Law, Diplomacy, and Force: North Korea and the Bomb

Kenneth W. Dam
OCCASIONAL PAPERS FROM
THE LAW SCHOOL
THE UNIVERSITY OF CHICAGO

Number 33

LAW, DIPLOMACY, AND
FORCE: NORTH KOREA
AND THE BOMB

KENNETH W. DAM
“Law, Diplomacy, and Force: North Korea and the Bomb” was delivered as the Wilber G. Katz Lecture at the University of Chicago Law School on November 3, 1994. Copyright © 1994 by Kenneth W. Dam.

Copies of Occasional Papers from the Law School are available from William S. Hein & Company, Inc., 1285 Main Street, Buffalo, New York 14209, to whom inquiries should be addressed. Current numbers are also available on subscription from William S. Hein & Company, Inc.
LAW, DIPLOMACY, AND FORCE:
NORTH KOREA AND THE BOMB

BY KENNETH W. DAM*

When I chose this topic I did not anticipate that the negotiations for a U.S.-North Korea agreement would be concluded so soon. When I first heard that the negotiations had in fact led to an agreement, I considered changing the topic. However, that phase passed in a few minutes. I recalled the words of a Navy admiral, Jonathan Howe, with whom I had the pleasure to serve in the State Department. This wise officer reminded his colleagues many a morning that first reports are almost always wrong or at least misleading. It has been my misfortune to learn that his dictum, which he applied to disasters and to military encounters, also applies to diplomatic events. So my effort here will be to put the U.S.-North Korean agreement in context and to ask what it might really mean, especially for the future and for what has sometimes optimistically been called the New World Order.

Two preliminary comments: First, the North Korean crisis is the most serious national security and foreign policy issue that the Clinton Administration is confronting. This crisis is not behind us but rather is a long-term crisis that may not be resolved for many years. It dwarfs Somalia, Haiti, and even Bosnia in significance. The reason is clear.

Nuclear nonproliferation outweighs other concerns for the simple reason that North Korean nuclear weapons, delivered by North Korean missiles that they are developing, threaten the lives of hundreds of millions of Asians. Indeed, if North Korea were to develop a nuclear weapons capability, we have every reason to believe that they would sell it to several rogue nations in Asia and Africa and thereby threaten the lives of hundreds of millions

---

* Max Pam Professor of American and Foreign Law, University of Chicago Law School and former U.S. Deputy Secretary of State, 1982-85.
more in Europe. In decades to come, as they develop an intercontinental missile delivery capability, the threat may extend North America as well. Moreover, the North Korean issue, if not properly handled, can easily lead to a nuclear Japan, an outcome that would revolutionize the foreign policy dilemmas facing the United States. But more of the stakes later.

My second preliminary comment is that I chose this topic not to bring you up-to-date on an interesting aspect of current events. Rather, I chose it for this law school audience because it provides an important example of the role of law, and especially its limitations, in world affairs. And it also shows that where the coercive power of law is not available, then two other instruments of influence play a crucial role. I speak of diplomacy and force. By force I refer to a range of options from economic sanctions to the actual use of military weapons with all that that implies for armies and civilians. I particularly want to highlight why force must be tightly coupled with diplomacy rather than being viewed as a residual capability for possible use only after diplomacy fails, and why any threats of military force must be credible.

Few people have ever gone to law school who have not pondered the meaning of international law. Some never get much past the existential issue whether or not international law exists. Without entering into that well-known yet still largely impenetrable thicket, we may observe that nuclear non-proliferation policy is based on a treaty that sets out a relatively clear set of substantive prohibitions and duties and that both the United States and North Korea have acceded to this treaty and thereby committed themselves to abide fully by those rules. The rules are set out in the Nuclear Nonproliferation Treaty (NPT), which entered into force in 1970.

Law: The NPT

Under the terms of Article I the United States, one of five declared nuclear weapon states (along with Britain, France, China, and Russia, as successor to the Soviet Union), has pledged not to assist other countries in manufacturing or otherwise acquiring nuclear weapons. In turn, under Article II, more
than 150 other countries—including North Korea, which signed the NPT just two years ago in 1992—have committed themselves not to acquire nuclear weapons. Quite aside from whatever legal force the commitments might have, they certainly have played a crucial role in nonproliferation diplomacy because they have insured that nuclear aspirants will deny those aspirations as well as any steps toward a nuclear weapons capability. A crucial additional point is that the Treaty provides the essential authority and framework for the inspection activities of the International Atomic Energy Agency (IAEA), which have played such a large and public role in recent events not just in North Korea but in Iraq as well.

The North Korea crisis threatened to call into question the continued existence of this vital treaty for several reasons. One result of the U.S.-North Korean agreement therefore may be to assure the NPT’s continued vitality, at least for a time. Let us look briefly at the prospects for the NPT. In the original NPT negotiations several countries, notably Germany and Japan, opposed a treaty of indefinite duration. As a result, the NPT calls for the parties to meet twenty-five years after its entry into force to determine, by an absolute majority of all the parties, “whether the Treaty shall be extended indefinitely, or for an additional fixed period or periods.” Consequently, next spring, twenty-five years after the NPT’s entry into force in 1970, the world will be treated to the spectacle of a review conference in New York to determine the future of the world’s nuclear nonproliferation regime. While it can be argued that the language I just quoted gives only the alternatives of indefinite or fixed period extension and does not allow a vote to terminate the Treaty and while the votes now appear to be in place for an indefinite extension, the review conference could still turn into a shambles that would render the NPT just another piece of yellowing international paper representing past ideals and aspirations.

