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ERIC SCHWARTZ*

I. INTRODUCTION

As the world’s foremost superpower, the United States has the unique ability to influence the behavior of other states. Since the end of World War II, the United States has been the central architect in creating and maintaining a global system of international law and human rights. Generally, America has used this global system to protect its own interests, but current U.S. policies concerning preemptive self-defense and nuclear weapon use are contrary to the international norms which the United States itself helped to establish. These policies may have unintentionally encouraged nuclear proliferation and inspired North Korean Kim Jong-il to obtain nuclear weapons.

In the aftermath of 9/11, President Bush emphasized the threat of “rogue states” developing weapons of mass destruction (WMDs).1 Iraq, Iran, and North Korea, formally called the Democratic People’s Republic of Korea (DPRK), were singled out as members of the “axis of evil,”2 and the 2003 invasion of Iraq was premised on disarming Iraq of its WMDs.3 In the face of U.S. rhetoric warning against the development of WMDs, Kim Jong-il continued his pursuit of nuclear weapons until he procured a tentative deal after six-party talks in February 2007 to receive thousands of tons of oil, humanitarian assistance, and the

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unfreezing of North Korean bank accounts\textsuperscript{4} in exchange for closing North Korea's nuclear facilities.\textsuperscript{5} The status of North Korea's remaining nuclear arsenal, however, is far from certain. As a Kim Jong-il spokesperson declared in the months after this deal was brokered, "U.S. President George W. Bush [is] waving a white flag, offering to allow the DPRK to retain its nuclear arsenal as it is . . . . Kim Jong-il has built a nuclear-missile force capable of blazing the remotest target on the U.S. mainland."\textsuperscript{6}

North Korea has steadfastly pursued nuclear weapons under Kim Jong-il's leadership. The United States accuses North Korea of violating every nuclear treaty it has entered since 1992.\textsuperscript{7} U.S. State Department spokesman Richard Boucher recently stated, "North Korea's secret nuclear weapons program is a serious violation of North Korea's commitments under the [1994] Agreed Framework as well as under the Nonproliferation Treaty (NPT), its International Atomic Energy Agency safeguards agreement, and the Joint North-South Declaration on the Denuclearization of the Korean Peninsula."\textsuperscript{8}

Within the past decade, the DPRK has threatened preemptive attack against the United States,\textsuperscript{9} test-fired missiles towards Japan,\textsuperscript{10} and tested a nuclear weapon in the face of international protest.\textsuperscript{11} In 2003, after North Korea withdrew from the Nuclear Non-Proliferation Treaty (NPT), John Bolton, then Undersecretary of State for Arms Control and International Security, declared, "[it is] hard to see how we can have conversations with a government that has blatantly violated its

\begin{footnotesize}
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\item \textsuperscript{8} Id.
\item \textsuperscript{9} Yong Tiam Kui, Australia, N. Korea Join "Preemptive" Bandwagon, NEW STRAINS TIMES, Oct. 26, 2003, at 4.
\item \textsuperscript{11} North Korea Claims Nuclear Test, BBC NEWS, Oct. 9, 2006, http://news.bbc.co.uk/2/hi/asia-pacific/6032525.stm.
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agreements.” Despite this history, the United States agreed to terms in the February 2007 agreement that were almost identical to the terms of the failed 1994 Agreed Framework. North Korea later violated its February 2007 agreement with the United States by delaying the closure of its nuclear facility by two months.

The United States has taken the lead in imploring North Korea to relinquish its nuclear weapons program in compliance with its previous treaty obligations and international principles regarding nuclear non-proliferation. President Bush credits North Korea’s nuclear posture with the DPRK’s negative reputation among the international community, declaring that “[t]he North Korean regime will find respect in the world and revival for its people only when it turns away from its nuclear ambitions.”

Nevertheless, U.S. actions in the international community may speak louder than its words. While imploring North Korea to conform to established international norms, the United States has ignored these same norms in its own security policies. In 2002, President Bush withdrew from the Anti-Ballistic Missile Treaty and now advocates for the creation of a missile defense system. Furthermore, the United States steadfastly maintains that nuclear weapons may be employed during warfare, and it continues to modernize its nuclear arsenal while ignoring its commitment to disarm under the NPT. The Bush administration employed the doctrine of preemptive self-defense in the war against Iraq without UN approval. Yet, the United States has declined to recognize

14. See Media Note, U.S. Dep’t of State, supra note 5; see also Foster-Carter, supra note 13.
any other country’s right to preemptive attack. Finally, the United States has adopted policies for treating detainees that violate the Third Geneva Convention.

U.S. disregard for international norms has not gone unnoticed in North Korea. In 2003, following President Bush’s "axis of evil" comments, North Korea withdrew from the NPT, citing its right to launch a preemptive strike against the United States in self-defense. North Korea has stated its belief that the only adequate deterrence against a U.S. attack is nuclear development.

This Article explores whether the current U.S. nuclear weapons posture and preemptive self-defense policy serve to legitimize Kim Jong-il’s pursuit of nuclear weapons. U.S. national interests would be best served through nuclear and defense policies that conform to international principles and treaties. Part II examines the origins of the Bush administration’s policy of preemptive self-defense and the unintended consequences of its application in Iraq. Part III considers self-defense in the context of international law and the UN’s rejection of the doctrine of preemptive self-defense as a justification for war (the Bush Doctrine). Part IV analyzes the U.S. military’s acknowledgement of international law regarding nuclear weapons and examines current U.S. policy legitimizing the use of nuclear weapons. Finally, Part V looks at North Korea’s pursuit of nuclear weapons and its reaction to U.S. policies regarding preemptive self-defense and nuclear weapons.

II. THE BUSH DOCTRINE OF PREEMPTIVE SELF-DEFENSE

George W. Bush was the first American president to fully and openly endorse the doctrine of preemptive self-defense as a justification for war, the Bush Doctrine. In the 2002 National Security Strategy of the United States, President Bush proclaimed:

23. Id.
The greater the threat, the greater is the risk of inaction . . . the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.

