

The North Korean Nuclear Crisis: Past Failures, Present Solutions

Abstract

North Korea has recently announced that it has developed nuclear weapons and has pulled out of the six-party talks. These events do not emerge out of a vacuum, and this article lends perspective based on an interdisciplinary lens that seeks to grapple with the complexities and provide constructive approaches based on this well-researched understanding. This article analyzes political, military, historical, legal and other angles of this international crisis.

Past dealings with North Korea have been unfruitful because other nations do not recognize the ties between North Korean acts and its ideology and objectives. For a satisfactory resolution to the current crisis, South Korea and the U.S. must maintain sufficient deterrence, focus on multi-lateral and international avenues, and increase the negative and later positive incentives for North Korean compliance with its international obligations.

From an international legal and international organizations perspective, the multilateral talks can be bolstered by inclusion of the United Nations Secretary General as a proactive mediator. It can call for, if necessary and after the failure of other means, UN Security Council action and the reinstatement of the IAEA to do its duly constituted work of preventing proliferation. If these approaches succeed, the peninsula, region and world will become better places as a result.

Introduction

Nuclear physicists Otto Hahn and Fritz Strassman turned the hinges of history through the small but stupendous act of splitting a uranium atom.¹ The devastating power of an atomic bomb itself came about through the efforts of American nuclear scientists through the Manhattan Project.² A particular isotope of uranium, U235, accounts for nuclear possibilities.³ This atom, when hit by a neutron, emits one or more neutrons along with energy as it breaks apart into two pieces: this process is known as fission.⁴ A successive chain reaction can take place under the proper parameters.⁵ When one controls this chain reaction so that the rate of fission remains constant, nuclear energy results.⁶

Many nations, including North Korea, make use of nuclear fission to generate electricity.⁷ In 1993, contrary to the terms of the Nuclear Non-proliferation Treaty which it had signed, North Korea refused to allow inspections of one of its nuclear facilities, which the U.S., Japan, and South Korea suspected of processing nuclear materials for weapons.⁸ For the next eighteen months, North Korea played a game of nuclear brinkmanship—keeping inspectors at arms' length, threatening to withdraw totally from the NPT, agreeing to and withdrawing from talks, and increasing the vehemence of its propaganda to threaten war in the face of proposed sanctions—to try to secure more

¹ H. Athanasopoulos, *NUCLEAR DISARMAMENT IN INTERNATIONAL LAW 1* (McFarland & Company 2000).

² *Id.*

³ See Richard L. Williamson, Jr., *Law and the H-Bomb: Strengthening the Nonproliferation Regime To Impede Advanced Proliferation*, 28 *CORNELL INT'L L.J.* 71, 77 (Winter 1995).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 77-78.

⁷ B. K. GILLS, *KOREA VERSUS KOREA: A CASE OF CONTESTED LEGITIMACY*, 235-36 (1996).

⁸ *Id.* at 236.

economic aid and political leverage against the U.S.⁹ B. K. Gills writes that the nuclear crisis was on a “trajectory towards war” until Jimmy Carter, of his own accord, brokered a deal that removed the sanction threat if North Korea agreed to inspections, thus averting the crisis.¹⁰

Ten years later, however, not only is North Korea violating its pledge not to develop nuclear weapons, it has brazenly declared to the world that it already possesses such weapons.¹¹ Analysts attribute North Korea’s desire for weapons to several factors, such as deterrence against a perceived Western threat,¹² a bargaining chip to gain political and economic advantages,¹³ or as a natural extension of the national ideology.¹⁴ No matter the reason, atomic weapons in the hands of a nation with a stated goal to reunite the Korean Peninsula by force, a nation that has violated all of its major international agreements, a nation with missile systems capable of reaching South Korea, Japan, and possibly even the United States, are greatly opposed by these nations.¹⁵

This situation is worsened by North Korea’s refusal to engage in multi-nation talks that include South Korea, the U.S. and Japan, plus North Korea's own traditional

⁹ *Id.* at 236-40.

¹⁰ *Id.* at 240-43; William M. Drennan, *Nuclear Weapons and North Korea: Who’s Coercing Whom?*, in *THE UNITED STATES AND COERCIVE DIPLOMACY* 159 (Robert J. Art & Patrick M. Cronin, eds., 2003).

¹¹ See, e.g., Michael Duffy, *What Does North Korea Want?* TIME (Feb. 13, 2005), available at <http://www.time.com/time/magazine/printout/0,8816,1027498,00.html>; *Timeline: N. Korea Nuclear Dispute*, CNN.COM (Feb. 14, 2005), available at <http://www.cnn.com/2005/WORLD/asiapcf/02/10/nkorea.timeline/>; North Korea Chronology, available at http://www.armscontrol.org/act/2003_06/nkoreachron_june03.asp (June 2003).

¹² See, e.g., Daniel A. Pinkston et al., *Special Report on the North Korean Nuclear Weapons Statement*, Center for Nonproliferation Studies, Monterey Institute of International Studies, at <http://cns.miis.edu/pubs/week/050211.htm> (Feb. 11, 2005).

¹³ *North Korea’s Threat*, WASHINGTONPOST.COM (Feb. 12, 2005), at <http://www.washingtonpost.com/ac2/wp-dyn/A17611-2005Feb11?language=printer>.

¹⁴ See Sung-Yoon Lee, *Global Pressure Point: Nuclear Diplomacy vis-à-vis the DPRK: A Dead-End Street*, 27 FLETCHER F. WORLD AFF. 151 (Summer/Fall, 2003).

¹⁵ See, e.g., Pinkston et al., *supra* note 12.

allies China and Russia,¹⁶ which many analysts view as the best prospect for lasting solutions.¹⁷ Instead, North Korea wants to bypass South Korea, the nation with the most at stake, and deal with the United States directly.¹⁸ Although the U.S. currently opposes bilateral talks, an effective strategy to address the complexities of the current crisis has yet to emerge.¹⁹

For the past fifty years, North Korea has lied, broken its word, and pushed tensions to the brink of war, so that negotiations with this country have routinely been unproductive, if not outright failures. With nuclear weapons in the equation, though, the need for effective solutions has never been higher. At the same time, one scholar has called nuclear diplomacy with North Korea “a dead-end street.”²⁰ With these stakes as the background, this paper presents the history of North Korean relations with other countries, explores current actions and international responses, and offers solutions, with a focus on the application of international legal instruments and organizations.

Background: Korea Divided and North Korea as Rogue State

History of the Division

Korean Conflict

After finding itself no longer under the ignominy of the Japanese colonial period (1905-end of WWII),²¹ Korea moved into a different sort of problem. The Soviet Union,

¹⁶ *Id.*

¹⁷ *E.g.*, Lee, *supra* note 14.

¹⁸ *See North Korea's Threat*, *supra* note 13.

¹⁹ *Id.*

²⁰ Lee, *supra* note 17, at 152.

²¹ *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; *American Military History*, Army Historical Series, Office of The Chief Military History, United States Army ch. 25,

after a period of relative inaction, decided actively to pursue military efforts at the end of WWII in order to strengthen its hand during post-war settlements.²² They poured south into Manchuria.²³ The resulting U.S.-Soviet agreement, contrary to the will of the Korean people, split this small peninsula into the U.S.-aligned South Korea and the Soviet-aligned North Korea, with the Soviets agreeing to push no further south than the 38th parallel.²⁴

Border skirmishes ensued over the next few years until, on the early morning of June 25th, 1950, North Korean forces embarked on a full-scale war by launching out over the 38th parallel.²⁵ Premier Kim Il Sung had eight full divisions (135,000 troops) at his disposal. Many of these soldiers fought previously in World War II.²⁶ By contrast, South Korea counted only 95,000 generally less-seasoned soldiers.²⁷

The North Korean divisions drove deep into South Korea, overmatching the smaller South Korean forces, pushed down to the Pusan Perimeter, a relatively small swath of land at the southernmost tip of the peninsula.²⁸ The North Korean troops made full use of the advantage of surprise and initiative.²⁹

available at <http://www.army.mil/cmh-pg/books/amh/AMH-25.htm>; Henry Chung, KOREA AND THE UNITED STATES THROUGH WAR AND PEACE 43-85 (2000).

²² See, e.g., Robert J. Myers, KOREA IN THE CROSS CURRENTS: A CENTURY OF STRUGGLE AND THE CRISIS OF REUNIFICATION 77-95 (2001); Chung, *supra* note 21, at 97-108.

²³ Chung, *supra* note 21, at 97; Myers, *supra* note 22, at 78.

²⁴ Chung, *supra* note 21, at 109-24; Myers, *supra* note 22, at 78-79; M.P. Srivastava, THE KOREAN CONFLICT: SEARCH FOR UNIFICATION 54 (1982).

²⁵ Chung, *supra* note 21 at 155; Bruce Cumings, KOREA'S PLACE IN THE SUN 260-63 (1997).

²⁶ *American Military History*, *supra* note 21.

²⁷ *Id.* at 25.

²⁸ Chung, *supra* note 21, at 169.

²⁹ *But see* Cumings, *supra* note 25, at 261-63 (South Korean intelligence expected an attack on the Ongjin peninsula, which was repulsed – the surprise may have been that the attack continued and was more widespread than the Ongjin peninsula).

As the North steamrolled the South, the U.S. called upon the UN Security Council to take action against North Korean aggression.³⁰ The Security Council, with the support of fifty-three U.N. member states, called upon its members to send military assistance: twenty-nine member states made specific offers to help.³¹ As it turned out, twenty countries came to the aid of South Korea. General Douglas MacArthur stepped forward as the United Nations commander of the combined forces.³²

MacArthur led a key counter-initiative known as the Inchon Landing, a tricky military maneuver due to the tides.³³ By the middle of September, 1950, MacArthur's forces not only plowed back to the 38th parallel, they continued on north.³⁴ As the U.N. forces proceeded closer to the North Korean-Chinese border, Chinese soldiers poured into North Korea, driving the U.N. forces back.³⁵ After two more pushes, one northward by the U.N. troops and one southward by the Chinese, the battle lines hardened for two more years back where they started—the 38th parallel.³⁶

Armistice Agreement

With a military draw by mid-1951, the two sides negotiated from that point for two years, resulting in the Korean Armistice Agreement ("Armistice Agreement"), signed on July 27th, 1953.³⁷ The head of the North Korean military and the Commander-in-Chief of the U.N. Command signed this Armistice Agreement.³⁸

³⁰ Chung, *supra* note 21, at 159-6; Srivastava, *supra* note 24, at 17-45.

³¹ Hickey, *supra* note 21, at Introduction.

³² Chung, *supra* note 21, at 165-66.

³³ *Id.* at 170-77. MacArthur, aware of the historic significance of the Inchon Landing, actually staged the landing twice for the cameras that would capture it for posterity.