Quite aside from the complications presented by the North Korean imbroglio, the NPT has generated much resentment, indeed political resistance. It is not popular with many non-nuclear countries, especially in the Third World, who find the discrimination inherent in the different treatment of the five Article I declared nuclear weapons states and all
other states—the so-called Article II states—intolerably discriminatory. And some of the latter argue strenuously that the five Article I countries have failed to live up to some specific NPT obligations. The first is the obligation of all parties under Article IV to facilitate the peaceful use of nuclear energy in all member states through “the fullest possible exchange of equipment, materials, and scientific and technological information.” Some countries, especially in the Third World, challenge the advanced countries’ nuclear export controls on this ground. (To me, the objections to the principle, although not necessarily the scope of these controls, should more properly be directed at the failure of the world community to address adequately the efforts of some Article II countries to evade their NPT commitments through clandestine nuclear weapons development programs.)

A second obligation imposed squarely on the Article I countries that provides a good basis for criticism is the alleged failure of the Article I nuclear weapons states to discharge their Article V duty to “pursue negotiations on effective measures relating to the nuclear arms race at an early date and to nuclear disarmament.” Several events have muted somewhat the force of this argument. The conclusion of START I and II agreements by the superpowers is, at the least, a large down payment on this obligation, although the rejectionist attitudes of China, France and even Britain, have to be acknowledged. Another development is the decision of the Clinton administration to reverse the Reagan-Bush refusal to proceed with the negotiation of a Comprehensive Test Ban Treaty, although the negotiations thus far do not seem to be making much headway for various reasons.

Complicating the picture for next spring, influential voices in some Article I countries have not just called into question the bona fides of some countries’ Article II commitments. They have even cynically suggested that the best strategy for acquiring a clandestine nuclear weapons capacity is to first join the NPT and then deal with the IAEA in such a way that the Agency gives well-publicized favorable reports on the facilities that the IAEA is entitled to inspect—namely, those facilities that the countries in question declare as nuclear. Certainly the failure of the IAEA safeguards to be able to detect Iraq's
clandestine program, which was much more advanced than most observers imagined possible and in direct violation of Iraq's freely-given NPT commitments, have created a basis for this suspicion.

Another complicating aspect concerns the Article I countries themselves. One example is the apparent willingness of China to continue to assist Pakistan in its nuclear program even after China signed the NPT in 1992. Still another complicating aspect, leading to great cynicism about the effective of nonproliferation efforts, stems from the growth in the number of so-called de facto nuclear powers, of which the most often mentioned are India, Pakistan, and Israel, none of which have signed the NPT.

Despite these general problems with the structure of NPT member state obligations and performance, the tactics—some would say the antics—of the North Korean government have created serious doubts as to the credibility of the NPT, especially as North Korea's maneuvers have come so close to next spring's review conference. Quite aside from North Korea's failure to declare certain facilities that were revealed by publicly disclosed U.S. intelligence to be almost certainly nuclear waste sites and the outright refusal to permit IAEA inspections of them on the very ground that they had not been declared by North Korea to be nuclear facilities, North Korea took further steps that cast doubt on the credibility of the NPT as applied to states like it. When backed into an international public relations corner by other countries over the inspection issue, North Korea declared its intention on March 12, 1993, to withdraw from the NPT effective three months later on June 12. Yet after an IAEA finding of North Korean non-compliance with North Korea's safeguards agreement with the Agency and a Security Council resolution in support of the Agency's position, North Korea announced on June 11, 1993—just one day short of its self-declared final withdrawal date—that it would "suspend" its withdrawal. Now, mind you, the NPT has no provision for a country to withdraw—for good and obvious reasons. And no one knows what a suspended withdrawal means, though the North has treated it as a unique status in which they can control the timing and scope of inspections even of declared facilities.

For example, as even the most casual TV news viewer will recall, the North went even further late
this past spring by beginning to withdraw fuel rods from its five megawatt reactor without permitting IAEA inspectors to inspect the rods. This was a transparent device for avoiding accountability for production and use of plutonium resulting from a 1989 incident with respect to spent fuel from the same reactor. In fact, the refusal to permit inspection this year made it impossible to determine how much plutonium may have been diverted in 1989 and therefore made it extremely difficult to determine how much reprocessed weapons-grade plutonium North Korea already has. In February of 1993, nearly two years ago, CIA Director Woolsey testified publicly “to the real possibility that North Korea has already manufactured enough fissile material for at least one nuclear weapon, and is hiding this from the IAEA.” The amount of plutonium in this year’s unloading would be enough, if it were diverted, for four to five nuclear bombs, according to Secretary of Defense William Perry. Beyond its bearing on that capability, this year’s fuel rods unloading constituted a resounding slap in the collective face of the world community which was shown to be unable to enforce the NPT in the face of provocative duplicity and intransigence.

