

## DIPLOMACY AS A MEANS TO SUCCESSFULLY DISARM NORTH KOREA

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### 1. INTRODUCTION

Despite North Korea's agreement on February 13, 2007 to shut down its nuclear reactor and allow United Nations inspectors back into the country,<sup>1</sup> in addition to the country's participation in the sixth round of the Six-Party Talks in September 2007,<sup>2</sup> the likelihood of successfully disarming North Korea is quite dismal at the time of this writing. On April 5, 2009, North Korea launched a multistage rocket<sup>3</sup> and, little more than a month later, it conducted its second nuclear test.<sup>4</sup> On April 14, 2009, North Korea's foreign minister announced that the country was permanently quitting the Six-Party Talks and resuming their nuclear enrichment program,<sup>5</sup> which reached its "concluding stages" on September 3, 2009.<sup>6</sup>

This Comment argues that North Korea has little incentive to comply with the disarmament agreements to which it is party

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<sup>1</sup> See *North Korea's Nuclear Activities: Timeline*, TELEGRAPH, May 25, 2009, <http://www.telegraph.co.uk/news/worldnews/asia/northkorea/5381109/North-Koreas-nuclear-activities-timeline.html> (providing a timeline of North Korea's nuclear activities and international attempts to restrict them).

<sup>2</sup> *Schedule of the Second Session of the Sixth Round of the Six-Party Talks*, MINISTRY OF FOREIGN AFFAIRS OF JAPAN, [http://www.mofa.go.jp/announce/event/2007/9/1175582\\_856.html](http://www.mofa.go.jp/announce/event/2007/9/1175582_856.html) (last visited Feb. 21, 2011).

<sup>3</sup> See generally Peter Spiegel, *U.S. Warns North Korea Against Nuclear Activity*, WALL ST. J., May 30, 2009, at A8 (discussing the fallout in the United States following North Korea's missile test).

<sup>4</sup> See Choe Sang-Hun, *North Korea Says It Tested Nuclear Device*, N.Y. TIMES, May 25, 2009, at A1 (describing the second nuclear test conducted by North Korea).

<sup>5</sup> See Choe Sang-Hun, *North Korea Started Uranium Programs in 1990s, South Says*, N.Y. TIMES, Jan. 6, 2010, <http://www.nytimes.com/2010/01/07/world/asia/07korea.html> (discussing the history of North Korea's uranium program).

<sup>6</sup> David E. Sanger, *North Korea Reports Advances in Enriching Uranium*, N.Y. TIMES, Sept. 4, 2009, at A3.

because the enforcement mechanisms currently available under international law are ineffective and the agreements themselves allow for abuse. The underlying source of North Korea's unwillingness to disarm, however, is the United States' hostile diplomatic policy towards the country, which undermines the terms of these already vulnerable agreements. The United States must therefore abandon its antagonistic and uncompromising approach if it hopes to successfully disarm North Korea.

Part 2 of this Comment outlines the various disarmament treaties and agreements North Korea was party to and outlines their shortcomings. Part 3 discusses the enforcement mechanisms available under international law to bring North Korea into compliance with these commitments and their inherent weaknesses. Part 4 explores the United States' past diplomatic approach to North Korea through the framework of the Six-Party Talks and reaffirms its ineffectiveness. Part 5 offers creative diplomacy as a solution to the problem of North Korean disarmament.

## 2. NORTH KOREA'S DISCORDANT RELATIONSHIP WITH DISARMAMENT TREATIES AND AGREEMENTS

North Korea's disregard for international disarmament agreements is evidenced by its violation of the Nonproliferation Treaty, the Agreed Framework, the International Atomic Energy Agency Safeguards, and the North-South Declaration on the Denuclearization of the Korean Peninsula. Thus, if the United States cannot instill a sense of respect for international law in the North Korean government, it must, at least, make North Korea leaders respect the United States, one of the major parties it forms these agreements with, if it hopes to disarm North Korea.

The Nonproliferation Treaty<sup>7</sup> ("NPT") was formed on July 1, 1968 with the purpose of accomplishing the peaceful use of nuclear energy,<sup>8</sup> as well as non-proliferation<sup>9</sup> and disarmament.<sup>10</sup> North

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<sup>7</sup> Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 [hereinafter NPT].

<sup>8</sup> *See id.* art. IV(1) (acknowledging the "[i]nalienable right of all the Parties . . . to develop research, production and use . . . nuclear energy for peaceful purposes").

<sup>9</sup> *See id.* art. I-II (declaring State parties' promise to neither transfer nor receive "nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices").

Korea joined it as a non-nuclear weapon state in 1985,<sup>11</sup> ultimately withdrawing in 2003.<sup>12</sup> Non-weapon parties to the NPT must agree to accept safeguards by the International Atomic Energy Agency (“IAEA”) that allow the agency to monitor for compliance.<sup>13</sup> North Korea joined the IAEA in 1974,<sup>14</sup> but ultimately withdrew in 1994.<sup>15</sup>

In 1992, to fulfill its obligations under the NPT, North Korea announced the amount of plutonium—the ingredient used to make nuclear weapons—it had separated from damaged fuel rods.<sup>16</sup> IAEA inspectors discovered that the levels of plutonium made exceeded those actually reported.<sup>17</sup> When IAEA inspectors went to further investigate the misinformation in January 1993, North Korea did not allow them to enter<sup>18</sup> in contravention of its

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<sup>10</sup> See *id.* art. VI (stating that states must pursue “[n]egotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control”).

<sup>11</sup> See *IAEA and DPRK: Fact Sheet on DPRK Nuclear Safeguards*, IAEA.ORG, [http://www.iaea.org/NewsCenter/Focus/laeaDprk/fact\\_sheet\\_may2003.shtml](http://www.iaea.org/NewsCenter/Focus/laeaDprk/fact_sheet_may2003.shtml) (last visited Feb. 21, 2011) [hereinafter *IAEA Factsheet*] (outlining North Korea’s nuclear safeguards).

<sup>12</sup> See Andrew Ward, *N Korea Quits Nuclear Non-Proliferation Treaty*, FIN. TIMES, Apr. 11, 2003, at 11 (describing North Korea’s withdrawal from the NPT and the lack of a cohesive response “to the communist state’s suspected nuclear weapons programme”).

<sup>13</sup> See NPT, *supra* note 7, art. III(I) (“Each non-nuclear-weapon State Party undertakes to accept safeguards, as set forth in an agreement . . . with the International Atomic Energy Agency . . . with a view to preventing diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices.”).

<sup>14</sup> *IAEA Factsheet*, *supra* note 11.

<sup>15</sup> See *id.* (“Although the withdrawal did not affect [North Korea’s] obligations under its Safeguards Agreement, which in the Agency’s view remains binding and in force, [North Korea] took the position that it was . . . no longer obliged to allow inspectors to carry out their work under the Safeguards Agreement.”).

<sup>16</sup> See David Albright, *North Korean Plutonium Production*, 5 SCI. & GLOBAL SECURITY 63, 63 (1994) (describing the history of North Korea’s separation of plutonium from damaged fuel rods and potential for future plutonium separation).

<sup>17</sup> See *id.* (noting that North Korea may have separated enough plutonium to build one or two nuclear weapons).

