

LEGAL ELEMENTS FOR A COMPREHENSIVE SOLUTION TO THE PROBLEM OF NORTH KOREA'S WEAPONS OF MASS DESTRUCTION AND CRIMINAL ACTIVITIES

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The problems posed by the DPRK extend beyond nuclear weapons. They include chemical and biological weapons, ballistic missile proliferation and organized criminal activity. The potential for linkage to terrorists is significant. This paper recommends legal requirements to be embedded in a political solution to the DPRK nuclear crisis to achieve security comprehensively. It requires that the DPRK adhere to the Nuclear Non-Proliferation Treaty, the Chemical Weapons Convention, the Biological Weapons Convention, the International Code of Conduct Against Ballistic Missile Proliferation, and the UN conventions on transnational crime, drug trafficking, terrorism, and human rights. This paper recommends immediate enforcement of existing law by interdictions, economic sanctions, and tightened export controls. For the short term, it also recommends the passage of UN Security Council Resolutions to cover gaps in existing law and to enhance political support for enforcement actions. For the longer term, it advocates the creation of more treaties against international crime, the criminalization of WMD and their proliferation, and the expansion of the ICC's legal

jurisdiction to include drug trafficking and other crimes committed by the Kim Jong il regime. These lines of action can lead to the realization of a coherent international order maintained more by comprehensive rule of law rather than use of force.

I. Introduction

The latest North Korean nuclear crisis remains a troubling puzzle begging for resolution. In October 2002, the Democratic People's Republic of Korea (DPRK) admitted to continuing the development of its nuclear weapons capability despite its agreement in 1994 to freeze its nuclear program. In addition, the DPRK possesses a significant chemical weapons stockpile and production capability, which is mostly overlooked by the press, yet is a threat as real as nuclear weapons during this time of terrorism. In addition, it maintains development of its biological warfare program. It also produces missiles, one of its chief exports along with illegal drugs. The rottenness of the regime is emanating outward. The fear is that its reach will touch the likes of Al Qaeda, providing them with weapons of mass destruction in exchange for desperately desired cash.

The DPRK's engagement in organized crime must be taken as seriously as its production of weapons of mass destruction. The networks for the former provide the same opportunity for sales and export of the latter to unsavory customers. The distinction between drug trafficking, terrorism, and other crimes is becoming increasingly blurred.¹ These areas reinforce and fuel each other and must be considered comprehensively.

1 Raphael F. Perl, Congressional Research Service, "Organized Crime, Drug Trafficking, and Terrorism in a Changing Global environment," Statement before the U.S. House Judiciary Committee (December 13, 2000).

The world's response, however, to the DPRK's activities has been weak and ill-defined. States have chastised the DPRK for its nuclear activity, but little more than rhetoric has materialized. The war in Iraq occupied center stage in spring 2003 and directed attention away from the DPRK. Although the United Nations (UN) Security Council met in April 2003 to address the DPRK's withdrawal from the Nuclear Non-Proliferation Treaty (NPT), it failed to reach any agreement on what measures should be taken. Although China, the DPRK and the United States met later that month, nothing was resolved. In July, the UN Security Council again failed to condemn the DPRK's actions because permanent members China and Russia opposed.²

This paper considers policy for resolving the North Korean weapons of mass destruction and illegal trade problem. It breaks the problem into three parts: 1) Problems, primarily DPRK's weapons of mass destruction (WMD), missiles and their proliferation, and criminal activities, 2) Elements for a Comprehensive Solution, focusing on legal components, and 3) Enforcement. It advocates a multilateral, comprehensive solution, incorporating legally binding international instruments. It recommends that the DPRK comply with nuclear, chemical, and biological weapons conventions; the International Code of Conduct Against Ballistic Missile Proliferation; and transnational organized crime, terrorism, and human rights conventions. It also discusses the legal basis of enforcement by practical means for restraining the DPRK, such as interdiction of ships, economic sanctions, and tightened export controls.

This paper does not advocate international law at the exclusion of politics and traditional diplomacy as the sole solution to the DPRK problem. Rather, it recognizes that international legal standards must be imbedded into a political solution to provide a clear mechanism for

2 John Larkin and Donald MacIntyre, "Arsenals of the Axis," *Time Asia* (July 14, 2003), p. 33.

achieving security comprehensively. It also advocates enforcement of existing law and creation of new law to promote the development of a global legal order that can manage WMD production and proliferation and transnational crime comprehensively.

II. Problems

The problems associated with the DPRK are myriad and complex. They include WMD and missile production and proliferation, illegal drug trafficking, and other international crimes. The gravest concern is that the DPRK's WMD may reach the hands of terrorists, assisted by organized criminal networks. At the same time, the people of the DPRK are suffering from inhumane conditions and human rights abuses.

Weapons of mass destruction are defined generally as nuclear, chemical, and biological weapons, with radiological weapons ("dirty bombs")³ occasionally included. International legal analysis usually follows this definition, as neither treaty nor customary international law contains an authoritative definition of WMD.

1. Nuclear Weapons

The DPRK's nuclear activities have absorbed worldwide attention since it allegedly admitted them to United States envoy James Kelly in October 2002. Since then, the DPRK has engaged in increasingly provocative behavior. In December 2002, the DPRK expelled Interna-

3 A "dirty bomb" is a conventional explosive, such as dynamite, packaged with radioactive materials that scatter upon detonation. It is not a nuclear weapon, although it may have weapons-grade plutonium or uranium, Council on Foreign Relations, "Terrorism: Questions & Answers" (2003) at <http://www.terrorismanswers.org/weapons/dirtybomb.html>.

tional Atomic Energy Agency (IAEA) inspectors and announced its withdrawal from the 1968 Treaty on the Non-proliferation of Nuclear Weapons (NPT). In 2003, it restarted its plutonium-producing reactor and in July said it had completed processing its 8,000 spent fuel-rods,⁴ which is enough nuclear material for six or so bombs.

