (Richard Wasserstrom ed., 1970).

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

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

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

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

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

J. *U.S. Distortion No. 10: That Nuclear Weapons May Lawfully Be Used in Reprisal*

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

472. See DOCTRINE FOR JOINT NUCLEAR OPERATIONS, *supra* note 355, at I-1, I-2; MICHAEL WALZER, *supra* note 471, at 153, 273-83 (1968); FAGOTHEY, *supra* note 471, at 113 n.1.

473. DOCTRINE FOR JOINT NUCLEAR OPERATIONS, *supra* note 355, at I-1 (emphasis omitted).

474. *Id.* at I-2.

475. See MOXLEY, *supra* note 7, at 353-67; see also MODEL PENAL CODE § 3.02, cmt. 3, at 14-15 (A.L.I. 1985).

476. Navy JAG Tomahawk, *supra* note 397, at 7.

use of nuclear weapons were deemed *per se* unlawful, such weapons could still be used in reprisal:

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

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

477. ICJ Hearing, Nov. 15, 1995, *supra* note 351, at 75. See A.F. MANUAL ON INT'L LAW, *supra* note 311, at 10-3, 10-6 n.12 (quoting *United States v. Ohlendorf*, 4 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 493 (1950)); A.F. COMMANDER'S HANDBOOK, *supra* note 311, at 8-1; LAW OF LAND WARFARE, *supra* note 311, at 177; Col. Charles J. Dunlap, Jr., USAF, *Taming Shiva: Applying International Law to Nuclear Operations*, 42 A.F. L. REV. 157 (1997).

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

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

Id. at 163.

Secretary of Defense Perry described MAD:

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

Secretary of Defense William Perry & General John Shalikashvili, Chairman, Joint Chiefs of Staff, *Defense Department Briefing*, COMPASS NEWSWIRE, Sept. 22, 1994.

478. See U.S. ICJ Memorandum/GA App., *supra* note 315, at 30-31; see also ICJ Hearing, Nov. 15, 1995, *supra* note 351, at 75; A.F. MANUAL ON INT'L LAW, *supra* note 311, at 10-3, 10-4, 10-5; NAV./MARINE COMMANDER'S HANDBOOK, *supra* note 311, at 6-17, 6-18 (including a similar list).

weapon cannot be controlled.⁴⁷⁹ In addition, the action taken in reprisal must be “taken in the last resort, in order to prevent the adversary from behaving illegally in the future”⁴⁸⁰ and “may not significantly exceed the adversary’s violation either in violence or effect.”⁴⁸¹

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

In addition, the United States, while it disputes the applicability to nuclear weapons of the limitations upon reprisals imposed by Protocol I,⁴⁸² recognizes that the law of armed conflict, including that as to reprisals, is subject to the limitations inherent in the purposes of the law of armed conflict, such as preserving civilization and the possibility of the restoration of the peace, purposes that would likely be exceeded by the use of nuclear weapons.

Even if it were assumed that certain second uses of nuclear weapons, although otherwise unlawful, might be legitimized as reprisals, such legitimization, like the lawfulness of the limited use of a small number low-yield nuclear weapons in remote areas asserted by the United States before the ICJ, would only affect a small portion of the potential uses for nuclear weapons contemplated by U.S. policy and planning. It would leave unaffected the unlawfulness of the vast bulk of potential uses and virtually

479. See *supra* note 350 and accompanying text.

480. A.F. MANUAL ON INT’L LAW, *supra* note 311, at 10-3, 10-6 n.12 (quoting *United States v. Ohlendorf*, 4 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 493 (1950)); see also A.F. COMMANDER’S HANDBOOK, *supra* note 311, at 8-1, 8-4(b); LAW OF LAND WARFARE, *supra* note 311, at 177.

481. *Id.* at 10-5.

482. See MOXLEY, *supra* note 7, at 93-94 n.274-77, 150-51 n.127-29, 228-29, nn.246-49 and accompanying text.

the totality of *likely* possible uses, including first uses against biological, chemical, and conventional weapons targets, second uses intended to defeat and destroy the enemy, disproportionate second uses, and other high-mega-tonnage nuclear strikes with likely extreme effects.

