

1994

## Non-Proliferation, Self-Defense, and the Korean Crisis

Mark E. Newcomb

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vjtl>



Part of the [International Law Commons](#), and the [Military, War, and Peace Commons](#)

---

### Recommended Citation

Mark E. Newcomb, Non-Proliferation, Self-Defense, and the Korean Crisis, 27 *Vanderbilt Law Review* 603 (2021)

Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol27/iss3/3>

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Journal of Transnational Law by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact [mark.j.williams@vanderbilt.edu](mailto:mark.j.williams@vanderbilt.edu).

# Non-Proliferation, Self-Defense, and the Korean Crisis

Mark E. Newcomb\*

## ABSTRACT

*The United Nations, the United States, and other interested governments have sought to minimize the proliferation of nuclear weapons. North Korea's apparent attempts to begin production of nuclear materials clearly undermine the goal of non-proliferation. Moreover, the introduction of nuclear weapons onto the Korean peninsula, a site of continued political and military tension, has added a threat of potential nuclear conflict. This Article investigates the history of the Korean crisis and places North Korea's attempt to withdraw from the Treaty on the Non-Proliferation of Nuclear Weapons in the context of the international non-proliferation regime and policy. The author then examines the present collective security system and the evolution of the concept of self-defense in international law, concluding that the traditional concept of self-defense is inadequate to deal with the problem presented by a nuclear threat. In response to this crisis, the author suggests that the United States first pursue a peaceful, diplomatic solution. Economic sanctions, imposed both by the United Nations and by the United States unilaterally, are the next proposed route. As a last resort, the author proposes that the United States should respond to*

---

\*Lieutenant Commander, Judge Advocate General's Corps, United States Navy. Staff Judge Advocate, Commander, Carrier Group FIVE, Yokosuka, Honshu, Japan, B.S., U.S. Naval Academy, 1981; J.D., Marshall-Wythe School of Law, College of William and Mary, 1988; L.L.M., The Judge Advocate General's School of the Army, 1994.

The opinions expressed herein are the author's own and do not reflect the official positions of the United States Navy, United States Army, the Department of Defense, or any other federal agency. The author would like to thank Commander Michael F. Lohr, JAGC, USN; Lieutenant Colonel David M. Crane, JA, USA; Lieutenant Commander Patricia J. Batten, JAGC, USN; Major Mark S. Martins, JA, USN; and James P. Winthrop, JAGC, USN, for their advice and assistance in preparation of this Article.

*North Korean hostilities by increasing its military presence in the Western Pacific and by executing a preventive strike against North Korean nuclear facilities.*

TABLE OF CONTENTS

I.	INTRODUCTION.....	604
II.	PRELUDE TO CRISIS .....	606
	A. <i>The Non-Proliferation Regime</i> .....	606
	B. <i>Non-Proliferation Treaty Obligations and North Korea's Nuclear Program</i> .....	609
	C. <i>On the Brink</i> .....	613
III.	SELF-DEFENSE AND THE INTERNATIONAL COMMUNITY ....	617
	A. <i>United Nations Enforcement of International Obligations</i> .....	617
	B. <i>The Law of Self-Defense</i> .....	619
	C. <i>Framework for Analysis: Necessity and Preventive Self-Defense</i> .....	621
	D. <i>Preventive Acts: The Cuban Missile Crisis and Tuwaitha</i> .....	623
III.	A MODEL FOR ACTION.....	627
	A. <i>Defining the Threat</i> .....	628
	B. <i>The Course of Action</i> .....	631
V.	CONCLUSION .....	633

I. INTRODUCTION

I would like, upon authorization, to inform the Security Council of the United Nations that the Government of the Democratic People's Republic of Korea decided on 12 March 1993 to withdraw from the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), in accordance with paragraph 1 of Article X of the NPT, in connection with the extraordinary situation prevailing in the DPRK, which jeopardizes its supreme interests.

Kim Yong Nam  
Minister for Foreign Affairs<sup>1</sup>

With this announcement, the Democratic People's Republic of Korea (North Korea) sought to foreclose international scrutiny of

---

1. Letter dated March 12, 1993, from the Permanent Representative of the Democratic People's Republic of Korea to the United Nations, Addressed to the President of the Security Council, U.N. Doc. S/25405, 2 (1993), *reprinted in* 32 I.L.M. 602 (1993).

its nuclear power program and triggered what may become the third, overt, weapons-related confrontation of the nuclear era.<sup>2</sup> Although the stated goal of the United Nations, the United States, and other interested governments has been to minimize or prevent the proliferation of nuclear weapons and return North Korea to full compliance with its duties under international agreements,<sup>3</sup> vigorous agency and state-level diplomatic efforts have yielded no real progress. Given North Korea's diplomatic isolation, the history of confrontation on the Korean peninsula, evidence that Korea's nuclear program may have expanded to weapons development,<sup>4</sup> and the fact that international stability is compromised each time a new state possessing nuclear weapons emerges, a diplomatic solution may prove inadequate. As tensions increase, discussion of available options will invariably turn to restoration of the non-proliferation regime by force.

This crisis raises important questions concerning how and when the United Nations, or any individual state, may use force or invoke anticipatory self-defense to eliminate a potential nuclear threat. Defining the scope of self-defense is particularly troubling in such an instance. Traditionally, international law has required that states invoke anticipatory self-defense only when the necessity for action became "instant, overwhelming, leaving no choice of means and *no moment for deliberation.*"<sup>5</sup> Article 51 of the United Nations Charter creates further discord. Article 51 has been read to limit the scope of customary law by restricting self-defense to a response to an "armed attack."<sup>6</sup> When weighed against the devastating potential of nuclear weapons, the current rule, which imposes a stringent requirement of imminence or reactivity, is illogical and all but suicidal. Instead, self-defense should be analyzed by a standard that balances aggressive and defensive coercion and provides a reasonable foundation for collective or unilateral use of force.

This Article examines the genesis of the current crisis and suggests a course of action that permits the use of coercive force. Part I places North Korea's attempt to withdraw from the Treaty on the Non-Proliferation of Nuclear Weapons in the context of the

---

2. See *infra* notes 104-12 and accompanying text.

3. S.C. Res. 825, U.N. SCOR, 48th Sess., 3212th mtg, at 2, U.N. Doc. S/RES/825 (1993); William Perry, *U.S. Security Policy in Korea*, 5 U.S. DEPT. OF STATE DISPATCH 279 (1994).

4. See *infra* notes 28, 124-26 and accompanying text.

5. R. Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82, 89 (1938) (quoting LXI Parliamentary Papers (1843) and 30 British and Foreign State Papers, 193) (emphasis added).

6. U.N. CHARTER, art. 51. See *infra* notes 78-80 and accompanying text.

international non-proliferation regime and policy. Part II examines the present collective security system and the evolution of self-defense in the law, and delineates a framework for analysis of self-defense in the nuclear era. Finally, Part III examines the Korean crisis in the context of this framework and describes the circumstances that could justify the use of force to eliminate North Korea's prospective nuclear threat.

## II. PRELUDE TO CRISIS

### A. *The Non-Proliferation Regime*

Two imperatives define international relations: the pursuit of national security and the protection of sovereignty. While these goals can be compatible, they also create a natural tension in diplomatic relations. The link between world order and national security requires that states act in self-preservation by controlling the actions of other states. International cooperation inherently requires restriction of the free exercise of sovereign powers. The concept of collective security—an institutionalized arrangement for deterring or defeating aggression<sup>7</sup>—gained primacy in the early twentieth century as a means for sustaining world order.<sup>8</sup> This concept prompted the creation of the League of Nations and its successor, the United Nations.

As an adjunct to the system of collective security, states that possessed nuclear weapons, such as the United States, the Soviet Union, and the United Kingdom, pursued the ratification of a non-proliferation regime. Through United Nations agencies such as the Eighteen Nation Disarmament Committee, these states eventually achieved this goal.<sup>9</sup> The Treaty on the Non-Proliferation of Nuclear Weapons (Non-Proliferation Treaty or the Treaty)<sup>10</sup> was adopted in 1968 and entered into force in 1970. One hundred fifty-nine states are now signatories to the treaty.<sup>11</sup> Consistent with the collective security principle of preserving the status quo, the Non-Proliferation Treaty attempts to limit the

---

7. JOHN N. MOORE ET AL., NATIONAL SECURITY LAW 36 (1990).

8. *Id.*; see also HAMILTON FOLEY, WOODROW WILSON'S CASE FOR THE LEAGUE OF NATIONS (1923).

9. MOORE, *supra* note 7, at 579.

10. Treaty on the Non-Proliferation of Nuclear Weapons, adopted July 1, 1968, 21 U.S.T. 483 (entered into force March 5, 1970), reprinted in 7 I.L.M. 868 (1968).

11. 1992 International Atomic Energy Agency Report 137 (1993) [hereinafter 1992 IAEA Report].

number of states possessing nuclear weapons by imposing a two-tiered system of controls. Nuclear weapons states are prohibited from transferring applicable weapons technologies,<sup>12</sup> and non-nuclear weapons states are obligated not to develop or acquire nuclear weapons technologies.<sup>13</sup> In balancing the discriminatory purpose of the Treaty, Articles IV and V ensure that non-nuclear weapons states have full access to nuclear technologies that are employed for peaceful purposes.<sup>14</sup> Although sovereign discretion is limited by accession to the Treaty, it is not eviscerated; when a signatory finds that "extraordinary events" relating to nuclear weapons proliferation have jeopardized the state's "supreme interests," it may withdraw from the Non-Proliferation Treaty by giving written notice to the United Nations Security Council.<sup>15</sup>

The compliance mechanism delineated in Article III of the Non-Proliferation Treaty is central to the principle of non-proliferation and critical to the current crisis. In order to access peaceful nuclear technologies, non-nuclear weapons states must submit to a safeguard program monitored by the International Atomic Energy Agency (the Agency).<sup>16</sup> The Agency is required to negotiate and execute specific safeguard programs "with a view to preventing diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices."<sup>17</sup> Safeguards agreements must be in force no later than eighteen months after the initiation of negotiations between the Agency and the non-nuclear weapons state;<sup>18</sup> conclusion of these agreements is a prerequisite to the transfer of nuclear technologies under the Non-Proliferation Treaty.<sup>19</sup>

The Agency was established as an organ of the United Nations in 1957 following ratification of the International Atomic Energy Agency Statute (the Statute or the Agency Statute) by

---

12. Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 10, at art. I.