What the North Korean actions highlight is the lack of credibility in the present international legal structure. Is the NPT just a useful self-deception? Is the NPT at most a convenient mechanism for cooperation among willing countries on nuclear nonproliferation, especially for justifying IAEA inspections, without providing any real muscle behind those inspections and especially behind critical IAEA findings? Although it is unlikely that the NPT regime will collapse at next spring’s review conference, and perhaps the U.S.-North Korea agreement will be a talking point in favor of indefinite extension, it also seems unlikely that the NPT will be significantly strengthened. In short, the likelihood is that the NPT will continue to be on balance a useful, yet ultimately ineffective instrument in combating nuclear proliferation.

Let us now turn to what instruments are left if we

---

1 Quoted in testimony of Undersecretary of State Lynn Davis, Hearing on U.S. Policy Toward North Korea 9 (Senate Subcommittee on East Asian and Pacific Affairs, March 3, 1994).
2 David Albright, “How Much Plutonium Does North Korea Have?,” 50 Bull. of Atomic Scientists 46, 48 (No. 5) (Sept. 1994).
discount the role of law in stopping proliferation—namely, diplomacy, and force. Before doing so, however, this is a useful time to review the known facts about the North Korean nuclear program. I do so not just to make clear the subject of recent diplomacy but also to underscore what is at stake for the entire world.

Facts on the Ground

First, and this is particularly important for public understanding, North Korea does have a nuclear program. I mean this in two senses. First, it has a large program to build nuclear reactors, ostensibly for electrical power and indeed one can readily accept this motivation as being at least in part sincere. But it is a particularly large program for a country with a small population and the reactors are of a type that produce comparatively large amounts of plutonium, the vital raw material for nuclear weapons.

Second, one is hard put to look at this nuclear program in its entirety, especially if we accept what U.S. officials say overhead photography shows and what even unclassified French commercial satellite photography shows, without concluding that North Korea has been pushing forward toward nuclear weapons. Indeed, its long-standing missile development program, in which a third generation missile is being tested that could reach Osaka, Japan, merely underscores the ominous nature of this nuclear weapons program. The only real issue that has divided informed analysts is whether North Korea’s intention is to build nuclear weapons for their own sake or to try to trade their nuclear weapons program for economic assistance and diplomatic support from the rest of the world. I shall return to this question in just a moment.

But first let me point out that North Korea has been building three nuclear power reactors, not just the small five megawatt reactor at Yongbyon that you have seen so often on television and in the newspapers in connection with this year’s fuel rod contretemps. This reactor, by the way, is not even connected to a power grid and thus, although called experimental, seems to be of value to the North primarily as a source of plutonium. The other two reac-
tors are much larger. One is a 50 megawatt reactor nearby that was expected to be completed in 1995 and the other is a 200 megawatt reactor at Taechon whose completion was expected in 1996. This third reactor could itself produce 250 kilograms yearly of plutonium, which would be enough for at least ten nuclear weapons each year. Indeed, some say that eight kilos of plutonium is enough for a bomb. Still further out is a large facility in the early stages of construction at Simpo’o.\textsuperscript{4}

Even more worrying than the enormous plutonium potential of these reactors is a plutonium reprocessing plant, the kind of plant necessary to take plutonium from spent fuel and upgrade it to weapons grade. This reprocessing plant is located adjacent to the small Yongbyon reactor involved in the fuel rods episode. With regard to the reprocessing plant, the IAEA has declared that its inspections reveal evidence that North Korea reprocessed more plutonium than it has declared to the IAEA. It is this “Case of the Missing Plutonium” that has played a central role in past diplomacy. And adding a further ominous note is the continued refusal of North Korea to permit inspection of the two suspected nuclear waste sites I referred to earlier. These sites are probably the locus of waste from the reprocessing plant, which would reveal how much plutonium the North had in fact reprocessed and therefore how much weapons grade plutonium they might have. These waste sites were detected by U.S. satellite photography rather than being declared to the IAEA by North Korea.\textsuperscript{5} Indeed, it was the IAEA insistence on inspection of these two facilities that led directly to North Korea’s declaration, subsequently “suspended,” that it would withdraw from the NPT.

\textsuperscript{3} Bruce Blair, “IAEA: Mission Impossible?” Brookings Review 46 (Summer 1994). See estimate of five kilos of separated weapons-grade plutonium per bomb, based on the assumption that plutonium lost in the weapons manufacturing process is recovered. David Albright, supra note 3. How many kilos of plutonium in spent fuel form would be required depends to separate one kilo of weapons-grade plutonium is unclear.

\textsuperscript{4} The information on these reactors is based on Arms Control Association Fact Sheet, North Korea’s Nuclear Facilities (July 21, 1994).

\textsuperscript{5} On the waste sites and the IAEA conclusions on the missing plutonium, see David Albright, supra note 3.
Diplomacy

Against the background of these kinds of "facts on the ground," the United States launched a major diplomatic initiative near the end of the Bush Administration. This initiative had two prongs. The first was to engage North Korea, long a pariah state, in direct high level bilateral talks rather than to continue its diplomatic isolation. Undersecretary of State Kanter kicked off the talks with a North Korean delegation in New York in January 1992. The second prong was to reassure the North Koreans that they had nothing to fear from the United States. Here, on the principle that actions speak louder than words, the substance was the withdrawal of all tactical nuclear weapons from South Korea.