A. Preemptive Self-Defense

The Bush administration did not invent the doctrine of preemptive self-defense: In response to terrorism, previous administrations have expressed similar, but more limited, views on this doctrine. In 2000, the Clinton administration released *A National Security Strategy for a Global Age*, which stated, "[a]s long as terrorists continue to target American citizens, we reserve the right to act in self-defense by striking at their bases and those who sponsor, assist, or actively support them, as we have done over the years in different countries." The Reagan administration also adopted a policy of preemption to address known terrorist activities.

While President Bush is not the first president to advocate a right of preemptive self-defense, the Bush Doctrine advocates the most expansive claim of this right. The Bush administration's interpretation of preemptive self-defense asserts the right to unilaterally, without international authorization, use military force to halt development of a threat. Such a threat need not pose imminent danger, but action is nevertheless authorized if ignoring the threat could result in unacceptable dangers. These non-imminent threats include nation-states, not simply individual terrorist groups. Previously, the United States found the law of
force laid out in the UN Charter adequate to deal with threats to security.\textsuperscript{31}

Advocates of the Bush Doctrine contend that the international system cannot protect the world from the threat of rogue states such as North Korea obtaining and using nuclear weapons.\textsuperscript{32} These advocates complain that under current international law, "we end up hobbling ourselves with legalistic restrictions against carrying the war . . . to those who intend to do us and our way of life severe harm, either now or in the not-[tool]-distant future."\textsuperscript{33} A policy of preemptive attack claims to deter potential enemies from developing nuclear weapons and signals that the United States will not wait for an attack to employ its military might.\textsuperscript{34} Accordingly, states which remain undeterred from acquiring nuclear weapons risk preemptive attack.\textsuperscript{35}

\textbf{B. Unintended Consequences of the Bush Doctrine}

Although the preemption doctrine seeks to improve U.S. security against enemies who are impervious to the traditional deterrent of mutual destruction, a broad application of the preemptive self-defense policy actually serves to undermine international security.\textsuperscript{36} Even such "hawkish" international realists such as Secretary of State Henry Kissinger have declared that a U.S. policy of preemptive self-defense could have negative security consequences.\textsuperscript{37} Following the release of the 2002 National Security Strategy, Kissinger stated:

As the most powerful nation in the world, the United States has a special unilateral capacity to implement its convictions. But it also has a special obligation to justify its actions by principles that transcend the assertions of preponderant power. It cannot be in either the American national interest or the world's interest to develop principles that grant every nation an

\textsuperscript{31} See O'Connell, \textit{supra} note 24, at 15.


\textsuperscript{33} \textit{Id.} at 485-86.

\textsuperscript{34} \textit{2002 NATIONAL SECURITY STRATEGY, supra} note 1, at 15.


unfettered right of preemption against its own definition of threats to its security.88

The principle of preemptive self-defense has never been expanded from the stringent requirement of a known imminent attack, as set forth in the Caroline decision,39 perhaps because it is too difficult to delineate when military action would not be justified. A policy based on predicting future attack without any evidentiary basis could produce distrust and anarchy in the international community.

Before the invasion of Iraq, the Bush administration attempted to use preemption as a justification for military action. In 2002, then-National Security Advisor Condoleezza Rice tried to limit the preemptive doctrine when she stated, “[t]he number of cases in which [the preemptive doctrine] might be justified will always be small. It does not give a green light – to the United States or any other nation – to act first without exhausting other means, including diplomacy.”41 Despite this statement, U.S. efforts at diplomacy before undertaking military action in Iraq left much of the international community suspicious.42

In 2003, the United States ended diplomatic efforts and employed its new, broader policy of preemptive self-defense against Saddam Hussein. President Bush declared that Saddam Hussein had refused to follow his UN non-proliferation obligations and that he possessed WMDs.43 The Bush administration presented the UN Security Council with evidence of Hussein’s alleged WMD aspirations, but the Council declined to authorize an invasion.44 Following the U.S. invasion of Iraq, no

88. Id.
42. See Iraq War Illegal, Says Annan, supra note 19.
WMDs were ever found. Moreover, in 2004, the U.S. Report on the U.S. Intelligence Community's Prewar Intelligence Assessments on Iraq determined that much of the evidence justifying the war was either presumptuous or false.  

Common sense dictates that an inappropriate application of preemptive self-defense would draw hostility and distrust from other nations. In fact, the flawed evidence presented by the United States illegitimatized the Iraq war in the eyes of the world. Because the doctrine of preemptive self-defense authorizes a state to act without the threat of imminent attack and before any actual warning of an attack, evidence plays a crucial role in evaluating the existence of a serious threat. In this case, the evidence proved faulty, contributing to the chaos and instability in Iraq.

American credibility in the international community, an essential commodity for a world leader, has been severely damaged. Following the preemptive attack on Iraq, anti-American sentiment has risen. Perceived "American exceptionalism," the idea that the United States applies one set of rules to itself and another to the rest of the world, has created international animosity, particularly in the Muslim world. A panel chosen by the Bush administration reported that "[h]ostility toward America has reached shocking levels" among Arabs and Muslims abroad.

The preemptive self-defense doctrine is now viewed by some around the world as nothing more than propaganda used to justify U.S. global military actions while the United States pursues its own political or economic interests. This sort of international hostility is harmful to national security when combined with the threat of preemptive attack. In the extreme, this environment could arguably lead to nuclear war.


47. See Extract of NSDD 138, supra note 27.


49. See Weisman, supra note 46, at A1.

50. Id.


52. Weisman, supra note 46, at A1.

53. See Extract of NSDD 138, supra note 27; see also Weisman, supra note 46, at A1.
III. INTERNATIONAL LAW GOVERNING SELF-DEFENSE

Treaties and customs are the central tenets of international law, and, particularly, the law of war. This section will examine the origins of international law surrounding the doctrine of preemptive self-defense in the form of customary law and treaties. Treaties specifically enunciate the rights and duties of signatory nations and provide a concrete point of analysis for international law. Though treaties can illustrate international ideals, the extent to which signatory states view their obligations within a treaty as effective and binding often varies. Treaties often lack strong international enforcement, and nations often interpret them expediently, as opposed to accurately.

Customary law provides a better indicator of a state’s actual behavior and is considered by some experts to be the nucleus of international law. Customary law is derived from the consistent practice of states over time and a sense of legal obligation. Modern scholars argue that the behavior of powerful states greatly influences the behavior of weaker states. A large amount of empirical data supports this contention.