³⁴ Cumings, *supra* note 25, at 276-78.

³⁵ See Hickey, *supra* note 21, at China's Intervention; Cumings, *supra* note 25, at 283-86.

³⁶ See Hickey, *supra* note 21, at China's Intervention; Cumings, *supra* note 25, at 289.

³⁷ Chung, *supra* note 21, at 300-02. Note that South Korea had no desire to sign an armistice, and had to be persuaded to sign by General MacArthur, largely through repeated assurances that the U.S. was committed

While this Agreement calls for a cease-fire, it is not a peace treaty.³⁹ This Armistice Agreement established the military line of demarcation, and the demilitarized zone (DMZ).⁴⁰ The Military Armistice Commission oversees this Agreement.⁴¹

The Armistice Agreement, intended as a temporary measure by its own terms, was supposed to be replaced by a peace treaty through a conference convening within three months after the Armistice Agreement.⁴² While a treaty emerging from the conference was supposed to settle the remaining issues such as withdrawal of foreign forces from Korea and a new peace for the Land of the Morning Calm, this anticipated peace treaty did not come about as planned. Due to this gap, the two Koreas signed the Agreement of Reconciliation, Non-Aggression and Exchanges and Cooperation between North and South towards the end of 1991, and the Joint Declaration in 1992.⁴³

North Korea as Rogue State⁴⁴

History of Hostile Actions

Notwithstanding the Armistice, the U.S. Congressional Research Service has documented some 124 provocations by North Korea against the U.S., South Korea,

to unifying Korea. *Id.*, at 280-300; THE INSTITUTE OF EAST ASIA STUDIES, FOREIGN POLICY FOR PEACE AND UNIFICATION 15-16 (1975).

³⁸ See, e.g., Myers, *supra* note at 92-95. The Armistice Agreement, a purely military document, can be found in its entirety at <http://news.findlaw.com/hdocs/docs/korea/kwarmagr072753.html>. There are no national signatories to this Agreement.

³⁹ Cecilia Y. Oh, Comment, *The Effect of Reunification of North and South Korea on Treaty Status*, 16 EMORY INT'L L. REV. 311, 311-12 (Spring, 2002).

⁴⁰ *Id.*

⁴¹ Armistice Agreement, *supra* note 38, arts. I(1), II(A)-(B).

⁴² See *Id.* Art. IV; Chung, *supra* note 21, at 300.

⁴³ See http://www.korea.net/issue/sn/summit/summit_012106.asp, which contains the Agreement on Reconciliation, Non-Aggression and Exchanges and Cooperation Between North and South, effective from Feb. 19, 1992. See also 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) ("Joint Declaration").

⁴⁴ "Rogue state" is the actual designation that the Clinton administration placed on the North Korean regime.

and/or Japan from June 1950 to March 2003.⁴⁵ They have ranged from multiple assassination attempts on South Korean Presidents,⁴⁶ to the infiltration of thousands of armed agents involved in kidnapping and terrorism,⁴⁷ the mid-air bombing of a South Korean Boeing 707 passenger plane in 1987⁴⁸ to the capture of the U.S.S. Pueblo, a surveillance ship.⁴⁹

There have been various air and naval encounters over the years. In April 1969, North Korea MiG jet fighters destroyed a U.S. EC-121 reconnaissance plane over the Sea of Japan, taking 31 lives.⁵⁰ This unarmed plane was flying around 90 miles off the North Korean coast.⁵¹ As recently as March 2003, four North Korean fighters intercepted an American Air Force reconnaissance plane in international airspace above the Sea of Japan.⁵² The North Korean Navy has captured and detained numerous South Korean merchant ships that have entered its territorial sea.⁵³

⁴⁵ Dick K. Nanton, *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>; THE INSTITUTE FOR EAST ASIAN STUDIES, *FOREIGN POLICY FOR PEACE AND UNIFICATION* (1975) (which tracks the South Korean-Japanese relationship during the early 1970s); *KOREAN UNIFICATION: PROBLEMS AND PROSPECTS* (C.I. Eugene Kim ed., 1973).

⁴⁶ Nanton, *supra* note 45, at 8-9. One assassination plot ended up killing the wife of President Park Chung-hee only two days before the capture of the U.S.S. Pueblo. See also Robert S. Litwak, *ROGUE STATES AND U.S. FOREIGN POLICY: CONTAINMENT AFTER THE COLD WAR* 202 (2000).

⁴⁷ "North Korea is reported to have infiltrated a total of 3693 armed agents into South Korea from 1954 to 1992...." Nanton, *supra* note 45, at 2; for more on the kidnapping by North Korea of Japanese nationals, see Richard P. Cronin, *Averting Trouble in China and North Korea: The North Korean Nuclear Threat and the U.S.-Japan Security Alliance: Perceived Interests, Approaches, and Prospects*, 29 *FLETCHER F. WORLD AFF.* 51 (Winter, 2005).

⁴⁸ Nanton, *supra* note 45, at 10. The plane was traveling from Baghdad to Seoul. Twenty crewmembers and ninety-five passengers died. This egregious act sought to discourage participation in the Seoul Olympics.

⁴⁹ *Id.* at 4. The North Koreans killed one crew member and held eighty-two of them prisoner for eleven months. See also Litwak, *supra* note 46.

⁵⁰ Nanton, *supra* note 45, at 8.

⁵¹ *Id.* at 5. See also Litwak, *supra* note 46.

⁵² Nanton, *supra* note 45, at 25-6.

⁵³ Stephen Kong, *The Right of Innocent Passage: A Case Study on Two Koreas*, 11 *MINN. J. GLOBAL TRADE* 373, 375-76 (Summer, 2002).

Military Sales

North Korea has aggressively exported ballistic missile technology over several decades.⁵⁴ North Korea has sold this technology to countries such as Libya,⁵⁵ Pakistan, Syria, Egypt, Iran and the United Arab Emirates,⁵⁶ grossing hundreds of millions of dollars per year, its largest source of hard currency.⁵⁷ North Korea's financial stake in the development and sale of missile technology drives its economy.⁵⁸

In October of 2002, North Korea reportedly assisted Pakistan in developing long-range missiles. This activity falls in line with the intermediate range ballistic missiles supplied to Pakistan in the 1990's.⁵⁹ In the late 1990's, it is thought that North Korea furnished Pakistan with twelve to twenty-five complete No-Dong medium range missiles. Ominously, North Korea gained from Pakistan centrifuge enrichment technology, which it can use (and may have already used) for producing nuclear weapons.⁶⁰

⁵⁴ See Joseph S. Bermudez, *A History of Ballistic Missile Development in the DPRK*, at <http://http://cns.miis.edu/pubs/opapers/op2/op2.pdf> (Apr. 12, 2004).

⁵⁵ Libya recently relinquished tons of uranium supplied to it by North Korea.

⁵⁶ According to the U.S. Weapons Inspector David Kay, in an interesting twist of events, Kim Jong-Il defrauded Saddam Hussein out of \$10 million in a deal that Kim failed to fulfill. The contract included ballistic missile technology and other *verboden* missile equipment before the 2nd Gulf War. Bermudez, *supra* note 54. See also 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. 4th, 2002.

⁵⁷ See Andrew Ward, *Trade Ties Grow Between Two Koreas*, FINANCIAL TIMES, Dec. 10, 2003, at 2; see also Douglas Frantz, *North Korea's Nuclear Success Is Doubted: 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.

⁵⁸ See, e.g., Bertil Lintner, *North Korea's Missile Trade Helps Fund Its Nuclear Program*, YALEGLOBAL (May 5, 2003), available at <http://yaleglobal.yale.edu/display.article?id=1546>.

⁵⁹ See Larry A. Niksch, *North Korea's Nuclear Weapons Program*, Congressional Research Service Issue Brief for Congress No. IB91141, at 9, available at <http://www.fas.org/spp/starwars/crs/IB91141.pdf> (Apr. 2004).

⁶⁰ See Sharon A. Squassoni, *North Korea's Nuclear Weapons: How Soon An Arsenal?*, Congressional Research Service Report for Congress 4 No. RS 21391, at 2, available at <http://www.fas.org/spp/starwars/crs/RS21391.pdf> (quoting Pakistan's Benazir Oversaw Korea Nuclear Deal-sources, Reuter News, Nov. 20, 2002).

Such proliferation efforts have continued. For example, a North Korean vessel transported Scud missiles to Yemen in December of 2002.⁶¹ A spokesman for the Nigerian government indicated that a North Korean delegation showed the Nigerian government a catalogue of weapons—but that Nigeria had not made a definite commitment to purchase them yet.⁶²

Biological and Chemical Weapons in North Korea

North Korea joined the Biological Weapons Convention, an international treaty that for the most part does not permit even possession of biological weapons.⁶³ However, it appears that North Korea has developed biological weapons such as anthrax, yellow fever, smallpox, cholera, and plague.⁶⁴

Unlike the Biological Weapons Convention, North Korea did not sign the Chemical Weapons Convention.⁶⁵ Consistent with their refusal to sign, North Korea has a formidable assemblage of such weapons.⁶⁶ North Korean military doctrine asserts the use of chemical weapons as standard weaponry, which makes the use of chemical

⁶¹ *Id.* at 24.

⁶² *Missiles for Sale: North Korea Spreading Weapons Technology to Largest African Nation*, COLUMBUS DISPATCH, Jan. 30, 2004, at 10A.

⁶³ 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.

⁶⁴ *North Korea Special Weapons Guide: Biological Weapons Program*, Federation of American Scientists, at <http://www.fas.org/nuke/guide/dprk/bw/index.html> (last visited Apr. 12, 2004).

⁶⁵ See 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/cwcframeset.html>.

⁶⁶ North Korea is purported to possess the technology to produce nerve, blister, choking and blood agents in large quantities. It already has copious stockpiles of sarin and mustard gas, as well as blood agents, choking gases, VX and riot control agents in unknown amounts. In all, U.S. Intelligence reports—as a low figure--some 180-250 tons of chemical weapons. High estimates place the figure as between 2,500 to 5,000 tons. See 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 to June 30, 2001, available at <http://www.cia.gov/cia/reports/721reports/janjun2001.htm#5>; see also *North Korea Special Weapons Guide*, supra note 64; U.S. Dep't of Defense, Northeast Asia, *Proliferation: Threat and Response* (Report 1997), available at <http://www.defenselink.mil/pubs/prolif/neasia.html>; *Chemical Overview*, at <http://www.nti.org/eresearch/profiles/NK/Chemical/>.

weapons in a fashion akin to conventional weapons a looming concern.⁶⁷ The choice not to sign the Chemical Weapons Convention involved conflict within the regime and illustrates the dominance of military considerations in this country.⁶⁸

The Present Situation with North Korea

Projections Regarding Another Korean War

Military planners project that in the event of a North Korean full-scale invasion, the first several months of conflict could see some 300,000 to half a million casualties in the South Korean and U.S. militaries, as well as additional hundreds of thousands of civilian casualties.⁶⁹ According to Doug Bandow of the Cato Institute, total casualties for such a war could exceed 1,000,000.⁷⁰ Oplan 5027, the U.S. military's plan for the region, anticipates massive attacks on Seoul with artillery and rockets, possibly turning Seoul into a "sea of fire" through launching up to half a million shells per hour.⁷¹ A pre-emptive strike by North Korea could inflict huge levels of casualties and damage before the South Korean and U.S. military could do much to block such attacks⁷² or pre-emptively defang the North Korean military by military force.⁷³ While analysts typically

⁶⁷ *Attack across the DMZ Special Report*, JANE'S INTELLIGENCE REV., Apr. 1, 1994.

