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Preventing Repeat Offenders: North Korea's Withdrawal and the Need for Revisions to the Nuclear Non-Proliferation Treaty

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Preventing Repeat Offenders: North Korea's Withdrawal and the Need for Revisions to the Nuclear Non-Proliferation Treaty

ABSTRACT

The Nuclear Non-Proliferation Treaty (NPT) took effect on March 5, 1970, with the following purposes: to prevent the proliferation of nuclear arms, promote nuclear disarmament, and encourage the peaceful use of nuclear energy. Even though the NPT was initially intended as a temporary solution to the threat of nuclear weapons, in 1995 the parties to the NPT voted to extend it indefinitely. For the most part, the NPT has been successful in achieving its goals. Recent challenges to the NPT, however—namely North Korea's withdrawal from the NPT in January 2003—have revealed several weaknesses inherent in the NPT. To strengthen the NPT, revisions should be made to the withdrawal provision of the NPT, nuclear disarmament must be made a priority, and the review process must be strengthened.

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I. INTRODUCTION

The Nuclear Non-Proliferation Treaty (NPT) is an international pact that was signed in London, Washington, and Moscow by sixty-two countries in 1968.¹ The aims of this treaty are (1) to prevent the proliferation of nuclear arms, (2) promote nuclear disarmament, and (3) encourage the peaceful use of nuclear energy.² The parties to the

1. Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S.161.

2. *Id.*

NPT are divided into two categories: nuclear states ("those that had manufactured and tested their nuclear weaponry before January 1, 1967) and non-nuclear states ("those that did not possess an atomic arsenal.")³

The five nuclear states are Britain, China, France, Russia, and the United States.⁴ Under the NPT, each nuclear state agreed not to transfer nuclear weapons to any state that did not possess such technology as of the date of the NPT and not to assist any country in obtaining nuclear weapons or devices.⁵ The non-nuclear states agreed not to obtain nuclear weapons and ensured performance of this agreement by agreeing to accept and place all of their nuclear equipment and facilities under the ambit of the International Atomic Energy Agency (IAEA).⁶ In exchange for a pledge by the non-nuclear states not to acquire nuclear weapons, the five nuclear states agreed to pursue good-faith negotiations in ending the arms race and moving toward disarmament.⁷ All parties to the NPT, including non-nuclear states, have a right to use nuclear energy for peaceful purposes.⁸ Nuclear states, furthermore, may assist non-nuclear states, mainly developing countries, in developing nuclear technology.⁹ Each party to the NPT, however, agreed not to provide nuclear equipment or material for peaceful purposes to any non-nuclear state unless in accordance with the IAEA.¹⁰

The NPT includes a provision that calls for a conference twenty-five years after the NPT went into effect. At the conference, the parties would decide whether to extend the NPT indefinitely or merely for an additional fixed period (or periods).¹¹ That conference was held on May 11, 1995, with the parties to the NPT choosing to extend the NPT indefinitely.¹² The Extension Conference's final statement required the five declared nuclear states to commit to complete nuclear disarmament as expeditiously as possible.¹³ In

3. Craig T. Mierzwa, Comment, *The Indefinite Nuclear Nonproliferation Treaty: Substantial Accomplishments or Ambitious Hopes*, 4 J. INT'L L. & PRAC. 555, 555 (1995).

4. *NPT Review*, JAPAN WEEKLY MONITOR, May 1, 2000, available at 2000 WLNR 4046978.

5. Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 1, 21 U.S.T. at 487, 729 U.N.T.S. at 171.

6. *Id.* at 487-88, 729 U.N.T.S. at 172.

7. *Id.* at 490, 729 U.N.T.S. at 173.

8. *Id.* at 489, 729 U.N.T.S. at 172-73.

9. *Id.*

10. *Id.*

11. *See id.* at 494, 729 U.N.T.S. at 175. Article VIII, Section 3 of the NPT also called for a review conference every five years to make sure the purposes of the NPT were being carried out. *Id.*

12. Mierzwa, *supra* note 3, at 555.

13. Gary J. Meise, *Securing the Strength of the Renewed NPT: China, the Linchpin "Middle Kingdom"*, 30 VAND. J. TRANSNAT'L L. 539, 541 (1997).

practice, however, countries on both sides of the nuclear divide have not upheld their part of the agreement.¹⁴ Although Libya is a party to the NPT, just last year it admitted to pursuing an illicit weapons program.¹⁵ Some have alleged that Iran is making highly enriched uranium for bombs.¹⁶ On January 10, 2003, North Korea became the first (and only) country to withdraw from the NPT, after it admitted to developing nuclear weapons.¹⁷ Finally, the nuclear states have yet to fulfill their promise to “pursue negotiations in good faith on effective measures relating to . . . nuclear disarmament.”¹⁸

This Note addresses the need for the reformation of the NPT in light of its inadequacies and the withdrawal of North Korea from the NPT. Part II gives the background of the NPT and discusses relevant provisions of the NPT that have been successful, as well as the shortcomings of the NPT, including discrimination against the non-nuclear states. Part III discusses North Korea’s withdrawal from the NPT. Part IV gives an overview of the Review Conferences, and Part V sets out three proposals submitted by Germany, France, and Canada for strengthening the NPT. Finally, Part VI advocates which portions of these proposals should be adopted.

II. HISTORY OF THE DEVELOPMENT OF THE NUCLEAR NON-PROLIFERATION REGIME AND THE NUCLEAR NON-PROLIFERATION TREATY

A. *Pre-NPT*

In 1945, the United States brought an end to World War II with the development and use of the world’s first atomic bomb when it detonated atomic and plutonium bombs over Hiroshima and Nagasaki.¹⁹ Soon thereafter, many countries realized that the newest threat to global security and peace was the development of nuclear weapons capable of destroying lives.²⁰ In light of this concern and developing negative perceptions of Soviet intentions, the United States introduced the Baruch Plan to the United Nations Atomic Energy Commission.²¹ “Under this plan, the United States proposed to relinquish its nuclear arsenal to an international authority that would assume control over nuclear energy.”²² This plan was not

14. *The Final Straw for a Fragile Treaty?*, 182 NEW SCIENTIST 7, 7 (2004).

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. Helen M. Cousineau, *The Nuclear Non-Proliferation Treaty and Global Non-Proliferation Regime: A U.S. Policy Agenda*, 12 B.U. INT’L L.J. 407, 410 (1994).

20. *Id.*

21. *Id.*

22. *Id.*

successful, however, because the country of concern, the Soviet Union, "rejected the plan, primarily due to a lack of trust and goodwill between the United States and the Soviet Union."²³

The next significant U.S. attempt at stopping the proliferation of nuclear weapons came in 1953 when the Eisenhower Administration presented the Atoms for Peace Initiative.²⁴ Under this initiative, the world's three nuclear states were to develop peaceful uses for atomic energy, and an international atomic energy agency would be created to inspect and control all nuclear material.²⁵ It also called for the enactment of the Atomic Energy Act of 1954.²⁶ The United Nations enthusiastically embraced the Atoms for Peace Initiative, which resulted in the establishment of the IAEA in 1957.²⁷ Even though the IAEA provided initial safeguards to prevent the transfer of nuclear goods, the number of nuclear states grew nonetheless.²⁸ Several treaties were enacted to address the rapid growth of nuclear states, such as the Limited Test Ban Treaty of 1963, the Outer Space Treaty of 1967, and the Treaty of Tlatelolco of 1967.²⁹ Once the United Kingdom, France, and China joined the United States and the Soviet Union as major nuclear powers, however, the international community desired a more comprehensive treaty.³⁰ Thus, the NPT emerged as the "backbone of the nuclear nonproliferation regime."³¹

B. Adoption of the NPT

Even though the NPT opened for signature in 1968, it did not take effect until March 5, 1970, when sixty-two nations signed as parties to the NPT.³² The major principles of the NPT are set forth in its first six articles.³³ Article I prohibits the transfer of nuclear armaments from signatory nuclear states to "any recipient whatsoever."³⁴ Article II bars non-nuclear states from manufacturing or otherwise acquiring nuclear weapons or other explosive devices from any source, and from seeking or receiving any assistance in the

23. *Id.* at 410-11.

24. *Id.* at 411.