XI. *AGENDA BETWEEN THE UNITED STATES AND NORTH KOREA*

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

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

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

483. See, e.g., *Cashing in on China Reform*, July 31, 2003, available at <http://www.business-times.asia1.com.sg/story/0,4567,89466,00.html> (last visited Apr. 16, 2004); Bonnie S. Glaser, *U.S.-China Relations: The Best Since 1972 or the Best Ever*, COMP. CONNECTIONS PAC. F., CSIS (Oct. 2003); *Cuba's Agriculture: Collapse and Economic Reform*, Economic Research Service, USDA, Oct. 1998, at 26, available at <http://www.ers.usda.gov/publications/agoutlook/oct1998/ao255h.pdf>. (last visited Apr. 16, 2004).

484. See *supra* note 70 and accompanying text.

485. See *supra* note 112 and accompanying text.

486. See Leonard Weiss, *Nuclear Weapon States and the Grand Bargain*, ARMS CONTROL TODAY, December 2003, available at http://www.armscontrol.org/act/2003_12/weiss.asp (last visited Apr. 16, 2004); Transcript of Nuclear Scientist Abdul Qadeer

attacks;⁴⁸⁷ and Iraq in the 1980's with its actual use of chemical weapons against Iran and the Kurds.⁴⁸⁸

With the end of the Cold War, the U.S. military and the supporting industrial complex lost much of their reason for being, at least at the level they were then constituted. The world appeared to be facing the prospect of substantial demilitarization. This diminution of the military appeared to be happening for a number of years, at least to some extent.⁴⁸⁹

At the time of demilitarization, the thought occurred to many that, if an enemy did not emerge, the industrial, military, and political systems of the United States would find an enemy.⁴⁹⁰ President Dwight D. Eisenhower had long previously warned of the risks of the development of this kind of thinking.⁴⁹¹

The United States' antagonism with Iraq starting in the early 1990s seemed to have many of the earmarks of such a contrived instigation of military antagonism. Saddam Hussein had long been the friend and ally of the United States, going back to the early 1980s.⁴⁹² The United States supported him in many of

Khan on Pakistan TV, *available at* <http://www.fas.org/nuke/guide/pakistan/nuke/aqkhan020404.html> (last visited Apr. 16, 2004).

487. See Josh Meyer, *Saudi Government Promised Aid to 9/11 Hijackers, Sources Say*, L.A. TIMES, Aug. 2, 2003, at A1; see also David Johnston & James Risen, *Threats and Response: Tracking Terrorism: 9/11 Report Says Saudi Arabia Links Went Unexamined*, N.Y. TIMES, Nov. 23, 2002, at A1.

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

489. For example, U.S. military spending steadily decreased from 1992 through 1999 to a low-point of U.S.\$298.4 billion (in 2002 dollars) in 1999. See Information Compiled for the Center for Defense Information, *available at* www.cdi.org (last visited Apr. 16, 2004). Projected spending for 2004 is U.S.\$379.9 billion, not including the recently approved U.S.\$87 billion to fund the Iraq war. See *id.* This puts military spending back to its actual 1992 level of \$379.5 billion, assuming these are actual, not time or inflation adjusted numbers. See *id.*; see also Carl Conetta and Charles Knight, *Post-Cold War US Military Expenditure in the Context of World Spending Trends Project on Defense Alternatives, Briefing Memo* Jan. 10, 1997, *available at* <http://www.comw.org/pda/bmemo10.htm> (last visited Apr. 16, 2004) (reporting that from 1986 to 1994 U.S. military expenditure decreased 21%); U.S. Military Spending, 1945 - 1996, Center for Defense Information, <http://www.cdi.org> (last visited Apr. 16, 2004).

490. See, e.g., *Who's The Enemy Now?*, Center for Defense Information, American Defense Monitor, Sept. 5, 1993, *available at* <http://www.cdi.org/adm/651/> (last visited Apr. 23, 2004).

491. Dwight D. Eisenhower, *Military-Industrial Complex Speech*, 1961, Public Papers of the Presidents, 1960, at 1035-40.

492. See *supra* notes 156-63 and accompanying text.

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

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

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

XII. *NORTH KOREA'S POTENTIAL USE AND THREAT OF USE OF NUCLEAR WEAPONS*

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

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

493. See *supra* notes 157-60 and accompanying text.

494. See *supra* notes 157-64 and accompanying text; *Nerve Gas Used in Northern Iraq on Kurds*, Physicians for Human Rights, available at http://www.phrusa.org/research/chemical_weapons/chemiraqgas2.html (last visited Apr. 16, 2004).

