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Operation 'Denucleunification': A Proposal for the Reunification and Denuclearization of the Korean Peninsula

By EUNICE LEE*

I. Introduction

Questions regarding to the Korean peninsula have befuddled the international community since the end of World War II, when the region was arbitrarily divided by two emerging powers, the Soviet Union and the United States. Since then, the peninsula has remained in the public eye, largely as a result of North Korea's nuclear program. Scholars have addressed possible ways to denuclearize the Korean peninsula, but to this day, North Korea remains a nuclear state.¹ As North Korea remains isolated from the outside world, mystery surrounds the manner in which its government behaves.² Should the U.S. respond to North Korea's perceived nuclear threat with force,³ or should diplomacy be used to achieve peace? Given the complexity of the nuclear dilemma, there is no simple solution to resolve the nuclear threat.

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1. North Korea is one of several non-NPT nuclear states, which are nuclear states that are presently not parties to the Nuclear Non-Proliferation Treaty.

2. For an article detailing the mystery surrounding North Korea's leader, Kim Jong Il, see Zain Verjee, *Mystery Surrounds Kim Jong Il*, CNN, Oct. 9, 2006, <http://edition.cnn.com/2006/WORLD/asiapcf/06/22/nkorea.kim/index.html>.

3. For an explanation of the lack of justifications for a pre-emptive strike on North Korea, see Brendan M. Howe & Jasper S. Kim, *Legality, Legitimacy and Justifications for Military Action Against North Korea*, 11 U.C. DAVIS J. INT'L L. & POL'Y 229 (2005).

Since its division, the Korean peninsula has been clouded by a complex history. To understand how to resolve the nuclear threat, it is crucial to recognize and account for the multi-layered factors giving rise to the current predicament. Underneath North Korea's nuclear threat lies the issue of peace and security on the Korean peninsula. The issue of peace and security is not exclusively a Korean issue, for the Nuclear Non-Proliferation Treaty (hereinafter "NPT") makes note in its Preamble that the "devastation that would be visited upon all mankind by a nuclear war [mandates the] consequent need to make every effort to avert the danger of such a war and to take measures to safeguard the security of peoples."⁴ North Korea had been a party to the NPT, but it withdrew in 2003 for reasons that will later be discussed. Nevertheless, as a member of the U.N., North Korea must be committed to maintain international peace and security and take "effective collective measures for the prevention and removal of threats to the peace"⁵ It is unclear whether peace and security will lead to denuclearization, or whether denuclearization will produce peace and security. Nevertheless, the two issues are undoubtedly interconnected.⁶ With peace and security at stake, it is interesting that reunification of the two Koreas has not played a prominent role in discussions of denuclearization. Without cordial relations between the two halves of the Korean peninsula, there cannot be peace and security. Thus, a dialogue on inter-Korean relations helps to shed light on the motivations behind nuclear proliferation on the Korean peninsula and is important to the pursuit of a unified, denuclearized Korean peninsula.

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

5. U.N. Charter art. 1, para. 1.

6. In fact, as the note will later discuss, agreements to end North Korea's nuclear program have addressed peace and security on the Korean peninsula. For instance, the Agreed Framework between the U.S. and North Korea stated that the two countries would "work together for peace and security on a nuclear-free Korean peninsula." Agreed Framework between the United States of America and the Democratic People's Republic of Korea art. 3, U.S.-N. Korea, Oct. 21, 1994, *available at* <http://www.kedo.org/pdfs/AgreedFramework.pdf> [hereinafter Agreed Framework]. Also, the Joint Statement produced from the Fourth Round of Six Party Talks on September 19, 2005, agreed that the six parties (U.S., North Korea, South Korea, China, Russia, and Japan) "committed to joint efforts for lasting peace and stability in Northeast Asia." Joint Statement of the Fourth Round of the Six-Party Talks, Sept. 19, 2005, *available at* <http://www.fmprc.gov.cn/eng/zxxx/t212707.htm>.

With the multi-layered nature of North Korea's nuclear threat, international efforts to denuclearize the peninsula have fallen short of absolute denuclearization. This note strives to illustrate that denuclearization and reunification of the Korean peninsula are not mutually exclusive issues, and a potential way to bring peace and security to the peninsula is to address both denuclearization and reunification in an interconnected manner by means of a treaty among the key players to the conflict – the U.S., North Korea, and South Korea. To get there, Part II will lay the groundwork explaining the historical motivations behind North Korea's nuclear ambitions, including the role the U.S. played in provoking North Korea to pursue a nuclear program. Part III will look more closely at bilateral relations between the two Koreas and examine the tumultuous relationship due to nuclearization, which has plagued efforts to reunify the Korean peninsula. Part IV will explain how the international community has attempted to resolve North Korea's nuclear threat since 1993, in particular, through the use of the Agreed Framework and the Six Party Talks.⁷ Part V will demonstrate the shortcomings of both reunification and denuclearization efforts through the Agreed Framework and Six Party Talks, and will then present possible solutions to the issues at hand, including a trilateral treaty among the U.S., North Korea, and South Korea. Finally, Part VI will conclude with a look toward the future of the Korean peninsula.

II. The Korean Peninsula's Modern History

A. *Division of the Korean Peninsula*

Near the end of World War II, the international community divided the Korean peninsula along the thirty-eighth parallel line, with Soviet troops in the North and U.S. troops occupying the South.⁸ In 1947, the U.N. passed a resolution calling for the election of a free and independent National Government of Korea. However, a breakdown of relations between the U.S. and the Soviet

7. The Agreed Framework was an agreement whose objective was to freeze North Korea's nuclear program. *See infra* Section IV.A. The Six Party Talks consist of multilateral talks among six nations whose goal is to peacefully resolve security concerns related to North Korea's nuclear program. *See infra* Section IV.B.

8. DON OBERDORFER, *THE TWO KOREAS: A CONTEMPORARY HISTORY* 6-7 (2d ed. 2001).

Union prevented the reunification of the two Koreas.⁹ Thereafter, the Soviet Union chose Kim Il Sung to lead the North, while Syngman Rhee was selected to head the South.¹⁰

Increased tensions between the North and South led to North Korea's invasion of the South on June 25, 1950. Kim Il Sung claimed in a radio address that the invasion was intended to prevent Syngman Rhee from turning "our country into a colony of [U.S.] imperialism and make the entire Korean people slaves of [U.S.] imperialism."¹¹ However, North Korea failed to unify the peninsula, as the U.S., South Korea, and other nations fought back.¹² The Korean War ravaged the peninsula for the next three years, firmly establishing the Cold War and bringing the Korean peninsula to the center of global attention.¹³ In 1953, an armistice stopped the fighting and created a cease-fire line near the thirty-eighth parallel, now known as the Korean Demilitarized Zone (hereinafter "DMZ"), but the two Koreas never signed a peace treaty.¹⁴ Despite the armistice, North and South Korea continued hostilities through extensive espionage, occasional battles along the DMZ, and propaganda aimed at the other side.¹⁵ The constant friction resulted in a hardening of ideological and political lines, with hatred between the regimes and blood feuds among family members divided by the DMZ.¹⁶ In hindsight, it is clear that the Korean War contributed to the nuclearization of the Korean peninsula.

9. LOUISE I. GERDES, NORTH AND SOUTH KOREA 14 (2007). See also G.A. Res. 112 (II), at 16 (Nov. 14, 1947).

10. OBERDORFER, *supra* note 8, at 8. Both leaders hoped to reunite the Korean peninsula, with Kim Il Sung having "a burning desire to reunite his country" and Syngman Rhee believing that "he was destined to reunite Korea under an anti-communist banner." *Id.*

11. *Kim Il Sung: Go All Out For Victory in the War* (radio address June 26, 1950), <http://libweb.uoregon.edu/ec/e-asia/read/1006-j.pdf>.

12. OBERDORFER, *supra* note 8, at 8.

13. *Id.* at 8-9.

14. GERDES, *supra* note 9, at 15.

15. JOHN FEFFER, NORTH KOREA SOUTH KOREA: U.S. POLICY AT A TIME OF CRISIS 46 (2003).

16. OBERDORFER, *supra* note 8, at 10. This has been one of the most important consequences of the Korean War. *Id.*

B. Nuclearization of the Korean Peninsula

North Korea's decision to obtain a nuclear weapons arsenal did not occur in a vacuum, but had roots in the Korean War. In 1952, President Dwight Eisenhower had been elected in part on a platform of ending the Korean War, and in February 1953 he turned to the possibility of using nuclear weapons when China and North Korea stalled at peace talks.¹⁷ When the armistice was finally signed in July 1953, President Eisenhower asserted that the threat of nuclear weapons induced the signatures.¹⁸ Following the Korean War, the U.S. continued to provoke North Korea by declaring nuclear support for South Korea, even though the armistice banned the introduction of new weapons.¹⁹ Given these actions, in light of the existing tension on the Korean peninsula, it should not come as a surprise that North Korea's interest in obtaining nuclear weapons increased as the Cold War intensified. In fact, the U.S. nuclear presence in South Korea "may have played a decisive role in stimulating North Korean leaders to embark upon their own nuclear weapons program."²⁰

Various rationales explain why North Korea gained interest in acquiring a nuclear weapons system. First, as previously noted, a nuclear weapons program may have helped deter and counterbalance the U.S. nuclear umbrella over South Korea.²¹ Second, North Korea feared an emerging South Korean nuclear weapons program, and may have wanted to preempt South Korean superiority.²² In economic terms, nuclear proliferation initially appeared to be "a cheaper route to national security than an indefinite conventional arms race with the South . . . [especially since] the South's growth rates and margin of economic superiority

17. MICHAEL J. MAZARR, *NORTH KOREA AND THE BOMB* 15-16, (2d ed. 1997).

18. *Id.* at 16. Thus, according to Michael Mazarr, the U.S. had exposed North Korea, in "its infancy as a nation, to the fearsome power and enormous political value of nuclear weapons."

19. *Id.* at 20. In January 1955, the Chairman of the U.S. Joint Chiefs of Staff, Admiral Arthur W. Radford, explicitly pledged to South Korea that the U.S. would secure Seoul through nuclear systems. *Id.*

20. *Id.* at 17.

21. This can be seen as a reactionary response rather than aggressive action, since North Korea probably believed their lack of security to be a "potentially fatal weakness" in light of U.S. nuclear capabilities. *Id.*

22. *Id.* at 18.

began to soar in the 1970s.”²³ Moreover, North Korea may have desired an end to the inter-Korean rivalry by breaking up the South Korean government and uniting the country on North Korea’s terms, which “would certainly resolve North Korea’s main security problem.”²⁴ Third, the North Korean regime may have viewed the possession of nuclear weapons as a means of gaining diplomatic leverage, perhaps to “extract economic concessions in negotiations” with the international community.²⁵ Fourth, possession of nuclear weapons would have provided North Korea with the military resources to reduce its dependence on its allies, China and Russia.²⁶ This desire for security independence likely increased as relations between China and the Soviet Union soured during the Cold War.

After a relatively calm period in the late 1950s, North Korea’s perception of threats to its existence reemerged in the 1960s.²⁷ Despite its security alliances with China and the Soviet Union, North Korea had been dissatisfied with its allies on various occasions since the Korean War.²⁸ During the Cuban Missile Crisis, North Korean officials worried that the Soviet Union’s acquiescence to U.S. demands and abandonment of Fidel Castro’s regime forecasted a similar response if North Korea were to confront the U.S.²⁹ In light of the U.S. nuclear threat to North Korea, as well as North Korea’s precarious position in Sino-Soviet tensions, North Korea’s “embryonic nuclear program slowly took shape.”³⁰

23. SELIG S. HARRISON, *KOREAN ENDGAME: A STRATEGY FOR REUNIFICATION AND U.S. DISENGAGEMENT* 203 (2002).

24. Daniel A. Pinkston, *North Korean Motivations for Developing Nuclear Weapons*, http://cns.miis.edu/north_korea/dprkmotv.pdf.

