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The Jurisprudence of Non-Proliferation: Taking International Law Seriously

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THE JURISPRUDENCE OF NON- PROLIFERATION: Taking International Law Seriously

*by David A. Koplow**

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I. INTRODUCTION

Skeptical people often make the mistake of thinking that international affairs in general, and arms control matters in particular, are solely questions of policy, not law. They assert that the great public issues of the day are considered and resolved entirely on high political grounds, with national leaders acting in calculated pursuit of raw national interests—and law is added, if at all, as an afterthought, a makeweight in formal deliberations, or a post hoc “cover” for actions truly undertaken for other reasons.

This colloquial perspective neglects a host of compelling questions—including the conundrum of whether there can be, at core, any meaningful distinction between the notions of “law,” “policy,” “morality,” and the like¹—but as with all good public myths, it contains a grain of truth. Too many crucial international decisions are still undertaken with insufficient attention to the dictates of binding international obligations; too many wanton violations of international order and justice survive unpunished; and too many national leaders behave with unwarranted ignorance of the long-term implications of their lawless behaviors.

But international law is more than just an ephemeral debating point. In disarmament, as in other salient aspects of international life, law has meaning and impact. It guides behaviors, shapes expectations, undergirds notions of appropriateness and legitimacy, and, in the extreme, provides at least an imperfect collective format for redress of violations and other grievances. In the area of arms non-proliferation, in particular, law can be one of the sinews that binds the community of nations, contributing valuably to the overall effort to retard the spread of dangerous weaponry.

This essay is about the power of the international law of non-proliferation—its mounting power in the world today and its properly augmented power in an enlightened future. The article focuses on three primary areas in which international law may play a greater role than is commonly appreciated in affecting the behavior of potential proliferators, their suppliers, and their resolute opponents. The three topics—areas in which the essay pleads for law to be taken even more seriously, and by a wider audience of governments and the international public—are: (a) treaties (especially the provisions of those treaties that commit the parties to pursue further incremental measures of disarmament); (b)

1. See, e.g., W. Michael Reisman, *Law from the Policy Perspective*, in *INTERNATIONAL LAW ESSAYS: A SUPPLEMENT TO INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 1* (Myres McDougal & W. Michael Reisman eds., 1981).

customary international law (especially those aspects of behavior-based jurisprudence which provide unwritten, but nevertheless binding, constraints upon the preparation for and conduct of state violence); and (c) disarmament institutions (especially those novel multilateral organizations that have recently sprung up to play a variety of fact-finding, confidence-building, and dispute-resolution functions).

In all of this, the core notion is the suggestion that international law works, and that it would work even better if more people would notice it and come to understand how lawfulness advances their own self-interest. Louis Henkin's observation that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time"² is still true today (and parenthetically is also about as strong a statement as one could realistically support for compliance with most domestic American legal standards). As Burns Weston has noted, every day vehicles ply the highways and the oceans in international commerce, electronic impulses pierce the ether in international communications, and capital surges to exploit new opportunities in international finance.³ Law alone can hardly claim all the credit for this commercial symbiosis, but it does help shape and sustain the framework of people and institutions that makes it all feasible. The international law of non-proliferation can and should now aspire to similar coverage and impact in safeguarding the modern world.

People around the planet already act as if they believe international law matters. States generally try to position themselves on the high side of a jurisprudential controversy, offering rhetorical justifications that can serve to legitimate their arguments—and sometimes they actually change their policies in order to conform to the dictates of the international community. In the midst of the confrontation with Iraq, for example, the Bush administration regularly cited international law as a primary explanation for American participation:⁴ one of the principal reasons why we were

2. LOUIS HENKIN, *HOW NATIONS BEHAVE* 47 (2d ed. 1979).

3. Burns H. Weston, *Law and Alternative Security: Toward a Just World Peace*, in *ALTERNATIVE SECURITY: LIVING WITHOUT NUCLEAR DETERRENCE* 78, 80 (Burns H. Weston ed., 1990).

4. In press conferences and speeches, President Bush frequently invoked notions of international law to condemn the Iraqi aggression and explain the American and coalition responses. See *Transcript of News Session by Bush and 2 Officials on Mideast*, N.Y. TIMES, Aug. 23, 1990, at A16; *Mideast Tensions: Excerpts From Bush's Remarks on His Order to Enlarge U.S. Gulf Force*, N.Y. TIMES, Nov. 9, 1990, at A12; Exchange With Reporters on the Persian Gulf Crisis, 26 WKLY. COMP. PRES. DOC. 1709, 1710 (1990); The President's News Conference, 26 WKLY. COMP. PRES. DOC. 1257, 1257-1258 (1990).

engaged in hostilities was to uphold the rule of law enshrined in the Charter of the United Nations.⁵ The Bush administration seems generally to have attempted—albeit, with incomplete success⁶—to initiate and conduct those hostilities in conformity with relevant international law strictures;⁷ at least the government *said* that pursuit of a “new world order,” based upon newfound respect for international law, was an important consideration.⁸

Today, the world has a new opportunity to reconfigure, or at least to reconceptualize, global politics, affording us a second chance to avoid repeating—in a new, even more hazardous milieu—some of the security errors of previous generations. During the depths of the Cold War, the United States routinely invoked legal trappings and vocabulary in grappling with the Soviet Union, but even the protagonists never took this assertion of international law quite seriously. For example, American leaders in the early 1980s began issuing annual “compliance reports,”⁹ which detailed allegations of perfidious Soviet behavior relative to sequential arms control accords, and they routinely averred that unresolved violations of these treaties were an exceptionally grave matter, calling into

5. U.N. CHARTER, June 26, 1945, 59 Stat. 1031. Of course, the U.S. government was not nearly so solicitous of U.N. opinion in previous, less globally popular military incursions, such as the invasions of Panama or Grenada. Even there, however, American diplomats attempted to argue that the actions were justified under various doctrines permitting the unilateral use of force—seeking to shelter the United States actions under the rubric of legality. Ved P. Nanda, *The Validity of United States Intervention in Panama under International Law*, 84 AM. J. INT'L L. 494 (1990); Stuart Taylor, Jr., *Legal Basis for Invasion*, N.Y. TIMES, Oct. 27, 1983, at A22.

6. Richard Homan, *Report Says U.S.-Led Air Campaign Against Iraq Violated “Laws of War,”* WASH. POST, Nov. 17, 1991, at A37; Patrick J. Sloyan, *Army Said to Plow Under Possibly Thousands of Iraqi Soldiers in Trenches*, WASH. POST, Sept. 12, 1991, at A9.

7. Some have argued that the initiation of the sanctions and the fighting against Iraq did not conform properly to United Nations standards, as the United States manipulated the proceedings, merely going through the motions of Security Council consideration while threatening unilateral action if the coalition members did not acquiesce. Burns H. Weston, *Security Council Resolution 678 and Persian Gulf Decision-Making: Precarious Legitimacy*, 85 AM. J. INT'L L. 516 (1991).

8. *Confrontation in the Gulf: Transcript of President's address to joint session of Congress*, reprinted in N.Y. TIMES, Sept. 12, 1990, at A20 (describing the objective of a “new world order” and asserting “today that new world is struggling to be born. A world quite different from the one we've known. A world where the rule of law supplants the rule of the jungle.... America and the world must support the rule of law. And we will.”).