25. *Id.*

26. *Id.*

27. *Id.*

28. *See* Meise, *supra* note 13, at 548-49. In addition to the United States and Russia developing nuclear weapons, France conducted its first atomic test in 1960 and China conducted its first test in 1964. *Id.*

29. *See* Cousineau, *supra* note 19, at 412 n.23.

30. *Id.* at 412.

31. Meise, *supra* note 13, at 550.

32. Cousineau, *supra* note 19, at 413.

33. Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 1, 21 U.S.T. at 487-90, 729 U.N.T.S. at 171-73.

34. *Id.*

manufacture of nuclear weapons or other nuclear devices.³⁵ Article III requires non-nuclear states to enter into a safeguards agreement with the IAEA.³⁶ The IAEA is the primary mechanism for verifying that parties to the NPT are complying with its terms.³⁷ The implementation of IAEA safeguards is further evidence of the way in which the NPT strengthens international security.³⁸ Safeguards under the NPT, including international inspections, help to deter the use of nuclear material for nuclear explosive purposes and, thus, are an important confidence-building measure.³⁹ Article IV guarantees to all signatories the right to develop research and produce and use nuclear energy for peaceful purposes; Article IV also sanctions the exchange of equipment, materials, and information for such uses.⁴⁰ Article V stipulates that only nuclear states may conduct peaceful nuclear explosions, while ensuring that the benefits of such explosions would be made available to all non-nuclear signatories.⁴¹ Finally, Article VI requires the nuclear states to pursue good faith negotiations on “measures relating to the cessation of the nuclear arms race . . . to nuclear disarmament, and on a Treaty on general and complete disarmament.”⁴²

At the 1995 Review and Extension Conference of Parties to the NPT, the NPT was extended indefinitely without limitations.⁴³ By January 2003, 186 countries had signed the NPT, making it one of the largest multilateral arms control agreements ever effected.⁴⁴ Even though the NPT has yet to achieve its original goal of freezing the status quo of the nuclear world, it has significantly impacted the course of nuclear weapons proliferation by keeping the number of states possessing nuclear weapons at five for thirty-seven years.⁴⁵ Thus, many nations regard the NPT as the first effective response to the threat of nuclear proliferation posed by the Cold War’s nuclear arms race.⁴⁶

35. *Id.*

36. *Id.*

37. Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, U.S. Dep’t of State, available at <http://www.state.gov/t/np/trty/16281.htm>.

38. Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 1, 21 U.S.T. at 484-85, 487-88, 729 U.N.T.S. at 169-70, 172.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. Mierzwa, *supra* note 3, at 555.

44. Cousineau, *supra* note 19, at 413-14.

45. *Id.* at 414.

46. *Id.* at 414-15.

C. Inadequacy of the NPT

Even though the NPT is regarded as an effective response to the threat of nuclear proliferation, it has been slow to achieve its main goal of promoting nuclear disarmament.⁴⁷ This is illustrated by the fact that “the US still has 10,600 nuclear bombs, Russia 18,000 and Britain 200—and they all want to keep them. Add in France, China and others, and the world tally is about 29,800 nuclear warheads, a relatively small drop from 38,000 in 1968.”⁴⁸

1. Non-Nuclear States’ Ability to Develop Nuclear Weapons

Article IV of the NPT guarantees “the inalienable right of all the Parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes.”⁴⁹ Even though this was conceived as an effective means of preventing proliferation, it actually provides a way for non-nuclear states to initiate a process for building nuclear weapons.⁵⁰ The non-nuclear states can legally develop facilities for enriching uranium to produce fuel for civilian nuclear reactors, and they may reprocess these reactors’ spent fuel to extract plutonium.⁵¹ These same facilities can also “produce highly enriched uranium or bomb-usable plutonium—the critical ingredients for nuclear weapons.”⁵² Thus, the non-nuclear states can use legal means under the NPT to develop these weapons and then withdraw from the NPT to test their weapons and become nuclear states.⁵³

2. Discrimination against the Non-Nuclear States

Under the NPT framework, only five countries are permitted to possess nuclear weapons—Britain, China, France, Russia, and the United States.⁵⁴ The non-nuclear states argued that permitting a few states to have nuclear weapons while forbidding others from doing so constituted a discriminatory feature of the NPT.⁵⁵ Because of this

47. See Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 1, at art. VI, 21 U.S.T. at 490, 729 U.N.T.S. at 173 (requiring that the nuclear states “pursue negotiations in good faith on effective measures relating to . . . nuclear disarmament”).

48. *The Final Straw for a Fragile Treaty?*, *supra* note 14, at 7.

49. See Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 1, at art. IV, 21 U.S.T. at 489-90, 729 U.N.T.S. at 172-73.

50. GRAHAM ALLISON, NUCLEAR TERRORISM: THE ULTIMATE PREVENTABLE CATASTROPHE 158 (2004).

51. *Id.* at 156.

52. *Id.*

53. *Id.* at 158.

54. NPT Review, *supra* note 4.

55. William Epstein & Paul C. Szasz, *Extension of the NPT: A Means of Strengthening the Treaty*, 33 VA. J. INT’L L. 735, 736 (1993).

disparity, the non-nuclear states wanted to ensure that the nuclear states relinquished their weapons as soon as possible.⁵⁶ As a result, several provisions were included in the NPT for the protection of the non-nuclear states.⁵⁷

Article X (1), for example, grants a party to the NPT the sovereignty of withdrawing from the NPT "if it decides that extraordinary events, related to the subject matter of the Treaty, have jeopardized the supreme interests of its country."⁵⁸ The only other requirement placed on a withdrawing country is that it provide a three-month notice to the U.N. Security Council that includes a statement of the extraordinary events it regards as having jeopardized its supreme interests.⁵⁹ Even though this provision was included to protect states that may perceive that their interests are being undermined by the nuclear states, it still does not solve the discrimination problem because only the nuclear states continue to have access to the materials needed to create nuclear weapons.⁶⁰ Since the nuclear states can only trade nuclear materials with those states that are parties to the NPT,⁶¹ the non-nuclear states would be in a worse position if they were to withdraw from the NPT. Thus, once a country withdraws from the agreement, it cannot receive any nuclear materials from any of the nuclear states, even if for peaceful purposes.

Another provision that was meant to counteract this apparent discrimination against the non-nuclear states can be found in Article VIII(3), which provides for a conference of the parties every five years to review the operation of the NPT.⁶² This provision was enacted with the hope of ensuring that all signatories were adhering to the underlying purposes and objectives of the NPT.⁶³ Even though this principle was reinforced at the 2000 Review Conference of the NPT when the countries made an "unequivocal undertaking" to eliminate their nuclear arsenals,⁶⁴ there has been limited progress toward nuclear disarmament.⁶⁵ That not even a quarter of all of the nuclear weapons that existed at the inception of the NPT have been disarmed exhibits the profound weakness of the NPT in this area.⁶⁶ This

56. *Id.*

57. *Id.* at 737.

58. Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 1, at art. X, 21 U.S.T. at 493, 729 U.N.T.S. at 175.

59. *Id.*

60. *See id.* at 487, 729 U.N.T.S. at 171.

61. *Id.*

62. Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 1, at art. VII, 21 U.S.T. at 491, 729 U.N.T.S. at 173-74.

63. Epstein & Szasz, *supra* note 55, at 743.

64. *The Final Straw for a Fragile Treaty?*, *supra* note 14, at 7.

65. *Id.*

66. *Id.*

weakness is due in part to the fact that “the NPT lacks specific regulations or timelines to govern the cessation of nuclear weapons production or the disarmament of [nuclear states].”⁶⁷ Thus, the lack of mechanisms to force the nuclear states to comply with their obligations under the NPT strengthens the argument that the non-nuclear states are victims of discrimination.