25. Benjamin Friedman, *Fact Sheet: North Korea’s Nuclear Weapons Program*, CENTER FOR DEFENSE INFORMATION, Jan. 23, 2003, <http://www.cdi.org/nuclear/nk-fact-sheet.cfm>. Given that North Korea was a relatively young state, possessing nuclear weapons might have forced the world to take notice of the country and take it seriously in international relations.

26. MAZARR, *supra* note 17, at 19.

27. *Id.* at 22-23.

28. For example, even though China and the Soviet Union aided North Korea during the Korean War, Kim Il Sung desired more support than he received. He wanted more Soviet ground forces to expel the Americans from Korea, but Stalin did not meet Kim’s demands. Pinkston, *supra* note 24.

29. MAZARR, *supra* note 17, at 23. Meanwhile, South Korea had been moving rapidly ahead in developing a modern army with the Americans’ aid, so North Korea announced that it would “henceforth place ‘equal emphasis’ on military preparedness and economic development.” *Id.*

30. *Id.* at 24.

In the early 1960s, North Korea turned to China shortly after the large neighbor had detonated its first atomic blast. Reportedly Chinese leaders declined the request to share nuclear knowledge, dismissive as they were of North Korea as a small country.³¹ Then in 1965, the Soviet Union provided a small two-to-four megawatt Soviet research reactor and a .1 megawatt nuclear research lab at Yongbyon.³² By the 1980s, North Korea "perceived itself to be standing alone, trapped between the Sino-Soviet conflict to the north, the Sino-American alignment to the west and Japan to the east, and over half a million hostile soldiers to the south."³³ Sometime in the mid-1980s, the international community began to take notice of the nuclear activity at Yongbyon. A U.S. intelligence satellite discovered evidence of the construction of a second nuclear reactor at Yongbyon that was large enough to produce one bomb's worth of plutonium each year.³⁴ The U.S. then turned to the Soviet Union for assistance on the North Korean nuclear issue. To encourage North Korea to sign the NPT, the Soviet Union agreed to supply four light-water nuclear power reactors if North Korea joined the NPT. North Korea agreed, promising "not to receive or manufacture nuclear weapons and to accept international inspection of all its nuclear facilities to verify that weapons were not being produced."³⁵

At various times during the 1980s, North Korea had called for a nuclear-free peninsula, but developments in the 1990s tested North

31. OBERDORFER, *supra* note 8, at 252-53.

32. MAZARR, *supra* note 17, at 25. Also, in the late 1960s South Korea had motive to acquire nuclear weapons, as the U.S. security commitment began to fade. *Id.* at 27. In turn, North Korea responded in several ways: it moved to reaffirm ties with and obtain new security pledges from traditional allies; it publicly denounced the importance of nuclear weapons and claimed an ability to defend itself comfortably without them; it expanded its formal commitment to nonproliferation; and it continued to work on its own nuclear weapons program, beginning work on the large reactor at Yongbyon that would eventually cause much concern in the 1980s and 1990s. *Id.* at 28.

33. *Id.* at 32.

34. *Id.* at 40. The U.S., paying close attention to the developments at Yongbyon, asked the Soviet Union to convince North Korea to sign the NPT, "hoping this would lead to international inspection and control of Pyongyang's nuclear facilities." OBERDORFER, *supra* note 8, at 254.

35. OBERDORFER, *supra* note 8, at 254. This commitment would later serve as the legal justification for international intervention to stop North Korea's nuclear program. *Id.*

Korea's seriousness about denuclearization.³⁶ The fall of communism in Eastern Europe in 1989 and the fall of the Soviet Union in 1991 resulted in a significant drop in aid to North Korea, leading to decreased relations with Russia and a loss of the security guarantees that North Korea had maintained since the Korean War.³⁷ With knowledge of North Korean activity at Yongbyon, the U.S. pursued a strategy whereby North Korea's compliance with the NPT would lead to progress in other areas, such as the normalization of relations. To do so, the U.S. and South Korea began a nonproliferation campaign directed at North Korea, which included U.S. nuclear withdrawal from South Korea and potential reconsideration of the U.S.-South Korean Team Spirit military exercises if "progress were made on the nuclear issue."³⁸

In February 1992, it appeared that progress was made, with North Korea agreeing to sign an agreement with the International Atomic Energy Agency (hereinafter "IAEA") in which the IAEA would have the right to ensure that safeguards were applied to the peaceful use of nuclear facilities.³⁹ In May 1992, North Korea allowed a team from the IAEA to inspect the facility at Yongbyon for the first time, but by the end of 1992, it became apparent that North Korea had provided an inaccurate accounting of the true nature of its nuclear activities.⁴⁰ The IAEA then demanded an

36. MAZARR, *supra* note 17, at 41. In 1980, Kim Il Sung explained at the Sixth KWP Congress that North Korea wanted a nuclear-free peninsula, and by 1986, extended this request to include tripartite talks with the U.S. and South Korea. *Id.* In the late 1980s and early 1990s, North Korea wanted U.S. nuclear forces withdrawn from South Korea and hoped to establish a general agreement for a nuclear-free zone in Korea. *Id.* North Korea has maintained that the U.S. provoked the nuclearization of the Korean peninsula despite North Korea's objections. See Charles J. Moxley, Jr., *The Sword in the Mirror: The Lawfulness of North Korea's Use and Threat of Use of Nuclear Weapons based on the United States' Legitimization of Nuclear Weapons*, 27 FORDHAM INT'L L.J. 1379, 1411-12 (April 2004).

37. U.S. Department of State, North Korea (08/08), <http://www.state.gov/r/pa/ei/bgn/2792.htm> (2009). Moreover, South Korea established diplomatic relations with the Soviet Union in 1990 and with the China in 1992, which further strained relations between North Korea and its allies.

38. MAZARR, *supra* note 17, at 51, 59, 67.

39. Int'l Atomic Energy Agency [IAEA], *Agreement of 30 January 1992 between the Government of the Democratic People's Republic of Korea and the International Atomic Energy Agency for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons*, art. 1, IAEA Doc. INFCIRC/403 (Jan. 30, 1992), available at <http://www.iaea.org/Publications/Documents/Infircs/Others/inf403.shtml>.

40. MAZARR, *supra* note 18, at 79-94. During Blix's inspection, he had suspected

unprecedented inspection of nuclear sites not offered voluntarily by North Korea, and in response, the North Korean newspaper *Nodong Sinmun* warned that the IAEA was attempting to infringe on North Korea's sovereignty.⁴¹ North Korea then stunned the world in March 1993 when it announced its intention to abandon the NPT.⁴² The U.S. agreed to high-level talks after North Korea announced its withdrawal. After eighty-nine days of intense negotiations, North Korea agreed to temporarily suspend its withdrawal only for as long as it considered the country to be safe from harm.⁴³ For the time being, a tense situation was eased, but the conflict was far from over.

III. Reunification Efforts on the Korean Peninsula

The 1993 endeavor by the U.S. to stop North Korea's withdrawal from the NPT was vital for containing North Korea's nuclear threat. Moreover, the effort to halt North Korea's nuclear program has been important because it "holds explosive implications for the evolution of the Korean peninsula and the architecture of regional security."⁴⁴ However, denuclearization of the Korean peninsula cannot be addressed without discussing reunification efforts on the Korean peninsula as well. While much of the global community focused primarily on the issue of North Korea's nuclear weapons program during the latter half of the twentieth century, North and South Korea had been engaged in discussions of possible reunification since the 1970s.⁴⁵ To fully realize the possibility of resolving North Korea's nuclear threat and attaining peace and security, it is helpful to understand the history

that North Korea was engaged in plutonium reprocessing, contrary to its earlier claims. *Id.* at 83.

41. *Id.* at 96, 99.

42. David. E. Sanger, *North Korea, Fighting Inspection, Renounces Nuclear Arms Treaty*, N.Y. TIMES, Mar. 12, 1993, available at <http://www.query.nytimes.com/gst/fullpage.html?res=9F0CEFD103EF931A25750C0A965958260&sec=&spoon=&partner=permalink&exprod=permalink>.

43. MAZARR, *supra* note 17, at 121. Meanwhile, the U.S. "offered only the slimmest carrot: a pledge not to 'use armed forces, including nuclear weapons, nor threaten' such use against the North" *Id.*

44. *Id.* at 9.

45. See SAMUEL S. KIM, NORTH KOREA FOREIGN RELATIONS IN THE POST-COLD WAR WORLD 71-77 (Strategic Studies Institute, April 2007), <http://www.strategicstudiesinstitute.army.mil/pdf/files/PUB772.pdf> (discussing inter-Korean relations following the Korean War).

of dialogue between North and South Korea with regards to reunification and denuclearization.

Following the armistice, both North and South Korea talked superficially about eventual reunification, but during the 1950s and 1960s, the countries mainly exhibited animosity towards each another.⁴⁶ However, Red Cross talks in the 1970s resulted in a joint agreement with three principles: (1) unification achieved through independent efforts; (2) unification achieved through peaceful means; and (3) national unity sought by transcending differences in ideas, ideologies, and systems.⁴⁷ The euphoria was brief as failed talks to co-host the 1988 Seoul Olympics were followed by the 1987 Korean Air Flight 858 bombing by North Korean secret agents.⁴⁸ South Korea then began pursuing the *Nordpolitik* policy in the late 1980s, hoping to pressure North Korea to reduce tensions by normalizing relations with North Korea's traditional allies. North Korea reacted to this coolly, accusing South Korea of "intend[ing] to permanently split the country."⁴⁹

In a 1988 speech to the U.N. General Assembly, South Korean President Roh called for a wide-ranging discussion of issues concerning peace and stability in Northeast Asia and proposed to replace the 1953 armistice agreement with a peace treaty.⁵⁰ The talks that stemmed from Roh's proposal resulted in two agreements: the Agreement on Reconciliation, Nonaggression, Exchanges, and Cooperation (hereinafter "Basic Agreement"), and the Declaration on the Denuclearization of the Korean Peninsula (hereinafter "Joint Declaration").⁵¹ The Joint Declaration was an important step

46. OBERDORFER, *supra* note 8, at 11.

47. KIM, *supra* note 45, at 71. However, these initial contacts broke down in 1973 and there was no other significant contact until the early 1980s. U.S. Department of State, *supra* note 37. Talks renewed in 1984 when South Korea accepted North Korea's offer to provide relief goods to flood victims in South Korea. FEEFFER, *supra* note 15, at 48.

48. OBERDORFER, *supra* note 8, at 180-86.

49. *Id.* at 188-89.

50. South Korea Foreign Policy, Basic Goals and Accomplishments, <http://countrystudies.us/south-korea/75.htm> (last visited Feb. 16, 2009). See also Paul Lewis, *South Korean Chief, at U.N., Calls For World Talks and Unification*, N.Y. TIMES, Oct. 19, 1988, at A1, available at http://query.nytimes.com/gst/fullpage.html?res=940DEEDD113FF93AA25753C1A96E948260&sec=&spon=&page_wanted=all.