9. See, e.g., U.S. DEP'T. ST. SPECIAL REPORT NO. 122, *Soviet Noncompliance With Arms Control Agreements*, Feb. 1, 1985. This type of compliance report has now become an annual event, mandated by statute.

question Soviet good faith and jeopardizing prospects for success on a wide range of collaborative efforts.¹⁰ At the same time, however, it was abundantly clear that these quasi-legal documents were entirely artificial. They were in no way an attempt to fashion workable, mutually-acceptable solutions; instead, they were part of a deliberate effort to isolate and denigrate the Soviet Union, using treaty law as a handy club with which to batter the "evil empire."¹¹

Similar tactics today would have even less productive consequences. If Iraq is to be brought back into the community of nations, and if repetition of its disastrous aggression is to be avoided, law will have to play a key role in creating and sustaining a disarmament and inspection regime.¹² If nuclear confrontation is to be avoided on the Korean peninsula,¹³ on the Indian subcontinent,¹⁴ or in Latin America,¹⁵ legal documents and processes must be viable. If chemical weapons are to be truly eradicated from the earth, a strict and manageable compliance mechanism will have to arise.¹⁶ Of course politics will play a leading role in all this, but law, too, has a function—a function too often ignored.

10. *Id.* at 2.

11. See *Analysis of the President's Report on Soviet Noncompliance With Arms Control Agreements*, 17 *ARMS CONTROL TODAY* 1A (1987); Stuart D. Goldman, *Verification and Compliance: Soviet Compliance With Arms Control Agreements*, CONGRESSIONAL RESEARCH SERVICE ISSUE BRIEF, June 9, 1989 (arguing that the administration's compliance reports were consistently overstated or one-sided). Taking international law seriously does, of course, include careful monitoring of arms control agreements, and faithful adherence by all parties is key. If the United States was truly interested in resolving the disputes, various diplomatic approaches might have been attempted; however, this was manifestly not what the Administration pursued.

12. See George Leopold, *U.N. Inspections Lift Verification Role*, *DEF. NEWS*, May 4-10, 1992, at 9-10 (intrusive inspections are necessary to root out Iraqi weapons of mass destruction).

13. See David E. Sanger, *North Korea Reveals Nuclear Sites to Atomic Agency*, *N.Y. TIMES*, May 7, 1992, at A8 (national reports and international inspections may unwrap mystery surrounding North Korean nuclear weapons programs).

14. See Sanjoy Hazarika, *Moscow Affirms Sale of Technology to India*, *N.Y. TIMES*, May 7, 1992, at A7 (transfers of weapons-related technology threaten to exacerbate India-Pakistan tensions and weapons competition).

15. See Gary Marx, *S. American Nuclear Threat Fades*, *CHI. TRIB.*, May 3, 1992, at C21 (Argentina and Brazil have signed treaties to terminate their incipient nuclear arms race).

16. See Lee Feinstein, *Australia Offers New Draft Treaty at Chemical Weapons Negotiations*, 22 *ARMS CONTROL TODAY* 20 (1992) (new verification proposals might help permit conclusion of a chemical weapons ban).

II. TAKING DISARMAMENT TREATIES SERIOUSLY

The first step in elevating international law is to place greater emphasis upon solemn treaty commitments. Disarmament agreements are the clearest, most reliable and visible form of state assent to the creation of a safer world. Their words should be scrutinized with care, and their obligations should be enforced, not casually dismissed as merely vague or aspirational.

Obviously, the primary effect of most disarmament accords lies in the substantive regulation of weaponry.¹⁷ Specified categories of arms may be banned outright¹⁸ or, more frequently, limited in number,¹⁹ and their deployment²⁰ or use²¹ may be circumscribed. Verification arrangements in support of these substantive bans often consume a disproportionate share of the negotiators' time and text,²²

17. Some agreements are designed as "confidence-building measures," enhancing the "transparency" of countries' military structures (via devices such as notifications of maneuvers or invitations for inspection) and easing the fears about a possible surprise attack, even without reducing the sides' military forces. *See, e.g.*, Document of the Stockholm Conference on Confidence- and Security-Building Measures and Disarmament in Europe, Sept. 19, 1986, *reprinted in* UNITED STATES ARMS CONTROL AND DISARMAMENT AGENCY, ARMS CONTROL AND DISARMAMENT AGREEMENTS: TEXTS AND HISTORIES OF THE NEGOTIATIONS 319, 323 (1990) [hereinafter ACDA TREATY BOOK]; Treaty on Open Skies, Mar. 24, 1992 (on file with *Transnational Law & Contemporary Problems*) [hereinafter Open Skies Treaty].

18. *See, e.g.*, Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 U.S.T. 583 [hereinafter Biological Weapons Convention or BWC] (prohibits virtually all offensive activity regarding germ warfare).

19. *See, e.g.*, Treaty on the Limitation of Strategic Offensive Arms, June 18, 1979, U.S.-U.S.S.R., 18 I.L.M. 1112 [hereinafter SALT II Treaty] (not in force) (under which each side would have been permitted to retain a fixed number of nuclear weapons in several categories, reducing their total armaments).

20. *See, e.g.*, Treaty on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, U.S.-U.S.S.R., 23 U.S.T. 3435 [hereinafter ABM Treaty] (permitted each side no more than two anti-ballistic missile sites, each of which could include no more than 100 interceptor missiles).

21. *See, e.g.*, Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571 [hereinafter Geneva Protocol] (prohibits the use in war of chemical weaponry).

22. *See, e.g.*, Treaty on the Reduction and Limitation of Strategic Offensive Arms, U.S.-U.S.S.R., July 31, 1991 [hereinafter START Treaty] (not in force) (where the substantive arms control provisions are stated succinctly, but where the associated inspection provisions, dismantling arrangements, data accounting procedures, and the like required great elaboration).

but the underlying obligations mandating arms limitation constitute the main rationale for the agreement and the principal advantage for global security.

In addition to this immediate weapons limitation impact, however, several modern arms control accords have also come to fulfill an important subsidiary role, worthy of greater attention. These treaties deliberately contribute to the long-term growth of international security by helping to establish and entrench "the arms control process," defined as a regularized, ongoing phenomenon through which the major military powers commit themselves to the institutionalization of disarmament proceedings, conveying reciprocal promises to pursue even further measures of weapons regulation over time. Although little noticed, these commitments already have played a significant role in generating additional negotiations, in driving the parties to further diplomatic exchanges, and in promoting a more constructive, amicable "detente" relationship across a broad range of issues.²³

Four examples help illustrate the pattern of these treaty commitments and the role they play in shaping international diplomacy. Each merits review.

A. Nuclear Testing

Most leading states of the world have long adhered to the view that a comprehensive test ban treaty (CTBT) would be enormously valuable in regulating the proliferation of nuclear arms and in checking the superpowers' "qualitative" arms race.²⁴ Nevertheless, it has so far proven possible to approach this ultimate goal only incrementally, in a sequence of step-by-step advances, each imposing only partial constraints upon nuclear testing.

23. On the other hand, some observers argued that throughout the Cold War period, the United States and Soviet Union cynically used these partial measures of arms control to protect their planned weapons programs, to evade real efforts at disarmament, and to perpetuate their shared global hegemony. ALVA MYRDAL, *THE GAME OF DISARMAMENT: HOW THE UNITED STATES AND RUSSIA RUN THE ARMS RACE* xi-xxiv (rev. ed., 1982).

24. PHILIP G. SCHRAG, *GLOBAL ACTION: NUCLEAR TEST BAN DIPLOMACY AT THE END OF THE COLD WAR* 7-31 (1992); INTERNATIONAL FOUNDATION, *TOWARD A COMPREHENSIVE NUCLEAR WARHEAD TEST BAN* 3-11 (1991). Proponents assert that a CTBT would promote security in two ways: by inhibiting additional states who might otherwise attempt to develop nuclear weapons (a country might not need explosive tests in order to develop a crude fission "atomic" bomb, but would require testing to be confident about any more sophisticated weapons such as a fusion "hydrogen" bomb); and by complicating any efforts by the states that already possess nuclear weapons to develop additional, more advanced types of devices (the "qualitative" arms race).