Customary law is therefore highly influenced by the world’s hegemonic power, the United States. Robert Keohane defines a “hegemon” as a state that is “powerful enough to maintain the essential rules governing interstate relations, and willing to do so.” The hegemon uses its power to influence international institutions and laws to parallel its own interests. When a hegemon claims a new right or alters an existing right, it has a considerable, if not dispositive, effect on the international system and customary law. Because the making of international law is

56. See id.
57. Brewster, supra note 55, at 515 n.34-35.
59. Id. at 1116.
60. Id. at 1123.
61. See id.
63. Id. at 34-35.
64. See id. at 34.
65. See id. at 35.
largely political, the actions of the hegemonic power loom large in the eyes of the international community. Therefore, actions of hegemons have significant worldwide ramifications.

The international community has long recognized the preemptive right of states to defend themselves against imminent attack. This right was first formally recognized in the famous 19th century Caroline case, in which then-U.S. Secretary of State Daniel Webster stated that any military action based on the pretext of self-defense must demonstrate the imminence of a future attack, proportionality of the military action taken in self-defense, and the necessity of this action. This case has come to represent the standard, legally recognized doctrine of self-defense. Furthermore, the "imminence" requirement has become a central tenet in determining the legality of an anticipatory self-defense claim.

The UN Charter memorializes the customary right of self-defense as an international treaty. Even so, the Charter's language is facially more restrictive than the Caroline doctrine; only allowing for military action in self-defense in response to an armed attack. Article 2(4) provides that all states must "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the [UN]."

Article 51 of the UN Charter is one of only two express exceptions to Article 2(4)'s prohibition on the use of force. Article 51 states, "Nothing in the present Charter shall impair the

66. Id.
68. Jennings, supra note 39, at 82 ("It was in the Caroline case that self-defense was changed from a political excuse to a legal doctrine.").
70. Jennings, supra note 39, at 82.
71. Id. at 89.
73. Id.
74. U.N. Charter art. 2, para. 4.
inherent right of individual or collective self-defense if an armed attack occurs against a Member of the [UN], until the Security Council has taken measures necessary to maintain international peace and security.”

This article reinforces a state’s inalienable right to defend itself against any armed attack.

In 2003, the UN High-Level Panel on Threats, Challenges and Change addressed the restrictive language of Article 51. In the wake of the U.S. invasion of Iraq, which the United States justified as an act of preemptive self-defense, the UN Secretary General appointed the High-Level Panel “to assess current threats to international peace and security; to evaluate how [the UN’s] existing policies and institutions have done in addressing those threats; and to make recommendations for strengthening the [UN] so that it can provide collective security for all in the twenty-first century.” Specifically, the panel addressed whether the right of self-defense should be expanded and whether states should have greater latitude to act unilaterally. The panel concluded that, despite Article 2(4)’s limitations on a state’s use of force, “a threatened State, according to long established international law, can take military action as long as the threatened attack is imminent, no other means would deflect it and the action is proportionate.” This statement incorporates the Caroline decision, reinforcing the requirement that a threat of attack must be “imminent” before a state may lawfully take military action in self-defense. The High-Level Panel declined to discard the element of “imminence” in a military act of self-defense.

The High-Level Panel indirectly addressed the situation with North Korea, as a state who was pursuing the acquisition of nuclear technology with an allegedly hostile intent. The panel acknowledged the danger of hypothetical nuclear acquisition scenarios:

76. U.N. Charter art. 51, para. 1.
77. *A More Secure World*, supra note 75, ¶ 188.
78. *Id. Note by the Sec’y Gen.* ¶ 3.
79. *Id.* ¶ 189.
80. *Id.* ¶ 188.
81. *See id.* ¶ 192 (“We do not favour the rewriting or reinterpretation of Article 51.”).
82. *See id.* ¶ 188 (addressing the concern that some threats are so great that states cannot wait until they become imminent to act; “[t]he problem arises where the threat in question is not imminent but still claimed to be real: for example the acquisition, with allegedly hostile intent, of nuclear weapons-making capability”).
[W]here the threat in question is not imminent but still claimed to be real . . . the risk to the global order and the norm of non-intervention on which it continues to be based is simply too great for the legality of unilateral preventive action, as distinct from collectively endorsed action, to be accepted. Allowing one to so act is to allow all.\(^{83}\)

The UN Secretary General agreed with the High-Level Panel's statement in a 2005 report.\(^{84}\) He affirmed, "where threats are not imminent but latent, the Charter gives full authority to the Security Council to use military force."\(^{85}\) The Secretary General and High Panel's statements may be viewed as a rejection of any policy of preventative action absent an imminent threat.

**IV. U.S. NUCLEAR POLICIES AND INTERNATIONAL LAW**

An examination of U.S. military guidelines acknowledging the existence of customary international law underscores the inconsistencies between a purported right to nuclear arms and U.S. accession to international law. The United States steadfastly reserves the right to use nuclear weapons in warfare.\(^{86}\) Furthermore, the United States remains determined to modernize its nuclear arsenal and maintain its current nuclear stockpile in contravention of its obligations under the NPT.\(^{87}\)

The following section will contrast the U.S. position on the use of nuclear weapons with its own military policy manuals. Then, the opinion of the International Court of Justice (ICJ) on the legality of the use of nuclear weapons will be compared to U.S. actions concerning the NPT.

**A. U.S. Military Policy Regarding the Use of Nuclear Weapons**

The United States recognizes the existence of customary international law, at least so far as military policy is concerned.

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83. Id. ¶¶ 188, 191.
85. Id. ¶ 125.
86. See, e.g., Gov't of the U.S., *Written Observations on the Request by the General Assembly for an Advisory Opinion*, 7 CRIM. L.F. 401, 402 (1996) ("In the view of the United States, there is no general prohibition in conventional or customary international law on the threat or use of nuclear weapons.").
This is exemplified through examination of official U.S. military training manuals, which heavily incorporate the customary international law of war. Specifically, the Air Force Manual on International Law (Air Force Manual) provides for the possibility that use of a weapon may be illegal under “prohibitions contained in specific rules of custom and convention” and on “those prohibitions laid down in the general principles of the law of war.” The Air Force Manual further asserts that customary international law imposes obligations on all states, including the United States.