<sup>18</sup> See William J. Perry, *Proliferation on the Peninsula: Five North Korean Nuclear Crises*, 607 ANNALS AM. ACAD. POL. & SOC. SCI. 78, 81 (2006) (“[E]vidently surprised at the thoroughness of the inspectors, refused them access to the spent fuel storage area for more detailed examination.”).

Safeguards Agreement.<sup>19</sup> Unwilling to honor its commitments, North Korea left the IAEA and soon threatened to leave the NPT.<sup>20</sup>

On January 20, 1992, North Korea signed the North-South Declaration on the Denuclearization of the Korean Peninsula under which both agreed to refrain from testing, manufacture, production, acceptance, possession, storage, deployment, or use of nuclear weapons.<sup>21</sup> North Korea ignored the provision in the declaration that called for a bilateral nuclear inspection regime<sup>22</sup> in January 1993 when it refused IAEA inspections of its facilities.<sup>23</sup>

In an attempt to avoid the nuclear threat that North Korea presented, the United States negotiated the Agreed Framework, which forced North Korea to cease its nuclear program and allow inspections in exchange for obtaining two modern nuclear reactors.<sup>24</sup> In October 2002, North Korea admitted to having a clandestine nuclear program in violation of the Agreed Framework and the NPT.<sup>25</sup> Two months later, North Korea lifted the freeze on its plutonium program and expelled inspectors that were

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<sup>19</sup> See Int'l Atomic Energy Ass'n [IAEA], *Agreement of 30 January 1992 between the Government of the Democratic People's Republic of Korea and the International Atomic Energy Agency for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons*, art. XLVIII, IAEA Doc. INFCIRC/403 (Jan. 30, 1992) [hereinafter *Safeguards Agreement*] ("The Agency, in co-operation with [North Korea], may send inspectors to verify the design information provided to the Agency . . .").

<sup>20</sup> See Perry, *supra* note 18, at 81 (stating that North Korea announced their withdrawal from the NPT in May 1994).

<sup>21</sup> Joint Declaration on the Denuclearization of the Korean Peninsula, N. Kor.-S. Kor., Jan. 20, 1992, 33 I.L.M. 569 [hereinafter the North-South Joint Declaration].

<sup>22</sup> See *id.* ("The north and south shall make an inspection of objects chosen by the other side . . . in order to verify the denuclearization of the Korean peninsula.")

<sup>23</sup> See Perry, *supra* note 18, at 81 (noting that after the inspectors left, North Korea began preparations to refuel).

<sup>24</sup> See Agreed Framework between the United States of America and the Democratic People's Republic of Korea, U.S.-N. Kor., art. I, Oct. 21, 1994, 34 I.L.M. 604 [hereinafter *Agreed Framework*] (stating that the U.S. would provide North Korea with a light-water reactor in exchange for North Korea freezing its graphite-moderated reactor); see also, THOMAS GRAHAM JR., *DISARMAMENT SKETCHES: THREE DECADES OF ARMS CONTROL AND INTERNATIONAL LAW* 235 (2002) (describing the goals of the Agreed Framework).

<sup>25</sup> See John S. Park, *Inside Multilateralism: The Six-Party Talks*, 28 WASH. Q. 75, 76 (2005) (discussing the discovery of North Korea's nuclear program and the United States' response).

supervising the freeze.<sup>26</sup> On January 10, 2003, North Korea officially withdrew from the NPT.<sup>27</sup>

The United States, China, South Korea, Japan, and Russia participated in the Six-Party Talks with North Korea in August 2003 in the hopes of negotiating an end to North Korea's nuclear program.<sup>28</sup> North Korea refused to attend the fourth round of talks in October 2004 because of the "hostile climate created by the US [sic]."<sup>29</sup> Although these talks continued into February 2007<sup>30</sup> and resulted in a statement in which the United States agreed to end trade sanctions in return for North Korea shutting down its nuclear program,<sup>31</sup> on April 5, 2009, North Korea conducted a satellite launch.<sup>32</sup> On April 14, 2009, after the United Nations Security Council vowed to expand sanctions on the country,<sup>33</sup> North Korea announced that it would "never again take part in such [six party] talks."<sup>34</sup>

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<sup>26</sup> See Perry, *supra* note 18, at 83–84 (outlining the events of the "fifth nuclear crisis" with North Korea in 2002).

<sup>27</sup> See *North Korea Leaves Nuclear Pact*, CNN.COM, Jan. 10, 2003, [http://articles.cnn.com/2003-01-10/world/nkorea.treaty\\_1\\_nuclear-weapons-nuclear-pact-nuclear-non-proliferation-treaty?s=PM:asiapcf](http://articles.cnn.com/2003-01-10/world/nkorea.treaty_1_nuclear-weapons-nuclear-pact-nuclear-non-proliferation-treaty?s=PM:asiapcf) (noting that "North Korea's announcement of its withdrawal from the NPT is largely symbolic, as it has . . . admitted to be secretly pursuing a nuclear weapons program").

<sup>28</sup> See Jayshree Bajoria, *The Six-Party Talks on North Korea's Nuclear Program*, COUNCIL ON FOREIGN RELATIONS, <http://www.cfr.org/publication/13593/> (last updated July 1, 2009) (describing, among other things, the objectives of the parties involved in the Six-Party Talks).

<sup>29</sup> *Korean Delegations Hold Bilateral Meeting Ahead of Six-Party Talks*, RIA NOVOSTI, July 24, 2005, <http://en.rian.ru/world/20050724/40963132.html>.

<sup>30</sup> See *Timeline: N. Korea Nuclear Dispute*, CNN, Feb. 13, 2007, <http://www.cnn.com/2005/WORLD/asiapcf/02/10/nkorea.timeline/> (stating that North Korea agreed to take the first steps towards nuclear disarmament on February 13, 2007).

<sup>31</sup> See Full Text of S. Korea-U.S. Summit Statement, KOR. TIMES, Apr. 20, 2008, [http://www.koreatimes.co.kr/www/news/nation/2008/04/116\\_22786.html](http://www.koreatimes.co.kr/www/news/nation/2008/04/116_22786.html) (providing the full text of the U.S./South Korea Summit Statement).

<sup>32</sup> See Sun-won Park, *Pyongyang Fails Again: North Korea's Third Missile Launch and Kim Jong-il's Miscalculation*, BROOKINGS (Apr. 6, 2009), [http://www.brookings.edu/opinions/2009/0406\\_north\\_korea\\_park.aspx](http://www.brookings.edu/opinions/2009/0406_north_korea_park.aspx) (discussing the failures that characterized the launch).

<sup>33</sup> See Geraldine Baum, *U.N. Security Council Condemns North Korea Launch*, L.A. TIMES (Apr. 14, 2009), <http://articles.latimes.com/2009/apr/14/world/fg-un-north-korea14> (describing the presidential statement issued by the Security Council which criticized the launch and agreed to tighten sanctions).

<sup>34</sup> Mark Landler, *North Korea Says It Will Halt Talks and Restart its Nuclear Program*, N.Y. TIMES, Apr. 15, 2009, at A5 (quoting North Korea's Foreign Ministry).

Thus far, North Korea has failed to fulfill any of its obligations under international treaties and agreements, which suggests that there are limitations to the enforcement mechanisms available and flaws in the agreements themselves. If the United States hopes to ensure its security, it must examine and address both of these structural weaknesses, as well as the motivations behind North Korea's eagerness to take advantage of them.