That the NPT appears to inherently discriminate against non-nuclear states has made some countries, namely North Korea, hesitant in agreeing to comply with the NPT. North Korea firmly stands by its contention that the NPT is characterized by serious discrimination and partiality toward the nuclear states.⁶⁸

III. NORTH KOREA’S WITHDRAWAL FROM THE NPT

North Korea was hesitant to join the NPT because of the treaty’s inherent discriminatory qualities. Despite its reservations, on December 12, 1985, North Korea, in the interest of turning the Korean Peninsula into a nuclear-free zone, joined the NPT as a non-nuclear state.⁶⁹ North Korea’s main objective behind acceding to the NPT was to satisfactorily solve its power problems with nuclear energy.⁷⁰ Further, it sought to remove the United States as a nuclear threat.⁷¹ Even though Article III of the NPT requires each non-nuclear state to enter into a safeguards agreement with the IAEA to verify the non-nuclear state’s compliance with its Article II obligation under to refrain from manufacturing or acquiring nuclear explosives, North Korea was hesitant to enter into such an agreement because of its belief that the United States posed a nuclear threat to its country.⁷² After receiving assurances from the United States that it would not use nuclear weapons against North Korea and representations from South Korea that there were no nuclear weapons within its borders, North Korea entered into a safeguards agreement with the IAEA on January 30, 1992.⁷³ North Korea based its compliance on the premise that “none of the NPT member countries will deploy nuclear weapons on the Korean peninsula and

67. Meise, *supra* note 13, at 551.

68. *DPRK Urges UN to Avoid Applying Double Standards on NPT* (Xinhua News Agency broadcast June 27, 2003).

69. *KCNA Detailed Report on Circumstances of DPRK’s Withdrawal from NPT*, KOREAN NEWS SERVICE, Jan. 23, 2003, at 1, available at <http://www.kcna.co.jp/item/2003/200301/news01/23.htm>.

70. *Id.*

71. *Id.*

72. See Charles J. Moxley, *The Sword in the Mirror—the Lawfulness of North Korea’s use and Threat of Use of Nuclear Weapons Based on the United States’ Legitimization of Nuclear Weapons*, 27 *FORDHAM INT’L L.J.* 1379, 1384 (2004).

73. *Id.*

pose a nuclear threat to the DPRK [Democratic People's Republic of Korea].⁷⁴ The safeguards agreement provided for measurements and observations of North Korean nuclear material and facilities by IAEA inspectors.⁷⁵ Article 26 of the safeguards agreement provides, "This Agreement shall remain in force as long as the Democratic People's Republic of Korea is party to [the NPT]."⁷⁶ This logically implies that if North Korea were to withdraw from the NPT, then it would no longer remain bound by the safeguards agreement.

Unfortunately, North Korea's commitment to the non-proliferation effort ended rather abruptly when, in January 1993, it became the first signatory to abandon the NPT by refusing to allow inspections of its nuclear sites.⁷⁷ On March 12, 1993, pursuant to Article X(1) of the NPT, North Korea advised the U.N. Security Council of its intent to withdraw from the NPT.⁷⁸ Not surprisingly, this revelation provoked an international response and eventually led to diplomatic talks between North Korea and the United States.⁷⁹ In 1993, after the Clinton administration agreed to a negotiation meeting, North Korea "suspended" its withdrawal from the NPT.⁸⁰ North Korea, however, was unrelenting in its refusal to allow the IAEA to perform special inspections and regular inspections of facilities as designated under the safeguards agreement.⁸¹ As concern over North Korea's blatant disregard of its obligation to allow inspections mounted, a military confrontation with the United States almost occurred in June 1994.⁸² Nevertheless, North Korea used its potential status as a nuclear threat as leverage to avoid a military engagement and coerce the United States into high-level negotiations.⁸³ The result of these negotiations was the "Agreed Framework."⁸⁴

74. *Id.*

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

76. *Id.*

77. Erik Raines, Note, *North Korea: Analyzing the "New" Nuclear Threat*, 12 CARDOZO J. INT'L & COMP. L. 349, 355 (2004).

78. Christian Sano Homsí, Note, "Self-Contained Regimes"—No Cop-Out for North Korea!, 24 SUFFOLK TRANSNAT'L L. REV. 89, 91 (2000).

79. Larry A. Niksch, *North Korea's Nuclear Weapons Program*, CRS Issue Brief for Congress, Aug. 27, 2003, at 13, <http://fas.org/spp/starwars/crs/IB91141.pdf>.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

A. *The Agreed Framework*

The Agreed Framework was signed by the United States and North Korea on October 21, 1994, and provided certain stipulations for both sides to uphold. Under this agreement, North Korea would halt its existing nuclear program and agree to enhanced IAEA safeguards.⁸⁵ Both sides would cooperate to replace North Korea's graphite-moderated reactors for related facilities with light-water (LWR) power plants.⁸⁶ Finally, both countries agreed to move toward full normalization of political and economic relations by working together to establish peace and security on a nuclear-free Korean peninsula and to strengthen the international nuclear non-proliferation regime.⁸⁷

Unfortunately, the Agreed Framework only provided a temporary resolution to the tension between North Korea and the international community in regards to the non-proliferation regime. On January 10, 2003, North Korea announced its official withdrawal from the NPT, citing U.S. aggression towards the country as its reason for withdrawal.⁸⁸ North Korea claimed that it could "no longer remain bound by the NPT, allowing [our] country's security and the dignity of our nation to be infringed upon."⁸⁹ In addition to its withdrawal from the NPT, North Korea announced that it was abandoning its safeguards agreement with the IAEA.⁹⁰ In asserting "self-defense" as its primary reason for withdrawing from the NPT, North Korea seemed to be relying on Article X of the NPT, which allows withdrawal if extraordinary events related to the subject matter of the NPT have jeopardized the supreme interests of its country.⁹¹

North Korea has supported its accusation against the United States with several instances of what it labels as deviance by the United States.⁹² For example, North Korea claims that the United States instigated the IAEA's performance of "special inspections" on

85. Steven Aftergood, *Nuclear Weapons Programs—Current Status*, <http://www.fas.org/nuke/guide/dprk/nuke/index.html> (last updated June 9, 2003).

86. *Id.*

87. *Id.*

88. *North Korea Withdrew from the Nuclear Non-Proliferation Treaty Today*, THE NEW YORK POST, Jan. 10, 2003, at 4.

89. *Id.*

90. *Major excerpts of KPRK statement on quitting NPT*, XINHUA GENERAL NEWS SERVICE, Jan. 10, 2003.

91. See Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 1, 21 U.S.T. at 493, 729 U.N.T.S. at 175.

92. See generally, *U.S. to blame for derailing process of denuclearization of Korean Peninsula*, KOREAN CENTRAL NEWS AGENCY OF DPRK, May 12, 2003, <http://www.kcna.co.jp/item/2003/200305/news05/13.htm> (describing North Korea's view of the United States deviance).

the Korean peninsula.⁹³ Additionally, North Korea asserted that in February 1997 the United States introduced depleted uranium bombs and deployed them for actual war even though the use of such bombs is banned internationally.⁹⁴ Moreover, in March 2002, the United States adopted a policy to mount preemptive nuclear attacks on seven countries, including North Korea.⁹⁵ North Korea viewed these actions taken by the United States, a nuclear state under the NPT, as a

wanton violation of the basic spirit of the NPT which calls on the nuclear weapons states to refrain from threatening other countries with [nuclear weapons] or using them against other countries and creating emergency cases endangering the fundamental interests of non-nuclear states and exert all efforts to avert a nuclear war.⁹⁶

Other accusations included a claim that the United States has failed to fulfill its obligations to North Korea under the Agreed Framework by neglecting to provide LWR reactors and suspending its promise of heavy oil shipments.⁹⁷ North Korea further stated that the United States had “instigated even the IAEA to internalize its moves to stifle the DPRK, thus putting into practice its declaration of a war against the DPRK.”⁹⁸ Even though North Korea cited self-defense as the motive for its withdrawal, it has stated that it has no intention to produce nuclear weapons: “Though we pull out of the NPT, we have no intention to produce nuclear weapons and our nuclear activities at this stage will be confined only to peaceful purposes such as the production of electricity.”⁹⁹

Despite North Korea’s statement that its nuclear activities will be limited to peaceful purposes, the IAEA’s Director General Mohamed El Baradei categorized the withdrawal as a defiant act against the NPT and argued that because “the NPT is the ‘cornerstone’ of international efforts to contain the spread of nuclear weapons . . . [a] challenge to the integrity of that Treaty may [pose] a threat to international peace and security.”¹⁰⁰ El Baradei also reminded North Korea that pursuant to Article X of the NPT, a withdrawal only takes effect after three months of its announcement.¹⁰¹ North Korea responded by sending a letter to the IAEA stating that its withdrawal would be immediate due to its announcement in 1993 of its intention to withdraw from the NPT.¹⁰²

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. Moxley, *supra* note 71, at 1385.