13. *Id.* art. II.

14. *Id.* arts. IV, V.

15. *Id.* art. X, para. 1.

16. *Id.* art. III, para. 1.

17. *Id.* See also International Atomic Energy Agency, *Revised Safeguards System to Assure That Nuclear Materials are not Used for Military Purposes*, 4 I.L.M. 512 (1965) [hereinafter IAEA Revised Safeguards System].

18. Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 10, at art. III, para. 4.

19. *Id.* art. III, para. 2.

eighteen states.<sup>20</sup> The Agency serves to "accelerate and enlarge the contribution of atomic energy to peace" and to ensure that its services are not "used in such a way to further any military purpose."<sup>21</sup> The Statute empowers the Agency to apply safeguards to a nuclear program. Accordingly, the Agency has the right to examine equipment and facility design, to require the maintenance and production of records accounting for use and production of fissionable material, and to set parameters for inventory, deposit, or disposal of fissionable materials.<sup>22</sup> Although the Statute does not speak to the inspection and surveillance regime, it is the Agency's practice to employ ad hoc, routine, and special—or demand—inspections as its primary means to ensure that fissionable materials are not diverted to weapons development programs.<sup>23</sup> Failure to comply with a safeguards agreement is reported to the Agency's Board of Governors and may result in suspension or curtailment of Agency assistance, a call for the return of materials made available by the Agency or members, suspension of membership in the Agency, or a report of non-compliance to the Security Council and the General Assembly of the United Nations.<sup>24</sup>

At the outset, the Non-Proliferation Treaty suffered from two significant weaknesses. First, the Treaty was not ratified by all states possessing nuclear weapons.<sup>25</sup> The failure to encompass all nuclear weapons states within the non-proliferation regime seriously weakened its effect, providing a source of fissionable nuclear materials and technologies to non-signatory states without nuclear weapons. Second, the Treaty did not provide the

20. Statute of International Atomic Energy Agency done Oct. 26, 1956, prologue, art. XXII, para. e (1990), 8 U.S.T. 1093, T.I.A.S. No. 3873 (entered into force July 29, 1957) [hereinafter IAEA Statute].

21. *Id.* art. II. The Agency is structured in three parts. The General Conference includes all Members of the United Nations, as well as any other state that ratifies the Statute. *Id.* art. IV. The Board of Governors, a forty-member body selected on criteria encompassing technological achievement and regional representation, is responsible for determining agency policy and carrying out statutory functions. *Id.* art. VI. Daily administration of the agency, including inspection functions carried out by the technical staff, is the responsibility of the Director-General, subject to Board of Governors regulation. *Id.* art. VII.

22. *Id.* art. XII.

23. See Eric Wemple, *Preventing the Proliferation of Nuclear Weapons: Multilateral Efforts and U.S. Attempts—International Controls Under the NPT and the IAEA*, EXPORT CONTROL NEWS, Mar. 26, 1991, available in LEXIS, Nexis Library, CURNWS File.

24. IAEA Statute, *supra* note 20, prologue, art. XXII, para. c.

25. France and the People's Republic of China, who both possessed nuclear weapons at the time that the Non-Proliferation Treaty came into force, did not accede to the Treaty's terms until 1992. 1992 IAEA Report at 137 (1993); U.S. DEP'T OF STATE, Pub. No. 9433; TREATIES IN FORCE 375-76 (1993).

Agency with any positive mechanism for enforcing safeguards agreements. Compliance with safeguards agreements is dependent upon the good will of signatory states, and sanctions for non-compliance are severely limited by diplomatic maneuvers and alliances.<sup>26</sup> Nonetheless, in spite of its weaknesses, the Non-Proliferation Treaty has proven to be a reasonable and relatively effective counter to the proliferation of nuclear weapons technologies.<sup>27</sup>

### B. *Non-Proliferation Treaty Obligations and North Korea's Nuclear Program*

North Korea ratified the Non-Proliferation Treaty on December 12, 1985, and concluded a safeguards agreement with the Agency on January 30, 1992.<sup>28</sup> This agreement conforms to the Agency's statutory mandates and reflects its practices as developed over the past twenty-five years.<sup>29</sup> North Korea is

---

26. See STOCKHOLM INT'L PEACE RESEARCH INST., *THE NPT: THE MAIN POLITICAL BARRIER TO NUCLEAR WEAPONS PROLIFERATION* 21-22 (1980).

27. See generally Ray Silver, *Ex-Safeguards Head Sees Threat Continuing from Iraq, North Korea*, NUCLEONICS WEEK, Oct. 21, 1993, at 7, available in LEXIS, Nexis Library, CURNWS File.

28. Agreement Between the Government of the Democratic People's Republic of North Korea and the International Atomic Energy Agency for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons, IAEA Doc. INFCIRC/403, May 1992, reprinted in 33 I.L.M. 315 (1994) [hereinafter IAEA/DPRK Safeguards Agreement]. Although the Safeguards Agreement did not take effect until April 10, 1992, five facilities at the Yongbyon complex, including a five-megawatt, graphite-moderated, uranium core experimental reactor—capable of producing plutonium, a weapons grade material, as a by-product—a uranium fuel rod fabrication plant, and a fuel reprocessing facility were in service before the arrival of the Agency's first inspection mission in May 1992. David Holley, *U.S. Group Tells of N. Korea A-Pledge*, L.A. TIMES, May 6, 1992, at A24. In addition, North Korea was operating uranium core concentration plants at Pakchon and Pyongsan, a nuclear research laboratory at Pyongyang, and had begun construction of two more power plants at Yongbyon and Taechon. The finalized Safeguards Agreement was approved by the Agency's Board of Governors on September 12, 1991, and signed by both parties in Vienna on January 20, 1992. The agreement entered into force in April 1992, after North Korea notified the Agency's Director-General that it had taken adequate statutory and constitutional steps to be bound by the agreement. IAEA/DPRK Safeguards Agreement, *supra*. See also Lynn Davis, *Korea: No Capitulation*, WASH. POST, Jan. 26, 1994, at A21; Bruce W. Nelan, *A Game of Nuclear Roulette*, TIME, Jan. 10, 1994, at 28-29. Prior to the Safeguards Agreement, North Korea's source of nuclear technologies and materiel appears to have been the former Soviet Union. See Andrew Browne, *Nuclear Fears on Agenda at Pyongyang Conference*, REUTER LIBR. REP., Apr. 28, 1991, available in LEXIS, Nexis Library, CURNWS File.

29. See generally IAEA/DPRK Safeguards Agreement, *supra* note 28; Extension of I.A.E.A. Safeguards System to Reprocessing Plants, IAEA Doc.



obligated to accept safeguards on all fissionable materials,<sup>30</sup> to provide a preliminary accounting of materials and facilities,<sup>31</sup> to maintain a system for accounting and control of fissionable materials,<sup>32</sup> and to provide annual reports of safeguarded materials inventory.<sup>33</sup> Concomitantly, the Agency is authorized and obligated to apply safeguards to North Korea's nuclear programs and may employ ad hoc, routine, and special inspections to ensure compliance.<sup>34</sup> Inspections may encompass examination of records, independent measurement of safeguarded materials inventory, physical examination of facilities, and use of permanent surveillance and containment measures.<sup>35</sup>

From the outset, it was difficult to determine whether North Korea complied with the Safeguards Agreement. After receipt of North Korea's initial report on May 4, 1992, the Agency's technical staff conducted six ad hoc inspections of facilities design and material records. They also installed containment seals and video surveillance systems. Inconsistencies between the inspectors' observations and North Korea's initial reports were reviewed during the fourth and fifth ad hoc missions.<sup>36</sup> During

GC(x)/INF/86 (July 8, 1966), reprinted in 5 I.L.M. 987 (1966); IAEA Revised Safeguards System, *supra* note 17; Extension of I.A.E.A. Safeguards System to Large Nuclear Reactors to Assure that Nuclear Materials are Not Used for Military Purposes, IAEA Doc. INFCIRC/26/Add.1 (Apr. 9, 1964), reprinted in 3 I.L.M. 496 (1964).

30. IAEA/DPRK Safeguards Agreement, *supra* note 28, art. 1. Exceptions to the safeguard program are discussed in Articles 14, 36 and 37. Article 14 allows North Korea to use nuclear materials that would otherwise be subject to safeguards for a peaceful, non-proscribed military activity (i.e., weapons development). *Id.* art. 14. Small amounts of fissionable materials, when used in sensing component instruments or non-nuclear activities, are exempted from the safeguards by article 36. *Id.* art. 36. Finally, North Korea may accumulate up to one kilogram of special fissionable materials (plutonium or enriched uranium), ten metric tons of natural or depleted uranium with enrichment greater than 0.05%, twenty metric tons of natural or depleted uranium enriched at less than 0.05%, and twenty metric tons of thorium without application of the safeguards. *Id.* art. 37.

31. *Id.* arts. 8, 42-48.

32. *Id.* arts. 7, 31-32, 51-58.

33. *Id.* arts. 59-65, 68.

34. *Id.* arts. 71-73.

35. *Id.* 74-75. In 1989, the Agency supplemented physical plant inspections by beginning use of photographic and electronic surveillance systems and attaching containment seals to supplement physical plant inspections. See Wemple, *supra* note 23.

