

# **“BAD COP” DIPLOMACY & PREEMPTION: AN ANALYSIS OF INTERNATIONAL LAW AND POLITICS GOVERNING WEAPONS PROLIFERATION**

## INTRODUCTION

October 4, 2002, North Korea nullifies the Agreed Framework not to develop nuclear weapons and admitted that it had been working on a nuclear weapons program since 1997;<sup>1</sup> March 21, 2003, the United States invades Iraq partially on the rationale of preemptive self-defense, arguing such an invasion was necessary to stop Iraq from developing weapons of mass destruction (WMD);<sup>2</sup> December 17, 2003, Iran signs an agreement allowing intrusive inspections of its nuclear sites and says it is giving up its nuclear program after receiving international condemnation for its programs;<sup>3</sup> December 19, 2003, Libya reaches an agreement with the United States and Great Britain to give up its WMD programs and allowing unfettered inspections.<sup>4</sup> With the first date, we see the questionable effectiveness of nuclear control regimes that are based on good faith; with the second, the United States for the first time used preemption as a mechanism to control WMD proliferation; and with the last two, we can see how compliance can be brought to bear by a reorientation of international regimes with a more outcome-oriented doctrine of preemptive self-defense.

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1. VICTOR D. CHA & DAVID C. KANG, NUCLEAR NORTH KOREA 132 (2003). As this Note was being published North Korea admitted that it had nuclear weapons and that it would not participate in further multi-party negotiations. James Brooke & David E. Sanger, *North Korea Says They Hold Nuclear Arms*, N.Y. TIMES, Feb. 11, 2005, at A1. This revolution makes the policies analyzed in this Note all the more pressing.

2. BBC News, *Invasion Force Pushes into Iraq*, at <http://news.bbc.co.uk/1/hi/england/2872325.stm> (Mar. 21, 2003) (last visited June 18, 2004).

3. Nazila Fathi, *Iran to Sign Inspection Pact on Atomic Sites*, N.Y. TIMES, Dec. 18, 2003, at A24.

4. George W. Bush, Remarks of the President, *Libya Pledges to Dismantle WMD Programs*, at <http://www.whitehouse.gov/news/releases/2003/12/20031219-9.html> (last visited June 19, 2004).

Nuclear weapons provide a unique vantage point by which one can examine the salience of international law in controlling state conduct. International law often cannot be properly enforced against states who have a great deal of freedom to initiate actions in derogation of their international obligations and suffer no repercussions if the risk and cost of enforcement is too high. This note copes with the question of how to fill the void traditional international law has faced in dealing with the threat of weapons proliferation.

While the goal for this note could be considered overly ambitious and broad, it provides needed perspective at the current crossroads of nuclear policy. In this note, I will first lay out the international political theories that have been used in the past to address the threat posed by nuclear weapons, including deterrence, counterforce, and nonproliferation. After looking at the underlying rationale for each of these theories, as well as criticisms of each, our analysis turns to the role international law has had in providing leadership and serving as a catalyst to end the use of nuclear weapons. By looking at treaty law, customary law, as well as court decisions, it becomes clear that international law has taken the view that the use of nuclear weapons are almost always proscribed.<sup>5</sup> While that topic may be relatively settled, what must be asked is whether international law's determination is relevant when there are many divergent perspectives regarding the lawful use of force. Third, this note will analyze the Bush administration's *National Strategy to Combat Weapons of Mass Destruction* and question whether its reliance on preemptive self-defense (the Bush Doctrine) will provide a better paradigm to limit the proliferation of weapons of mass destruction.<sup>6</sup> Fourth, this note provides a case-by-case application of the Bush Doctrine to the factual realities of the war in Iraq, the conflict with North Korea, and the proposed settlements with Libya and Iran to determine when preemptive self-defense would be permissible and when it is actually practical. Fifth, I will propose an alternative system where nonproliferation regimes teamed with preemptive self-defense can provide the necessary legitimacy that is currently lacking under both the nuclear nonprolifera-

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5. See generally ICJ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 95 (July 8), available at <http://www.icj-cij.org/icjwww/icasess/iunan/iunanframe.htm> [hereinafter *Opinion on the Legality of the Threat or Use of Nuclear Weapons*] (last visited June 19, 2004).

6. National Strategy to Combat Weapons of Mass Destruction (Dec. 2002), available at <http://www.whitehouse.gov/news/releases/2002/12/WMDStrategy.pdf> (last visited June 16, 2004).

tion regime of the past several decades and the preemptive attack paradigm advocated by the current administration. A discussion of these elements will provide a fuller understanding of the interaction between international politics, international law, and the current realities of the nuclear threat.

## I. INTERNATIONAL POLITICS PARADIGMS REGARDING NUCLEAR WEAPONS

Numerous paradigms have been proposed to control the use or threat of use of nuclear weapons. Any effort to grasp the current legal realities must be grounded in an understanding of how nuclear weapons are perceived by states. It is additionally important to look at the drawbacks to these perspectives because of their reemergence and integration under modern nuclear control doctrines. While these perspectives may be considered entirely within the camp of international politics or war strategy, they are key elements of *opinio juris* that will aid in evaluating the state action (or rather inaction) regarding the use or threat of use of nuclear weapons over the course of the Cold War.

### A. Deterrence

Shortly after the United States' first use of nuclear weapons in Japan, the Soviet Union joined the United States as a nuclear superpower.<sup>7</sup> The Cold War between the United States and the Soviet Union was based on the understanding that any activity by one actor would result in an act of retaliation, and likely complete destruction, by the other party.<sup>8</sup> Nuclear deterrence is understood as "the threat of nuclear attack as retaliation, to prevent the opponent from using violence against the vital interests of the deterrer."<sup>9</sup> Thus, nuclear

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7. PETER MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* (1997).

8. For a discussion on the effect of nuclear weapons on the relationship and actions of the United States and the Soviet Union, see John Mueller, *The Essential Irrelevance of Nuclear Weapons: Stability in a Postwar World*, in *THE COLD WAR AND AFTER: PROSPECTS FOR PEACE* 43, 43–60 (Sean M. Lynn-Jones & Steven E. Miller eds., 1993) (arguing that numerous factors such as a general fear of fighting any war was the key to the deterrence during the Cold War); Robert Jervis, *The Political Effects of Nuclear Weapons: A Comment*, in *THE COLD WAR AND AFTER: PROSPECTS FOR PEACE* 70, 70–80 (Sean M. Lynn-Jones & Steven E. Miller eds., 1993) (arguing that nuclear weapons were the key to deterrence during the Cold War by looking at key events such as the Cuban Missile Crisis and statements of Reagan and Gorbachev that "a war that cannot be won should never be fought").

9. TOM SAUER, *NUCLEAR ARMS CONTROL I* (1998).

weapons were not only thought of as an offensive weapon to be used in an effort to win a war, but rather primarily thought of as defensive measures to prevent war.<sup>10</sup>

Yet nuclear deterrence is not something that exists automatically simply from the creation of nuclear weapons. There are a number of key assumptions that nuclear deterrence theory is based upon: (1) the opponent is susceptible to deterrence (that meaning they are not irrational, fundamentalists, or risk takers); (2) the opponent has vital interests (limiting deterrence to state actors who have tangible, vital interests); and (3) the threat of use of nuclear weapons is credible.<sup>11</sup> These three assumptions work ideally when there are two state actors who both have nuclear weapons, as was evident during the Cold War. In such a case, both actors know that any use of nuclear weapons on their part will almost assuredly result in retaliation such that there would be no realistic plan under which one could achieve victory. Even after disarmament from Cold War highs, the United States maintains 8,425 operational nuclear weapons and Russia maintains 10,240 operational weapons.<sup>12</sup> Deterrence appears to remain the position at the center of nuclear arms control.<sup>13</sup>

The popularity of deterrence theory has long been controversial and it has become even more so after the end of the Cold War. The International Court of Justice (ICJ) in the *Legality of Threat or Use of Nuclear Weapons* case opined that the problem underpinning deterrence is that in order for it to work people must be willing to use nuclear weapons freely to deter an attack.<sup>14</sup> Second, as technology develops to the point where nuclear weapons can be produced by non-state actors such as terrorist groups, the principle of a limited multipolar system is clearly undermined.<sup>15</sup> Additionally, these groups do not have “rational” or “vital interests” like those of state actors as

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10. *Id.* at 1–2.

11. *Id.* at 3–10.

12. CHARLES J. MOXLEY, JR., NUCLEAR WEAPONS AND INTERNATIONAL LAW IN THE POST COLD WAR WORLD 555 (2000).

13. SAUER, *supra* note 9, at 1.

14. *Opinion on the Legality of the Threat or Use of Nuclear Weapons*, *supra* note 5, at ¶ 48 (“In order to be effective, the policy of deterrence, by which those States possessing or under the umbrella of nuclear weapons seek to discourage military aggression by demonstrating that it will serve no purpose, necessitates that the intention to use nuclear weapons be credible.”).

15. George Rathjens, *Nuclear Proliferation Following the NPT Extension*, in THE NUCLEAR NONPROLIFERATION REGIME 30–31 (Raju G.C. Thomas ed., 1998) (noting that the price of acquiring sufficient enriched uranium to produce a nuclear weapon has fallen from \$400,000 in 1979 to a tenth of that today).

such groups often fight for a cause rather than the traditional rational goals typical of states. Third, as state actors who have nuclear weapons increase in number and heterogeneity, the ability to create an effective deterrence system lessens as many states will not be evenly matched as nuclear competitors, negating the underpinnings that all parties view the risk-reward calculus of using nuclear weapons virtually identically.<sup>16</sup> Therefore, the assumptions upon which deterrence has been based have effectively been eroded.<sup>17</sup>

Beyond the theoretical problems that face deterrence, there is fear of the secondary effects that result from a policy of deterrence. Among these are the fear that if weapons exist, they will eventually be used; that they will foster an arms race and nuclear proliferation; and they will provide risks for terrorism, human and equipment failure, and environmental concerns resulting from the long-term storage of existing weapons.<sup>18</sup> These fears are compounded by the tangible monetary cost of maintaining a nuclear program that is never intended to be used.<sup>19</sup> With changes to the nuclear climate, the practicality of deterrence has evolved to the point where many currently question its potency in rationalizing the continued existence of nuclear weapons. However, as will be discussed later, the Bush administration has breathed new life into the deterrence doctrine as it is still seen as a reasonable way of explanation of the sixty year period where nuclear weapons have not been used.

## B. Nonproliferation & Counterproliferation

After tensions between the United States and the Soviet Union reached a near boiling point, it became clear for all parties that measures needed to be implemented to control the spread of nuclear

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16. Sumit Ganguly, *Behind India's Bomb: The Politics and Strategy of Nuclear Deterrence*, FOREIGN AFF., Sept./Oct. 2001, at 135 (book review) (analyzing a system where states that have fledgling nuclear programs will conceptualize deterrence in a more real way to ward off any possible attack or threat to their interests).

17. The United States has admitted that groups like al-Qaeda were working toward and had plans for the development of nuclear weapons. See Office of Press Secretary, *Fact Sheet: Day 100 on the War on Terrorism: More Steps to Shut Down Terrorist Networks*, The White House, Dec. 20, 2001, at <http://usinfo.state.gov/topical/pol/terror/01122004.htm> (last visited June 16, 2004).

18. MOXLEY, *supra* note 12, at 533–48.

19. David Silverberg, *America's Nuclear Arsenal: \$5.5 Trillion Well-Spent*, The Brookings Institute, July 8, 1998, at <http://www.brook.edu/fp/projects/nucwcost/silverberg.htm> (noting the cost of maintaining nuclear weapons programs in a post Cold War era is \$25 billion dollars a year and the overall cost of nuclear programs amounts to ten percent of the entire defense budget) (last visited June 16, 2004).

weapons. This concern was embodied in the *Treaty on the Nonproliferation of Nuclear Weapons* (NPT) in which a plan to control nuclear weapons development was created.<sup>20</sup> It is important to note that non-proliferation is an international treaty obligation as well as an international political conception for dealing with nuclear weapons. This treaty also became central in the ICJ decision regarding nuclear weapons, discussed below.

The treaty sets out a number of provisions addressing the spread of nuclear weapons. First, the members undertake to not directly or indirectly pass nuclear weapons or other nuclear devices to other states.<sup>21</sup> Second, it provides for safeguards for “non-weapon” states that do not seek such weapons.<sup>22</sup> Third, all parties agree to pursue “good faith” negotiations to end the use of nuclear weapons and bring about eventual complete nuclear disarmament.<sup>23</sup>

In 1995, the members of the NPT agreed to the indefinite extension of the agreement.<sup>24</sup> This agreement has been lauded by many as the best possible avenue for eliminating the existence of nuclear weapons at some point in the future.<sup>25</sup> It has served as the basis of the Strategic Arms Reduction Treaties (START I and II) between the United States and the Soviet Union, which have resulted in large reductions in nuclear stockpiles.<sup>26</sup> It has also provided the basis for nu-

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20. Treaty on the Nonproliferation of Nuclear Weapons, 1968, art. I, available at <http://disarmament.un.org/TreatyStatus.nsf> (last visited June 16, 2004).

21. *Id.* art. I. While not a member of the NPT, the actions of Pakistan in providing weapons technology to member countries has been troubling in recent news. See William J. Broad et al., *A Tale of Nuclear Proliferation: How Pakistani Built His Network*, N.Y. TIMES, Feb. 12, 2004, at A1 (detailing the extent and means by which Pakistan spread weapons technology); David E. Sanger & William J. Broad, *Pakistani's Nuclear Earnings: \$100 Million*, N.Y. TIMES, Mar. 16, 2004, at A12 (noting that clandestine sales of weapons to Libya alone netted Pakistan \$100 million).

22. *Id.* art. II.

23. *Id.* art. VI.

24. Extension of the Treaty on the Non-Proliferation of Nuclear Weapons, Dec. 3, 1995, available at <http://disarmament.un.org/wmd/npt/1995dec3.htm> (last visited June 16, 2004).

25. See generally, e.g., JOHN BURROUGHS, THE LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS: A GUIDE TO THE HISTORIC OPINION OF THE INTERNATIONAL COURT OF JUSTICE (1998) (emphasizing the importance of the nonproliferation regimes at forcing nuclear states to negotiate the end of the use of nuclear weapons); Joseph F. Pilat & Charles W. Nakhleh, *A Treaty Reborn? The NPT After Extension*, in THE NUCLEAR NONPROLIFERATION REGIME 41 (Raju G.C. Thomas ed., 1998) (opining with cautious optimism that the NPT will be able to control the spread and supplement counter-proliferation measures).