### 2.1. Weaknesses of Current Disarmament Treaties and Agreements

According to Article II of the NPT, non-nuclear states cannot attempt to obtain nuclear weapons or to manufacture their own.<sup>35</sup> The agreement only focuses on nuclear technology and makes no mention of the raw materials necessary to make nuclear weapons. North Korea could therefore use the "by-products which . . . provide base materials for nuclear weapons."<sup>36</sup> North Korea would therefore not be in violation of the NPT when it used the fissile material it supposedly produced while party to the agreement<sup>37</sup> to create a nuclear device after withdrawing from the NPT. The scope of the NPT is thus unnecessarily narrow because it restricts the international community's ability to respond to countries' clear attempts at obtaining nuclear weapons.<sup>38</sup>

Article IV, section 2 of the NPT states, "[a]ll the Parties to the Treaty undertake to facilitate and have the right to participate in the fullest possible exchange of equipment, materials and scientific and technological information for the peaceful uses of nuclear energy."<sup>39</sup> In other words, the NPT actually promotes the use and transfer of nuclear materials for peaceful purposes. By doing so, the NPT provides countries with an easy means of gaining the materials they need for nuclear weapons. Simply put, there exists an almost irresistible incentive to manipulate the system.

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<sup>35</sup> NPT, *supra* note 7, art. II.

<sup>36</sup> 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, 423 (1994).

<sup>37</sup> See SHARON SQUASSONI, CONG. RESEARCH SERV., RS 21391, NORTH KOREA'S NUCLEAR WEAPONS: LATEST DEVELOPMENTS 3-4 (2006) (implying that North Korea has been reprocessing materials since the early 1990s).

<sup>38</sup> See Matthew Rice, *NPT Review Conference Finds Consensus, Issues Document*, ARMS CONTROL TODAY, June 2000, available at [http://www.armscontrol.org/act/2000\\_06/nptjun](http://www.armscontrol.org/act/2000_06/nptjun) (suggesting that the narrow scope of the treaty is the result of broad compromises by nuclear-weapons states regarding disarmament).

<sup>39</sup> NPT, *supra* note 7, art. IV, para. 2.

Article X of the NPT states that, "Each Party shall [with three months notice and] in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events . . . have jeopardized the supreme interests of its country."<sup>40</sup> There is no intermediate body to ensure that a country's claim is indeed legitimate. Thus, a country can take advantage of all the privileges of being party to the NPT, and leave the treaty as soon as it no longer suits the country to be a member.<sup>41</sup>

Several of the provisions in the IAEA statute are similarly in need of redrafting. For example, to be held liable under Article XI of the statute, North Korea's suspect nuclear program must have "started out as an official IAEA project."<sup>42</sup> Article XII clearly states that the "rights and responsibilities" or agency safeguards listed in the statute apply only "[w]ith respect to any Agency project, or other arrangement where the Agency is requested by the parties concerned to apply safeguards."<sup>43</sup> Thus, if North Korea's nuclear weapons originated from facilities not controlled and maintained by the IAEA, it is difficult to find North Korea in violation of the IAEA statute.

Article XII, section A, and Article III, section D, of the IAEA Statute further highlight the inability of the statute to effectively enforce agency safeguards. Article III, section D, states that, "[s]ubject to the provisions of th[is] Statute . . . the activities of the Agency shall be carried out with due observance of the sovereign rights of States."<sup>44</sup> Although the phrasing of this provision appears to limit a state's "sovereign rights" to decisions not governed by the Statute, Article XII, section A, suggests otherwise. On its face, the Statute requires countries to allow monitoring by inspectors.<sup>45</sup> Article XII, section A, however, says that the IAEA may only send

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<sup>40</sup> *Id.* art. X, para. 1.

<sup>41</sup> See Erik Raines, *North Korea: Analyzing the "New" Nuclear Threat*, 12 CARDOZO J. INT'L & COMP. L. 349, 363 (2004) ("The language of the withdrawal provision is inherently weak . . . as it allows for withdrawing countries to subjectively determine what 'extraordinary events' have jeopardized its 'supreme interests.'").

<sup>42</sup> Matthew Liles, Comment, *Did Kim Jong-II Break the Law? A Case Study on How North Korea Highlights the Flaws of the Non-Proliferation Regime*, 33 N.C. J. INT'L L. & COM. REG. 103, 121 (2007).

<sup>43</sup> Statute of the International Atomic Energy Agency art. XII(A), July 29, 1957, 8.1 U.S.T. 1093, 276 U.N.T.S. 3 [hereinafter IAEA Statute].

<sup>44</sup> *Id.* art. III(D).

<sup>45</sup> See *id.* art. XII(A)(6) (describing the Agency's right to send inspectors into recipient states).

inspectors into a country after consultation with “the State or States concerned.”<sup>46</sup> North Korea’s past and present actions demonstrate that, if given the choice, North Korea (like all countries) will always choose to honor its personal goals over its international commitments. Though respect for state sovereignty is an important principle in international law, lawmakers need to find a better balance between respecting states’ interests and protecting the international community. The international community therefore needs to make nuclear disarmament in North Korea’s best interest if it hopes to capitalize upon the nation’s proclivity towards basing decisions solely on its own interests. This can be accomplished by offering economic aid or increased trade for complying with disarmament treaties.

The Agreed Framework of 1994 lacks clarity and therefore allows for manipulation by states. Article IV required North Korea to remain in the NPT<sup>47</sup> and also to comply with IAEA Safeguards after “a significant portion of the LWR [light water reactor] project [was] completed.”<sup>48</sup> The agreement also required the United States to “make *best efforts* to secure the conclusion of a supply contract with the DPRK within six months.”<sup>49</sup> While North Korea was never really put in the position to deliver on its promise because of the United States’ failure to implement many of the provisions in the agreement,<sup>50</sup> there would have likely been conflicts over what constituted “a significant portion” of the project and there likely *were* disagreements over what constituted a “best effort” in securing the supply contract.<sup>51</sup> The Agreed Framework’s weakness also lies in its lack of implementation plans. For instance, when discussing the project’s financing, the agreement states: “The U.S. will organize . . . an international consortium to

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<sup>46</sup> *Id.*

<sup>47</sup> See Agreed Framework, *supra* note 24, art. IV(1) (specifying North Korea’s duty to remain a party to the Treaty on the Non-Proliferation of Nuclear Weapons).

<sup>48</sup> *Id.* art. IV(2)-(3) (emphasis added).

<sup>49</sup> *Id.* art. I(1) (emphasis added).

<sup>50</sup> See *Stalemated LWR Project to Prompt Pyongyang to Restart N-Program*, PEOPLE’S KOREA, [http://www1.korea-np.co.jp/pk/042nd\\_issue/98051302.htm](http://www1.korea-np.co.jp/pk/042nd_issue/98051302.htm) (last visited Feb. 21, 2011) (discussing the conflicts arising from the United States’ failure to install civilian nuclear light reactors); see also Selig S. Harrison, *Time to Leave Korea?*, FOREIGN AFF., Mar.-Apr. 2001, at 62, 63 (describing the United States’ failure to phase out economic sanctions because of congressional opposition).