36. Note by the Secretary-General, Letter dated 17 September 1993 from the Director General of the International Atomic Energy Agency, Addressed to the Secretary-General, U.N. SCOR, Annex, at 3, Doc. S/25456/Add. 1 (1993) [hereinafter U.N. Doc. S/25456]; Letter dated 15 March 1993 from the Permanent Representative of the Democratic People's Republic of Korea to the United Nations,

the sixth ad hoc inspection, Agency inspectors and North Korea's technical representatives attempted to resolve the differences in their data. Dissatisfied with North Korea's explanation, the Agency technical staff determined that "the correctness and completeness" of the initial report on inventory could not be confirmed, and reported their findings to the Director General.<sup>37</sup> On February 9, 1993, Director General Hans Blix proposed a special inspection for the purpose of rectifying the "significant inconsistencies" between North Korea's declaration and the Agency's findings, and requested access to "specific additional information and to two locations where the Agency had reason to believe there existed nuclear waste which might be of safeguards relevance."<sup>38</sup> In response, North Korea agreed to continue discussions regarding inconsistencies, but refused to grant the Agency access to the additional sites.<sup>39</sup> North Korea asserted that the two sites in question, both military installations, had previously been inspected by the Agency in September 1992 and found to be not at all relevant to nuclear activities. North Korea therefore concluded that it had no duty to reopen them for inspection.<sup>40</sup>

Stymied by North Korea's intransigence, Director General Blix referred the matter to his Board of Governors (the Board) under Article XII of the Agency Statute.<sup>41</sup> The Board considered the Director General's report and determined that access to the additional information was "essential and urgent" to ensure that North Korea was complying with the Safeguards Agreement.<sup>42</sup> The Board approved a resolution that called for immediate cooperation by North Korea and extension of access to the requested information and sites. The Board also directed that

---

*Addressed to the President of the Security Council, U.N. SCOR, Annex, at 3, U.N. Doc. S/25442 (1993) [hereinafter U.N. Doc. S/25422].*

37. U.N. Doc. S/25422, *supra* note 36, at 4-5; U.N. Doc. 25456, *supra* note 36, at 3.

38. U.N. Doc. S/25456, *supra* note 36, at 3. Agency inspectors found that the composition and quantity of plutonium declared did not correspond with their own calculations and that the isotopic composition of the plutonium extracted by the inspection team did not correspond with that of the declared liquid waste. U.N. Doc. S/25422, *supra* note 36, at 4-5. The requested additional sites allegedly harbor nuclear wastes from illicit plutonium production that occurred prior to the conclusion of the 1992 Safeguards Agreement. R. Jeffrey Smith, *N. Korea to Allow Inspections*, WASH. POST, Feb. 16, 1994, at A1.

39. U.N. Doc. S/25456, *supra* note 36, at 3.

40. U.N. Doc. S/25422, *supra* note 36, at 6.

41. IAEA Statute, *supra* note 20, art. XII.

42. *Resolution of the IAEA Board of Governors on the Implementation of Safeguards in the Democratic People's Republic of Korea, adopted in 25 February 1993*, 35 IAEA BULL. 41 (1993), IAEA Doc. GOV/2636 (Feb. 25, 1993).

dialogue with North Korea continue with a view toward settlement of the disagreement.<sup>43</sup> Consistent with the Board's position, Director General Blix forwarded a copy of the resolution to North Korea and requested the receipt of his special inspection mission on March 16, 1993, at Pyongyang.

Once again, the North Korean government refused to comply. Choi Hak Gun, North Korea's Minister of Atomic Energy, denounced the Board's resolution as "unjust" and reserved consideration of receipt of the inspection team based upon mobilization of North Korea to a state of "semi-war."<sup>44</sup> Director General Blix replied that same day, advising the North Korean minister that the claimed state of "semi-war" did not relieve North Korea of its obligation to receive the inspection mission.<sup>45</sup>

North Korea's response was startling. Minister Kim Yong Nam announced North Korea's intent to withdraw from the Non-Proliferation Treaty. This announcement was accompanied by an official government statement detailing the "grave situation" that allegedly threatened North Korea's security. North Korea denounced the resumption of "Team Spirit"—a joint military exercise of the United States and the Republic of Korea (South Korea)—as a "nuclear war rehearsal."<sup>46</sup> North Korea also decried the Agency's demand for a special inspection as coordinated machinations of the United States designed to encroach upon North Korean sovereignty, interfere with internal affairs, and stifle North Korean socialism.<sup>47</sup> To define the threat faced by the North Korean people, the government pointed to these "hostile" acts, the

43. *Id.*

44. *Letter Dated March 19, 1993 from the Secretary-General Addressed to the President of the Security Council*, U.N. SCOR, Annex I, at 2, U.N. Doc. S/25445, at 9 [hereinafter U.N. Doc. S/25445].

45. *Id.* at 10.

46. *See Letter Dated 13 April 1993 From the Permanent Representative of the Democratic People's Republic of Korea to the United Nations, Addressed to the President of the Security Council*, U.N. SCOR, Annex, at 2, U.N. Doc. S/25595 (1993). Team Spirit is an annual exercise which involves virtually all 35,000 United States troops stationed in South Korea, a significant majority of South Korea's 650,000 troops, and approximately 20,000 U.S. troops who deploy to the peninsula for the exercise. The purpose of the exercise is to prepare for defense of South Korea against an invasion launched from North Korea and focuses on the problems associated with rapid, full-scale deployment to a combat zone. Cessation of the exercise had been used as a bargaining chip in 1990 to convince North Korea to ratify the Non-Proliferation Treaty. William Matthews, *North Korea Deal May Cost Team Spirit '94*, NAVY TIMES, Jan. 17, 1994, at 23. Team Spirit resumed in 1992. William Matthews, *N. Korean Cooperation Cancels Team Spirit*, ARMY TIMES, Mar. 14, 1994, at 8.

47. *Letter Dated 12 March 1993 From the Permanent Representative of the Democratic People's Republic of Korea to the United Nations Addressed to the President of the Security Council*, U.N. SCOR, Annex, at 2, U.N. Doc. S/25407, at 2 (1993) [hereinafter U.N. Doc. S/25407].

United States failure to permit the inspection of U.S. nuclear weapons and bases in South Korea,<sup>48</sup> and the Agency's "tacit" approval of the Japanese and South Korean movements towards nuclear armament.<sup>49</sup> In subsequent statements, North Korea criticized the Agency's lack of impartiality and claimed that its insistence on access to the two North Korean military sites was no more than an attempt by the United States to confirm military intelligence gained by "espionage satellite or by high-altitude reconnaissance plane . . . [in] violation of [North Korea's] sovereignty."<sup>50</sup>

On March 30, 1993, the Agency's Board of Governors met to consider North Korea's announced withdrawal from the Non-Proliferation Treaty, the statement by the North Korean government that delineated its reasons for withdrawal, and the Director General's report on the status of the Safeguards Agreement. After two days of deliberation, the Board adopted a resolution declaring that North Korea had not complied with the Non-Proliferation Treaty and referred its finding to the UN Security Council and the UN General Assembly.

### C. *On the Brink*

In the two and a half decades between general ratification of the Non-Proliferation Treaty and North Korea's announcement of withdrawal from the Treaty, the emergence of four de facto nuclear weapons states—Israel, India, Pakistan, and South Africa<sup>51</sup>—has significantly affected the purpose of the non-proliferation regime. Although states possessing nuclear weapons continue to view any expansion of the "nuclear club" as

---

48. *Id.*

49. *Id.* at 2-4.

50. *Letter dated April 6, 1993, from the Permanent Representative of the Democratic People's Republic of Korea to the United Nations, Addressed to the President of the Security Council, U.N. SCOR, Annex, at 2, U.N. Doc. S/25538 (1993).*

North Korea accused the Agency of handing over secret information—obtained in the course of inspections—to the United States and of using "fabricated 'satellite intelligence information' provided by the United States" as the basis of the special inspection request. *Letter Dated May 10, 1993 from the Permanent Representative of the Democratic People's Republic of Korea to the United Nations, Addressed to the President of the Security Council, U.N. SCOR, Annex, at 3, U.N. Doc. S/25474 (1993).*

51. South Africa recently confirmed its development of nuclear weapons in the late 1970s and plans to abandon its program. Lee Hamilton, *Bomb Scares*, N.Y. TIMES, Feb. 22, 1994, at A21. See generally John M. Deutch, *The New Nuclear Threat*, 71 FOREIGN AFF. 120 (1992) (discussing recent nuclear proliferation).

destabilizing for the international security system,<sup>52</sup> the overarching bar to proliferation has given way to the creation of a comprehensive limitation and security system that would minimize proliferation.<sup>53</sup> This subtle shift reflects the primacy of caution. Rather than taking any action that may accelerate a nuclear crisis, states possessing nuclear weapons have replaced non-proliferation with counter-proliferation.