The agreements⁵ governing the DPRK's nuclear weapons capabilities that capture the most international attention are the NPT and the 1994 Agreed Framework between the United States and the DPRK⁶ (the Agreed Framework). The latter agreement resulted the previous time the DPRK threatened to withdraw from the former agreement in 1993. The DPRK has again threatened to withdraw from the NPT, this time apparently carrying through with its threat. It has also violated the Agreed Framework, thus undermining the resolution of the 1994 crisis.

The Agreed Framework originated when the possibility of a resolution sanctioning the DPRK was before the UN Security Council, and China indicated it might not veto it. China's pressure made the DPRK far more conducive to negotiations.⁷ Former US President Jimmy Carter brokered the deal that led to the Agreed Framework, which required North Korea to freeze its nuclear weapons program in exchange for two light water nuclear reactors (LWR) and diplomatic recognition by the United States.

4 "North Korea: Fuel rod reprocessing finished," *The Korea Herald*, July 14, 2003, p. 1.

5 Another important agreement is that between the ROK and DPRK, signed December 31, 1991, in which both parties agreed not to "test, manufacture, produce, receive, possess, store, deploy or use nuclear weapons" and not to "possess nuclear reprocessing and uranium enrichment facilities." They also agreed to reciprocal inspections by a Joint Nuclear Control Commission. However, the DPRK said it was scrapping the agreement on May 12, 2003.

6 Agreed Framework between the United States of America and the Democratic People's Republic of Korea, Geneva, October 21, 1994.

7 Don Oberdorfer, *The Two Koreas, A Contemporary History* (Indianapolis: Basic Books, 2001), p. 320.

The Agreed Framework required the United States to supply heavy oil for heating and electricity production to offset the energy foregone due to this freeze until the LWR power plants were completed. At that time, the DPRK's graphite-moderated reactors would have been dismantled. The agreement utilized the IAEA and specified that the DPRK remain a party to the NPT. It timed the delivery of key nuclear components of the LWR power plants until after DPRK's full compliance with its Safeguards Agreement with the IAEA, by which it carried out its obligations under the NPT. In addition, the Agreed Framework required the United States to provide formal assurances to the DPRK against the threat or use of nuclear weapons by the US. It would have upgraded bilateral relations to the ambassadorial level. It also called for reduction of trade and investment barriers.

Based on its alleged confession in October 2002, the DPRK has violated Section I(3) of the Agreed Framework by continuing to develop its nuclear weapons capability instead of freezing its reactors and complying with the Safeguards Agreement. When the United States stopped delivery of heavy oil in December in response, the DPRK charged that the United States was the party that was in violation of the Agreed Framework (Section I(2)) by failing to deliver.

The current status of the Agreed Framework is in doubt. The DPRK is seeking a negotiated solution to resolve the nuclear weapons crisis. The United States is also considering a negotiated solution, but does not necessarily support a return to the Agreed Framework. It has left open the possibility of more robust measures such as economic sanctions and use of force. At the same time, legislation is before the United States Congress that would definitively end compliance with the Agreed Framework.⁸ Neither the United States nor the DPRK has raised the possibility of adjudication although the breach of the Agreed

8 Dianne E. Rennack, "North Korea: Economic Sanctions," Congressional Research Service, Washington, D.C. (January 24, 2003).

Framework could be brought before the International Court of Justice if both the DPRK and the United States agreed to its jurisdiction, as the Court lacks compulsory jurisdiction.

2. Chemical Weapons

The DPRK may be among the largest possessors of chemical weaponry in the world. The DPRK arsenal reportedly includes all of the major classes of chemical weaponry, such as mustard (blistering), phosgene (choking), hydrogen cyanide (blood) and sarin (nerve agent).⁹ Reports estimate huge amounts between 2,500 and 5,000 tons, although it is unclear if these amounts include the munitions or only the chemical agents. The DPRK has long employed chemical weapons in its military strategy, reflecting the influence of the Soviet model. In 1961, Kim Il Sung's "Declaration for Chemicalization" called for greater support of chemical weapons production. In 1966, the Soviets began providing assistance. By the late 1980s, the DPRK reportedly was able to produce chemical weapons and deploy ordnance in very large amounts. The Republic of Korea (ROK) Agency for Defense Development has estimated that the DPRK's chemical weapons production capability is 4,500 tons annually in peacetime, and 12,000 tons in wartime.¹⁰

3. Biological Weapons

The DPRK also has biological weapons capability, resulting from a dedicated effort to achieve it. While its biotechnology infrastructure is not advanced, it likely has the capability to produce sufficient amounts

9 "Chemical Overview," Center for Nonproliferation Studies at the Monterey Institute of International Studies (2003) at http://www.nti.org/e_research/profiles/NK/Chemical/print/index.prt.

10 *Ibid.*

of biological agents for military use within weeks of deciding to do so.¹¹ Specific agents it is likely to possess are anthrax, smallpox, plague, and botulism. The DPRK's development of biological weapons began in the early 1960s while actual production of biological weapons agents did not begin until the early 1980s.

4. Ballistic Missiles

The DPRK's significant ballistic missile production capability is well-known. It has deployed about 500 Scud missile variants, about 100 Nodong missiles, and about 10 Taepodong-1 missiles. It is developing the Taepodong-2, which reportedly will have an intermediate range Nodong for its second stage and the capability to reach the continental United States.¹² A weaponized Taepodong-2 missile could carry a several-hundred-kilogram payload to Alaska or Hawaii. Lighter Taepodong-2 missiles could reach as far as Madison, Wisconsin.¹³ Most significantly, the DPRK may be the world's greatest exporter of ballistic missiles systems, components and technology. These exports have been valued at \$100 million annually.¹⁴ This is particularly troubling, given which states are the DPRK's primary customers. Recipients of DPRK's ballistic missiles, nuclear technology and bomb making components include Iran, Syria, Libya, Pakistan, Egypt, and the United Arab Emirates.¹⁵ The United States has attempted to negotiate an

11 "Biological Weapons Overview," Center for Nonproliferation Studies at the Monterey Institute of International Studies (2003) at http://www.nti.org/e_research/profiles/NK/Biological/print/index.prt.