98. *Id.* at 1385-86.

99. *Major Excerpts of DPRK Statement on Quitting NPT, supra* note 89.

100. *N. Korea’s NPT pullout poses ‘threat’ to peace: IAEA, JAPAN ECON. NEWSWIRE*, Jan. 10, 2003.

101. *Id.*

102. *Id.*

North Korea supported this contention by stating that it had declared a moratorium on its withdrawal in light of the agreement reached between it and the United States, but since the United States had now violated that agreement, North Korea was declaring an immediate and effectual withdrawal.¹⁰³ Regarding the IAEA's charge that North Korea is threatening international peace and security, North Korea accused the IAEA of abandoning the principles of impartiality and fairness that are supposed to be inherent in the NPT.¹⁰⁴

B. North Korea's Potential as a Nuclear Threat

Although North Korea has stated that it intends to use nuclear materials solely for peaceful purposes, its leaders have made statements indicating otherwise. North Korea argues that since it has withdrawn from the NPT and terminated its Safeguard Agreement with the IAEA, like other nuclear powers, it is no longer subject to international law as to nuclear weapons.¹⁰⁵ In very clear terms, North Korea has stated that it "will build up a powerful physical deterrent force capable of neutralizing any sophisticated and nuclear weapons with less spending unless the U.S. gives up its hostile policy toward the DPRK."¹⁰⁶ It has also stated that it will "increase its self-defensive capacity strong enough to destroy aggressors at a single stroke."¹⁰⁷ North Korea also uses the U.S.-led war in Iraq as a reason to decline inspections and refuse to dismantle its nuclear weapons: "What has happened in Iraq shows that if we agree to disarmament through unjustified inspections, it will not prevent a war but actually invite one."¹⁰⁸ North Korea will concede and allow inspections and the dismantling of its nuclear program only if it receives written guarantees from the United States not to invade and to provide economic aid to the country.¹⁰⁹

Given these threats made by North Korea, the question is whether North Korea has the capabilities of becoming a nuclear state? There is no definite answer to this question because the true

103. *DPRK's withdrawal from the NPT now effectual: official*, XINHUA GENERAL NEWS SERVICE, Jan. 11, 2003.

104. *North Korean Commentary Threatens "Strong Countermeasures" to US Pressure*, BBC MONITORING ASIA PACIFIC-POLITICAL [London], Jan. 14, 2003.

105. Moxley, *supra* note 71, at 1394.

106. *DPRK "Nuclear Deterrent Force" to Be Built if US Maintains "Hostile Policy"*, KOREAN CENTRAL NEWS AGENCY OF DPRK, June 9, 2003, available at <http://www.fas.org/nuke/guide/dprk/nuke/dprk060903.html>.

107. *U.S. to blame for derailing process of denuclearization of Korean Peninsula*, *supra* note 91.

108. *Pyongyang says Disarmament Will Lead to Invasion*, TAIWAN NEWS.COM, Mar. 19, 2004, <http://www.etaiwannews.com/Asia/2004/03/19/1079661874.htm>.

109. *Id.*

extent of North Korea's nuclear program is unclear.¹¹⁰ Some facts are certain, however. First, North Korea possesses the means to produce plutonium, a key ingredient in nuclear weapons.¹¹¹ Second, in the city of Yongbyon, North Korea has an operating nuclear reactor that can produce enough plutonium for approximately one nuclear weapon per year.¹¹² Third, North Korea has demonstrated the ability to produce and purify plutonium, having produced at least small amounts in the 1980s and early 1990s.¹¹³ Lastly, North Korea is known to have possessed about 8,000 spent fuel rods, enough for five or six nuclear weapons.¹¹⁴

Beyond that, there has been a substantial amount of speculation concerning what North Korea has been able to accomplish since nuclear inspectors were expelled from the country in December 2002.¹¹⁵ Since the expulsion of the inspectors, however, North Korea has been very visible and vocal in regards to its endeavor to build a nuclear weapons program. In April 2003, North Korea took 8,000 spent fuel rods out of storage—a prerequisite for extracting plutonium.¹¹⁶ In May 2003, Pyongyang renounced the 1991 joint declaration it signed with South Korea pledging to keep the Korean peninsula non-nuclear.¹¹⁷ In October 2003, Pyongyang announced that it finished reprocessing the fuel rods and was building nuclear weapons.¹¹⁸ In response to these facts, President Bush's advisers believe that North Korea could be telling the truth about having turned 8,000 nuclear fuel rods into enough weapons-grade plutonium for several warheads, while others in the State Department are more skeptical because there is still no definitive proof and plenty of incentive for North Korea to lie.¹¹⁹ The IAEA is somewhere in the middle and believes that North Korea has probably produced enough plutonium to make two new nuclear weapons.¹²⁰

110. See generally David E. Sanger, *Intelligence Spawl Over North Korea*, INT'L HERALD TRIB. [Paris], Oct. 15, 2003.

111. Jon Wolfsthal, *The Intelligence "Black Hole" Over N. Korea*, BBC NEWS, July 17, 2003, available at <http://news.bbc.co.uk/1/hi/world/asia-pacific/3073677.stm>.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. Ted Galen Carpenter, *Outside View: Illusions on N. Korea Nukes*, UNITED PRESS INT'L, Oct. 8, 2003, available at <http://www.upi.com/view.cfm?StoryID=20031008-050533-1217r>.

117. *Id.*

118. *Id.*

119. Sanger, *supra* note 111.

120. *Id.*

C. *Implications of North Korea's Withdrawal From the NPT and Possible Nuclear Program*

Arguably, the most important implication of the North Korean situation is the revelation that the withdrawal provision of the NPT overwhelmingly weakens the effect of the NPT by allowing withdrawing countries to subjectively determine what "extraordinary events" jeopardize its national security.¹²¹ North Korea has taken advantage of this weakness in the NPT by pointing towards both the U.S.'s direct use and alleged indirect use of a "hostile policy" through the IAEA as the "extraordinary events" which jeopardize North Korea's national security.¹²² By allowing such subjective determinations of "extraordinary events," the NPT's own purpose has been severely compromised.¹²³ North Korea's withdrawal proves that a country can enter the NPT as a non-nuclear state and then, as long as the country deems that it is in peril, withdraw regardless of whether it has made its determination in good faith.

North Korea further exploited the weakness of the NPT in this area by declaring "an automatic and immediate effectuation of its withdrawal from the [NPT]."¹²⁴ By declaring this withdrawal and immediately operating as if it were no longer subject to the NPT, North Korea did not respect the ninety-day waiting period required by the NPT prior to withdrawal from the NPT and showed the international community that there will be no ramifications for such actions.¹²⁵ The immediate implication of North Korea's decision not to abide by the Article X waiting period is that the lack of a means of enforcement of the withdrawal period substantially weakens the force of the NPT.¹²⁶ Furthermore, the existence of a nuclear weapons program in North Korea may lead nearby countries like South Korea and Japan to abandon the nuclear non-proliferation regime and develop nuclear weapons as a means of self-defense.¹²⁷ The reality is that absent safeguards—such as the ability of inspectors to monitor these facilities—and without a North Korean commitment to abide by its obligations under the NPT, the United States and the rest of the international community are powerless to stop a dictatorial regime from progressing toward becoming a nuclear power and a global threat.¹²⁸

121. Raines, *supra* note 76, at 364-65.

122. *Id.* at 363-365.

123. *Id.* at 365.

124. *Id.*

125. *Id.*

126. *See id.*

127. *Id.* at 366.

128. *Id.* at 366-67.

North Korea's declaration of a secret nuclear program and the subsequent implications serve as key indicators of the need for the reconstruction of the NPT.¹²⁹ The present situation, in which a previous signatory to the NPT can unilaterally decide that it is at risk of attack and then begin to build a nuclear weapons program as a means of self-defense, poses serious dangers to the peace and security of the international community.¹³⁰ Moreover, the fact that North Korea was classified as a non-nuclear state when it became a signatory to the treaty makes the problem more disturbing, for if a non-nuclear state can withdraw and not be subject to ramifications, then it would be quite troublesome if a country that is already established as a nuclear state were to withdraw in such a manner. In either case, North Korea's withdrawal from the NPT and the NPT's inability to control it indicate the need for revisions to be made to the NPT.