In its initial response to the Agency's report of North Korea's non-compliance, the Security Council encouraged the Agency to continue its discussions with North Korea in order to settle the verification issue and announced that it would merely "follow the situation."<sup>54</sup> After an exchange of notes, the Agency and North Korea agreed that the Safeguards Agreement remained in force during the ninety-day pendency of withdrawal.<sup>55</sup> In addition, North Korea permitted a seventh inspection mission to perform containment, surveillance, and equipment maintenance activities at several reactor sites.<sup>56</sup>

While discussions continued between the Agency and North Korea, the United States initiated bilateral talks with North Korea.<sup>57</sup> After the first round of these discussions, North Korea announced on June 11, 1993, that it would "unilaterally suspend, as long as it considers it necessary, the effectuation of its withdrawal" from the Non-Proliferation Treaty and agreed not to take any further steps towards the acquisition or development of nuclear weapons.<sup>58</sup> At a second round of discussions in July, the United States sought, and apparently received, North Korea's commitment to continue discussions with the Agency regarding

52. Of particular concern are: the possible domino effect of acquisition, that is, several non-nuclear weapons states acquire weapons in response to a regional adversary's acquisition; the increased probability of accidental or unauthorized use due to unreliable command and control procedures; increased temptation to employ nuclear weapons in a localized conflict, particularly when first-strike weapons are vulnerable to attack; escalation of regional conflict to global proportions due to use of nuclear weapons; and proliferation of nuclear weapons by an unstable or renegade regime. In sum, international relations take on a greater—and presumably unmanageable—complexity with the existence of multiple, adversarial states possessing nuclear weapons. See STOCKHOLM INT'L PEACE RESEARCH INST., POSTURES FOR NON-PROLIFERATION: ARMS LIMITATION AND SECURITY POLICIES TO MINIMIZE NUCLEAR PROLIFERATION 5 (1993); see generally HERMAN KAHN, ON ESCALATION (1965); AVOIDING WAR: PROBLEMS OF CRISIS MANAGEMENT (Alexander L. George, ed., 1991)

53. STOCKHOLM INT'L PEACE RESEARCH INST., *supra* note 52.

54. Note by the President of the Security Council, U.N. Doc. S/25562 (1993) [hereinafter U.N. Doc. S/25562].

55. *Id.* at 4-6; see also Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 10, art. x.

56. U.N. Doc. S/25562, *supra* note 54, at 6.

57. Perry, *supra* note 3, at 275.

58. *Id.*; see also U.N. Doc. S/25456, *supra* note 36, at 7.

"full scope" safeguards<sup>59</sup> and North Korea's promise to reopen discussions with South Korea concerning a prior denuclearization agreement.<sup>60</sup> Further discussions between the United States and North Korea were suspended, awaiting settlement of the verification issue.<sup>61</sup>

Over the next five months, North Korea and the Agency staff sought to resolve their disagreement while the United States pursued international support for enforcement of the non-proliferation regime. In the course of discussions, North Korea took the position that its situation was a "unique and extraordinary situation." Because it temporarily suspended its withdrawal from the Non-Proliferation Treaty, North Korea had opened all issues relating to the implementation of the Safeguards Agreement to renegotiation.<sup>62</sup> As a result, North Korea was only willing to discuss a one-time mission to verify containment seals and to complete maintenance on installed surveillance systems.<sup>63</sup> On the other hand, the Agency was willing to discuss its request for additional information and access to additional sites. However, the Agency wanted to carry out ad hoc and routine inspection activities in accordance with the prior agreement.<sup>64</sup> Because the parties took directly conflicting positions, little progress was made. On several occasions, Director General Blix announced compliance deadlines and threatened to submit another non-compliance report to the Security Council.<sup>65</sup> He posited that timely resumption of safeguards was critical to provide the needed assurances regarding the peaceful use of declared nuclear material and facilities.<sup>66</sup>

In February 1994, North Korea finally agreed to permit the Agency to inspect its declared nuclear facilities.<sup>67</sup> When they subsequently balked and tried to link the Agency's mission to reopening bilateral discussions with the United States,<sup>68</sup> the Clinton Administration agreed to suspend Team Spirit and to resume political discussions with North Korea on March 21,

---

59. Perry, *supra* note 3, at 275.

60. *Id.*

61. *Id.*

62. U.N. Doc. S/25456, *supra* note 36, at 5-6.

63. *Id.*

64. *Id.*

65. Smith, *supra* note 38, at A1.

66. U.N. Doc. S/25456, *supra* note 36, at 8.

67. Smith, *supra* note 38, at A1.

68. Thomas W. Lippman, *As N. Korea Balks, U.S. Predicts Nuclear Inspections Will Go On*, WASH. POST, Feb. 24, 1993, at A28.

1994.<sup>69</sup> Although an Agency inspection team was allowed to enter North Korea in March, the North Korean government did not grant access to the Yongbyon reactor and again halted completion of the ad hoc inspection.<sup>70</sup> On May 15, North Korea announced that it was withdrawing spent fuel rods from its Yongbyon reactor without an Agency team present, asserting that the Agency's "unreasonable inspection demands . . . had left [North Korea] no choice but to begin the unmonitored withdrawal[s]."<sup>71</sup>

At this point, a period of rapid and contradictory developments in the crisis began. As the United States searched for international support for sanctions against North Korea, the Agency received a telex from the North Korean government indicating North Korea's willingness to receive Agency officials for consultations regarding the defueling. North Korea then offered to suspend fuel reprocessing in exchange for a firm commitment by the United States to extend diplomatic assistance and recognition.<sup>72</sup> However, the Agency cut off minor technical assistance in response to North Korea's persistent refusal to allow comprehensive analysis of the nuclear fuel. In turn, North Korea announced its immediate withdrawal from the Agency and barred Agency inspectors from its Yongbyon facilities.<sup>73</sup> In response to this situation, the United States proffered a "phased-in approach" to sanctions, hoping that a grace period would induce North Korea to remain within the Agency and to remain a party to the Non-Proliferation Treaty.<sup>74</sup>

In mid-June, following an unofficial diplomatic mission by former U.S. President Jimmy Carter, North Korean President Kim Il-Sung agreed to suspend any withdrawal from the non-proliferation regime, to freeze North Korea's nuclear program, and

69. Thomas W. Lippman & T.R. Reid, *N.Korea Nuclear Inspection Begins*, WASH. POST, Mar. 4, 1994, at A1.

70. R. Jeffrey Smith, *Inspectors Returning to North Korea*, WASH. POST, May 14, 1994, at A14. The Agency scheduled another ad hoc inspection to begin in mid-May 1994, but the team was not allowed to take samples from the Yongbyon reactor, which might evidence removal of plutonium for reprocessing, nor was it granted access to the two undeclared nuclear sites. *Id.*

71. R. Jeffrey Smith, *N. Korea Defies Atomic Energy Agency*, WASH. POST, May 15, 1994, at A29. North Korea initiated the withdrawal of fuel rods despite warnings from Secretary of Defense William J. Perry that the procedure would cause the United States to seek economic sanctions against North Korea through the UN Security Council. *Id.* at A31.

72. T.R. Reid, *Accord Near on N. Korean Sanctions*, WASH. POST, Jun. 11, 1994, at A1.

73. R. Jeffrey Smith & T.R. Reid, *N. Korea Quits U.N. Nuclear Body*, WASH. POST, Jun. 14, 1994, at A1, A16.

74. R. Jeffrey Smith, *U.S. Plans to Seek N. Korea Sanctions*, WASH. POST, Jun. 1, 1994, at A22; Daniel Williams, *U.S. Considers Gradual Path on N. Korea*, WASH. POST, Jun. 2, 1994, at A1, A28.

to allow the Agency's inspectors to remain in place at the Yongbyon complex. In exchange, the United States agreed to open comprehensive, high-level talks between North Korea, South Korea, and the United States.<sup>75</sup> After more than a year of sensitive negotiations and contentious posturing, the situation had, at best, returned to square one. By continuing to deny access to the additional facilities and taking actions that decreased the likelihood that accurate and positive controls were available to the Agency, North Korea had actually regressed from the stance that resulted in the Agency's original declaration of non-compliance. North Korea had gained a political advantage.<sup>76</sup>

### III. SELF-DEFENSE AND THE INTERNATIONAL COMMUNITY

#### A. *United Nations Enforcement of International Obligations*

From its inception in 1947, the United Nations declared purpose has been to maintain international order by use of "effective collective measures for the . . . removal of threats to peace."<sup>77</sup> By deterring aggression, the United Nations acts to protect the values of all states. When pacific settlement of a dispute cannot be achieved by negotiation or mediation, the issue may be submitted to the Security Council for resolution.<sup>78</sup> Acting for all states that are members of the United Nations, the Security Council may determine whether a threat to peace exists and the scope of action necessary to neutralize the threat.<sup>79</sup> If "measures not involving the use of armed force," such as condemnation or economic sanctions, are insufficient, the Security Council may employ force to remove the threat.<sup>80</sup>

---

75. *Clinton OKs July Talks with N. Korea*, SAN DIEGO UNION-TRIB., Jun. 23, 1993, A1, A23. In accepting the North Korean commitment as a basis for further negotiation, the United States apparently abandoned its prior demand that North Korea preserve evidence of the 1989 Yongbyon fuel extraction. This evidence may have confirmed that North Korea previously reprocessed and diverted plutonium to a weapons program. *Id.* at A23. See also R. Jeffrey Smith and Julia Preston, *Nuclear Watchdog Group Says N. Korea Steps Up Fuel Rod Withdrawal*, WASH. POST, Jun. 26, 1994, at A1, A10; R. Jeffrey Smith & Ann Devroy, *Carter's Call from N. Korea Offered Option*, WASH. POST, Jun. 26, 1994, at A1, A10.

76. See *supra* notes 34-49 and accompanying text.

77. U.N. CHARTER, art. 1.

78. *Id.* arts. 33-38. The Security Council is the organ within the United Nations with primary responsibility for maintenance of the international peace and security. *Id.* art. 24, para. 1.

79. *Id.* arts. 39-42.

80. *Id.* arts. 42-43.



Ideally, the synergy between the UN Charter and the Non-Proliferation Treaty should result in a timely and reasoned response to non-compliance. As the Korean crisis illustrates, it has not. Although the Security Council has received at least fifteen communiqués from the Agency and North Korea on this issue, action has been limited to two nonbinding statements. The first statement requested that North Korea honor its obligations under the Non-Proliferation Treaty. The second statement asked North Korea to abide by its "1992 pledge to allow unfettered Agency access to its declared nuclear sites."<sup>81</sup>

The reluctance to take direct action originates with the People's Republic of China, one of North Korea's few allies. The Chinese favor negotiated denuclearization instead of "exerting pressure and intensifying contradictions."<sup>82</sup> In 1993, Premier Li Peng publicly announced that China would oppose use of economic sanctions to compel compliance from North Korea.<sup>83</sup> That stance, coupled with the prospect of a Chinese veto to proposed Security Council action against North Korea, has effectively blocked any coercive action against North Korea by the United Nations.<sup>84</sup>

With the United Nations unable, or unwilling, to act, the world reverts to a primitive system in which the general community cannot protect individual members.<sup>85</sup> In these circumstances, individual states must act to preserve peace while securing their own defense and serving national interests.<sup>86</sup> In

81. S.C. Res. 825, *supra* note 3; Smith, *supra* note 70, at A14.

82. *China Opposes Oil Embargo on North Korea*, REUTERS, Dec. 21, 1993, available in LEXIS, Nexis Library, CURNWS File.