⁶⁸ This confrontation took place between the Ministry of Foreign Affairs (MFA) and the Ministry of the People's Armed Forces (MPAF). The MFA briefed Kim Jong-Il on the tactical value of signing the Chemical Weapons Convention. However, rather than take the MFA's advice, the Deputy Minister of the MFA had to complete a full year "revolutionization course" before he could resume his post. The reason for this punishment was the violation of reporting rules. Sung Chull Kim et al., *NORTH KOREA IN CRISIS: AN ASSESSMENT OF REGIME SUSTAINABILITY*, 58.

⁶⁹ R. Jeffrey Smith, *North Korea Deal Urged by State Dept.*, WASHINGTON POST, Nov. 15, 1993, at A15; Drennan, *supra* note 10, at 191.

⁷⁰ *N. Korea Is No Place to Apply Iraq Lessons*, L.A. TIMES, Apr. 22, 2003, at B13.

⁷¹ 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.

⁷² Phillip C. Saunders, *Military Options for Dealing with North Korea's Nuclear Program*, Center for Nonproliferation Studies, Jan. 27, 2003, at <http://cns.miis.edu/research/korea/dprkmil.htm>.

⁷³ North Korea's military assets are very numerous. To make it even more difficult, these arms often have mobile capabilities or find shelter in caves or underground. Although a number of even nuclear sites are known, some of the sites are heavily reinforced and armored, and other sites, such as nuclear reactors and

project an eventual South Korean/American victory, this victory would come at great price: some might call it a Pyhrric victory.⁷⁴

There exists a more devious possibility that North Korea has hinted at by its firing of missiles over Japan, kidnapping of Japanese citizens, and other hostile actions: North Korea could attack U.S. bases in Japan.⁷⁵ In this scenario, North Korea would seek to fray or split the alliance between the U.S. and South Korea, and possibly move towards uniting the two Koreas. Given the rising anti-U.S. sentiment, especially among the younger generations of South Koreans, the tilt in the South Korean government towards socialism, the friendly overtures of South Korea (both governmental and private) to North Korea, the prevalent pro-North Korean and anti-American media bias, North Korean infiltrations in South Korea, and the strong desire of the Korean populace to unite, such a scheme takes on increased credibility.⁷⁶

Regardless of whether or not North Korea attacks U.S. military bases in Japan, it can still attack, or threaten to attack, Japanese targets. In one conceivable scenario, North Korea can blitzkrieg the South, and then threaten to destroy major Japanese cities if the U.S. sends reinforcements. North Korea seeks to weaken America's will to defend South Korea, foment favorable political conditions in South Korea, and then wage war to

reprocessing plants (especially for uranium) could be functional in small, underground facilities. *Id*; see also 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 since the North uses mostly mobile rocket launchers, not fixed ones, it is assumed that the North does not have fixed rocket launchers).

⁷⁴ See *Attack Across the DMZ Special Report*, *supra* note 67; see also Linda D. Kozaryn, *Despite Progress, North Korea Poses Major Threat*, American Forces Press Service, Apr. 3, 2001, available at <http://www.defenselink.mil/news/Apr2001/n04032001200104031.html>; Eleanor Hall, *North Korea a Greater Threat than Iraq*, ABC Local Radio Broadcast, Australia (Feb. 13, 2003), available at <http://www.abc.net.au/worldtoday/s783676.htm>; Saunders, *supra* note 72.

⁷⁵ Hall, *supra* note 74.

⁷⁶ **Ethnic / Social** subsection, *infra*.

distract their own populace from their extensive woes.⁷⁷ Official North Korean policy maintains the objective of re-unifying Korea by force: they consider a violent Communist revolution of the South to be their manifest destiny.⁷⁸

South Korea, for many reasons including economic, political, historical and humanitarian, has strong incentives to avoid the outbreak of another war on the Korean peninsula.⁷⁹ In one form or another, war does not present itself as an attractive option.

Resources

North Korean Military

The North Korean situation requires a delicate balance: at one extreme, the risk of war which would prove disastrous for the entire peninsula, and at the other extreme, the risk of blackmail and exploitation--where North Korea would receive the benefits that it would divert for its own devious ends. It is advisable to explore both extremes in order to find the parameters for the best solutions. This section of the article focuses on the extreme of potential war.

The devastating capabilities North Korea possesses must be kept in mind. In conventional weapons alone, it is one of the leading countries in the world in total number of military units. While it may be accurately stated that some of these units are not the most state of the art weapons available, the sheer overwhelming numbers nonetheless make North Korea a menacing foe indeed. North Korea has many artillery, mortars, rockets, and missiles pointed and ready to turn the city of Seoul⁸⁰ into rubble. North Korea boasts the ability to field approximately five to seven million troops; it

⁷⁷ Hwang Jang Yop, KOREA UPDATE (2002).

⁷⁸ See Lee, *supra* note 14, at 156-58.

⁷⁹ See, e.g., Saunders, *supra* note 72.

⁸⁰ Seoul, one of the most populous cities in the world, contains about a quarter of South Korea's population. It sits not much more than 30 miles away from the DMZ.

already has about 1,000,000 soldiers in its standing forces, 120,000 special operation forces, 11,000 forward deployed artillery pieces, 1,700 aircraft, 800 ships, 500 170-millimeter guns, 200 multiple launch rocket systems, 62 submarines, cave and underground bases, air defense weapons, mobile missile launchers and other potential causes of military mayhem.⁸¹

One of the questions that remain is what sort of missile delivery technology does North Korea possess and is that technology sufficient to deliver a nuclear warhead to the United States of America? It is safe to say presently that North Korea has the missile delivery technology to strike South Korea and Japan, and, if they so foolishly desired, to strike various parts of China as well.⁸² The huge population densities of both South Korea and Japan would make such weapons, especially nuclear weapons, particularly destructive as they would take more lives per square mile than other locales—due to the greater number of people per unit of area.

While the might of the U.S. military would likely be able to eventually win or at least maintain or return to the *status quo* in a fight against North Korea alone, it would do so at great cost. The cost of human lives and property on the Korean peninsula would likely dwarf the casualties suffered during the first Korean War.⁸³

Additionally and more alarming is the possibility for another Korean war to draw in China.⁸⁴ After all, during the Korean War, it was the Chinese forces that turned back

⁸¹ See Saunders, *supra* note 72; Kathleen T. Rhem, *North Korean Military “Very Credible Conventional Force”*, American Forces Press Service (Nov. 18, 2003), available at <http://www.defenselink.mil/news/Nov2003/n11182003200311181.html> (citing Gen. Leon LaPorte, USA, Commander of U.S. forces in South Korea). See also Hall, *supra* note 74.

⁸² See, e.g., Pinkston et al., *supra* note 12.

⁸³ E.g., Kongdan Oh, *The Problem and Promise of Inter-Korean Economic Cooperation*, KOREA BRIEFING: TOWARD REUNIFICATION 25-48 (David R. McCann, ed., 1997).

⁸⁴ But see Charles M. Perry & Toshi Yoshihara, *THE U.S.-JAPAN ALLIANCE* 78 (2003) (China told Pyongyang in the mid-90s that China will not participate in any future Korean conflict).

the U.N. forces as they were approaching the Yalu River near the Chinese border. China would want to maintain North Korea as a buffer between it and South Korea, both geographically and ideologically.⁸⁵

The U.S. Military Presence on the Korean Peninsula

Nuclear: The U.S. nuclear presence in Korea has steadily dwindled to none. In 1967, the U.S. had over 800 nuclear weapons south of the DMZ.⁸⁶ That number decreased to around 600 by 1977, 151 by 1985,⁸⁷ and in 1991, the U.S. removed all of its nuclear weapons from Korea.⁸⁸ However, because the U.S. has long-range delivery systems, the presence of nuclear weapons in Korea—or even Asia—carries less significance than if the U.S. had only mid-range or short-range delivery abilities.⁸⁹

Conventional: The Army has 37,000 troops stationed in South Korea. These troops have ample equipment, such as Apache helicopters and Patriot missile batteries.⁹⁰ The largest forward-deployed fleet of the Navy, the 7th Fleet, rests not far from the shores of North Korea.⁹¹ Around 200 aircraft, forty to fifty ships,⁹² and some 20,000 Navy and Marine personnel constitute the 7th Fleet.⁹³ Air Force deployment in the

⁸⁵ James Hoare & Susan Pares, CONFLICT IN KOREA: AN ENCYCLOPEDIA 145 (1999).

⁸⁶ Robert S. Norris et al., *Where They Were*, 55 BULL. ATOMIC SCIENTISTS 6, 26-35 (1999), available at <http://www.bullatommsci.org/issues/1999/nd99/nd99norris.html>.

⁸⁷ *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>.

⁸⁸ South Korea was the last forward nuclear base for the U.S. in the Pacific. See Cumings, *supra* note 25; 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>.

⁸⁹ See Charles J. Moxley, Jr., NUCLEAR WEAPONS AND INTERNATIONAL LAW IN THE POST COLD WAR WORLD 501-514 (2000).

⁹⁰ U.S. Forces Order of Battle, at <http://www.globalsecurity.org/military/ops/korea-orbat.htm> (Mar. 17, 2004).

⁹¹ *Forward Presence*, U.S. Navy, Commander, U.S. Seventh Fleet, at <http://www.c7f.navy.mil/New/Pages/Forward%20presence.html>.

⁹² *Id.* The ships typically include three to five Aegis guided-missile cruisers, five to ten destroyers and frigates, and one to two aircraft carriers.

⁹³ *Id.* Eighteen of these ships use Japan as their base.

Pacific numbers 45,000 military and civilian personnel—with about 300 fighter and attack aircraft under its control.⁹⁴ The Seventh Air Force perches in Korea with the Fifth in Japan.⁹⁵

These forces in the Pacific, some in and around Korea and Japan, can respond rapidly to an outbreak of hostilities. At the same time, the ability to quickly deploy additional military resources enables rapid reinforcement of the present numbers.