12 "Missile Overview," Center for Nonproliferation Studies at the Monterey Institute of International Studies (2003) at http://www.nti.org/e_research/profiles/NK/Missile/print/index.prt.

13 Hun Kyung Lee, "North Korea's Missile Program and US Nonproliferation Strategy," *The Korean Journal of Defense Analysis*, Vol. XIV, No. 2 (Fall 2002).

14 Marcus Noland, *Avoiding the Apocalypse, the Future of the Two Koreas* (Washington, D.C.: Institute for International Economics, June 2000), p. 118.

agreement with the DPRK to halt its missile proliferation since 1996. Negotiations stalled at the end of US President Bill Clinton's administration, and they have yet to begin under President George W. Bush's administration, which favors development of a missile defense system as one element of its policy.¹⁶

5. Other Trade in Illegal Goods

The DPRK also engages in illicit activities such as smuggling, drug trafficking, and counterfeiting. The magnitude of the drug trafficking in terms of revenues is about the same as that of arms. In essence, DPRK leader Kim Jong Il is running a criminal enterprise. As Marcus Noland states in *Avoiding the Apocalypse, the Future of the Two Koreas*:¹⁷

In most countries, gangs try to penetrate the state. In the case of North Korea, it is the other way around: it is a state attempting to penetrate the world of international criminal syndicates, exploiting its sovereign status to produce drugs at home and distribute them through embassies abroad. DPRK embassies are actually required to generate profits that are sent to Kim Jong Il's "Bureau 39," his private slush fund. During the 1990s, North Koreans, mostly diplomats, have been arrested for smuggling cigarettes, alcohol and gold; trafficking in counterfeit goods, endangered species, and ivory; and illegally dealing in military equipment. The major activity, however, has been drug trafficking. The DPRK began refining opiates in the mid-1980s, but it shifted to production of methamphetamines when bad weather hurt poppy cultivation in the mid-1990s. Still, opiates dominate total revenues from drug trafficking with \$59 million annually, compared to \$12 million from amphetamines. Counterfeiting United States paper currency is another source of revenue for the DPRK, perhaps \$15 mil-

15 Larkin and MacIntyre, *op. cit.*, p. 33.

16 Lee, *op. cit.*, pp. 65-68.

17 Noland, p. 120.

lion annually.¹⁸ Other activities include prostitution, passport forgery, and bribery. Profits from all of these crimes may be financing the DPRK's WMD production.¹⁹

6. Human Rights Violations

In addition, the DPRK egregiously violates the most fundamental human rights of its citizens in several ways. Human Rights Watch has documented torture and cruel and degrading treatment of DPRK detainees in labor training camps, provisional concentration centers, political prison camps, the use of forced labor, and arbitrary and discriminatory treatment of citizens based on family background. DPRK criminal law also prohibits unauthorized departure from the country, in violation of the fundamental right to leave one's country, as stated by the International Covenant on Civil and Political Rights.²⁰ Punishment for those who leave the DPRK in such a manner may include imprisonment, hard labor, or execution.²¹ Compounding this abominable situation is the country's grave food shortage, which in previous recent years has resulted in deaths of perhaps two million persons. The shortage is the result of floods and government economic mismanagement.²²

18 Noland, *op. cit.*, p. 121.

19 Woosang Kim and Sung-Kwon Cho, "Human Security in the Korean Peninsula: A Case of the North Korean Drug Trafficking," UNESCO International Conference on Human Security in East Asia, Seoul, Korea (June 16, 2003).

20 Article 12(2) states: Everyone shall be free to leave any country, including his own.

21 Human Rights Watch, Briefing to the 59th Session of the UN Commission on Human Rights, February 27, 2003, <http://www.hrw.org/un/chr59/dprk.htm>.

22 Hun Kyung Lee, "The US Policy and Strategy toward DPRK: Comparison and Evaluation of the Clinton and Bush Administrations," *Pacific Focus*, Vol. XVII, No. 2 (Fall 2002), p. 74.

III. Elements for a Comprehensive Solution

Finding a negotiated solution that encompasses all of the problems delineated above is complex. It involves questions of states to be involved timing and venue for negotiations and other diplomatic issues. It also requires consideration of incentives whether to have them and in what form. Policy positions range from no incentives, on the grounds that providing them would be succumbing to blackmail, to generous incentives, including large amounts of aid. The Agreed Framework or some form of it could be revived with the DPRK receiving some form of energy assistance and aid for development of its energy infrastructure. In addition, the United States could ease its trade restrictions such as waiving the Jackson-Vanik Amendment,²³ which requires freedom of emigration to allow normal trade relations and removal of the DPRK from its terrorism list, thereby opening the possibility of World Bank Group financial assistance. It could also issue a statement of non-aggression in the form of an executive agreement and elevate diplomatic relations. However, this paper recommends, whatever modalities are chosen, that the following legal requirements be included to achieve a comprehensive solution that fills in gaps, such as control of the DPRK's chemical and biological weaponry, missile proliferation, and criminal activities not covered by the Agreed Framework. Mindful of the large scale and egregious human rights abuses perpetrated by the Kim Jong il regime in addition to its WMD security threat, this paper advocates grounding policy in legal standards and holding the DPRK accountable to them. It also advocates further development of the international legal order to more comprehensively address actions such as those taken by the Kim Jong il regime as criminal.

23 Title IV of Trade Act of 1974. The DPRK violates its citizens' freedom of emigration; therefore waiving the Jackson-Vanik Amendment would allow this human rights violation to continue.