The incoming Clinton Administration accelerated the diplomatic pace. A new round of high level talks were completed in July 1993 and, after a tense year-long standoff that culminated in former President Jimmy Carter's visit to North Korea this past June, a third round of high level talks began in July and led to the agreement reached this past month.

This U.S.-North Korean agreement has two parts, a published "agreed framework" and a secret annex. This secrecy need not be considered suspicious, by the way, because there are many good reasons for secrecy with regard to details, and I am comforted by the Administration's declafation that the secret portion is "consistent" with the published portion. What we do know is that the United States has promised to supply North Korea with a light water reactor capacity of 2000 megawatts (which has been described by Ambassador Gallucci as made up of two separate reactors). The United States has further promised to provide North Korea with 500,000 tons of heavy oil annually for heating and electricity generation free of charge until such time as the light water reactors come on line. The light water reactors have the virtue, by the way, that they produce much less plutonium per unit of electrical output than the graphite-moderated reactors of the type that North Korea is now using and building. As a quid pro quo for the light water reactors and the oil, North Korea has agreed to "freeze" its nuclear program and eventually to dismantle its graphite-moderated reactors. The North has also agreed to
be, in effect, a good boy about the IAEA.

The bill for all of this is substantial. The light water reactors themselves will cost about $4 billion. The United States has prevailed on South Korea and Japan to fund most of this cost. However, President Clinton has had to assure the North personally by letter that he will use the full powers of his office, subject to Congressional approval, to have the United States make good on any shortfall. Is $4 billion-plus too much, as Senator Dole implied when he commented that the accord just shows that anyone can get an agreement if he concedes enough?

Certainly diplomacy envisages the possibility of paying for performance, and precedents can be found aplenty in every Administration. After all, diplomacy can, in principle, take only one of three forms. The first is “sweet reason,” in which we say to those we hope to influence that they should do what we ask because it is good for them or for the world. Anyone who believes that sweet reason will move the North Koreans will believe anything.

The second form of diplomacy is coercive diplomacy. It presupposes that we have leverage. We say, if you don’t do what we ask, we will do something to you that you won’t like at all.

The coercion that Americans have always seemed to favor is economic sanctions, although I must say that the sentiment in favor of economic sanctions cannot be justified on the basis of their efficacy. They have seldom worked, and therefore the favor economic sanctions find in Washington must be based on the theory that the best way to deal with a problem is to kick it down the road to a point in time when the problem will be someone else’s responsibility. Aside from whether economic sanctions could in principle work with North Korea, the fact is that the United States has already been refusing to trade with North Korea for a long time. Therefore, any effective threat of sanctions would have depended upon the Chinese cutting off oil shipments and the Japanese cutting off massive transfers of hard currency from Koreans living in Japan. These Japanese transfers are estimated at up to $1 billion a year, a considerable sum in hard currency for a coun-

---

try whose GNP is estimated at $20 billion per year.\footnote{1991 figures given in testimony by Undersecretary Davis, supra note 2 at 12.}

A second kind of non-military coercion that can be threatened is isolation. This sanction is what so-called recognition and non-recognition are about. Among other hallowed methods of isolation are the withdrawal of ambassadors and other subtle chess moves of traditional diplomacy. Assuming the sanction of isolation has any value, and for some uncertain leaders of the United States it has sometimes seemed the best of a bad set of options, isolation was not available because the United States had already successfully isolated North Korea. We had no diplomatic presence there at all, and all U.S. trade with North Korea was proscribed. Moreover, a policy of isolating North Korea was especially strange because it played directly into the North's own paranoid policy of "chuche," which can be translated, I am told, as "self-isolation." In any case, U.S. isolation of North Korea may have been counterproductive because that policy has consciously deprived us of an opportunity for insight into the "black box" of North Korean decision-making. Indeed, one can speculate that the October 1994 agreement, by providing for a relaxation of isolation and the eventual establishment of full diplomatic relations and an embassy in Pyongyang, may prove the most important single measure in the eventual transition of North Korea into a normal country, perhaps in unification with South Korea.

The third kind of coercion that could be threatened was military force. In other words, full-scope diplomacy would involve the threat of military force itself. Here it is useful to distinguish between military force and the threat of it. They are closely related. Military force without a prior threat that could have obviated the action itself is usually irresponsible. A threat without the capability and willingness to carry it out is feckless and even dangerous. A threat that is not credible constitutes perhaps the greatest diplomatic mistake of all.

Force

Let us put diplomacy by threat to one side and
start this part of our analysis with the actual use of military force. We must acknowledge that military force can sometimes deal with proliferation; we must never forget that the Israelis threw the Iraqi nuclear program back perhaps a decade through a daring air attack on a large nuclear facility in 1981.

Could such a bold strike have worked against North Korea? I ask this question because if the United States could not in fact take out the facilities in question, then there was little point in making the threat. Aside from the little-recognized point that the popular notion of a surgical strike rarely works in practice (the Israeli/Iraqi example aside), there is some question whether military raids, by aircraft or missile, could do enough against the North Koreans, who after all are world champions in tunnels and underground installations. So while we might have been able to take out what we knew about, we could not take out what we did not know about or what we might have suspected but not known the location of. The one or more nuclear bombs that CIA Director Woolsey spoke of almost certainly fall in that category.