South Korean Resources

Military: With mandatory military service for male citizens, South Korea can mobilize approximately 4,500,000 well-equipped soldiers with newer armaments than their North Korean counterparts, such as over 3000 tanks and 1500 strike aircraft.⁹⁶ Approximately 5,300 mortars and two surface-to-surface battalions add to the South Korean military resources.⁹⁷

Economic: The robust South Korean economy, once the second to poorest at the end of the Korean War, now stands as the 12th largest economy in the world, with a per capita GNP of U.S. \$10,000.⁹⁸ It would have large capabilities to sustain a war effort, if those capabilities would not already find themselves devastated by a North Korean attack. However, after another war with North Korea, the South Korean economy might

⁹⁴ Pacific Air Forces, at <http://www.osan.af.mil/Facts/Pacific%20Air%20Forces.htm> (last visited Apr. 6, 2004).

⁹⁵ U.S. Security Strategy for the East Asia-Pacific Region, at <http://www.usa.or.th/services/docs/reports/ussec1.htm> (last visited Apr. 6, 2004). The Seventh Air Force includes the Fifty-first and Eighth Fighter Wings, with a combined 117 planes and 8,300 air force personnel. The Fifty-first uses A-10 aircraft as well as three squadrons of F-16 fighter aircraft. *See also* 7th Air Force, at <http://www.osan.af.mil/Facts/7th%20Air%20Force.htm> (last modified Apr. 2003).

⁹⁶ Kozaryn, *supra* note 74.

⁹⁷ Orders of Battle and Major Equipment: South Korean and North Korea, at <http://www.globalsecurity.org/military/world/rok/orbat-comp.htm> (last visited Mar. 17, 2004).

⁹⁸ *Background Note: South Korea*, Bureau of East Asian & Pacific Affairs, U.S. Dep't of State, at <http://www.state.gov/r/pa/ei/bgn/2800.ntm> (Mar. 2003).

end up flattened even more than after the first Korean War⁹⁹ because there exists more to destroy—whether infrastructure, industry, edifices or people.

Kim Jong-II

On the other extreme from full-out warfare are the problems that result from deceit and blackmail in the political arena. In the case of North Korea, politics flows from the top, North Korean dictator Kim Jong-II. Early intelligence wrongfully assessed Kim Jong-II as unintelligent. Later intelligence corrected this earlier assessment, and concluded instead that Kim possesses a high-powered intellect. Estimates of his I.Q. have placed it at around 160.

Kim Il Sung groomed his son Kim Jong II to take the reins of power from him starting from the early 1970s.¹⁰⁰ As Korean Workers Party Secretary, he ran the organization, including its propaganda function.¹⁰¹ In 1980, the Sixth Party Congress named him the official successor.¹⁰²

In 1991, Kim Jong II ascended to the position of Supreme Commander of the People's Army and Chairman of the National Defense Committee in 1993.¹⁰³ Throughout this time, propaganda deifying Kim Jong II drummed its way into the day-to-day life of North Korea.¹⁰⁴

According to defectors from North Korea itself, the North Korean populace, in spite of the propaganda, knows about Kim Jong II's immoral behavior, the failure of his

⁹⁹ Prof. Bruce Howard asserted that war in a country devastates a country's economy more than anything else. Economics Lecture, (1996).

¹⁰⁰ Sung Chull Kim et al., *supra* note 68, at 35; Sang-Woo Rhee, SECURITY AND UNIFICATION OF KOREA 7 (1983).

¹⁰¹ Sung Chull Kim et al., *supra* note 100.

¹⁰² *Id.*

¹⁰³ *Id.* at 35-6.

¹⁰⁴ *Id.* at 36.

economic policies, and the politicized nature of his inner circle.¹⁰⁵ The deterioration of the country on many fronts would tend to diminish the glorified image of this totalitarian dictator.¹⁰⁶

The Present Crisis

History of the Geneva Protocol

The 1994 Agreed Framework¹⁰⁷ resulted from intensive negotiations, and marked a departure from the otherwise relatively uniform policy of the Clinton administration to what it termed "rogue states". The policy towards North Korea, dubbed "limited engagement by necessity", emerged out of heated discussion and debate, both within the Clinton administration and also with the Republican-led Congress.¹⁰⁸

During this debate, the range of options considered included pre-emptive strikes of the known nuclear facilities, proposed sanctions, and a negotiated agreement with North Korea.¹⁰⁹ Even a focused pre-emptive attack solely on the nuclear facilities carried with it, even according to the military leaders at the time, too much risk of a full-blown war.¹¹⁰ The Clinton administration actually started pursuing the sanctions option when a visit to Pyongyang by former president Jimmy Carter derailed such efforts.¹¹¹

With the reluctant permission of President Clinton (permission that president George H.W. Bush had previously refused to give), Jimmy Carter went on a peacemaking mission to Pyongyang.¹¹² Upon Carter's return, he pronounced the end of the crisis

¹⁰⁵ *Id.* at 38.

¹⁰⁶ *See Id.*

¹⁰⁷ Agreed Framework to Negotiate Resolution of the Nuclear Issue on the Korean Peninsula, Oct. 21, 1994, U.S.-N. Korea, 34 I.L.M. 603.

¹⁰⁸ Gills, *supra* note 7, at 234-43.

¹⁰⁹ Litwak, *supra* note 46.

¹¹⁰ *Id.*

¹¹¹ *Id.*; Drennan, *supra* note 10, at 159.

¹¹² Litwak, *supra* note 109, at 175-77.

through getting Kim Il Sung's agreement to freeze North Korea's nuclear program under IAEA inspections, and to come back to the bargaining table with the then current U.S. administration.¹¹³

This trip served as a catalyst for the negotiations that led to the Geneva Protocol, also known as the Agreed Framework.¹¹⁴ The planned initial meeting between the DPRK and the US in Geneva found itself suspended due to the demise of Kim Il Sung, the self-styled "Great Leader" who had ruled North Korea from its inception until July 9th, 1994.

After a one-month delay, the negotiation resumed. A joint statement emerged on August 12th, which announced the core of the agreement. Ambassador Gallucci and First Vice Foreign Minister concluded it on October 17th, and signed it on October 21st.

The four-page document was a carefully crafted agreement implementing the DPRK's transition from graphite-moderated nuclear reactors to light water reactors.¹¹⁵ This transition was scheduled to take place over a decade, buttressed by substantial commitments from the US to replace lost generating capacity through shipments of heavy oil.¹¹⁶ The agreement met resistance from some quarters as a "sellout and an act of appeasement."¹¹⁷ Others hailed it as a major achievement for peace on the peninsula.¹¹⁸

Breach of the Agreement and the Current Situation

As events have unfolded afterwards, it has become obvious that North Korea has materially breached the Agreed Framework. In 1998, U.S. intelligence discovered a large

¹¹³ Gills, *supra* note 108; Drennan, *supra* note 111, at 177.

¹¹⁴ Agreed Framework, *supra* note 107.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Litwak, *supra* note 109, at 220.

¹¹⁸ Of course, the Clinton administration was under the misapprehension that the North Korean regime was not long for this world. They felt "the Agreed Framework is almost certainly a sufficient period of time for their regime to have collapsed." *Id.* at 227.

underground facility that could support nuclear weapon development.¹¹⁹ In a meeting with Ambassador Kelly, a North Korean official disclosed North Korea's present possession of nuclear weaponry, a statement later denied by Pyongyang.¹²⁰ During this very year (2005), North Korea publicly announced that it had already developed nuclear weapons.

Given the breach of contract, KEDO suspended shipment of heavy oil and scrapped the Light Water Reactor (LWR) project. North Korea claimed U.S. breach of the agreement and stated that it must develop and produce nuclear weapons as a deterrent against potential American aggression, which they claim to genuinely fear.¹²¹ North Korea then withdrew from the ongoing six party talks—formerly involving itself, South Korea, the U.S., Japan, China, and Russia. The Bush administration has refused to engage in bilateral negotiations thus far with Pyongyang in an effort to avoid what it sees as blackmail.

Various Responses to North Korea

North Korea's behavior regarding nuclear weapons has led many American sources, ranging from scholars and politicians to comedians and talk show hosts, to suggest that North Korea acts and speaks in a crazy and irrational manner.¹²² While it may be correct to speak about North Korea in this fashion if one incorporates a moral dimension to those statements, it is inaccurate in terms of whether or not North Korea's behavior and speech is logically connected with their own goals and objectives.

¹¹⁹ *Id.* at 222, 225; see also *No Nukes Warning from Clinton to N. Korea*, CNN.COM (Nov. 21, 1998), available at <http://www.cnn.com/WORLD/asiapcf/9811/21/korea.01/index.html>.

¹²⁰ See, e.g., *Timeline*, *supra* note 11; North Korea Chronology, *supra* note 11.

¹²¹ Pinkston et al., *supra* note 12.

¹²² See, e.g., Lee, *supra* note 14; David Letterman, when discussing North Korea, frequently refers to Kim Jong Il and his son "Menta Lee Il (Mentally Ill)," and the recent movie *Team America: World Police* portrayed an ego-maniacal Kim Jong-II as the primary villain.

North Korea has a goal of holding on to power, of removing American involvement in the peninsula, of reunifying Korea by force, and of wresting benefits from other countries through the use of threats and coercion due to the deteriorated condition of their own country. Understanding these goals will help one to make sense of North Korea's actions—as insidious as many of these resulting activities have been. Though dangerous and seemingly desperate, the actions of North Korea are not irrational or illogical. Perhaps the single biggest mistake by the United States and South Korea in past dealings with North Korea has been to ignore or misinterpret this logic. This section analyzes past dealings in four major areas—military, political, economic, and ethnic—to show that past responses to North Korea have been inadequate or wrong-headed. Then, it recommends better solutions for dealing in each of these four areas. The article then concludes by focusing on potential solutions relating to international legal theory.

Military

Background

As the preceding sections make clear, North Korea's most obvious—and, for the world, dangerous—goals are militaristic: holding on to power in its totalitarian dictatorship, reunifying Korea by force, and extracting benefits from other countries through the use of threats and coercion.¹²³ It should be no surprise that North Korea has continued with its belligerent and hostile actions towards the United States and South Korea repeatedly since the cease-fire--whether a naval battle with South Korea, frequent border skirmishes, or intentional incursions into South Korea of thousands of armed

¹²³ Lee, *supra* note 14, at 152.

agents.¹²⁴ These actions have extended to Japan as well.¹²⁵ Time after time, North Korea has persistently sought these aforementioned objectives, often in overtly hostile ways.