IV. NPT REVIEW CONFERENCES

Article VIII of the NPT establishes regular conferences at intervals of five years to review the operation of the NPT.¹³¹ At these review conferences, the operation of the NPT should be reviewed to assure that the purposes of the preamble and the provisions of the NPT are being realized.¹³² Six such conferences have been held since the NPT took effect.¹³³ In short, the first four Review Conferences discussed two main concepts: (1) the strengthening and consolidation of the horizontal non-proliferation regime and (2) how to resolve the slow progress with regard to the termination of the nuclear arms race and nuclear disarmament.¹³⁴

Since the NPT was initially drafted as a temporary solution to nuclear proliferation, it also included a provision requiring, after twenty-five years of its entry into force, that a conference be held to determine whether to extend the NPT temporarily, make it

129. *Id.* at 367.

130. *Id.*

131. See Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 1, 21 U.S.T. at 492, 729 U.N.T.S. at 174.

132. *Id.*

133. Narrative preceding NPT, http://www.nti.org/e_research/official_docs/inventory/pdfs/npt.pdf (last visited Sep. 29, 2005).

134. Sergio Duarte, Ambassador-at-Large of Brazil for Disarmament and Non-Proliferation, Presentation at Annual Joint Forum—Canadian Pugwash Group and Science for Peace, *Genesis and Development of the NPT: An Overview of the Review Process*, Apr. 17, 2004 (transcript available at <http://www.pugwashgroup.ca/events/documents/2004/2004.04.17-Duarte-presentation.pdf>).

permanent, or end it entirely.¹³⁵ Thus, in 1995 the NPT Review and Extension Conference was held at the United Nations.¹³⁶ Without taking a vote, the state parties agreed to extend the NPT indefinitely.¹³⁷ In addition to extending the NPT indefinitely, the parties also adopted two initiatives: (1) "Strengthening the Review Process for the Treaty," which involves creating a new, more substantive review process for the NPT; and (2) "Principles and Objectives for Nuclear Non-Proliferation and Disarmament," which sets out a program of action for full implementation of the NPT.¹³⁸

Under the new review process, Review Conferences will continue to be held every five years as specified in the NPT.¹³⁹ The previous purpose of the review conferences was to review the operation of the NPT; however, with the adoption of this new agreement that purpose has been expanded as follows:

Review Conferences should look forward as well as back. They should evaluate the results of the period they are reviewing, including the implementation of undertakings of the States parties under the Treaty, and identify the areas in which, and the means through which, further progress should be sought in the future. Review Conferences should also address specifically what might be done to strengthen the implementation of the Treaty and to achieve its universality.¹⁴⁰

Under this new structure for review conferences, preparatory committees (PrepComs) were assigned the task of considering "principles, objectives and ways in order to promote the full implementation of the NPT, as well as its universality, and to make recommendations thereon to the Review Conference."¹⁴¹ The "Principles and Objectives" set forth at the 1995 Review Conference were specifically included as a topic for PrepComs to consider, and according to the preamble of the "Principles and Objectives," its contents should be evaluated periodically within the review process.¹⁴²

The review conference held in 2000 was considered, by most, to be a success.¹⁴³ First, the conference was deemed to be successful because it was able to produce a final document, which is something that had not occurred since the 1985 conference.¹⁴⁴ The state parties

135. Stephen Young, *1999 NPT PrepCom: Keys to Success*, 30 BASIC PUBLICATIONS—OCCASIONAL PAPERS ON INT'L SECURITY POLICY, Apr. 1999, available at <http://www.basicint.org/pubs/Papers/BP30.htm>.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 4.

143. Duarte, *supra* note 135, at 4.

144. *Id.*

confirmed that the NPT, despite its imperfections, was the document from which they expected to derive security benefits.¹⁴⁵ Second, in constructing ways to strengthen the review process, the parties were able to discuss substantive questions pertaining to the implementation of all provisions of the NPT, particularly those involving nuclear disarmament.¹⁴⁶ Third, the nuclear states expressed an “unequivocal undertaking” to bring about the complete elimination of their nuclear arsenals, and in the end, attain the ultimate goal of nuclear disarmament.¹⁴⁷ Even more powerful was the adoption of the thirteen practical steps¹⁴⁸ spelling out the consensual measures necessary to achieve that goal.¹⁴⁹

While the future of the NPT certainly looked bright at the end of the 2000 Review Conference, the international community has experienced several incidents that have called the credibility and authoritativeness of the NPT into question. Many thought that the 2005 Review Conference would properly address these issues and bring the NPT back to the forefront of the battle against nuclear proliferation. The 2005 Review Conference was held May 2–27 at the United Nations, but unfortunately, it did not produce the desperately needed revisions.¹⁵⁰ Most of the debate at this conference concerned agenda and logistics rather than substantive discussions on how to strengthen the nonproliferation regime.¹⁵¹ The conference produced a “final document,” but rather than adopt measures to strengthen the

145. *Id.*

146. *Id.*

147. *Id.*

148. See Rebecca Johnson, *The 2002 PrepCom: Papering over the Cracks?*, DISARMAMENT DIPL., May–June 2002, available at <http://www.acronym.org.uk/dd/dd64/64npt.htm>. Describing the plan of action adopted by the Conferences and the thirteen steps that address the following issues, summarized in Merav Datan, *Reaching Nuclear Disarmament: New Challenges and Possibilities*, Feb. 25, 2005, available at <http://tinyurl.com/dywwq3>:

the unequivocal undertaking by the nuclear-weapon states to accomplish the total elimination of their nuclear arsenals; entry into force of the Comprehensive Nuclear-Test-Ban Treaty (CTBT) and a moratorium on nuclear testing; progress on a fissile materials ban and the disposition of fissile materials; putting the [Conference on Disarmament] back to work on disarmament issues; commitments to irreversibility, transparency and accountability including reporting and verification; reducing the role of nuclear weapons in doctrine, policy and in operational status; and further unilateral steps, deeper bilateral cuts in the American-Russian arsenals and in nonstrategic nuclear weapons, plurilateral P5 engagement and multilateral negotiations.

149. Duarte, *supra* note 135, at 4.

150. Johnson, *supra* note 149.

151. Kofi A. Annan, *Break the Nuclear Deadlock*, THE ACRONYM INST., May 30, 2005, available at <http://www.acronym.org.uk/docs/0505/doc12.htm>, originally printed in INT'L HERALD TRIB., available at <http://www.int.com/articles/2005/05/29/news/edannan.php>.

NPT, the document did nothing more than list the participants and officials of the conference and how many meetings they held.¹⁵² Failure of this conference to come to an agreement does not end the war against nuclear proliferation; instead, it reinforces the need for some significant revisions to strengthen the NPT. During the PrepComs for the 2005 Review Conference, several countries gave suggestions on how the NPT could be strengthened. Even though the 2005 Review Conference did not produce any results regarding these proposals, they are still relevant and can provide significant insight for the PrepComs as they prepare a report for the 2010 Review Conference.

V. STRENGTHENING THE NPT AGAINST WITHDRAWAL AND NON-COMPLIANCE: SUGGESTIONS FOR THE ESTABLISHMENT OF PROCEDURES AND MECHANISMS

A. Germany's Proposal

At the second PrepCom of the 2005 NPT Review process, Germany introduced its suggestions on how to strengthen the NPT against withdrawal and non-compliance.¹⁵³ The proposal is split into three parts: structuring the withdrawal process, structuring the communication between NPT members, and structuring the reaction to a withdrawal.¹⁵⁴ Germany began by stressing the significance of the NPT as the most universal multilateral treaty and the need for it to maintain its authority.¹⁵⁵

First, Germany suggested that the 2005 Review Conference establish an agreement on the rules and procedures to be observed when a state intends to withdraw from the NPT.¹⁵⁶ This was qualified by a statement that nothing in the agreement should limit or exclude the right of states to withdraw from the NPT as set forth by Article X of the NPT; rather, this agreement would merely set out the procedures to be followed to procure an effective withdrawal.¹⁵⁷ Germany then suggested that the agreement define what constitutes

152. Rebecca Johnson, *The NPT Review Conference 2005: Acronym Special Coverage: Day 26: Spineless NPT Conference Papers Over Cracks and Ends with a Whimper*, THE ACRONYM INST., May 27, 2005, available at <http://www.acronym.org.uk/npt/05rep12.htm>.