26. For more information regarding the status and details of these treaties, see Defense Threat Reduction Agency, [http://www.dtra.mil/os/ops/nuclear/os\\_npt.html](http://www.dtra.mil/os/ops/nuclear/os_npt.html) (last updated Jan. 9, 2001) (last visited June 19, 2004).

clear states to help non-nuclear states remain nuclear free by providing economic incentives to remain so.<sup>27</sup>

While remaining the primary regime dealing with the spread of nuclear weapons technology, nonproliferation has become increasingly difficult to maintain and has essentially broken down because of the actions of several states. Shortly after the extension of NPT, both India and Pakistan declared their nuclear capabilities.<sup>28</sup> The discovery after the first Gulf War of nuclear weapons research in Iraq, in violation of its obligations under the NPT, fueled further concern about the realistic nature of any nonproliferation regime without stronger compliance mechanisms.<sup>29</sup> The most recent and possibly damning event for the NPT regime is North Korea's announcement that it is a nuclear state after years of concerted efforts to prevent Pyongyang from developing such weapons by providing numerous concessions.<sup>30</sup> Each of these events points to the key problem that has always accompanied the NPT regime—the lack of an enforcement mechanism. Because of the absence of this important element, good faith remains the basis for its enforcement, and as is evident in the recent developments in North Korea, good faith is woefully inadequate when a rogue state can more easily decide that attaining weapons of mass destruction is in its best interest.<sup>31</sup>

The obligations of nuclear states to continue negotiations to reduce nuclear stockpiles have also stalled. While more successful recently, the United States and Russia have had a difficult time completing further bilateral negotiations to cut their nuclear stockpiles.<sup>32</sup>

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27. A notable situation of this is the work of the United States and the Soviet Union in providing pressure in preventing India and Pakistan from getting nuclear technology for many years. Additionally the difficulty in getting nuclear weapons technology after the NPT helped stop nuclear programs in Argentina and Brazil. Rathjens, *supra* note 15, at 34. It must be noted that India and Pakistan were not members of the NPT but this speaks to the competence of the regime to deal with critical states.

28. See Associated Press, *Nuclear History in India Pakistan*, N.Y. TIMES, May 28, 1998, available at <http://www.mtholyoke.edu/acad/intrel/nuchist.htm> (providing a timeline of the development of nuclear weapons between India and Pakistan) (last visited June 19, 2004).

29. Rathjens, *supra* note 15, at 35.

30. *Point of No Return*, THE ECONOMIST, Apr. 26, 2003; see discussion *infra* beginning with note 130; Brooks and Sanger, *supra* note 1.

31. For a discussion of how to approach a heterogeneous state system regarding ambition on attaining nuclear weapons, see Rathjens, *supra* note 15, at 32–34.

32. While there have been agreements regarding the cuts in nuclear weapons numbers, other areas of nuclear technology (most notably ABM) have made weapons cuts unstable. The slowness in cuts has been frustrating for non-nuclear states. David E. Sanger, *The Bush-Putin Summit: The Accord*, N.Y. TIMES, Nov. 14, 2001, at A1; Steven Lee Myers, *Bush in First Step to Shrink Arsenal of U.S. Warheads*, N.Y. TIMES, Feb. 9, 2001, at A1. But see Ronald Timerbaev

The United States withdrew from the Anti-Ballistic Missile Treaty (ABM), another component in the nonproliferation regime, in late 2001.<sup>33</sup> As the United States continues to take a more unilateralist view on the enforcement of what it sees as its rights and obligations under international law, the future viability of multilateral disarmament is in much doubt.

### C. Counterforce

The principle that a nuclear war can and should never be fought (the basis of deterrence theory) has been challenged by experts that feel nuclear weapons can be used effectively in certain circumstances and the United States must prepare to defend against the possibility of a limited nuclear attack. This concept of limited nuclear war is known as counterforce.

Counterforce has long been considered as one approach to the threat of nuclear weapons as well as when and in what matter such weapons can be used. The United States and the Soviet Union both have at one point created counterforce scenarios outside of their basic deterrence strategy of Mutually Assured Destruction; however the original conception of the limited use of nuclear weapons was hard to call “limited.”<sup>34</sup>

Yet as nuclear technology has developed so that the breadth of any nuclear impact can be limited, the United States has taken several steps to develop nuclear technology that would allow for a realistic counterforce initiative. The United States’ understanding that nuclear weapons can be used in limited situations on small targets is evident from the development of weapons like the nuclear tipped, “bunker busting” Trident bomb that can penetrate deep below the surface

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& Vladimir Orlov, *Concerted Action Needed on Nonproliferation*, THE MOSCOW TIMES, Apr. 19, 2000, available at <http://www.pircenter.org/board/article.php3?artid=288> (noting distrust by the Russians over the status of nonproliferation agreements with the United States) (last visited June 16, 2004).

33. For more information regarding the debate surrounding the ABM debate, see John Newhouse, *The Missile Defense Debate*, FOREIGN AFF., July/Aug. 2001, at 97.

34. See MOXLEY, *supra* note 12, at 426–30 stating:

Even under the most favorable assumptions it appeared that between 2 and 20 million Europeans would be killed, even from a very limited nuclear attack, with widespread damage to the economy of the affected area and a high risk of 100 million dead if the war escalated to attacks on cities. (US attack)

The attack, while designed to inflict the maximum economic damage while minimizing the attack size, would have killed some 20 million Americans immediately and injured another 5 million . . . [with a]t worst a modest nuclear attack. . . induc[ing] a permanent collapse of the U.S. economy . . .

(Soviet attack)

to destroy targets underground that are unreachable with conventional weaponry.<sup>35</sup> The United States Defense Department states that such weaponry is necessary to fill a gap that exists in the ability to fight entrenched opponents.<sup>36</sup>

A second way that counterforce has influenced United States nuclear policy is in the development of a missile defense mechanism, such as the Strategic Defense Initiative (SDI).<sup>37</sup> Originally initiated by President Ronald Reagan in 1983, such a mechanism was believed to provide the United States with “something that would render [nuclear] weapons obsolete.”<sup>38</sup> While critics contend that such a program will never work, the plan embodies the belief that Mutually Assured Destruction is an unsound theory for a country with other available defense options.<sup>39</sup> While SDI and programs like it have been conceptualized in many different ways,<sup>40</sup> it remains a key component of the United States strategy for addressing the nuclear threat.<sup>41</sup>

Counterforce measures have been attacked on a number of levels. First, no matter how limited the initial use of nuclear weapons, there is a substantial fear of the escalation to a broader nuclear conflict.<sup>42</sup> Additionally, with the changing nature of potential enemies and their means of attack, counterforce measures are likely unable to

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35. See generally J.D. Crouch, *Nuclear Posture Review: Hearing Before the Senate Armed Services Committee*, available at [http://www.defenselink.mil/news/Jan2002/n01092002\\_200201094.html](http://www.defenselink.mil/news/Jan2002/n01092002_200201094.html) (Jan. 9, 2002) (last visited June 19, 2004).

36. *Id.*

37. However, development of the new SDI system has suffered continual setbacks and there is concern that systems will be deployed before technology is adequately tested and developed. See Bradley Graham, *U.S. Missile Defense Test Fails*, Dec. 16, 2004, at A5 (reporting recent failures of missiles tests to intercept their targets).

38. *Transcript of Reagan News Session on Social Security and Missile Defense*, N.Y. TIMES, Mar. 26, 1983, at A1.

39. See generally ELLIOTT L. MEYROWITZ, *PROHIBITION OF NUCLEAR WEAPONS: THE RELEVANCE OF INTERNATIONAL LAW* (1989) (stating the history and basis behind the development of SDI).

40. For a complete timeline and history of United States missile defense programs, see Daniel Smith, *Chronology of U.S. National Missile Defense Programs*, at <http://www.cdi.org/hotspots/issuebrief/ch9/index.html> (last visited June 19, 2004).

41. National Strategy to Combat Weapons of Mass Destruction, *supra* note 6, at 3 (Dec. 2002) (stating the need for a vigorous air defense and effective missile defense against today's threats).

42. See JOINT CHIEFS OF STAFF, JOINT PUB. 3-12 DOCTRINE FOR JOINT NUCLEAR OPERATIONS, I-5-I-6, available at [http://www.dtic.mil/doctrine/jel/new\\_pubs/jp3\\_12.pdf](http://www.dtic.mil/doctrine/jel/new_pubs/jp3_12.pdf) (Dec. 15, 1995) (last visited June 19, 2004); MOXLEY, *supra* note 12, at 595-598 (providing numerous quotations from government officials, military experts, and academics opining that any sort of limited use of weapons will not be successful).

effectively address unconventional attacks, especially those from non-state actors.<sup>43</sup>

The above rationales governing the world since the first use of nuclear weapons provide insight into the numerous paradigms currently employed to manage the existence of nuclear weapons. While these theories do not provide a specific single response to nuclear weapons and the threat of their use, they provide valuable context and an understanding of how states currently perceive the role of nuclear weapons. This in turn aids in effectively analyzing whether the use or threat of use of such weapons is lawful and the significance of such a determination.

## II. INTERNATIONAL LAW REGARDING NUCLEAR WEAPONS

Treaties and customs that represent the collective views of the belligerents have been developed throughout history. These principles protect combatants and noncombatants, safeguard human rights, and facilitate the restoration of peace. These treaties and customs make up the law of armed conflict.<sup>44</sup>

While international political theory provides several rationales both for and against the use of nuclear weapons, international law standards are also applicable. It is important to remember that there are a number of applicable principles regarding the use or threat of use of nuclear weapons; however the scope of this note is limited to the humanitarian law principles of proportionality, necessity, and discrimination. This section provides an overview of each of these legal principles, along with an attempt to parse out how they apply to the nuclear threat and, ultimately, how nuclear weapons have affected the legitimacy of international law.

Indeed, it is important to note that this is an area of international law where positive and customary law come together. Humanitarian law is governed under the principle called the Martens Clause:

Until a more complete code of the laws of war is issued, the high contracting Parties think it is right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of

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43. James Dao, *Defense Secretary Warns of Unconventional Attack*, N.Y. TIMES, Oct. 1, 2001, at B5 (warning that terrorist groups could use nuclear dirty bombs to attack the United States).

44. JOINT CHIEFS OF STAFF, JOINT PUB. 3-12.1 DOCTRINE FOR JOINT THEATER NUCLEAR OPERATIONS, v, available at [http://www.fas.org/nuke/guide/usa/doctrine/dod/jp3\\_12\\_1.pdf](http://www.fas.org/nuke/guide/usa/doctrine/dod/jp3_12_1.pdf) (Feb. 9, 1996) (last visited June 19, 2004).

international law, as they result from the *usages* established between civilized nations, from the laws of humanity and the requirements of the public conscience.<sup>45</sup>

For this reason and because of the necessary limited scope of this note, the principles that govern international law are going to be discussed at the same time in order to draw out their essential elements. Only after drawing out these principles will the difficult issue of customary international law as applied to nuclear weapons be discussed. Additionally, because of the all-encompassing effect the use nuclear weapons would have, it is important to acknowledge up front that there is inherent overlap between these principles, which makes it difficult to parse them into discrete elements.

#### A. Rule of Proportionality

Principles of international law require that the use of force be generally proportionate to the threat that exists.<sup>46</sup> In order to examine whether nuclear weapons can meet this principle, one must look at (1) the potential threats that could exist for a state contemplating the use of these weapons and (2) the amount of damage that would result from the use of the weapons.

As was discussed in the first part of this note, there have been many different incarnations of the perceived threat that would allow the use of nuclear weapons. However, when we get below the level of complete destruction of a state, it becomes harder to determine what other threats could allow the use of nuclear weapons. Looking to history, the United States' use of nuclear weapons on Hiroshima and Nagasaki in the waning days of World War II was based on a fear that the war would drag on indefinitely and tens of thousands of Americans and Japanese would die in an invasion of Japan.<sup>47</sup> From this rationale, it would appear that the limited use of nuclear weapons for tactical purposes could be justified, but the single use of such weapons under this rationale makes it extremely difficult to establish a customary norm of what qualifies as a proper threat.

The second element proposed above considering the amount of damage the use of nuclear weapons would entail, once again forces one to look at the state of nuclear technology. The United States, in its argument to the ICJ and in its actions in developing limited nu-

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45. Preamble, Hague Convention II (July 29, 1899) (emphasis added).

46. HISAKAZU FUJITA, INTERNATIONAL REGULATION OF THE USE OF NUCLEAR WEAPONS, 33-37 (1988).

47. BURROUGHS, *supra* note 25, at 67; MALANCZUK, *supra* note 7, at 26.

clear weapons, opines that current nuclear policies are built upon a false belief that nuclear weapons can only be used indiscriminately on a large-scale basis.<sup>48</sup> If a country can limit the use of a nuclear device to a small area, the proportionality necessary for its use must be recalibrated to properly account for the weapons' true effect.<sup>49</sup> However, it is important to note the fear of escalation that can result from any use of nuclear weapons. Additionally, the fallout that will result from their limited suggests such limited use may not fully conceive of possible inherent secondary dangers.<sup>50</sup> Supporting this is the evidence of long-term environmental damage and disease surrounding nuclear blast sites such as at Bikini Atoll and in Hiroshima and Nagasaki, which were relatively low-yield nuclear weapons relative to the weapons of today.<sup>51</sup> If the nature of the qualitative damage that results from nuclear weapons is too great, this element would likely overwhelm any justified use of such weapons.

Tying these two aspects of proportionality together suggests a sliding scale that depends on the type of nuclear weapon used and the rationale for its use. It will become increasingly difficult to judge proportionality as new limited weapons are developed, likely opening the door to new possible arguments for their use.

## B. Rule of Necessity<sup>52</sup>

Nuclear weapons should only be used when conventional weapons would not suffice in meeting the military objective in question, and any use of force beyond that would be illegal.<sup>53</sup> The United States military specifically acknowledges that because of the direct and secondary fallout that would likely result from the use of nuclear weapons, their use would likely violate the rule of necessity.<sup>54</sup> The principle of necessity is a long-standing doctrine that was used in ob-

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48. *Opinion on the Legality of the Threat or Use of Nuclear Weapons*, *supra* note 5, at ¶ 91.

49. FUJITA, *supra* note 46, at 40.

50. BURROUGHS, *supra* note 25, at 67.

51. MOXLEY, *supra* note 12, at 430–433 (acknowledging the problems that have resulted from the long-term affects of exposure to nuclear fallout include babies born without bones and transparent skin. This has been noted in humans and other species as well).