Past Military Responses

As the sections above make clear, the response of key countries such as South Korea, the United States, and Japan have been to reduce their military force relative to North Korea. Because North Korea's goal is to unify Korea, by force if necessary, then such a response moves in the wrong direction. For example, one devious way in which North Korea may seek to start a war is by having their own soldiers dressed in South Korean military uniforms pretending like they are invading North Korea, and in response to this phony incursion, North Korea attacking South Korea with the justification of having been "attacked" first. They have actually had military exercises where they are practicing such a subterfuge.

Recommended Military Solutions

A better solution would be for these nations to increase the defensive capabilities of their military. The South Korean military should ready itself because the belligerent rhetoric of North Korea has sometimes spilled into combat, and a very important thing that South Korea needs to do is have enough of a deterrent--especially in terms of defensive measures--readily at hand.¹²⁶ Such measures should discourage the outbreak of war, and send a clear message to North Korea that they would meet vigorous resistance and ultimately find defeat if they instigate another war.

¹²⁴ See, e.g., Joseph S. Bermudez, Jr., *TERRORISM: THE NORTH KOREAN CONNECTION* 24-54 (1990); Sang-woo Rhee, *supra* note 100, at 210.

¹²⁵ See, e.g., Bermudez, Jr., *supra* note 124, at 146-154. North Korean agents kidnapped at least thirteen Japanese nationals, forcing them to teach language and culture while using their identities to infiltrate South Korea and Japan. Robert J. Lundin III, Note, *International Justice: Who Should Be Held Responsible for Kidnapping of Thirteen Japanese Citizens?* 13 *TRANSNAT'L L. & CONTEMP. PROBS.* 699, 700-701 (Fall, 2001).

¹²⁶ E.g., James Hoare & Susan Pares, *CONFLICT IN KOREA: AN ENCYCLOPEDIA*, xxiii (1999).

Another option is for Japan to indicate it will bolster its military in order to defend against the North Korean threat, which perhaps could motivate China to persuade North Korea to disarm.¹²⁷ In recent years Japan has taken a harder line toward North Korea, but so far has increased only its defensive and not offensive capabilities.¹²⁸ If it looks like the US is behind that effort though (as in the efforts of U.S. Rep. Tom Lantos), then perhaps it would not achieve the desired effect.

Finally, the US should at least send greater defensive reinforcements, such as more Patriot missile batteries.¹²⁹ The emphasis on defense forecloses reasonable pretexts for North Korea to attack pre-emptively by considering buildup of offensive capabilities as an indicator of imminent U.S. attack. North Korea might try to claim that America is building up its military forces in and around the peninsula in order to attack North Korea: Pyongyang could, for example, draw analogies with of the military buildup in Iraq prior to that war.¹³⁰ However, primarily defensive reinforcements would at once take away such an excuse while preparing for a possible attack by North Korea.

Political

Background

The North Korean pattern of brinkmanship or "negotiating on the edge"—as Scott Snyder has put it in his book by that title, and as shown in a recent book on North Korean negotiation strategy—is in fivesteps: 1) escalate the crisis; 2) use it to gain bargaining

¹²⁷ See, e.g., Perry & Yoshihara, *supra* note 84, at 47, 81, 130.

¹²⁸ Cronin, *supra* note 47, at 53-54; see also Christopher W. Hughes, *Japan-North Korea Relations: Obstacles to a Breakthrough*, in COOPERATION AND REFORM ON THE KOREAN PENINSULA 28 (James M. Lister, ed., Korea Economic Institute 2002).

¹²⁹ Cf. Jong Chul Park, KOREA'S ENGAGEMENT POLICY TOWARDS NORTH KOREA AND ITS IMPLICATIONS TO THE U.S., 16-17 (July, 2001); Perry & Yoshihara, *supra* note 127, at 138-46.

¹³⁰ Drennan, *supra* note 10, at 190. The U.S.-South Korean alliance has been and will continue to be a primary deterrent against North Korean aggression, so that these two nations must not only continue but must strengthen their ties. Stephen W. Bosworth, *U.S.-Korean Relations after the Summit*, 25 FLETCHER F. WORLD AFF. 25, 27 (Winter, 2001).

leverage, to get the desired parties (most particularly the U.S.) to the table, such as the Clinton administration for bi-lateral negotiations; 3) as a result of the crisis, to come to an agreement which 4) gives them benefits, which they swallow; and then 5) not abide by their promises, break the agreement, and create another crisis—thus starting this cycle again.¹³¹

What must also be recognized is that deception and breaking of their word has been the norm, not the exception, for North Korea. In addition to North Korea's deception of the international community, it extends as well to the steady stream of lies that it pumps to its populace. Its propaganda states ridiculous things: that South Korea is in much worse economic condition than North Korea; the outlandish deification of the dictator Kim Jong Il; the ever present threat of attack from South Korea and the United States; and the false promises that a communist utopia will come about if the populace just perseveres a little bit longer.¹³² Also, North Korea levels a steady stream of wild accusations against South Korea and the US that probably would better describe what North Korea has done and where it stands rather than what either South Korea or the US has done against North Korea.¹³³

One recurring problem involves North Korean efforts to negotiate directly with the U.S. while sidelining South Korea. Given the continuing North Korean policy that

¹³¹ Hyun Joon Chon, *Characteristics of North Korea's South Korean Policy*, in KINU RESEARCH ABSTRACTS '02 39-44 (2003); Scott Snyder, *NEGOTIATING ON THE EDGE: NORTH KOREAN NEGOTIATING BEHAVIOR* (1999); Litwak, *supra* note 46, at 226 (“[they] understand that there is no alternative to brinkmanship”).

¹³² *See, e.g.*, Kim-Il Sung, *FOR THE INDEPENDENT PEACEFUL REUNIFICATION OF KOREA* (1975); Li Jong Mok, *ON THE QUESTION OF KOREA: SPEECHES OF REPRESENTATIVES AT THE 30TH SESSION OF THE U.N. GENERAL ASSEMBLY 1-25* (1976); Park Chung Hee, *North Korean Communists' Deceptive Double Tactics, New Year Press Conference* (January 18, 1974), reprinted in *TOWARD PEACEFUL UNIFICATION* (1978); Park Chung Hee, *Peace Propaganda & Warlike Provocations* (1978), *Special Statement on Third Anniversary of the South-North Joint Communiqué* (July 4, 1975), reprinted in *TOWARD PEACEFUL UNIFICATION* (1978).

¹³³ *E.g.*, Kim-Il Sung, *supra* note 132; *Text of Kim Il Sung's Speech at Pyongyang Mass Meeting (June 23, 1973)*, in *KOREAN UNIFICATION* 340 (Se-Jin Kim, ed., 1976).

fails to officially recognize or engage in official diplomacy with South Korea,¹³⁴ and continues on the path of seeking forceful reunification, there exist continuing tensions about how to conduct multilateral negotiations.¹³⁵

Responses to North Korean Deceit and Brinkmanship

Secretary of State Condoleeza Rice recently responded to North Korean accusations that the US is hostile to North Korea and is about to wage war and attack North Korea. Secretary Rice called such rhetoric ridiculous--that there exist no war plans against North Korea presently. These recent accusations amount to nothing more than the continued spewing of the North Korean propaganda machine, the lineup of lies that it regularly puts forth to its populace.¹³⁶

Although these actions by Rice indicate an awareness of North Korean tactics, other parts of our government do not seem to appreciate fully how North Korea operates. Pronouncements by Representative Curt Weldon, who was part of a recent Congressional delegation to North Korea, appear overly optimistic. Shortly after their return, he claimed that North Korea anticipated de-nuclearizing.¹³⁷ Not long after that press conference, in a matter of weeks, North Korea announced unabashedly to the world that it possessed

¹³⁴ The 2000 Summit remains a insubstantial anomaly that achieved greater support from South Korea to North Korea while ultimately giving South Korea very little. North Korea lost next to nothing by agreeing to the reunion of families, its largest "concession".

¹³⁵ For a more thorough discussion of the need for all six nations to be involved, and why no single nation should predominate, see Ilpyong J. Kim, *The Major Powers and the Korean Triangle*, in *TWO KOREAS—ONE FUTURE?: A REPORT PREPARED FOR THE AMERICAN FRIENDS SERVICE COMMITTEE*, 119-34 (John Sullivan & Roberta Foss, eds., 1987).

¹³⁶ See Pinkston et al., *supra* note 12. See also Glenn Kessler, *Three Little Words Matter to N. Korea; Bush Has Avoided 'No Hostile Intent,'* WASH. POST, Feb. 22, 2005, at A10 (the Bush administration repeatedly states that it has no intention to invade North Korea, but backs away from the Clinton-era phrase 'no hostile intent').

¹³⁷ Jason Motlagh, *North Korea: Denuclearization is Final Goal*, WASH. TIMES, Jan. 19, 2005, available at <http://www.washtimes.com/upi-breaking/20050119-102012-8082r.htm>; Glenn Kessler, *N. Korea Talks May Hinge on Bush*, WASH. POST, Jan. 28, 2005, at A23.

nuclear weapons.¹³⁸ The ranking democratic foreign relations committee member (Tom Lantos) drew a parallel in a speech at John Hopkins' School of Advanced International Studies (SAIS) the example of Libya reaping economic and political benefits from voluntarily disarming their arsenal of weapons of mass destruction.¹³⁹ Such a prospect does not reflect North Korea's past patterns of behavior.¹⁴⁰

Recommended Political Solutions

While Representative Lantos acknowledged that it is a "longshot" that North Korea would go the path of Libya, his words nonetheless indicate members of the U.S. Congress want to take a softer approach than the Bush administration.¹⁴¹ The present administration's insistence on six party talks over bilateral negotiations directly with North Korea helps to counter North Korea's attempt to go over the head of South Korea--and for that matter over the heads of its regional neighbors--to directly negotiate with the US.¹⁴² Such bilateral talks, which led to the 1994 Agreed Framework, not only failed, but also gave additional time for North Korea to become more dangerous and to reap benefits without meeting its obligations. The present administration's approach, whatever its overall merits, at least avoids such blackmail.

¹³⁸ Motlagh, *supra* note 137; see also Michael Duffy, *What Does North Korea Want?* TIME (Feb. 13, 2005), available at <http://www.time.com/time/magazine/printout/0,8816,1027498,00.html>.

¹³⁹ Lantos on North Korea broadcast on C-SPAN (2005).

¹⁴⁰ Tom Lantos, *Is Libya the Future of North Korea?* (Feb. 14, 2005), available at http://www.sais-jhu.edu/pubaffairs/SAISarticles05/Lantos_Speech.pdf; see also Adam Wolfe, *U.S. Attempts to Make an Example Out of Libya Will Fail* (Apr. 28, 2004), available at http://www.pinr.com/report.php?ac=view_report&report_id=163&language_id=1; Henry Sokolski, *The Qaddafi Precedent*, THE WEEKLY STANDARD (Jan. 26, 2004), available at <http://www.npec-web.org/published/qaddafi2.htm>.