495. See *supra* notes 165-67 and accompanying text.

496. See *supra* notes 171-89 and accompanying text.

497. MOXLEY, *supra* note 7, at 174-84.

498. Nuclear Weapons Advisory Opinion, *supra* note 1, at ¶ 42.

that it is used for lawful self-defense or other lawful purpose does not immunize the unlawfulness:

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

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

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

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

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

499. *Id.* at ¶ 39.

500. *Id.* at ¶ 78, 35 I.L.M. at 827 (emphasis added); *but see Lord Advocate's Reference No. 1 of 2000* [Mar. 30, 2001], 2001 SCCR 296, 2001 SC 143, Misc 11/00 H.C.J. (Scot.), ¶¶ 86, 96 (The Scottish High Court of Justiciary, in a case involving a challenge to the United Kingdom's policy of nuclear deterrence, concluded that that State's policy of deterrence was not specific enough to constitute a threat under international law); *see also* Charles J. Moxley, Jr., *The Unlawfulness of the United Kingdom's Policy of Nuclear Deterrence*, JURIDICAL REVIEW, Part 6, 2001; JOHN BURROUGHS, *THE (IL)LEGALITY OF THREAT OR USE OF NUCLEAR WEAPONS* 32-37 (Lit Verlag, Münster Germany 1997).

Thus it would be illegal for a state to threaten force to secure territory from another state, or to cause it to follow or not follow certain political or economic paths. *The notions of "threat" and "use" of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal – for whatever reason – the threat to use such force will likewise be illegal. In short, if it is to be lawful, the declared readiness of a state to use force must be a use of force that is in conformity with the Charter.* For the rest, no state – whether or not it defended the policy of deterrence – suggested to the Court that it would be lawful to threaten to use force if the use of force contemplated would be illegal.

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

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

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

501. Nuclear Weapons Advisory Opinion, *supra* note 1, at 823, ¶¶ 47–48 (emphasis added). The ICJ further stated in Paragraph 67 of its opinion (35 I.L.M. at 826) that it did not intend to pronounce upon the practice known as the "policy of deterrence." *Id.* at ¶ 67, 35 I.L.M. at 826.

collective self-defense under any circumstances, there would be no credible threat of such use in response to aggression and deterrent policies would be futile and meaningless. In this sense, it is impossible to separate the policy of deterrence from the legality of the use of the means of deterrence. Accordingly, any affirmation of a general prohibition on the use of nuclear weapons would be directly contrary to one of the fundamental premises of the national security policy of each of these many states.⁵⁰²

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

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

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

502. ICJ Hearing, Nov. 15, 1995, *supra* note 351, at 62-63.

503. *See* Deller, *supra* note 123.

504. *Chemical and Biological Weapons: Possession and Programs Past and Present*, available at <http://cns.miis.edu/research/cbw/possess.htm> (last visited Apr. 16, 2004). The Federation of American Scientists list is more inclusive and includes countries capable of producing chemical or biological weapons. There are twenty-six countries capable of acquiring chemical weapons and twenty capable of acquiring biological weapons. *States Possessing, Pursuing, or Capable of Acquiring Weapons of Mass Destruction*, at http://www.fas.org/irp/threat/wmd_state.htm (last visited Apr. 16, 2004).

505. *See* Deller, *supra* note 123.

506. *See* Federation of American Scientists, *supra* note 128 and accompanying text.

It seems unrealistic to expect that the States of the world will ever agree to an effective ban on chemical and biological weapons as long as the United States is supporting — indeed asserting — the legitimacy of nuclear weapons.

This leads to a dangerous world, ostensibly more dangerous than the Cold War world, given the loss of coherency and control imposed by the Cold War strategic situation. Biological and Chemical weapons are extremely dangerous. Some credible sources have concluded that, in circumstances favorable to the attacker, biological weapons have the potential to cause as much injury as nuclear weapons.⁵⁰⁷ A small amount of a toxin or virus could poison substantial portions of the population of any U.S. city through only a few droplets placed in the water supply or through aerosol sprayed into the air.⁵⁰⁸

The underlying technical information as to biological and chemical weapons, including information as to ingredients and to production technology — is more available and much less complex than that for nuclear weapons.⁵⁰⁹ The underlying materials, many of which have other innocent applications, are