The Limited Test Ban Treaty (LTBT) of 1963²⁵ was the first such step, confining nuclear explosions to deep underground locations, where the radioactivity and other effects would not disturb the biosphere.²⁶ Dissatisfied with their inability to get closer to a CTBT, the parties declared in the LTBT preamble that they were "[s]eeking to achieve the discontinuance of all test explosions of nuclear weapons for all time, determined to continue negotiations to this end, and desiring to put an end to the contamination of man's environment by radioactive substances."²⁷

In addition, in article I of the LTBT, immediately after stating the substantive bans against testing in the atmosphere, in outer space or under water, the parties stated,

It is understood in this connection that the provisions of this subparagraph are without prejudice to the conclusion of a treaty resulting in the permanent banning of all nuclear test explosions, including all such explosions underground, the conclusion of which, as the Parties have stated in the Preamble to this Treaty, they seek to achieve.²⁸

The next contribution to this incremental progression was the 1974 Threshold Test Ban Treaty (TTBT),²⁹ which regulated the size of underground nuclear explosions, confining each test to no greater than the equivalent of 150 kilotons of TNT.³⁰ There the parties reaffirmed the commitment to pursue a CTBT, again using both the

25. Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, Aug. 5, 1963, 14 U.S.T. 1313 [hereinafter Limited Test Ban Treaty or LTBT].

26. The United States and the Soviet Union negotiated toward a CTBT over a period of several years, but were unable to fashion a mutually-satisfactory inspection regime that would adequately verify compliance with a complete halt to testing. Therefore they settled for a partial accord which would eliminate testing in the atmosphere, in outer space, and under water, where the existing verification capabilities were deemed sufficient. See ACDA TREATY BOOK, *supra* note 17, at 37-44; SCHRAG, *supra* note 24, at 7-19.

27. LTBT, *supra* note 25, pmb., para. 3.

28. *Id.* art. I.1(b).

29. Treaty on the Limitation of Underground Nuclear Weapon Tests, July 3, 1974, U.S.-U.S.S.R., 13 I.L.M. 907 [hereinafter Threshold Test Ban Treaty or TTBT].

30. The TTBT prohibits the full testing of nuclear weapons with very high yields, preventing some possible twists in the strategic nuclear arms race. Many observers, however, contended that the 150 kiloton ceiling (roughly 10 times the size of the Hiroshima bomb) is so high that the superpowers are not, as a practical matter, restrained from doing anything that they would otherwise elect to do. ACDA TREATY BOOK, *supra* note 17, at 184-86; SCHRAG, *supra* note 24, at 19-23.

preamble³¹ and article I³² to express their determination to continue their negotiations toward that end.

Since then, the United States and the former Soviet Union have negotiated additional accords: a 1976 Peaceful Nuclear Explosions Treaty (PNET),³³ designed to apply restrictions similar to the TTBT in the case of nuclear explosions other than weapons tests;³⁴ a 1990 protocol inserting additional verification arrangements into the TTBT;³⁵ and a companion 1990 protocol providing parallel inspection procedures for the PNET.³⁶

Although each of these treaties seemed to elicit the next step in the progression, no true comprehensive nuclear test ban agreement has yet been reached, and no bilateral or multilateral negotiations toward such a CTBT currently are underway.³⁷ The Reagan administration, after long resisting meaningful progress toward a test ban treaty, ultimately reaffirmed CTBT as an eventual goal of the United States. The Bush administration, however, has not made good on the pledge to proceed with negotiations toward that end.³⁸

31. TTBT, *supra* note 29, pmbl, para. 3. ("Recalling the determination expressed by the Parties to the 1963 Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water in its Preamble to seek to achieve the discontinuance of all test explosions of nuclear weapons for all time, and to continue negotiations to this end."). *Id.*

32. *Id.* art. I.3 ("The Parties shall continue their negotiations with a view toward achieving a solution to the problem of the cessation of all underground nuclear weapon tests.")

33. Treaty on Underground Nuclear Explosions for Peaceful Purposes, May 28, 1976, U.S.-U.S.S.R., 15 I.L.M. 894 [hereinafter Peaceful Nuclear Explosions Treaty or PNET]. The TTBT and PNET did not enter into force until 1990.

34. The PNET was a companion to the TTBT—neither could enter into force without the other—in order to prevent a party from circumventing the TTBT's limitations on weapons tests through the guise of a "peaceful" nuclear explosion, allegedly undertaken for mining or civil engineering purposes. ACDA TREATY BOOK, *supra* note 17, at 191-93; SCHRAG, *supra* note 24, at 19-23.

35. Protocol to the Threshold Test Ban Treaty on the Limitation of Underground Nuclear Weapon Tests, June 1, 1990, U.S.-U.S.S.R., 29 I.L.M. 969 [hereinafter TTBT Protocol].

36. Protocol to the Threshold Test Ban Treaty on Underground Nuclear Explosions for Peaceful Purposes, June 1, 1990, U.S.-U.S.S.R., 29 I.L.M. 1025.

37. There were negotiations toward a CTBT during the Carter Administration, and substantial areas of agreement were reached, but the parties were unable to conclude a treaty. SCHRAG, *supra* note 24, at 23-27.

38. *Id.* at 83, 187-88; R. Jeffrey Smith, *Breaking Pledge, U.S. to Defer Underground Nuclear Test Talks*, WASH. POST, Jan. 24, 1990, at A24 [hereinafter *Breaking Pledge*]. Recently, there have been indications that the Bush Administration would be willing to be somewhat flexible on test ban questions, and some additional limitations—but no

What has been the consequence of this pattern of actions? The world—led largely by the United States—has undertaken a series of steps edging part way down the test ban path, and securing widespread adherence. On the other hand, the world—again, largely at the behest of the United States—has refrained from concluding a CTBT, stopping with, at best, a miserly approach to the legal obligations for continuing negotiations as spelled out in the earlier documents. At the same time, the capacity to conduct nuclear weapons test explosions has proliferated (half a dozen additional states have *de facto* joined the “nuclear club” since 1963, and others are working vigorously in that direction)³⁹ and the superpowers’ arms race continued (at least until very recently) with undiminished vigor.⁴⁰

It is, of course, impossible to calculate what the world would have been like had the community been able to secure a CTBT in conformity with the pre-existing commitments at an earlier date. Certainly, at least some weapons programs in the superpower countries and elsewhere, would have been choked off; others might have found a new way to flourish. But it is increasingly clear, as noted below, that the international political and legal consequences of the United States’ ongoing adamant refusal to continue the accretion of testing limitations, called for in the earlier treaties, could soon prove hazardous for the entire global non-proliferation regime, as well as for the system of international law more generally.

B. Chemical and Biological Weapons

The second illustration of an arms control treaty mandating follow-on negotiations toward a more complete, ambitious or significant successor is the 1972 Biological Weapons Convention (BWC).⁴¹ There, the negotiating parties were building upon an international diplomatic history that had, at times, treated both chemical and biological weapons as linked parts of a whole, so that

international negotiations—may yet emerge. R. Jeffrey Smith, *Administration Considers Limiting Nuclear Tests; Options Prepared for Bush as Summit Nears*, WASH. POST, May 25, 1992, at A1.

39. LEONARD SPECTOR, *THE UNDECLARED BOMB* 3-22 (1988) (surveying nuclear weapons-related activities in several developing countries).

40. *See generally* RUTH SIVARD, *WORLD MILITARY AND SOCIAL EXPENDITURES 1991; UNITED STATES ARMS CONTROL AND DISARMAMENT AGENCY, WORLD MILITARY EXPENDITURES AND ARMS TRANSFERS 1990* (1991) (surveying global military spending).