153. Germany, *Strengthening the NPT Against Withdrawal and Non-Compliance: Suggestions for the Establishment of Procedures and Mechanism 1-3* (NPT Conference 2005, Working Paper No. 15, 2004), available at www.reachingcriticalwill.org/egal/npt/prepcom04/papers/GermanyWP15.pdf [hereinafter Germany Working Paper].

154. *Id.* at 1.

155. *Id.*

156. *Id.*

157. *Id.*

an event that is "extraordinary" enough to trigger a possible withdrawal.¹⁵⁸ The agreement should require a state contemplating withdrawal from the NPT to submit, in writing, prior to the notification of withdrawal provided by Article X, information outlining the concerns that have led to its contemplation of withdrawal from the NPT.¹⁵⁹ Immediately after this information is furnished, but prior to the state's invocation of its withdrawal right under Article X, the state considering withdrawal must conduct consultations with NPT-state parties.¹⁶⁰ These consultations would take place in the context of an extraordinary conference of the NPT, and the purpose of the consultations would be to provide an arena for developing alternatives to withdrawal, including adopting measures within the bounds of the NPT to satisfy the stated security needs of the party intending to withdraw.¹⁶¹ Lastly, the right to withdraw cannot be exercised by states that are not complying with the NPT or facing allegations of noncompliance with the NPT (with relevant investigations/procedures underway).¹⁶²

In addition to suggesting procedures that should be followed before a withdrawal can be effectuated, Germany also suggested ways that the NPT parties should react to a withdrawal. The priority of the international community after a withdrawal should be to reduce the possibility that the withdrawing state will still be able to benefit from the technology and know-how that it has acquired under Article IV of the NPT during its membership.¹⁶³ Germany admitted that this would be difficult to do once a party has already withdrawn, but it still made a number of suggestions for realizing this objective.

First, the members of the NPT should reinforce the argument that membership in and full compliance with the NPT is of paramount importance, to ensure that development of nuclear energy will only be used for peaceful purposes and not to threaten international security.¹⁶⁴ Second, the nuclear states that supply the non-nuclear states with the materials that they need to develop nuclear energy for peaceful purposes should include a provision in their delivery agreements stating that in the event that the country withdraws from the NPT, the items delivered will remain under IAEA safeguards.¹⁶⁵ Additionally, it should be made clear that any nuclear equipment, technology, and know-how restricted to peaceful purposes that is obtained by a member state of the NPT also has to

158. *Id.*

159. *Id.*

160. *Id.* at 2.

161. *Id.*

162. *Id.*

163. *Id.* at 3.

164. *Id.*

165. *Id.*

remain subject to IAEA safeguards.¹⁶⁶ IF the country does not comply with this restriction, an additional possibility would be to establish a right for supplier countries or the IAEA to obtain immediate restitution of material and technology delivered under Article IV of the NPT in case the state withdraws from the NPT.¹⁶⁷ Ultimately, one of the consequences of withdrawal could be a requirement that the relevant facilities be closed, which would ensure that the withdrawing state would not benefit from the knowledge that it has obtained about the nuclear files as a result of being a party to the NPT.¹⁶⁸ Last, Germany suggested that the members of the NPT should reiterate that in accordance with international law, a state that has withdrawn from the NPT can still be held accountable for breaches or acts of non-compliance committed while still a party to the NPT, and as a result, will still be subject to the regulations of the relevant international institutions such as the IAEA and the U.N. Security Council.¹⁶⁹ Finally, Germany's proposal addressed possible procedures and communication rules that should be followed by the members of the NPT when a party to the NPT is in violation of the NPT by way of noncompliance.¹⁷⁰ At the outset, Germany stated that any mechanisms adopted at the 2005 Review Conference regarding procedures to be followed if non-compliance would not undermine the role and obligations of the IAEA in such circumstances.¹⁷¹ The following two suggestions were offered: (1) establishment of a formal point of contact system that would provide a forum for questions and answers between the regular PrepCom meetings and the review conferences themselves and (2) establishment of procedures so that an extraordinary conference can be convened when serious violations occur.¹⁷² This emergency conference should be organized in such a manner as to provide ample opportunities to discuss specific non-compliance cases.¹⁷³ The only limitation to the convening of such a conference is that a quorum must be present.¹⁷⁴

B. *France's Proposal*

At the third session of the NPT PrepCom for the 2005 Review Conference, France submitted its proposal for strengthening the

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 2.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

nuclear non-proliferation regime.¹⁷⁵ France's proposal is essentially based on the following principles: "fostering the NPT and international institutions (UN, IAEA) through effective multilateralism, restoring the confidence of the international community, adopting an inclusive approach, and avoiding the creation of dividing lines among the international community."¹⁷⁶ In many respects, France's proposal is very similar to Germany's. For example, with respect to withdrawal, France's proposal mirrors Germany's because France's proposal advocates reaffirming the principle that if a state withdraws from the NPT, it still remains responsible for violations committed while subject to the NPT.¹⁷⁷ France also argued that the U.N. Security Council is the appropriate international framework for making decisions in such a context.¹⁷⁸ Furthermore, France advocated the position that once a state has withdrawn, it should no longer be allowed to make use of any nuclear materials, facilities, equipment or technologies acquired from another country as a result of being a member of the NPT before its withdrawal.¹⁷⁹ France's suggestion of how to confiscate these materials includes returning the equipment and materials to the supplying state, either frozen or dismantled under international verification.¹⁸⁰

France's proposal was also similar to Germany's with respect to the measures that should be taken on the issues of compliance and international cooperation. France suggests that Article IV of the NPT can be strengthened by suspending nuclear cooperation with states if the IAEA cannot provide satisfactory assurances that those states' nuclear programs are devoted exclusively to peaceful purposes.¹⁸¹ To supplement this suggestion, France offered situations where suspension would be appropriate: "a situation of 'serious breaches'; a situation of 'non-compliance'; an 'unacceptable risk of diversion'; [and] the impossibility, for the Agency, to carry out its mission."¹⁸² If appropriate corrective measures were taken by the state, however, then automatic suspension would not occur.¹⁸³ The reality of the suspension could be made more severe by a decision of the U.N. Security Council to make the suspension universal and mandatory.¹⁸⁴

175. France, *Strengthening the Nuclear Non-Proliferation Regime* 1-4 (NPT Conference 2005, Working Paper No. 22, 2004), available at www.reachingcriticalwill.org/legal/npt/prepcom04/papers/Francewp22.pdf [hereinafter France Working Paper].

176. *Id.* at 1-2.

177. *Id.* at 4.

178. *Id.* at 4.

179. *Id.*

180. *Id.*

181. *Id.* at 3.

182. *Id.* at 3-4.

183. *Id.* at 4.

184. *Id.*

In addition to making proposals about what should happen once a withdrawal has been effectuated, France suggested measures that may, in effect, prevent a country from wanting to withdraw. First, France called for a standard to be imposed on all parties to the NPT whereby each party must take immediate steps to adhere to the additional protocol.¹⁸⁵ A duty that coincides with that responsibility is one requiring each IAEA Member State to take measures to ensure that the Agency has adequate technical and financial means to carry out its statutory mission.¹⁸⁶ In turn, the IAEA should “optimize safeguards implementation to fulfill its new missions.”¹⁸⁷

France also recommends, as a means of strengthening the NPT, that the export of nuclear materials, facilities, equipment or related technologies should only be allowed when a set of conditions relevant to the global non-proliferation regime and NPT objectives are fulfilled.¹⁸⁸ These conditions include:

an alleged need in the country; a credible nuclear power generation program and related fuel cycle needs; an economically rational plan for developing such projects; an Additional Protocol brought into force and implemented before a physical transfer or transfer of know-how; the highest standard of non-proliferation commitments; the effective and efficient implementation of an export control system with adequate sanctions; the highest standard of nuclear security and safety; an analysis of the stability of the country and the region concerned.¹⁸⁹

Additionally, all parties involved in the export of these materials should adopt responsible policies regarding nuclear exports.¹⁹⁰ As an example, France proposes that the supplying state transferring

185. The aim of the Additional Protocol is to allow the U.N.'s nuclear watchdog to verify a country's declared nuclear activities and ensure it is not hiding material which could be used to build a nuclear bomb. The protocol obliges countries to provide the IAEA with much more precise information about their nuclear activities than is required under the NPT. And it authorizes the IAEA to carry out more intrusive inspections of nuclear facilities. Under the agreement, states commit to giving IAEA inspectors information about, and short-notice access to, all parts of their nuclear fuel cycle, including uranium mines, fuel production and enrichment plants, and nuclear waste sites. They must also offer access to any other location where nuclear material is or may be present. The IAEA may give as little as two hours' notice before it visits a site to check for evidence of undeclared nuclear material or resolve inconsistencies in the information the government has provided about its nuclear activities. Once at a site the IAEA is authorized to inspect it, examine records, take samples, use radiation detection equipment and impose seals or other tamper-indicating devices. The agency may also make use of established satellite surveillance systems. States which sign the protocol have one month, from the time of the request, to issue nuclear inspectors with multiple entry visas valid for at least one year. *The Additional Protocol to the UN Nuclear NPT*, IRAN MANIA, Dec. 18, 2003, available at <http://www.iranmania.com/News/ArticleView/?NewsCode=20758&NewsKind=Current+Affairs>.