But even if a bold strike could work, the question for diplomacy is whether the threat of such a strike would be credible. After all, if the North Koreans do not believe that the U.S. government is going to carry out a threat, then that threat has limited utility at best. But without getting into the question of the abstract willingness to carry out such a strike, a factor that ranks equally with the capability to do so, one can surmise that the North Koreans effectively deterred any U.S. attack through their imposing conventional capacity.

The sobering fact is that North Korea can apply overwhelming force at the beginning of any hostilities on the Korean peninsula. Though its population is only twenty-three million compared with South Korea's forty-five million, North Korea has an active army of one million soldiers compared to Korea's 520,000. Moreover, North Korea has a surprising superiority in tanks and artillery, at least in numbers; for example, it has 3700 main battle tanks compared to the South's 1500. To be sure, the United States maintains about 26,000 Army as well as about 10,000 Air Force personnel in South Korea. But two factors ren-
der this U.S. offsetting capability less impressive than might appear. The first is that in order to stop a North Korean attack, U.S. air and ground forces would have to be reinforced and that would take time.

The second factor is closely related. South Korea's capital, Seoul, the world's fourth largest city with over sixteen million people, lies only about twenty-five miles from the DMZ boundary. There is no assurance that Seoul could be held in the face of a sudden North Korean attack. Moreover, the approaches to Seoul and to some extent the city itself are in range of North Korean artillery and surface-to-surface missiles comfortably ensconced in caves, where they remain until the moment of firing. Hence we would lack the capability to suppress this capability, at least completely and in time to be decisive. One can only imagine the chaos that would be produced by millions of South Korean civilians fleeing southward out of Seoul in the first few days of any war.

Worse yet, any attempt by the United States to bring into Korea the force necessary to hold Seoul might provoke the very North Korean attack it was designed to deter because it would take time. The North Koreans might well feel provoked to attack while they still had time, even though we sitting comfortably here might feel confident that the South Koreans, with our help, would in the end win any such war. Indeed, the fact that we do not know enough about North Korea and its government to know whether to take its counter-threats seriously may itself have deterred the Administration and South Korea when the North stated that they would regard even comprehensive economic sanctions as an act of war.

Any consideration by the Administration of the use of military force would have had to take into consideration the opposition to such a policy by South Korea, Japan, and China, all of which wanted the United States to fix the problem without provoking the North Koreans and without undertaking even comprehensive economic sanctions. The resulting U.S. hesitancy to use force must have been increased after President Carter's trip to North Korea last summer, especially after he said publicly

---

that he had told the North Koreans that he was ashamed of his own country's call for economic sanctions. What actually happened in the diplomacy of the last six months, we do not, of course, know. We do not know whether the Administration backed up its diplomacy with threats of military force. And we do not know whether such threats, if made, were credible to the North Koreans.

What we do know is that the Clinton Administration, like many key personalities in prior Administrations and like many in the Congress and the media, has been reluctant about the use of force. For this conclusion I rely on no less an authority than President Clinton himself. In a recent Time magazine interview (published in the October 31 issue), which was devoted entirely to the President giving his philosophy of foreign policy, he responded to a vaguely critical question about whether his Administration "suffered from a problem with the projection of forcefulness." After conceding that he had "some things to learn" about "the difference between what you do and how you're perceived," he launched into an explanation of his attitude toward force. First, he said that force was important:

"We're not the world's policeman, but we do have certain responsibilities. We will be more respected if it's clear that we're making every attempt to blend force with diplomacy."

After this remarkably clear statement, he then began to backtrack by suggesting that use of force abroad was a cheap domestic political trick:

"You may actually lose some political mileage if there is no actual force: if the bombs aren't dropped, and people aren't shot, and no one dies. I understand that."

And in a further verbal tour de force, he made clear that he thought it better to be known for one's good intentions:

"But I also believe that that is a form of strength when you know the power is there. It seems to me that restraint is, in itself, a policy instrument, which reinforces our good intentions."\(^{10}\)

\(^{10}\) "Blending Force with Diplomacy," *Time* 35-36 (Oct. 31, 1994).
Now we all know that President Clinton talks a lot and there is enough in this interview to provide quotations to support almost any possible philosophy of foreign affairs. But this particular interview certainly will not convince other North Koreas that they should fear America's will to use force to achieve its objectives. This is especially unfortunate given the demonstrated willingness of the Administration to use force in Haiti and its recent rapid movement of military force to the Kuwaiti border.

In any case, what the President said in the interview, while using the right words about blending force with diplomacy, does not give full weight to the wisdom of George Kennan, who is reputed to have said that it is amazing how much better diplomacy works when a little force is introduced into the picture. Moreover, though the Administration’s Haitian and Iraqi actions demonstrate that the Administration has been changing its attitude toward force, it did in fact adopt early on the notion widely held not just in the United States but in most of the developed world, and certainly in United Nations fora, that force is something to be applied only after diplomacy has failed. Yet, as George Shultz has noted, a policy of force as a last resort too often leads to a situation where “force is the only resort and likely a more costly one than if used earlier.”