41. BWC, *supra* note 18.

any disarmament accord should deal with both simultaneously.⁴² At other times, however, the relevant states had concluded that the overall problem should be fractured, to permit immediate progress on biological weapons (which were seen as having little military utility, and were therefore relatively easy for the partisans to surrender),⁴³ while deferring work on chemical weapons (which, in addition to possessing potential military value, relied upon precursor substances widely used in the civilian chemical industry and therefore posing severe verification hurdles).⁴⁴

Eventually, the treaty drafters decided to pursue the bifurcated approach, drafting a BW-only treaty, but including in it a commitment to attack resolutely the other half of the problem, too.⁴⁵ Therefore, in article IX, BWC parties undertook "to continue negotiations in good faith with a view to reaching early agreement on effective measures for the prohibition" of chemical weapons.⁴⁶ Over the intervening two decades, negotiations toward a CW accord have proceeded fitfully in a variety of bilateral and multilateral fora, and it now appears that the long-awaited document has finally emerged.⁴⁷ This Chemical Weapons Convention thus satisfies the aspirations and obligations originally expressed (and legally adopted) in 1972.

The two decades of delay, however, have carried a substantial price. Imperfect compliance with the legal obligations has kept the door open for additional countries to develop and to apply chemical

42. ACDA TREATY BOOK, *supra* note 17, at 129-30. Biological and chemical weapons have been closely linked in the public mind, and the 1925 Geneva Protocol dealt with both categories of weapons. Geneva Protocol, *supra* note 21.

43. In 1969—three years prior to the conclusion of the BWC—President Richard Nixon unilaterally renounced all methods of biological warfare for the United States and ordered the dismantling of all offensive BW capabilities, independent of any reciprocal actions by other countries. ACDA TREATY BOOK, *supra* note 17, at 130.

44. See VERIFICATION OF DUAL-USE CHEMICALS UNDER THE CHEMICAL WEAPONS CONVENTION: THE CASE OF THIODIGLYCOL *passim* (S. Lundin ed., 1991) (many of the chemicals that could be used to produce lethal weaponry are simultaneously essential to a range of applications such as plastics, paints, fertilizers, and the like, so any effort to ban the weaponry also threatens to inhibit valuable commerce).

45. ACDA TREATY BOOK, *supra* note 17, at 130-31.

46. BWC, *supra* note 18, art. IX.

47. Will Carpenter, *Completing the Chemical Weapons Convention: An Industry View*, CHEMICAL WEAPONS CONVENTION BULL., Mar. 1992, at 1; Raff Trapp, *Into the "End Game,"* CHEMICAL WEAPONS CONVENTION BULL., Mar. 1992, at 21. The Chemical Weapons Convention will be a comprehensive global ban on the production, deployment and use of lethal chemical weapons in international hostilities. Treaty negotiations have recently produced a final text, which was opened for signature in early 1993.

weapons in combat, and experts now estimate that as many as twenty states have deployed or pursued undeclared CW arsenals.⁴⁸ The longstanding taboo against the use of CW has at least partially eroded, and people died on both sides from exposure to chemical ordnance during the Iran-Iraq war.⁴⁹ There is, of course, no way of knowing how world events would have unfolded had the 1972 BWC pledge been redeemed earlier, but the negotiators at that time thought it was important, and hoped that a prompt CW agreement could help forestall this type of calamity. The resulting losses for United States security—manifested most recently in the discovery of a massive Iraqi chemical weapons industry⁵⁰—might therefore have been avoided.

C. Strategic Nuclear Weapons

The third example concerns strategic nuclear weaponry. Here, too, the evolutionary progression has taken the form of a series of partial, incomplete accords, each of which consciously pointed the way for its successor. In the SALT I negotiations, for example, the United States and the Soviet Union emplaced a pathbreaking set of constraints upon both offensive and defensive weaponry, and explicitly committed themselves “to continue active negotiations” on deeper reductions.⁵¹ In fact, the United States declared that if those further reductions were not promptly forthcoming, such a failure might jeopardize American willingness to continue adherence with even the first phase of the controls.⁵²

The next round of those negotiations, therefore, produced the 1979 SALT II treaty.⁵³ The most massive and detailed agreement negotiated to that time, SALT II incorporated a delicate balancing of asymmetric reductions and limitations upon the United States and the Soviet Union.⁵⁴ Some weapons were to be drawn down immediately, others were permitted over a longer period of time, and

48. GORDON BURCK & CHARLES FLOWERREE, *INTERNATIONAL HANDBOOK ON CHEMICAL WEAPONS PROLIFERATION* xx-xxi (1991).

49. *Id.* at 85-137.

50. *Id.* at 35-84.

51. ABM Treaty, *supra* note 20, art. XI; Interim Agreement on Certain Measures With Respect to the Limitation of Strategic Offensive Arms, May 26, 1972, U.S.-U.S.S.R., 23 U.S.T. 3462, art. VII [hereinafter SALT I Interim Agreement].

52. ABM Treaty, *supra* note 20, Unilateral Statement A; SALT I Interim Agreement, *supra* note 51, Unilateral Statement A.

53. SALT II Treaty, *supra* note 19.

54. ACDA TREATY BOOK, *supra* note 17, at 261-66.

still others were deferred to subsequent deliberations.⁵⁵ Consequently, the parties included in the package of treaty documents a "Joint Statement of Principles and Guidelines for Subsequent Negotiations on the Limitation of Strategic Arms."⁵⁶ The Joint Statement incorporated some rather general principles, such as "equality and equal security"⁵⁷ and "cooperative measures" of verification.⁵⁸ However, there was also language clearly laying down markers that some of the more problematic issues (such as cruise missiles) that had been incompletely resolved in SALT II would have to be dealt with more definitively in the next round of talks.⁵⁹

Although the SALT II Treaty never entered into force,⁶⁰ subsequent negotiations, under the rubric of START,⁶¹ did proceed, and did, *mutatis mutandis*, deal with the points indicated in the Joint Statement of Principles. Deeper cuts in offensive arms, together with coverage of the wider range of weapons types—all circumscribed by an intrusive verification apparatus—were written into the successor agreement, just as SALT II had forecast and required.⁶²

The commitment to negotiate additional treaties and deeper reductions in strategic offensive arms has therefore been honored, but only slowly and incompletely. In the meantime, however, the United States and the Soviet Union both squandered their national resources on billions of dollars worth of arms race gadgets, they imperiled the planet with the threat of massive "overkill," and they perpetuated a system of "mutual assured destruction" which

55. During the initial period of the treaty, each side was permitted a total of 2400 strategic weapons, and the ceiling was to be lowered to 2250 within three years. SALT II Treaty, *supra* note 19, arts. III.1 and III.2.

56. SALT II Treaty, *supra* note 19, Joint Statement of Principles [hereinafter JSP].

57. *Id.* first para.

58. *Id.* second para.

59. *Id.* third para. This provision directed attention at the Protocol to the treaty, in which the parties constructed an interim regime to regulate cruise missiles and mobile ICBMs, pending a more comprehensive successor agreement.

60. After the SALT II Treaty was signed and submitted to the Senate, and while the advice and consent process was pending, the Soviet Union invaded Afghanistan. President Carter then asked that the Senate defer its consideration of the treaty. He and President Reagan both issued statements of intention to abide by the unratified document so long as the Soviet Union reciprocated. In 1986, President Reagan declared that the Soviets had not honored their commitment, and he abrogated American compliance. ACDA TREATY BOOK, *supra* note 17, at 263.