1. The DPRK must comply with the Treaty on the Non-Proliferation of Nuclear Weapons.

The DPRK must comply with the NPT and its corresponding Safeguards Agreement including IAEA inspections. The NPT is the principal multilateral instrument for addressing the problem of nuclear proliferation. Articles I and II provide that each nuclear-weapon State Party to this Treaty undertakes not to transfer to any recipient nuclear weapons or other nuclear explosive devices and each non-nuclear-weapon State Party undertakes not to receive nuclear weapons or other nuclear explosive devices and not to manufacture or otherwise acquire nuclear weapons.

Importantly, Article III of the NPT also requires each non-nuclear state to enter into an agreement that specifies methods for verification of its compliance with the NPT. The International Atomic Energy Agency (IAEA) was created to carry out this verification function and therefore is an important element of the NPT mechanism. The DPRK met the Article III requirement by entering into a Safeguards Agreement with the IAEA on January 30, 1991.²⁴ It is this Safeguards Agreement that supplies the details on what materials the DPRK may possess and how IAEA inspections are to be conducted.

When the DPRK expelled the IAEA inspectors in December 2002, it was in violation of its Safeguards Agreement with the IAEA. The DPRK's viewpoint is that the Safeguards Agreement is no longer in force pursuant to Article 26 because the DPRK is no longer a party to the NPT. On January 10, 2003, the DPRK declared immediate effectuation of its withdrawal from the NPT, which it said took place in March 1993, when "it unilaterally announced a moratorium as long as it

²⁴ 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.

deemed necessary, (because) the US has unilaterally abandoned its commitments to stop nuclear threat and renounce hostility towards the DPRK in line with the same statement.”²⁵

Article X of the NPT does allow parties to withdraw from the NPT “if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country...” NPT state parties have not yet made an agreed statement in response to the DPRK’s action. An argument against the DPRK’s withdrawal is that it has failed to notify the state parties as required by Article X. The state parties also could question the grounds for the DPRK withdrawal. Legal status aside, the important practical significance of the DPRK’s action is the IAEA’s inability to verify whether it is engaging in nuclear materials production or proliferation.

2. The DPRK must sign, ratify or accede to and comply with the Chemical Weapons Convention.

The DPRK is not a party to the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and Their Destruction (the Chemical Weapons Convention), which is a landmark treaty in that it was the first to eliminate an entire category of WMD. It entered into force in 1997 after 65 states had ratified it. It requires each state party to destroy its chemical weapons and production facilities and any chemical weapons it may have abandoned on the territory of another state party. The verification measures are extensive including on-site inspections that are short notice. A technical headquarters, the Organization for the Prohibition of Chemical Weapons, was established at the Hague and carries out the verification provisions. It also contains provisions for assistance of a state party if it is

25 Text of North Korea’s Statement on NPT Withdrawal in English by North Korean news agency, KCNA, at <http://cns.miis.edu/research/korea/nptstate.htm>.

attacked or threatened by chemical weapons. In addition, it governs trade in certain relevant chemicals.

In short, the Chemical Weapons Convention offers a legally binding method of reducing chemical weapons that is analogous to that provided by the NPT. It follows logically that the DPRK should be pressured to enter the Chemical Weapons Convention for the same type of legal governance of its chemical weapons activities. According to defectors, the DPRK actually considered joining the Convention in the early 1990s, but the military opposed it and overrode the foreign ministry's support of it.²⁶ The ROK has been urging the DPRK to join since 1997 but to no avail. Importantly, the Chemical Weapons Convention also prohibits proliferation. This prohibition is enhanced by the efforts of the Australia Group, which coordinates member states' domestic export controls for both chemical and biological weapons. The DPRK's membership in the Australia Group would, therefore, also be desirable.

3. The DPRK must comply with the Biological and Toxin Weapons Convention.

The principal legal instrument governing the DPRK's biological weapons development is the Biological and Toxin Weapons Convention (Biological Weapons Convention), which DPRK acceded to in 1987. The Convention, which entered into force in 1975, bans the research, development, production, stockpiling or acquisition of biological and toxic weapons. It also bans delivery systems designed for biological weapons. It does not have a specific provision for monitoring, but states may abide by a non-binding "confidence-building" regime to declare compliance by their facilities that handle dangerous organisms. A group of member states is drafting a legally binding protocol for verification to compensate for the lack of a monitoring provi-

²⁶ "Chemical Overview," *op. cit.*, p. 3.

sion, a weakness that distinguishes the Biological Weapons Convention from the better-designed Chemical Weapons Convention.

4. DPRK must sign and abide by the International Code of Conduct Against Ballistic Missile Proliferation.

The International Code of Conduct Against Ballistic Missile Proliferation (the Code) requires states to curb the proliferation of WMD-capable ballistic missiles and to exercise maximum restraint in developing, testing and deploying such missiles. Unlike the Conventions, it is not legally binding. It was produced by the Missile Technology Control Regime (MTCR), which is the chief multilateral mechanism for member states to coordinate their export controls on items that facilitate missile proliferation. The MTCR provides licensing policy and procedures for states to follow and lists specific commodities for control.

The Code is open to all states including those such as the DPRK, which are not members of the MTCR. The Code incorporates three legally binding treaties related to outer space into the actions to be followed by states.²⁷ In addition to abiding by the Code, the DPRK should join the MTCR itself. For the greatest possible comprehensiveness in export controls, it should also join the other multilateral non-proliferation export control regimes: the Nuclear Suppliers Group, the Australia Group (on chemical and biological weapons, as stated above), and the Wassenaar Arrangement (military and dual-use export controls).

²⁷ The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (1967); the Convention on International Liability for Damage Caused by Space Objects (1972); and the Convention on Registration of Objects Launched into Outer Space (1975).