507. See, e.g., U.S. CONGRESS OFFICE OF TECHNOLOGY ASSESSMENT, *PROLIFERATION OF WEAPONS OF MASS DESTRUCTION: ASSESSING THE RISKS, OTA-JSC-559*, at 3, 8, 54, 100 (Washington, DC, Aug. 1993) [hereinafter *PROLIFERATION OF WEAPONS OF MASS DESTRUCTION*] (report prepared at request of Congress “to assist Congress in its efforts to strengthen and broaden U.S. policies to control the proliferation of weapons of mass destruction”); Daryn Kagan & Eileen O’Connor, *President Clinton to Announce Plan to Counter Biological Weapons Threat*, CNN MORNING NEWS, May 22, 1998 (statement of John Boatman of Jane’s Information Group); Chemical & Biological Weapons Resource Page, Center for Non-Proliferation Studies, Monterey Institute for International Studies, available at <http://cns.miis.edu/research/cbw/index.htm> (last visited Apr. 16, 2004); Jonathan B. Tucker, *Biosecurity: Limiting Terrorist Access to Deadly Pathogens*, Peaceworks 52, United States Institute for Peace, available at <http://www.usip.org/pubs/peaceworks/pwks52.html> (last visited Apr. 16, 2004); Wayne Turnbull and Praveen Abhayaratne, *2002 WMD Terrorism Chronology: Incidents Involving Sub-National Actors and Chemical, Biological, Radiological, and Nuclear Materials*, Center for Nonproliferation Studies 2003, available at <http://cns.miis.edu/pubs/reports/pdfs/cbrn2k2.pdf> (last visited Apr. 16, 2004).

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

509. See Gertz, *supra* note 198. “Highly advanced communications are putting such weapons know-how in the hands of anyone with a computer and modem. ‘The ingredients for sarin and other chemical weapons are easily accessible over the Internet,’ said Sen. Sam Nunn (D. Ga.), the senior Democrat on the Senate Armed Services Committee, ‘as is information about biological weapons and even instructions on how to make a nuclear device.’” *Id.*

likewise generally more available,⁵¹⁰ and the prerequisites for acquiring, implementing, and setting up the necessary production facilities and processes are less daunting.⁵¹¹

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

510. See PROLIFERATION OF WEAPONS OF MASS DESTRUCTION, *supra* note 507, at 6. "Virtually all the equipment underlying production of biological and toxin agents has civil applications and has become widely available as fermentation technology, and the pharmaceutical and biotechnology industries more generally, have spread worldwide." *Id.*

511. See *id.* at 1. "Barring a shortcut, such as the direct acquisition of nuclear materials usable in weapons, the infrastructure required to produce nuclear weapons is considerably more difficult and expensive than for either biological or chemical weapons. Mass production of lethal chemicals requires a greater investment than that of biological weapons, but is not nearly as expensive or challenging as production of nuclear materials." *Id.*

Similarly, "A nuclear bomb in the hands of a deranged person has long been the stuff of nightmares, but the materials needed to make such a device are hard to obtain and exceedingly tricky to assemble. Biological weapons are not nearly so difficult to manufacture." TAYLOR, *supra* note 435.

512. It is often said that biological and chemical weapons are a poor man's nuclear weapons, because they are appreciably cheaper, more accessible and substantially easier to deliver. See Boyle, *supra* note 508; see also Thomas Graham, *Conventional Response; Nuclear Stance Could Worsen Chem-Bio Threat*, DEFENSE NEWS, Feb. 23, 1998/Mar. 1, 1998, at 31.

513. See David Rohde, *Standoff With Iraq: The Inspections*, N.Y. TIMES, Feb. 12, 1998, at A6. ("In a 1996 report on biological weapons, the Center for Strategic and Int'l Studies, a public policy research institution in Washington, D.C., warned that it was easy for a would-be terrorist to assemble biological weapons — using commercial equipment with a capacity of 130 gallons"). Chemical weapons generally require somewhat larger production facilities that would be visible from the air. See Boyle, *supra* note 508.

514. See Boyle, *supra* note 508 ("Anybody who has taken Microbiology 202 can make a biological weapon Sophisticated lab equipment and exotic materials are not needed. You can brew up a biological weapon in a small brewer—like one you'd use for homemade beer").

515. See Gertz, *supra* note 198. A Nation or group gains tremendous flexibility if it chooses a biological weapons program: "Unlike chemical weapons programs, which require the use of large scale industrial equipment and possession of precursor chemicals, BW weapons do not need to be stockpiled. Nations can keep small quantities or even sample cultures on hand in freeze-dried form. Cultures can be mass produced at any time." *Id.* With biological weapons, "the threat resists taming because the weapons are easy to make and their production is hard for international monitors to detect." Boyle, *supra* note 508.

