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## **RULE OF FORCE OR RULE OF LAW? Legal Responses to Nuclear Threats from Terrorism, Proliferation, and War**

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Alyn Ware<sup>1</sup>

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## I. INTRODUCTION

Legal issues regarding nuclear weapons policies have emerged recently in response to new threats arising from a broadening of nuclear doctrines amongst the pre-existing nuclear weapons States (NWS), plans for the development of new types of nuclear weapons, proliferation of nuclear weapons to other States, the emergence of pre-emptive use of force as a response to suspected proliferation of nuclear weapons, increasing tensions between States possessing nuclear weapons, and possible acquisition and use of nuclear weapons by non-State actors.

There is thus an increasing urgency for the strengthening of legal norms to constrain the possession, threat or use of nuclear weapons, and for the development of legal regimes to control, reduce and eventually eliminate such weapons. The alternative—a world governed by increasing threats to use force, including the use of nuclear weapons—is likely to occur should the rule of force not be replaced by the rule of law.

This article discusses the history of nuclear weapons, current control regimes and nuclear doctrine, the inherent instability of current discriminatory approaches, the legal status of nuclear weapons and the legal implications of the pre-emptive use of force. It also proposes alternatives to the use of force for dealing with nuclear proliferation, and the possibility of nuclear disarmament through a nuclear weapons convention.

## II. SHATTERER OF WORLDS OR PROTECTOR OF PEACE? PERSPECTIVES ON NUCLEAR WEAPONS

*I am become death, the shatterer of worlds.*

J. Robert Oppenheimer<sup>2</sup>

The birth of the nuclear age created the seeds of two diametrically opposed strands of thought regarding nuclear weapons: their role in security doctrine and their legality. The first strand originated from U.S. President Franklin D. Roosevelt's decision to create the first nuclear weapon and

President Truman's decision to use it against Japan.<sup>3</sup> This strand confers positive value on the possession of nuclear weapons by a limited number of "responsible" states in order to protect the security of those states,<sup>4</sup> their allies,<sup>5</sup> and the rest of the "law-abiding" world from aggressive states or "rogue" governments. The other strand originates from scientific,<sup>6</sup> diplomatic,<sup>7</sup> legal,<sup>8</sup> and public reaction<sup>9</sup> to the first development and use of nuclear weapons. It holds that nuclear weapons are inhumane, immoral, illegal, and inherently destructive of regional and international security.

The two strands of thought have evolved into very different, and mostly contradictory, approaches to dealing with nuclear weapons. The first, a combination of deterrence and counter-proliferation, is the preferred approach of the NWS and their allies. It relies on the threat or use of force, including the threat or use of nuclear weapons by an elite nuclear club<sup>10</sup> and their allies, against all others who may threaten their interests or have nuclear ambitions of their own. This approach is one of international power politics,<sup>11</sup> as opposed to consistent application of international law.<sup>12</sup>

The second approach, adhered to by the majority of states,<sup>13</sup> favours disarmament rather than deterrence and counter-proliferation and calls for the comprehensive and universal abolition of nuclear weapons under international supervision.<sup>14</sup> It also includes the strengthening of legal mechanisms for the development of international security, as opposed to the strengthening of military doctrine and capabilities. It is thus an approach favouring the application of international law over international power politics.<sup>15</sup>

### III. OPENING THE FLOODGATES: NUCLEAR PROLIFERATION

#### *A. Nuclear Weapon States*

In 1995, a commission of disarmament experts, including former French Prime Minister Michel Rocard, former head of U.S. Strategic Command General Lee Butler, and former U.S. Secretary of Defense Robert

McNamara, warned that “[t]he proposition that nuclear weapons can be retained in perpetuity and never used—accidentally or by decision—defies credibility,” and that “[t]he possession of nuclear weapons by any state is a constant stimulus to other states to acquire them.”<sup>16</sup>

Following the use of nuclear weapons against Japan in 1945, there emerged the possibility that these weapons could be abolished, with both the United States and the USSR supporting a UN commission that held a mandate to work for nuclear disarmament.<sup>17</sup> However, the ensuing Cold War prevented a nuclear elimination regime from being developed. Instead, there was a colossal build-up of nuclear weaponry, until each of the Cold War antagonists possessed over 25,000 nuclear weapons, most of them 100–1,000 times the explosive force of the Hiroshima bomb.<sup>18</sup>