Moreover, the Air Force Manual recognizes that weapons which are not expressly banned may still be prohibited under international law. The manual states, “a new weapon or method of warfare may be illegal, per se, if it is restricted by international law including treaty or international custom. The issue is resolved, or attempted to be resolved, by analogy to weapons or methods previously determined to be lawful or unlawful.” The Air Force Manual cites biological weapons as an example of a universally recognized indiscriminate (and therefore illegal) weapon.

The United States acknowledges the three central principles of the law of war: necessity, proportionality, and discrimination. These principles help determine the legality of using certain weapons, including nuclear weapons.

Under the rule of necessity, a state may only use the minimum level of force necessary to accomplish a military objective. This rule prohibits the use of any weapon where a less destructive weapon could achieve the same objective, and further prohibits the use of any weapon incapable of being regulated. The Commander’s Handbook on the Law of Naval Operations (Commander’s Handbook) allows for “[o]nly that degree and kind

90. Id. at 1-7.
91. Id. at 6-7.
92. Id. at 6-3.
93. Moxley, supra note 88, at 1380.
94. Id.
95. Id. at 1436.
96. Id.
of force . . . required for the partial or complete submission of the enemy with a minimum expenditure of time, life, and physical resources.”

The rule of proportionality requires that consequences for combatants, non-combatants, and objects harmed in any military action be directly proportionate to the objective’s importance or value. The Commander’s Handbook affirms “incidental injury or death to civilians, or collateral damage to civilian objects, during an attack upon a legitimate military objective” may be allowed, but the action “should not . . . be excessive in light of the military advantage anticipated by the attack.”

The rule of discrimination outlaws using weapons that cannot differentiate between military and civilian targets. The Commander’s Handbook states, “It is prohibited to launch attacks against the civilian population . . . . Distinctions must be made between combatants and noncombatants, to the effect that noncombatants be spared as much as possible.”

The United States considers all three principles in determining the legality of the use of any weapon in its arsenal. The Air Force Manual considers the following questions relevant:

1. Can the weapon be delivered accurately to the target;
2. Would its use necessarily result in excessive injury to civilians or damage to civilian objects, so as to be termed an “indiscriminate weapon”;
3. Would its effects be uncontrollable or unpredictable in space or time as to cause disproportionate injury to civilians or damage to civilian objects; and
4. Would its use necessarily cause suffering excessive in relation to the military purpose which the weapon serves so as to violate that prohibition.

The Air Force Manual defines “uncontrollable effects” as those “which escape in time or space from the control of the user as to necessarily create risks to civilian persons or objects excessive

98. Moxley, supra note 88, at 1435.
100. Moxley, supra note 88, at 1438.
in relation to the military advantage anticipated.\textsuperscript{103} The Air Force Manual contextualizes the "uncontrollable effects" of biological weapons by noting their indiscriminate nature. It specifically points to the tendency of biological warfare to affect not only the enemy's civilian population, but also the civilian populations of surrounding states.\textsuperscript{104}

Consequently, the Air Force Manual's articulation of the principles of necessity, proportionality, and discrimination seems to undermine rather than support the right asserted by the United States to use nuclear weapons.

\textit{B. U.S. Defense of the Right to Use Nuclear Weapons}

U.S. reliance on the theory of nuclear deterrence demands that the United States claim a right to use nuclear weapons under international law.\textsuperscript{105} The theory of deterrence has driven U.S. national security policy since the inception of the nuclear bomb.\textsuperscript{106} Recently, the Bush administration has bolstered the United States' longstanding policy of deterrence.\textsuperscript{107} The concept of deterrence is based on the threat that the United States will not hesitate to use its nuclear arsenal in the face of any serious threat to its national security.\textsuperscript{108} In support of its policy of deterrence, the United States claims no international law prevents the use of nuclear weapons,\textsuperscript{109} despite the contrary positions taken in the U.S. military manuals discussed above.

The U.S. advisory letter to the ICJ outlined the U.S. claim for the legality of nuclear weapons use.\textsuperscript{110} In 1996, the ICJ responded to a request from the UN General Assembly to provide an advisory opinion regarding the question: "Is the threat or use of

\textsuperscript{103} Id. at 6-3 (emphasis in original).
\textsuperscript{104} Id.
\textsuperscript{105} Gov't of the U.S., \textit{supra} note 86, at 405.
\textsuperscript{106} \textit{Cf.} Donald H. Rumsfeld, \textit{Foreword to Nuclear Posture Review Report} (2002) ("As a result of this review, the U.S. will no longer plan size, or sustain its forces as though Russia presented merely a smaller version of the threat posed by the former Soviet Union."), available at http://www.globalsecurity.org/wmd/library/policy/dod/npr.htm.
\textsuperscript{107} Id. (noting that President Bush's direction "to transform America's military... puts in motion a major change in our approach to the role of nuclear offensive forces in our deterrent strategy and presents the blueprint for transforming our strategic posture.").
\textsuperscript{108} \textit{Nuclear Posture Review Report} 7 (2002) ("Nuclear weapons play a critical role in the defense capabilities of the United States, its allies and friends. They provide credible military options to deter a wide range of threats, including WMD and large-scale conventional military force.").
\textsuperscript{109} Gov't of the U.S., \textit{supra} note 86, at 402, 405.
\textsuperscript{110} Id. at 401.
nuclear weapons in any circumstance permitted under international law?\textsuperscript{111} The United States and many other countries submitted letters to the ICJ concerning their positions on the use of nuclear weapons. The U.S. letter advises that the use of nuclear weapons should be found legal under international law.\textsuperscript{112}

The U.S. letter rejects a per se rule banning the use of nuclear weapons.\textsuperscript{113} The United States proclaims it has never signed any treaty banning the use of nuclear weapons, and, therefore, it cannot be banned from using nuclear weapons.\textsuperscript{114} Moreover, the United States argues that customary law cannot be read to ban the use of nuclear weapons since the United States has used them in the past.\textsuperscript{115} The letter further proclaims that there has been no international consensus on a customary law ban of nuclear weapons.\textsuperscript{116}