51. See Agreement on Reconciliation, Non-aggression and Exchanges and Cooperation Between the South and the North, N. Korea-S. Korea, Dec, 13, 1991,

towards inter-Korean cooperation. It stated that North and South Korea "shall not test, manufacture, produce, receive, possess, store, deploy or use nuclear weapons," "shall use nuclear energy solely for peaceful purposes," "shall not possess nuclear reprocessing and uranium enrichment facilities," and that to implement the Joint Declaration, "[the Koreans] shall establish and operate a South-North Joint Nuclear Control Commission (hereinafter "JNCC")."⁵² Around the same time as the Joint Declaration came into force in February 1992, North Korea signed the IAEA Safeguards Agreement.⁵³ Subsequently, the JNCC was established in March 1992 to help implement the Joint Declaration, but the two countries made little progress toward establishing an inspection regime, and dialogue eventually stalled as "it gradually became apparent that the North was unwilling to approve a plan for meaningful challenge inspections."⁵⁴

North Korea essentially disregarded the Joint Declaration, which prohibited the possession of nuclear reprocessing and uranium enrichment facilities, and refused IAEA inspections, thus "[raising] tensions in Korea to the boiling point."⁵⁵ For various reasons, including lack of progress on implementation of the Joint Declaration and the IAEA's unprecedented inspection demand, North Korea threatened to withdraw from the NPT in 1993. The threat to withdraw brought inter-Korean dialogue to an abrupt halt, and tensions ran high on the Korean peninsula as the confrontation

available at <http://www.nautilus.org/DPRKBriefingBook/agreements/CanKor-VTK-1991-12-13-agreement-on-reconciliation-non-agression-exchanges.pdf> [hereinafter Basic Agreement]; Joint Declaration on the Denuclearization of the Korean Peninsula, N.Korea-S. Korea, Jan. 20, 1992, available at <http://www.fas.org/news/dprk/1992/920219-D4129.htm> [hereinafter Joint Declaration].

52. Joint Declaration, *supra* note 51.

53. See *supra* Part II.B.

54. MAZARR, *supra* note 17, at 86. Predictably, the nuclear crisis generated nationalistic concerns in South Korea regarding the problem of reunification. *Id.* at 10. South-North dialogue on the issue of reunification continued to delay, thus preventing South Korean businesses from building an economic infrastructure, a unification safety net, in the North. *Id.* Further, many South Koreans especially objected to their government's promise not to develop nuclear reprocessing facilities per U.S. request. *Id.* See generally Federation of American Scientists, Nuclear Weapons Program - North Korea, <http://www.fas.org/nuke/guide/dprk/nuke/index.html> (last visited Feb. 20, 2009).

55. *Id.* at 97; Joint Declaration, *supra* note 51 ("South and North Korea shall not possess nuclear reprocessing and uranium enrichment facilities.").

between North Korea and the global community worsened.⁵⁶ South Korea began to view the North from a tougher stance, and in the early 1990s, it appeared as though the nuclear crisis would prevent reunification of the Korean peninsula.⁵⁷ With a dangerous situation worsening, the U.S. stepped in to convince North Korea not to withdraw from the NPT, which the next section will highlight. Since then, the international community has taken steps to resolve the North Korean nuclear threat through a series of agreements and talks.

IV. International Efforts to Address North Korea's Nuclear Threat

A. *Geneva Agreed Framework*

As the 1990s progressed, concern over North Korea's nuclear program became a major issue in international relations. With North Korea's pending withdrawal from the NPT, the U.N. Security Council passed Resolution 825 in May 1993 urging North Korea to re-affirm its obligations under the NPT and to comply with the IAEA Safeguards Agreement in addition to asking Member States to encourage North Korea to respond positively to the resolution.⁵⁸ The U.S. responded by holding talks with North Korea in June 1993, outlining basic principles for continued U.S.-North Korean dialogue and North Korea suspending withdrawal from the NPT.⁵⁹ The U.S. and North Korea finally agreed to the Agreed Framework in October 1994.⁶⁰ Under the agreement, North Korea agreed to:

freeze activity at its existing reactor and at the reprocessing site within one month of signing the framework and promise not to construct any new graphite reactors or reprocessing facilities . . .

56. See OBERDORFER, *supra* note 8, at 281-304.

57. For example, South Korea decided to go ahead with planning for the U.S.-South Korean Team Spirit Exercise in 1993, which was very risky in light of negotiations. MAZARR, *supra* note 17, at 88. The North Korean Foreign Ministry issued a statement saying that the Team Spirit exercise was a "criminal act" that would "drive North-South dialogue to a crisis" and "cast dark shadows on U.S.-[North Korean] relations," which had been improving until then. *Id.* at 92.

58. S.C. Res. 825, ¶¶ 1, 2, 4, U.N. Doc. S/RES/825 (May 11, 1993).

59. Globalsecurity.org, Nuclear Weapons Program - North Korea: 1994 Agreed Framework, <http://www.globalsecurity.org/wmd/world/dprk/nuke-agreedframework.htm> (last visited Feb. 16, 2009.)

60. MAZARR, *supra* note 17, at 173.

and permit regular nuclear inspections as provided by the terms of the [NPT] that would be performed by the IAEA under a special mandate Washington promised to work out with the [U.N.].⁶¹

In exchange, North Korea would receive assurance that the U.S. would not use nuclear weapons against it, fuel oil, economic cooperation and two modern light-water nuclear power plants by a target date of 2003, to be supplied and financed by the Korean Peninsula Energy Development Organization (hereinafter "KEDO").⁶² North Korea's existing nuclear facilities were to be completely dismantled by the time the light-water reactor project was complete, and in the meantime, North Korea agreed to freeze its reactors and allow IAEA inspectors to monitor the freeze.⁶³ Additionally, KEDO would:

provide for the supply of interim energy alternatives in lieu of the energy from [North Korea's] graphite-moderated reactors pending construction of the first light-water reactor . . . [and] provide for the implementation of any other measures deemed necessary to . . . carry out the objectives of the Agreed Framework.⁶⁴

However, problems with KEDO caused persistent "delays in negotiating critical agreements relating to specific aspects of the construction process and eventual operation of the reactors."⁶⁵

Over the years, North Korea became increasingly frustrated with U.S. failures to adhere to the Agreed Framework. U.S.-North Korean tensions intensified when President Bush, in his 2002 State of the Union address, categorized North Korea as part of the "Axis of Evil," calling it a "regime arming with missiles and weapons of mass destruction, while starving its citizens."⁶⁶ Later that year, the U.S. claimed that North Korea was developing an uranium

61. *Id.*

62. *Id.* at 173-75.

63. OBERDORFER, *supra* note 8, at 357.

64. Agreement on the Establishment of the Korean Peninsula Energy Development Organization, U.S.-Japan-S. Korea, art. 2(a)(2)-(3), Mar. 9, 1995, <http://www.kedo.org/pdfs/EstablishmentKEDO.pdf>.

65. Harrison, *supra* note 23, at 260.

66. George W. Bush, President of the United States, State of the Union Address (Jan. 29, 2002) (transcript available at <http://archives.cnn.com/2002/ALLPOLITICS/01/29/bush.speech.txt/>).

enrichment program for nuclear weapons purposes.⁶⁷ Assistant Secretary of State James Kelly visited North Korea to question officials about North Korea's secret program to enrich uranium, and the regime did not rebut the allegations.⁶⁸ Such a program would presumably violate North Korea's obligations under the NPT, the IAEA Agreement, the Joint Declaration, and the Agreed Framework – all of the agreements that North Korea had entered with regards to denuclearization. Whether North Korea affirmatively admitted to a secret program or not, the U.S. subsequently announced that the Agreed Framework was obsolete.⁶⁹

Subsequently, North Korea pulled out of the NPT in January 2003, justifying its decision as a "legitimate self-defense measure."⁷⁰ North Korea declared that if the U.S. dropped its "hostile policy to stifle North Korea," then it would prove through separate verification with the U.S. that it was not constructing a nuclear weapon.⁷¹ Under Article X(1) of the NPT, a State has "the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of [the NPT], have jeopardized the supreme interests of its country."⁷² In its withdrawal statements, North Korea accused the U.S. of violating international law, rationalizing that "[by] listing [North Korea] as a target for [...] nuclear preemptive attack, the Bush administration completely destroyed the basis of the Agreed Framework. As such, it flagrantly infringed on the basic spirit of the NPT."⁷³ Afterwards, North Korea moved to terminate IAEA monitoring at Yongbyon, began reprocessing the existing spent fuel, and expelled U.N. inspectors, all due to the U.S.' "hostile policy."⁷⁴ With the Agreed Framework defunct and North Korea pulling out of the NPT, the international

67. FEFFER, *supra* note 15, at 11.

68. *Id.* at 65.

69. *Id.* Predictably, North Korea responded to the Bush administration's abrasive approach with severity, not only ending negotiations with the U.S., but also breaking off ongoing efforts to reconcile with South Korea. *Id.*

70. *N. Korea Says Withdrawing From Nuclear Treaty is 'Self Defense'*, CNN, Jan. 11, 2003, <http://www.cnn.com/2003/WORLD/asiapcf/east/01/11/nkorea.rally/>.

71. *Id.*

72. NPT, *supra* note 4, art. X(1).

73. KCNA 'Detailed Report' Explains NPT Withdrawal, KOREAN CENTRAL NEWS AGENCY, Jan. 22, 2003 (translation available at <http://www.fas.org/nuke/guide/dprk/nuke/dprk012203.html>).

74. U.S. Department of State, *supra* note 37.

community responded rapidly with the hope of avoiding a catastrophe.

B. Six Party Talks

In early 2003, the U.S. proposed multilateral talks regarding the North Korean nuclear threat, which North Korea initially opposed.⁷⁵ However, with China's involvement, North Korea agreed to talks with the U.S. and China in April 2003.⁷⁶ In August 2003, the Six Party Talks commenced as a multilateral approach to end North Korea's nuclear program, with North Korea, South Korea, the U.S., China, Russia, and Japan participating.⁷⁷ During the talks, North Korea agreed to eliminate its nuclear program if the U.S. signed a bilateral "non-aggression treaty," but the U.S. declined North Korea's proposal.⁷⁸ The first few meetings made no apparent progress, but the fourth meeting in mid-2005 resulted in a presumed understanding that North Korea was entitled to have a peaceful nuclear program.⁷⁹ However, conflicting reports existed as to the meaning of a peaceful program. The U.S. asserted that full disarmament had to be a first step before it would consider North Korea's request for a light-water reactor, while North Korea said that the light-water reactors must be agreed to before any disarmament was to begin.⁸⁰

Meanwhile, North Korea was moving forward with its nuclear program, and in 2006 there was strong evidence that North Korea

75. *See id.*

76. *See id.*

77. Jayshree Bajoria & Carin Zissis, Backgrounder, *The Six-Party Talks on North Korea's Nuclear Program*, COUNCIL ON FOREIGN RELATIONS, July 1, 2009, <http://www.cfr.org/publication/13593/>.

78. U.S. Department of State, *supra* note 37.

79. William J. Perry, Former Sec'y of Defense under President Bill Clinton, Testimony to the House Foreign Affairs Committee (Jan. 18, 2007) (transcript available at http://www.globalsecurity.org/military/library/congress/2007_hr/070118-perry.htm). Discussions in mid-2005 resulted in all parties agreeing to a Joint Statement of Principles. U.S. Department of State, *supra* note 38. The parties unanimously reaffirmed the goal of verifiable peaceful denuclearization of the Korean Peninsula, North Korea committed to abandon all nuclear weapons and existing nuclear programs and to return to the NPT and to IAEA safeguards, the other parties agreed to provide economic cooperation and energy assistance, and the U.S. and North Korea agreed to take steps to normalize relations subject to bilateral policies. *Id.*

80. Perry, *supra* note 80.

was well on its way to build a sizable nuclear arsenal.⁸¹ In October 2006, North Korea conducted a nuclear bomb test, which the U.N. Security Council strongly condemned, calling for North Korea to return to multilateral talks.⁸² A breakthrough came in the February 2007 agreement in the Six Party Talks, which not only highlighted a path toward a denuclearized Korean peninsula, but also outlined steps toward the normalization of political relations with North Korea. The breakthrough led to the U.S. eventually removing North Korea from the state-sponsor-of-terrorism list and ending the application of the Trading with the Enemy Act, a replacement of the Korean War armistice with “a permanent peace regime on the Korean Peninsula,” and the building of “lasting peace and stability in Northeast Asia.”⁸³

The multilateral talks appeared to make progress, and in June 2008 the U.S. agreed to start lifting restrictions after North Korea began the disarming process.⁸⁴ However, after several months of cooperation, North Korea stopped disabling Yongbyon in August 2008 to protest the U.S.’s refusal to remove North Korea from the list of state sponsors of terrorism.⁸⁵ The parties moved forward in October 2008 when the U.S. and North Korea secured an agreement in which North Korea would continue disarming its nuclear program and allow U.S. inspectors access to its main declared

81. *Id.*

82. S.C. Res. 1718, ¶¶ 1, 14, U.N. Doc. S/RES/1718 (Oct. 14, 2006).

83. Agreement on Initial Actions for the Implementation of the Joint Statement, art. II, ¶ 3; VI, Feb. 13, 2007, <http://www.fmprc.gov.cn/eng/zxxx/t297463.htm>.