52. Please note that there is also a rule of moderation that applies to the use of force. The Hague Regulations Article 22 states that “the right of belligerent to adopt a means of injuring the enemy is not unlimited.” Encompassed in the discussion in this section of necessity is also the rule of moderation that force needs to be used in as limited a way as possible, and that going beyond such an means would be a violation of the rule of moderation.

53. MOXLEY, *supra* note 12, at 52.

54. JOINT CHIEFS OF STAFF, *supra* note 44, at v–vi.

taining convictions in the Nuremberg and Yugoslavia tribunals. Essentially force that cannot be controlled may not legally be used.<sup>55</sup> Additionally, attached to this principle is the belief that soldiers are constrained in their behavior while fighting a war and that there will be repercussions for actions beyond those accepted as legitimately necessary.<sup>56</sup>

When nuclear weapons are looked at through the lens of necessity, some contend that their destructive capacity will always make their use illegitimate.<sup>57</sup> However, these assertions do point to a key challenge for those advocating the use of nuclear weapons—any military objective must survive the necessity requirement.<sup>58</sup> If the use of the weapon can provide no benefit to the state employing them, it is very difficult to say that using such a weapon is necessary.<sup>59</sup> As military technology has developed and the use of nuclear technologies for limited purposes, such as penetrating underground targets unreachable with conventional weapons, the components of a legitimate limited military nuclear objective begin to emerge.<sup>60</sup> The use of large-scale missiles and the destruction that would result from their use is much harder to grasp under this principle. It has been held that use of large-scale nuclear weapons would only be allowable to preserve the existence of the state, but others claim that even this limited circumstance is not permissible given the mass destruction that would result from large-scale nuclear engagements.<sup>61</sup> For these reasons, the use of nuclear weapons under the necessity analysis is highly dependent upon the surrounding facts and circumstances of the limited capacity of the weapon and the means of attacking the target in question.

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55. For a brief outline of the principle of necessity as applied in the Nuremberg Tribunals and International Criminal Tribunal for the former Yugoslavia, see Leif Tore Mickelson, *Military Ethics from the International Military Tribunals at Nuremberg and of the Former Yugoslavia; a dissertation Proposal*, available at <http://www.accts.org/ethics/norway/michelst.htm> (last visited June 20, 2004); MOXLEY, *supra* note 12, at 52.

56. *See id.*

57. BURROUGHS, *supra* note 25, at 96–97; MOXLEY, *supra* note 12, at 57.

58. MOXLEY, *supra* note 12, at 57.

59. *Id.*

60. Crouch, *supra* note 35.

61. *See supra* notes 34–43 and accompanying text for discussion on counterforce; the issue of the limited use of nuclear weapons was presented to the International Counter of Justice and is discussed *infra*.

### C. Rule of Discrimination

Elemental to the fighting of wars is the goal of destroying the opponent's army. Within this goal is the principle that the object of an attack should not be to attack civilians and to protect them to the extent practicable.<sup>62</sup> Thus, the use of a weapon, despite being focused on a military target, that has a disproportionate impact on civilians would be considered improperly discriminatory under international law. Indeed, Article 48 of the First Protocol to the Geneva Conventions states:

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between the civilian objects and military objectives and accordingly shall direct their operations only against military objectives.<sup>63</sup>

Some have tried to distinguish discrimination in the nuclear context in a way that does not entirely distinguish in a classic, absolute division between combatants and noncombatants. The Hiroshima and Nagasaki bombings are used as examples for a more discretionary reading of what discrimination should mean. While many will simply attack the Hiroshima and Nagasaki bombings as a violation of international law and end their argument,<sup>64</sup> it would be disingenuous not to analyze these events further to see how they could further refine a useful definition of the concept of discrimination in the nuclear context. First, one must look at the legitimate interests of the state attacking. In this case the United States contended that by attacking these two cities the war was shortened and the lives of many Americans and Japanese were saved. Additionally, some would argue that as long as the primary objectives of the attack are military in nature, widespread collateral damage will not deprive the use of force from being considered properly discriminatory.<sup>65</sup> Even if opponents of this reading claim that the underlying facts of the Hiroshima-Nagasaki

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62. MALANCZUK, *supra* note 7, at 343.

63. *Id.* at 347; however it is important to note on this point that the United States specifically provided that in its ratification of the First Protocol was subject to the understanding that "the rules established by this Protocol were not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons." Such reservations are permissible under the Vienna Convention on the Law of Treaties as long as they do not conflict with the object and purpose of the treaty. In this case because of other areas governed by the treaty this would appear to not be such a violation.

64. BURROUGHS, *supra* note 25, at 67.

65. FUJITA, *supra* note 46, at 35 (quoting ROBERT W. TUCKER, *THE JUST WAR: A STUDY OF CONTEMPORARY AMERICAN DOCTRINE*, 90-93 (1960)).

case are questionable,<sup>66</sup> the underlying theory provides a powerful basis upon which discrimination can be understood to potentially allow for the use of nuclear weapons in limited circumstances.

#### D. Application of the principles of international law to the use of nuclear weapons

The International Court of Justice in 1996 provided an advisory opinion at the behest of the World Health Organization (WHO) and the United Nations General Assembly on the question, “[i]s the threat or use of nuclear weapons in any circumstance permitted under international law?”<sup>67</sup> While the court dismissed the WHO as not being a proper body to put a question of this type before the court, it did proceed with the General Assembly request.<sup>68</sup> While the court decided several questions individually. There are four that are important to the overall discussion about when, or if, the use of nuclear weapons is ever permissible.

1. *No Customary or Treaty Rule Allowing the Authorization of Nuclear Weapons.* The ICJ stressed that “[t]here is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons.”<sup>69</sup> The court in this case looked largely at the customary aspects regarding the authorization of the use of nuclear weapons.<sup>70</sup> There are two components necessary for a customary rule to take root: there must be state practice and *opinio juris* (intent on the parts of the states to support such as use).<sup>71</sup>

Three elements are necessary for state practice to constitute a customary norm. There must be (1) sufficient state practice, (2) by a specified number of states, (3) over a certain amount of time.<sup>72</sup> The

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66. BURROUGHS, *supra* note 25, at 67; MALANCZUK, *supra* note 7, at 26.

67. *Opinion on the Legality of Threat or Use of Nuclear Weapons*, *supra* note 5.

68. The power of the court to decide this case comes from Article 65(1) of the Statute of the International Court of Justice which states “the Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.”

69. *Opinion on the Legality of Threat or Use of Nuclear Weapons*, *supra* note 5, at ¶ 105 .

70. While the Nonproliferation Treaty allowed for 5 states to retain nuclear weapons there is no treaty law to support the use of such obligations.

71. *See, e.g.*, *Military and Paramilitary Activities (Nicaragua v. United States) (Merits)*, 1986 I.C.J. 14 (June 27); for a further explanation of customary international law see MALANCZUK, *supra* note 7, at 39–48.

72. MALANCZUK, *supra* note 7, at 41.

calculus of whether there is sufficient state practice for a customary norm requires balancing these elements. Regarding the use of nuclear weapons, it has been acknowledged that it is very difficult for a rule of customary international law to be acknowledged from a single instance of use.<sup>73</sup> In the case of nuclear weapons, while the five major superpowers all have such weapons, and they have tested these weapons extensively, there is only one such instance of their use during war.<sup>74</sup> While one could stretch this principle and claim that the policy of developing these weapons is sufficient to allow their use, looking at the lack of such actual use over such a long period of time makes it equally difficult to claim that a customary rule allowing the use of nuclear weapons exists.

The insufficient state practice that exists regarding the threat or use of nuclear weapons is reinforced by the mixed message surrounding their possession by the nuclear powers. While the court took note that deterrence was the central policy undergirding the previous fifty years of nuclear policy, the court did not determine that such a policy should influence the creation of a customary rule that would allow for the use of nuclear weapons.<sup>75</sup> Thus, the lack of intent behind any actions tied to the lack of state practice prevented a customary rule in favor of allowing the use of nuclear weapons.<sup>76</sup>

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73. Asylum Case, 1950 I.C.J 266, 277 (Nov. 20).

74. FUJITA, *supra* note 46.

75. *Opinion on the Legality of the Threat or Use of Nuclear Weapons*, *supra* note 5, at ¶ 105. *But see* Judge Shi (Appended Declaration), available at [http://www.icj-cij.org/icjwww/icasess/iunan/iunan\\_judgment\\_advisory%20opinion\\_19960708/iunan\\_ijudgment\\_advisory%20opinion\\_19960708\\_Opinions/iunan\\_ijudgment\\_19960708\\_Declaration\\_Shi.htm](http://www.icj-cij.org/icjwww/icasess/iunan/iunan_judgment_advisory%20opinion_19960708/iunan_ijudgment_advisory%20opinion_19960708_Opinions/iunan_ijudgment_19960708_Declaration_Shi.htm) (last visited Jan. 3, 2005) (noting disagreement over the use of political deterrence as a basis for *opinio juris* stating that this was international politics and should not be used in the determination of rules under international law).

76. This holding of the court was not controversial as it was unanimous.

2. *No Customary or Treaty Rule Against Nuclear Weapons.*

There is in neither customary nor conventional international law any comprehensive and universal prohibition on the threat or use of nuclear weapons as such.<sup>77</sup> A group of states argued before the court that both treaties and customary law were sufficient to prohibit the use of nuclear weapons in law, however, the court in the end determined, by a sizable majority, that no such law existed.<sup>78</sup>

Under treaty obligations relating to other types of weapons, it is argued that the threat or use of nuclear weapons is prohibited. Such groups pointed to The Hague Convention of 1907 and the Geneva Protocol of 1925 as either controlling in themselves or sufficient in their extension to create a customary rule that prohibits the use or threat of use of nuclear weapons.<sup>79</sup> The 1925 Geneva Protocol was seen as most applicable.<sup>80</sup> It was argued that the treaty's prohibition against the distribution by projectile of poisonous or other gases should be seen as sufficiently analogous to the effects of nuclear weapons to prohibit their use.<sup>81</sup> The ICJ, however, chose not apply these treaties, stating that under their plain meaning they could only cover weapons whose actual effect was to poison or asphyxiate and they were therefore inapplicable to nuclear weapons.<sup>82</sup> The court, through this narrow construction, refused to consider these treaties as evidence of the prohibition of nuclear weapon use in customary international law.

Beyond these treaties, there is other evidence that opponents of nuclear weapons were able to use to support creation of a rule against the threat or use of nuclear weapons. First, the United Nations General Assembly passed a resolution in 1961 stating that the use of nu-

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77. *Id.* at ¶ 105.

78. *Id.*

79. Roger S. Clark, *Treaty and Custom*, in INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS 171, 173 (Laurence Boisson de Chazournes & Philippe Sands eds., 1999).

80. *Id.*

81. MOXLEY, *supra* note 12, at 197.

82. *Opinion on the Legality of the Threat or Use of Nuclear Weapons*, *supra* note 5, at ¶ 54–56. *But see* Dissenting Opinion of Judge Shahabuddeen, available at [http://www.icj-cij.org/iccases/iunan/iunan\\_judgment\\_advisory%20opinion\\_19960708/iunan\\_ijudgment\\_advisory%20opinion\\_19960708\\_Opinions/iunan\\_ijudgment\\_19960708\\_Dissenting\\_Shahabuddeen.htm](http://www.icj-cij.org/iccases/iunan/iunan_judgment_advisory%20opinion_19960708/iunan_ijudgment_advisory%20opinion_19960708_Opinions/iunan_ijudgment_19960708_Dissenting_Shahabuddeen.htm) (arguing strenuously for the applicability of the rules of these conventions because of the fallout that results from nuclear weapons being tantamount to poisoning) (last visited June 19, 2004).

clear weapons was illegal.<sup>83</sup> General Assembly resolutions are not binding, but they can be considered as evidence of customary international law.<sup>84</sup> However, in this case, the number of states that voted for this resolution undermines its power as an ingredient of custom. Only fifty-five states voted for the resolution while twenty states voted against.<sup>85</sup> In this circumstance, the circumstances of the support for the resolution reduces its strength as illustrative of any international custom, as the resolution was motivated by narrow strategic concerns of the Soviet Union.<sup>86</sup>

Opponents of nuclear weapons additionally tried to point to the lack of their use as evidence of a customary rule that such weapons were not allowed. While the lack of an event can be evidence of state action, in this case there was no *opinio juris* to support a belief that states with nuclear weapons did not use them because they were illegal. The court specifically took notice, as touched upon in the previous section, of the importance that deterrence has played in the policy of nuclear states, and how this policy was grounded in the use of nuclear weapons in a massive retaliation against any possible attack.<sup>87</sup> Additionally, under the principle of the *North Sea Continental Shelf* case, the rationales of the nuclear powers would be essential in creating a customary rule against the use of nuclear weapons because they were the states that such a rule would most directly be applied; those states being in vocal opposition to the illegality of nuclear weapons once again undermines the creation of a customary norm against the proscription of nuclear weapons.<sup>88</sup>

3. *Limited Area for Debate.* It follows from the requirements discussed above that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in

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83. *Declaration on the Prohibition of the Use of Nuclear and Thermo-Nuclear Weapons*, G.A. Res. 1653, U.N. GAOR, 16th Sess. (1961).

84. MALANCZUK, *supra* note 7, at 379.

85. *Id.* at 346.

86. *Id.* This is because the main defensive line against the Soviets was highly dependent upon the nuclear deterrent that existed in Western Europe.

87. See *supra* notes 7–17 and accompanying text regarding the policy of deterrence; see also *Opinion on the Legality of the Threat or Use of Nuclear Weapons*, *supra* note 5. But see Judge Shi Declaration, available at [http://www.icj-cij.org/icjwww/icasess/iunan/iunan\\_judgment\\_advisory%20opinion\\_19960708/iunan\\_ijudgment\\_advisory%20opinion\\_19960708\\_Opinions/iunan\\_ijudgment\\_19960708\\_Declaration\\_Shi.htm](http://www.icj-cij.org/icjwww/icasess/iunan/iunan_judgment_advisory%20opinion_19960708/iunan_ijudgment_advisory%20opinion_19960708_Opinions/iunan_ijudgment_19960708_Declaration_Shi.htm) (believing that deterrence was a political question not subject to consideration by the court) (last visited June 20, 2004).

88. *North Sea Continental Shelf Cases*, 1969 I.C.J. 3 (Feb. 20).