The U.S. letter provides a cursory assessment of the binding principles of international law. It concedes “that the use of nuclear weapons is subject to the law of armed conflict, including the rules of proportionality, necessity, and discrimination, moderation, civilian immunity, neutrality, and humanity.”\textsuperscript{117} The United States contends that the elements of proportionality and necessity must be considered under the specific circumstances of a situation in which the use of nuclear force is contemplated.\textsuperscript{118} This position advocating ad hoc evaluation, allows nuclear threats and their possible use to be freely incorporated into U.S. military policy.\textsuperscript{119} As any decision to use nuclear weapons would be made under immense pressure and in a short period of time, “ad hoc evaluation” is a policy of presumptive lawfulness.\textsuperscript{120}

Most importantly, the U.S. position hinges on the contention that modern nuclear weapons are able to discriminate between

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\item[\textsuperscript{111}] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8).
\item[\textsuperscript{112}] Gov't of the U.S., \textit{supra} note 86, at 401.
\item[\textsuperscript{113}] \textit{Id.} at 402, 405.
\item[\textsuperscript{114}] \textit{Id.} at 407 (“We are aware of no international agreement – and certainly none to which the United States is a Party – that contains a general prohibition on the use of nuclear weapons.”).
\item[\textsuperscript{115}] \textit{Id.} at 406.
\item[\textsuperscript{116}] \textit{Id.} at 406-07.
\item[\textsuperscript{117}] Moxley, \textit{supra} note 88, at 1433.
\item[\textsuperscript{118}] \textit{Id.} at 1435-36.
\item[\textsuperscript{119}] \textit{Id.} at 1442.
\item[\textsuperscript{120}] \textit{Id.} at 1442.
\end{enumerate}
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civilian targets and military targets. No evidence has been presented by any nation that the radiation effects of nuclear weapons can be controlled. The assumption that nuclear weapons can be controlled serves to characterize nuclear weapons as any other conventional weapon. However, the assumption of controllability does not comport with U.S. acknowledgment that the effects of biological weapons cannot be controlled. If nuclear effects can be controlled, and nuclear weapons operate under the same laws as conventional weapons, then North Korea’s pursuit, possession, and use of nuclear weapons should be perfectly acceptable under international law.

C. The ICJ Ruling on the Use of Nuclear Weapons

The ICJ ruled inconclusively on the question of whether all uses of nuclear weapons could be banned. In a seven-to-seven opinion decided by the vote of the president, the majority stated:

[T]he 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; however, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.

The court’s indecision was due to the lack of evidence regarding the effects of modern low-yield tactical nuclear weapons. Although low yield nuclear weapons do release lower amounts of radiation, the spread of this radiation is still uncontrollable. Furthermore, by the U.S. Army’s own admission, the risk of nuclear war escalation compounds the risk of the spread

121. Gov’t of the U.S., supra note 86, at 416.
123. Id. at 1448.
124. See id. at 1440.
125. See id. at 1448.
126. Id.
127. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. at 268 (July 8).
128. Moxley, supra note 88, at 1449.
129. Id. at 1450-51.
of radiation.\textsuperscript{130} As the United States’ Doctrine for Joint Nuclear Operations states, “[t]here can be no assurances that a conflict involving [WMDs] could be controllable or would be short of duration.”\textsuperscript{131} Indeed, the ICJ opinion notes that the use of nuclear weapons could result in massive damage to neutral countries, even “the possible extinction of all life.”\textsuperscript{132}

The ICJ failed to conclude unanimously that all states must work towards disarmament.\textsuperscript{133} The court found, according to Article VI of the NPT, “an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all aspects under strict and effective international control.”\textsuperscript{134} ICJ President Mohammed Bedajou declared nuclear weapons to be the “ultimate evil” and emphasized that the obligation for nuclear disarmament had assumed customary force.\textsuperscript{135}

\textbf{D. The United States and the Nuclear Non-Proliferation Treaty}

The NPT has functioned as the central basis for nuclear non-proliferation in the international community.\textsuperscript{136} Drafted in 1968, the NPT boasts extensive international membership, and in 1995 its obligations were extended permanently.\textsuperscript{137} Furthermore, the ICJ recognized the treaty as an important instrument in achieving nuclear disarmament.\textsuperscript{138}

Non-proliferation, disarmament, and the right to peaceful uses of nuclear energy constitute the three pillars of the NPT.\textsuperscript{139} Under the non-proliferation pillar, the five recognized nuclear states agree “not in any way to assist, encourage, or induce” any non-nuclear state in acquiring nuclear weapons.\textsuperscript{140} In turn, the non-nuclear states agree not to “receive,” “manufacture,” or “acquire”

\begin{itemize}
\item 130. \textit{Id.} at 1454.
\item 131. \textit{Joint Chiefs of Staff, Joint Pub. 3-12, Doctrine for Joint Nuclear Operations}, at I-6 (1995).
\item 132. \textit{Legality of the Threat or Use of Nuclear Weapons}, 1996 I.C.J. at 375, 409.
\item 133. \textit{Id.} at 268.
\item 134. \textit{Id.}.
\item 135. \textit{Id.}.
\item 136. \textit{See generally} Treaty on the Non-Proliferation of Nuclear Weapons, supra note 18.
\item 137. \textit{Id.}.
\item 140. \textit{Treaty on the Non-Proliferation of Nuclear Weapons}, supra note 18, art. 1.
\end{itemize}
nuclear weapons. The disarmament pillar requires all parties to “pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.”

The non-proliferation pillar is open to interpretation. For example, the United States views non-proliferation as the prevention of new states from obtaining nuclear capability. Many non-nuclear states argue against nuclear deterrence as a viable military strategy, and point out that the continued development of new nuclear technology only induces non-nuclear states to acquire nuclear capabilities. Furthermore, a policy of preemptive attack can be viewed as additional pressure to develop nuclear weapons.

The Bush administration has renewed the U.S. strategy of nuclear deterrence in the post-9/11 era. In the 2002 Nuclear Posture Review, the U.S. Department of Defense presented a deterrence strategy that was focused on developing “[o]ffensive strike systems (both nuclear and non-nuclear); [d]efenses (both active and passive); and [a] revitalized defense infrastructure that will provide new capabilities.” The Nuclear Posture Review notes the significant U.S. investment in modernizing its nuclear arsenal. Notably, the Review does not mention any effort to disarm, as required by Article VI of the NPT.