61. START Treaty, *supra* note 22.

62. *Id.* art. II.

contributed to the “psychic numbing” of their citizenry.⁶³ Greater fidelity to their legal obligations—and better appreciation for the strategic and economic realities underpinning them—might have resulted in a shorter, safer, and more prosperous cold war era on all sides.

D. Nuclear Non-Proliferation

The final, and most important, example of legally-compelled incremental progress in arms control comes from article VI of the 1968 Nuclear Non-Proliferation Treaty.⁶⁴ This document, widely regarded as the keystone of the global effort to prohibit the further spread of nuclear weapons capability,⁶⁵ embraces a complex set of tradeoffs in pursuit of security and economic growth. The non-nuclear-weapons states (NNWS) pledge never to develop or acquire nuclear weapons⁶⁶ and to accept international inspections to verify compliance with that ban.⁶⁷ The nuclear-weapons states (NWS) conversely promise to refrain from assisting other states in procuring nuclear weapons,⁶⁸ to share the peaceful and civilian benefits of nuclear power,⁶⁹ and—most importantly in this context—to arrest their own pursuit of nuclear arms:

Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and

63. Mutual Assured Destruction (MAD) is the doctrine positing that security in the nuclear age is achieved when each side is confident that it possesses sufficient retaliatory capability to deliver a devastating blow to its opponent, even after absorbing an all-out surprise first attack. Under this premise, each side’s civilian population is essentially hostage to the other’s nuclear prowess, a condition of reciprocal vulnerability that has strong negative consequences for national mental health and psychic well-being. See Spurgeon M. Keeny, Jr. & Wolfgang K. H. Panofsky, *MAD Versus NUTS: Can Doctrine or Weaponry Remedy the Mutual Hostage Relationship of the Superpowers*, 60 FOREIGN AFF. 287 (1981); ROBERT J. LIFTON & RICHARD FALK, *INDEFENSIBLE WEAPONS: THE POLITICAL AND PSYCHOLOGICAL CASE AGAINST NUCLEARISM* 177-89 (1982).

64. Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483 [hereinafter NPT].

65. Mohamed Shaker, *The Nonproliferation Treaty Regime*, in BEYOND 1995: THE FUTURE OF THE NPT REGIME 7 (Joseph Pilat & Robert Pendley eds., 1990).

66. NPT, *supra* note 64, art. II.

67. *Id.* art. III.

68. *Id.* art. I.

69. *Id.* arts. IV and V.

complete disarmament under strict and effective international control.⁷⁰

Compliance with article VI has recently become controversial because at least some leading NNWS have adopted the view that behind the rather generic language of the treaty lies a deeper understanding that a comprehensive nuclear test ban treaty, in particular, is mandated.⁷¹ That is, some partisans have asserted that despite the raft of monumental arms control accords in recent years (limiting in dramatic fashion intermediate range weapons, strategic arms, conventional forces in Europe, etc.), article VI will not be satisfied until the superpowers conclude a CTBT.⁷²

However, the United States has refused for a decade to negotiate toward, or even talk constructively about, a CTBT. American leaders have denied that article VI really targeted a CTBT in any special way, and have asserted that further restrictions upon testing are not in the national interest as long as the country depends upon nuclear weapons as a bulwark of deterrence.⁷³

This issue will be joined in stark form in the coming months because the NPT also includes a novel "renewal" article, mandating that after the treaty has been in force for twenty-five years (i.e., in 1995), a conference of parties will be convened to decide the future of the treaty regime. If many NNWS states are dissatisfied with the record of United States (and other) compliance with article VI—especially regarding the failure to produce, or even pursue, a CTBT—then a consensual extension of the NPT could be in doubt. The international community will therefore be plunged into a debate about the content of article VI: what types of disarmament measures does it really require, and what is the nature of "good faith" in such negotiations?

The point illustrated by these four examples, is that international law plays a role in influencing state behaviors, and, more importantly, that it should play an even bigger role. These treaty

70. *Id.* art. VI.

71. See Darryl Howlett & John Simpson, *The NPT and the CTBT: An Inextricable Relationship?*, Programme for Promoting Nuclear Non-Proliferation, Issue Review No. 1, Mar. 1992, at 6.

72. Under the NPT, a "review conference" convenes every five years to assess the operation of the treaty. Two of the previous four such meetings have ended in disarray, with the participants unable to reach consensus upon any type of joint concluding statement. The primary reason for this anomie has been the ongoing dispute about CTBT, with some NNWS asserting that a test ban treaty is an essential component for satisfaction of article VI, and with the United States insisting otherwise. SCHRAG, *supra* note 24, at 127-31; Howlett & Simpson, *supra* note 71, at 6.

73. SCHRAG, *supra* note 24, at 83, 187-88; *Breaking Pledge*, *supra* note 38, at 24.

commitments to pursue additional measures of arms control—and others could easily be added to the list of illustrations⁷⁴—are more than hortatory. Even if imprecisely articulated or cast in rather general, long-term vocabulary, they are part of binding international law, and ought to be taken seriously. No one could prove that the mandate for follow-on negotiations *caused* the subsequent treaties identified above—in each instance, multiple factors were at play in eliciting that progress. But international lawyers should not overlook those treaty provisions, either—we should highlight them, underscore their importance, and stress that they are binding obligations that a law-abiding society ought to respect.

The BWC promise to conclude a chemical weapons accord should have been honored far sooner—the world should not have had to wait twenty years for the next meaningful step. The LTBT and TTBT obligations to work toward a CTBT should not be dismissed as merely aspirational—they have the force of law. The NPT article VI language also has some teeth: a requirement to negotiate “in good faith” may be vague, but it is not meaningless. Where a country simply changes its mind about the feasibility or wisdom of a treaty commitment—even if a major power such as the United States reverses itself on strategic doctrine—the treaty obligation still stands, and should not be blithely evaded.

Thus the United States has, through these various arms control agreements, voluntarily assumed a set of binding obligations under international law to pursue further measures of weapons regulation. Perhaps, in some instances, these undertakings were accepted casually or cavalierly, not quite comprehending the eventual import of the clauses. Perhaps the treaty drafters could have exercised greater precision and clarity, implanting precise timetables and specifying the contents of the future accords. Perhaps the strategic situation has changed in key ways, and new military and foreign policy approaches should now be adopted in the new milieu. But the fundamental international law principle of *pacta sunt servanda* remains, and the United States and others have accumulated a record of, at best, partial and tardy compliance with these commitments. Doing more than this is now required not merely by considerations of policy and strategy, but by law.

Taking law seriously means, first of all, taking treaty obligations seriously. Treaties are the “coin of the realm” in international

74. Other arms control treaties, too, have mandated or otherwise elicited follow-on negotiations. *See, e.g.*, Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, Feb. 11, 1971, art V, 23 U.S.T. 701; Treaty on Conventional Armed Forces in Europe, Nov. 19, 1990, art. XVIII, 30 I.L.M. 1 [hereinafter CFE Treaty].

affairs, and the international community must sustain them and execute them in good faith, even if that might occasionally prove disadvantageous in the short term. The United States, in particular, has the biggest stake in the sound maintenance of treaty law: as the most frequent instigator and participant in major treaty negotiations across a broad range of issues, the United States has the most to lose if this form of international communication and commitment is debased. More than most other countries, the United States benefits when the community underscores its commitment to international agreements; violating a treaty, discrediting it as vague or precatory, or seeking to evade its impact through exploitation of alleged loopholes would be foolishly shortsighted for our non-proliferation concerns and for a wide range of other issues.