83. Steven Mufson, *China Says No Sanctions on N. Korea*, WASH. POST, Dec. 27, 1993, at A13.

84. See U.N. CHARTER, art. 27, para. 3. China has also played an important behind-the-scenes role in persuading North Korea to slow or freeze its nuclear program. Shortly after North Korea announced its intent to withdraw from the Agency in June. China delivered a communiqué to North Korea indicating that North Korea's economic and diplomatic interests—particularly reunification of the Korean peninsula—would be served best by cooperating with the nuclear inspection and non-proliferation regime. See *U.S. Credits China for Reting in N. Korea*, HONOLULU ADVERTISER, Jun. 29, 1994, at A1, A9.

85. Myres S. McDougal, *Editorial Comment, The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT'L L. 597, 597-98 (1963).

86. This Article does not discuss United States policy in detail. Instead, three propositions are assumed. First, U.S. policy is defined by several enduring historical interests: 1) defense of the United States and its constitutional system; 2) enhancement of the United States economic well-being and promotion of U.S. products at home; 3) creation of a favorable world order (international security environment); and 4) promotion of the United States democratic values and the free market system abroad. See DONALD E. NUECHTERLEIN, *AMERICA RECOMMITTED: UNITED STATES NATIONAL INTERESTS IN A RESTRUCTURED WORLD* 17 (1991).

taking these actions, states must ensure compliance with the precepts of both conventional and customary international law.

### B. *The Law of Self-Defense*

While the use of force is contrary to general principles and goals of the United Nations, the UN Charter speaks to both aggression and self-defense, prohibiting aggression but permitting self-defense. The UN Charter outlaws aggression, which it defines as "[t]he use of armed force by a State against the sovereignty, territorial integrity, or political independence of another State."<sup>87</sup> In contrast, Article 51 of the Charter provides that self-defense, the fundamental and customary right of a sovereign to protect its territorial integrity and independence by use of force, remains unimpaired.<sup>88</sup> Customary law limits the right of self-defense only by the concepts of necessity and proportionality.<sup>89</sup>

As a rule, the right of self-defense has also been viewed as broad enough to permit anticipatory responses to imminent

---

Second, national interests may be quantified on a sliding scale: Survival, or critical, national interests are most important, followed by vital or dangerous interests, major or serious interests, and peripheral interests. *Id.* Vital interests differ from survival interests principally in the amount of time that a state has to decide how to respond to an external threat; vital interests encompass a potential or probable, but not imminent danger. *Id.* at 19. Our interest in the denuclearization of North Korea, or non-proliferation in general, would be vital, rather than survival.

Finally, United States political strategy is based on democratization and the efficient use of collective security to ensure world peace. See John Norton Moore, Symposium, Low-Intensity Conflict and the International Legal System, Remarks at the Naval War College, Low Intensity Conflict Symposium 11, April 9-10, 1992, (unpublished manuscript, on file with the author).

87. U.N. CHARTER, art. 24; G. A. Res. 3314, U.N. GAOR, 29th Sess., at 19, U.N. Doc. A/9890 (1974).

88. U.N. CHARTER, art. 51; see also McDougal, *supra* note 85, at 598.

89. Necessity is defined by the availability of peaceful modalities to resolve conflict, the nature of coercion applied by an opponent, the objectives of each party, the parties' impact on world order, and the likelihood of effective community intervention. MYRES S. MCDUGAL & FLORINTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 229-30 (1961). Proportionality is a limitation of the means and time of action; force used in self-defense must be directed at the threat itself and may not continue after the danger or threat has been neutralized. See McDougal, The Soviet-Cuban Quarantine, *supra* note 85, at 602-04; Uri Shoham, *The Israeli Aerial Raid Upon the Iraqi Nuclear Reactor and the Right of Self Defense*, 109 MIL. L. REV. 191, 193 (1985). Some commentators would assert that "[c]ustomary law prescribes the use of peaceful procedures, if they are available, as the first requirement of self-defense." W. Thomas Mallison & Sally V. Mallison, *The Israeli Aerial Attack of June 7, 1981, Upon the Iraqi Nuclear Reactor: Aggression or Self-Defense*, 75 VAND. J. TRANSNAT'L L. 417, 419 (1982). Others argue the absence of peaceful recourse is generally treated as a component of necessity. See generally McDougal, *supra* note 85.

threats. First recognized in the *Caroline* case,<sup>90</sup> anticipatory self-defense requires a degree of imminence that precludes reflective action. While commentators have debated the impact of Article 51 on the scope of self-defense,<sup>91</sup> the imminence requirement is widely viewed as having been altered by the advance of weapons technologies. As weapons have greater range and have become more lethal, the point of imminency has moved further in time from the actual moment of aggressive use. Customary application of the *Caroline* criteria for anticipatory self-defense has been characterized as requiring "paralysis."<sup>92</sup> In order to provide a reasonable modern standard, a determination of necessity, and specifically imminence, should move beyond the paradigm of time to include "an appraisal of the total impact . . . of coercive activities."<sup>93</sup>

---

90. See Jennings, *supra* note 5, at 89.

91. Two schools of interpretation have developed with respect to Article 51 of the UN Charter and the customary law of self-defense. The restrictive school would justify self-defense only in response to an *armed attack*. This school of thought views Article 51 as exhaustive and relies on a literal reading of the Article, which preserves the right of self-defense "if an armed attack occurs against a Member of the United Nations." The restrictive view is reinforced by the obligation of Article 33 to seek peaceful means to settle international disputes. U.N. CHARTER, arts. 33-51. Under a restrictive-view analysis, Article 51 prohibits any action not explicitly mentioned. While protecting the right of self-defense, this approach would extinguish anticipatory self-defense. See Quincy Wright, *The Cuban Quarantine*, 57 AM. J. INT'L L. 546 (1963).

The broad interpretation of Article 51 arises from a balanced analysis of the prohibition on the threat and use of aggressive force in Article 2(4), the historic development of the right of self-defense, and the underlying intent of the UN Charter's framers to preserve the right of self-defense rather than restrict it. By allowing the full breadth of the customary right, impermissible acts of coercion are effectively countered by permissible or defensive coercion. To accept the restrictive view would be to "compel a defending state to allow its assailant to deliver the first and perhaps fatal blow." C.H.M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 R.C.A.D.I. 451, 498 (1953); see also McDougal, *supra* note 85, at 599-600.

The restrictive approach depends upon a myopic interpretation of the phrase "armed attack." The restrictive approach fails to address linguistic differences in other language versions—specifically, the French version uses the term "aggression armée," or armed aggression—that are consistent with the preservation of anticipatory self-defense, and it denies the dynamic nature of international law. "International law, like all living law, is in a process of continuous growth and adaptation to new needs and circumstances." LOUIS HENKIN, *INTERNATIONAL LAW* 91 (1980). In sum, the broad interpretation of Article 51 is more pervasive.

92. McDougal & Feliciano, *supra* note 89, at 217; see also Mallison & Mallison, *supra* note 89, at 348.

93. McDougal, *supra* note 85, at 598.

### C. Framework for Analysis: Necessity and Preventive Self-Defense

Historically, anticipatory self-defense has focused on preempting rather than preventing aggression. For example, state X could lawfully attack and destroy a weapon in state Y at the ultimate moment before state Y uses the weapon against state X.<sup>94</sup> Israel used this type of preemptory attack against Egypt and Syria in the Six Days War. This example illustrates that the decision to use force under UN Charter Article 51 is generally a conditioned reflex to stress.<sup>95</sup> In the context of nuclear confrontation, with its attendant risks of escalation and massive destruction, reasoned rather than reflexive action is preferred and should be fostered. Despite the natural tendency toward preemption in this paradigmatic situation, when the threat to a state's survival or vital interests is not immediate, but may be predicted as the logical conclusion of a course of events, a preventive *action* is preferable to preemptive *reaction*.<sup>96</sup>

If a standard of preventive self-defense is adopted, it must sanction reasoned action at the earliest opportunity without empowering the use of force against a speculative or unsubstantiated threat. Framed properly, a preventive standard defines a clear course of action, and, critically, provides the international community with a means with which to judge any action taken. The legal precept of self-defense is inherently retrospective; once a state has chosen to use force, the legality of the act is not determined by the depth of the state's explanation, but by how closely the act corresponds to the pattern of practice sanctioned by the international community.<sup>97</sup>

The standard for preventive self-defense should merely redirect interpretation of customary law principles from time to the quantum, or scope, of coercion. In response to a nuclear threat, a lawful claim of self-defense should be available to a state which has:

---

94. See, e.g., Charles W. Yost, *The Arab Israeli War: How It Began*, and Quincy Wright, *The Middle East Crisis*, and Amos Shapira, *The Six Day War and the Right of Self Defense* in 2 THE ARAB ISRAELI CONFLICT 5-21, 107-32, 205-20 (John N. Moore ed., 1974).

95. Eugene V. Rostow, *Law is Not a Suicide Pact*, N.Y. TIMES, Nov. 15, 1983, at A35.

96. See MOORE ET AL., *supra* note 7, at 154. Until the moment that the aggressive weapon is deployable and ready for use, any counter-measure must be considered preventive. Once the weapon is deployable, the focus shifts to the prospective moment of its use, and self-defense becomes a preemptive act.