The tendency of the United States in the past few years to act the Hamlet of Nations may well have tempted the North Koreans to toy with the world community. Recall in this connection that most of the serious debate in this country on North Korea had to do with whether the North Koreans really wanted the bomb or were only using their nuclear program as a bargaining chip for economic assistance. While I have little doubt that the answer to that question is that the North Koreans wanted both, the fact that the debate raged publicly in Washington and divided different parts of the U.S. government may itself have undermined any credibility of a threat of force and hence have undermined U.S. diplomacy generally.

Recently the Administration appears to have come to a belated recognition of the need to couple diplomacy and force. The most dramatic single piece

---

11 George P. Shultz, Turmoil and Triumph 650 (1992). The quotation is from a 1984 Shultz speech about terrorism.
of evidence demonstrating the need to couple the two, rather than to exhaust diplomacy first, was the fact that the Haitian generals and the Haitian president agreed to the Carter/Nunn/Powell entreaties to allow U.S. forces to come in peacefully only when they learned that U.S. troops were already in the air and that they were coming to shoot their way into Haiti. As I have already suggested, the prompt movement of massive force to the Kuwaiti border is another example of the use of force. It is worth noting that North Korea reached agreement with the United States only several weeks after these events. A further factor in producing agreement may have been the deliberate and low-key way in which the Defense Department did in fact increase U.S. strength in South Korea by bringing in Patriot missiles and other non-offensive weapons over the past months. In short, recent events may have strengthened the U.S. diplomatic hand and have helped bring about the agreement. On the other hand, the Administration’s prior aversion to force may have encouraged the North to call the U.S. bluff by itself threatening force in reaction to sanctions, thereby routing U.S. attempts to organize comprehensive sanctions and greatly weakening the U.S. hand.

To recap what I have been saying, the Administration apparently could not achieve its diplomatic objectives by sweet reason or by threats, whether of economic sanctions or military force. Nor did it choose to use military force, perhaps for the military reasons I have suggested. It was therefore forced to use a third category of diplomacy, the diplomacy of exchange. It had to pay something to get the commitments it sought. There is absolutely nothing wrong with such diplomacy. We do it all the time, whether we are talking about the exchange of trade commitments in NAFTA or the Uruguay Round, about making pledges to international financial institutions, or about forming and extending alliances.

The Agreement Evaluated

To return now to the U.S.-North Korean agreement itself, the key question concerns not what it cost us but rather what we gained. The price can only be evaluated against the gain achieved. If this agreement leads to the end of North Korea’s nuclear
weapons program, then the price was surely modest. But will that be the end point as opposed to merely our objective and our hope? Earlier I gave my own view that North Korea wanted both nuclear weapons and whatever it could gain economically by using its nuclear program as a bargaining chip. In analyzing the agreement prudence dictates that we assume that they still want both. While the North Koreans may have gotten all they can expect for the moment in economic assistance, they have two reasons to want nuclear weapons. One is security, and the other is respect.

Let us take security first. The peninsula may well seem nearly as dangerous a place for the North as it does for the South, especially given the fact that it is the only territory lying between China, Russia, and Japan. The North Koreans and especially their leaders can easily equate nuclear weapons with independence and security. As for respect, they can hardly have missed the point that France and to a certain extent Britain have maintained an influence in world affairs not fully justified by their economic strength or their conventional military power.

These observations lead to two questions. First, will the North Koreans be able to generate a second tranche of assistance by backsliding on their commitments, and indeed perhaps a third and fourth tranche, especially because the light water reactor project is likely to slip past the presently projected eight year completion period? Second, will the North Koreans nevertheless be able to develop a nuclear weapons capability of some type despite the agreement, even if somewhat smaller and somewhat later than they would have been able to achieve on the path they were on? I note, in this last respect, that there is nothing in the published agreement that restricts their ballistic missile development program. Nor can we be sure that we have located all existing North Korean nuclear facilities. With the capability to deliver weapons of mass destruction, even a very small inventory of nuclear warheads would be destabilizing.

I have no doubt that the Administration worked as hard and as energetically as possible in the negotiations to foreclose such an outcome. Certainly, in Robert Gallucci the United States had an outstanding negotiator. Nevertheless, the Administration wanted an agreement and it “wanted it now.” Even
without access to the secret annex, one is therefore justified in making a few critical observations without disparaging what was actually accomplished.

On the positive side, the agreement breaks out of the limitations imposed by focusing solely on the IAEA's right to inspect and on demanding an accounting for what North Korea did in the past with plutonium from the 1989 unloading. The main thrust of the agreement is rather on the main point of what North Korea is going to do in the future with respect to its nuclear power reactors. The essence of the agreement is that North Korea will not refuel its small reactor and will not use the associated reprocessing plant but that it will freeze its two large "reactors and related facilities."

As for IAEA inspections, North Korea has agreed to allow the IAEA to "monitor" the freeze, though such a task is nowhere in the IAEA's charter, which may itself produce a problem. On the more general question of the inspections that the IAEA is empowered by its charter to carry out, North Korea has agreed to allow implementation of its existing safeguards agreement, but only after completion of the first stage of the light water reactor project, a five-year stage of pre-nuclear construction after letting of contracts. In short, implementation of safeguards to which North Korea is already committed is pushed off at least five years and in practice probably further into the future.