III. TAKING CUSTOMARY INTERNATIONAL LAW SERIOUSLY

The second major source of international law is custom, focusing upon repeated, notorious state behavior, driven by a sense of obligation and accepted as legitimate by other participants in the community of nations.⁷⁵ Although the centuries-old tradition of primary reliance upon custom has been somewhat eclipsed in the modern era by the rise of treaties,⁷⁶ custom retains its vitality as a source of law, and may even be primed for something of a resurgence.⁷⁷

Regarding chemical weapons, for example, customary international law still could be a major lawmaking process. The 1925 Geneva Protocol⁷⁸ expressed certain prohibitions upon the use of chemical weapons in warfare,⁷⁹ but various limitations in that

75. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) and cmt. b (1986) [hereinafter RESTATEMENT].

76. The existence, content, and binding character of a norm of customary international law may be difficult to establish. Treaties, in contrast, usually offer clearer, more accessible evidence, and have often been used to codify or develop the customary standards. *Id.* § 102(3) and cmt. i.

77. Controversy has arisen regarding the application of customary international law in domestic disputes by courts of the United States. See Philip Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665 (1986). There is, however, little question regarding the continuing binding effect of custom as a matter of international law. See RESTATEMENT, *supra* note 75, §111.

78. Geneva Protocol, *supra* note 21.

79. *Id.* first declaration. The Geneva Protocol outlawed only the use of chemical weapons in international combat, and did not proscribe the development, production, or deployment of chemical munitions.

instrument⁸⁰ (including many parties' entry of relatively restrictive reservations)⁸¹ confine its direct impact. Customary international law, in contrast, can provide a more comprehensive, global proscription. A careful analysis of the pattern of state practice (including reactions to the occasional departures from that pattern) helps substantiate the view that first use of lethal chemical agents in international combat is already *per se* illegal under customary international law.⁸² If states and other actors in the international scene would pay greater attention to evolving custom, they would realize that the network of law impinging upon chemical warfare is greater than merely the content of treaties.⁸³ Even a completed Chemical Weapons Convention will be directly binding only upon those states that voluntarily adopt it and become parties to it, but the overarching customary international law proscription against CW may simultaneously obligate the entire community of nations, affecting even the most recalcitrant treaty holdouts.⁸⁴

In the same vein, there is a significant argument that longstanding customary international law also has something to say

80. By its terms, the Geneva Protocol applied only to uses of chemical weapons against other parties to the treaty. There was a sustained controversy about the treaty's coverage of non-lethal chemical agents such as riot-control substances and herbicides. ACDA TREATY BOOK, *supra* note 17, at 10-14.

81. Many parties to the Geneva Protocol formally reserved the right to retaliate against an enemy's use of chemical weapons, effectively converting the Geneva Protocol into a no-first-use pledge. ACDA TREATY BOOK, *supra* note 17, at 10.

82. See David Koplow, *Long Arms and Chemical Arms: Extraterritoriality and the Draft Chemical Weapons Convention*, 15 YALE J. INT'L L. 1, 19-20 (1990); Elizabeth A. Smith, *International Regulation of Chemical and Biological Weapons: "Yellow Rain" and Arms Control*, 1984 U. ILL. L. REV. 1011, 1048.

83. It could also be argued that the first use of lethal chemical weapons in international combat (or other particularly egregious weapons applications) would be a violation of *jus cogens*, a peremptory norm of international law from which no derogation is permitted. Such a norm supersedes even contrary principles of custom or treaty, and is recognized as a valid source of international law. However, the notion of *jus cogens* has proven ephemeral in practice, a claim asserting *jus cogens* is difficult to substantiate, and no cases have been decided upon that basis. RESTATEMENT, *supra* note 75, §102, cmt. k and reporters' note 6.

84. A state that consistently expresses its opposition to an emerging norm of customary international law may be exempt from its application. By overtly withholding its consent from the initiation of a putative rule of customary law, the objecting state may permanently escape coverage of the rule. RESTATEMENT, *supra* note 75, at § 102, cmt. d. However, no state has consistently objected to the customary prohibitions against chemical warfare, so none would be exempt from the international rules.

about the legality of nuclear weapons.⁸⁵ Traditional norms of the international law of war—such as recognition of the distinctions between civilians and soldiers, or between belligerent states and neutrals⁸⁶—require a degree of finesse and precision in the application of force in hostilities, and it is plausible to assert that nuclear weapons inherently ignore these subtleties. Similarly, the well-accepted notion of “proportionality” as a criterion for the legality of force⁸⁷ (in the exercise of legitimate self-defense, a state may do “nothing unreasonable or excessive”)⁸⁸ may automatically exclude weapons of such massive destruction in many circumstances.

This is not the place to rehearse the arguments about the legality *vel non* of nuclear weapons, or to attempt to fashion more refined contentions differentiating “first strike weapons” from others that might be said to play a lawful role in deterrence or defense. But it is a suitable occasion to assert that law should be relevant to these types of discussions. In determining whether to deploy the MX “Peacekeeper” missile, for example, the United States should have considered more fully the possible restraint that customary international law might impose. In determining whether to recognize former Soviet republics that have not yet rid themselves of offensive nuclear weapons, the world should weigh more heavily the impact of binding custom in arms control. In determining how to react to covert attempts to supply chemical weapons-related equipment, materials or technology to Libya or other “rogue” states, the community of nations should focus more on the relevant legal dimensions, not solely on the politics or the economics of the transactions.

Customary international law could become an even more substantial force in disarmament proceedings in the future for three reasons. First, we are in an era where at least some disarmament proposals have progressed with breakneck speed, outstripping the negotiators’ abilities to craft suitable written treaties. Consequently,

85. See FRANCIS A. BOYLE ET AL., *IN RE: MORE THAN 50,000 NUCLEAR WEAPONS: ANALYSES OF THE ILLEGALITY OF NUCLEAR WEAPONS UNDER INTERNATIONAL LAW passim* (1991).

86. STATEMENT ON THE ILLEGALITY OF NUCLEAR WARFARE (C. David Birman ed., 1990) (modern rules of warfare outlaw weapons or tactics that do not discriminate between combatants and noncombatants, and between belligerent and neutral countries).

87. *Destruction of the “Caroline,”* 2 MOORE, A DIGEST OF INTERNATIONAL LAW 409-414 (1906), reprinted in BARRY E. CARTER & PHILIP R. TRIMBLE, *INTERNATIONAL LAW* 1221-23 (1991).

88. Letter from Secretary of State Daniel Webster, regarding the destruction of the “Caroline,” CARTER & TRIMBLE, *supra* note 87, at 1223.

we see much greater reliance upon the exchange of "parallel unilateral statements of intention" and "politically binding commitments," through which the parties align their respective behaviors even before they are able to reduce their mutual understanding to satisfactory legal text.⁸⁹ In this environment, state practice, and the words that accompany the nuanced behavior, are of growing salience and importance. At least as a temporary measure, state behavior—the genesis of customary international law—may play an increasingly vital role in international affairs. As patterns of disarmament practice endure and spread, they "harden" over time, generating expectations, reliance, and a sense of legitimacy that eventually accretes into law.⁹⁰

Second, the modern era has witnessed a stunningly rapid creation of new states, as former communist empires in the Soviet Union and Yugoslavia undergo a long-delayed fission reaction. Pursuant to standard understandings, a newly emerging state generally must take the existing content of customary international law as given; even if it dislikes some of the rules, and even if it had no opportunity to participate independently in the process of creating those proscriptions, it is too late to dissent and effectively "opt out."⁹¹ Therefore, while these new participants on the world scene do have some high degree of autonomy and flexibility in determining which *treaties* to accept and which to avoid,⁹² they cannot easily reject the content and coverage of contemporary customary international law. The more that important arms limitation understandings are poured into the framework of international law adopted as custom,

89. For example, in October 1991 and January 1992, Presidents Bush, Gorbachev, and Yeltsin issued dramatic statements containing not only proposals for negotiations toward future deep cuts in nuclear weaponry but also immediate, unilateral reductions that might prompt reciprocal restraint even before any treaty was concluded. R. Jeffrey Smith, *Bush, Yeltsin Add Momentum To Cuts in Atomic Stockpiles*, WASH. POST, Jan. 30, 1992, at A18; Serge Schmemmann, *Gorbachev Matches U.S. on Nuclear Cuts and Goes Further on Strategic Warheads*, N.Y. TIMES, Oct. 6, 1991, at 1.