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 did not conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a state would be at stake.<sup>89</sup>

In the most controversial aspect of its decision, the court stated that humanitarian law prohibited nuclear weapons use except in the case where the viability of the state was in jeopardy.<sup>90</sup> Yet the court makes this broad assertion but does not provide guidance as to what “survival of the state” means. The exception provides much difficulty in that if this means that states have a fundamental right to preservation, a broad reading would create an exception that would gut the norm stated in the first half of the holding.<sup>91</sup> Additionally, under this broad reading, this fundamental right would potentially trump a state’s other obligations including any treaty limiting nuclear weapons.<sup>92</sup> This would, in essence, create an exception from international law when the state’s existence is threatened and would result in a default to deterrence being the guiding force in international law because the only thing that would keep states from killing their enemy would be the fear of one’s own certain demise.<sup>93</sup>

However, a more limited reading of when a state can use nuclear weapons may be more appropriate in light of the surrounding language used by the ICJ. In laying out the principles of necessity and proportionality, the court was likely presenting an *example* of a limited case where a state may be able to meet the requirements laid out under humanitarian law rather than a right that would inure to the state. This reading is more palatable since there is no precedent where an unlimited right of a state to its own preservation can be found in treaty or customary law.<sup>94</sup> However, a right to some form of self-defense in the use of nuclear weapons and the lack of a clear definition of such a right represents the lack of certainty in this field

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89. *Opinion on the Legality of the Threat or Use of Nuclear Weapons*, *supra* note 5, at ¶ 105.

90. *Id.*

91. Marcello G. Kohen, *The Notion of ‘State Survival’ in International Law*, in *INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS* 293, 294–95 (Laurence Boisson de Chazournes & Philippe Sands eds., 1999).

92. *Id.*

93. *Id.* at 298.

94. *Id.* at 306–10.

of international law as principles of the nuclear age are stretched to cover the realities of modern warfare.

4. *Need for Negotiations.* There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.<sup>95</sup> The ICJ concluded their decision by reminding states of the obligation to continue with their nuclear nonproliferation obligations. This holding of the court was designed to counter one of the main criticisms of bringing this case to the ICJ in the first place—a decision about the legality of the use of nuclear weapons would impede progress on treaty negotiations for nuclear disarmament.<sup>96</sup> This can be read as an attempt to cajole the nuclear states to bring to fruition the end goal of nuclear disarmament, and that their right to maintain a stockpile of nuclear weapons is limited, based on their good faith efforts to eliminate them.<sup>97</sup>

The court's decision came down to the conclusion that nuclear weapons should seldom, if ever, be used and suggests that all states have an obligation to work together toward true nuclear disarmament. The decision marks a concerted effort to lay out with authority the position of international law on nuclear weapons; however, as is evident from this analysis, notable and evident gaps exist in international law when humanitarian law provides the underlying principles for such principles. This gap can be attributed to how humanitarian law has difficulty understanding how nuclear weapons operate within their unique framework. Additionally, the lack of binding authority behind the ICJ decision underscores the weakness of the international law and the nonproliferation principles the ICJ is asking all states to follow. As a result, the ICJ decision, while arguably one of the highest and most authoritative decisions on the status of nuclear weapons under international law, remains an opinion.

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95. *Opinion on the Legality of the Threat or Use of Nuclear Weapons*, *supra* note 5, at ¶ 105.

96. MEYROWITZ, *supra* note 39, at 197–208.

97. See Miguel Marin Bosch, *The Non-Proliferation Treaty and Its Future*, in INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS, 375, 386–89 (Laurence Boisson de Chazournes & Philippe Sands eds., 1999) (arguing that nuclear weapons states are not serious about nonproliferation of nuclear weapons and that a new paradigm is necessary to lead to true disarmament).

### E. The American Backlash to International Law—The Death of the Comprehensive Test Ban Treaty

The frustration with soft international law and the lack of an effective mechanism for the enforcement of obligations has not gone unnoticed in the world's capitals. Several examples point to the breakdown in nuclear weapons control regimes, a high profile example among them was the United States Senate's refusal to ratify the Comprehensive Test Ban Treaty (CTBT) in 1999. While there are several reasons (including ones that are purely political) for the treaty's demise, a shift in trust of international regimes on nuclear weapons was one of the driving forces behind its defeat.<sup>98</sup> There was concern in the Senate of how the CTBT would operate. First, there was deep suspicion over the science of high-tech virtual testing and its ability to maintain the readiness of U.S. nuclear capabilities.<sup>99</sup> Second, there was an overarching belief that other states that had signed the CTBT would not actually stop nuclear testing and that the CTBT's monitoring and verification systems were insufficient to detect cheating.<sup>100</sup> Given these concerns, the CTBT not only failed to attain its required two-thirds majority but instead failed to achieve a bare majority.<sup>101</sup>

The CTBT is more than simply illustrative of bad vote counting by Democrats in what amounted to a game of chicken between internationalists and unilateralists. It represents a growing frustration with soft law principles to bind parties that provide no means of ensuring compliance by other members. The CTBT vote also provides a preview of the current Bush administration foreign policy characterized by the flexing of American muscle to force compliance on a more bilateral level.<sup>102</sup> The question that must then be asked is how well bilateral threats can provide an effective tool for nuclear weapons management.

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98. Terry L. Deibel, *The Death of a Treaty*, FOREIGN AFF., Sept./Oct. 2002, at 142, 144–45 (providing an analysis on the reasons for the treaties defeat including a group of Senators who believed that international law cannot bring true security for the United States).

99. *Id.* at 144.

100. *Id.* at 145.

101. *Id.* at 142.

102. *Id.* at 161; G. John Ikenberry, *American's Imperial Ambition*, FOREIGN AFF., Sept./Oct. 2002, at 45, 51.

### III. THE BUSH POLICY ON NUCLEAR WEAPONS

If the United States intends to rely on its strength to govern nuclear weapons proliferation, it will have to shift from the current framework of nonproliferation to a new regime that can provide stability but also provides some overarching basis that can bring to accord the hearts and minds of nuclear weapons states, those states not seeking nuclear weapons, and those states without nuclear weapons who may be seeking them.<sup>103</sup>

#### A. Nuclear Theory *a la Carte*

In December 2002 as a derivative of the new National Security Strategy, the Bush administration released the *National Strategy to Combat Weapons of Mass Destruction*.<sup>104</sup> The policy is heavily reliant upon an amalgamation of many different theories under the umbrella of a “new” concept of deterrence and counterproliferation.<sup>105</sup>

The President’s plan is based largely on the opinion that new states should not be allowed to develop nuclear weapons and the United States should take measures to ensure such states comply with current nonproliferation controls. The plan would take into account the tools of diplomacy, arms control, multilateral agreements, export controls, and other elements to enforce international agreements that would limit the spread of nuclear weapons.<sup>106</sup> The problem is that the United States emphasizes obligations of other states under the NPT but fails to account for its own obligations under the treaty.<sup>107</sup> The Bush perspective is based on the assumption that nuclear weapons are here to stay and that the United States should reduce its stockpile only as is prudent, while developing new nuclear technologies (such as the Trident) for today’s modern enemy.<sup>108</sup> The policy also promotes the further development of nuclear missile defense technology, which has been evidenced in the United States withdrawal from the ABM treaty.<sup>109</sup>

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103. George Perkovich, *Bush’s Nuclear Revolution: A Regime Change in Nonproliferation*, FOREIGN AFF., Mar./Apr. 2003, at 1, available at <http://www.drumbeat.mlaterz.net/Op-Ed/George%20Perkovich%20Bush’s%20Nuclear%20Revolution%20030203a.htm> (last visited June 20, 2004).

104. See *supra* note 6.

105. *Id.* at 1.

106. *Id.* at 2–3.

107. Perkovich, *supra* note 103, at 7.

108. *Id.*

109. *Id.*

The Bush policy is based upon a fundamental shift in the understanding of the proper role of nuclear weapons and how they should be governed. The weapons themselves are not seen as the problem—the new focus is on the state and non-state actors who would seek to use those weapons (terrorists; rogue states; and potentially Pakistan, Russia, and China).<sup>110</sup> Such a policy of allowing nuclear disarmament to be on what can be described as an *a la carte* basis not governed by a larger multilateral framework negates the benefit that non-nuclear nations realize from their NPT obligations and neglects the fact that there are states that may seek to join the nuclear club if such weapons will remain attainable in the distant future.<sup>111</sup>

### B. Preemptive Self-defense

Another element within the Bush strategy regarding WMD is the concept of a preemptive attack to prevent other states from attaining nuclear weapons.<sup>112</sup> Such a right of preemptive attack is extremely controversial. A state is understood to have a right to use force to repel an attack that is brought upon it.<sup>113</sup> The imperative question here is how imminent must an attack be before a state can use force against that threat. The U.N. Charter provides no explicit guidance on when force may be applied in such a situation. While opponents argue that the language of Article 51 provides a mechanism to deal with threats to states under the first clause of Article 51 and Article 2(4), a more liberal reading of the right of self-defense can be made by looking at the applicable language of the Charter in conjunction with the circumstances of its drafting.<sup>114</sup>

The historic Caroline Doctrine states that preemptive hostile action can only be used when an attack is “instant, overwhelming, leaving no choice of means and no moment for deliberation.”<sup>115</sup> The Caroline Doctrine, while a central concept in the use of force, should be questioned in its applicability to the nuclear weapons context since the *Caroline* was not touting a twenty-megaton nuclear weapon. Because of the large threat inherent in such a weapon, a hard Caroline approach to nuclear weapons would force states to accept nuclear de-

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110. *Id.* at 5–6.

111. SAUER, *supra* note 9, at 31.

112. National Strategy to Combat Weapons of Mass Destruction, *supra* note 6, at 3.

113. U.N. CHARTER art. 51.

114. MALANCZUK, *supra* note 7, at 312.

115. Michael Elliott, *Strike First, Explain Yourself Later*, TIME, June 24, 2002, available at <http://www.time.com/time/columnist/printout/0,8816,265536,00.html> (last visited June 16, 2004).

velopment and would only allow action when the weapon was primed for attack. The concept of necessity and immediacy in preventing an attack needs to be balanced with the amount of damage that will result from a state acquiring nuclear weapons and the inability to properly respond to a threat after a nuclear weapon's development and deployment. The statement by Vattel about the possibility of preemptive self-defense should be looked at as a better articulation of the proper norm.<sup>116</sup> When looking at what actions are permissible for a state to provide for its own security, Vattel opined that:

It is safest to prevent the evil when it can be prevented. A nation has a right to resist an injurious attempt, and to make use of force and every honourable expedient against whosoever is actually engaged in opposition to her, and even to anticipate his machinations, observing, however, not to attack him upon vague and uncertain suspicions, lest she should incur the imputation of becoming herself an unjust aggressor.<sup>117</sup>

This statement seems to correctly emphasize the harm component while properly requiring that a harm demonstrably exist before any such force could be used. While this admittedly obfuscates the third step under the Caroline Doctrine, the legal requirement of exhaustion of deliberation has become less important and harder to apply when the goal is to prevent the development of nuclear weapons.<sup>118</sup>

Preemptive self-defense does have its drawbacks and enjoys little historical support. Until recently, it has been frowned upon by all major powers, including the United States. The most notable example of its disfavor was Israel's bombing of the Osirak nuclear facility, which Israel claimed was going to be used to produce a nuclear weapon.<sup>119</sup> The United Nations Security Council stated that the ac-

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116. EMER DE VATTEL, *THE LAW OF NATIONS*, bk II, ch. IV, § 50 (Joseph Chitty trans., 1870), available at [http://www.constitution.org/vattel/vattel\\_02.htm](http://www.constitution.org/vattel/vattel_02.htm) (last modified Oct. 21, 2002) (last visited June 16, 2004).

117. *Id.*

118. See Thomas Graham, Jr., *National Self-Defense, International Law, and Weapons of Mass Destruction*, 4 CHI. J. OF INT'L L. 1, 7-8 (2003) (noting that the condition of immediacy has been diminished when looking to threats that are less predictable and by state action); Angus Martyn, *The Right of Self-Defense Under International Law—The Response to Terrorist Attacks of 11 September*, available at <http://www.aph.gov.au/library/pubs/CIB/2001-02/02cib08.htm> (Feb. 12, 2002) (last visited June 16, 2004). But see Kelly J. Malone, Comment, *Preemptive Strikes and the Korean Nuclear Crisis: Legal and Political Limitations on the Use of Force*, 12 PAC. RIM L. & POL'Y J. 807, 831-32 (2003) (noting that while exhaustion of peaceful remedies is not cited as much as other aspects of the *Caroline* Doctrine it is an important concept of international law reinforced by the U.N. Charter, and thereby applies it to the current North Korean Nuclear Crisis).

119. MALANCZUK, *supra* note 7, at 313.

tions of Israel were unjustified in the face of the threat that existed at that time.<sup>120</sup> Beyond Osirak, there are situations where nuclear weapons were placed in Europe by the United States and in Cuba by the Soviet Union; in both of these situations neither party used preemptive self-defense to stop the actions of the opposing party.<sup>121</sup> The question that cannot be answered and likely one of the main reasons the principle has not been applied until recently is the fear that it will be impossible to draw the line between when action would be justified and when it would be unjustified because it involves predicting future actions of other states, and this could introduce chaos into international law and politics regarding the use of force.<sup>122</sup> The bright line rule of keeping “bad” weapons out of the hands of “bad” people will not likely work in reality, as the nuclear club continues to grow. However, as discussed below, there are ways to distinguish between nuclear proliferators and one must do so in order to use this new doctrine of preemptive self-defense in a more practical setting.

Regardless of what one thinks of the doctrine of preemptive self-defense as a tool to ward off the threat of nations developing weapons of mass destruction, the doctrine appears to be here to stay, at least for the immediate future. The attack on Iraq was largely based upon the belief that Iraq’s alleged weapons of mass destruction development programs needed to be stopped, as well as the claim that Hussein’s regime was in breach of Iraq’s obligations not to develop such weapons.<sup>123</sup> While the White House relied upon U.N. Security Council resolutions 687 and 1441 as additional support for the invasion of Iraq, the entire context of these arguments was wrapped in the doctrine of preemptive self-defense.<sup>124</sup> The doctrine, while under question because of the inability to find WMD in Iraq,<sup>125</sup> likely represents a strategic realignment where the United States critically looks to its own interests as justifying its action around the world.

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120. S.C. Res. 487, U.N. SCOR, 22 Sess., 2288th mtg. at 10 (1981).