84. *U.S. to Ease North Korea Sanctions*, BBC NEWS, June 26, 2008, <http://news.bbc.co.uk/2/hi/asia-pacific/7476625.stm>. President Bush announced that he would remove North Korea from the list of state sponsors of terrorism after North Korea’s programs were verified. *Id.* Shortly thereafter, North Korean officials released video of the demolition of the cooling tower at Yongbyon, considered symbolic of their commitment to ending their nuclear program. *N. Korea Demolishes Reactor Tower*, BBC NEWS, June 27, 2008, <http://news.bbc.co.uk/2/hi/asia-pacific/7476755.stm>.

85. *Officials: North Korean Nuclear Mission for United States Envoy*, DAILY NEWS, Sept. 28, 2008, http://www.nydailynews.com/news/us_world/2008/09/27/2008-09-27_officials_north_korean_nuclear_mission_f-3.html?print=1&page=all.

President Bush delayed the scheduled removal in August because North Korea had refused to agree on a verification plan. *North Korea Rebooting Nuclear Plants? United States Chastens Country*, ASSOCIATED PRESS, Sept. 24, 2008, http://www.nydailynews.com/news/us_world/2008/09/24/2008-09-24_north_korea_rebooting_nuclear_plants_uni.html. In September 2008, North Korea barred UN nuclear inspectors from its main nuclear reactor and planned to reactivate the plant that supplied the plutonium for its nuclear bomb test. *Id.*

nuclear compound at Yongbyon, in exchange for removal from the U.S. list of state sponsors of terrorism.⁸⁶ Yet, the parties ran into problems in November 2008. The U.S. alleged that North Korea had agreed to provide full access to its nuclear facilities and allow inspectors to "take samples and conduct forensic tests."⁸⁷ North Korea said that it never agreed to such a move, thus causing ongoing negotiations to halt.⁸⁸ Problems of interpretation, such as the case with nuclear sampling, have hindered discussions of denuclearization. As 2008 winded down, the parties remained at odds over the scope of agreements, and despite over six years of the Six Party Talks, the Korean peninsula still lacks peace and security.

V. Resolving the Issues of Reunification and Denuclearization

Before the international community can denuclearize and bring peace to the Korean peninsula, it is important to recall the historical context in which North Korea decided to pursue a nuclear weapons program. Given the historical roots previously outlined, various scholars have asserted their belief that North Korea's nuclear program is defensive rather than offensive.⁸⁹ As long as North Korea feels threatened by the U.S., South Korea, or otherwise, it will maintain a nuclear program.⁹⁰ This posture, in turn, will inhibit

86. Helene Cooper, *North Korea is Off Terror List After Deal with U.S.*, N.Y. TIMES, Oct. 12, 2008, at A1, available at http://www.nytimes.com/2008/10/12/world/asia/12terror.html?_r=2.

87. *N. Korea Rejects Nuclear Sampling*, BBC NEWS, Nov. 12, 2008, <http://news.bbc.co.uk/2/hi/7724784.stm>.

88. *Id.*

89. Peter Hayes illustrates that while the U.S. nuclear presence on the Korean peninsula served only to deter a conventional attack from North Korea, it had the effect of over-detering North Korea. Harrison, *supra* note 23, at 198. This may have contributed, either indirectly or directly, to North Korea's desire to build up a nuclear arms arsenal in order to curb a U.S. nuclear attack. Also, David Kang believes that North Korea has pursued a policy of "regime survival" because it "believes it is facing a massive security threat from overwhelming U.S. might." ANDREW SCOBELL, NORTH KOREA'S STRATEGIC INTENTIONS 4-5 (Strategic Studies Institute, July 2005), <http://www.strategicstudiesinstitute.army.mil/pdffiles/PUB611.pdf>.

90. Andrew Scobell writes:

While leaders of communist countries tend to be prone to paranoia in the first place, the Pyongyang regime also believes that it faces a very real threat from the armed forces of the United States and [South Korea]. They appear truly afraid of possible attack. This fear may have heightened in the

peaceful relations on the Korean peninsula and weaken prospects for reunification.

Some scholars believe that reunification is unlikely.⁹¹ Resolution of the North Korean nuclear threat would require peace on the peninsula, which involves reunification efforts. In essence, absent good relations between the North and South, North Korea will not disarm, and without denuclearization, the North and South will continue to experience tense relations. This unstable situation may be addressed by marrying efforts to reunite and denuclearize the Korean peninsula. An official end to the Korean War provides a symbolic and tangible step towards peace and security. When coupled with denuclearization, the important players – North Korea, South Korea, and the U.S. – can work together towards a permanent regime that will establish peace and security on the Korean peninsula.

A. Why International Efforts Have Failed Thus Far

As illustrated by the previous sections, resolving North Korea's nuclear threat has not been a simple task. Pestered by uncertainties and broken promises, efforts to denuclearize the Korean peninsula have stalled, and the two countries have not been able to establish a permanent peace regime. On one hand, North Korea may feel so threatened by external forces that it may be unwilling to give up its nuclear program for security reasons, or perhaps it may be willing to negotiate an end to its nuclear program only in exchange for the guarantee of security and sovereignty.⁹² On the other hand, it is possible that North Korea's "key strategic goals are to build up its WMD programs, engage in parasitic extortionism and pursue

spring of 2003 when U.S. and coalition forces toppled the regime of Saddam Hussein in Iraq because North Korea feared that it might be the next object of an American military operation.

SCOBELL, *Id.* at 8. For a discussion of North Korea's position as to the lawfulness of its nuclear program, *see also* Moxley, *supra* note 36.

91. Bruce Cummings appears to suggest that "Pyongyang has given up on unification and desires 'peaceful coexistence with the South.'" SCOBELL, *supra* note 89, at 5. Stephen Bradner, a hawkish observer of North Korea, "argues that Pyongyang 'will not reconcile with the South' but rather is intent on overthrowing the Seoul government." *Id.* at 8.

92. Phillip C. Saunders, *Confronting Ambiguity: How to Handle North Korea's Nuclear Program*, ARMS CONTROL ASS'N, Mar. 2003, http://www.armscontrol.org/act/2003_03/saunders_mar03.

unification by force or coercion.”⁹³ The uncertainty of North Korea’s true nuclear intentions has been one of the contributing factors to the international community’s inability to ensure peace and security on the Korean peninsula.

1. *Agreed Framework*

One reason why the Agreed Framework failed was due to the sloppy character of the bilateral agreement. From the beginning, the agreement lacked a sound structure, for it “did not address North Korea’s disintegrating power grid; . . . did not allay North Korea’s security concerns; . . . [and] did not obligate North Korea to reveal until much later how much plutonium it reprocessed before the freeze went into effect.”⁹⁴ Moreover, the Agreed Framework contained vague statements lacking a thorough implementation plan. Ambiguous provisions in the Agreed Framework included, for example, that “both sides will reduce barriers to trade and investment,” work together for peace and security on a nuclear-free Korean peninsula,” and “engage in North-South dialogue as this Agreed Framework will help create an atmosphere that promotes such dialogue.”⁹⁵ As no specific criteria were set to implement these ambiguous provisions, the absence of tangible steps may have contributed to the collapse of the agreement.⁹⁶

Moreover, the Agreed Framework was not a treaty, so it did not require Senate approval to come into force.⁹⁷ Under Article II of the U.S. Constitution, the executive branch has the “power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur.”⁹⁸ Since treaties require approval by the Senate, it may have been more difficult to obtain the requisite approval from the Senate for the Agreed Framework.

93. SCOBELL, *supra* note 89, at 27.

94. FEFFER, *supra* note 15, at 63.

95. See Agreed Framework, *supra* note 6, arts. 3-4.

96. Daniel A. Pinkston, JAMES MARTIN CTR. FOR NONPROLIFERATION STUDIES, IMPLEMENTING THE AGREED FRAMEWORK AND POTENTIAL OBSTACLES (Oct. 2000), <http://cns.miis.edu/reports/kaeri.htm>.

97. LEON V. SIGAL, DISARMING STRANGERS: NUCLEAR DIPLOMACY WITH NORTH KOREA 190 (1998). For an interesting analysis of KEDO’s Supply Agreement as binding not as a treaty, but under customary international law, see Paul E. Boehm, *Decennial Deja Vu: Reassessing a Nuclear North Korea on the 1995 Supply Agreement’s Ten-Year Anniversary*, 14 TUL. J. INT’L & COMP. L. 81, 106-08 (Winter 2005).

98. U.S. CONST. art. II, § 2.

However, the executive branch has devised ways to bypass the Senate approval process for international agreements, most notably through executive agreements.⁹⁹ In U.S. courts, the Supreme Court has honored presidential executive agreements as being on the same plane as Article II treaties.¹⁰⁰ However, the Agreed Framework has not even been considered a binding executive agreement, which raises issues regarding enforceability under international law, for while the U.S. did not view the Agreed Framework as a binding agreement, North Korea did.¹⁰¹ For purposes of international law, agreements between two countries may be treated as binding, governed by the provisions of the Vienna Convention on the Law of Treaties (hereinafter "Vienna Convention").¹⁰² However, the different standards that the U.S. and North Korea applied to the Agreed Framework may have strained their ability to implement it effectively. The U.S. General Accounting Office viewed the Agreed Framework as "a nonbinding political agreement" or "nonbinding international agreement," but North Korea thought the signed agreement would be viewed as a legally binding treaty, and "has since perceived itself as suffering from a double standard of expectations regarding implementation."¹⁰³ Given uncertainty regarding the enforceability of the Agreed Framework, the agreement crumbled when problems of interpretation and implementation arose.

Another reason for the Agreed Framework's failure is that South Korea had not been involved in the negotiation process.¹⁰⁴ Without intending to, the bilateral agreement between North Korea and the U.S. alienated South Korea from discussions of the nuclear threat, even though the Agreed Framework called for North Korea

99. See, e.g., General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187.

100. See *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (applying a fairly loose standard to the practice of claim settlement by executive agreement, by implying congressional approval); *United States v. Pink*, 315 U.S. 203 (1942) (holding that the President had the power to conduct foreign affairs without the consent of the Senate, as he did by negotiating the Litvinov Agreement to settle liability claims with the Soviet Union).

101. See KIM, *supra* note 45, at 59.

102. See Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter Vienna Convention].

103. See KIM, *supra* note 45, at 59.

104. SIGAL, *supra* note 97, at 190.

to continue to engage in dialogue with South Korea. Many South Koreans were upset that the U.S. would establish any relationship with North Korea, "about which nearly everyone had complex feelings and which many regarded as a bitter enemy."¹⁰⁵ The *Korean Herald* voiced public fears that the Agreed Framework did not do enough to resolve the nuclear issue, "blaring that '[t]he so-called breakthrough . . . came as a glaring case of giving much and taking little . . .'"¹⁰⁶ Furthermore, *Chosun Ilbo* reported that the "agreement symbolized a U.S. shift 'from [South Korea] to the Korean peninsula as a whole' [and] that it proved the [U.S.], China, Russia, and Japan were conspiring to prevent unification . . ."¹⁰⁷ This alienation of South Korea certainly did not bode well for the U.S., and it contributed to the ultimate demise of the Agreed Framework.