5. *The DPRK must sign, ratify or accede to and comply with the UN Convention Against Transnational Organized Crime and the UN Drug Convention and associated conventions and protocols.*

The UN Convention Against Transnational Organized Crime, which opened for signature in December 2000, has not yet come into force and is therefore not legally binding.²⁸ However, like the Code, it provides useful guidance for curbing criminal behavior and should therefore be required of the DPRK. The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (UN Drug Convention), which is legally binding, prohibits drug trafficking. It also recognizes the link between drug trafficking and other organized criminal activity. It requires all signatories to criminalize money laundering, to institute banking safeguards, and to provide mutual legal assistance. With the Council of Europe's Laundering Convention, the UN Drug Convention has facilitated the development of an international regime against money laundering.

6. *The DPRK must sign, ratify or accede to and comply with the UN terrorism conventions.*

The United Nations has produced 12 conventions related to terrorism.²⁹ The DPRK has ratified or acceded to six of them, all dated before or during the 1970s.³⁰ The DPRK should become a party to all the UN

28 As of March 24, 2003, 147 states have signed the United Nations Convention against Transnational Organized Crime, and 33 have become parties. 40 parties are required to bring the Convention into force, <http://untreaty.un.org/English/TreatEvent2003/corelist.htm>.

29 See <http://untreaty.un.org/English/Terrorism.asp>.

30 The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on December 14, 1973; International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on

terrorism conventions, particularly the 1997 International Convention for the Suppression of Terrorist Bombings, which prohibits any contribution connected to any explosive or lethal device deployed in a public place with the intent to cause death, serious injury, or extensive destruction. It should also become a party to the 1980 Convention on the Physical Protection of Nuclear Material, which requires levels of protection of nuclear material used for peaceful purposes while in transport.³¹ Both of these conventions also criminalize violations of their provisions, an important feature, as discussed below. In addition, the UN terrorism conventions include the prohibition of financing terrorism, another important restriction that can weaken the link between organized crime and terrorism.

7. The DPRK must comply with international human rights standards.

The DPRK is a party to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The DPRK must meet its legal obligations and abide by these principal human rights treaties instead of egregiously violating them.

IV. Enforcement

Gaining DPRK agreement to the legal provisions listed above does not, of course, guarantee that it will comply with them. Enforcement of

December 17, 1979; the Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on September 14, 1963; the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at the Hague on December 16, 1970; and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on September 23, 1971.

31 See <http://untreaty.un.org/English/tersumen.htm>.

these provisions is critical for their effectiveness. An effective enforcement strategy against the DPRK must also include its organized criminal activities as they fortify the regime and magnify the potential for harm by its WMD in that they become more accessible to terrorists. However, enforcement is the weakest aspect of international law at its present stage of development.

Forms of enforcement include the use of force, the interdiction of ships and aircraft transporting weapons and illegal items, economic sanctions, and tightened export controls. The legal grounds for such actions can be created or found in several existing sources to compensate for the lack of a fully developed global enforcement mechanism. Some, therefore, are an alternative if the DPRK refuses to agree to or comply with the above instruments.

International law may require obligations of a state even in the absence of explicit treaty requirements. Customary international law, for example, is as binding as treaty provisions. Customary international law is composed of two parts: 1) actual behavior of states and 2) *opinio juris*, the belief by states that such is law. This second component is what distinguishes the custom from mere social usage. In domestic legal systems, custom is not a significant source of law. Its great significance in the international arena is a reflection of the relatively undeveloped state of legal affairs at the international level.

Customary international law is by its very nature an evolving standard. The post-Cold War has produced political and technological developments that have demanded legal development to encompass problems that have gone beyond arms control treaties.³² Scholars contend that the prohibition of WMD is now recognized as customary international law,³³ and therefore, DPRK's failure to respect the treaties

32 David P. Fidler, "Weapons of Mass Destruction and International Law," *American Society of International Law Insights* (February 2003) at <http://www.asil.org/insights/insigh07.htm>.

33 Michael P. Scharf, "Clear and Present Danger: Enforcing the International Ban on

governing them does not mean that it avoids legal responsibility for its WMD activities. Some scholars also contend that terrorism and trade in illegal drugs are also now prohibited by customary international law.³⁴

The following legal grounds include traditional use of force and traditional criminal enforcement approaches. Because the DPRK includes both security and criminal threats, both approaches are appropriate. Indeed, the distinction between security threat and crime is in itself a developing area. This paper advocates a comprehensive approach that links WMD proliferation and international criminal law into one problem³⁵ to be solved by international cooperation of state bodies and instruments of enforcement, such as Interpol, state coast guard bodies, and state intelligence services. As the world increasingly seeks legal solutions, rather than coercive measures to resolve conflicts, the distinction between security threat and criminal activity should be dissolved and a unified system of order more akin to that within states should be prepared.

A. Anticipatory Self-Defense

Anticipatory self-defense is one customary international legal basis for the use of force against the DPRK. Customary international law has long recognized anticipatory self-defense as a legitimate basis for action. The concept was first articulated in the *Caroline* case of 1837, in which the British attacked the American ship *Caroline* because it was

Biological and Chemical Weapons through Sanctions, Use of Force, and Criminalization," *20 Michigan Journal of International Law* 477 (Spring 1999).

34 There is disagreement, however. Antonio Cassese, *International Law* (Oxford: Oxford University Press, 2001), states that drug trafficking is not an international crime according to customary international law, while terrorism is. Other scholars state that terrorism is not because of the difficulty in defining it.

35 Barry Kellman and David S. Gualtieri, "Barricading the Nuclear Window - A Legal Regime to Curtail Nuclear Smuggling," *University of Illinois Law Review* (1996), p. 667.

supplying Canadian rebels in their fight against the British. US Secretary of State Daniel Webster stated that the criteria for determining whether anticipatory self-defense legally applies are whether the threat is “instant, overwhelming, leaving no choice of means and no moment for deliberation.”