121. MALANCZUK, *supra* note 7, at 312.

122. Perkovich, *supra* note 103, at 8.

123. George W. Bush, President’s Radio Address, available at <http://www.whitehouse.gov/news/releases/2003/03/20030315.html> (Mar. 15, 2003) (last visited June 16, 2004).

124. George W. Bush, *President Says Saddam Hussein Must Leave Iraq in 48 Hours*, available at <http://www.whitehouse.gov/news/releases/2003/03/20030317-7.html> (Mar. 17, 2003) (last visited June 16, 2004).

125. Richard W. Stevenson, *Head of Iraqi Arms Search May be Ready to Step Down*, N.Y. TIMES, Dec. 19, 2003, at A15; see discussion *infra* note 205.

#### IV. THE PRAGMATISM OF NUCLEAR PREEMPTION AS APPLIED

Applying the doctrine of preemptive self-defense in theory is one thing, however, one must look critically at the places where such a doctrine would actually be used. A number of authors, for and against preemptive action, have given lists of factors that should be considered as the sole basis of when nuclear preemption is permissible. From these different analyses and having hindsight perspective to consider what factors have actually affected preemption, this note proposes four factors that should be used to judge the wisdom of using preemption in any given situation. The factors by which preemption seems to turn are: (1) the imminence of the development of nuclear weapons or other weapons of mass destruction;<sup>126</sup> (2) the threat a state perceives from outside its borders;<sup>127</sup> (3) the ideological reason

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126. This factor is a triggering mechanism, which the doctrine of preemptive self-defense is based. Until a state has started some form of plans of weapons development, preemption is not applicable. United States action in Iraq (discussed *infra* beginning with note 202 and accompanying text) turns largely how far out this issue can go. This element turns entirely on a temporal question of when states will develop nuclear weapons technology and leaves reasons for development for a different analysis. Michael J. Glennon, *The Fog of Law: Self-defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL'Y 539, 552–53 (2002). However, it should be noted that the imminence factor by some has said to be a two-sided determination, which allows preemption only up to the point where preemption is likely to cause large damage (whether from the use of the weapon or environmental damage from collateral radiation cause by the destruction of a facility). David Sloss, *Forcible Arms Control: Preemptive Attacks on Nuclear Facilities*, 4 CHI J. OF INT'L L. 39, 48–49 (2003) (arguing that North Korea has gone beyond the point where preemption is an option because of their state of development).

127. This factor looks at what external threats possibly exist that cause a state to develop nuclear weapons. This factor looks more at reasons for *reactive* development and use of nuclear weapons, which will more likely be done by states that have a negative outlook on their position and future in the overall global framework. VICTOR D. CHA & DAVID C. KANG, *supra* note 1. Victor Cha provides a graph that helps understand how a states perspective on the world affects its actions:

**How do states Frame the Status Quo?**

	Domain of Gains	Neutral	Domain of Losses
Preemptive or Preventative Situation with Offense Having the Advantage	Unlikely	Likely	Very High
Preemptive or Preventative Situation with Defense Having the Advantage	Very Unlikely	Unlikely	High

*Id.* at 27. As will be discussed with each state, the perspective a state has of its future will affect whether a threat of preemptive attack will be effective in stopping weapons proliferation.

for nuclear development;<sup>128</sup> and (4) the state's existing capacity to inflict destruction without weapons or mass destruction.<sup>129</sup> One could argue that the prudence of using the doctrine of preemptive self-defense could be varied by each situation; in order to understand the implications of this argument, these factors need to be applied to the states against which this doctrine would be applied.

#### A. North Korea: Promises Broken (And a Nuclear Threat on the Horizon?)

North Korea has been a complex adversary for United States foreign policy for the second half of the twentieth century.<sup>130</sup> While the history of the United States-North Korea relationship relating to nuclear proliferation could be (and has actually become many times over<sup>131</sup>) a book in itself, its complexity can be (and must be for the purposes of this note) quickly summarized. In 1994, the United States (under a special envoy lead by former President Jimmy Carter) entered into an agreement by which the United States agreed to provide benefits including a light water nuclear power plant to provide power for the North as well as certain security guarantees. North Korea pledged to rejoin the NPT and allow inspections by the Interna-

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128. At the basis of international law is the belief that state actors are rational and have reasons for their actions. However, certain reasons for developing weapons are defensive and some are offensive in nature, differ in how strongly they are felt, and vary in how malleable they are to outside pressure. "Rational state actors" and fundamentalists will react very differently when threatened with the use of force. Louis Re e Beres, *Israel, Iran, and Nuclear War: A Jurisprudential Assessment*, 1 *UCLA J. OF INT'L L. & FOREIGN AFF.* 65, 73-76 (1996).

129. Pragmatically for preemptive self-defense to be an option, it has to have some beneficial effect in bringing stability to regional and world politics. Thomas Graham, Jr., *National Self-Defense, International Law, and Weapons of Mass Destruction*, 4 *CHI. J. OF INT'L L.* 1, 8-9 (2003); CHA & KANG, *supra* note 1, at 55. A state's conventional forces and weapons need to be considered when any preemptive attack is considered because a preemptive attack can bring on a debilitating conventional weapons attack that will have similar evils to those sought to be stopped by the use of preemption. *See id.*; *see also* discussion *infra*. *Cf.* Beres, *supra* note 128 (discussing the concept that "bee sting" attacks where one's attack on an opponent brings one's own demise are often ill-advised).

130. *See, e.g.*, William M. Drennan, *Nuclear Weapons and North Korea: Who's Coercing Whom?*, in *THE UNITED STATES AND COERCIVE DIPLOMACY* 157, 198 (Robert J. Art and Patrick M. Cronin eds., 2003) (proving a full history of United States and North Korean interaction and noting several times that relations have broken down between the states in 1994 and several times since then).

131. *See, e.g.*, CHA & KANG *supra* note 1; JOHN FEFFER, *NORTH KOREA SOUTH KOREA: U. S. POLICY AT A TIME OF CRISIS* (2003). There are numerous books coming out as this conflict changes.

tional Atomic Energy Agency (IAEA). To this point, neither party has fully complied with its obligations (the Agreed Framework).<sup>132</sup>

In October 2002, the current North Korean crisis began when the North Korean government admitted to the United States it had continued to develop nuclear weapons in violation of the Agreed Framework and the NPT.<sup>133</sup> While suspicions of the violations dated back to 1997, few expected that North Korea would fully admit the existence of the program when confronted.

The United States demanded that North Korea comply with existing nonproliferation agreement obligations before any further talks could take place and suspended any deliveries of heating oil under the terms of the Agreed Framework. The Koreans in response removed seals from their facilities and expelled IAEA inspectors, removed IAEA monitoring equipment, and withdrew from the NPT.<sup>134</sup>

Many believe that preemptive use of force against North Korea is a non-issue, however, as talks with the North Koreans on proliferation issues have been unproductive and with North Korea appearing to continue its program of weapons development, the question of preemption has not been lightly dismissed. As Donald Rumsfeld noted, “[w]e’re capable of winning decisively in one [Iraq] and swiftly defeating in the case of [North Korea]. . . .”<sup>135</sup> What must be answered is whether such a policy of threatening preemptive use of force or actual preemption is an effective remedy to the North’s actions or whether such a policy will actually degrade the strategic situation further.

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132. CHA & KANG, *supra* note 1, at 137; Drennan, *supra* note 130, at 175–77.

133. CHA & KANG, *supra* note 1, at 130–32. Leading up to this meeting with North Korea in October relations between the United States and the North Korea had been improving. High-level meetings had taken place between Secretary Powell and North Korean foreign minister Paik Nam-sen, construction at the United States funded light water reactor reached a new stage. *Id.* Japan and North Korea had also reached a new level of improved relations as Japan apologized for its actions during World War II and Korea admitted and apologized for kidnapping Japanese nationals for espionage training and arranged for visits with their families in Japan. *Id.* at 131.

134. *Id.* at 133. Other North Korean actions include resumption of missile tests, declaration of their nuclear weapons status, and plutonium reprocessing. *Id.*

135. John Diamond & Dave Moniz, *Gulf Buildup Limits Options on Korea, Officials Say*, USA TODAY, Feb. 4, 2003, at A8, (quoting Secretary Rumsfeld). *But see* Philip Zelikow, *The Transformation of National Security*, NAT INT., Spring 2003, at 24 (noting that administration officials tend to overplay the role of truth teller because of the license they tend to get for working for a “plain-spoken” president). However, one may contend that subsequent events may have changed the Secretary’s assessment.

1. *The Imminence of Development.* Of the states analyzed in this note, few would doubt that North Korea either has or is close to developing nuclear weapons. It has additionally been proven that North Korea has developed the rocket technology to deliver such weapons over a great distance and has become a large exporter of ballistic missiles.<sup>136</sup> North Korea has admitted that they have nuclear weapons with sufficient component materials to make a several additional weapons each year.<sup>137</sup> The scope of North Korea's weapons programs has notably grown as a result of Pakistan's alleged assistance of the North's nuclear program in the form of centrifuge technology that can spin out uranium suitable for weapons.<sup>138</sup> This is in addition to the Yongbyon plutonium extraction facility that initiated the current Korean crisis. Additionally, North Korea has advanced means to test its weapons that impede the United States from being able to determine whether the North actually has an operational weapon.<sup>139</sup> The fact that this program has been in development for many years and goes back to the early 1980s is proof that North Korea has sufficient means to be considered an imminent nuclear power.

2. *The Threat from Outside Force.* The Bush administration has been very sharp in the words it has used in dealing with North Korea's nuclear weapons disclosures.<sup>140</sup> North Korea's concern over its inclusion in the Bush administration's "Axis of Evil" is likely dwarfed by its concern over its perceived weakness relative to its

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136. David E. Sanger, *North Korea's Bomb: Untested but Ready, CIA Concludes*, N.Y. TIMES, Nov. 9, 2003, at A8 (noting development activity has continued in North Korea and that when North Korea has a weapon it will not need to actually test the weapon to see to determine if it would work in an attack). CHA & KANG, *supra* note 1, at 33.

137. Over the course of two years year of working on this note, the evidence on whether North Korea currently has developed nuclear weapons has been both suggesting an affirmative and negative answer. This is because North Korea has been able to develop more clandestine means by which they develop weapons and test them as well. David E. Sanger, *U.S. Widens View of Pakistan Link to Korean Arms*, N.Y. TIMES, Mar. 14, 2004, at A1 (providing the most recent assessment that a weapon nuclear weapon could be produced in the next one to two years, however, intelligence analysts stat that "it is a guess"). As this note went to print, North Korea admitted they had nuclear weapons. Brooke & Sanger, *supra* note 1.

138. David E. Sanger, *U.S. Widens View of Pakistan Link to Korean Arms*, N.Y. TIMES, Mar. 14, 2004, at A1.

139. Associated Press, *CIA: N. Korea Doesn't Need Nuclear Tests*, Nov. 9, 2003, available at <http://www.newsmax.com/archives/articles/2003/11/8/184723.shtml> (last visited June 20, 2004).

140. Even before North Korea's announcement Bush had let it be known his dislike of the North Korean leader with his statement that "I loathe Kim Jong-il—I've got a visceral reaction to this guy. . . ." George W. Bush, Interview with Bob Woodward (Aug. 2002), available at <http://www.cbsnews.com/stories/2002/11/17/60minutes/main529657.shtml> (last visited Jan. 3, 2005).

southern neighbor and competitor. Exposing the North's weaknesses provides some understanding of why it acts differently than most states when force is exerted on them. Like a gambler on a losing streak, one who is losing will often act more desperate in what they will try to do to change the losing status quo. One could argue that this applies on the state level, as well, as a state that finds time on its side and a bright future has an incentive to fall in line and modify its actions to the status quo when challenged.<sup>141</sup> North Korea is in desperate straits. While North Korea has proposed some programs to move forward in economic development aimed at garnering outside investment for its production and manufacturing capabilities, the development of transportation systems with Russia, and the creation of the Rajin-Sonbong free trade zone,<sup>142</sup> these have been sporadic advances in an overall losing war for stability. North Korea has never enjoyed the economic success of its southern neighbor, but the collapse of its patronage from the Soviet Union combined with Chinese ambivalence has caused the GNP of the North to slip from fifty percent of the South to ten percent.<sup>143</sup> In the post-September 11 world, North Korea has also found that U.S. priorities have shifted to Afghanistan and Iraq.<sup>144</sup> Shifts of influence compounded by years of failed crops and bad winters have created a domestic environment lacking stability.<sup>145</sup> One of the few areas where North Korea has the edge is in conventional military forces of around 900,000 to 1.1 million forces as opposed to around 600,000 in the South.<sup>146</sup> However, a large military has been a mixed blessing for North Korea as it has further taxed the North's resources.<sup>147</sup> This only exacerbates the horrible

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141. CHA & KANG, *supra* note 1, at 28.

142. *Id.* at 33, 103–14.

143. Central Intelligence Agency, *The World Factbook, North Korea* (2003), available at <http://www.odci.gov/cia/publications/factbook> (last visited Dec. 19, 2003).

144. CHA & KANG, *supra* note 1, at 77.

145. *Id.*

146. CHA & KANG, *supra* note 1, at 51; MICHAEL O'HANLON & MIKE MOCHIZUKI, *CRISIS ON THE KOREAN PENINSULA* 64 (2003).

147. O'HANLON & MOCHIZUKI, *supra* note 146, at 65–66. Military spending as part of the North Korean GDP compared to all other countries indicates that strain on its resources. Twenty-five percent of North Korea's GDP is spent on defense. *Id.* at 64. That is compared to South Korea's 3 percent of GDP and the United States' 3.3 percent of GDP on defense. *Id.* These numbers are even relatively high when one looks to the 2 percent of GDP commonly spent on defense in Europe. ROBERT KAGAN, *OF PARADISE AND POWER* 25, 89 (2004) (looking at the role economic growth has on a country's ability to continue spending relatively large amounts of money on defense in a robust economy). However, North Korea is exactly the opposite because relatively small amounts of money are spent on defense, but because of the its depressed economy defense spending amounts to 25 percent of GDP.

condition in the North as humanitarian aid is diverted to keep the military fed and supplied.<sup>148</sup> North Korea is clearly in a “loss” perspective, thereby making it more likely to react negatively to coercive force threatened against it; North Korea will have an incentive to lash out when challenged because it has no stake in the current status quo,<sup>149</sup> suggesting the doctrine of preemptive self-defense may be disfavored in this context.