While emphasizing the importance of the nuclear non-proliferation agreements by other states, the United States ignores its disarmament obligations under NPT’s third pillar. The logical incentive for non-nuclear states to sign this treaty is the hope that nuclear states that join the treaty will shift their focus away from nuclear weapons as a security strategy and move towards the elimination of nuclear weapons altogether.

141. Id. art. 2.
142. Id. art. 6.
143. Kuppuswamy, supra note 139, at 142.
144. Id.
145. Id.
146. Rumsfeld, supra note 106.
147. Id.
148. Id.
150. Id. at 473.
However, is undermined as nuclear states continue to develop nuclear weapons technology. The most obvious disarmament commitment currently available to United States is the Comprehensive Test Ban Treaty (CTBT). President Bush has celebrated Libya's recent commitment to the CTBT. Yet, when asked about United States' adherence to the CTBT and its obligation to eliminate nuclear weapons, a Bush administration official candidly stated, "[w]e're not for that."53

Bush's open support of India's civilian nuclear technology further weakens the NPT. In July 2005, President Bush declared he would do all in his power to change international rules to allow for the trade of civilian nuclear technology with India, a country that has refused to join the NPT and has acknowledged its possession of nuclear weapons. Despite India's refusal to sign the NPT, President Bush and Congress have rewarded India with the promise of nuclear technology, thereby sidestepping the NPT and accordingly diminishing its legitimacy. On the other hand, Iran, an NPT signatory, has not been granted the same access to civilian nuclear technology.

President Bush's policy is that nuclear weapons are not the problem. Instead, "rogue states" such as North Korea are the problem. Current U.S. security strategy emphasizes preemptive actions the United States may take to ensure compliance with non-proliferation mechanisms like the NPT. The "rogue states," however, are not the sole proliferation threat. The mere existence and possession of nuclear weapons creates the threat. As long as nuclear states openly incorporate and legitimize nuclear weapons

155. Id.
156. Perkovich, supra note 40, at 3.
158. Kuppuswamy, supra note 139, at 145, 149.
160. See id.
as a security strategy, other states will want their own nuclear weapons.  

The failure of the United States to recognize the benefits of upholding international norms is problematic. For example, the U.S. assertion that "rogue states" such as North Korea do not follow international norms ignores the compliance of most states, including necessary allies and advocates that support non-proliferation. The potential success of the six-party talks with North Korea that resulted in the February 2007 agreement further highlights the U.S. need for nuclear strategy allies. Yet, the United States delegitimized the NPT and set an example that states may ignore NPT requirements. After reviewing the 2002 Nuclear Posture Review, current State Department Policy Planner Richard Sokolsky acknowledged, "The most serious consequences of the [2002 Nuclear Posture Review] are the diplomatic and geopolitical problems it causes for America's standing and image in the world, rather than its direct effects on international security and the prospects for war and peace."

V. NORTH KOREA'S DEVELOPMENT OF NUCLEAR WEAPONS: TAKING ITS CUE FROM THE UNITED STATES?

North Korea's pursuit of nuclear weapons exemplifies the unintended consequences of U.S. legitimization of nuclear weapons and preemptive self-defense. The dual threats of nuclear weapons and preemptive attack may deter those parties whose vital interests include maintaining the international status quo, protecting their citizens, and retaining power. A policy of deterrence, however, may only serve to motivate rivals, such as Kim Jong-il, in their pursuit of nuclear weapons. Already on the offensive against the United States, Kim Jong-il has little to lose by pursuing a nuclear agenda. Thus, he may view nuclear weapons as
North Korea's best chance to avoid American attack and to reinforce his self-proclaimed position as the "Great Leader" of his country.

A. Background

North Korea is among the world's poorest nations. Its economy is in shambles, and many of its people are starving. A famine in the 1990s caused the death of at least one-tenth of the country's population. Consequently, North Korea requires foreign assistance to feed its people, and it has received aid from the United States, China, South Korea, and other states. In 2002, the UN estimated that a third of North Koreans received government food aid, and that half of the population was malnourished.

North Korea's leader, Kim Jong-il, is an enigmatic figure known for his eccentricity. The government-run media often aggrandizes his accomplishments. Accordingly, he has been credited with writing three operas and personally designing the tallest building in North Korea. Yet, while his intelligence and sanity have been questioned, former Secretary of State Madeline Albright found him competent and well-informed during her 2000 visit to North Korea.

North Korea is a communist totalitarian government, and is accused of being one of the most notorious human rights violators. All North Korean media is state-controlled, and it is reported that over 200,000 people are being held as political prisoners. The UN has condemned North Korea for its human

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167. Id.
168. Id.
171. Country Profile: North Korea, supra note 169.
172. Id.
174. Interview by Jim Lehrer with Madeleine Albright, supra note 173.
175. Country Profile: North Korea, supra note 169.
176. Id.
rights abuses, which include torture, political imprisonment, and slave labor.\textsuperscript{177}

North Korea has a reported available military manpower of about 12 million, and an annual average available military manpower of about 400,000.\textsuperscript{178} Furthermore, it is estimated North Korea has acquired enough plutonium to make nuclear missiles that could reach Japan or South Korea.\textsuperscript{179}

The Korean War is considered a Cold War proxy battle between China and the United States.\textsuperscript{180} In 1950, North Korea invaded South Korea in an attempt to reunify the Korean Peninsula.\textsuperscript{181} In response, the United States convinced the UN Security Council to vote in favor of sending military aid to South Korea.\textsuperscript{182} The Security Council recommended that all UN members assist the U.S.-led force to restore peace to the Korean Peninsula.\textsuperscript{183} The war eventually ended in a stalemate, and the Korean Peninsula remained divided into two separate nations.\textsuperscript{184} In 1953, the two sides signed an armistice agreement but did not sign an official peace treaty.\textsuperscript{185} As a result, North Korea and South Korea are still technically at war today.\textsuperscript{186}