<sup>51</sup> Agreed Framework, *supra* note 24, art. I(1), IV(3).

finance and supply the LWR project to be provided to the DPRK.”<sup>52</sup> There was neither specification as to how much money was required of the United States (or who in the United States was to provide this financing<sup>53</sup>), nor was there clarification regarding how international funding would be solicited.

Perhaps the biggest weakness of the Agreed Framework lies in its narrow scope: it only applies to the “5MW(e) reactor, the Radiochemical Laboratory . . . the fuel fabrication plant and the partially built 50 and 200MW(e) nuclear power plants.”<sup>54</sup> If North Korea manufactured weapons or reprocessed fuel in facilities other than those specified, it would not be liable under the agreement.

While the North-South Joint Declaration provides a clear vision of its objectives, it does not provide for a means of adjudication, enforcement, or penalties.<sup>55</sup> Without any compliance mechanisms in place, South Korea was left to take whatever it could get from a defiant North Korea.<sup>56</sup> Another weakness of the Joint Declaration lies in its verification system. Inspections are only permitted on “objects chosen” by the side being examined, and must first be approved by both sides;<sup>57</sup> inspections are not an “inherent right of the requesting side.”<sup>58</sup> North Korea’s repeated refusals to allow inspections would therefore be permissible under this agreement.

Because many of the disarmament agreements in place require the cooperation of North Korea, it is not only important that the United States strengthen the authority of these agreements, but it is also imperative that the United States abandon its hostile policy towards North Korea so as to make North Korea more willing to comply.

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<sup>52</sup> *Id.* art. I(1).

<sup>53</sup> See Interview by PBS with William Perry, U.S. Sec. of Def. from 1994–1997 (Feb. 26, 2003), <http://www.pbs.org/wgbh/pages/frontline/shows/kim/interviews/perry.html> (describing how, initially, the project was financed by the U.S. Department of Defense emergency funds not under Congressional control).

<sup>54</sup> *IAEA Factsheet*, *supra* note 11.

<sup>55</sup> See North-South Joint Declaration, *supra* note 21 (detailing the terms of the agreement to denuclearize North and South Korea).

<sup>56</sup> See PETER HAYES & MICHAEL HAMEL-GREEN, *THE PATH NOT TAKEN, THE WAY STILL OPEN: DENUCLEARIZING THE KOREAN PENINSULA AND NORTHEAST ASIA* 16 (2009), available at <http://gc.nautilus.org/Nautilus/australia/apsnet/reports/2009/hayes-hamel-green.pdf> (reporting that South Korea “reverted to a small number of annual inspections with advance warning—an almost meaningless inspection arrangement”).

<sup>57</sup> North-South Joint Declaration, *supra* note 21, art. IV.

<sup>58</sup> HAYES & HAMEL-GREEN, *supra* note 56, at 16.

### 3. WEAKNESSES OF INTERNATIONAL LAW

Even if North Korea is found in breach of these agreements and treaties, it is not clear whether the remaining parties have any means of gaining justice through international law. An advisory opinion issued by the International Court of Justice ("ICJ") held that the "threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law."<sup>59</sup>

One could claim that the ICJ may not have jurisdiction over the trials that occurred on April 5, 2009, and July 4, 2009,<sup>60</sup> because these were *tests* of weapons, not actual uses of them in armed conflict. Furthermore, although the ICJ has acknowledged that the possession of nuclear weapons "may indeed justify an inference of preparedness to use them,"<sup>61</sup> and may therefore constitute an actionable "threat," it is unclear whether this is indeed the case for North Korea. North Korea has represented that it only intends to use its missiles in self-defense.<sup>62</sup> There is therefore no real "threat" at issue here, because there is neither a sense of immediacy nor an identifiable target.

The ICJ does not even support the contention that the possession of nuclear weapons is illegal because of the existence of treaties like the NPT wherein nuclear-weapon States offer security assurances to non-nuclear weapon States.<sup>63</sup> The fact that nuclear-weapon States are permitted to keep their weaponry and, even use it in particular circumstances, proves that "[t]here is in neither customary nor conventional international law any comprehensive

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<sup>59</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, para. 105(2)(E) (July 8).

<sup>60</sup> See *North Korea Missile Tests Defy UN*, BBC NEWS, July 4, 2009, <http://news.bbc.co.uk/2/hi/8134115.stm> (reporting on North Korea's most recent nuclear tests which involved the firing of a series of missiles into the Sea of Japan).

<sup>61</sup> Legality of the Threat or Use of Nuclear Weapons, *supra* note 59, para. 48.

<sup>62</sup> See Richard Sisk, *World Trembles as Despot Goes Ballistic. North Korea Unleashes Blast and Could Hit Button on a Second*, DAILY NEWS, Oct. 10, 2006, at 7 (quoting Pak Gil Yon, a North Korean diplomat, as saying that nuclear tests afford his country a "defense capability").

<sup>63</sup> See Legality of the Threat or Use of Nuclear Weapons, *supra* note 59, para. 59(c) (discussing assurances made by the United States, United Kingdom, and USSR to assist non-nuclear weapon states that are the victims of nuclear weapons).

and universal prohibition of the threat or use of nuclear weapons as such.”<sup>64</sup> As evidenced in the aforementioned paragraph, the ICJ was only willing to acknowledge that these actions are generally contrary to the rules of international law, and was quick to concede that their threat and use may be permissible in “extreme circumstance[s] of self-defence.”<sup>65</sup>

The Martens Clause is a part of the laws of armed conflict and is subject to a variety of interpretations.<sup>66</sup> At its most restricted reading, the Clause states that customary international law, those unwritten aspects of international law that derive from convention, continues to apply after the adoption of a treaty.<sup>67</sup> Under a wider interpretation, the Clause provides that things that are not explicitly prohibited by a treaty are not ipso facto permitted.<sup>68</sup> If the aforementioned ICJ opinion is indeed a summation and consensus of the general practice of states, then under the Martens Clause, Korea is not liable for the possession or testing of nuclear weapons—a practice found in countries like the United States<sup>69</sup> and France.<sup>70</sup> Furthermore, even if North Korea were found in violation of a provision of the ICJ advisory opinion, the very status of the document as such makes it non-binding.<sup>71</sup> Advisory opinions are only binding after they are ratified or incorporated

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<sup>64</sup> *Id.* para. 105(2)(B) (noting the abovementioned conclusion by an 11-3 vote).

<sup>65</sup> *Id.* at 263.

<sup>66</sup> See Rupert Ticehurst, *The Martens Clause and the Laws of Armed Conflict*, 317 INT’L REV. OF THE RED CROSS 125, 126 (1997) (describing various interpretations of the Martens Clause and how it has been used historically in international law).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> See *Gallery of U.S. Nuclear Tests*, NUCLEAR WEAPON ARCHIVE, <http://nuclearweaponarchive.org/Usa/Tests/> (last updated Feb. 6, 2001) (discussing the high number of nuclear tests the United States has conducted by revealing that “1054 nuclear tests” were recorded “[b]etween 16 July 1945 and 23 September 1992”).

<sup>70</sup> See Fifteenth Anniversary of France's Last Nuclear Test, CTBTO Preparatory Comm'n (Jan. 27, 2011), <http://www.ctbto.org/press-centre/highlights/2011/fifteenth-anniversaryof-frances-last-nuclear-test/> (noting that France has carried out 210 nuclear tests, the last of which took place on January 27, 1996).