186. France Working Paper, *supra* note 176, at 2.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* at 3.

materials to non-nuclear states should do so only if an inter-governmental agreement is signed prior to the transfer, creating a legal basis and framework for such cooperation.¹⁹¹ Thus, it logically follows that any transfer not covered by such an agreement will be considered illegal, and legal action should be taken in accordance with national regulations.¹⁹² To soften the restrictions to non-nuclear states that might feel over-regulated under France's plan, France suggests balancing the stringent aforementioned policy by granting the non-nuclear states easier access to non-sensitive equipment and technologies and nuclear cooperation.¹⁹³ This could also include agreeing to grant long term access to services related to nuclear fuel or related services at market prices on a long-term basis.¹⁹⁴ Of course, France qualified this "benefit" by stating that it is only available to states that plan to use the resources for peaceful purposes and further requires those countries to develop a comprehensive safeguards agreement and an additional protocol.¹⁹⁵

C. Canada's Proposal

Canada's proposal does not focus specifically on the area of withdrawal. Instead, its recommendation, for the most part, advocates strengthening changes in the review process so that the review conferences can be more efficient in addressing the weaknesses of the NPT, which, in effect, gives the NPT more authority.¹⁹⁶ In place of the current PrepCom, Canada suggests that annual general conference of state parties should be adopted to consider and decide on any issues covered by the NPT.¹⁹⁷ Each annual conference would last for one week, with the exception of the conference that is held the year before a review conference, which would be extended to two weeks to carry out the function of a preparatory committee for that review conference.¹⁹⁸ The overall time

191. *Id.*

192. *Id.*

193. *See id.* (proposing increased access to non-sensitive technologies and/or guarantees of access).

194. *Id.*

195. *See id.* (suggesting that these countries should work with the IAEA in making these developments and such guarantees should avoid the creation of monopoly situations).

196. *See* Canada, *Overcoming the Institutional Deficit of the NPT 1-2* (NPT Conference 2005, Working Paper No. 1, 2004), available at www.reachingcriticalwill.org/legal/npt/prepcom04/papers/canadawp1.pdf (arguing that NPT membership is not well-served by a situation where it can only exercise its decision-making functions once every five years).

197. *Id.* at 1.

198. *Id.*

allotted for these conferences would not exceed the current six weeks devoted to the preparatory process.¹⁹⁹

Furthermore, Canada advocates that the best way to carry out these conferences is to establish a standing bureau of the NPT comprised of the president and chairs of the quinquennial review conference.²⁰⁰ The elections for these positions would be held at the end of each review conference with a mandate extending until the subsequent review conference.²⁰¹ This bureau would have the authorization, either by request of the depositary governments, the U.N. Secretary General, or by a consensus decision of its own, to assemble emergency sessions of the general conference of state parties if threatening situations arose against the viability or integrity of the NPT.²⁰² Finally, the bureau, the annual conferences, and any emergency sessions would still be supported by the U.N. Department of Disarmament Affairs.²⁰³

VI. LOOKING BEYOND THE 2005 REVIEW CONFERENCE OF THE NPT: WHAT TYPE OF PROPOSAL SHOULD BE ADOPTED AND WHY

Because the 2005 Review Conference failed to produce the changes needed, the parties to the NPT must now use the 2010 Review Conference as their opportunity to strengthen the NPT. The three proposals have made suggestions that could strengthen the NPT significantly, end the debate about the effect that North Korea's withdrawal had on the NPT, and prevent future defiances. None of the plans, however, with the exception of France's, contain any incentive for the non-nuclear states to adopt any new proposals, nor do they address the concern that has been discussed at every review conference since the inception of that NPT, of when the nuclear states are going to live up to their obligation to procure a "good faith effort" to promote disarmament. Therefore, the proposal adopted by the 2010 Review Conference of the NPT should contain a provision addressing this pertinent issue as well as a combination of the strongest parts of the proposals articulated by Germany, France, and Canada.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at 2 (For example, a notification of intent to withdraw from the NPT or the violation by a State Party of its obligations under the NPT).

203. *Id.*

A. *Step One: Strengthen Article IV of the NPT by Imposing Stricter Regulations on Both the Nuclear States and the Non-Nuclear States to Adhere to the Promises Made Under the NPT*

The first step in strengthening the NPT and avoiding future occurrences of non-compliance with the NPT is to end the notion of a “double standard” existing against the non-nuclear states in favor of the nuclear states. The three proposals above perpetuated the “double-standard” by suggesting even more stringent regulations of the non-nuclear states regarding their obligations under Article IV while completely ignoring the fact that the nuclear states have failed to meet their obligation under Article VI to move towards nuclear disarmament. The review conferences have lost sight of the fact that the principal reason the non-nuclear states renounced their right to use and develop nuclear weapons was because the nuclear states promised to disarm.²⁰⁴ With that in mind, it is time that more pressure is put on the nuclear states to uphold their part of the bargain, especially in light of the fact that the nuclear states have not completely adhered to the CTBT and the thirteen steps set forth at the 2000 Review Conference.²⁰⁵ Just as demands are being placed on the non-nuclear states to adhere to the procedures and guidelines set forth regarding the use of nuclear energy for peaceful purposes, demands should be placed on nuclear states to actively pursue disarmament.

Since the threat of denying nuclear energy to nuclear states has no force, the way that this goal can be achieved is to impose sanctions on the nuclear states to ensure compliance. First, the review conference should set a specific goal of how many weapons should be disarmed by the next review conference. The ramifications of not achieving the goals set forth at the conference within the specified timeframe should be a large monetary fine against the nuclear state. The money collected as a result of these sanctions could then be used to fund the IAEA in its implementation of safeguard agreements. It may seem that the nuclear states could easily refuse to pay the fine or simply refuse to be sanctioned. That type of refusal, however, would

204. France Annecy, *The Roadmap to 2005: Where do we want to go and how should we get there?*, MONTEREY INST. OF INT'L STUD., March 7-8, 2004, at 7, available at http://cns.miiis.edu/research/npt/pdf/annecy_final_report.pdf.

205. Johnson, *supra* note 149. Many of the nuclear states have interpreted the commitments in such a way as to renege on the agreement. France and Russia have complained that they have been forced into accepting more than they originally intended. China quietly ignored the thirteen steps while modernizing its arsenal. The United States, however, has reneged on many of its promises by publicly opposing the CTBT and making clear that it wants the NPT to deal with noncompliance. This is exemplified by the comment made by John Bolton as U.S. Undersecretary of State for Arms Control and International Security, “We cannot divert attention from the violations we face by focusing on Article VI issues that do not exist.” *Id.*

be a direct act of defiance, just as North Korea's actions were. Furthermore, if the nuclear states truly want to ensure international security against a nuclear war, they would agree to such sanctions if for no other reason than to lead by example and show the non-nuclear states that any state that does not adhere to its obligations under the NPT should and will have to suffer repercussions.