97. Rostow, *supra* note 95.

- 1) reasonably determined that nuclear weapons are to be used as an aggressive force against it;
- 2) affirmatively pursued alternative modalities of resolution and remained engaged in the diplomatic process until the ultimate moment of action;
- 3) acted only after the aggressor's conduct has coalesced into a coherent nuclear threat; and
- 4) achieved minimal destruction, using only as much force as necessary to effectively eliminate the threat.<sup>98</sup>

The existence of a nuclear threat is a fact-specific determination that encompasses both the manifest intent and technical abilities of the aggressor.<sup>99</sup> In determining intent, the relationship between the parties is critical. Past aggressive acts, disregard for sovereign integrity, violations of the laws of war—particularly with respect to civilians—and repetitive threats of future action may support a reasonable apprehension of attack. On the other hand, prior peaceful relationships should require a direct and specific threat of the use of force to provide justification for self-defense. From a technical perspective, the aggressor must have obtained or developed nuclear technologies as well as a system for delivery of nuclear weapons. The potential victim must employ all reasonably available means to detect the development of nuclear technologies, including intelligence available from other states. The potential victim also should have no second-strike or deterrent nuclear forces available.<sup>100</sup> In sum, evaluation of the facts must lead a reasonable person to believe that the preservation of territorial integrity and political independence require the use of military force.

In addition, the potential victim should not resort to force unless the existence of nuclear weapons would critically alter the military status quo. A preventive strike will be lawful when the state finds that further delay will compromise its security and will unreasonably increase the possibility of harm to its civilian population.<sup>101</sup> While a preventive attack should effectively

---

98. See YORAM DINSTEIN, *WAR, AGGRESSION AND SELF DEFENSE* 165-90 (1988); Beth M. Polebaum, Note, *National Self-Defense in International Law: An Emerging Standard for a Nuclear Age*, 59 N.Y.U.L. REV. 187, 208-17 (1984).

99. Polebaum, *supra* note 98, at 210-11.

100. This last criterion, however, should not be applied to a third-state intervenor that is not directly threatened by the aggressor's nuclear weapons. For an example, where state X is threatened by state Y, the existence of a nuclear arsenal at the disposal of state Z, X's military ally, is not relevant. If state X, the threatened state, has no credible capability to employ nuclear weapons against Y, Z must be allowed to act on X's behalf within the principles of mutual self-defense and treaty obligations. To do otherwise would vitiate the purpose and effect of the bilateral defense agreement. All other preventive self-defense criteria would otherwise apply.

101. *Id.* at 211.

eliminate the nuclear threat, the use of force should be proportional and limited to the facilities that relate directly to the threat. Nuclear weapons, platforms, depots, and laboratories, as well as fissionable material storage and manufacturing sites, would all be lawful targets. On the other hand, conventional military facilities, economic centers, and civilian targets would be prohibited. The potential victim must choose its targets so that it achieves its purpose with a minimum of destruction to the prospective aggressor; therefore, the use of nuclear weapons would be disproportionate force per se.<sup>102</sup>

More importantly, the potential victim must continuously seek to resolve the threat by other means until the absolute last moment. By affirmatively seeking peaceful remedies, the potential victim will publicize the aggressor state's intent and encourage third-party intervention. The international community will thereby be able to discern the objectives of both parties, determine if they present an extension or conservation of community values, and prepare for the consequences of any action.<sup>103</sup>

#### D. *Preventive Acts: The Cuban Missile Crisis and Tuwaitha*

Although the nuclear age opened with the bombings of Hiroshima and Nagasaki in 1945 and expanded to a critical standoff between the United States and the Soviet Union in the 1950s, only two incidents of nuclear confrontation have occurred in the last half-century—the United States quarantine of Cuba in 1962 and the Israeli attack on an experimental nuclear-powered reactor at Tuwaitha, Iraq, in 1980. Each focused on a perceived nuclear threat, but evoked distinctly different reactions from the international community. In both cases, the defending state, or potential victim, invoked self-defense and reacted with force before aggression with nuclear weapons was actually possible.

The Cuban Missile Crisis squarely satisfies the criteria of preventive self-defense, but is distinguishable from Tuwaitha and the crisis at hand. While the latter two confrontations related to the potential development of nuclear weapons, the Cuban Missile Crisis involved the placement of strike-ready weapons. Although the situs of coercion was the island state of Cuba, the actual threat of action came from the Soviet Union. The Soviet Union began clandestine installation of a series of strategic nuclear

---

102. *Id.* at 212.

103. See Anthony D'Amato, Editorial Comment, *Israel's Air Strike Upon the Iraqi Nuclear Reactor*, 77 AM. J. INT'L L. 584, 585-87 (1983).

missile sites in Cuba late in the summer of 1962. The United States issued a public protest on October 22, 1962, after discovery of the sites via reconnaissance overflight, and announced a quarantine on all offensive military equipment under shipment to Cuba. Over the next two days, the United States raised the issue in the UN Security Council. Seeking to induce the withdrawal of strategic weapons already in Cuba, the United States characterized Soviet actions as a danger to both peace and security and an overt threat of war in violation of Article 2(4) of the UN Charter.

The United States, which had previously expressed concern about the build-up of armaments in Cuba, obtained immediate ratification of its action by the Organization of American States and the North Atlantic Treaty Organization.<sup>104</sup> The United Nations, however, did not sanction the United States action nor did it condemn either party. Three draft resolutions were presented to the Security Council. The first resolution, sponsored by the United States, called for the immediate withdrawal of all Soviet strategic weapons from Cuba. The second draft resolution, sponsored by the Soviet Union, condemned the United States blockade as a violation of the UN Charter. The third proposed resolution sought mediation of the dispute in the General Assembly. However, each proposal failed to pass in the Security Council. In the face of an effective blockade and negative world opinion, the Soviet Union decided to remove its missiles and stop work on launch sites after October 28, 1962. In return, the United States officially lifted its quarantine on weapons shipped to Cuba on November 20, 1962.<sup>105</sup>

With the Soviet Union's declared policy of expansionism and clear history of antagonism toward the United States, installation of medium-range weapons inside the Distant Early Warning line would have critically altered the balance of military power both within the western hemisphere and worldwide. As a general matter, the United States and the Soviet Union were continuously engaged in diplomatic exchanges, and the United States had publicized its protest.

Discovery of the nuclear threat occurred before the missiles were launch-ready, but pursuit of a diplomatic solution might have given the Soviet Union more time to ship additional missiles and support equipment into Cuba, gaining an unassailable

104. Statements by President John F. Kennedy (Sept. 4, 1962) (Sept. 13, 1963) 47 U.S. DEP'T ST. BULL. 450, 481, 715 (1962).

105. See generally Carl Q. Christol & Charles R. Davis, *Maritime Quarantine: The Naval Interdiction of Offensive Weapons and Associated Materiel to Cuba*, 1962, 57 AM. J. INT'L L. 525, 526-28 (1963); Wright, *supra* note 91; Polebaum, *supra* note 98, at 205; Shoham, *supra* note 89, at 201.

coercive advantage. The United States naval interdiction was directed only at strategic offensive weapons bound for Cuba and was imposed only after the Soviet Union's course of conduct made a clearly threatening result possible. Significantly limited in intensity and magnitude, the Cuban quarantine was widely, and properly, accepted as a lawful exercise of the right of self-defense.

In contrast to the quarantine of Cuba, the Israeli attack on Tuwaitha was uniformly condemned. Given the factual similarity between the Tuwaitha attack and the North Korean crisis, application of the framework set forth above to the Tuwaitha raid is instructive.<sup>106</sup> On June 7, 1980, Israeli Air Force fighters and bombers attacked and destroyed the experimental Iraqi nuclear reactor at Tuwaitha. The next day, Israeli Prime Minister Menachem Begin claimed that the reactor posed a threat to Israel.<sup>107</sup> More specifically, Israel contended that Iraq had developed a nuclear weapon to attack Israeli territory. To support this claim, Israel cited the following: Iraq's consistent refusal to recognize Israel's right to exist; Iraq's refusal to reach a political accommodation with Israel; the continued state of war between Israel and Iraq, starting with the 1948 War of Independence; Iraq's selection of a gas-graphite reactor for implementation of nuclear technologies; Iraq's development of a laboratory capable of handling and separating small quantities of weapons grade material; and the admission by an Iraqi government official that Iraq's nuclear reactor would be "the first Arab attempt toward nuclear arming."<sup>108</sup>

The Israeli government noted that it had expressed its concern regarding the Iraqi nuclear program with states that it felt could assist in resolution of the problem. In response to Israeli inquiries, both France and Italy, Iraq's source of nuclear technologies, indicated that they would rely on International Atomic Energy Agency safeguards to preclude weapons proliferation. The United States, Israel's closest ally, merely cautioned the French and the Italians regarding the importance of safeguards. Not comfortable with the efficacy of Agency standards or the scope of international sanctions available and concerned about the possible release of radioactive materials from an operating reactor, the Israelis attacked Iraq's Tuwaitha facility before the facility was operational.<sup>109</sup>

---

106. See Yost, *supra* note 94, at 16.

107. Shoham, *supra* note 89, at 191.

108. *Id.* at 204-16.

109. Israeli Ministry of Foreign Affairs and Atomic Energy Comm'n, *The Iraqi Nuclear Threat—Why Israel Had to Act*, 3-9, 14, 17-25, 29-34 (1981) (unpublished manuscript on file with author) [hereinafter *Why Israel Had to Act*].



It is important to note that operation of a gas-graphite, uranium core reactor—for example, the French Orisis reactor at Tuwaitha—could provide two means for development of weapons. In the first method, the ninety-three percent enriched uranium fuel could be diverted to direct production of nuclear weapons.<sup>110</sup> In the second method, irradiation of the enriched uranium fuel produces another weapons grade material, plutonium. In light of the technical evidence, the probability that Iraq intended to develop nuclear weapons was high. Given Iraq's manifest belligerency, Israel reached the reasonable and logical conclusion that it was the intended target of Iraq's aggression. The timing and limited scope of the Israeli attack also fell well within the parameters of proportional response to the threat.