¹⁴¹ With a new Secretary of State, it is possible there may be some variations from the prior Secretary in terms of how such matters are approached.

¹⁴² U.S. Ambassador to the Republic of Korea Stephen W. Bosworth notes the advantage of multi-party talks over bilateral negotiations because the former build broad regional consensus that supports North-South dialogue and cooperation. *Supra* note 130.

Lantos did parlay a tactic might help the U.S. politically, although it may have helped even more if the speaker came from elsewhere than the U.S.: he had spoken to leaders in China and indicated how it was in China's interest to see that North Korea got rid of its weapons of mass destruction because of the possibility of Japan's re-arming to defend and deter North Korean potential aggression with such weapons.¹⁴³ Given the history of hostilities that historically had transpired between China and Japan, China would not want Japan to rearm. Thus, Lantos used the approach that former secretary of state George Schultz had suggested would be an effective way to motivate China to step in to help disarm North Korea.¹⁴⁴

Economic

Background

If North Korea merely diminished its military spending by approximately five to ten percent, then it could potentially feed its starving populace; yet, it refuses to do so. It has preferred artillery, tanks, and fighter planes to rice, *kimchi* (Korean pickled vegetables), and *kalbi* (Korean style marinated short ribs)--thus deciding to be armed to the teeth while turning their populace into ragged skeletons.

The Korea Institute for National Unification ("KINU") published an interesting empirical study that takes the factors used by Zbigniew Brezizinski, formally prominent in the Carter administration and now a scholar in the field of international relations, where he examined various different factors to measure the degree of crisis within regimes in Eastern Europe to help to predict whether they would be experiencing

¹⁴³ Hamish McDonald, *Japan's Prominent Role in Coral Sea Exercise Will Unsettle China*, SYDNEY MORNING HERALD, Sept. 15, 2003, at 8.

¹⁴⁴ See, e.g., Steven Kamara, *Schultz '42 Discusses Solutions to Nuclear Threat from North Korea*, DAILY PRINCETONIAN (Apr. 14, 2003), available at <http://www.dailyprincetonian.com/archives/2003/04/14/news/7921.shtml>.

impending collapse, transformation, regime change, and other similar events.¹⁴⁵ KINU took the Breszinski factors, added some of their own that were appropriate to the North Korean context, and measured to what extent the North Korean regime is in crisis and the probability that it would implode. Their conclusion, after analysis of political, social, economic, cultural, and other factors, was that even through 1995—when their measurements ended—North Korea had already entered a crisis level.¹⁴⁶ Many of those factors were on a downward trend, meaning that they were degenerating, potentially leading to regime transformation or regime change if these trends were not reversed.¹⁴⁷

Incentives, Trade, and Humanitarian Aid in Response

Ten years later, if one presumes that at least the majority of those factors have grown worse, then North Korea has grown closer and closer to imploding from within. The initial implementation of economic free-enterprise zones may have helped to start to reverse their economic woes, but more likely, a greater factor in helping sustain North Korea, as was mentioned earlier, is increased trade and aid, most particularly from South Korea. From 1985 to 1996, there was 1.2 billion dollars worth of trade from South Korea to North Korea. Predominantly, the amount flowing from North Korea to South Korea was miniscule, but the numbers have been increasing since that time.¹⁴⁸

The head of Hyundai, one of the two giant conglomerates in Korea, has been funding various projects, including the Mount Guhmahng tourism, as well as an entire industrial zone, various donations and provision of funds for infrastructure.¹⁴⁹ That type

¹⁴⁵ Sung Chull Kim et al., *supra* note 68, at 124.

¹⁴⁶ *Id.* at 124.

¹⁴⁷ *Id.* at 126.

¹⁴⁸ In a historic move, North Korea actually shipped shirts to South Korea in 2005.

¹⁴⁹ Young Whan Kihl, *The DPRK and its Relations with the ROK*, in *KOREA BRIEFING 1997-1999* 139 (Kongdan Oh, ed., 2000).

of aid from various South Korean sources has been increasing, and increasing dramatically. China is another major source of aid and trade, but Russia has diminished its aid to North Korea due to its own economic woes.¹⁵⁰ What must be realized is that North Korea only engages the international community to the extent that it thinks it can benefit from such interaction while continuing to pursue its own inimical goals. While North Korea may have established diplomatic relationships with 140 countries, the depth of the relationships extend no further than the instrumental pursuit of its own interests at best.

North Korea claims that if it just gets sufficient humanitarian aid, then it would be sustained thereby. The root problem is more foundational, though: its economic system has failed.¹⁵¹ North Korea is, however, experimenting with economic free enterprise zones, which seem to be a step in the right direction as far as increasing production. They have remained, however, unwilling to cut military spending, which would free the necessary resources to be able to feed their country. The means to be able to help their citizens, and the people inside North Korea, is within their own grasp, but rather than increasing overall production, they even cut food rations to a portion of their populace during the latter part of the 1990's.

Obviously, to help open up the society and the economy, North Korea should implement reforms that move towards a more free-market, capitalistic system that rewards industriousness, productivity and enterprise. It has made slight steps in that direction as mentioned, and trade, especially with South Korea, has increased

¹⁵⁰ Perry & Yoshihara, *supra* note 84, at 84-87.

¹⁵¹ Compare the 1999 per capita incomes and total trade of the two nations. North Korea was at \$714 per person and \$1.48 billion in trade, while South Korea stood at \$8,581 and \$263.5 billion. Sung Chul Yang, *South Korea's Sunshine Policy: Progress and Predicaments*, 25 FLETCHER F. WORLD AFF. 31, 32 (Winter, 2001).

dramatically—even as it has evaporated with almost the entire rest of the world. But North Korean so called “trade” is more charity than anything else, where South Korea is helping North Korea, and getting little to nothing in return, except the continued animosity and hostility of the Pyongyang regime.¹⁵²

Representative Lantos indicated that sanctions against North Korea already exist. One scholar suggests that U.S. economic sanctions against North Korea have not worked to force North Korea to change. However, these sanctions provide a bargaining chip that allows the U.S. to maintain a policy of containment and appeasement that at least keeps the crisis on the Korean peninsula from worsening.¹⁵³

A More Hands-Off Solution to Economic Development

To promote change, however, a better approach would be at the very least, continued containment and deterrance, where nations such as Japan and the U.S.—and especially South Korea—take the path of patiently waiting, and perhaps in some ways accelerating, an internal implosion--the demise of North Korea from within. This would require nothing more than ceasing, or at least dramatically reducing, trade and humanitarian aid so that North Korea would be forced to negotiate more broadly—and more honestly.¹⁵⁴ Current trade and humanitarian efforts are undoubtedly paved with good intentions and compassion. However, they also help to reinforce a terrible regime, one that has miserably failed its people, so that such aid may be delaying the internal

¹⁵² The large cost of reconstructing north Korea’s collapsed economic infrastructure “will have to be carried, in effect, on the balance sheets of South Korea’s government, South Korea’s corporations, and, ultimately, South Korea’s households.” Bosworth, *supra* note 130, at 28.

¹⁵³ Paul VanWagenen, Note, *U.S. Economic Sanctions—Non-Traditional Success against North Korea*, 32 LAW & POL’Y INT’L BUS. 239 (2000); *see also* Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1491 (May, 2003) (arguing that sanctions phasedown and increased food aid would improve U.S.-North Korean talks).

¹⁵⁴ International organizations and other nations provide North Korea with hundreds of thousands of tons of food aid, and South Korea provides over 35 percent of the humanitarian assistance. Yang, *supra* note 151, at 32.

collapse of North Korea. The one drawback is that North Korea may respond to economic reductions with military force; thus, South Korea and her allies must maintain a substantial military deterrent as outlined above.

One can argue that even if North Korea will collapse, it is better for them to collapse with better economic conditions in order to alleviate the burden of South Korea, as well as other nations and organizations that would help. However, it seems that given the determination of Kim Jong Il and his regime to hold on to power at all costs, and to orient the whole regime to maintaining a grip on power rather than serving the common good of the populace that exists there, it is highly likely that aid to North Korea would only tend to increase the grip that Kim Jong Il and his cronies have on this country, especially given the diversion of aid to government and military personnel rather than the peasants who need it most.¹⁵⁵

Ethnic and Nationalistic Propaganda

Background

Hwang Jang Yop¹⁵⁶ indicated that North Korea is seeking to foment favorable political conditions within South Korea. These efforts seem to be working on various different fronts. For example, the current and immediate past president, as well as many

¹⁵⁵ Kongdan Oh calls those who favor trade the engagement school, while those who think that all economic aid to North Korea should be avoided are the confrontation school. Oh suggests that economic dealing with North Korea will help only North Korea in the short term, but that eventually South Korea will need to expand and integrate to sustain its growth. *The Problem and Promise of Inter-Korean Economic Cooperation*, in KOREA BRIEFING: TOWARD REUNIFICATION 25-48, 45-46 (David R. McCann, ed., 1997).

¹⁵⁶ Hwang Jang Yop, the highest level defector from North Korea, has dedicated the remainder of his life to try to find the path of peace for the Korean peninsula. No better or higher insider view exists of the reclusive North Korean regime. Previously, he had served as president of the most prestigious university in North Korea, Kim Il Sung University. Also, he had headed up the now defunct legislature. Overall, he held the 24th highest position in the North Korean hierarchy. Hwang also formulated the *Juche* philosophy, the primary propaganda framework for North Korea. After defecting, he considered himself a criminal for his complicity with such a regime: he deeply regrets his involvement at the highest levels of the North Korean government. One of my law students translated for him when he addressed the U.S. Congress in 2004.

members of the South Korean legislature, have socialist tendencies, which is moving in the direction *towards* the failed communism that has been happening in North Korea. From the government, there increasingly have been elements that have been favorable towards North Korea and its system—which is strange, given the domestic disaster that is North Korea, and the relative paradise by comparison that South Korea has become.

Additionally, according to the Seoul bureau chief of Time Magazine,¹⁵⁷ the South Korean media is reluctant to report North Korean abuse and aggression, whether to Japan or to South Korea itself, but it is quick to trumpet stories that magnify any real or perceived transgression of a soldier or any one else from the US. There has emerged a naiveté combined with wishful thinking about the intentions of North Korea, and a willful disbelief of the bellicose intentions of North Korea on the part of a good number of South Korean youth, who never experienced the Korean War. The Time Magazine bureau chief said when he visited the law school at which I served as a founding professor that the South Korean media tends to downplay or even ignore a lot of North Korean acts of aggression, whether it be sending submarines down to South Korea where spies emerge and infiltrate, or naval skirmishes between North and South Korea near the borderline, or North Korea's wrongful actions against Japan, such as the kidnapping of innocent Japanese civilians conscripted into teaching North Korea officials Japanese. These stories receive relatively low or little press, whereas anything that seems even remotely like a U.S. soldier doing wrong, the headlines magnify disproportionately.¹⁵⁸ Such reporting tends to drive a wedge between South Korea and the US. North Korea actively has

¹⁵⁷ Speech delivered at Handong International Law School in 2004.