Another contributing factor to the Agreed Framework's demise was the Bush Administration's change in policies that reversed Clinton's commitment to the nuclear threat. By putting North Korea on the nuclear target list, the Bush Administration "reversed Clinton's commitment against targeting non-nuclear states with nuclear weapons."¹⁰⁸ North Korea warned that it would take strong countermeasures against Bush's nuclear policy shifts, accusing the administration of an "'inhuman plan to spark a global nuclear arms race' and warning that it would 'not remain a passive onlooker'" after being put on the nuclear target list.¹⁰⁹ Under the Agreed Framework, the U.S. had agreed to "provide formal assurances to [North Korea], against the threat or use of nuclear weapons by the U.S."¹¹⁰ The amended U.S. policy towards North Korea probably threatened North Korea's assurance that the U.S. would not use nuclear weapons against it. From North Korea's perspective, the U.S. did not follow its agreements, thus ending the "policy of constructive engagement [that may have] successfully ended North Korea's plans to develop nuclear weapons if the United States had

105. OBERDORFER, *supra* note 8, at 358.

106. MAZARR, *supra* note 17, at 176.

107. *Id.*

108. Robert Parry, *Bush's Tough-Talkin' Korean Bungle*, CONSORTIUM NEWS, Oct. 10, 2006, <http://www.consortiumnews.com/2006/101006.html>.

109. *Id.*

110. Agreed Framework, *supra* note 6, art. 3(1).

lived up to its promises" under the Agreed Framework.¹¹¹ Thus, the Bush Administration's change in policy may have been the last straw in dismantling the Agreed Framework.

2. Six Party Talks

With the failure of the bilateral Agreed Framework, there have been concerns about whether a multi-lateral framework could resolve the nuclear issue.¹¹² The Six Party Talks have dominated discussions of the Korean peninsula's nuclear issue, but like the Agreed Framework, have run into problems. Given the failure of the bilateral Agreed Framework, it would appear that multilateral negotiations would have rendered more effective results. After all, with multiple parties participating in the denuclearization process:

[t]his variance creates a burden sharing affect [sic] where the global powers have incentive to enforce the denuclearization because they are sharing the cost of support that is being given to North Korea. At the same time, North Korea is discouraged from breaching the agreement because of the regional players' involvement. Moreover, the careful planning and artful phrasing of agreement builds trust and credibility among each of the parties, supporting the verification of the agreed objectives.¹¹³

Further, since North Korean leadership has been unpredictable and confrontational throughout history, a flexible, multilateral approach would be beneficial since one could not predict what North Korea would do next.¹¹⁴

111. Peter Sokgu Yuh, Note, *Nuclear Diplomacy: Negotiating Peace on the Korean Peninsula*, 1 LOY. INT'L L. REV. 103, 114-15 (Fall 2003/Winter 2004).

112. A professor at Dongguk University College of Law explained that "[w]hile such a clash [between the Bush Administration and North Korea] could not be easily reconciled, it needed to be dealt with it through a multilateral framework." Eric Yong-Joong Lee, *The Six-Party Talks and the North Korean Nuclear Dispute Resolution Under the IAEA Safeguards Regime*, 5 ASIAN-PAC. L. & POL'Y J. 3, 121 (2004).

113. Jared M. Lee, Recent Development, *Denuclearization of the Korean Peninsula: Recent Agreements and Lessons from the Past*, 16 J. TRANSNAT'L L. & POL'Y 377, 385 (Spring 2007).

114. So, with an unpredictable regime like North Korea, "which has disrespected the NPT and other international law in the past, this less formal type of agreement is a far better way of containing the urgent nuclear crisis" Ja Young Elizabeth Kim, Note & Comment, *The Agreement After the Six-Party Talks: Are There No Alternatives to the "Modified" Version of the 1994 Geneva Agreed Framework? – An Analysis of the Newly-Adopted Framework and its Significance for the Nuclear Proliferation Issues Relating to North Korea*, 21 TEMP. INT'L & COMP. L.J. 177, 196 (Spring 2007).

However, like the Agreed Framework, a major problem surrounding the agreements arising from the Six Party Talks is that they do not constitute binding treaties. If a party refused to follow through with an agreement, international law could not intervene to induce the party to comply.¹¹⁵ A partial explanation for the unenforceable nature of the agreements has been that "[t]here [was] . . . pressure to get a deal done . . . [and] often the easiest deal to make is one that is vague, illusory, or lacks adequate enforcement."¹¹⁶ The lack of a dependable enforcement mechanism raises doubts about the progress being made to end North Korea's nuclear program. During a congressional hearing in 2007, U.S. Congressman Donald Manzullo acknowledged North Korea's unreliability, questioning the lack of a verification mechanism in the agreements arising out of the Six Party Talks.¹¹⁷

The Six Party Talks continue to encounter problems with communication and coordination. For instance, during the September 2005 Six Party Talks, the Bush Administration rejected a statement of principles on nuclear disarmament during negotiations, and it was only due to China's warning that it would publicly announce that the U.S. was stalling progress that the U.S. signed the statement.¹¹⁸ Nevertheless, the U.S. soon violated one of the statement's main points of normalizing North Korean relations when it sanctioned North Korean accounts in Banco Delta Asia for the circulation of counterfeit money, which resulted in a setback in

115. Unlike a treaty, where a breach could be disciplined through international law such as recourse to an international adjudicatory body or the U.N. Security Council, for example, the lack of an enforcement mechanism with multilateral talks "is a huge drawback to solving the current nuclear problem." *Id.* at 198.

116. *The Six Party Process: Progress and Perils in North Korea's Denuclearization Before the Subcomm. on Asia, the Pacific, and the Global Env't and the Subcomm. on Terrorism, Nonproliferation, and Trade of the H. Comm. on Foreign Relations*, 110th Cong. 3 (2007) (statement of Brad Sherman, Congressman from California's 27th District), available at <http://www.internationalrelations.house.gov/110/38544.pdf>. Congressman Sherman noted that this was "especially true with the North Koreans, who have a history of violating agreements and . . . a process of making an agreement and then backing out of it, even if it is specific." *Id.*

117. He asked, "[H]ow do we verify that the upcoming declaration by North Korea regarding its nuclear programs will be truthful and complete? There currently is not verification mechanism in the agreement . . ." *Id.* at 6.

118. Gregory Elich, *Why Bush is Seeking Confrontation with North Korea*, GLOBAL RESEARCH, Oct. 29, 2006, <http://www.globalresearch.ca/index.php?context=va&aid=3619>.

negotiations.¹¹⁹ Conflicts such as the Banco Delta Asia sanctions have hampered nuclear talks.

A 2004 report to the Committee on Foreign Relations found that the talks would probably make progress if the parties worked to define terms and discuss verification protocols.¹²⁰ However, 2008 concluded with disputes over whether North Korea agreed to verification protocols involving nuclear sampling as part of an agreement to take North Korea off the list of state sponsors of terrorism. As chief U.S. negotiator Christopher Hill stated that North Korea would not agree to the verification proposal offered by the other nations, thereby causing the other nations of the Six Party Talks to reassess negotiations.¹²¹ Given the waxing and waning character of the Six Party Talks, perhaps a reconsideration of the flexible, multilateral structure would improve efforts to denuclearize the Korean peninsula.

B. The Importance of Reunification

1. The Status of Reunification Efforts Since the Late Twentieth Century

An important step towards denuclearization and reconciliation is an official end to the Korean War by replacing the armistice with a peace treaty. The prospects for reunification center on a reemergence of friendly relations between the two Koreas, which

119. Although the U.S. agreed to begin normalizing relations with North Korea, shortly after the agreement was signed it imposed sanctions on North Korean accounts held in the Macao-based Banco Delta Asia because they were used to circulate counterfeit currency. *Id.* The sanctions infuriated North Korea, giving them a pretext to refuse to continue the talks and to increase their nuclear arsenal. Kim Myong Chol, *Speaking Freely: Sanctions on Pyongyang will Backfire*, ASIA TIMES ONLINE, Feb. 16, 2006, <http://www.atimes.com/atimes/Korea/HB16Dg02.html>. Moreover, from North Korea's perspective, the U.S.'s actions were a "flagrant violation" of the agreement they had just agreed to. Selig S. Harrison, *In a Test, a Reason to Talk*, WASH. POST, Oct. 10, 2006, at A21, available at <http://www.washingtonpost.com/wpdyn/content/article/2006/10/09/AR2006100901035.html>.

120. STAFF OF S. COMM. ON FOREIGN RELATIONS, 108TH CONG., NORTH KOREA: STATUS REPORT ON NUCLEAR PROGRAM, HUMANITARIAN ISSUES, AND ECONOMIC REFORMS 11 (Comm. Print 2004), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_senate_committee_prints&docid=f:92278.pdf.

121. See Merle D. Kellerhals Jr., *Six-Party Talks Stall as North Korea Refuses to Sign Agreement*, AMERICA.GOV, Dec. 11, 2008, <http://www.america.gov/st/peacesec-english/2008/December/20081211172120dmslahrellek0.112652.html>.

presently are hampered by the nuclear threat.¹²² However, during the late 20th century, it appeared that North and South Korea were progressing towards reconciliation, especially under then-President Kim Dae Jung's Sunshine Policy, which called for promoting economic, cultural, and social contacts with North Korea, rather than using aggressive rhetoric and belligerent gestures.¹²³ While North Korea initially viewed the Sunshine Policy with suspicion,¹²⁴ eventually at the North-South Summit in 2000, Kim Jong Il and Kim Dae Jung worked out a joint declaration agreeing to "resolve the question of reunification on their own initiative and through the joint efforts of the Korean people."¹²⁵ However, many conservatives were not comfortable with the "sudden warming and the rush of developments."¹²⁶

Since the election of conservative President Lee Myung Bak in 2007, South Korea's relations with the North have soured. Commentary in North Korean newspaper *Rodong Sinmun* accused President Lee Myung Bak of being a "political charlatan," arguing that his administration would be "held totally responsible for ushering in a catastrophic incident by freezing North-South relations and destroying peace and stability on the Korean peninsula through its pro-U.S., anti-North Korea confrontational attempts."¹²⁷ In the south, South Korean newspapers warned that North Korea's nuclear arsenal posed a threat to South Korea and that South Korean forces were "envisaging a possible preventive attack in case of a North Korea nuclear threat" for the first time since

122. In his inaugural speech in 2008, South Korean President Lee Myung Bak made it clear that North Korea's denuclearization was a precondition to the reconciliation of the two Koreas. See Jung Sung Gi, *Denuclearization before NK Aid*, KOREA TIMES, Feb. 25, 2008, http://www.koreatimes.co.kr/www/news/nation/2008/02/120_19564.html.

123. FEFFER, *supra* note 15, at 49-50.

124. From North Korea's perspective, the Sunshine Policy was an "unabashed attempt to subvert its system, . . . designed to bring about dependent economic relations with the South . . . [This would lead to] the replacement of the present leadership in Pyongyang with new leaders beholden to Seoul and, in time, absorption on the South's terms." HARRISON, *supra* note 23, at 83.

125. OBERDORFER, *supra* note 8, at 431.

126. *Id.* at 434.