An “instant” threat meant a visible mobilization of military forces preparing to attack. However, the advent of terrorism as a significant threat has raised questions about the applicability of this standard. What does “instant threat” mean after September 11, 2001? The very nature of terrorism is invisibility and utter surprise; it does not allow for the observable build-up that could provide sufficient time for a defensive response. Accordingly, scholars contend that use of force against terrorists can be justified on their past practices and doctrines alone. A specific threat is not required.

Stretching anticipatory defense to allow for use of force against a state that has not made a specific threat is more difficult to ground in law than its use against non-state terrorists because it is usually easier to see the preparation for hostile activity by a state. However, when the scenario involves WMD, states possessing them can hold the same power of surprise as non-state terrorists in that very little lead time is needed to deploy some of these weapons.³⁶ Some scholars justify the United States prosecution of the recent war in Iraq on this ground although most believe that a UN Security Council Resolution was required specifically for the action. The Security Council voted on such a Resolution but failed to pass it. The United States, with the support of the United Kingdom, disregarded the Security Council’s failure to approve and proceeded with its invasion of Iraq. The United States’ minority position was that Resolution 1441, passed in October 2002, provided sufficient legal grounds.³⁷ In the case of the DPRK, no analo-

36 Stephen Murdoch, “Pre-emptive War: Is It Legal?,” *The Washington Lawyer* (January 2003), pp. 24-31.

37 The United States contended that the phrase “serious consequences” in Resolution

gous Security Council Resolution exists. The legal basis for a United States attack against the DPRK would, therefore, be weaker than that for the recent war in Iraq. The ultimate enforcement mechanism - using military force to topple Kim Jong il - would be ill advised from a legal point of view.³⁸

However, anticipatory self-defense has also been applied as the legal basis for blockades. In 1962, when the United States imposed “quarantine” against Cuba to interdict the delivery of materials for medium-range ballistic missiles capable of hitting the United States, the action was largely justified as self-defense.³⁹ The interdiction of vessels laden with WMD and missile materials is now called a “critical part” of the United States’ National Strategy to Combat Weapons of Mass Destruction.⁴⁰ The catalyst for the new policy was a recent interdiction of a DPRK vessel that ironically failed to result in seizure of WMD materials because of insufficient legal grounds.⁴¹ On December 10, 2002, two Spanish naval ships stopped and boarded a DPRK cargo vessel about 600 miles from the coast of Yemen. The Spanish navy was participating in organized patrols of the area to find Al Qaeda members fleeing from Afghanistan. On board the DPRK vessel, the *Sosan*,

1441 meant the use of force if Iraq did not comply with its provisions. Some scholars contend that Resolution 687 (1991) was sufficient grounds in that the Gulf War of that time never ended.

38 In 1981, Israeli jets bombed an Iraqi nuclear reactor at Osirik. The UN Security Council condemned the attack as illegal because there was no evidence of Iraqi intent to use WMD for an attack. However, some scholars contend anticipatory self-defense justified the Israeli attack. Guy B. Roberts, “The Counter-proliferation Self-Help Paradigm: A Legal Regime for Enforcing the Norm Prohibiting the Proliferation of Weapons of Mass Destruction,” *27 Denv. J. Int’l L. & Pol’y* 483 (Summer 1999).

39 *Ibid.*

40 United States National Strategy to Combat Weapons of Mass Destruction, December 2002.

41 Wade Boese, “US Pushes Initiative to Block Shipments of WMD and Missiles,” *Arms Control Today*, Arms Control Association (July/August 2003) at <http://www.armcontrol.org>.

the Spanish found fifteen SCUD missiles hidden under sacks of cement. United States explosive experts also inspected the missiles on board. Conventional warheads and 85 drums of inhibited red fuming nitric acid, an oxidizer for Scud missile fuel, were also found. However, the United States released the *Sosan* and allowed delivery of the missiles and materials to Yemen on the grounds that the sale was legal because the short-range missiles are not banned under international law.⁴²

Although the Bush administration was not pleased with this outcome, its current policy is to focus on existing law rather than creating new international law to allow for future seizures. Interdiction is a controversial policy because a blockade is an act of war under international law. Proponents say that they are not advocating an embargo, but rather a “selective interdiction” of only suspect vessels. Critics note that the benefits of the policy are marginal whatever the legal status, given the ease of hiding WMD materials - such as a grapefruit-size ball of plutonium, which is sufficient for a nuclear weapon - without detection, while its provocation of the DPRK may be great, given that it has already stated that it considers sanctions an act of war.⁴³

42 Given the United States’ “war against terrorism,” the law of contraband could arguably be applied. This law allows confiscation of items that have military uses and are on their way by sea for the use of an enemy belligerent in wartime. The missiles clearly had a military use. However, a broad definition of belligerent state (encompassing venues of terrorist attacks, such as the USS Cole, or suspected terrorist enclaves) and wartime (the “war against terrorism”) would be required to include Yemen within its purview. The United States apparently decided not to take such a position, as the political goodwill of Yemen outweighed legal arguments favoring seizure.

43 *Council of Foreign Relations*, “Q & A: The Hunt for WMD: Is Interdiction Legal?,” June 26, 2003 at <http://www.nytimes.com/cfr/international>.

B. Domestic law of cooperating states

In its focus on existing law, the US initiative will necessarily rely significantly on the domestic law of cooperating countries to support interdictions and other enforcement actions.⁴⁴ On June 12, 2003, United States officials began orchestrating the initiative with ten states - Australia, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain, and the United Kingdom. These countries are to assess their domestic authorities to determine what interdiction efforts are possible and to identify gaps in current measures against weapons proliferation. For example, cooperating states can target known proliferation routes and chokepoint. They can strengthen existing instruments and close current loopholes. US Undersecretary of State John Bolton noted on June 4 that within the past two months, two separate WMD-related shipments believed to be headed to the DPRK were seized with France and Germany involved.