<sup>71</sup> See SHABTAI ROSENNE, *THE WORLD COURT: WHAT IT IS AND HOW IT WORKS* 83–84 (5th ed. 1995) (detailing that although a state can be a party to a statute and therefore qualified to be a party to litigation, jurisdiction is not necessarily conferred to the Court).

into a separate agreement,<sup>72</sup> and this has not yet been accomplished in North Korea.

Although one would believe North Korea could be held liable under the principle of good faith for its numerous nuclear transgressions, the rule is too expansive to limit the country. It holds that, once a state makes a promise, it has the duty to fulfill it so that "interested States may . . . place confidence in them."<sup>73</sup> Furthermore, "an international obligation assumed by unilateral declaration" is "binding;"<sup>74</sup> in other words, when a state agent makes a declaration and thereby creates a reasonable reliance from others that it will meet its promise, it is obliged to deliver on it. Although this appears to be a reasonable safeguard against empty promises by world leaders, it offers them the opportunity to escape *existing* international obligations simply by making new declarations. It is not clear, therefore, whether North Korea violated the 1994 Agreed Framework and, by extension, the principle of good faith when it announced it would restart its plutonium production in December 2002.<sup>75</sup> On the one hand, Korea has a duty to follow through on its commitment to freeze its nuclear program. On the other hand, however, Korea created a competing obligation to unfreeze the program through its unilateral declaration.

The IAEA is similar to a United States government agency in the sense that it "must look elsewhere to enforce its determinations."<sup>76</sup> It may only suspend the "privileges and rights of membership"<sup>77</sup> of noncompliant members and must look to the I.C.J.,<sup>78</sup> the United Nations General Assembly, or the Security

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<sup>72</sup> See *How the Court Works*, INT'L COURT OF JUSTICE, <http://www.icj-cij.org/court/index.php?p1=1&p2=6> (last visited Feb. 20, 2011) (revealing that a state must consent to the jurisdiction of the Court in order for the decision to be binding).

<sup>73</sup> Nuclear Tests Case (N.Z. v. Fr.), 1974 I.C.J. 457, 473 (Dec. 20).

<sup>74</sup> *Id.*

<sup>75</sup> See Benjamin Friedman, *Fact Sheet: North Korea's Nuclear Weapons Program*, CTR. FOR DEF. INFO., <http://www.cdi.org/nuclear/nk-fact-sheet.cfm> (last updated Jan. 23, 2003) (recounting the history of North Korea's nuclear weapons program).

<sup>76</sup> Liles, *supra* note 42, at 135.

<sup>77</sup> IAEA Statute, *supra* note 43, art. XII(C).

<sup>78</sup> See *id.* art. XVII(A) (declaring that the International Court of Justice will review disputes over the "interpretation or application" of the statute that are not settled by negotiation).

Council for actual enforcement.<sup>79</sup> North Korea therefore has little reason to respect or obey a group with so little power itself.

With respect to North Korea, the problem with the Security Council lies in the right of member states to challenge council decisions.<sup>80</sup> Under international law, “a state has a right to challenge the validity of acts of international organizations” (i.e. the Security Council) both during and following the “decision-making process.”<sup>81</sup> If countries can question the legality of Security Council decisions, it is difficult to draw the line between this right to challenge resolutions and the competing duty to comply with Security Council decisions. This escape clause functions as yet another way North Korea can ignore its international disarmament obligations.

The weaknesses of both the treaties and the enforcement mechanisms currently in place suggest that the United States cannot disarm North Korea solely through legal means. The United States must use the extralegal tools of diplomacy and respect if it hopes to accomplish its goal.

#### 4. THE SIX-PARTY NUCLEAR TALKS AS A MODEL OF THE UNITED STATES' INEFFECTIVE APPROACH TO DIPLOMATIC NEGOTIATIONS UNDER THE BUSH ADMINISTRATION

In order to resolve the nuclear threat posed by North Korea, the United States must resume diplomatic negotiations through a process similar to the Six-Party Talks that occurred from 2003 to 2007. These talks will only be successful, however, if the United States abandons its hostile approach and makes a concerted effort to be cooperative and respectful. This will allow for the drafting of improved treaties and agreements and, more importantly, it may make North Korea more committed to honoring its promises of disarmament.

On December 12, 2002, North Korea stated that its decision to “refreeze” its nuclear program depended “entirely . . . on the

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<sup>79</sup> See *id.* art. III(B)(4) (providing further enforcement options through the Security Council because of its status as the “organ bearing the main responsibility for the maintenance of international peace and security”).

<sup>80</sup> See DAVID SCHWEIGMAN, *THE AUTHORITY OF THE SECURITY COUNCIL UNDER CHAPTER VII OF THE UN CHARTER* 206 (2001) (discussing the remedies available to member states who challenge council decisions).

<sup>81</sup> *Id.* at 207.

attitude" of the United States.<sup>82</sup> The "attitude" of the United States during this time, however, was one of antagonism and disrespect. For instance, in his 2002 State of the Union address, Bush categorized North Korea as a part of the "Axis of Evil," prompting the North Korea Foreign Ministry to describe the act as "little short of declaring a war against" the country.<sup>83</sup> On February 5, 2003, then Secretary of Defense Donald Rumsfeld described North Korea as a "terrorist regime" that had the capability of selling nuclear weapons technology and materials to terrorists and rogue nations.<sup>84</sup> This statement only resulted in apologies from senior administration officials and angered North Korea,<sup>85</sup> likely contributing to a delay in the commencement of the Six-Party Talks. As inconsequential as comments and "attitudes" may seem, they play an important role in affecting U.S.-North Korean diplomatic relations. Broad characterizations do not appear to accomplish anything but increased hostility and should therefore be kept to a minimum to facilitate successful future negotiations.

Another obstacle that continually stands in the way of U.S.-North Korea negotiations are the preconditions these countries established both prior to and convening at the bargaining table. During the Three-Party Talks that occurred between April 23 and April 25 in 2003, for example, North Korea proposed to suspend its nuclear program in exchange for energy and aid.<sup>86</sup> The U.S., however, insisted that it would meet North Korea's demands only after it "scrap[ped] its nuclear program."<sup>87</sup> It went on to demand North Korea's "complete[], verifiabl[e] and irreversibl[e]"

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<sup>82</sup> Paul Kerr, *North Korea Quits NPT, Says It Will Restart Nuclear Facilities*, ARMS CONTROL TODAY, Jan.-Feb. 2003, available at <http://www.armscontrol.org/print/1195>.

<sup>83</sup> *Bush's 'Evil Axis' Comment Stirs Critics*, BBC NEWS, Feb. 2, 2002, <http://news.bbc.co.uk/2/hi/americas/1796034.stm>.

<sup>84</sup> James Dao, *Bush Administration Defends Its Approach on North Korea*, N.Y. TIMES, Feb. 7, 2003, at A13.

<sup>85</sup> See *id.* (describing North Korea's negative response to Rumsfeld's statement).

<sup>86</sup> See generally *Pyongyang Allegedly Hints Nuclear Possession at "3-Party Talks"; Makes "New Bold Proposal"*, PEOPLE'S KOREA, [http://www1.korea-np.co.jp/pk/191th\\_issue/2003042601.htm](http://www1.korea-np.co.jp/pk/191th_issue/2003042601.htm) (discussing the details of the Three Party Talks).