127. John Herskovitz, *North Korea Lashes Out at South's New President*, INT'L HERALD TRIBUNE, Apr. 1, 2008, <http://www.iht.com/articles/reuters/2008/04/01/asia/OUKWD-UK-KOREA-NORTH.php>.

the end of the Korean War.¹²⁸ To exacerbate the situation, North Korea has taken a harsher stance towards South Korea and has threatened to obliterate it.¹²⁹ Towards the end of 2008, North Korea threatened to close its land border with South Korea in response to South Korea's forceful approach over North Korea's nuclear program.¹³⁰ To date, tense relations between North and South Korea continue to hamper efforts at reconciliation and delay negotiations to denuclearize the Korean peninsula.

2. *Reunification Resolves the Nuclear Threat*

An important step towards reconciliation involves a peace treaty. The Korean War has not officially ended, so replacing the armistice with a peace treaty would represent a significant and symbolic step towards peaceful reunification, and it would contribute to efforts to denuclearize the Korean peninsula. After all, for North Korea, replacing the armistice with a new peace structure has been a "precondition for arms-control and confidence-building measures."¹³¹ Article 4 of the armistice recommended that within three months after the armistice was signed, a "political conference of a higher level of both sides be held by representatives appointed respectively to settle through negotiation the questions of the withdrawal of all foreign forces from Korea."¹³² Yet, U.S. forces have remained in South Korea well past the agreement, and the divided countries have yet to establish peace. Over time, there have been various efforts to replace the armistice agreement with a more

128. *Lee Myung-Bak Is an Absent-Minded Traitor According to Pyongyang*, ASIANEWS, Apr. 1, 2008, <http://www.asianews.it/index.php?l=en&art=11907&size=A>.

129. Propaganda leaflets dropped into North Korea by South Korea have been viewed as threats to the North Korean regime. North Korea has lashed out at Lee Myung Bak for his pledge to get tough with North Korea. *N. Korea Issues Warning to South*, BBC NEWS, Oct. 28, 2008, <http://news.bbc.co.uk/2/hi/7694503.stm>. Further, President Lee's hard stance towards North Korea's compliance with an agreement to disable its nuclear complex at Yongbyon has induced North Korea to adopt a policy of "steadily escalating confrontation." Donald Kirk, *North Korea Stokes Another Crisis*, ASIA TIMES ONLINE, Nov. 15, 2008, <http://www.atimes.com/atimes/Korea/JK15Dg01.html>.

130. Kim Jung Hyun & Jon Herskovitz, *North Korea Using Strongarm Nuclear Tactics*, REUTERS, Nov. 12, 2008, <http://www.reuters.com/article/vcCandidateFeed2/idUSSEO211167>.

131. Harrison, *supra* note 23, at 154.

132. Korean War Armistice Agreement art. 4, July 27, 1953, *available at* <http://news.findlaw.com/hdocs/docs/korea/kwarmagr072753.html>.

permanent peace mechanism, but to date, the two countries have failed to sign a peace treaty.¹³³

Presently, the cool relations between North and South Korea, especially on the issue of nuclear weapons, have inhibited efforts to achieve peace on the peninsula. However, Lee Myung Bak has stated that he would not oppose a summit between President Obama and Kim Jong Il if it would help end North Korea's nuclear program.¹³⁴ With strained relations between Pyongyang and Seoul, reunification is probably not in the immediate future. Nonetheless, to plan for eventual reunification, "Seoul wants the North to start opening up and narrow gaps with the South."¹³⁵ Without peaceful relations on the Korean peninsula, it is unlikely that North Korea will give up its nuclear weapons program. If Kim Jong Il's relations with the Obama Administration differ from his tumultuous interactions with the Bush Administration, then open talks could lead to a softening of relations among the three nations, which would increase the prospects of a peace treaty between the two Koreas. Thus, South Korea wants to resume talks with North Korea and "bolster its ability to keep an eye on its communist neighbour by working closely with the new Obama administration."¹³⁶ In doing so, the countries can work towards an official end to the Korean War through a peace treaty, and moreover, resolve the issue

133. For example, in 1995 the South Korean Foreign Ministry had tried to devise a "two plus two" formula where the two Koreas would negotiate a permanent peace treaty to replace the Korean War armistice, with the U.S. and China acting as facilitators and guarantors; however, President Kim Young Sam later stopped the initiative. OBERDORFER, *supra* note 8, at 383-84. Also, North Korea has wanted the armistice commission to be replaced by a trilateral "mutual security assurance commission" whereby North Korean, South Korean, and U.S. generals would have equal status, but the U.S. and South Korea have refused to negotiate, their position being that a new peace structure should be limited to North and South Korea and occur only after tensions have decreased. Harrison, *supra* note 23, at 155-56.

134. *S. Korea Would Be OK with Obama-Kim Jong Il Summit*, INT'L HERALD TRIBUNE, Nov. 11, 2008, <http://www.iht.com/articles/ap/2008/11/11/asia/AS-Koreas-US-Nuclear.php>. The article adds that Lee Myung Bak "did not have a 'speck of concern' that a meeting between Obama and Kim would sideline South Korea in the international effort to disarm the North of nuclear weapons." *Id.*

135. Moon Ihl Wan, *Why Seoul Backs Obama on North Korea*, BUS. WEEK, Nov. 18, 2008, http://www.businessweek.com/globalbiz/content/nov2008/gb20081118_245676.htm?chan=top+news_top+news+index+-+temp_global+business.

136. Jon Herskovitz & Kim Jung Hyun, *S. Korea to Press North for Talks, Seeks U.S. Help*, Reuters UK, Dec. 31, 2008, <http://uk.reuters.com/article/latestCrisis/idUKSEO312559>.

of denuclearization.¹³⁷

C. *A Trilateral Treaty for the Reunification and Denuclearization of the Korean Peninsula*

As illustrated by both the Agreed Framework and Six Party Talks, non-binding commitments have held back developments in the denuclearization campaign. Moreover, South Korea has been noticeably absent from central dialogue during these agreements.¹³⁸ Given these hindrances, an international solution should respond to the entire situation on the Korean peninsula, acknowledging the historical context that has led to the current state of affairs, in addition to addressing both peace and security. After all, while diplomacy can provide for cordial relations among nations, agreements arising out of diplomatic talks may not always result in tangible solutions to grave threats like nuclear weapons unless the underlying motivations for nuclear proliferation are dealt with. As members of the U.N., North Korea, South Korea, and the U.S. have committed to "maintain international peace and security."¹³⁹ In order to do so, a solution requires comprehensive cooperation among the important players in the North Korean nuclear situation. Moreover, it requires more than a series of talks that stall when disagreements arise. Thus, in the midst of the Six Party Talks, a treaty that addresses and alleviates the intricate conflict among the U.S., South Korea, and North Korea may help bring peace to the

137. Some believe that reunification will be costly to South Korea, arguing that millions of refugees might flee the poverty and misery of North Korea for the prosperous South and for China. See Bruce W. Bennett, *Commentary: N. Korea Policy Options*, UNITED PRESS INT'L, Nov. 28, 2006, available at <http://www.rand.org/commentary/2006/11/28/UPI.html>. However, the purpose of this note is not to argue whether reunification is beneficial to the Korean peninsula, but rather, to demonstrate that the North Korean nuclear issue is not exclusive from the issue of potential reunification. After all, North Korea arguably will not disable its nuclear weapons program as long as peace does not exist in East Asia. Nevertheless, fears about the costs of reunification appear exaggerated to some commentators. See Philip Bowring, *Modeling Korean Reunification*, INT'L HERALD TRIBUNE, Sept. 27, 2005, <http://www.ihrt.com/articles/2005/09/26/opinion/edbowring.php>.

138. For example, it was China and the U.S. that initiated multi-party talks in 2003, and it was China that brought North Korea back to the multi-lateral talks following its 2006 nuclear test. See Scott Snyder, *North Korea & the Formalization of a Regional Security Dialogue in Northeast Asia*, THE ASIA FOUNDATION, Apr. 25, 2007, <http://asiafoundation.org/in-asia/2007/04/25/north-korea-the-formalization-of-a-regional-security-dialogue-in-northeast-asia/>.

139. U.N. Charter art. 1.

Korean peninsula and end North Korea's nuclear program, for reasons addressed in the Vienna Convention.

A theme that casts a shadow over the Korean peninsula's modern history shows that treaties have either been absent, or have not succeeded, in resolving conflicts.¹⁴⁰ Nevertheless, a treaty has profound advantages that may settle the question of North Korea's nuclear regime, in addition to officially ending the Korean War. At the outset, a treaty carries a sense of obligation that induces each party to adhere to its provisions. Article 26 of the Vienna Convention asserts that treaties are "binding upon the parties to [them] and must be performed by them in good faith."¹⁴¹ The fact that treaties are binding upon parties enhances the significance of such agreements. According to reports, the U.S. had not treated the Agreed Framework as a binding treaty.¹⁴² So, while the Agreed Framework had been viewed as an important commitment, its lack of enforceability contributed to its downfall. Similarly, the Six Party Talks may have stalled due to the absence of binding obligations, which would be required in a treaty.

In addition, the Six Party Talks' delays may be the result of confusion as to actual agreements reached during each round of talks. At a daily briefing in December 2008, White House press secretary Dana Perino said that "the North Koreans did not want to put into writing what they have said in words."¹⁴³ A treaty could reduce confusion by virtue of the fact that treaties are "concluded between States in written form."¹⁴⁴ Rather than to have a series of agreements that may or may not have been agreed to, the treaty provisions would dispose of confusion as to the final binding agreement. However, the problem of interpretation remains a potential conflict. Few will deny that the Six Party Talks have resulted in agreements. Rather, it is the issue of interpretation of those agreements that has halted negotiations. Still, a treaty offers

140. Among things to recall: the armistice agreement stopping the Korean War hostilities was not considered a treaty; the Agreed Framework was viewed by the U.S. as a non-binding political agreement; the Six Party Talk produce agreements, but are not formally considered binding conventions; and North Korea withdrew from the NPT, citing as a contributing factor that it felt threatened by the U.S.

141. Vienna Convention, *supra* note 102, art. 26.

142. *See supra* text accompanying note 103.

143. Kellerhals Jr., *supra* note 121.

144. *See* Vienna Convention, *supra* note 102, art. 2, § 1(a).

internationally recognized norms to assist in the interpretation of agreements,¹⁴⁵ which may allow for relevant international legal principles to guide the parties, which the Six Party Talks lack officially. The absence of a uniform guide to interpretation will continue to hamper the multilateral talks, unless international standards are agreed upon in order to govern disputes.

The guidance of international legal principles is particularly helpful on the Korean peninsula. The Cold War, alleged American imperialism, nuclear threats, security, regime survival, reunification, and diverging Korean ideologies have all factored into the complex relationship that has shaped international relations on the Korean peninsula. Perhaps international law efforts to resolve the nuclear threat and bring peace to the Korean peninsula have not succeeded because they have failed to take into account the vast multitude of complex issues surrounding the problem. Not only is denuclearization important, but an official end to the Korean War with a peace treaty is significant. It is easy to point a finger at North Korea for complicating efforts at denuclearization and reunification.¹⁴⁶ However, one must also remember that North Korea did not unilaterally generate the problems that preoccupy the Korean peninsula today.¹⁴⁷ With the U.S. viewed by both South Korea and North Korea as having become part of the Korean problem as well as the Korean solution,¹⁴⁸ a trilateral treaty

145. See *id.*, art. 31.

146. After all, North Korea has breached international legal obligations under the NPT, IAEA agreement, and Joint Declaration. Additionally, Kim Jong Il has maintained a reputation for being difficult to negotiate with, as former Secretary of State Condoleezza Rice explained that “[y]ou’d have to be an idiot to trust the North Koreans.” Donald Kirk, *Top Diplomatic Quote of 2008 (Rice): ‘You’d Have to Be an Idiot to Trust the North Koreans,’* WORLDTRIBUNE.COM, Dec. 31, 2008, http://www.worldtribune.com/worldtribune/WTARC/2008/ea_nkorea0826_12_31.asp.