The legality of state involvement rests on law that governs jurisdiction. Customary international law recognizes five bases of extraterritorial jurisdiction: 1) territorial, 2) nationality of the perpetrator (active personality), 3) nationality of the victim (passive personality), 4) protective, and 5) universal.⁴⁵ Maritime law addresses state sovereignty over the sea and therefore is important for determining territorial jurisdiction. According to the 1982 UN Convention on the Law of the Sea, a state possesses full sovereignty over its territorial sea, which is 12 nautical miles from its coastal baseline, subject to the right of innocent passage of foreign merchants' ships and warships. Beyond the state's contiguous zone, 24 nautical miles beyond the baseline, and its exclusive economic zone, 200 miles beyond the baseline, is the high seas, which

44 Boese, *op. cit.*

45 CarrieLyn Donigan Guymon, "International Legal Mechanisms for Combating Transnational Organized Crime: The Need for a Multilateral Convention," 18 *Berkeley J. Int'l L.* 53 (2000).

are free for every state.

Each state also enjoys sovereignty over the airspace above its territory and territorial sea, and therefore, may require that a foreign aircraft seek permission to fly through. Bilateral and multilateral agreements may also allow for over-flight. The 1944 Chicago Convention on International Civil Aviation, for example, allows contracting parties to fly without permission, and subjects non-scheduled air services to the right of the state flown over to require landing.⁴⁶

Thus enforcement actions will be focused on territorial waters and national airspace, where domestic law is clearly relevant, as opposed to the high seas. On the high seas, each state has exclusive jurisdiction over its own ships. A state may exercise jurisdiction over foreign ships and board them under the exceptional cases of ascertaining their nationality or whether they are engaged in piracy or slave trading, or if it is in “hot pursuit” of the ship for illegal activities and the chase commenced within its areas of jurisdiction. Otherwise, consent from the state where the ship is registered will be required to stop it on international waters and seize its cargo.

In the *Sosan* incident, the fact that the ship lacked a flag meant that it was considered as not having nationality. In such a case, persons from a foreign naval ship may board the flagless ship, as an exception to the normally governing prohibition under the United Nations Convention on the Law of the Sea. However, the DPRK has declared the incident “an act of piracy” and demanded compensation despite the unambiguous legality of the boarding.

States regularly exercise jurisdiction over drug trafficking and other crimes in the international arena, pursuant to the five bases of jurisdiction described above. Enforcement against the DPRK’s criminal activity as well as WMD proliferation must be targeted as a critical element for addressing the DPRK WMD security threat because the organized

46 Cassese, *op. cit.*, p. 63.

criminal activity fortifies the DPRK regime and magnifies the potential for terrorists to access DPRK's WMD. The link between terrorism and organized crime cannot be overlooked.

Drug trafficking and terrorism share many operational similarities. For example, perpetrators in both areas need weapons and use violence to achieve their aims. They both need financing and launder funds to obscure their activities. They require logistical and operational support for their clandestine activities. The same channels of delivery of drugs can easily be used for delivery of WMD to terrorists. Thus the same enforcement approaches are useful for both such as interdiction of ships. Australia, for example, stopped and boarded a DPRK freighter, the *Pong su*, after finding 50 kg of heroin in April 2003 and arrested 30 crew members including a DPRK ruling Worker's Party official. Another 75 kg of heroin believed to be from the *Pong su* was found in May 2003.⁴⁷

The similar modalities of enforcement against organized crime and the proliferation of WMD suggest that the criminalization of WMD and their proliferation may be appropriate. Indeed, nuclear smuggling and weapons proliferation is considered a primary activity of international organized crime. Nuclear smuggling is already codified by the Convention on the Physical Protection of Nuclear Material as an international crime. Scholars contend that proliferation of nuclear materials - whether by state or non-state actors - also constitutes an international crime and a crime against peace.⁴⁸ In addition, the UN Convention on the Suppression of Terrorist Bombings⁴⁹ criminalizes WMD terrorism. The Chemical Weapons Convention also requires each state party to enact implementing legislation that criminalizes its prohibitions for each of its citizens.⁵⁰

47 Dominic Hughes, "North Korea ship Heroin Haul Found," *BBC News* (May 27, 2003) at <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk>.

48 Guymon, *op. cit.*, p. 6.

49 Jan. 12, 1998, Art. 1.3(b) at <http://untreaty.un.org/English/Terrorism/Conv11.pdf>.

Given the US initiative's emphasis on domestic legislation, cooperating states may consider enacting domestic legislation to criminalize WMD proliferation and then exercise extraterritorial jurisdiction to prosecute violators. For example, the United States has enacted a law that provides that any person who, without lawful authority, uses or threatens, attempts, or conspires to use a weapon of mass destruction including any biological agent, toxin, or vector against a national of the United States shall be punished whether such national is within the United States or not. The US Code also prohibits chemical weapons for similar uses.⁵¹

States could also apply protective and universal bases of jurisdiction to allow for their enforcement actions. Protective jurisdiction covers activities, otherwise not punished that have particularly grave consequences for the prosecuting state or threaten specific national interests such as security, integrity, sovereignty or other governmental functions.⁵² Universal jurisdiction, in its broadest form, allows a state to exercise jurisdiction over any international crime based on the rationale that it is of such gravity and magnitude that it warrants universal prosecution and that the exercise of jurisdiction does not breach the sovereign equality of states and does not lead to undue interference in the internal affairs of the state where the crime has been perpetrated.⁵³ Spain and Belgium, for example, have enacted legislation that allows their courts jurisdiction even if the accused is not in the custody of the state.⁵⁴

Another major area of domestic law that can be employed to signifi-

50 Organization for the Prohibition of Chemical Weapons at <http://www.opcw.org>.

51 Scharf, *op. cit.*, p. 13.

52 Guymon, *op. cit.*

53 Cassese, *op. cit.*, p. 262.

54 Cassese, *op. cit.*, p. 261. Belgium is considering repealing its law granting Belgian courts the power to try war crimes no matter where they were committed. Patrick Lannin, "Belgium Scraps War Crimes Law Which Angered U.S.," *Reuters*, July 13, 2003.

cant effect is export controls. States should tighten their export controls to prevent contributing to the proliferation problem. They should comply with the regulations of the Wassenaar Arrangement, the Nuclear Suppliers Group, the Australia Group, and the Missile Technology Control Regime.