90. For example, the Conference on Confidence- and Security-Building Measures and Disarmament in Europe developed in the "Stockholm Document," a package of measures (advance notification of military maneuvers, invitation of foreign observers, etc.) designed to reduce fears about a surprise attack. ACDA TREATY BOOK, *supra* note 17, at 319-22. Initially, these measures were only "politically binding," but their success, and the vigor with which the participants exercised them, contributed to the subsequent efforts to elaborate similar confidence-building provisions in the CFE Treaty and the Open Skies Treaty. CFE Treaty, *supra* note 74; Open Skies Treaty, *supra* note 17.

91. RESTATEMENT, *supra* note 75, §102, reporters' note 2.

92. John B. Rhinelanders & George B. Bunn, *Who's Bound by the Former Soviet Union's Arms Control Treaties?*, 21 ARMS CONTROL TODAY 3 (1991).

the more completely the legal network will automatically embrace these new, inexperienced entries.⁹³

Third, there is in modern state practice something of a trend toward regionalism, as particular corners of the globe are indentified as having unique problems and special opportunities. Proposals abound for creating a local "weapons free zone" or a "zone of peace" of various sorts,⁹⁴ and some successes have already been achieved.⁹⁵ Regional custom may be easier to contemplate, too, as like-minded states, sharing a common location, history, and appreciation of the security situation, can align their behaviors more readily.⁹⁶ True global consensus is often elusive, but collaboration among a smaller group may provide a more feasible opportunity for law to advance. For example, future efforts, sustained by custom, may be able to preclude the introduction of selected types of advanced weapons into a particular region, even in the absence of the specificity, mutuality, and verifiability required to craft a treaty.⁹⁷

The point is not that customary international law can solve all the problems of weapons proliferation, but that it can play a role, and that it could play an even greater role if the people involved would simply notice the muse of jurisprudence, recognize the extent to which it promotes the values of stability and peace, and embrace it with greater regularity and fortitude. Even without treaties, customary behavior can have an impact in confining and moderating states—it has done so in the past, and it may prove even more powerful in the future. Each of the world's current troublespots presents its own thicket of difficulties, so it may prove

93. See Julie Dahlitz, *The Role of Customary Law in Arms Limitation*, in THE INTERNATIONAL LAW OF ARMS CONTROL AND DISARMAMENT 157-78 (Julie Dahlitz & Detlev Dicke eds., 1991).

94. See, e.g., Félix Calderon, *Security and Arms Limitation in Latin America and the Caribbean*, *infra* this volume; see also entries for proposals such as Nordic Nuclear-Weapon-Free Zone, Mediterranean Zone of Peace, and Indian Ocean as a Zone of Peace, 11 ARMS CONTROL REP. 100.1 (1990).

95. See Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794 (demilitarizing Antarctica); Treaty for the Prohibition of Nuclear Weapons in Latin America, Feb. 14, 1967, 634 U.N.T.S. 281 [hereinafter Treaty of Tlatelolco] (creating a nuclear-weapons-free zone for Latin America).

96. See RESTATEMENT, *supra* note 75, §102, cmt. e (describing the evolution of regional or special customary international law).

97. See R. Jeffrey Smith, *State Department Meeting on Mideast Arms Control Opens Without Rancor*, WASH. POST, May 12, 1992, at A12 (efforts to develop at least a partial solution to a regional arms race, even while no comprehensive settlement is yet in sight); Knut Ipsen, *Explicit Methods of Arms Control Treaty Evolution*, in THE INTERNATIONAL LAW OF ARMS CONTROL AND DISARMAMENT 75-93 (Julie Dahlitz & Detlev Dicke eds., 1991) (noting regional approaches to arms control).

futile to attempt to resolve all of them through some grand, generally-applicable strategy; but an *ad hoc* approach, treating each case as unique and relying upon step-by-step lawmaking through the accretion of state practice, may offer more promise.

IV. TAKING DISARMAMENT INSTITUTIONS SERIOUSLY

One of the most dramatic changes in modern arms control agreements has been the extent to which they have spawned new, permanent, specialized institutions⁹⁸ designed to implement the treaties, consider improvements to them, and resolve disputes arising under them—the creation of a sort of “peace-industrial complex.”

The 1972 SALT I negotiations were the progenitor of this tradition, as the ABM Treaty called for the creation of a Standing Consultative Commission (SCC) through which the parties could regularly communicate in their effort to sustain and improve the treaty regime.⁹⁹ When the Reagan administration, which had roundly criticized the SCC as ineffective, concluded the 1987 INF Treaty, it recognized that a similar institution would be valuable, but felt constrained not to cede greater authority to the disfavored SCC. So the INF Treaty instead created a clone, the Special Verification Commission, with a substantially similar mandate.¹⁰⁰

Other arms control agreements have also regularly established their own standing bodies,¹⁰¹ almost as a matter of course in the search for permanence and prestige:

98. Arms control and other treaties have long called for periodic review conferences, ongoing consultations, and other episodic meetings of the parties. *See, e.g.*, Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, May 18, 1977, 31 U.S.T. 333, 16 I.L.M. 88, art. V; Antarctic Treaty, *supra* note 95, art. IX.

99. ABM Treaty, *supra* note 20, art. XIII.

100. Treaty on the Elimination of Their Intermediate-Range and Shorter-Range Missiles, Dec. 8, 1987, U.S.-U.S.S.R., 27 I.L.M. 90, art. XIII.

101. The Conference on Disarmament, a Geneva-based affiliate of the United Nations, has become the primary multilateral body for negotiating new arms control agreements. It and its predecessor organizations assisted in the elaboration of many of the treaty texts noted in this Article. In contrast, the implementation bodies considered in this section are those that have been established by the various treaties to operate and improve the applicable regime.

- 1976 Peaceful Nuclear Explosions Treaty: Joint Consultative Commission;¹⁰²
- 1990 TTBT Protocol: Bilateral Consultative Commission;¹⁰³
- 1990 Conventional Forces in Europe Treaty: Joint Consultative Group;¹⁰⁴
- 1991 START Treaty: Joint Compliance and Inspection Commission;¹⁰⁵
- 1992 Open Skies Treaty: Open Skies Consultative Commission;¹⁰⁶ and
- Forthcoming Chemical Weapons Convention: Organization for the Prohibition of Chemical Weapons.¹⁰⁷

These organizations fulfill a variety of crucial roles. They serve as the primary mechanism for exchanging information between the parties, including notifications of routine weapons actions (dismantlings, etc.) required by the treaty. They oversee the on-site inspection process and the destruction of excess weapons and facilities. They perform the "risk reduction" and "crisis management" functions in various ways. They consider compliance questions, exchanging inquiries and responses. They resolve disputes—not in the sense of some independent, neutral adjudicator, but more as a forum for ongoing negotiations and deliberations.¹⁰⁸ They serve as the venue through which parties may undertake periodic reviews as required by the treaty. They negotiate follow-on accords or implementing arrangements needed to flesh out the day-to-day mechanics of the treaty.

The Board of Governors of the International Atomic Energy Agency (IAEA), operating as an institutional arm of the NPT,

102. PNET, *supra* note 33, art. V.

103. 1990 TTBT Protocol, *supra* note 35, § XI.