516. MOXLEY, *supra* note 7, at 630-31.

black market, terrorist organizations, and other criminal sources.⁵¹⁷ Because they are lighter and smaller, bacteriological and chemical weapons are also easier to deliver.⁵¹⁸

It is noteworthy that the fundamental reason biological and chemical weapons have been outlawed by convention is the vast destructiveness to human life and the uncontrollability of their effects.⁵¹⁹

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

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

518. "Crude dissemination of biological agents in an aerosol cloud can be performed with commercially available equipment, such as an agricultural sprayer mounted on a truck, ship, or airplane." PROLIFERATION OF WEAPONS OF MASS DESTRUCTION, *supra* note 507, at 6.

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

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

In addition, the proliferation of ballistic missiles, such as the Soviet-made SCUD systems, has increased the risks of the potential use of chemical or biological weapons. See JOINT DOCTRINE FOR NUCLEAR, BIOLOGICAL, AND CHEMICAL (NBC) DEFENSE, *supra* note 512, at I-3. "Ballistic missiles offer potential proliferators several advantages in delivering NBC weapons . . . The potential for coercion is, perhaps, the long-range ballistic missile's greatest value to proliferators . . . [to] threaten distant cities and . . . distract and tie up military resources." 1997 COUNTERPROLIFERATION PROGRAM REVIEW COMMITTEE REPORT TO CONGRESS 3-8 (1997).

519. As a "universally agreed illustration of . . . an indiscriminate weapon," THE A.F. MANUAL ON INT'L LAW cites biological weapons, noting that the uncontrollable effects from such weapons "may include injury to the civilian population of other states as well as injury to an enemy's civilian population." See *id.* at 6-3. The manual further states that the "wholly indiscriminate and uncontrollable nature of biological weapons has resulted in the condemnation of biological weapons by the international community, and the practice of states in refraining from their use in warfare has confirmed this rule." *Id.*

trary to the national interest of the United States, certainly more so in the current era than during the Cold War.

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

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

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

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

See also LAWRENCE FREEDMAN, THE EVOLUTION OF NUCLEAR STRATEGY 71 (1989). Under NSC-68,

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

Id. Cf. John Lewis Gaddis & Paul Nitze, *NSC 68 and the Soviet Threat Reconsidered*, 4 INT'L SECURITY, No. 4, Spring 1980, at 164-76; Secretary of State John Foster Dulles, *Massive Retaliation*, Address to the Council on Foreign Relations, Jan. 12, 1954 (DEP'T ST. BULL., Jan. 25, 1954), in AMERICAN DEFENSE POLICY, *supra*, at 288, 294; William J. Perry, Secretary of Defense, 1995 ANNUAL REPORT TO THE PRESIDENT AND THE CONGRESS 84-85 (U.S. Government Printing Office); HENRY KISSINGER, WHITE HOUSE YEARS 218 (1979); Testimony of Adm. Noel Gayler, U.S. Navy (Retired), Former Commander in Chief, U.S. Forces in the Pacific, Former Director, National Security Agency, in Hearings on the Role of Arms Control in U.S. Defense Policy, before the Committee on Foreign Affairs, House of Representatives, Ninety-Eighth Congress, 2d Sess., at 126 (June 20, 21, 26, July 25, 1984); NSC-68, *supra*, at 288. See also MOXLEY, *supra* note 7, 400 nn.14-15, 474-77 nn. 29-35, and accompanying text.

Cf. Gaddis & Nitze, *supra*, at 164-76.

Secretary of State John Foster Dulles, *Massive Retaliation* (Address to the Council on Foreign Relations, 12 Jan. 1954 (DEP'T ST. BULL., 25 Jan. 1954), in AMERICAN DEFENSE POLICY, *supra*, at 294.