3. *The Ideological Reason for Nuclear Development.* North Korea arguably has an incentive to develop nuclear weapons because of its loss-oriented perspective, described above. In a broader sense, one has to look at how, when, and under which circumstances North Korea may actually use such weapons. Most obvious to note is the fact that the Korean War has never officially ended, and the North’s stated goal of the destruction of the South has never been renounced. The North’s “theology” includes: (1) the North is the true representative of the Korean people and the puppet regime in the South is a threat to the Korean people, (2) the people of the South would welcome unity with the North but for the United States’ aggression and their puppet government, and (3) the North position is the morally correct one and will ultimately win on the peninsula.<sup>150</sup> It is quite clear that the North is not working to force these issues, as it is hard to work for the fall of South Korea when one is trying to stave off one’s own collapse.<sup>151</sup> However, North Korean actions likely will no longer follow the line of Kim Il-Sung’s pragmatic policy that “[w]e [the North] must wait and see what changes will bring about in the revolutionary situation in South Korea” as those in the leadership who remain loyal to revolutionary foundations as embodied in Kim Jong-Il.<sup>152</sup> This fear is also emphasized with the erratic nature of Kim Jong-Il who remains unpredictable.

4. *The Conventional Capacity.* More than any other state analyzed here, North Korea has the best capacity to retaliate to a preemptive use of force with existing conventional weaponry in a manner

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148. CHA & KANG, *supra* note 1, at 50–51.

149. *Id.* at 29.

150. *Id.* at 82–83.

151. *Id.* at 83–84. This pragmatic basis of action has a long history in North Korea as far as making some form of rapprochement with the South. The Joint Communiqué between the North and South has been cited as built upon Northern hopes of alienating the United States and Japan.

152. *Id.* at 30.

to devastate its opponents. General military estimates of a war on the Korean peninsula would include 50,000 U.S. casualties, 500,000 Republic of Korea military casualties, untold civilian casualties, potential devastation in the Asian economy and the possible destruction of Seoul—all within the first three months.<sup>153</sup> North Korea maintains a sufficient conventional arsenal to destroy much of the industrialized South, and when destruction of this level can be unleashed in retaliation for an initial attack, raising doubts about the efficacy of the doctrine of anticipatory self-defense as applied on the Korean Peninsula.<sup>154</sup>

*Conclusion:* Preemptive self-defense is not the correct paradigm for dealing with North Korea. Any efforts to constrain North Korea's actions regarding the development or threatened use of a nuclear arsenal should rely on other tools as North Korea's worldview, ability to respond conventionally with a credible and effective military strike and unpredictable leadership suggest that any such strike in self-defense would cause greater instability.<sup>155</sup>

#### B. Iran: the Danger of a Bipolar State

Iran and the United States have what can be best termed as a “difficult relationship.” The Islamic Republic of Iran, as set up in 1979, has been known to support terrorism and Hezbollah with the purpose as furthering the “Islamic Revolution.”<sup>156</sup> It has also supported external terrorist groups like Hamas in attacks in Israel.<sup>157</sup> Alternatively, Iran has been a society of change, as the Iran of Ayatollah Khomeini has become a much more multipolar state since his death

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153. Drennan, *supra* note 130, at 191; O'HANLON & MOCHIZUKI, *supra* note 146, at 81 (noting that even under a slightly more optimistic prediction of the ability to defend the South, it would still be bloody).

154. O'HANLON & MOCHIZUKI, *supra* note 146, at 81–82.

155. While some authors appear to consider preemption with North Korea to be a possible last option that is available, what is possibly workable theory is impractical in practice. *Cf. id.* (holding that preemption would run the risk of a larger war and should be a near last alternative). With the discovery in late 2003 that North Korea has clandestine centrifuge development facilities, even if the U.S. would want to preempt North Korea they would be limited by their ability to actually target the facility. Unlike Yongbyon or Osirak, which were easily targeted reactor facilities, centrifuges can be hidden and makes preemption by means short of invasion even more difficult. David E. Sanger, *U.S. Widens View of Pakistan Link to Korean Arms*, N.Y. TIMES, Mar. 14, 2004, at A1.

156. Beres, *supra* note 128, at 72–74. The terrorist actions of Iran are far too numerous and are a tangential issue to the larger issue of WMD proliferation.

157. *Id.*

in 1989, and different groups in Iranian society and the government have different visions of the future of the Islamic revolution.<sup>158</sup> Firmly in charge of the military and most aspects of the government, including the military and police, is Khomeini's successor, Ayatollah Ali Hoseini-Khamenei.<sup>159</sup> On the other side is the moderate president Mohammad Khatami, who was reelected in a landslide in 2001 with nearly eighty percent of the vote. While Khatami's control is small and relatively checked by the Ayatollahs, he has been able to grow in stature as the face of the moderate movement in Iran.<sup>160</sup> This movement of moderation suffered a large setback recently when parliamentary elections in Iran moved hard liners into a much more commanding control of the government.<sup>161</sup> Within this complex state, nuclear weapons development appears to remain a troubling issue as an Iran with nuclear weapons would be perceived by many as a danger to stability in the region.

1. *The Imminence of Development.* There are several different components of the Iranian weapons programs. The main source of Iranian weapons in recent years has been Pakistan, China, North Korea, and Russia. It is well known that Iranian rocketry currently allows for the delivery of payloads over 1,500 kilometers.<sup>162</sup> Iran has worked to develop (first with Russian aid and later with North Korean aid) longer-range weapons to give it a range of at least 1,300 kilometers with the possibility of up to 4,000 kilometers.<sup>163</sup> It is thus

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158. Judith S. Yaphe, *U.S.-Iran Relations: Normalization in the Future?*, STRATEGIC FORUM No. 188 (Jan. 2002), available at <http://www.ndu.edu/inss/strforum/SF188/sf188.htm> (last visited June 19, 2004).

159. Central Intelligence Agency, *The World Factbook, Iran* (2003), available at <http://www.odci/cia/publications/factbook> (last visited Dec. 19, 2003); Reuel Marc Gerech, *Iran: Fundamentalism and Reform*, in PRESENT DANGERS: CRISIS AND OPPORTUNITY IN AMERICAN FOREIGN AND DEFENSE POLICY 111 (Robert Kagan & William Kristol eds., 2000) (providing a discussion of the different personalities and roles in Iran).

160. ANTHONY H. CORDESMAN, *IRAN'S MILITARY FORCES IN TRANSITION: A CONVENTIONAL THREAT AND WEAPONS OF MASS DESTRUCTION* 10-11 (1999) (noting the political jockeying that has been taking place since Khatami's election including arrests of a number of officials that supported Khatami but additionally noting that Khatami has been able to get officials in office that support his moderate platforms).

161. Douglas Jehl, *C.I.A. Says Elections in Iran Dealt Blow to Reform*, N.Y. TIMES, Feb. 26, 2004, at A10.

162. CORDESMAN, *supra* note 160, at 66, 228.

163. *Id.* at 228 (there are a number of reports based on Israeli intelligence of missile programs in Israel). Actual weapons development shows that a test in July 21, 1998 that a missile that was hoped to have a range of 1,240 kilometers exploded after going 620 miles; however, it is claimed that Iranian rocketry is fairly accurate. *Id.* at 229. It is hoped that this rocket will give a range of 1,300 kilometers. *Iranian Missile a Regional Issue*, Carnegie Endowment for Interna-

evident that Iran likely has sufficient delivery mechanisms to threaten much of the Middle East including Israel.

Nuclear weapons development in Iran has been in progress for decades. With the help of Russia and China, Iran has developed nuclear reactors and has an acknowledged nuclear energy program.<sup>164</sup> In early 2003, the IAEA discovered that Iran had sufficient infrastructure that would allow it to have workable nuclear weapons by the end of the decade.<sup>165</sup> The Iranian program at Natanz involved an underground uranium enrichment facility equipped with centrifuges that could produce weapons grade plutonium.<sup>166</sup> This process will allow for the production of two weapons per year when fully operational.<sup>167</sup> Thus it appears that Iran should be considered to be a state with prospects for nuclear weapons in the near future.

2. *The Threat from Outside Forces.* The United States has a long history of involvement in Iranian affairs whether it was the overthrow of Mohammad Mosaddeq's government in favor of the Shah in the early 1950s, the lack of support after being attacked by Iraq in the early 1980s, or being spurned for its actions in moving forces into neighboring countries during the Persian Gulf War.<sup>168</sup> Saddam Hussein's Iraq was a danger to Iran, and his propensity to develop nuclear weapons was a substantial threat after he had shown that he was willing to use chemical weapons on his neighbor in his invasion of Iran during the Iran-Iraq War.<sup>169</sup> The threat from Iraq definitely changed after Iraq's defeat during the Persian Gulf War; however, two modern threats drive the Iranian weapons program. Israel's presence in the

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tional Peace, at <http://www.ceip.org/files/nonprolif/templates/article.asp?NewsID=96> (July 24, 2000) (last visited June 20, 2004). Most notably, the distance between Israel and Iran is 1,300 kilometers. *Id.*

164. CORDESMAN, *supra* note 160, at 66.

165. Johanna McGeary et al., *What Will Make Them Stop?: Carrots? Stocks? Inside Bush's Diplomatic Struggle to Persuade Iran and North Korea to Give Up Their Nuke Programs*, TIME, Nov. 3, 2003, at 36. Israel claims that the development that Iran will have sufficient plutonium in two years to have a nuclear weapon. *Id.*

166. *Id.*; Craig S. Smith, *U.S. Softens Its Rebuke on Iran Nuclear Issue, Appeasing Allies*, N.Y. TIMES, Mar. 10, 2004, at A5 (noting the recent concern over advanced designs for uranium enriching centrifuges that Iran failed to declare under an agreement reached in November 2003 with the IAEA and traces of highly enriched uranium that has been discovered on some of the equipment in Iraq).

167. McGeary et al., *supra* note 165.

168. Gerecht, *supra* note 159, at 128.

169. CORDESMAN, *supra* note 160, at 337.

region is perceived by Iran as a threat to their existence,<sup>170</sup> and Israel's possession of WMD is viewed as a danger to all Islamic states in the region.<sup>171</sup> Second, Iran's strategic position between Russia, Iraq, and the Taliban has contributed to its longstanding security concerns, concerns which have been exacerbated by the perceived omnipresent power of the United States.<sup>172</sup> This situation was made worse due to United States military initiatives over the last three years, in which the United States now effectively surrounds Iran—Afghanistan is under the control of the American-backed Karzai government,<sup>173</sup> while Iraq is led by an American-backed and financed government. Thus, Iran feels threatened on many levels, which make the development of weapons of mass destruction an attractive path.

However, when juxtaposed against the situation proposed in North Korea, Iranian concerns driving WMD development appear now to be rather defensive in nature rather than part of a larger plot for regional domination. Iran has large oil reserves that if allowed to fully participate on the global level would stand to reap substantial economic benefits.<sup>174</sup> Economically and politically, Iran has been in a state of flux but has remained stable as a state engaging in a fairly productive dialogue between moderates and conservatives. Under the threat perception matrix presented above, Iran likely views its future as at least neutral and is likely to have several opportunities for growth in the future.

3. *The Ideological Reason for Nuclear Development.* Iran is an ideological state. From one perspective, this defines all Iranian action.<sup>175</sup> Traditionally, the Islamic government repressed those who taught religious tolerance and has pledged the destruction of the Israeli state.<sup>176</sup> These were the principles that undergirded Ayatollah

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170. Israel is perceived as much as a threat for ideological reasons than as for any pragmatic reasons. This will be discussed in the next section.

171. See generally Beres, *supra* note 128 (discussing the angst between Iran and Israel and noting that Israel may need to attack Iran if Iran continues development of weapons that could threaten Israel).

172. Gerecht, *supra* note 159, at 123–24.

173. See Amy Waldman & Carlotta Gall, *A Young Afghan Dares to Mention the Unmentionable*, N.Y. TIMES, Dec. 18, 2003, at A3 (discussing the ongoing development of the new government in Afghanistan and the problems with various warlords).

174. Central Intelligence Agency, *The World Factbook, Iran* (2003), available at <http://www.odci.gov/cia/publications/factbook> (last visited June 16, 2004).

175. See generally Beres, *supra* note 128 (viewing Iran as likely to attack regardless of its chances of victory in a war because of ideological reasons).

176. *Id.*

Khomeini's revolution, and there is concern that external forces and practical limitations of power will not limit Iranian proliferation.<sup>177</sup>

However, weapons development appears to be largely, if not entirely, driven by pragmatic concerns about the region rather than revolutionary ambitions. Iran, as was noted in the previous section, is largely driven by security concerns as it is surrounded by forces hostile to its existence on all sides. One additionally needs to look at military expenditures in Iran to see a practical reason weapons proliferation is appealing when surrounded by opposing forces. Military spending has been relatively small part of the Iranian GNP since the end of the Iran-Iraq war where it peaked at slightly more than 10 percent of GNP and has since dropped to being only about 3 percent of GNP.<sup>178</sup> This large drop in overall expenditures shows that military spending is not as large of a drain relative to other countries widely perceived as threats to the stability of the international system. Much of the military focus of the Islamic Republic of Iran has been inward, aimed at ensuring the republic is not undermined by Iranians rather than by actions from the outside. Because of this, we see a situation exactly the opposite of North Korea that is seeking nuclear weapons at least partially to allow it to cut back on its military spending. Iran's proliferation is likely driven by an attempt for long term cost savings as WMD (particularly nuclear weapons) would serve to create a cost effective deterrent as opposed to an expensive conventional force. This pragmatic concern is more typical for proliferating states where nuclear weapons are seen as an easy fix to credible deterrence. Threats of preemptive self-defense can be effective in tempering the tendency to follow the easy path of nuclear proliferation.

4. *The Conventional Capacity.* As was alluded to above, while Iran does have some military capacity, it is not such where it could threaten its neighbors effectively with current weapons technologies. Iran has a standing army of roughly 518,000, reserves of 350,000, 1,394

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177. However, in rationalizing backing off nuclear proliferation, Iran cited ideological reasons for choosing to give up the weapons program. Ayatollah Khamenei stated nuclear weapons were an un-Islamic weapon. *See generally* Beres, *supra* note 128. This perspective of general ideological reasons for not developing weapons needs to be considered when one thinks that Iran will necessarily act for ideological reasons.