<sup>87</sup> *Id.*

disarmament as a precondition to any future talks.<sup>88</sup> This resulted in a stalemate that was only broken after China served as a mediator to bring the two parties together for the first round of the Six-Party talks on August 27–29, 2003.<sup>89</sup>

Again, there was no progress in negotiations, as the United States demanded that North Korea end its nuclear programs before it would offer economic assistance and diplomatic normalization, while North Korea insisted that the U.S. first offer security guarantees.<sup>90</sup> Therefore, to ensure that future negotiations are successful, both parties need to approach the bargaining table without preconditions and with a willingness to compromise. No country can be expected to jeopardize the safety of its citizens and make itself vulnerable to attack based on another country's promise. If it is indeed the case that North Korea "can never accept" the demand that it drop its nuclear program first,<sup>91</sup> the most reasonable approach would allow for the two countries to begin efforts simultaneously, instead of chronologically.<sup>92</sup>

This diplomatic policy of compromise should extend to the types of negotiations the United States is willing to enter. North Korea has consistently insisted on its dislike of multilateral negotiations and its desire to conduct direct negotiations with the United States.<sup>93</sup> Despite this fact, the United States has consistently

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<sup>88</sup> *U.S. Urged to Accept DPRK-Proposed Simultaneous Package Solution*, KOREAN CENT. NEWS AGENCY, Dec. 15, 2003, <http://www.kcna.co.jp/item/2003/200312/news12/16.htm>.

<sup>89</sup> *See generally* Tae-Hwan Kwak, *The Six-Party Nuclear Talks: An Evaluation and Policy Recommendations*, Remarks at the 45th Annual Convention of the International Studies Association 6 (Mar. 17, 2004) (unpublished paper, on file with Eastern Kentucky University) (analyzing the origin of the Korean nuclear crisis, evaluating the six-party talk as an effective framework for resolving the nuclear issue, and providing recommendations for resolving the North Korean nuclear issue).

<sup>90</sup> *See id.* at 6–7 (discussing the interactions between each member of the Six-Party Talks).

<sup>91</sup> *U.S. Urged to Accept Simultaneous Action and Package Solution*, KOREAN CENT. NEWS AGENCY, Dec. 1, 2003, <http://www.kcna.co.jp/item/2003/200312/news12/02.htm>.

<sup>92</sup> *See generally, Keynote Speeches Made at Six-Way Talks*, KOREAN CENT. NEWS AGENCY, Aug. 29, 2003, <http://www.kcna.co.jp/item/2003/200308/news08/30.htm> (outlining North Korea's proposal for a package solution and the principle of simultaneous actions).

<sup>93</sup> *See* Ed Henry et al., *N. Korea Feels 'Owed' Direct Talks With U.S.*, *Richardson Says*, CNN, Aug. 19, 2009, <http://www.cnn.com/2009/POLITICS/08/19/us.north.korea.richardson/index.html?iref=allsearch> ("North Korea believes it's owed bilateral talks with the United States after the communist government

forced North Korea to negotiate within a multilateral framework.<sup>94</sup> Only recently, this policy led North Korea to vow “never again [to] take part in” the Six Party Talks in response to a U.S.-backed UN Security Council resolution condemning its April 5, 2009 satellite launch.<sup>95</sup> Although “internationaliz[ing]”<sup>96</sup> the nuclear issue is considered a key protection for the international community, the United States should take any opportunity to negotiate with North Korea. If North Korea believed in the process leading to a future agreement, it might be far more likely comply with the ultimate agreement.

Overall, the United States must abandon its hard-line policy of inflexibility if it hopes to bring about North Korea’s disarmament. Chinese Vice Minister Wang Yi put it best when he said, “the main problem we are facing” is not North Korean, but U.S. policy.<sup>97</sup>

While it is important that the United States does not make concessions that endanger its interests, it should adopt a diplomatic policy that allows for the assignment of compensation. By offering incentives for North Korea to dismantle its nuclear program, the United States provides “a face-saving way” for North Korea’s President to achieve the disarmament of his country.<sup>98</sup> The United States should not view concessions as “reward[s],” but should rather view them as an essential means to gaining North

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released two detained American journalists . . . .”); *Gov. Bill Richardson on North Korea’s Nuclear Weapons*, REAL CLEAR POLITICS (Aug. 19, 2009), [http://www.realclearpolitics.com/articles/2009/08/19/gov\\_bill\\_richardson\\_on\\_north\\_koreas\\_nukes\\_97971.html](http://www.realclearpolitics.com/articles/2009/08/19/gov_bill_richardson_on_north_koreas_nukes_97971.html) (“[T]he issue is should that dialogue be in the context of the six-party talks which the United States wants with the other Asian countries or bilaterally as the North Koreans want, directly U.S./North Korea.”); *N. Korea for No-War Pact with USA*, TRIBUNE INDIA, Jan. 31, 2003, <http://www.tribuneindia.com/2003/20030201/world.htm#5> (“We are not only opposed to any attempt to internationalise the nuclear issue on the Korean peninsula but also we will never participate in any form of multilateral talks.”) (quoting North Korea’s ambassador in Beijing).

<sup>94</sup> See Kwak, *supra* note 89, at 5 (“The U.S. has insisted that the North Korean nuclear crisis be resolved . . . within a multilateral framework, through the United Nations.”).

<sup>95</sup> Landler, *supra* note 34.

<sup>96</sup> See Kwak, *supra* note 90, at 5 (noting that North Korea “wants direct negotiations with the U.S. on the nuclear issue”).

<sup>97</sup> Glenn Kessler, *U.S. Has a Shifting Script on N. Korea*, WASH. POST, Dec. 7, 2003, at A25.

<sup>98</sup> See Kwak, *supra* note 89, at 12 (discussing President Roh Moo Hyun’s suggestion to offer North Korea incentives for disarming its nuclear program so that North Korea’s President might save face).

Korea's trust and respect.<sup>99</sup> It is only fair, for instance, that "as the U.S. urges [North Korea] to dismantle its nuclear weapons completely, verifiably and irreversibly, the latter has the same right to demand the U.S., the dialogue partner, give it complete, verifiable, and irreversible security assurances."<sup>100</sup>

The United States cannot expect North Korea to dismantle its nuclear program without seeing any action on the United States' part until completion. While these incentives may involve costly expenditures, like providing energy assistance in the form of oil, they may provide the key to achieving North Korea's complete disarmament. North Korean leaders will simply be more likely to compromise and comply with agreements if they believe they are being treated fairly.

The United States' "hostile" diplomatic policy towards North Korea is most evident in the unreceptive and inhospitable mannerisms of its leaders and representatives. In the end, this approach only frustrates both United States and North Korean goals. The North Korean Vice Foreign Minister Kim Kye-Gwan, for instance, blamed the inconclusive results of the Six-Party Talks in April and August 2003 on "U.S. hostile policies toward North Korea."<sup>101</sup> In fact, he commented on the discourteousness of the U.S. chief delegate,<sup>102</sup> saying that "the settlement of the nuclear issue [would] depend entirely upon [a] change in the U.S. attitude."<sup>103</sup> This hostile attitude again frustrated United States objectives in 2004, when President Bush sent a curt directive to the U.S. delegation at the second round of the Six-Party Talks to make it clear that "the administration's patience in diplomatically seeking North Korea's dismantling of its weapons program could run out."<sup>104</sup> This actually stopped the discussions the six parties

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<sup>99</sup> See *U.S. Urged to Accept DPRK-Proposed Simultaneous Package Resolution*, *supra* note 88 (analyzing shortcomings in the U.S.-North Korea nuclear disarmament talks, and suggesting that the United States not view incentives to North Korea as rewards, but rather as assurances of good faith).