¹⁵⁸ For example, large demonstrations followed the acquittal of two U.S. soldiers who were acquitted by U.S., as opposed to South Korean, tribunals of negligent homicide for running over two South Korean girls in 2002. Yoon-Ho Alex Lee, *Criminal Jurisdiction under the U.S.-Korea Status of Forces Agreement: Problems to Proposals*, 13 J. TRANSNAT'L L. & POL'Y 213, 215-16 (Fall, 2003).

sought to take advantage of, and deepen, any rifts or disagreements between these allies, as well as with other involved countries (such as Japan, Russia and China).

In addition, South Korean media and other sources, such as books, have tended to demonize the US while indicating attractive points of North Korea. These sources have helped to inculcate in the younger generations a sizable degree of anti-Americanism as well as pro-North Korean sentiments.¹⁵⁹ North Korea regularly seeks to implant anti-American and pro-North Korean propaganda in South Korea, and it seems that they have done so successfully to a large extent. As an example, North Korea likes to say that it has to liberate South Korea from US imperialism and domination, and thus, damages the pride of South Korea by in essence speaking of South Korea as if it were a colony under the thumb of the US.¹⁶⁰

Recently, a professor at Seoul National University (considered the leading university in South Korea) who had taught sociology in Seoul National University for over 30 years was recently discovered to be a North Korean spy when two fellow spies were linked to him. These spies confessed that this professor emeritus had been a North Korean spy all along. North Korea has thus been able to infiltrate influential centers of South Korean culture, and the culture, sadly enough, seems to be swallowing more of the North Korean propaganda¹⁶¹—and other reinforcing messages. Ironically enough, such devious communication exists in South Korea because as a developing democracy, it allows incomparably more freedom of speech than North Korea.

¹⁵⁹ See, e.g., Lee, *supra* note 14.

¹⁶⁰ Jong Chul Park, *supra* note 68, at 18-19.

¹⁶¹ Gregory Henderson writes that North Korea “rules through exceedingly concerted and consistent propaganda and socialization programs in an isolated polity.” *The Politics of Korea, in TWO KOREAS—ONE FUTURE?: A REPORT PREPARED FOR THE AMERICAN FRIENDS SERVICE COMMITTEE* 95, 108 (John Sullivan & Roberta Foss, eds., 1987).

There are also appeals to Korean nationalism, such that the common bond of Korean ethnicity is touted as being more important than other pieces of common ground, such as the extensive common ground that the US and South Korea share, both in terms of their inner relationship, but also the common ground in terms of their systems. North Korea is an entirely different sort of society economically, politically, religiously, socially--in all these ways. There exists much more common ground, and much more of a relationship between South Korea and the US, than between South Korea and North Korea.¹⁶² The South Korean media, a significant portion of university students, and now many government elements in South Korea are sympathetic with the North Korean regime, sees the U.S. as a big bully against North Korea and an exploiter of South Korea, and sees North Korea as one of us, "our people," as fellow ethnic Koreans. For many especially in the generations in South who did not experience the Korea War, it is possible that affinities with the U.S. politically, socially, economically, and legally can be overshadowed by the common ethnic blood that is shared between North and South Korea.

Playing into this misguided identity politics is the strong nationalism of Koreans as *Koreans* (not North and South Koreans) and a strong sense of ethnic identity that has not only survived many invasions, many attacks, and many attempts to dominate or even colonize it, but has grown stronger in resistance against outside attacks. That being the case, they are susceptible to this sort of propaganda and rhetoric. There are many in Korea, especially among the younger generations and the media, who want the U.S. out.

¹⁶² Since the Armistice, the political and economic interests of the two nations have diverged considerably. Cecilia Y. Oh, *supra* note 39, at 315; *see also* Charles K. Armstrong, *The Politics of Transition in North and South Korea*, in *KOREA BRIEFING: TOWARD REUNIFICATION 5* (David R. McCann, ed., 1997) ("Beyond the state of transition. . . North and South Korea can hardly be more different.").

Indeed, that plays into the hands of North Korea propaganda, which says South Korea is not free, must be liberated by North Korea, because South Korea is under the imperialist fist of the US. This way of thinking and feeling plays right into the hands of North Korea, and if it was not for the deterrent of American military might, South Korea might already be overrun by North Korea, and there would be a unified Korea, but it would be under Kim Jong Il and the totalitarian dictatorship thereof.

The North Korean regime puts the entire society in a straitjacket. It has at least ten known concentration camps, where political dissidents are tortured and executed, and a regime that has had many people literally starve to death or suffer greatly from malnutrition and starvation. There is no ability to socialize freely, no freedom of association, no freedom of press, no freedom of expression, no freedom of speech, no freedom of religion. The rights, freedoms and privileges that Americans and even South Koreans can at times take for granted are non-existent in North Korea. Since there is no freedom of movement either, a North Korean citizen cannot travel freely out of the country. It is an iron cage of a society with the canary inside wasting away--and certainly not singing.

Responses, or a Lack Thereof

Deep, historic ties exist between South Korea and the U.S., given that South Korea and the US have been close allies over the past half-century. In fact, the development of the two Koreas is intimately linked to the influence of other nations. Just as North Korea is an exaggerated version of Maoist China and Stalinist Soviet Union, through U.S. protection and investment, South Korea has developed into a much more

free-enterprise, democratic, and open society than its Northern counterpart.¹⁶³ So there are extensive social, economic, political, religious, educational, and cultural ties.

These ties ought not be taken for granted or subsumed under the anti-U.S. rhetoric barrage tilting the culture. A solution would be for those in power in South Korea, and those in the media sympathetic to U.S.-South Korean ties, to promote the affinities between the two nations. South Korea must learn that all it has received back from North Korea for its extensive aid and economic investments has been continued hostility and an unrelenting aggressive stance against it. South Koreans need to know that they may be helping to sustain a failed regime, stoking the dying embers of that society, whereas if South Korea were not subsidizing North Korea to the extent that has, perhaps it would have collapsed already. South Korea may be unwittingly delaying the peaceful unification of the Korean peninsula by virtue of their propping up of a malignant, totalitarian dictatorship.

Legal and Diplomatic Solutions to North Korea

Although the above sections point to facets of an overall approach to dealing with North Korea, this essay climaxes with international legal and international relations applications, which would do well to consider the above context.

Multi-Party, Not Bilateral, Negotiations

The Problem with Bilateral

China and Russia, among others, have urged appeasement of North Korea's repeated demands for a bi-lateral security agreement with the United States.¹⁶⁴ That

¹⁶³ Henderson, *supra* note 161.

¹⁶⁴ Tatiana Zakaurtseva, *North Korean Nuclear Issue and Some Ways of Its Settlement from the Russian Point of View: Peaceful Resolution of the North Korean Nuclear Issue*, International Symposium on Peace and Prosperity in Northeast Asia (Jan. 13, 2005); Yunling Zhang, *Ending Confrontation in the Korean*

would be inadvisable. Hwang Jang Yop, the highest level defector from North Korea, indicated that North Korea still is intent on taking over South Korea and the whole peninsula (unification by force is the official North Korean policy still), and in order to do so, it seeks to take the U.S. out of the picture.¹⁶⁵ The U.S. commitment to defend South Korea is the principal impediment for North Korea not to take over the peninsula¹⁶⁶—after all, it was the U.S. forces, along with the UN and South Korean forces, which pushed back North Korean aggression during the Korean War. Thus, it would be a mistake to take Pyongyang's insistence upon the security agreement with the U.S. as simply the paranoid delusions of a regime that anticipates U.S. aggression to dismantle the regime. Rather, if Hwang Jang Yop's diagnosis is correct, and he has the best and highest inside view of the regime available, it is a very calculated effort for the North Koreans to take the U.S. out of the picture as far as defending South Korea on the peninsula.¹⁶⁷

A recent U.S. bipartisan congressional delegation claimed some success in speaking with the North Korean government.¹⁶⁸ Apparently, in an attempt to defuse the North Korean nuclear deterrent reasoning for its nuclear weapons program, the U.S. delegation indicated that Washington did not seek regime change nor plan a pre-emptive attack.¹⁶⁹ During this visit, the beleaguered North reportedly offered to become a "friend" of the United States if Washington did not make inflammatory remarks about

Peninsula: The Way Out, International Symposium on Peace and Prosperity in Northeast Asia (Jan. 13, 2005).

¹⁶⁵ Hwang Jang Yop, *supra* note 77.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ USATODAY (Jan. 15, 2005), at http://www.usatoday.com/news/world/2005-01-15-koreas-nuclearus_x.htm?csp=24&RM_Exclude=Juno.

¹⁶⁹ *Id.*

Kim Jong Il's regime.¹⁷⁰ The North Korean government also stated its desire to resume "substantive discussions" according to Rep. Curt Weldon (R-PA) with no option "off the table," including an end result of "giving up their nuclear capability."¹⁷¹

Based on its repeated history of mendaciousness, obsessive efforts to keep a grip on its power, past reaping of benefits without corresponding adherence to the obligations that it agrees to, and continued goal to remove the U.S. from the picture on the peninsula, one should view this recent claim with the benefit of past experience and a knowledge of North Korea's ambitions. Even the day after this meeting, the official, government-controlled newspaper (*Nodohng Shinmuhn*) continued its usual anti American tirades, calling the U.S. a "nuclear criminal."¹⁷² The North Korean newspaper, given the history of what has transpired thus far, appears more representative of Pyongyang's actual stance. While speaking against the "inflammatory" language of the U.S., it frequently resorts to inflammatory anti-American language itself.

Multi-Lateral the Preferred Course

Although there have been multilateral talks in Beijing, they have largely consisted of recitations of each country's positions, with no real progress towards an agreement. The United States, North and South Korea, China, Japan and Russia have attempted for months to set up another (fourth) meeting to pressure Pyongyang to abandon its nuclear weapons, a development that all the other countries *sans* North Korea claim to seek. The Six-Party Talks have thus far failed to make much substantive progress in resolving the current crisis on the peninsula. For the most part, the delegates from each country have reiterated their positions and stood their ground. There have been minor agreements as to

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

the setting up of sub-committees that would address issues: however, no breakthroughs have yet emerged. North Korea indefinitely suspended the Six Party talks this year (2005) while giving conditions for it to return to these multilateral talks.