178. Central Intelligence Agency, *The World Factbook, Iran* (2003), available at <http://www.odci.gov/cia/publications/factbook> (last visited June 16, 2004); CORDESMAN, *supra* note 160, at 47.

tanks, 297 combat aircraft, 4 combat ships, and 3 submarines.<sup>179</sup> Iran has been more effective in the development and purchase of missiles;<sup>180</sup> however, while one should not underestimate the Iranian military, it is not sufficient in either size or tactical reach to counter a preemptive attack that would inflict major damage.<sup>181</sup> Thus, Iran's current military forces are not developed in such a way to make a preemptive attack unpractical in the event that it was discovered that Iran was going to develop nuclear weapons and preemption was the chosen solution.

*Conclusion:* Iran is a state that would likely be susceptible to a threat of preemption, given its relatively small conventional force, its long-term economic prospects, and its strategic concerns.

### C. Libya: surprises in admissions—questions in reasons

On December 19, 2003, a surprise announcement came from the White House that Libya was seeking to join the international community again and was going to abandon its programs for weapons of mass destruction.<sup>182</sup> It is still questionable how far along the Libyan weapons development had progressed or whether Qaddafi was just giving up on a program that did not have any hope of actually producing a weapon.<sup>183</sup> However, in the announcement of the agreement with Libya, President Bush opined that the actions of the United States and its coalition in opposition to WMD (likely referring to the preemptive use of force in Iraq) was a major factor considered by Qaddafi in his decision to abandon his pursuit of nuclear weapons.<sup>184</sup> However, in order to see if Libya is a country that fits the United

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179. CORDESMAN, *supra* note 160, at 66–94. Interesting to note the practical problems Iran faces as a result of changing sources of military hardware. Changing from Western, to Russian, and then to North Korean technology has caused a hodgepodge of different technologies that do not interpolate with each other. This has caused problems for maintaining a coherent single military. *Id.*

180. *Id.* Iran has developed some moderate strike rocketry and has purchased a number of scud missiles from North Korea.

181. One should note that Iran does have a sufficient supply of chemical and biological weapons that it could use in retaliation for an attack. *Id.*

182. George W. Bush, *Libya Pledges to Dismantle WMD Programs*, at <http://www.whitehouse.gov/news/release/2003/12/20031219-9.html> (Dec. 19, 2003) (last visited June 16, 2004).

183. Neil MacFarquhar, *Libya's 'Brother Leader' Pulls Another Rabbit from His Hat*, N.Y. TIMES, Dec. 21, 2003, at A30.

184. George W. Bush, *supra* note 182. The State Department also stated that Qaddafi felt the urgency to get rid of its weapons programs because of the American stances on Iran and North Korea and the war in Iraq, and a fear from militant elements in his own country.

States program of preemptive use of force, its profile needs to be applied to the preemption paradigm.

1. *The Imminence of Development.* In the past, Qaddafi's Libya was notorious for its proliferation intentions. Observers classified Libya as one of the most dangerous nations when it came to WMD proliferation including nuclear weapons.<sup>185</sup> The Russians provided a general reactor to Libya in the 1980s; however it was generally believed that the nuclear program had been abandoned or extremely small until recent disclosures.<sup>186</sup> Libya also had a stockpile of chemical weapons including World War I era mustard gas and additionally produced blister and nerve agents.<sup>187</sup> On January 6, 2004, Libya signed the Chemical Weapons Convention and turned its chemical weapons programs over to international inspectors.<sup>188</sup>

In its disclosures regarding its weapons program, Libya was shown to be more advanced in its programs than was initially thought.<sup>189</sup> Most significant in the discoveries about the Libyan program was their working centrifuges for nuclear enrichment. Such centrifuges are necessary to make weapons-grade uranium.<sup>190</sup> However, there were only a few centrifuges discovered and hundreds are necessary to make the quantities of enriched uranium necessary over a reasonable time.<sup>191</sup> Additionally, the Libyans denied that any enriched uranium had been produced in those centrifuges.<sup>192</sup> Regarding

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185. Federation of American Scientists, *WMD Around the World: Libya Special Weapons*, at <http://www.fas.org/nuke/guide/libya/index.html> (last visited June 20, 2004).

186. *Id.*

187. John J. Lumpkin, *U.S.: Libya Eager to Dismantle Weapons*, Associated Press (Dec. 19, 2003), available at <http://www.emjournal.pwp.blueyonder.co.uk/a0053.html> (last visited June 20, 2004).

188. Judith Miller, *Libya Discloses Production of 23 Tons of Mustard Gas*, N.Y. TIMES, Mar. 6, 2004, at A5; Samia Amin, *Recent Developments in Libya*, Carnegie Endowment for International Peace at <http://www.ceip.org/files/projects/npp/resources/Factsheets/developmentsinlibya.htm> (Feb. 10, 2004) (last visited June 19, 2004).

189. Patrick Tyler & James Risen, *Secret Diplomacy Won Libyan Pledge on Arms*, N.Y. TIMES, Dec. 21, 2003, at A1 (showing the C.I.A. did have a some evidence regarding the Libyan WMD programs but did not know the full extent of the programs development); Peter Grier, *From Iraq to Libya, U.S. Knew Little on Weapons*, CHRISTIAN SCIENCE MONITOR, Jan. 27, 2004, available at <http://www.csmonitor.com/2004/0127/p01s01-uspf/html> (pointing to the lack of accurate information the United States had regarding Libya's weapons of mass destruction program).

190. Lumpkin, *supra* note 187.

191. *Id.*

192. *Id.*

delivery systems for possible weapons, Libya admitted having Scud-C ballistic missiles manufactured by North Korea that allow it to deliver payloads over 300 miles.<sup>193</sup> These contraband materials, missiles, and supporting documents have been turned over to the United States.<sup>194</sup> Thus, while Libya did not appear to have an advanced weapons program, it definitely had the potential and the intent to develop weapons and was further along than the international community had realized. Under a relaxed viewing of imminent development, Libya could be so classified, however, it is more likely to classify Libya's program as having distant potential not close to that of Iran or North Korea but, instead, more on the lines with what Iraq's program was believed to be.

2. *The Threat from Outside Forces.* Libya has long seen the United States as a threat to its interests, however, the threat Libya perceived was often an outgrowth of its own actions.<sup>195</sup> More recently Qaddafi has seen internal opposition grow to his thirty-year reign, which has for the most part been unquestioned, as nearly twenty years of economic sanctions have dealt a lasting economic blow to Libyan stability.<sup>196</sup> While a number of countries have lifted their sanctions against Libya after paying reparations for its terrorist actions, the United States retained its sanctions until the recent disclosures.<sup>197</sup>

While Qaddafi has some concerns in opposition to his control, and the fact that the Libyan economy has had a relatively hard, slow transition to market level openness, there are several reasons that it should view its future in either a gain oriented or neutral perspec-

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193. *Id.* These missiles are sufficient to threaten United States interests in the Mediterranean region. NATO Parliamentary Assembly, *Interim Report, NMD, and Implications for the Alliance*, at <http://www.naa.be/archivedpub/comrep/2000/at-265-e.asp#6> (Nov. 2000) (last visited June 19, 2004).

194. Amin, *supra* note 188. Overall 55,000 pounds of documents and components of Libya's nuclear and ballistic programs have been provided as part of Libya's disarmament agreement. Libya provided uranium hexafluoride, centrifuge parts, documentation, and guidance devices for long-range missiles. *Id.*

195. Among the most notable actions was an air raid on a Qaddafi palace after it was blamed for an explosion in a Berlin discotheque that killed an American serviceman. Libyan supported terrorists additionally supported bombings of commercial airliners over Lockerbie, Scotland and over Africa. MacFarquhar, *supra* note 183.

196. *Id.*; Tyler & Risen, *supra* note 189 (noting the fact that after decades of economic sanctions Libya is economically crippled and needs the return of the economic advantage from its rich oil reserves).

197. *Id.*

tive.<sup>198</sup> Libya has oil reserves of nearly 30 billion barrels and further exploitation of those resources would allow it to add to its current oil production of 1.4 million barrels per day.<sup>199</sup> This would allow Libya to finance its market transformation and theoretically stabilize the Qaddafi government. For this reason alone, Libya, as can be deduced from their actions in December 2003, is prone to act favorably when it feels threatened by the even the remote possibility of a preemptive attack.

3. *The Ideological Reason for Nuclear Development.* Libya is not unlike Iran in theory. While a de facto military dictatorship, many of its actions were based on Islamic principles. The “old” Libya could be said to be a nation that acted entirely for ideological reasons, blind of the repercussions of its action. Its support of worldwide terrorism drove its entire foreign policy. Qaddafi stated “I will do everything in my power to divide the world into imperialists and freedom fighters.”<sup>200</sup> However, old Libya is dead and from its ashes appears to be a “new” pragmatic Libya. Qaddafi fears the loss of control that befell his contemporary, Saddam Hussein, and Libya needs American investment to shake off decades of economic sanctions.

4. *The Conventional Capacity.* Libya’s military ranks were composed of an estimated 90,000 soldiers in the 1980s, but the size of the Libyan military has continued to shrink.<sup>201</sup> Its defense budget is 1.3 billion dollars, being slightly less than 4 percent of GDP.<sup>202</sup> It has a small air force of older Soviet aircraft, and a navy that is essentially the equivalent of a coast guard that is composed of six Soviet-built submarines. As discussed above, Libya did maintain a moderate stockpile chemical weapons and moderate ballistic missile technology.<sup>203</sup> While Libya does have a working military, it is not so sizable to make preemption dangerous.

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198. Central Intelligence Agency, *The World Factbook, Libya* (2003), available at <http://www.odci.gov/cia/publications/factbook> (last visited June 16, 2004).

199. *Id.*

200. Boaz Ganor, *Survey of Arab Affairs- A Periodic Supplement to Jerusalem Letter/Viewpoints*, available at <http://www.ict.org.il/articles/article3.htm> (June 1, 1992) (last visited June 16, 2004).

201. Central Intelligence Agency, *The World Factbook, Libya* (2003), available at <http://www.odci.gov/cia/publications/factbook> (last visited June 16, 2004).

202. *Id.*

203. *Id.*

*Conclusion:* Libya is an example of the secondary effects that can be expected of preemption doctrine where a state that does not have fully developed weapons programs will potentially halt its programs upon noticing the peril of further development.

#### D. Iraq—Reflections on Preemptive Force in Action

As was addressed in the previous section, the attack on Iraq was largely built upon the belief that Iraq had to be stopped before they could develop WMD to attack its neighbors.<sup>204</sup> Iraq has provided a harsh test for a new doctrine as evidence of actual WMD has been virtually non-existent causing critics of the policy to say it is unworkable. While looking back at history benefits from hindsight,<sup>205</sup> in this section, the four-factor analysis will again be applied as to the appropriateness of using preemptive use of force to deal with the perceived threat from Iraq with particular emphasis on the first point, imminence. Additionally, comparisons with the applications done with other states above will be done to provide a useful juxtaposition to when the doctrine should be applied.

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204. George W. Bush, President's Radio Address, *available at* <http://www.whitehouse.gov/news/releases/2003/03/20030315.html> (Mar. 15, 2003) (last visited June 16, 2004).

205. It is beyond the scope of this article to delve into the larger issue of intelligence breakdowns that have taken place in Iraq. Former U.N. weapons inspector David Kay noted in his statements about intelligence gaffs in Iraq that “[o]btaining accurate reads on enemy firepower is perhaps the most crucial challenge the nation is facing” and “[i]f the intelligence is correct, policy-makers have a better shot of doing the right thing. If it isn't, the resulting policies are likely to be flawed.” George Gedda, *Getting a Handle on Enemy Weapons is No Small Challenge*, ASSOCIATED PRESS, Feb. 26, 2004, *available at* <http://www.manilatimes.net/national/2004/feb/26/yehey/opinion/20040226opi7.html> (last visited June 20, 2004). Former executive director of the United Nations Monitoring, Verification, and Inspection Commission (UNMOVIC), Hans Blix, has been concerned about the incorrect prediction of finding nuclear weapons in Iraq and provided some rationales of the mistake. *See* HANS BLIX, *DISARMING IRAQ* 255–71 (2004). If preemption is going to be used in the future, more resources will have to be dedicated to providing reliable intelligence on proliferation programs in rogue states that are working to activity hide such programs. The practicalities of discovering weapons programs along with providing the needed legitimacy for preemptive action dictate that efforts on this front need to be redoubled. *See* Joseph Kahn, *North Korean Candor to be Central to New Nuclear Talks*, N.Y. TIMES, Feb. 24, 2004 (noting Chinese hesitance regarding the quality of U.S. intelligence with respect to secret North Korean weapons programs), *available at* <http://www.nytimes.com/2004/02/24/international/asia/24CND-KORE.html?pagewanted=1&ei=5070&en=e4ffed9eb8132ef1&ex=1087876800> (last visited June 20, 2004). *But see* Steven R. Weisman, *Lasting Discord Clouds Talks on North Korean Nuclear Arms*, N.Y. TIMES, Mar. 14, 2004 (noting increased cooperation among the non-North Korean parties as a result of North Korea's flippant behavior at the February joint meeting), *available at* <http://www.nytimes.com/2004/03/14/international/asia/14NORT.html?ex=1394600400&en=54e12324d09a8d9f&ei=5007> (last visited June 20, 2004).

1. *The Imminence of Development.* Iraq had tried to develop nuclear weapons in the past and had come relatively close to developing a nuclear weapon. While it was questionable whether Iraq was developing nuclear weapons in early 2003, President Bush stated “in one year or five years, the power of Iraq to inflict harm on all free nations would be multiplied many times over.”<sup>206</sup> The essence of this argument was that it would be foolish for the United States to wait until Iraq actually had nuclear weapons before it was ready to attack. Indeed, despite an apparent failure to produce conclusive proof of weapons program, the United States invaded based largely on what it believed was a secret nuclear, chemical and biological weapons program as well as a connection to Al Qaeda.<sup>207</sup> After Saddam’s forces were quickly defeated, the United States search for the WMD footprints was unsuccessful.<sup>208</sup> The Bush administration now works to stretch what would arguably be sufficient evidence to justify a preemptive attack from actual weapons to any general WMD weapons program at any level of development<sup>209</sup>—essentially the rationale now used is to focus on Saddam Hussein’s intent and desire to develop WMD and not whether he actually had such weapons.<sup>210</sup> However, stretching the self-defense doctrine to claim that early planning of a WMD program is sufficient to claim a right of preemptive self-defense is likely an abuse of the doctrine and is unnecessary. One must remember cases where states have started nuclear weapons programs, only to abandon them after a change of heart—the recent Libya solution is instructive in that regard. The Iraq situation appears fundamentally different than the current situation in Iran and North Korea, where weapons programs have progressed further down the

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206. George W. Bush, Address to the Nation on Iraq, Mar. 17, 2003, n.39 Weekly Comp. Pres. Doc. 338, 340 (Mar. 24, 2003), available at <http://www.cnsnews.com/ViewNation.asp?Page=%5C%5CNation%5C%5Carchive%5C%5C200303%5C%5CNAT20030317g.html> (last visited June 19, 2004).