<sup>100</sup> *Id.*

<sup>101</sup> Kwak, *supra* note 89, at 16.

<sup>102</sup> *DPRK Foreign Ministry Spokesman on Six-Way Talks*, KOR. CENT. NEWS AGENCY, Feb. 29, 2004, available at <http://www.nautilus.org/publications/books/dprkbb/multilateralTalks/DPRKSixwayTalks.html/> (saying that the U.S. chief delegate, "only read the prepared script without stammering and showed no sincerity, giving no answer even to the questions raised").

<sup>103</sup> *Id.*

<sup>104</sup> Glenn Kessler, *Bush Signals Patience on North Korea is Waning*, WASH. POST, Mar. 4, 2004, at A14.

were having on a joint statement for finally settling the nuclear dispute, resulting in an empty reconfirmation of the parties' commitment to denuclearizing North Korea and a delay in resolving important issues.<sup>105</sup> To achieve any kind of headway in this nuclear debate, leaders and representatives of the U.S. must therefore abandon their arrogance in favor of humility and respect.

5. CONCLUSION: CREATIVE DIPLOMACY AS AN EFFECTIVE MEANS OF DISARMAMENT

The United States should abandon its hostile diplomatic policy in favor of statecraft, or creative diplomacy. This is "the art of developing an effective geopolitical strategy and executing it through the intelligent use of all appropriate instruments of power."<sup>106</sup> Statecraft challenges contemporary notions of diplomacy that consider mediation initiatives and sustained diplomatic campaigns as ineffective and overly accommodating means of foreign policy. Statecraft does not abandon war and coercion as legitimate means of diplomacy, it only advocates that countries use "hard power *intelligently*, recognizing both its potential and its limits."<sup>107</sup> The Bush administration did not recognize the "limits" of its hostile foreign policy, allowing it to undermine its goals abroad.

Two of the most important aspects of statecraft involve having "clearly defined objectives and policy consensus within government . . . [and] accurate, realistic assessments of obstacles and of the resources required to overcome them."<sup>108</sup> The Obama administration needs to approach future negotiations with North Korea with a realistic and detailed plan for its disarmament. In order to avoid the financial and political obstacles that prevented

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<sup>105</sup> See Kwak, *supra* note 89.

Bush's directive essentially halted the discussions on the detailed statement. China instead began to prepare for a bland statement that would commit the parties to continuing the talks at a later date. But that effort failed as well after last-minute demands by North Korea delayed the closing ceremony for several hours. In the end, the parties downgraded their communiqué to a 'chairman's statement.

*Id.* at 18.

<sup>106</sup> Chester A. Crocker, *The Art of Peace: Bringing Diplomacy Back to Washington*, FOREIGN AFF., July–Aug. 2007, at 160, 161 (reviewing DENNIS ROSS, STATECRAFT: AND HOW TO RESTORE AMERICA'S STANDING IN THE WORLD (2007)).

<sup>107</sup> *Id.* (emphasis added).

<sup>108</sup> *Id.*

the successful implementation of the Agreed Framework of 1994, this administration needs to garner sufficient intra-governmental support before it becomes involved in any future disarmament negotiations. Most importantly, it needs to have a clear sense of what it is trying to accomplish: the complete disarmament of North Korea (as proposed during the Three-Party Talks in 2003), or the establishment of a controlled and heavily monitored nuclear weapon state (as permitted in the NPT).

A “realistic assessment[] of [the] obstacles and of the resources required” to effect North Korea’s successful disarmament involves acknowledging that North Korea may not want to negotiate or comply with its agreements if it is not offered concessions.<sup>109</sup> It also involves acknowledging that our hostile, and often discourteous, actions and attitudes have continually served as a major obstacle to successful negotiations with North Korea. In the end, the only way we will get North Korea to comply with international agreements and international law is by working cooperatively and fairly alongside North Korea—North Koreans will only obey and respect laws they themselves helped craft.

5.1. *From Bush to Obama: The United States’ Renewed Commitment to Creative Diplomacy*

The United States’ latest use of creative diplomacy, and the relative success of this approach, is best illustrated by the events surrounding the imprisonment of American journalists, Laura Ling and Euna Lee. In June 2009, the North Korean government sentenced these journalists to twelve years of hard labor for illegally entering North Korean territory.<sup>110</sup> The North Korean government pardoned the women after former President Bill Clinton met with Kim Jong Il in North Korea and, in the words of the North Korean state media, “apologized”<sup>111</sup> for the women’s actions. Although the White House and the State Department have repeatedly insisted that Mr. Clinton was on a “private

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<sup>109</sup> *Id.*

<sup>110</sup> See Glenn Kessler, *N. Korea Releases U.S. Journalists*, WASH. POST, Aug. 5, 2009, at A1 (discussing the pardon that North Korea issued to two detained American journalists after Bill Clinton met with Kim Jong Il).

<sup>111</sup> See Mark Landler & Peter Baker, *Clinton Secures 2 Pardons; All 3 Leave North Korea*, N.Y. TIMES, Aug. 5, 2009, at A1 (describing the roles of Bill and Hillary Clinton in the release of the journalists).

humanitarian mission,"<sup>112</sup> several factors suggest that the trip was indeed conducted on the Obama administration's behalf.<sup>113</sup> If Clinton's trip was indeed a diplomatic move, it appears to have been very artfully conducted to win the respect and cooperation of North Korea's Kim Jong II. According to the Korean Central News Agency, Clinton's apology was "sincere" and his manner was "courteous."<sup>114</sup>

This courteous attitude was likely adopted as a means of remedying the fallout that occurred just two weeks earlier when Secretary of State Hillary Clinton compared North Korea's nuclear test and missile launchings to the behavior of an "attention-seeking teenager."<sup>115</sup> In response to Clinton's statement, the North Koreans only rejoined with further insults: "Mrs. Clinton [is] . . . unaware of the elementary etiquette in the international community [and] . . . [s]ometimes she looks like a primary schoolgirl and sometimes a pensioner going shopping."<sup>116</sup> The

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<sup>112</sup> Kessler, *supra* note 110.

<sup>113</sup> See John R. Bolton, Op.-Ed., *Clinton's Unwise Trip to North Korea*, WASH. POST, Aug. 4, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/04/AR2009080401486.html> (claiming that "it seems that the Obama administration not only chose to negotiate, but to send a former president to do so."); Darren Lenard Hutchinson, "Private" Diplomacy: Following Clinton Visit, *North Korea Pardons U.S. Journalists*, DISSENTING JUSTICE (Aug. 4, 2009, 9:25 PM), <http://dissentingjustice.blogspot.com/2009/08/private-diplomacy-following-clinton.html> (asserting that "[g]iven Clinton's status as a former president and Hillary Clinton's status as the current Secretary of State (not to mention the strained relations between the United States and North Korea), his visit definitely has diplomatic overtones, and it was possibly designed for that purpose."); Jack Tapper, *Former US Envoy to North Korea Ambassador Jack Pritchard: "They Needed a Prop. This Was the Prop,"* ABC NEWS (Aug. 5, 2009, 5:31 PM), <http://blogs.abcnews.com/politicalpunch/2009/08/former-us-envoy-to-north-korea-ambassador-jack-pritchard-they-needed-a-prop-this-was-the-prop.html> (quoting Pritchard, former US Ambassador to North Korea: "it's not a personal mission . . . clearly the administration wanted to insulate themselves. They wanted in the public's and particularly in the North Koreans' mind for this to be seen a [sic] separate issue other than the nuclear issue that's going on."); see also Landler & Baker, *supra* note 111 (stating that the initiative "came after weeks of back-channel talks between the United States and North Korea through its United Nations mission").