The efforts to encourage North Korea to continue in the multi-lateral talks, however, is still a favorable one because it takes North Korea's regional neighbors and applies international pressure upon North Korea to disarm. However, Russia and China have thus far taken a less than tenacious stance towards North Korea and its nuclear weapons. Yet the U.S. has let each country know that applying such pressure to North Korea would be desirable.¹⁷³

Notwithstanding its shortcomings, indefinite suspension by North Korea, and the absence of a breakthrough, this approach is better than the US appearing to engage in unilateral efforts. Accordingly, the present administration is doing a fine job of resisting the brinkmanship blackmail that North Korea again attempts to perpetrate. Allowing North Korea to go straight to the US, over the head of South Korea, seriously undermines South Korea. If there is any bilateral action, it should first and foremost be between South Korea and North Korea, who after all live on the same peninsula in question, not North Korea and the US.

China's role could prove critical in resolving the crisis. As North Korea's best ally in the world, China's strong insistence that North Korea denuclearize the peninsula would carry the most weight. Whether China would do so remains in considerable doubt.

Russia, which has recently renewed its ties with North Korea, while not as influential as China, might have some sway with North Korea. North Korea still owes a

¹⁷³ Zakaurtseva, *supra* note 164.

sizable monetary debt to Russia.¹⁷⁴ Russia could offer a measure of debt forgiveness as an incentive for North Korea to relinquish its nuclear weapons and program.

Japan has aligned itself with South Korea and the United States. It takes a firm stance that North Korea must get rid of its nuclear arms.¹⁷⁵ Given the outrageous actions by North Korea in abducting Japanese citizens and the sending of fraudulent bones of one of them when the issue arose, some 70 percent of the Japanese public support the levying of sanctions against North Korea.¹⁷⁶

A Role for the UN Secretary General

These multi party talks might benefit from outside assistance. The UN Secretary General, currently Kofi Anan, could use his office as a mediator for multi-party talks.¹⁷⁷ Passive attempts to make the Secretary General office available, as well as attempts to diminish tensions by going and visiting the respective countries, South and North Korea, have not helped in the past.¹⁷⁸ Yet, when the U.S. failed in its attempts to gain the liberty of captured airmen, the Secretary General used his office to negotiate the release of captured U.S. airmen after the Korean War.¹⁷⁹ A role as mediator for an existing multi-party framework though, may help drive the talks.

North Korea has stated, however, that it does not consider the U.N. a neutral party.¹⁸⁰ Their argument stems from the UN's condemnation, and subsequent military action against, the North Korean aggression that started the Korean War. It all too conveniently does not credit the aid that UN organizations have rendered to North Korea.

¹⁷⁴ *Id.*

¹⁷⁵ Akio Miyajima, *Some Thoughts and Comments on [the] North Korean Nuclear Issue*, International Symposium on Peace and Prosperity in Northeast Asia (Jan. 13, 2005).

¹⁷⁶ *Id.* at 168.

¹⁷⁷ Chi Young Pak, *KOREA AND THE UNITED NATIONS*, (2000).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

Implementing This Strategy

Hwang Jang Yop also indicated that Kim Jong Il is a coward, and capriciously changes his decisions based on his mood.¹⁸¹ If that is so, it is possible that a course of diplomacy that is incrementally increased to the point of actively going in and disarming North Korea at the last stage of this process might be the best thing--to call North Korea's bluff and see whether or not Kim Jong Il proves to be as courageous as Saddam Hussain was--darting from spider hole to spider hole and offering very little resistance to US forces notwithstanding his inflated rhetoric.

However, this would not be the first or even most desirable step in the process—it should come only if prior efforts fail. A call for continued multi-lateral pressure from other countries and international organizations, with resort as much as possible to international law, should continue—whether or not North Korea returns to the six-party talks. Additionally, invitations to North Korea to engage in negotiations either through the good offices of the UN secretary general and/or to the multi-lateral six-party talks can be extended to Pyongyang again.

Step by step, the heat can be raised on North Korea, and as the heat is being raised, the drive for accountable ways (also known as CVID:¹⁸² Complete, Verifiable and Irreversible Dismantlement) in which North Korea could indeed be disarmed can be pursued. After the heat increases sufficiently, giving some positive incentives for North Korea to comply could increase the likelihood of a peaceful resolution.¹⁸³ Both sticks

¹⁸¹ Hwang Jang Yop, *supra* note 77.

¹⁸² International Symposium on Peace and Prosperity in Northeast Asia (Jan. 13, 2005).

¹⁸³ This principle emerges from the best analytical study on the topic, COERCIVE DIPLOMACY, *supra* note

and carrots (but sticks first¹⁸⁴) of these can be incrementally ratcheted up, step by step, stage by stage, to the point where if none of these things work, only then would it be time for a very proactive international effort to disarm North Korea. Such an approach seems to be the best way to approach the North Korean crisis because softer approaches have clearly failed repeatedly in the past.

Giving positive incentives and a soft landing or a soft way out after turning up the heat and pressure might be much more persuasive to a regime that operates on the basis of fear and intimidation of its own people, as well as its regional neighbors, and indeed, the world.¹⁸⁵ Along the lines of this incremental ratcheting up, it could include possibly an agreement with specific resort to the UN Security Council and the International Court of Justice (ICJ) upon noncompliance, and whatever is maximally possible through the IAEA¹⁸⁶ built in.

Along these lines, it could then help to have UN Security Council resolutions¹⁸⁷ or other assertive action.¹⁸⁸ The basis for such resolutions and possible sanctions can lie squarely on the multiple instruments of international law that North Korea has violated. Consider, for example, that it has broken every single major agreement that they have made, whether with another country(ies) or international organizations: the biological weapons convention, the cease-fire agreement after their initial Korean War, the 1991-92

¹⁸⁴ Drennan, *supra* note 10, culls several lessons from the history of U.S. coercive diplomacy. It seems like in this incremental ratcheting up, that the stakes can be made more and more serious for North Korea, and as that pressure is being applied, perhaps a way out, including positive incentives for verifiable disarmament could look increasingly attractive.

¹⁸⁵ *But see Id.* at 193-95 (the Clinton administration's reliance on incentives encouraged Kim Il Sung's brinkmanship tactics almost to the point that he finally crossed the only real limit the U.S. had – the development of nuclear weapons).

¹⁸⁶ A weakness of the IAEA is that it does not provide for resort to the ICJ.

¹⁸⁷ Zakaurtseva, *supra* note 164, recommends an *in camera* meeting of the Security Council.

¹⁸⁸ A reason to think that UN Security Council action could help is that during the early 1990's, when North Korea initially spoke of withdrawal from the NPT, an IAEA appeal to the UN Security Council brought North Korea back in at that time.

agreements with South Korea, the 2000 agreement after the summit between the leaders of South Korea and North, the 1994 Agreed Framework, the IAEA dictates, the non-proliferation treaty that it belonged to since 2003, etc.¹⁸⁹ Hwang Jang Yop indicates how North Korea only enters into such agreements for tactical gain—not with any intention to restrict itself based on legal instruments.¹⁹⁰

There is an interesting secondary role that the General Assembly can play if the UN Security Council is paralyzed by the abuse of a veto by, for example, China, who would be the most likely one to veto actions—including resolutions or sanctions against North Korea.¹⁹¹ It can take the initiative to recommend action by the UN Security Council in such situations while passing resolutions of its own.¹⁹²

There should be international, not just U.S. verification of North Korea's disarmament, and that what they did in terms of kicking out the IAEA inspectors¹⁹³ in the past would firmly be deemed to be unacceptable. Otherwise, the acceptability and impunity of nuclear proliferation would be a message learned by other potentially dangerous regimes. Ideally, it would be best if North Korea returns to the NPT Treaty—given that it was the first country in history to withdraw from it and disavow it in 2003.¹⁹⁴ Regardless of North Korean withdrawal from the NPT, there remains little doubt that they breached it while still a party to it.¹⁹⁵

Again, it is worth stressing that there ought to be as many defensive measures put in place by the South Korean and US military to deter North Korean aggression as much

¹⁸⁹ See, e.g., Koh, *supra* note 153, 1492-93; Cecilia Y. Oh, *supra* note 39, at 314-15.

¹⁹⁰ Hwang Jang Yop, *supra* note 77.

¹⁹¹ Pak, *supra* note 177. This role for the General Assembly emerged out of the Uniting for Peace resolution precedent.

¹⁹² *Id.*

¹⁹³ Gills, *supra* note 7.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

as possible. The US must reaffirm a strong determination to defend South Korea. What North Korea would perceive as U.S. weakness or anticipated non-involvement could prove catastrophic for the peninsula.

In this whole process of external pressure, North Korea could come closer and closer to an internal collapse,¹⁹⁶ in which case the possibility for reunification exists. On the other hand, the threat of China perhaps stepping in and grabbing North Korea would then be distinct possibilities. China, however, denies a desire in this direction.¹⁹⁷

There are various factors that have been correlated to increase the likelihood of success for the course of coercive diplomacy, and each of these can be applied to the North Korean context.¹⁹⁸ Although each context is not identical to other contexts, certain analogies may be drawn.

Conclusion

A situation as complex¹⁹⁹ as the current North Korean crisis requires an understanding of history²⁰⁰ and context, a consideration of options and ideas from various angles (including legal), and courageous yet not foolhardy implementation. The stakes could rise as high as not only another Korean War, but at its worst, even World War III, if countries such as China, Russia, Japan and the United States all enter the fray.

On the other hand, a successful resolution can build a bridge towards peaceful reunification, which could help considerably in stabilizing the region, stimulate growth and cooperation there, and avert a horrendous cataclysm. If the thoughts in this article

¹⁹⁶ Sung Chull Kim et al., *supra* note 145.

¹⁹⁷ Yunling Zhang, *supra* note 164.

¹⁹⁸ See Drennan, *supra* note 10, at 157-99.

¹⁹⁹ The conflict between the two Koreas has its own encyclopedia. Hoare & Pares, *supra* note 85.

²⁰⁰ For more about how the two Koreas developed during their first thirty years as separate nations, see Jungwon Alexander Kim, *DIVIDED KOREA: THE POLITICS OF DEVELOPMENT, 1945-1972* (1975). For a more far-ranging historical perspective, see Gills, *supra* note 7.

help move the situation towards greater understanding and resolution through implementation in even a small way, it would have fulfilled its primary *raison d'etre*. If it at least gives more clarity to the issues involved so that all concerned may see more sharply, then it was not written in vain. While at best a work in progress as the actual situation continues to unfold, it aims to provide constructive insight into a very precarious, real life situation that cries out to be understood and addressed--rather than ignored.