521. MOXLEY, *supra* note 7, at 485, 493-94 nn.48-52 and accompanying text.

sessing nuclear weapons will enable it to avoid greater expenditures for conventional weapons, thereby enabling it to commit more of its resources to civilian needs.⁵²² Ironically, the United States gave this same economic justification for its nuclear weapons program during the Cold War, as it permitted the Soviet Union to become more powerful in conventional weapons and relied on nuclear weapons for defense and deterrence.⁵²³

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

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

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

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

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

524. See, e.g., John F. Murphy, *Legal and Ethical Dimensions of Collateral Damage*, in 78 INT'L LAW STUDIES 232 (Andru E. Wall ed., 2002); Lieutenant Commander Stuart Belt, *Missiles Over Kosovo: Emergence, Lex Lata, of a Customary Norm Requiring the Use of Precision Munitions in Urban Areas*, 47 NAVAL L. REV. 115, 130 (2000); Danielle L. Infeld, *Precision-Guided Munitions Demonstrated Their Pinpoint Accuracy in Desert Storm: But Is A Country Obligated to Use Precision Technology to Minimize Collateral Civilian Injury and Damage?*, 26 GEO. WASH. J. INT'L L. & ECON. 109, 188 n.74 (1992); MOXLEY, *supra* note 7 at 367-74.

would suffice to accomplish the military mission.⁵²⁵ Given that the rule of necessity is a rule of reason,⁵²⁶ to be applied based upon an objective consideration of all available facts,⁵²⁷ it would seem that a State has an obligation, to the extent feasible, to maintain sufficient conventional weapons as not to run the risk of bring upon itself the necessity to use nuclear weapons when conventional weapons would have sufficed.⁵²⁸

This becomes a very significant legal point in the real world. Given the capability of today's high-tech nuclear weapons, the United States is essentially in the position of being able to achieve with conventional weapons virtually any military mission for which it might previously have felt the need to resort to nuclear weapons.⁵²⁹

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

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

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

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

Thus, the determination of proportionality with respect to the use of nuclear weapons includes a comparison of the probable results of using conventional as opposed to nuclear weapons. See MOXLEY, *supra* note 7, at 339-46, 141-42, 472-77 nn.27-36 and accompanying text. See also 1996 DOCTRINE FOR JOINT THEATER NUCLEAR OPERATIONS, *supra* note 353, at vii-viii, II-7.

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

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

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

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

529. See GARY W. LANE, *NEW CONVENTIONAL WEAPONS, REDUCING RELIANCE ON A NUCLEAR RESPONSE TOWARD AGGRESSORS* (2002); MOXLEY, *supra* note 7, at 53 nn.110-12, 56 n.128, 633-50. See also *id.* at 400-01 nn.15-17, 633 n.1, 637 nn.13-14, 641-45 nn.37-52; NATIONAL DEFENSE PANEL, *TRANSFORMING DEFENSE: NATIONAL SECURITY IN THE 21ST CENTURY* 51 (Dec. 1997); David Learmount, *Smart Bombs in Demand*, FLIGHT INT'L, June 9, 1999; William J. Perry, *Desert Storm and Deterrence*, 70 FOREIGN AFF., no. 4, Fall 1991, at 66.

whereby, even if it spent every last penny of its national budget on conventional weapons, leaving nothing for civilian purposes, it would be unable to defend itself with conventional weapons against the United States.⁵³⁰ On such a basis, the use of nuclear weapons, if it is ever potentially lawful, as the United States asserts, could arguably be lawful for North Korea, but not for the United States.⁵³¹

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

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

CONCLUSION

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

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

531. See 78 *LEGAL AND ETHICAL LESSONS OF NATO'S KOSOVO CAMPAIGN, INT'L LAW STUDIES* 243, 302, 303 (Andru E. Wall ed., 2002); Michael N. Schmitt, *The Principle of Discrimination in 21st Century Warfare*, 2 *YALE HUM. RTS. & DEV. L.J.* 143, 155, 169 (1999); COMMENTARY ON THE ADDITIONAL PROTOCOLS OF JUNE 8, 1977 TO THE GENEVA CONVENTIONS OF AUG. 12, 1949, at 384 (Yves Sandoz et al. eds., 1987).

532. See Department of Defense, *Nuclear Posture Review Report*, available at http://www.nuclearweaponslaw.org/2002NPR/2002NPR_Article.html (Jan. 8, 2000) (available with accompanying briefing speech and slides). See also Charles J. Moxley Jr., *2002 Nuclear Posture Review: Strategic and Legal Ramifications*, available at <http://www.nuclearweaponslaw.org> (Apr. 16, 2002).

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

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

The threat posed by the nuclear weapons regime propagated by the United States is intertwined with the threat posed by biological and chemical weapons. As long as the United States legitimizes nuclear weapons, biological and chemical weapons, the "poor Nation's nuclear weapons," will be *de facto* legitimized.

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

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

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