<sup>114</sup> See Kessler, *supra* note 110 (reporting that "Clinton expressed words of sincere apology to Kim Jong II for the hostile acts committed by the two American journalists.")

<sup>115</sup> Landler & Baker, *supra* note 111.

<sup>116</sup> Mark Landler, *Clinton and North Korea Engage in Tense Exchange*, N.Y. TIMES, July 24, 2009, at A10 (describing the "acrimonious exchange[s]" between Hillary Clinton and Kim Jong II).

North Korean's focus on Mrs. Clinton's lack of "etiquette" points to the importance of good manners in successful international relations. This exchange clearly frustrated America's efforts at disarming North Korea, as the majority of the banter occurred during a meeting of the Association of Southeast Asian Nations, and it thereby overshadowed and "competed for attention with Mrs. Clinton's campaign to marshal worldwide pressure on the North Koreans to dismantle their nuclear weapons program."<sup>117</sup> The North Korean's ill will was most evident when they reiterated at a news conference on the same day that they "would never return to multiparty talks."<sup>118</sup>

In changing its approach to North Korea, the United States clearly made an "accurate, realistic assessment[] of [the] obstacles"<sup>119</sup> posed by these hostile confrontations with North Korea. King Jong II could never oblige a country whose leaders publicly hurl humiliating insults at him without losing the respect of his own people. The United States clearly realized this, as Mrs. Clinton "moderated her tone with regard to the case, moving from declaring in June that the charges [against the journalists] were 'absolutely without merit or foundation' to saying [in July] that the journalists 'are deeply regretful, and we are very sorry it's happened.'"<sup>120</sup>

The importance of civility and respect in the international relations arena is further evidenced by the fact that, for Kim Jong II, the freeing and pardoning of the women was a "reciprocal humanitarian gesture" in response to Mr. Clinton's decision during his presidency to send Mr. Kim a letter of condolence on the death of his father.<sup>121</sup> Clearly, the past and present approaches exhibited by Mr. Clinton were instrumental in securing the freedom of these American journalists.

The international community has taken note of President Obama's embrace of creative diplomacy, as he was recently awarded the 2009 Nobel Peace Prize for his "extraordinary efforts to strengthen international diplomacy and cooperation between

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> See Crocker, *supra* note 106 (arguing that a deeper understanding of the interplay between diplomacy, strategy, and power is essential to successful U.S. foreign relations).

<sup>120</sup> Kessler, *supra* note 110.

<sup>121</sup> Landler & Baker, *supra* note 111.

peoples.”<sup>122</sup> In describing its decision to award Obama, the Norwegian Nobel Committee noted that “[m]ultilateral diplomacy has regained a central position, with emphasis on the role that the United Nations and other international institutions can play. Dialogue and negotiations are preferred as instruments for resolving even the most difficult international conflicts.”<sup>123</sup>

Multilateralism is defined as “any system associating several states which are united by equal and mutual obligations, by common rules.”<sup>124</sup> Former President George W. Bush was heavily criticized during his presidency for “an excessive reliance on unilateral action and U.S. military power.”<sup>125</sup> The Committee therefore awarded President Obama the Nobel Prize in hopes that it would encourage the president to continue utilizing international institutions as a means of seeking cooperation and compromise with other countries.

Since being awarded the Nobel Prize, President Obama has delivered on his promise to utilize less hostile tactics in the United State’s international affairs. In April 2009, President Obama issued a call for the creation of a summit that would address the problem of nuclear terrorism by “bolstering international cooperation and improving security for nuclear materials worldwide.”<sup>126</sup> Last April in Washington, D.C., the Global Nuclear Security Summit brought over forty nations and several international organizations together to discuss “the nature of the threat and develop steps that can be taken *together* to secure vulnerable materials, combat nuclear

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<sup>122</sup> *Obama: Nobel Peace Prize is “Call to Action”*, CNN WORLD (Oct. 9, 2009), [http://articles.cnn.com/2009-10-09/world/nobel.peace.prize\\_1\\_norwegian-nobel-committee-international-diplomacy-and-cooperation-nuclear-weapons?s=PM:WORLD](http://articles.cnn.com/2009-10-09/world/nobel.peace.prize_1_norwegian-nobel-committee-international-diplomacy-and-cooperation-nuclear-weapons?s=PM:WORLD).

<sup>123</sup> Press Release, Norwegian Nobel Committee, The Nobel Peace Prize for 2009 (Oct. 9, 2009), available at [http://nobelprize.org/nobel\\_prizes/peace/laureates/2009/press.html](http://nobelprize.org/nobel_prizes/peace/laureates/2009/press.html).

<sup>124</sup> Philippe Moreau Defarges, *Le Multilatéralisme et la Fin de l’Histoire*, 3 POLITIQUE ÉTRANGÈRE 575, 576 (2004) (Gregory Elliott trans.), [http://www.diplomatie.gouv.fr/fr/IMG/pdf/0104Moreau\\_Defarges\\_gb.pdf](http://www.diplomatie.gouv.fr/fr/IMG/pdf/0104Moreau_Defarges_gb.pdf).

<sup>125</sup> *Obama: Nobel Peace Prize is “Call to Action”*, *supra* note 122.

<sup>126</sup> John Isaacs & Leonor Tomero, *Fact Sheet: 2010 Global Nuclear Security Summit*, CTR. FOR ARMS CONTROL AND NON-PROLIFERATION (Dec. 9, 2009), [http://www.armscontrolcenter.org/policy/nuclearweapons/articles/120909\\_global\\_nuclear\\_security\\_summit/](http://www.armscontrolcenter.org/policy/nuclearweapons/articles/120909_global_nuclear_security_summit/).

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smuggling and deter, detect, and disrupt attempts at nuclear terrorism."<sup>127</sup>

President Obama clearly hopes to affect the disarmament of North Korea, and other countries presenting nuclear threats, through negotiation, respect, and cooperation and, if the results of Mr. Clinton's visit to North Korea are any indication of the value of creative diplomacy, this new approach will be an effective one.

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<sup>127</sup> Press Release, The White House, Addressing the Nuclear Threat: Fulfilling the Promise of Prague at the L'Aquila Summit (July 8, 2009), *available at* [http://www.whitehouse.gov/the\\_press\\_office/Addressing-the-Nuclear-Threat-Fulfilling-the-Promise-of-Prague-at-the-LAquila-Summit/](http://www.whitehouse.gov/the_press_office/Addressing-the-Nuclear-Threat-Fulfilling-the-Promise-of-Prague-at-the-LAquila-Summit/) (emphasis added) (discussing President Obama's three-part strategy to address the international nuclear threat).