Notwithstanding the evidence available to the Israeli government prior to their action, a claim of preventive self-defense cannot be justified. Application of Agency safeguards at Tuwaitha and the expressed international interest in protecting the non-proliferation regime militated against any possible threat.<sup>111</sup> More importantly, Israel failed to pursue peaceful modalities of resolution. There is no evidence that the Israelis attempted direct or third-party negotiations with Iraq.

Furthermore, the matter was not raised before the United Nations.<sup>112</sup> The UN Charter obliges members to submit disputes which may endanger peace to the Security Council or the General Assembly for resolution. Any reasonable model for application of self-defense must adhere to this precept. Although a delay in the United Nations response or a refusal to take action might have justified unilateral action by Israel, Israel could not reasonably assume that referral to the United Nations was futile or that the Security Council would react indifferently to the evidence that Israel later presented. In acting unilaterally, the Israeli government gave primacy to the preservation of its own goal—security in a hostile, Arab world—and ignored the world community's preference for mediation and application of the rule.

110. In contracting for nuclear technology and supplies, Iraq rejected France's proposal to provide a reactor using 3% enriched uranium fuel. Instead, Iraq insisted that 93% enriched fuels be used. Notably, 3% enriched fuel is capable of sustaining critical reaction for power production, but 93% enriched fuel is required for weapons production. *Id.*

111. Following the attack, the Director General of the Agency characterized Israel's action as a "serious threat to the entire [Agency] safeguards regime." Burrus M. Carnahan, *Protecting Nuclear Facilities from Military Attack: Prospects After the Gulf War*, 86 AM. J. INT'L L. 524, 535 (1992). The UN Security Council concurred, without abstention, labeling the act as a "clear violation of the Charter . . . and the norms of international conduct." S.C. Res. 487, U.N. SCOR, 36th Sess., 2288th mtg., U.N. Doc. RES/487 (1981).

112. Mallison & Mallison, *supra* note 89, at 427-28.

of law. As a result, Israel's action fell outside the realm of lawful self-defense.

### III. A MODEL FOR ACTION

The critical issue in assessing the legitimacy of a preventive self-defense strike against North Korea is the extent to which its actions threaten world peace or an individual state's security. North Korea's entry into the "nuclear club" presents a general threat to international security and a specific threat to South Korea. However, judging from the examples discussed above, it is unlikely that the United Nations will respond to these threats. Should an individual state or other organization consider an armed response in the absence of a United Nations action, it must first define the tangible threat, the objective to be attained by a chosen action, and the consequences of each available alternative.

What, for example, are the United States interests in this controversy? The United States political engagement strategy has been to promote democratization of foreign governments and to strengthen system-wide deterrence against aggression or unlawful coercion.<sup>113</sup> The United States is also a party to the Mutual Defense Treaty with South Korea, the probable target of North Korean aggression.<sup>114</sup> The U.S. interests at issue are the international regime for non-proliferation (symbolized by the U.S. participation in the Non-Proliferation Treaty), the peaceful resolution of controversies (demonstrated by the United States membership in the United Nations), and the continued security and independence of South Korea (illustrated by the United States Mutual Defense Treaty with South Korea).

As part of its national security strategy, the United States undertook to ensure a prohibition on proliferation in 1968. Recognizing that aggression, or the threat of aggression, with nuclear weapons would be a new situation, the United States declared that it would act immediately to counter aggression or to remove the threat of nuclear aggression in accordance with the UN Charter and the inherent right of individual and collective

---

113. Moore, *supra* note 86, at 11.

114. Each party is obligated to consult the other whenever the "security of either of the Parties is threatened by external armed attack" and to "maintain and develop appropriate means to deter armed attack and . . . take suitable measures . . ." in response to any threat. Mutual Defense Treaty, Oct. 1, 1953, U.S.-Korea, 5 U.S.T. 2368, art. 2.

self-defense.<sup>115</sup> As a member of the United Nations, the United States must defer to the United Nations preference for pacific settlement of conflict, but the United States also has a general obligation to act in the best interests of international peace and security. Actions taken to protect the rule of law, to promote peaceful change, and to suppress aggression—by sanction or by force of arms—comport with that obligation.

However, the United States ultimate interest is defined by the moral and contractual obligations underlying the Mutual Defense Treaty between the United States and South Korea. Having declared the "common determination to . . . [act] so that no potential aggressor could be under the illusion that either . . . [state] stands alone,"<sup>116</sup> the United States has announced that the security and independence of South Korea are vital to the United States own security. Without losing perspective of nuclear proliferation's general threat to world peace, the United States must treat a coherent threat of nuclear attack against South Korea as a threat against the security of the United States.<sup>117</sup>

#### A. Defining the Threat

As discussed above, the foundation of preventive self-defense requires a coherent nuclear threat: the potential aggressor must have both the proclivity and the means to employ nuclear weapons. Manifestation of the threat may be found in historically acrimonious relationships or direct confrontation. Technical feasibility is dependent upon availability of fissionable material, weapons production technologies, and a credible delivery system.

115. *Declaration of the Government of the United States of America* (1968), 7 I.L.M. 903-04 (1968).

116. Mutual Defense Treaty, *supra* note 114, at 237.

117. The United States moral obligation to respond in a mutual or multilateral defense treaty is addressed in a draft presidential policy statement. Originally intended as a tool to help the President determine when to send peacekeeping forces overseas, Presidential Review Document 13 [hereinafter the Document] is now viewed as "a framework for deciding when our interests are at stake." The Document declares that unilateral military response is justified only for a "Level One" crisis. A Level One crisis is defined as a direct threat to United States security, such as an attack on a North Atlantic Treaty Organization party or other defense treaty party. See Lucy Howard & Gregory Cerio, *The Clinton Doctrine*, NEWSWEEK, Feb. 28, 1994, at 6. Significantly, the Document also defines "discovery of long range nuclear weapons in an unstable region" as a Level One crisis. If North Korea is characterized as an unstable region, confirmation that North Korea had possession of nuclear weapons technologies and long range delivery systems would place the current crisis exceedingly close to the Level One crisis criteria. Any action taken before the discovery of a launch-ready weapon would then be characteristic of preventive self-defense, while action taken after such a discovery would be characterized as preemptive. See *supra* note 100.

In the current crisis, action in self-defense is permissible because a true nuclear threat exists. On the whole, there is substantial evidence that North Korea intends to use nuclear weapons as a coercive force on the peninsula and is rapidly approaching the technical capability to do so.

Relations between North Korea and South Korea have long been replete with conflict. Artificially divided at the end of World War II, the North and the South developed in the mold of their administrators, the Soviet Union and United States, respectively. Rivalry between the Soviet Union and the United States eventually resulted in the formation of two separate states: the Stalinist regime headed by Kim Il-Sung in the north and the democratic republic south of the thirty-eighth parallel. Since September 1948, North Korea has claimed authority over the entire peninsula and has branded South Korea illegitimate.<sup>118</sup>

Three years of open, armed conflict between the North and the South drew in the armed forces of the United States—under the color of United Nations sanction—and the People's Republic of China, but resolved nothing. The Korean War was concluded by armistice on July 27, 1953. Despite dramatic changes of territorial control during the war, the Military Demarcation Line established by the armistice gave little territorial advantage to either the North or the South.<sup>119</sup> Since then, official diplomatic ties have been eschewed.

In the four decades following the Korean War, North Korea has pursued a strategy of insurgency, seeking to weaken the South's infrastructure and to increase the likelihood of a victory in a future *blitzkrieg*. After numerous border provocations in the first ten years of "peace," open but undeclared conflict erupted again from 1966 to 1969, with 450 firefights and 550 incidents of fire across the Demilitarized Zone, causing a total of more than four thousand casualties on both sides.<sup>120</sup> Discouraged by the combined resistance of the United States and South Korea in this confrontation, the North Korean government has since sanctioned terrorist attacks on a variety of unlawful targets, including the President of South Korea,<sup>121</sup> South Korean cabinet members,<sup>122</sup>

---

118. See JON HALLIDAY & BRUCE CUMMINGS, *KOREA: THE UNKNOWN WAR* 15-69 (1988).

119. *Id.* at 71-219; see generally JAMES L. STOKESBURY, *A SHORT HISTORY OF THE KOREAN WAR* (1988); ROSEMARY FOOT, *THE WRONG WAR: AMERICAN POLICY AND THE DIMENSIONS OF THE KOREAN CONFLICT, 1950-1953* (1985).

120. DANIEL P. BOLGER, *SCENES FROM AN UNFINISHED WAR: LOW-INTENSITY CONFLICT IN KOREA, 1966-1969*, at 111-114 (1991).

121. *Id.* at 62-65.

122. Seventeen South Korean nationals, including four cabinet members, were killed when a bomb exploded on a Korean Airlines jet on the tarmac at

and the general civilian population of South Korea.<sup>123</sup> These belligerent acts are clearly within the ambit of unlawful aggression and evince North Korea's disregard for South Korea's sovereign integrity.

When viewed in the context of North Korea's historic aggression towards South Korea, the course of North Korea's technical development is particularly troubling. A primary concern is the availability and production of weapons-grade fissile material. North Korea's reactor at Yongbyon is a dual purpose facility, producing heat for steam power generation as well as weapons-grade plutonium.<sup>124</sup> The facilities necessary to make military use of the plutonium are also in operation.<sup>125</sup> Clearly, the critical steps towards weapons production and delivery have been taken. In sum, the history of unlawful North Korean aggression and North Korea's technical nuclear capabilities demonstrate that a nuclear threat warranting preventive self-defense exists.<sup>126</sup>

Rangoon. Michael Shapiro, *Annals of Authoritarianism: Kim's Ransom*, NEW YORKER, Jan. 31, 1994, at 32, 34.