207. Miriam Sapiro, *Iraq: The Shifting Sands of Preemptive Self-Defense*, 97 AM. J. INT’L L. 599, 603 (2003).

208. Richard W. Stevenson, *Head of Iraqi Arms Search May be Ready to Step Down*, N.Y. TIMES, Dec. 19, 2003, at A15.

209. *Id.* President Bush has tried to recharacterize what was necessary for preemptive force to be appropriate. In an interview when asked him if evidence would be found of actual weapons or only weapons programs, he answered “So, what’s the difference?” *Id.*

210. Stevenson, *supra* note 208. The United States does have evidence, as has been confirmed by Dr. Kay, that the Iraqis had programs to develop various WMD; however, Kay stated that he would need as much as nine months before being able confirm or deny the existence of actual weapons.

road to development and the information regarding such development appears considerably more concrete.

2. *The Threat from Outside Forces, the Ideological Reason for Nuclear Development, and the Conventional Capacity.* The basis of the Iraqi weapons programs was likely a tool to provide Iraq a degree of legitimacy and means of checking United States actions in and around the Persian Gulf. Iraq serves an ideal example of a state seeking to exert clout in the region, however, the fact that Iraq did not actually possess WMD made its bargaining position weaker than what it could have hoped with such weapons. Iraq also serves as the perfect example of a totalitarian state that sees WMD as the magic potion to counter perceived American aggression. Iraq had not been able to use the airspace over a majority of its country for years because of no-fly zones that had been set up and had been subject to regular attacks by American forces patrolling the region. Iraq provides a lesson that one proliferates at its own risk.

*Conclusion:* Iraq is an example of preemption pushed to its limit. Preemptive action was likely unwarranted as Iraq's alleged WMD program had not been developed as extensively as initially thought. Further, because Iraq's military and infrastructure had been eroded by a decade of low-level war and economic sanctions following the Persian Gulf War, Iraq's ability to produce a credible conventional response to any U.S. preemptive aggression was not credible.

## V. CONTEXTUALIZING THE INCONSISTENCY— RETHINKING NONPROLIFERATION

The United States' policy of preemptive self-defense has been widely regarded as irresponsible and unnecessarily unilateral—with detractors claiming it will ultimately lead to a much more dangerous, unstable world.<sup>211</sup> Yet the monster of preemptive self-defense can and should be tamed, and integrated with the treaty obligations that currently exist under the NPT.<sup>212</sup> As has been discussed in this note, the NPT has provided a means of potentially eliminating the world of nuclear weapons by stemming the spread of weapons to states not currently part of the nuclear club.<sup>213</sup> Yet, the NPT is not a panacea—

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211. Madeline K. Albright, *Bridges, Bombs, or Bluster?*, FOREIGN AFF., Sept./Oct. 2003, at 2.

212. Perkovich, *supra* note 103, at 3.

213. *See* discussion *supra* notes 21–23.

critics are justifiably concerned about a tool that in essence relies on “good faith” and constrained by suspect enforcement mechanisms, especially when the stakes are so high.<sup>214</sup> Additionally, the willingness to threaten preemptive self-defense has arguably proven to produce positive results in Libya, along with potentially positive developments in Iran. Yet amputating nuclear disarmament from international legal principles, as the Bush Doctrine would do, has the potential to produce great confusion and effectively removes the long-term carrot that existed behind NPT—the eventuality of a nuclear free world.<sup>215</sup>

#### A. Preemption Is a Legitimate Tool

The United States is the world’s sole superpower, and its power must be realized as a reality in the current international climate. The Bush administration should take this opportunity to strengthen multilateral nonproliferation by moving toward multilateral nuclear disarmament, however the United States should have the right to condition such disarmament upon other states doing the same.<sup>216</sup> Under such a system, a violation of obligations must amount to more than short-term economic sanctions.

It is also questionable how far the United States is willing to push the doctrine of preemptive self-defense to enforce nonproliferation financial resources, political capital, and the pragmatic difficulties of retaining networks of information will likely be stretched to their limit.<sup>217</sup> However, the United States has set a bold precedent in its

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214. See discussion *supra* notes 96–99.

215. See discussion *supra* notes 21–23.

216. Philip Zelikow, *supra* note 135, at 25 (noting that “the administration prefers international institutions that judge performance and stress accountability rather than those that maintain a detached neutrality in order to preserve a friendly consensus”).

217. One need only consider the critique by many that are concerned over the focus on WMD that has affected the United States’ ability to seek out al Qaeda as states in the Middle East are concerned with the intentions of the United States. See Albright, *supra* note 211; Stephen Zunes, *The Archipelago of “Evil”—Middle East*, in *POWER TRIP: U.S. UNILATERALISM AND GLOBAL STRATEGY AFTER SEPTEMBER 11*, 117, 129–36 (John Feffer ed., 2003) (stating that United States multilateralism have caused several problem for the United States operations in the Middle East). Indeed, it is difficult for the United States to focus simply on weapons proliferation when other foreign policy goals in combating terrorism as one if its main allies in that war, Pakistan, has proven to be one of the prime suppliers of weapons technology to Iran, North Korea and Libya. David E. Sanger, *U.S. Widens View of Pakistan Link to Korean Arms*, N.Y. TIMES, Mar. 14, 2004, at A1 (noting the Bush Administration has not pushed Pakistan on the proliferation because of the search for Osama bin Laden); Kamran Khan, *Pakistanis Exploited Nuclear Network*, WASH. POST, Jan. 28, 2004, at A1 (noting the extent to which Pakistan was providing resources to Iran and Libya and that Pakistan’s leaders were not providing oversight over its nuclear weapons programs).

dealings with Iraq that can and should be employed credibly in its negotiations with Iran and North Korea. While this does not necessarily mean threatening invasion, as doing so would not necessarily be effective (as is discussed above with North Korea) promoting an environment where one is punished for seeking to join the nuclear club instead of getting the proverbial gift basket of security guarantees, oil and food supplies is necessary if nonproliferation is to have any long-term chance of success.

## B. Multilateralism is Not Inconsistent with Preemption

Multilateral relations cannot always be civilized—given the potential security benefits to states currently in pursuit of WMD, a willingness to use military action to enforce the stated purpose of NPT regime is necessary. While other states may not approve of the use of the preemptive attacks, Iran is an example of the threat of such action providing a “good cop-bad cop” dynamic where other states have effectively been able to get Iran to cease its weapons proliferation activities and engage in dialogue.<sup>218</sup> Those states and organizations that have negotiated these concessions with Iran cannot be so blind as to think that the settlement was entirely in spite of United States action in Iraq.<sup>219</sup> Whether they think the attack on Iraq was necessary, it is hard to argue that preemption has not added a necessary credible enforcement dimension to NPT obligations.<sup>220</sup>

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218. While the analogy to the “good cop-bad cop” rational can become strained if relied on too much, it is clear the United States has teetered on a line between multilateral action in Iran and North Korea while at the same time being more unilateral with Iraq. See, e.g., BBC News, *E.U. Draft Iran Nuclear Timetable*, Nov. 22, 2004, at [www.newsvote.bbc.co.uk/mpapps.pagetools/print/news.bbc.co.uk/1/hi/world/](http://www.newsvote.bbc.co.uk/mpapps.pagetools/print/news.bbc.co.uk/1/hi/world/) (last visited Jan 3, 2005); Craig S. Smith, *U.S. Softens Its Rebuke on Iran Nuclear Issue, Appeasing Allies*, N.Y. TIMES, Mar. 10, 2004, at A1 (noting the United States’ continued approach of standing down and allowing diplomatic measures to be used in Iran); Weisman, *supra* note 205 (noting the ongoing talks with North Korea).

219. The complexities of the United States role with the rest of the world community has been a topic of much discussion and numerous books are available that take various different stances on the proper way the United States should act and the way the other countries should respond to the United States. See generally, e.g., KAGAN, *supra* note 147 (proving the most pronounced statement as to the inevitable differences between the United States and Europe in what problems each seeks to address and by what means they will address those problems); BENJAMIN R. BARBER, *FEAR’S EMPIRE: WAR, TERRORISM, AND DEMOCRACY* (2003) (providing a criticism of the Bush Doctrine and stating the need for more liberal, multilateral action).

220. However, I do concede that preemptive use of force may have the effect of pushing proliferation underground and will add an additional burden to intelligence resources as additional funding and ingenuity will be necessary to ferret out these WMD programs before they develop to a point.

Preemption is a tool in the nonproliferation toolbox—it should in no way be the first and only tool to be used. Looking at the Bush Doctrine itself, it is important to note that preemption is not the only mechanism to address weapons proliferation.<sup>221</sup> From the Bush administration’s first presentations of its doctrine of preemptive self-defense, one must remember that it was one pillar within the overall game-plan to address the threat of weapons of mass destruction.<sup>222</sup> Multilateral regimes (through the NPT and IAEA), deterrence, counterproliferation, preemption, and any other tools available need to be fully exploited in a seamless, unified effort, and all parties in the fight against WMD proliferation need to understand that no single element is the “correct” one that must be used all the time.<sup>223</sup>

Preemption will likely be counterproductive and dangerous if not applied in some consistent way and accepted as a legitimate tool of nonproliferation—this means the United States needs to move beyond the rhetoric that has accompanied its preemptive actions to this date. An overambitious enforcement regime characterized solely by preemption will have the effect of making the United States the world’s policeman, a role that it has feared and loathed undertaking, leaving other states insecure about their role in international affairs.<sup>224</sup> Additionally, in order for this preemption to ever have any chance of acceptance after the diplomatic debacle in Iraq, the United States will have to be willing to allow multilateral input on the intricacies of any such a plan. Yet in a current environment where unilateral action is chic, the tolerance for such a framework is questionable. However, like in any “good cop-bad cop” plan, the “bad cop” needs to understand the game only can go so far. The United States has proven in Iraq that it is not bluffing when it proposes preemption, but that does

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221. National Strategy to Combat Weapons of Mass Destruction, *supra* note 6, at 2.

222. *Id.* at 5 (noting that all aspects of the policy, including multilateralism, intelligence gathering, and preemption, need to be integrated).

223. As is noted, the United States, while a hegemon, cannot rely on its military strength alone to stop weapons that can be hidden with ease given modern technology. Remember the “Model T” of nuclear weapons could be transported in an airplane and as the events of the last year have proven, no single means of controlling nuclear proliferation can be successful. See Zelikow, *supra* note 135, at 19 (noting that multilateralism is key in stating that “[w]e must speak of American power and of responsible ways to wield it; let us stop talking of American empire, for there is and there will be no such thing”).

224. It has been generally acknowledged that the United States is the primary enforcer of international law and international norms as it is the only country that has the potential to quickly and easily interdict in world conflict. KAGAN, *supra* note 147, at 46–47 (analyzing the Balkan War of 1999 as an example of the United States being the only country that could easily move forces into an area where Europe should have been able to mobilize with ease).

not mean that the preemption card needs to be played every time the state fits the paradigm discussed above.<sup>225</sup> Additionally, it is not acceptable for the United States to simply allow others to be involved in multilateral efforts.<sup>226</sup> While there are certain places where other states should take the lead in diplomacy, the apparent need to drag the United States to the table in certain situations (like Iran and North Korea) hurts the United States ability to capitalize on the strength and conviction it has shown on the issue of WMD proliferation.<sup>227</sup> Other states must also not take a simple view that preemption is the only tool the United States is willing to use as it has proven with its acceptance of multilateral dialogue and diplomatic mechanisms in Iran, North Korea, and Libya.

The current situation in North Korea presents a true testing ground for the full Bush nonproliferation framework including possible preemption, and whether it will help or hurt the environment for bringing about an effective settlement to North Korea's nuclear brinksmanship. While Donald Rumsfeld has stated that military action in North Korea is on the table, preemptive use of force, while an effective tool, can only be brought to bear when it will be effective in producing compliance with NPT regimes and will not unleash devastating attacks in itself. While it is practical to realize that Iraq and North Korea are not the same state and have different propensities, a

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225. Indeed, the administration has stated that preemption is the last alternative that should be followed, and that preemption is to be considered only in grave circumstances. Zelikow, *supra* note 135, at 27. National Security Advisor Condoleezza Rice specifically noted the limited circumstance when preemption can be used:

[Preemption] must be treated with great caution. The number of cases in which it 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. Preemptive action does not come at the beginning of a long chain of effort. The threat must be very grave. And the risks of waiting must far outweigh the risks of action.

Condoleezza Rice, Wriston Lecture (Oct. 1, 2002), available at <http://www.whitehouse.gov/news/releases/2002/10/20021001-6.html> (last visited June 16, 2004). When preemption is used in a situation where alternative means are available, the doctrine loses any sense of morality that could possibly accompany it (and morality is likely necessary if such a doctrine has the potential to be legitimately accepted under international law).

226. At the same time, the United States can see the benefit from other states exploiting contacts to these rogue states. Russia was instrumental in getting an agreement with Iran to allow unfettered inspection because of its conditioning additional nuclear fuel on Iran allowing inspections. Fathi, *supra* note 3.

227. Parisa Hafezi, *Iran Says EU Nuclear, Trade Talk Going Well*, REUTERS, Jan. 16, 2004, at <http://www.alertnet.org/the news.newsdesk/L16611732.htm> (noting positive negotiations with between the European Union and Iran, however, European leaders say United States support and approval is necessary).

dangerous precedent will be created if North Korea is given a pass sending the message that the key to developing weapons is to get far enough in their WMD development through cheating and blaming others for blatant violations of important NPT obligations.

### CONCLUSION

Paradigms to deal with nuclear weapons management need to adapt with a changing world rife with new threats. This note proposes integrating the Bush concept of preemptive self-defense with the preexisting NPT regime as a more effective, no-tolerance mechanism for dealing with nuclear weapons. Such a policy will involve the United States making a viable long-term commitments to international treaty obligations relating to nonproliferation and disarmament, continuously engaging allies and the major players in nonproliferation initiatives while maintaining the credible threat of preemption discussed above. As nuclear technology becomes easier to attain by rogue states and dangerous non-state actors, the United States will have to win over the hearts and minds of states and organizations if such a doctrine of nonproliferation with teeth will work to create a safer, nuclear-free world rather than a situation where the United States is isolated from the world community.

Blake Klein\*

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