In addition, to ensure that non-nuclear states are using nuclear energy obtained under Article IV for peaceful purposes, the conference should adopt France's proposal that such materials, facilities, equipment or related technologies should only be exported if certain conditions are met.²⁰⁶ As an incentive to those states that would be required to adhere to this new provision, France's proposal regarding increased access to non-sensitive technologies should also be adopted.²⁰⁷ Just as sanctions will be imposed on nuclear states for not adhering to their obligations under the NPT, sanctions should be imposed on the non-nuclear states if they use their nuclear resources for anything other than peaceful purposes. The best way to address this is to adopt France's proposal to suspend nuclear cooperation with states that cannot provide sufficient assurances that their nuclear programs are devoted exclusively to peaceful purposes.²⁰⁸ This suspension should be initiated in situations involving serious breaches, non-compliance or a risk of diversion.²⁰⁹ If the problem cannot be solved during suspension, then the ultimate solution should be to demand that all nuclear resources be returned to the supplying country.²¹⁰

B. Step Two: Strengthen Article X of the NPT by Adopting an Addendum to the Withdrawal Provision Stating the Strict Guidelines and Procedures that Govern the Process of Withdrawal

The proposals of Germany and France with respect to the withdrawal provisions appear to efficiently achieve the goal of strengthening Article X, so a combination of the two should be adopted. First and foremost, the addendum should, as suggested by

206. See France Working Paper, *supra* note 176, at 2 (listing the conditions that should be met before exports are permitted).

207. *Id.* at 3.

208. *Id.*

209. *Id.*

210. Compare *id.* at 4 (suggesting that a state that withdraws should no longer make use of nuclear materials, facilities, equipment or technologies acquired from third parties before its withdrawal) with Germany Working Paper, *supra* note 154, at 3 (suggesting that a country that withdraws from the NPT should not be allowed to benefit from the capacities and technological knowledge that it has established in the nuclear field as a result of having made use of Article IV of the NPT. As a result, the withdrawing should be required to return all materials obtained to the supplying country).

Germany, adopt the notion that the option of withdrawal cannot be exercised if the country contemplating withdrawal is under investigation for non-compliance with the NPT. Of course, if after an investigation has ensued there is no conclusive proof of noncompliance, then the country should be allowed to begin the process for withdrawal. Including such a provision would eliminate the escape route taken by North Korea when it withdrew from the NPT to avoid additional inspections in 1994 and 2003, which arguably suspended the power of the IAEA to inspect its facilities.²¹¹

Another provision that would be of paramount importance in preventing future withdrawals such as the one by North Korea would be a provision defining the type of event that is "extraordinary" enough to trigger the withdrawal provision of Article X. Under the current construction of Article X, a country justifies its withdrawal by determining that an "extraordinary event" has jeopardized its supreme interests. By defining extraordinary events, the right to withdraw will become more structured and will no longer leave room for a country to be able to receive nuclear technology and material for peaceful purposes and then unilaterally decide that an "extraordinary event" has jeopardized its supreme interests, thereby enabling it to withdraw from the NPT and develop a nuclear weapons program.

A crucial aspect of this plan to solidify the withdrawal provision is, as Germany suggested, a requirement that a country considering withdrawal give prior notice to all NPT parties outlining its concerns, as well as a requirement of mandatory participation in consultations to explore ways to address the concerns of the country and find an alternative to withdrawal. This, too, would prove to be a powerful mechanism against withdrawal while maintaining the integrity of the NPT and furthering one of its central purposes: the maintenance of international security against nuclear weapons and nuclear war. For example, North Korea cited as its reason for withdrawal a need to defend itself against the actions of the United States and accused the IAEA of allowing itself to be used as an instigator of the threat. If this new provision had been in place, North Korea would have had to give prior notice to the parties of the NPT of its concerns, a consultation would have been held, and the NPT parties could have adopted measures to satisfy the security concerns of North Korea. If the security concerns of North Korea had been met, the reason for North Korea's withdrawal would have been extinguished and withdrawal would have no longer been necessary (assuming North Korea was being honest about its reasons for withdrawal). Thus, as long as the

211. *But see* Antonio F. Perez, *Survival Rights Under the Nuclear Non-Proliferation Treaty: Withdrawal and the Continuing Right of International Atomic Energy Agency Safeguards*, 34 VA. J. INT'L L. 749, 797 (1994) (arguing that some safeguard rights should survive NPT withdrawal).

NPT parties can be informed about the perceived insecurity of a party considering withdrawal and can demonstrate that they are empowered to protect, and, in fact, will protect the parties of NPT, then the NPT's authority in the international community will be enhanced.

C. Step Three: Adopt Canada's Proposal to Restructure the Review Process

For the preceding changes to be effective, the NPT review process must be improved. As it stands, there is only one opportunity for any changes to be made to the NPT and that occurs every five years. Admittedly, there are PrepCom meetings in between the review conferences, but they lack the authority to make any decisions. Those sessions merely prepare the agenda and set forth the issues that will be discussed at the review conference. There are also no mechanisms in place that allow the NPT members to deal with emergency situations. By replacing these preparatory meetings with annual general conferences, pertinent issues that occur throughout the five-year time frame for the review conference can be adequately addressed and remedied. For example, North Korea's withdrawal took place on January 10, 2003. Yet since the review conference was not until May 2005, no authoritative action has been taken in response to North Korea's withdrawal; instead, only minor debates about what should be done have taken place. By implementing these annual general conferences and creating a bureau with the power to convene extraordinary sessions to address issues that threaten the vitality of the NPT, the members of the NPT can more readily address pertinent issues that threaten the NPT's authority. Then, at the review conference, which will still be held every five years, any extraordinary events that have occurred can be discussed and methods of prevention can be analyzed and implemented as necessary.

VII. CONCLUSION

As a result of the recent acts of terrorism and attempts of various nations to develop nuclear weapons, the NPT is more important today than ever before. If measured by the prediction of President Kennedy over forty years ago that fifteen to twenty countries would possess nuclear weapons by 1975, the success of the NPT is noteworthy since only eight countries currently possess

nuclear weapons.²¹² But juxtaposing this small number of eight countries with the fact that three of the countries that possess nuclear weapons are outside of the NPT demonstrates the need for some changes to be made to revitalize and strengthen the NPT as an effective solution to preventing nuclear proliferation. The fact that the 2005 Review Conference did not make any revisions has left the NPT in a vulnerable state for the next five years, until the 2010 Review Conference is held. To achieve an effective solution, the key issues that need to be addressed at the PrepComs and at the 2010 Review Conference are: how to prevent withdrawals such as the one initiated by North Korea; how to motivate nuclear states to carry out their obligations under the NPT to achieve nuclear disarmament; and lastly, how to improve the review process in order to exert more pressure for full implementation and accountability under the NPT.

These issues can effectively be addressed by adopting an addendum to the NPT, imposing new requirements and obligations under the withdrawal provision of Article X, through the peaceful use and nuclear disarmament requirements of Article IV, and by implementing a new structure for the review process of the NPT. The withdrawal provision can effectively be strengthened by requiring prior notification of reasons for withdrawal to the parties of the NPT, followed by a mandatory consultation session whereby the country considering withdrawal can have its security interests adequately addressed and resolved. Articles IV and VI can be strengthened by imposing more strenuous regulations on both the nuclear states and the non-nuclear states to adhere to their obligations under the NPT. The consequences of noncompliance by the non-nuclear states would be the revocation of all nuclear materials, facilities, and knowledge obtained as a result of participating in the NPT, while the penalty for defiance by nuclear states would be a monetary fine to help fund the mission of the IAEA. Compliance with such sanctions can be ensured by the domestic and international pressure that will be exerted on the state by a high-level conference of NPT parties.²¹³ With that in mind, it is imperative that the review process itself be strengthened. The best way to do this would be to establish a bureau, consisting of the president and chairs of the review conference, that can hold annual general review conferences to consider and decide on any issue covered by the NPT. This bureau should also be empowered to call emergency sessions in the event something that extraordinary

212. Jean du Preez, *The 2005 NPT Review Conference: Challenges and Prospects Ahead*, MONTEREY INST. OF INT'L STUD., available at <http://cns.miis.edu/research/npt/05revconf.htm>.

213. See Johnson, *supra* note 149, at 18 ("No state, however hegemonic or isolated, is immune to all the pressures from domestic or international opinion and interests, so a high-level conference of NPT parties would inevitably feed into a potential violator's political calculations and could make all the difference.")

threatens the NPT. Once these necessary changes are made, the credibility of the NPT will be restored and any future attempts to undermine the NPT can be handled expeditiously and efficiently.

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