What about those undeclared waste sites? Here the agreed framework appears to pin down the North to inspection, albeit in coded language and after the five-plus years. At the end of the first construction stage the North agrees to "take all steps that may be deemed necessary by the IAEA, following consultations with the Agency with regard to verifying the accuracy and completeness of the [North's] initial report on all nuclear material in the [North]." That means that the IAEA is supposed to be able to take whatever steps it deems necessary to verify the amount of reprocessed plutonium and that means inspecting the waste sites. So far, so good. If, however, the North says that the waste sites need not be inspected, will we refuse to complete the light water reactors? I will raise later the possibility that some other country may want to complete the light water reactors. But in any event this contingency may well not arise until the term of the President elected in
November 2000. Or suppose the waste sites are then inspected and the inspection shows that at the beginning of the 1990's North Korea did indeed divert enough plutonium for one or two bombs or indeed more.\(^{12}\) Will we really then—ten years later—do something about it? Indeed, what will go on in the interim in those two sites and what will be left there once the inspectors are allowed in? For all of these reasons, while the waste sites are important politically now, the main thrust of the agreed framework should be viewed as what it does for the future in freezing the North's nuclear program.

The agreed framework also deals with the fuel rods unloaded earlier this year. The intention is mutually declared to store and then dispose of this spent fuel "in a safe manner that does not involve reprocessing in the [North]." Presumably this means shipping the spent fuel to another country. This part of the agreement goes beyond any possible North Korean obligations under the NPT and its existing safeguards agreement and so it involves a commitment to more than it was committed to before.\(^{13}\)

As for any commitment to renounce an ambition to acquire nuclear weapons, whether by covert development or by purchase, North Korea promises only to remain a party to the NPT. But of course North Korea by acceding to this agreement promises not to renounce its existing Article II commitment, which of course it had no right to renounce anyway. Here again the North has committed in the agreed framework to no more than what it was already committed to. In this regard, it is well to remember what the media tend to gloss over. The IAEA inspects nuclear power plants and related facilities to guard against diversion. It has no policy, indeed no legal power and certainly no practical capacity, to verify a country's intention or acts involving nuclear weapons. For example, the IAEA has no power to act against the acquisition of

\(^{12}\) The estimate of one or two bombs is based on the assumption that no fuel rods were unloaded between 1989 and 1994. That assumption could be wrong and hence the quantity of currently available plutonium could be greater.

\(^{13}\) I have read that there is agreement that shipments of the spent fuel to a third party must begin when the key nuclear components of the first light water reactor are delivered to North Korea and must be completed before that first reactor begins operations. Perhaps that is in the secret annex, but it is not in the published agreed framework.
nuclear components or even nuclear weapons themselves. Anything to be done along those lines must be done by the signatories themselves, which brings us full circle to diplomacy and force.

To look at the import of the agreement from another perspective, let us assume that the North has decided that it wants to have a nuclear weapons capacity but that it can wait. What about the two big reactors that can generate the plutonium for a dozen or more warheads per year? They are to be dismantled but the dismantlement does not have to be completed until the completion of the two light water reactors, which will be at minimum eight years from now. The published framework has no dismantlement schedule. But of course when the light water reactors near completion, the U.S. leverage is less. Remember that these North Korean reactors were to be finished about one and two years from now, respectively. Even assuming that no further work goes on at their site, is it not reasonable to believe that North Korea could secretly prepare elsewhere the capability to complete them even more rapidly as soon as the light water reactors come into operation? But, of course, the answer is that the Americans won't complete the light water reactors except in synchronization with the completion of the dismantlement. But let's examine that assumption about future American behavior critically.

If your mind has been trained by game theory to consider all possibilities, then you are well prepared to consider the North Korean understanding of the rules of negotiation. According to Larry Niksch, a Korean specialist at the Congressional Research Service, the North considers the "breaking of an agreement to be as legitimate a negotiating tool as signing one" and certainly their past attitude toward the NPT illustrates this principle. So let us recall that many countries have the capability to build light water reactors. Who knows what country might find an interest in helping the North complete an American project, especially if, as seems virtually certain given the primitive infrastructure in North Korea, the project falls behind schedule. I leave it to others to conjure up permutations and combinations of these possibilities, but in doing so

---

it is important to remember that diplomacy is the “art of the possible” and an agreement like this is never going to read like a bill of lading or a corporate indenture.

Even if the agreement works exactly as hoped by the American side, it nevertheless creates problems for non-proliferation policy generally. The most obvious point is that the United States has found itself forced to buy out North Korea’s existing nuclear program, providing it with oil that will relieve economic pressure imposed by the North’s shortage of hard currency and by giving it two brand new world-class nuclear power plants. The incentives for other developing countries, particularly those whose backward economic policies impose severe problems, are obvious. In that sense this agreement may turn out to be just one more complication in worldwide nuclear nonproliferation policy.