Since the armistice, the relationship between the United States and North Korea has been plagued with virulent rhetoric and tension.\textsuperscript{187} Moreover, North Korea has often referred to the South Korean government as a U.S. "puppet."\textsuperscript{188}

\textsuperscript{177} Id.
\textsuperscript{183} Id.
\textsuperscript{184} See Korean War, supra note 180.
\textsuperscript{185} Nanto, supra note 181, at 3.
\textsuperscript{186} Country Profile: North Korea, supra note 169.
\textsuperscript{187} See Nanto, supra note 181, at 3-5, 10, 16, 17, 20, 24, 25.
B. North Korea's Nuclear History

The Soviet Union first gave North Korea nuclear assistance in the 1950s, but later pressured North Korea into signing the NPT in 1985. In 1989, the United States discovered that North Korea was developing a nuclear facility in the town of Yongbyon. Despite this finding, North Korea did not allow the International Atomic Energy Agency (IAEA) inspections, as required by the NPT, until 1992.

During that same year, the Joint Declaration of Denuclearization of the Korean Peninsula (Joint Declaration) was signed in 1992. This agreement provided that neither North nor South Korea would engage in "testing, manufacture, production, acceptance, possession, stockpiling, deployment and use of nuclear weapons." However, in 1994, North Korea expelled IAEA investigators and threatened to "begin reprocessing 8,000 spent fuel rods from a nuclear power plant." Although the United States made plans to attack North Korea, in 1994, former U.S. President Jimmy Carter went on a dramatic peace-keeping mission to save the Joint Declaration. His efforts resulted in the Agreed Framework between the United States and North Korea. Under this agreement, North Korea agreed to convert its nuclear reactors into light water reactors, continue as a party to the NPT, and allow IAEA nuclear inspections in exchange for oil shipments and security assurances from the United States.

191. Id.
193. Id.
198. Id.
Eight years later, in January 2002, President Bush declared North Korea to be part of the "axis of evil" and a threat to U.S. security.199 Later that year, U.S. Assistant Secretary of State James Kelly claimed that a North Korean diplomat had disclosed North Korean plans to pursue a nuclear program in violation of the Agreed Framework.200 Although North Korean leaders disputed this claim, the United States suspended its oil shipments.201 In response, North Korea expelled nuclear inspectors, withdrew from the NPT, and effectively destroyed the Agreed Framework.202 North Korea accused the United States of threatening the country with preemptive nuclear attack and blockades.203 Further, it denied having a nuclear program and stated that it was the United States that violated the Agreed Framework when it suspended the oil shipments under false pretenses.204 Months later, North Korea announced it would withdraw from the Korean Denuclearization Pact, its final remaining non-proliferation agreement.205

In August 2003, North Korea agreed to six-party talks (which included the United States) regarding ending its nuclear weapons program.206 When North Korea announced that it possessed nuclear weapons, however, the talks ended.207 In October 2006, despite UN protests, North Korea claimed it had conducted its first nuclear weapons test at an underground site.208 Further investigation revealed that, although the claim was likely true, the

199. Country Profile: North Korea, supra note 169.
201. Foster-Carter, supra note 13.
202. Id.
208. North Korea Claims Nuclear Test, supra note 11.
test may have been unsuccessful because the registered seismic waves seemed too small to have been produced by a nuclear test.\textsuperscript{209}

Surprisingly, on February 13, 2007, North Korea and the other members of the six-party talks (United States, Russia, South Korea, China, and Japan) agreed on a deal to shut down North Korea's nuclear facility, normalize U.S.-DPRK relations, and secure permanent peace on the Korean peninsula.\textsuperscript{210} The United States again agreed to send fuel in exchange for North Korea closing its nuclear facility, but under this agreement (as opposed to the original Agreed Framework) North Korea would receive food aid only \textit{after} the facility was closed.\textsuperscript{211} In turn, the United States agreed to unfreeze a Macau bank account with $25 million in North Korean funds.\textsuperscript{212} The United States gave North Korea an April 14, 2007 deadline to shut down its facility.\textsuperscript{213} The deadline passed without North Korea shutting down its nuclear facility.\textsuperscript{214} North Korea finally began to shut down the facility on July 16, 2007.\textsuperscript{215} Negotiations are ongoing, but the parties have not addressed North Korea's existing nuclear arsenal, which remains an area of major contention for both sides.\textsuperscript{216}

\section*{C. North Korean Justification of Its Nuclear Pursuits}

North Korea has long proclaimed that its nuclear pursuit is founded upon its fear of the United States.\textsuperscript{217} In 1957, the United States announced it could wage nuclear war upon North Korea from U.S. military bases in South Korea.\textsuperscript{218} The Bush administration has affirmed its commitment to the potential use of nuclear weapons in defending South Korea.\textsuperscript{219} North Korea cites the U.S. nuclearization of South Korea as a continued security threat, and a violation of the 1992 Joint Declaration of the

\begin{quote}
\textsuperscript{210} See Foster-Carter, supra note 13.
\textsuperscript{211} Id.
\textsuperscript{212} Id.
\textsuperscript{213} Id.
\textsuperscript{214} Id.
\textsuperscript{215} Id.
\textsuperscript{217} See generally Moxley, supra note 88.
\textsuperscript{218} Id. at 1411.
\textsuperscript{219} Bill Gertz, \textit{Nukes Option by U.S. in Korea}, WASH. TIMES, Nov. 18, 2003, at A1; see also \textit{NUCLEAR POSTURE REVIEW REPORT}, supra note 108.
\end{quote}
Denuclearization of the Korean Peninsula. In 2003, then-Secretary of Defense, Donald Rumsfeld said the U.S. defense of South Korea includes the “continued provision of a nuclear umbrella.”

North Korea also justifies its nuclear pursuit for economic reasons. The DPRK argues that it cannot deter an enemy such as the United States with conventional weapons. Under this theory, nuclear weapons would protect North Korea without having to fund a full military, allowing the DPRK to spend its economic resources on the support of its malnourished population. Because the United States clearly has more money to spend on weapons and military troops, the only credible deterrent available to North Korea is a nuclear bomb. Ironically, the United States used a similar rationale during the Cold War. The Soviet Union was allowed to create a superior conventional force while the United States relied on its nuclear force as a deterrent.