104. CFE Treaty, *supra* note 74, art. XVI.

105. START Treaty, *supra* note 22, art. XV and Protocol on the Joint Compliance and Inspection Commission.

106. Open Skies Treaty, *supra* note 17, art. X and Annex L.

107. *Report of the Ad Hoc Committee on Chemical Weapons to the Conference on Disarmament*, CD/1108, August 27, 1991, app. I, art. VIII (current "rolling text" of draft chemical weapons convention now being finalized).

108. Cf. Phillip R. Trimble, *Beyond Verification: The Next Step in Arms Control*, 102 HARV. L. REV. 885, 897 (1989) (proposing the establishment of a neutral, independent international dispute resolution mechanism for arbitrating arms control controversies).

deserves special consideration here. Although its verification procedures are not above reproach,¹⁰⁹ the IAEA may yet be the prototype of a true international institution, promulgating rules that are accepted as obligatory *per se*. In disseminating instructions to member states regarding reporting and inspection procedures, the IAEA has begun to assume a power to interpret treaties and issue implementing directives, any violation of which would be akin to a violation of the treaty itself.¹¹⁰ An "international administrative law," replete with some form of notice-and-comment rulemaking procedures, may yet arise from such humble beginnings.

In all of this, the various implementing institutions create and apply international law, and they do so in a wholly constructive and meaningful fashion. They serve as the bricks and mortar of the international law of arms control, and they help nudge the community toward greater reliance upon peaceful, negotiated settlement of problems that too often in the past exploded into something hostile. Again, greater adherence to these organizations, devoting still more care to their use and devolving greater authority upon them, would have a salutary effect upon the international system. These institutions have often been overlooked in the clutter of international traffic—in their quest for businesslike privacy conducive to getting the job done, they have slipped largely below public consciousness, and the world has not fully appreciated their contributions.

To date, the arms control negotiating states have been hesitant about generating truly powerful global security organizations. Despite recurrent plausible proposals, there is no public international verification institute, equipped with its own state-of-the-art satellites; there is no generic international inspection agency, capable of mounting immediate on-site visits across a spectrum of arms issues; and there is no standing global police force, adjudicatory body, or criminal court that could readily redress violations of the international law of arms control.

None of the existing arms control organizations come close to possessing that degree of authority or perspective—none could accomplish much on its own. All of the current generation of institutions are but creatures of their respective national

109. The IAEA's safeguards regime has steadily improved over the years, but questions remain regarding the system's capacity for timely detection of attempts to divert nuclear materials from civilian to weapons applications. LAWRENCE SCHEINMAN, *THE INTERNATIONAL ATOMIC ENERGY AGENCY AND WORLD NUCLEAR ORDER* 225-41 (1987).

110. See Jon Wolfsthal, *IAEA to Implement "Suspect Site" Inspection Powers*, 22 *ARMS CONTROL TODAY* 27 (1992).

governments, responsive to diverse political currents and national control. But they do at least start the process of institutionalizing arms control, making it a somewhat more predictable, routine part of international law, less dependent upon episodic "spectacular events" and less vulnerable to sudden perturbations.

V. CONCLUSION

Another common security misperception, comparable to the mistake noted at the outset of this essay, is that the United States is, in 1992, well positioned to assert a new kind of unilateral, self-interested military, economic, and social leadership in the world. As the sole remaining military superpower, America could perhaps "throw its weight around," insisting upon reconfiguring international affairs in a manner more conducive to pursuit of our immediate commercial and other interests.¹¹¹ No other country would be able to out-muscle the United States, so a partial return to a Hobbesian state of international nature might seem to work to the advantage of the strongest, most determined player.¹¹²

This perspective, however, is fundamentally misguided. In fact, the true comparative advantage for the United States, the area in which we are most able to "play to our strengths," is precisely the opposite. Even though the United States is now the planet's dominant military power, our physical safety is far from guaranteed, and we remain susceptible to a host of nuclear, chemical, biological, and other attacks against which there is no adequate defense. In the modern era of proliferating weapons of mass destruction, all states share a common, inescapable vulnerability, and traditional notions of rational deterrence become less compelling.¹¹³

111. See Patrick E. Tyler, *U.S. Strategy Plan Calls for Insuring No Rivals Develop*, N.Y. TIMES, Mar. 7, 1992, at 1 (new Department of Defense policy statement advocates measures to promote a world dominated by United States as sole military superpower).

112. Ironically, the converse of this premise supports intensified interest in multilateral disarmament, too. That is, one might start with the proposition that domestic political and economic constraints will prevent the United States from pursuing global military hegemony in the years ahead. In that situation, it would be clearly advantageous to keep other states under controls, too, so that unilateral disarmament does not undermine American security. See James Chace, *The Pentagon's Superpower Fantasy*, N.Y. TIMES, Mar. 16, 1992, at A17.

113. See Burns H. Weston, *The Logic and Utility of a Lawful United States Foreign Policy*, 1 TRANSNAT'L. & CONTEMP. PROBS. 1 (1991) (articulating the rationale for

America's real comparative advantage, in fact, lies with invocation of law. We are the foremost maker of, and the foremost beneficiary of, international law. We depend upon treaties, custom, and international institutions more than any other country, and we have the most to lose if these phenomena are undercut. We certainly have more lawyers than any other society, and a greater familiarity with the style and nuance of legal proceedings; if the world would turn to judicial proceedings as the forum of choice for resolution of conflict, it would promote our greatest relative assets. Our economic prosperity, as well as our sheer physical safety, depend more than ever upon the active cooperation of other states; the most effective way to derive a mutually satisfactory, durable, and wise accommodation of interests is for the United States to take the lead in respecting and promoting international law.

Why, then, hasn't this happened? Why does the United States not automatically adhere to international legal constraints with zeal and rigor? Why do leaders persist in cynical, self-defeating behaviors, failing to appreciate the better strategy? It is not simply selfishness—this essay advocates following international law precisely because it is in the selfish United States interest to do so. My argument has proceeded from the basis of pragmatic appraisal of national interests, not international charity.

The difficulty, I suggest, lies in the endemic inability or unwillingness to look at the long term—to build a durable, predictable structure enabling prudent, sustainable growth. It is ignorance, not necessarily malevolence, that diverts us from appreciation of our real interests. Political leaders, geared to the timing of the next election cycle, calculate benefits for the short term only, eschewing attention to true, enduring national values. Just as society is only now beginning to appreciate the dynamics of global environmentalism, similar principles ought to apply in the international law of disarmament: crude, one-sided exploitation cannot persist forever. In the long term we need to sustain our international relations with dignity and husband our collective resources with intelligence.

Sometimes, this strategy of taking law seriously will appear to work to the short-run disadvantage of the United States, in foregoing a material benefit that could be seized or retained through the threat or use of brute force. There are many excesses that the United States probably could "get away with," at least in the immediate term,

consistent United States adherence to international law); Thomas M. Franck, *Taking Treaties Seriously*, 82 AM. J. INT'L L. 67 (1988) (arguing for adherence to treaties as promoting national interests).

because no one, these days, is able to enforce many unwanted actions upon the unwilling behemoth.

But in the long term such a strategy would be as unwise as it is unjust. In the long term, the enlightened United States self interest supports international law, builds it up as a meaningful factor in global interaction, and submits willingly to it as a model for other states to imitate. This is the more reliable mechanism for pursuing national security in the modern era: working through international law. This is the sound investment strategy: adhering to international law not out of charity, but out of a pragmatic sense of our more durable gains. In seeking to retard the proliferation of weaponry, in disarmament matters more generally, and in other international law topics across the board, the United States—and the other players in the world community—need to learn to take international law truly seriously.