147. For example, the argument can be made that North Korea decided to pursue a nuclear weapons program as a reactionary response to the U.S. nuclear threat during the Cold War. Gavan McCormack emphasizes that “[w]hile in Washington the North Korean nuclear threat has been a major issue for the past decade, . . . in Pyongyang the U.S. nuclear threat has been the issue for the past 50 years.” KIM, *supra* note 45, at 67. To add fuel to the fire, it does not help that the U.S. took action such as placing North Korea on the list of state sponsors of terrorism and imposing economic sanctions on North Korea when it had agreed to normalize relations. John Feffer writes that “North Korea’s unpredictability is cited so frequently . . . as to become a cliché. Yet the United States in the 1990s has zigzagged sharply from war to engagement and back again . . .” FEFFER, *supra* note 16, at 99-100.

148. KIM, *supra* note 45, at 54.

addressing the various issues at stake may help "denucleunify" the peninsula and establish peace and security.

Moreover, it would be in the U.S.'s interests to form a treaty. To begin with, a treaty is binding on all parties that sign and ratify it, so it would erase any doubt of each party's obligations. If North Korea's honest concerns revolve around its mistrust of the U.S.'s commitment to its agreements,¹⁴⁹ then a treaty would demonstrate that the U.S. is willing to take its international obligations seriously. Theoretically, this should appease at least some of North Korea's suspicions, which were partially brought on by the lack of official treaty status of the Agreed Framework and Six Party Talks.¹⁵⁰ Also, given North Korea's withdrawal from the NPT, concerns about whether North Korea would adhere to a treaty are addressed by the Vienna Convention. If North Korea were to materially breach its obligations, then South Korea and the U.S. could terminate the treaty, thus releasing them from any further obligations.¹⁵¹ A treaty works for all parties, for North Korea could also terminate its treaty obligations if the other parties materially breached. There are foreseeable problems, such as what constitutes a material breach and when a party can withdraw from the treaty. Nevertheless, the essence of a treaty allows for international legal mechanisms to guide the path towards a peaceful Korean peninsula. A treaty is just one solution to consider in light of the problems that have plagued the Six Party Talks.

For the two Koreas and the U.S., denuclearization is not an issue separate from other issues. In the past, while the U.S. certainly

149. Under the Agreed Framework, the U.S. agreed to work with the international community to provide two light water reactors as part of a deal to dismantle North Korea's nuclear facilities. But the plan developed by KEDO was continually delayed, and with North Korea's frustration leading it to breach the agreement, the light water reactor project officially stopped in 2006. See KEDO, <http://www.kedo.org/> (last visited Feb. 20, 2009). Further, when North Korea pulled out of the NPT in 2003, it indicated that it would not produce nuclear weapons if the U.S. "[dropped] its hostile policy . . . and [stopped its] nuclear threat" *N. Korea Says Withdrawing From Nuclear Treaty is 'Self Defense,' supra* note 70.

150. It is also possible that North Korea's aims have nothing to do with denuclearization or reconciliation, but for purposes of this note, if North Korea sincerely wanted to normalize relations with the international community, then U.S. compliance with a treaty would send a different message than the one North Korea received with the stagnation of the Agreed Framework and the uncertainties of the Six Party Talks.

151. See Vienna Convention, *supra* note 102, arts. 60, 70.

hoped for North Korea to stop its nuclear program, "it also wanted a wide range of other things . . . [such as] more normal relations with North Korea to reduce the North's isolation and to set the state for a more peaceful unification of the peninsula.¹⁵² With North Korea willing to engage in negotiations with the Obama Administration,¹⁵³ and South Korea having no problems with a potential North Korean-U.S. summit,¹⁵⁴ the three countries may be able to work together to achieve both denuclearization and reunification. Historically, it has been difficult for all three countries to engage in cordial relations.¹⁵⁵ Now, with a new U.S. administration, the three countries could strive towards the creation of a treaty. Of course, for a treaty to transpire, each country must actually consent to treaty terms,¹⁵⁶ which may be difficult to achieve with the high level of distrust and uncertainty surrounding relations among the countries. Still, it is hard to imagine denuclearization without peace on the Korean peninsula, so inescapably, resolution of North Korea's nuclear threat involves both South Korea and the U.S.¹⁵⁷ However, it would be naïve to suggest that the three countries will engage in open and trusting relations, without acknowledging the possibility that North Korea in fact desires reunification by force or retention of its nuclear program.¹⁵⁸ Despite this concern, a trilateral treaty

152. MAZARR, *supra* note 17, at 191.

153. See *Pro-North Korea Paper Says Obama Brings in "New Phase,"* REUTERS, Nov. 7, 2008, <http://www.reuters.com/article/worldNews/idUSTRE4A621120081107>.

154. See *Obama-Kim Jong Il Summit*, *supra* note 134.

155. After the Agreed Framework was signed, North Korea had wanted to negotiate a U.S.-North Korean "peace insuring system" to replace the armistice agreement, but the U.S. did not want to negotiate a bilateral treaty without South Korea, and North Korea refused to deal with the South Korean government. OBERDORFER, *supra* note 8, at 364-65. South Korea was not a signatory to the armistice agreement, so North Korea insisted that the South not be included in talks about its future. *Id.* Also, because the South apparently "insulted North Korea by its conduct at the death of Kim Il Sung," North Korea refused to deal with the South Korean government. *Id.*

156. See Vienna Convention, *supra* note 102, art. 9 (stating that the text of a treaty is adopted "by the consent of all the parties participating in its drawing").

157. For example, the U.S. has been "central in Pyongyang's strategic thinking and behavior, alternately seen as a mortal threat or an external life support system . . ." KIM, *supra* note 45, at 55.

158. Some view North Korea's intentions with pessimism. For a discussion of possible nuclear deterrence of a nuclear North Korea and a coordinated U.S.-South Korea policy towards North Korea, see Sung Yoon Lee, *Nuclear Diplomacy vis-a-vis the DPRK: A Dead-End Street*, 27 FLETCHER F. WORLD AFF. 151 (Summer/Fall 2003).

among the U.S., North Korea, and South Korea is one way to address denuclearization and reunification, and it may resolve the conflict that has plagued international relations.

VI. Conclusion

As Michael Mazarr explains, nuclear motives can evolve over time – what began in North Korea as a simple response to a security threat became much more over time, as North Korea began to use its nuclear threat as a way to gain attention from the world community and to squeeze concessions from other countries.¹⁵⁹ Of course, it is easy in hindsight to calculate what would have occurred if the international community had reacted differently to North Korea in the past. For example, in the 1970s, North Korea may have,

agreed to dismantle its nuclear program in exchange for security-related concessions such as the withdrawal of U.S. tactical nuclear weapons from the South, an end to South Korea's nuclear ambitions, and a U.S. pledge of nuclear nonaggression, [but by] the early 1990s, the U.S. and South Korea offered all of those things and barely made a dent in Pyongyang's apparent determination to preserve some residue of its nuclear program.¹⁶⁰

While it is easy to pinpoint past actions, or lack thereof, it is harder to forecast the future. Certainly, with mystery surrounding North Korea, efforts to bring peace and security to the Korean peninsula have not always turned out the way the international community had hoped.

Nonetheless, the election of a new U.S. administration ushers in a new era of hope and change, not just for Americans, but for the international community, as well. Shortly after President Obama's victory, a pro-Pyongyang newspaper, *Choson Sinbo*, stated that "[t]he situation surrounding the Korean peninsula is about to enter a new phase, [for a] president who calls for 'change' has emerged in the United States."¹⁶¹ Kim Seong Bae, of the Seoul-based Institute for National Security Strategy, further highlighted, "For North Korea, eight years of waiting is over. North Korea views Obama's election as an opportunity to eliminate mistrust and hostile policies

159. MAZARR, *supra* note 17, at 182.

160. *Id.* at 182-83.

161. *Pro-North Korea Paper Says Obama Brings in "New Phase," supra* note 153.

between the two sides.”¹⁶² However, optimism is tempered by caution. Some South Koreans fear that the new administration “could make too many concession [sic] if dialogue with North Korea goes well. Others say dialogue could encourage the North in its strategy to communicate solely with the U.S. and freeze out the South, to the detriment of Seoul-Washington relations.”¹⁶³

The Obama administration has an opportunity to break new ground in the discussion of denuclearization and reunification. Although North Korea has constantly churned out rhetoric suggesting reasons to hold up a strong shield,¹⁶⁴ it is important not to give up efforts to foster peace and bring security to the Korean peninsula. For over half a century, North Korea has behaved in ways that suggest that it is impossible to negotiate meaningfully with the regime. Yet, the nuclear program has remained mostly contained. There may be something in North Korea’s recent statement that it is “not in a position to say when [it] will abandon nuclear weapons. That depends on when [it believes] there is no U.S. nuclear threat.”¹⁶⁵ Charles Pritchard reported that in October 2000, Kim Jong Il told former Secretary of State Madeline Albright that,

in the 1970s, Deng Xiaoping, the Chinese leader, was able to conclude that China faced no external security threat and could accordingly refocus its resources on economic development. With the appropriate security assurances, [Kim Jong Il] said, he would be able to convince his military that the [U.S.] was no longer a threat and then be in a similar position to refocus his country’s resources.¹⁶⁶

162. *North Korea Prepares for New U.S. President*, GLOBAL SECURITY NEWswire, Nov. 7, 2008, http://www.globalsecuritynewswire.org/gsn/nw_20081107_1692.php.

163. *What Obama's Election Could Mean for Korea*, CHOSUN ILBO (ENGLISH EDITION), Nov. 6, 2008, <http://english.chosun.com/w21data/html/news/200811/200811060023.html>.

164. In January 2009, North Korea “accused the United States of preparing for a pre-emptive strike by sending new fighter aircraft and spy planes to South Korea.” *N. Korea Accuses U.S. of Weapons Build-Up*, UNITED PRESS INT’L, Jan. 22, 2009, http://www.upi.com/Top_News/2009/01/22/N_Korea_accuses_US_of_weapons_build-up/UPI-38631232638998/.

165. Chris Buckley, *North Korea Says Plutonium “Weaponized” and Off-limits*, REUTERS, Jan. 17, 2009, available at <http://www.reuters.com/article/worldNews/idUSSP37196520090118>.

166. Charles L. Pritchard, *A Guarantee to Bring Kim into Line*, FINANCIAL TIMES,

Since President Obama took office, his administration has taken steps to improve relations with North Korea. On her first trip to Asia as Secretary of State, Hillary Clinton stated that "the United States would have a 'great openness' to [North Korea] if it gave up its nuclear ambitions," thus presenting a softer approach towards North Korea than the previous administration had.¹⁶⁷ While "North Korea accused the [U.S.] administration of planning a nuclear attack under the guise of diplomacy as Mrs. Clinton arrived in Seoul for talks on restarting stalled international talks on [the nuclear threat],"¹⁶⁸ it is important for the U.S. to push for collaboration with North Korea and South Korea in realizing a nuclear-free and peaceful Korean peninsula. Regardless of North Korea's constantly changing rhetoric, "denucleunification" can be attained through means of a trilateral treaty.

VI. Addendum to Operation 'Denucleunification': A Proposal for the Reunification and Denuclearization of the Korean Peninsula

Since the note's last edit in February 2009, North Korea has engaged in numerous aggressive acts demonstrating its unwillingness to participate in denuclearization or reunification talks. On April 5, 2009, North Korea launched a long-range rocket, drawing condemnation from the U.N. Security Council.¹⁶⁹ North Korea threatened to conduct nuclear and missile tests unless the U.N. apologized for its censure of the April rocket launch,¹⁷⁰ and on May 25, 2009, North Korea reportedly conducted a nuclear test.¹⁷¹ After the test, North Korean officials stated:

Oct. 10, 2003, available at http://www.brookings.edu/opinions/2003/1010northkorea_pritchard.aspx.