123. Korean Airlines Flight 858 was destroyed in flight after leaving Abu Dhabi on Nov. 29, 1987, killing all 115 passengers on board. Two North Korean agents, carrying a timed explosive device, had boarded the flight at Baghdad. Placing the bomb in an overhead bin, they engaged the remote trigger before disembarking at Abu Dhabi. The alleged purpose of the act was to interfere with the 1988 Seoul Olympics by exposing South Korea's strategic vulnerability. Lally Weymouth, *Does Clinton Know Who He's Dealing With?*, WASH. POST, Nov. 30, 1993, at A25.

124. See *Why Israel Had to Act*, *supra* note 109, at 11.

125. See *supra* note 30. These facilities are a uranium core concentration plant for "target" manufacture and a "hot lab" for fissile material extraction. Extraction itself requires removal of the fuel rods/targets from the reactor after stabilization from critical reaction. U.S. intelligence estimates indicate that the first confirmed shut-down of the Yongbyon reactor may have yielded twelve kilograms of weapons grade plutonium—enough to make one or two bombs. Fuel rods removed from the reactor in June 1994 are expected to yield more than twice that amount. *N. Koreans Plan to Quit U.N. Panel Immediately*, SAN DIEGO UNION-TRIBUNE, Jun. 14, 1994 at A1, A23. Having previously developed short-range and medium-range ballistic missiles such as the SCUD, the North Koreans successfully test-fired a ballistic missile capable of reaching nearly 1000 miles—the distance from Pyongyang to Osaka, Japan. Nelan, *supra* note 28, at 29; Holley, *supra* note 28, at 1; William Powell & Jane Whitmore, *A Game of Nuclear Poker*, NEWSWEEK, Nov. 15, 1993, at 41.

126. North Korea's conduct in the non-proliferation regime also raises questions of intent. Despite obligations imposed by the Non-Proliferation Treaty, North Korea sought and developed nuclear technologies while involved in dilatory negotiations over the Safeguards Agreement. Once an agreement was put into force, North Korea failed to provide accurate data regarding its nuclear materials, refused to allow the full scope of Agency inspections, and protested the use of credible third-party intelligence to justify a special—or demand—inspection of undeclared sites. North Korea remains a party to the Non-Proliferation Treaty and its safeguards agreement with the Agency, but it continues to deny the

To invoke the concept of preventive self-defense, any use of force must be directed at the specific sources of the threat. Lawful targets are limited to those facilities that are necessary for production of nuclear weapons. Plutonium production facilities—specifically the Yongbyon reactor—storage sites, and extraction or concentration facilities could each be targeted.

### B. *The Course of Action*

The United States government must examine its objectives within the framework of international security and the non-proliferation regime. Seeking the normalization of relations, North Korea, South Korea, and the United States have remained fully engaged in the diplomatic process over the last year, using informal discussions at the United Nations, consultation with other interested states, and specific bilateral negotiations to resolve all outstanding issues regarding North Korea's nuclear program. At this juncture, the United States announced that its intent is to bring North Korea into full compliance with its obligations under the Non-Proliferation Treaty. Furthermore, the United States is negotiating for North Korea to receive inspections at the two non-declared sites discussed above and to proceed with full implementation of the denuclearization agreement previously reached between North Korea and South Korea.<sup>127</sup>

In striving to achieve these objectives, the United States should be concerned about the effects of both action and inaction. An overt step to control North Korea's course, either by the imposition of economic sanctions or by the use of force to destroy potential weapons capabilities, risks the possibility of igniting another war on the Korean peninsula.<sup>128</sup> On the other hand, failure to take action may lead to cascading destabilization in the

---

Agency's right to special inspection and will not grant access to the sites in controversy. Although no evidence exists which directly demonstrates that North Korea has actually developed a nuclear weapon, a dispassionate analysis of North Korea's technological course has led many states to conclude that North Korea's ultimate goal is to obtain nuclear weapons. Nelan, *supra* note 28, at 28. Given the history of conflict between North Korea and South Korea, the logical and compelling conclusion is that North Korea is likely to employ its nuclear weapons as a coercive force against South Korea.

127. Perry, *supra* note 3.

128. North Korea has declared that if "the United Nations Security Council tries to put pressure on us and take 'collective sanctions' against us by representing the will of a big Power, we will be compelled to take corresponding effective self-defensive measures. We do not say empty words." U.N. Doc. S/25538, *supra* note 50, at 45.

Pacific.<sup>129</sup> First, North Korea may in fact develop a credible nuclear force, thereby upsetting the military status quo on the peninsula and prompting South Korea to seek re-introduction of U.S. nuclear arms or to pursue development of its own deterrent capability. Second, the Japanese, who have both ballistic missile systems and fissionable material stockpiles, may choose to arm themselves as a matter of self-defense.<sup>130</sup> Finally, North Korea might choose to export its nuclear weapons capabilities, as it has with its conventional arms, to other unstable regimes or terrorist organizations.<sup>131</sup>

Frustrated by the lack of progress in the negotiations between North Korea and the Agency, President Clinton has publicly declared that the United States will not allow North Korea to develop nuclear weapons.<sup>132</sup> The underlying threat in this declaration is that the United States may employ all available forms of coercion, both peaceable and forcible. Over the past few months, the United States position has softened. The United States has offered "carrots" to North Korea, such as the suspension of Team Spirit and the expansion of economic ties. North Korea has accepted these "carrots" without a true quid pro quo.

In the current context, North Korea has no reason to take any U.S. threat seriously. By playing a waiting game, North Korea has been allowed to take advantage of the situation. Through dissembling and delay, North Korea has ignored the standards of non-proliferation and has taken significant steps towards nuclear weapons development without suffering any international sanction. History counsels that continued appeasement will fail. Therefore, at this juncture, direct enforcement in the form of preventive self-defense should supplant negotiation.

The model for preventive self-defense provides a reasoned and legally sound course of action. With the critical prerequisite of this model—the existence of a coherent threat—nearly at hand, the United States should act to fulfill its duties to South Korea and to exhaust the available avenues of peaceful resolution. As a

129. The Japanese currently stockpile approximately 4.5 tons of plutonium as a fuel supply for the fast breeder-reactor at Monju. In addition, development of the Japanese H2 satellite launch system could readily be converted to ballistic uses. *North Korea Says Japan Plans to Make Nuclear Arms*, AGENCE FRANCE PRESSE, Mar. 7, 1994, available in LEXIS, Nexis Library, CURNWS File.

130. Paul Dibb, *Asia-Pacific Security: Act Now to Avoid A Regional Arms Race*, INT'L HERALD TRIB., Aug. 26, 1992, available in LEXIS, Nexis Library, CURNWS File; Powell & Whitmore, *supra* note 125, at 41.

131. Richard Fisher, *Price of Failure in North Korea*, WASH. TIMES, Jan. 18, 1994, at A27.

132. Michael Kramer, *Playing Nuclear Power*, TIME, Feb. 28, 1994, at 45.

signatory to the Non-Proliferation Treaty and a member of the United Nations, the United States can raise North Korea's continued non-compliance before the Security Council. A request for action by the United Nations in the form of diplomatic and economic sanctions represents the last viable means for pacific resolution. If pursuit of peaceful resolution triggers North Korea's threatened invasion of South Korea, a strike against nuclear weapons source facilities would no longer be a matter of anticipatory self-defense.

While seeking economic sanctions from the United Nations, the United States should also impose unilateral economic sanctions as an additional measure of lawful coercion. The United States significant allies in the region, Japan and South Korea, should be strongly encouraged to join in these sanctions. At the same time, the United States must overtly reinforce its military forces in the Western Pacific and communicate to North Korea that any initiation of hostilities will result in immediate and overwhelming intervention by the United States.

Should the United Nations fail to impose sanctions in the event that North Korea initiates hostilities, the United States may justifiably pursue unilateral action. Before taking action, however, the United States must recognize that the use of force as a preventive measure is no guarantee of success. If a strike fails, North Korea will have an incentive to retaliate once it actually achieves nuclear capability. Furthermore, any other aspiring nuclear power might be disinclined to negotiate. However, failure to act may lead to a similar result.

## V. CONCLUSION

Although the current crisis involves a broad spectrum of international legal principles and policies, the principles of non-proliferation and self-defense are of primary concern. Given the attendant risks of escalation and mass destruction in a nuclear confrontation, the extension of nuclear weapons capability is a destabilizing force and a significant threat to peace. When the non-proliferation regime fails to prevent aggressive states from developing nuclear weapons, international law must permit the international community or individual states to take overt steps to deny the deployment or use of those weapons.

In a case such as the North Korean crisis, the precepts of preventive self-defense provide a principled means to determine when the international community must turn to force. Sanctioning the use of preventive self-defense provides three stabilizing results. First, it lessens the probability of an actual



nuclear exchange. Second, self-defense provides standard criteria—such as the coherence of the nuclear threat—that are more workable and practical than imminency in the face of potential mass destruction. Third, preventive self-defense reinforces the requirement that states must first pursue peaceful modalities for conflict resolution before using other, non-peaceful measures.

In contrast, the traditional, restrictive requirement of imminency before self-defense fails to consider the realities of nuclear confrontation. No state should be forced to await the launch of a nuclear weapon before responding. Furthermore, contemporaneous development of a nuclear response is inimical to the principles of non-proliferation and the prospective goal of nuclear disarmament.

Customary international law represents the commingling of legal principle and policy. The breadth of customary international law is defined by the generally accepted and sanctioned practices of states, delimited first by policy. When customary law principles present an unworkable solution, or mandate an illogical result, an imbalance in the law exists. In the Korean crisis, application of the customary principle of self-defense, or even the ideal of anticipatory self-defense, would be both unworkable and illogical. In the face of a belligerent state that has nuclear technologies and credible weapons delivery systems at its disposal, the potential for mass destruction must be the critical factor in the justification and timing of the potential victim's response. Both policy and practice must move to resolve the imbalance.