C. Further Development of International Criminal Law

While existing customary law and domestic law applied extraterritorially provide significant grounds for enforcement action, significant gaps remain. A global legal architecture that effectively curbs international organized crime and WMD proliferation has yet to emerge. However, recent trends indicate that this is a realistic possibility for the future. International criminal law has developed to an extraordinary degree during the last decade. The end of the Cold War produced several mostly internal, horrifically bloody conflicts. However, international recognition of human rights standards also rose during this period, along with the revival of the UN Security Council as a potent international law-making body for the first time in decades. This new ethos, which favored greater international criminal justice, produced international criminal tribunals for the former Yugoslavia and Rwanda, and most significantly, the International Criminal Court (ICC).

The statute of the ICC does not on its face encompass such activities as trade in illegal drugs and nuclear materials, nor does it include terrorism. Perhaps an indictment against Kim Jong Il could be constructed on the grounds that his corrupt policies have resulted in grievous harm that could be categorized as a “crime against humanity,” which is within the purview of the Court. Nonetheless, the DPRK has not acceded to the ICC and would assert a lack of jurisdiction against it. Again, the current situation requires that domestic law be invoked, allowing a state court to exercise extraterritorial jurisdiction over him if prosecution were to be pursued. For the future, the ICC’s jurisdiction

should be expanded to cover drug trafficking and other international crimes.

In addition, more treaties should be drafted, signed and ratified to fill other gaps in international criminal law. For example, criminalization of biological weapons-related offenses should be realized by the coming into force of a draft convention to this effect.⁵⁵ Similarly, the UN Convention Against Transnational Organized Crime should come into force. Following the realization of these treaties, state parties must enact domestic legislation to implement them.

D. United Nations Security Council Resolutions

Although recent years have been propitious for the development of international criminal law, additional treaties to this effect will take time to realize. In the meantime, UN Security Council Resolutions can provide a way to supplement reliance on the enforcement of existing law. They also have the appeal of clear political support, as tangibly articulated by affirmative votes and the abeyance of veto powers held by the permanent five members of the Security Council. They also can be less ambiguous than custom-based international law.

United Nations Security Council Resolutions are legally binding on member states of the UN. Articles 41 and 42 of the United Nations Charter provide that the Security Council may use force, if necessary, to restore international peace and security. Thus the Security Council may produce resolutions requiring member states to impose sanctions and to use force to achieve this end.

The recent Security Council resolutions on Iraq illustrate the use of such resolutions to enforce the NPT. Security Council Resolution 1441

55 E.g. the Harvard/Sussex Program on CBW disarmament and Arms Limitation, Draft Convention on the Prevention and Punishment of the Crime of Developing, Producing, Acquiring, Stockpiling, Retaining, Transferring, or Using Biological or Chemical Weapons.

formed the legal basis for the Bush administration's decision to attack Iraq. A similar resolution could be adopted for the use of force against the DPRK, which is precisely what the DPRK fears. The Bush administration has deliberately left the use of force open as an option, though it emphasizes a preference for a peaceful, negotiated solution.

In addition to prohibiting proliferation of military materials, UN Security Council Resolutions can demand the end of proliferation of illegal drugs, counterfeit money and other illegal products. International organized criminal activity is a threat to world security and is therefore analogous to activities associated with WMD production and proliferation.⁵⁶

UN Security Council Resolutions can also require economic sanctions. Halting trade with China, for example, would have an enormous effect on DPRK behavior, as it supplies the DPRK with at least 70 percent of its fuel oil.⁵⁷ Ending the flow of money from ethnic Koreans living in Japan to the DPRK could also provide leverage, as DPRK supporters in Japan account for 80 percent of foreign investment in the DPRK.⁵⁸

The great drawback of reliance on UN Security Council Resolutions is that there is no guarantee they can be produced. As discussed above, the UN Security Council has already failed twice in 2003 to produce any statement condemning the DPRK, much less a legally binding resolution.

56 Guymon, *op. cit.*

57 *Council on Foreign Relations*, "Q & A: Is the US Willing to Negotiate with North Korea?" (July 17, 2003) at http://www.nytimes.com/cfr/international/slot1_071703.html.

58 Noland, *op. cit.*, p. 102.

V. CONCLUSION

The problems posed by the DPRK extend beyond non-compliance with the NPT. They include production and threatened proliferation of chemical and biological weapons in addition to nuclear weapons. The DPRK also widely proliferates ballistic missiles. In addition, it engages in organized criminal activity. The potential for linkage to terrorists is significant. This paper recommends a comprehensive, negotiated solution that includes requiring the DPRK to adhere to the NPT, Chemical Weapons Convention, Biological Weapons Convention, the International Code of Conduct Against Ballistic Missile Proliferation, and the UN conventions on transnational crime, drug trafficking, terrorism, and human rights.

This paper recommends immediate enforcement of existing law by interdictions, economic sanctions, and tightened export controls. For the short term, it also recommends the passage of UN Security Council Resolutions to cover gaps in existing law and to enhance political support for enforcement actions. For the longer term, it advocates the creation of more treaties against international crime, the criminalization of WMD and their proliferation, and the expansion of the ICC's jurisdiction to include drug trafficking and other crimes committed by the Kim Jong il regime. These lines of action can lead to the realization of a coherent international order maintained more by comprehensive rule of law rather than use of force.