Recent aggressive U.S. rhetoric has led North Korea to believe that the stage is being set for a future attack. As evidence, North Korea cites President Bush’s repeated accusations that North Korea is a rogue nation developing WMDs. The United States took preemptive action against Iraq under a similar rationale: repeated violations of UN sanctions, human rights violations, possession of WMDs, the irrationality of Saddam Hussein, and a long-standing rhetoric of hostility towards the United States. It follows that the United States could apply the same rationale to North Korea based on the actions of the North Korean government, even without exaggerated evidence.

North Korea’s fears of the United States exaggerating or distorting evidence to suit its “axis of evil” rhetoric may be well founded. Recent evidence suggests the United States may have exaggerated its claims that North Korea violated the 1994 Agreed Framework. Never a popular agreement with U.S. conservatives,
it is now widely believed that the United States distorted the DPRK diplomat's claim that North Korea had the right to develop nuclear weapons. At the time, the United States presented a flimsy, worst-case scenario of the DPRK's nuclear program as incontrovertible proof to exaggerate the dangers of North Korea's government (just as it did when presenting the dangers posed by Iraq). After publicizing North Korea's alleged assertion of its nuclearization rights, the United States characterized North Korea as an international menace. During this time, the Agreed Framework unraveled, with both countries blaming the other for the failure. Considering the exaggerated evidence used to support preemptive war against Iraq, another fellow "axis of evil" state, it is not unreasonable to believe that the United States could make the same decision to depose an anti-American regime in North Korea.

Thus far, the U.S. policy of preemptive self-defense as a deterrent seems to have backfired in the case of North Korea. If anything, this U.S. policy has encouraged North Korea to pursue nuclear capability. For example, in withdrawing from the NPT in 2003, a North Korean official stated, "The bloody lesson of the war in Iraq for the world is that only when a country has physical deterrent forces and massive military deterrent forces that are capable of overwhelmingly defeating any attack by state-of-the-art weapons, can it prevent war and defend its independence and national security." Arguably, the Bush Doctrine could inspire other nuclear states to take their own preemptive military action. In turn, non-nuclear states are provoked to acquire nuclear weapons secretly, hoping to discourage preemptive military actions against them. This counter-effect is exemplified by the North Korean Foreign Ministry's response to the escalation of rhetoric following Bush's "axis of evil" speech: "The United States says that after Iraq, we are next... but we have our own counter-measures. Preemptive attacks are not the exclusive right of the U.S."
VI. CONCLUSION

In an effort to preserve its hegemony, U.S. policies of nuclear legitimacy and preemptive self-defense are creating a dangerous double standard. The longer the United States continues these policies, the more entrenched they will become, both within the U.S. military and in the international community. Once the central architect of international law, the United States and its apparent reliance on a double standard serves to invalidate the current international system, its customs, and its capacity to promote universal values. Moreover, by violating norms of international law, the United States reduces its own capacity to advance American interests. A world without international law becomes a world that is much more difficult to control.

In the aftermath of the Iraq invasion and in light of the revelation that Iraq did not possess WMDs, the Bush administration has been forced to de-emphasize its preemption doctrine. In the 2006 National Security Strategy, it was widely touted that, while maintaining its right to preemptive self-defense, the Bush administration had decided to emphasize it as a last resort.

Ideally, the Bush Doctrine serves to deter states from attempting to acquire WMDs and allows the United States to attack any rogue state or terrorist who remains undeterred. The situations in Iraq and Afghanistan, however, have highlighted the difficulty of replacing governments once they are removed.

North Korea has plainly stated that, because of the U.S. threat of preemptive attack, it seeks to acquire nuclear weapons as its only method of deterrence. The DPRK even went so far as to test a nuclear bomb. Despite this revelation, the United States has declined to attack North Korea for the following reasons. First, the Bush Doctrine has kept the U.S. military fully engaged in the Middle East. It is questionable whether the United States has the military strength to concurrently conduct a large-scale operation in North Korea. Second, and perhaps most importantly, the U.S. invasion in Iraq, which was based on faulty intelligence and ran

235. Hewitson, supra note 149, at 494.
238. North Korea Claims Nuclear Test, supra note 11.
239. Klapper, supra note 36, at 3.
contrary to both international norms and consensus, has weakened the U.S. government's credibility both domestically and abroad.240

The Bush Doctrine led to the February 2007 agreement which is remarkably similar to the Agreed Framework scuttled by the administration in 2002.241 Domestically, the Bush administration has lost much of its political clout, and U.S. reputation abroad could suffer even more damage if the United States preemptively attacks North Korea. In light of this situation, the Bush administration has altered its rigid philosophy following the collapse of the Agreed Framework. According to former UN Ambassador John Bolton, who was appointed by President Bush, a deal was brokered that "contradicts fundamental premises of the president's policy he's been following for the past six years."242 Considering this deal and the 2006 National Security Strategy's de-emphasis on preemptive self-defense,243 it is possible the Bush administration is beginning to acknowledge the necessity of compromise and international diplomacy.

This development is important because the Bush administration's policies of preemption and nuclear legitimization have revealed that, without international support, even a nation as powerful as the United States cannot control the actions of every rogue nation. Instead, in order to achieve security against nuclear weapons, all nations must persistently implement treaties, customs, and principles established to control nuclear proliferation and, ultimately, to eliminate nuclear weapons altogether. Ironically, the Bush administration finds international norms applicable in other areas. As a defense official recently stated, "[w]orldwide moral battles can be fought and won ... [n]o decent person any more ... supports or excuses slave trading, piracy, or genocide. No decent person should support or excuse terrorism either."244

It is possible for the United States to regain international legitimacy and support by strengthening the international nonproliferation regime. Making nonproliferation a prominent goal would arguably create international goodwill and significantly

240. Id. at 3-4.
243. See generally 2006 NATIONAL SECURITY STRATEGY, supra note 236.
244. Perkovich, supra note 40, at 7.
pressure states such as Iran and North Korea to end their nuclear programs. The United States could begin by taking steps towards greater compliance with the NPT. A serious U.S. nonproliferation emphasis could serve to motivate all states to stop the spread of nuclear weapons and create a global norm of non-proliferation.