167. Mark Landler, *Clinton, Heading Abroad, Takes Softer Tone on North Korea*, N.Y. TIMES, Feb. 15, 2009, A10, available at http://www.nytimes.com/2009/02/16/washington/16diplo.html?_r=1.

168. Christian Oliver, *N. Korea Accuses US of Planning Nuclear Attack*, FINANCIAL TIMES, Feb. 19, 2009, <http://www.ft.com/cms/s/0/067834a6-fe41-11dd-b19a-000077b07658.html>.

169. *Timeline of North Korea's Nuclear and Missile Programs*, THE INDEPENDENT, May 25, 2009, available at <http://www.independent.co.uk/news/world/asia/timeline-of-north-koreas-nuclear-and-missile-programs-1690533.html>.

170. *Id.*

171. Choe Sang Hun, *North Korea Claims to Conduct 2nd Nuclear Test*, N.Y. TIMES, May 24, 2009, available at <http://www.nytimes.com/2009/05/25/world/asia/25nuke.html?scp=23&sq=north%20korea&st=cse>.

The study of the policy pursued by the Obama administration for the past [one hundred] days since its emergence made it clear that the U.S. hostile policy toward the D.P.R.K. remains unchanged. . . . There is nothing to be gained by sitting down together with a party that continues to view us with hostility.¹⁷²

This rhetoric channeled North Korea's prior attitude towards U.S. policy and diverged from its positive statements following President Obama's election victory.¹⁷³ Moreover, North Korea "renounced the armistice on the Korean peninsula and threatened possible attacks on South Korea,"¹⁷⁴ thus exacerbating the already existing tension on the peninsula. Predictably, the U.N. Security Council sanctioned North Korea for its antagonistic actions.¹⁷⁵ North Korea responded with harsh rebuke, vowing to meet the sanctions with "retaliation" and pledging to weaponize all the plutonium it could extract from used fuel rods at its Yongbyon nuclear plant, which it had been dismantling as part of an agreement arising from the Six Party Talks.¹⁷⁶

In just a matter of months, the Six Party Talks appear to have taken a similar course as the defunct Geneva Agreed Framework. North Korea has engaged in acts that alienate the international community, including its traditional allies like China and Russia.¹⁷⁷ With the Six Party Talks stalled, the U.S. Senate called on President Obama to contemplate returning North Korea to the State Department's list of state sponsors of terrorism.¹⁷⁸ In another act of

172. *Id.*

173. See *Pro-North Korea Paper Says Obama Brings in "New Phase,"* REUTERS, Nov. 7, 2008, <http://www.reuters.com/article/worldNews/idUSTRE4A621120081107>.

174. *South Korea Gives US Info on North's Bank Accounts,* CHANNEL NEWS ASIA, June 10, 2009, http://www.channelnewsasia.com/stories/afp_asiapacific/view/435005/1/.html.

175. See S.C. Res. 1874, U.N. Doc. S/RES/1874 (June 12, 2009).

176. Blaine Harden, *North Korea Says It Will Start Enriching Uranium,* WASH. POST, June 14, 2009, available at <http://www.washingtonpost.com/wpdyn/content/article/2009/06/13/AR2009061300636.html>

177. "Moscow sometimes has positioned itself in opposition to Washington on international issues and was reluctant to back tough new controls against North Korea but has condemned Pyongyang's continual defiance of successive U.N. resolutions." Conor Sweeney, *Russia Backs North Korea Sanctions, Nuclear Halt: U.S.,* REUTERS, Aug. 4, 2009, <http://www.reuters.com/article/reutersEdge/idUSTRE5724CG20090804>.

178. Brian Faler, *Senate Asks Obama to Consider Adding North Korea to Terror List,* BLOOMBERG, July 22, 2009, <http://www.bloomberg.com/apps/news?pid=20601080&sid=aspX9wypd5ws>.

distancing, the North Korean government and Secretary of State Hillary Clinton exchanged a war of words in July, with "Clinton telling Pyongyang it has 'no friends' and North Korea calling her 'vulgar' and criticizing her appearance."¹⁷⁹ While 2009 began with Kim Jong Il proclaiming that North Korea would denuclearize in the coming year,¹⁸⁰ it certainly does not appear that the Korean peninsula is headed towards denuclearization or reunification soon.

Despite the seemingly unattainable objectives of denuclearization and reunification, the spirit of the note survives.¹⁸¹ As the Geneva Agreed Framework and Six Party Talks have failed to attain tangible improvements with regards to the North Korea nuclear state of affairs, other means of action may help alleviate the situation, such as a treaty among the U.S., North Korea, and South Korea. North Korea has been predictably unpredictable, so it is important to take into account the complex history leading to the present situation on the Korean peninsula, which the note detailed, in order to address the multilayered North Korean nuclear threat. For example, regime survival may be one of North Korea's main priorities, and it may view its nuclear program as one of its last remaining bargaining chips in the international community.¹⁸² Ensuring security guarantees or diplomatic recognition may, ironically, lead North Korea to lessen its harsh stance against the international community.¹⁸³ This notion goes against the general

179. Nicholas Kravlev, *Clinton, North Korea Trade Insults*, WASH. TIMES, July 24, 2009, available at http://www.washingtontimes.com/news/2009/jul/24/sticks-andstones-clinton-north-korea-trade-insult/?feat=home_headlines.

180. See *North Korea Claims It Will Denuclearize*, UNITED PRESS INT'L, Jan. 1, 2009, http://www.upi.com/Top_News/2009/01/01/North_Korea_claims_it_will_denuclearize/UPI-74601230839192/.

181. Furthermore, although the events that have unfolded within the past few months convey a pessimistic message about the future of denuclearization, there is reason to hope for a favorable solution. Even President Obama has stated that the nuclear test in May did not come as a surprise, and "the calm reaction of Asian stock markets, which rallied after initial falls, also suggested that [the] nuclear detonation [in May 2009] had failed to create the shock-waves in the region that North Korea's leader Kim Jong-il might have hoped." Peter Foster, *North Korea Nuclear Test: An Analysis*, TELEGRAPH, May 25, 2009, <http://www.telegraph.co.uk/news/worldnews/asia/northkorea/5382922/North-Korea-nuclear-test-an-analysis.html>.

182. See Zhiqun Zhu, *Commentary, Should Obama Sign a Peace Treaty with North Korea?*, THE CHRISTIAN SCIENCE MONITOR, July 28, 2009, available at <http://www.csmonitor.com/2009/0728/p09s02-coop.html>.

183. Professor Zhu believes that "[a]cquiring nuclear technology does not make

global consensus, that nations will not establish diplomatic relations with North Korea until the regime terminates its nuclear program. Nevertheless, the unpredictable nature of Kim Jong Il calls for unconventional suggestions.

However, some are wary of North Korea's tactics. The fact that North Korea has not launched a nuclear attack against another nation does not change the fact that it has violated numerous agreements and treaties and that it has defied the international community. Former Secretary of State Henry Kissinger explained,

North Korea may return to its well-established tactic of diverting us with the prospect of imminent breakthroughs. This is exactly what happened after the Korean nuclear weapons test in 2006. Pyongyang undoubtedly will continue seeking to achieve de facto acceptance as a nuclear weapons state by endlessly protracted diplomacy. The benign atmosphere by which it culminated its latest blackmail must not tempt us or our partners into bypaths that confuse atmosphere with substance.¹⁸⁴

Rather than resorting to unsighted diplomacy, signing a treaty may provide some legal teeth and legitimacy that the Geneva Agreed Framework and Six Party Talks lacked. If North Korea is serious about its desire to improve relations with South Korea and the U.S., then entering into a treaty would address concerns that previous efforts to resolve the nuclear issue failed to do. In the past, there have been several suggestions for a peace treaty — North Korea called for a peace treaty in 2005,¹⁸⁵ and President Bush offered a peace treaty on the condition that North Korea provided verification of disarmament first.¹⁸⁶ It is apparent that the nations are not

North Korea more dangerous; it is how the regime uses this technology that matters. Since North Korea is already nuclear-capable, the US should keep this traditional enemy close by signing a . . . peace treaty, which may be the best way to keep North Korea's nuclear program and technology under control." *Id.*

184. Henry A. Kissinger, *The North Korea Fallout*, WASH. POST, Aug. 9, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/07/AR2009080703071.html>.

185. North Korea had released a statement saying that a peace treaty would "automatically result in the denuclearisation of the peninsula," and that "not a single nuclear weapon [would] be needed for [North Korea] if the US nuclear threat [was] removed." *N Korea Calls for US Peace Treaty*, BBC NEWS, July 22, 2005, <http://news.bbc.co.uk/2/hi/asia-pacific/4704351.stm>.

186. At the Asia-Pacific Economic Cooperation forum in Sydney, President Bush told reporters, "[W]e're looking forward to the day when we can end the Korean War. That will happen when Kim Jong-il verifiably dismantles his weapons programme." *Bush Offers North Korea Peace Treaty if Disarms*, Sept. 7, 2007,

opposed to the idea of a treaty. Rather, it appears that the pre-conditions of a treaty may cause some strife. While Secretary Kissinger is wary of the U.S. falling into a trap of empty diplomacy with North Korea, showing some flexibility may lead to improvements. A treaty does have legal norms to rely upon in case a party is in material breach, so the U.S. does not have much to lose by entering into a treaty with North Korea before North Korea verifiably terminates its nuclear program.¹⁸⁷

With recent developments, including President Clinton's visit to North Korea to secure the release of two captured American journalists,¹⁸⁸ the international community is once again at an important moment with regards to the North Korean nuclear issue. North Korea has refused to return to the Six Party Talks, but it has expressed a willingness to participate in bilateral talks with the U.S.¹⁸⁹ A Foreign Ministry spokesman for North Korea was quoted as saying,

There is a specific and reserved form of dialogue that can address the current situation. . . . If these countries blindly respond to the call for the resumption of the six-party talks, contending that there is no other alternative, it doesn't help resolve the problem; it does more harm than good.¹⁹⁰

The U.S. response has been that it is willing to hold direct talks with North Korea if it first returns to international negotiations.¹⁹¹ White House national security adviser James Jones stated, "[If the North Koreans] come back to the [Six Party Talks], we will talk to them bilaterally within those talks. . . . We have coordinated all of this by the way with the other allies - the Chinese, the Russians, the South Koreans, the Japanese."¹⁹² Once again, all parties appear willing to

http://www.chinadaily.com.cn/world/2007-09/07/content_6090092.htm.

187. See Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

188. See Mark Landler & Peter Baker, *In Release of Journalists, Both Clintons Had Key Roles*, N.Y. TIMES, Aug. 4, 2009, available at http://www.nytimes.com/2009/08/05/world/asia/05korea.html?_r=1.

189. N Korea: Would Participate In Dialogue, Not 6-Party Talks, WALL S. J., July 26, 2009, available at <http://online.wsj.com/article/BT-CO-20090726-704027.html>.

190. *Id.*

191. US Willing to Hold Direct Talks with North Korea, WASH. POST, Aug. 9, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/09/AR2009080900855.html>.

192. *Id.*

participate in dialogue with one another. Now perhaps, the time is ripe for a new strategy that involves a closer look at international law. A treaty offers benefits that both the Geneva Agreed Framework and Six Party Talks have lacked.¹⁹³ The Six Party Talks do not appear to be progressing, and the problem of nuclear proliferation on the Korean peninsula remains. It is unclear what the future of negotiations holds for the Korean peninsula, as events unfold on a daily basis and cloak the nuclear issue in ambiguity. Still, the Obama administration, working with South Korea and the international community, possesses the tools to break concrete ground in the push for a nuclear-free and peaceful Korean peninsula. This can be achieved through a treaty addressing and resolving the complex issues that have led to present North Korean nuclear threat.

193. *See Note.*