Another complicating factor for general nonproliferation policy is that the United States has just agreed to give North Korea what we have been strenuously arguing that Germany should not sell Iran—namely, light water reactors. These reactors, after all, do produce plutonium, the raw material of nuclear weapons, just not as much plutonium per unit of electoral output as North Korean-style graphite-moderated reactors. In fact, since the reactors’ capacity is so much larger than the reactors now under construction, it is a technical question what the comparative plutonium potential may be. At best then, the agreement will tend to force the United States to retreat from a policy of non-supply to one that focuses on safeguards concerning spent fuel. But this too is an area not covered by the published framework, except insofar as the new reactors will be subject to IAEA safeguards. According to press reports, the Pentagon objected to the provisions, presumably in the secret annex, about controls on North Korea’s use of the spent fuel from the light water reactors.15

The Alternative to Agreement

The conclusion that the agreement leaves much

---

to be desired is inevitable. But that is not entirely, or even mainly, the fault of Administration policy. Without the full support of Japan and China for economic sanctions and with what appears to be an equivocal position by South Korea (a country that even today is spending less than five percent of its GNP on its own defense),[^16] the United States was inevitably in the position of *demandeur*. What then was the alternative to this agreement? One alternative was the near certainty that down the line a few years the North would have had nuclear warheads and the missiles to deliver them.

With the completion of the two large graphite-moderated reactors, the North would have been in the position to make at least a dozen nuclear weapons a year.[^17] The technology of actually making a warhead is not obscure. Let us suppose that it put six in its military inventory and sold six to relieve its foreign currency constraint. This would be a double threat to world peace. First, who do you suppose would be the natural customers? Iran? Iraq? Syria? Libya? A newly fundamentalist Algeria? Already North Korea is marketing its newest generation ballistic missiles to Iran and Syria.[^16] One can only shudder at the consequences of allowing the nuclear program to go forward.

And what about the six it would add to its military forces each year? In view of the traditional Korean hostility to Japan, based on the long Japanese occupation from 1910 to 1945, Japan would almost certainly feel called upon to go nuclear itself. Strong as public opinion may be on the nuclear question, sporadic comments from Japanese politicians reveal that the nuclear question lurks not far below the surface of security thinking in governmental circles. Japan already has all the plutonium needed as well as reprocessing facilities, and no one can seriously doubt its technological ability to build warheads, missiles, and attack aircraft.

What we would then have is three very powerful nuclear nations—China, Russia, and Japan—facing

[^16]: Int’l Institute for Strategic Studies, supra note 9.
[^18]: Ibid.
each other at close range in the Northeast Asia. To this brew would be added a nuclear North Korea and, in that scenario, probably a nuclear South Korea as well. Carrying this scenario one step further a nuclear Japan might in turn lead to a unified nuclear Korea—seventy million strong—at the intersection of this triangular nuclear confrontation. This thought is enough to make the bipolar Cold War seem stability itself.

Conclusion

The North Korean example thus underscores not just the shortcomings of law, diplomacy, and force, especially when they are not tightly coupled, but it also shows how very high the stakes are in the successful use of all three in keeping the peace on this planet.

I recognize that I have not been able to deal with the full complexity of the nonproliferation problem. Rather I have taken what one can call a case study. Perhaps nuclear proliferation is inevitable, although one must recognize that it has not proceeded as rapidly this past fifty years as most experts predicted. Even if it is in the end inevitable, much is to be gained—including the lives of untold millions—by slowing it down. Dealing successfully with this problem requires dealing with the issues of security and respect that will drive countries to acquire nuclear weapons, just as it has already driven the so-called de facto nuclear states. This vast, complicated subject warrants more serious attention, especially at the highest levels of government, than it has been given.
No.1. "A Comment on Separation of Power"
   Philip B. Kurland, November 1, 1971.

No. 2. "The Shortage of Natural Gas"
   Edmund W. Kitch, February 1, 1972.

No. 3. "The Prosaic Sources of Prison Violence"

No. 4. "Conflicts of Interest in Corporate Law Practice"

No. 5. "Six Man Juries, Majority Verdicts—What Difference Do They Make?"

No. 6. "On Emergency Powers of the President: Every Inch a King?"

No. 7. "The Anatomy of Justice in Taxation"

No. 8. "An Approach to Law"

No. 9. "The New Consumerism and the Law School"

No. 10. "Congress and the Courts"
   Carl McGowan, April 17, 1975.

No. 11. "The Uneasy Case for Progressive Taxation in 1976"
   Walter J. Blum, November 19, 1976.
Franklin E. Zimring, January 24, 1977.

No. 13. "Talk to Entering Students"

Hans Zeisel, April 15, 1978.

No. 15. "Group Defamation"

No. 16. "The University Law School and Practical Education"

No. 17. "The Sovereignty of the Courts"

No. 18. "The Brothel Boy"

No. 19. "The Economists and the Problem of Monopoly"
George J. Stigler, July 1, 1983.

No. 20. "The Future of Gold"

No. 21. "The Limits of Antitrust"

No. 22. "Constitutionalism"

No. 23. "Reconsidering Miranda"

No. 24. "Blackmail"
No. 25. "The Twentieth-Century Revolution in Family Wealth Transmission"

Stuart E. Eizenstat, March 10, 1990.

No. 27. "Flag Burning and the Constitution"

No. 28. "The Institutional Structure of Production"

No. 29. "The Bill of Rights: A Century of Progress"
John Paul Stevens, December 1, 1992.

No. 30. "Remembering 'TM'"

No. 31. "Organ Transplantation: Or, Altruism Run Amuck"

No. 32. "The Constitution in Congress: The First Congress, 1789-1791"

No. 33. "Law, Diplomacy, and Force: North Korea and the Bomb"