At the end of the Cold War, there were hopes that global nuclear disarmament would finally materialize. Prior to the breakup of the USSR, President Gorbachev announced a plan for the complete elimination of nuclear weapons by the year 2000.<sup>19</sup> While Gorbachev’s plan was not implemented, the NWS did negotiate a treaty, which was concluded in 1996, to prohibit the testing (by detonation) of nuclear weapons<sup>20</sup> as a first step to nuclear disarmament. Additionally, the United States and the USSR/Russia concluded a number of nuclear arms control treaties in the late 1980s and early 1990s.<sup>21</sup>

These steps, however, serve merely to placate the expectation for disarmament and divert the attention of the world, while the NWS develop new means for testing nuclear weapons and new types of weapons and delivery vehicles. The United States, for example, continues to spend \$4 billion annually on nuclear weapons research and development, modernizing its Trident submarine missiles, deploying a new B61-mod11 nuclear bomb, and developing new “low yield” nuclear warheads.<sup>22</sup> There are no plans by the NWS to reduce their stockpiles of nuclear weapons any further, which now include 15-20,000 warheads. Nearly 5,000 of these

warheads remain on high alert, ready to be launched within minutes (See Table I).

<b>TABLE I: GLOBAL STOCKPILES OF NUCLEAR WEAPONS<sup>1</sup></b>			
	<b>Strategic delivery Systems<sup>2</sup></b>	<b>Deployed Warheads</b>	<b>Total Warheads</b>
U.S.	1097	7206	10,500
Russia	1122	5826	20,000
China	250	400	400
France	132	348	348
UK	48	185	185
Israel	-	-	~150
India	-	-	~80
Pakistan	-	-	~20
	<b>Total warheads</b>		<b>~31,700</b>
	<b>Total yield</b>		<b>5,000 Mt</b>
	<b>Number of weapons on alert</b>		<b>4,600</b>

Sources:

- Nuclear Forces Guide, Federation of American Scientists at <http://www.fas.org/nuke/guide/index.html> (last visited Nov. 21, 2003).
- Robert S. Norris & Hans M. Kristensen, *NRDC Nuclear Notebook: Global Nuclear Stockpiles 1945–2002*, BULL. OF ATOMIC SCIENTISTS, Nov./Dec. 2002, at 103–04, available at <http://www.thebulletin.org/issues/nukenotes/nd02nukenote.html>.
- JOSEPH CIRINCIONE, JON B. WOLFSTHAL, & MIRIAM RAJKUMAR, TRACKING NUCLEAR PROLIFERATION (2002).

<sup>1</sup> Sources vary in numbers due to uncertainty over status of some weapons removed from deployment.

<sup>2</sup> Israel, India, and Pakistan are reported to have not yet deployed nuclear weapons, but have short-medium range missiles that could be used for deployment.

*B. The Failure of Counter-Proliferation*

In 1968, the risks posed by uncontrolled proliferation of nuclear weapons led states to conclude the Nuclear Non-Proliferation Treaty, whereby non-NWS agreed not to acquire nuclear weapons, and the NWS agreed to negotiate for complete nuclear disarmament. However, in the ensuing years, the NWS made no progress on implementing their side of the agreement, and instead have placed greater emphasis on counter-proliferation policies rather than disarmament efforts in order to prevent proliferation. Counter-proliferation policies have included trade barriers in nuclear and missile technology, economic sanctions, diplomatic pressure, and threats of force. These policies have not been successful in preventing other states from acquiring or developing nuclear capabilities.

For instance, India demonstrated a nuclear weapons capability in 1974, detonating a device in what India called a peaceful nuclear experiment. In May 1998, India openly tested nuclear weapons and declared itself a nuclear weapons power, stating:

[T]he refusal of the NWS to consider the elimination of nuclear weapons ... continues to be the single biggest threat to international peace and security. It is because of the continuing threat posed to India by the deployment of nuclear weapons that we have been forced to carry out these tests.<sup>23</sup>

Pakistan is believed to have started developing its nuclear weapons program in 1971, following its war with India. In response to India's tests in May 1998, Pakistan followed with its own nuclear tests in June 1998, thus assuming a declared nuclear weapons status.

Israel neither acknowledges nor denies that it has nuclear weapons and is generally regarded as a de facto NWS. Mordechai Vanunu, a former nuclear technician at the Dimona facility, revealed in 1986 that Israel could have up to 200 nuclear warheads.<sup>24</sup>

Under the Non-Proliferation Treaty, it is possible for states to acquire assistance with nuclear technology for peaceful means<sup>25</sup> and later withdraw

from the Treaty in order to use that technology for weapons purposes. In 2003, North Korea, which had acquired assistance with its nuclear energy production from a number of countries, withdrew from the Non-Proliferation Treaty. North Korea declared the 1994 Joint Declaration on the Denuclearization of the Korean Peninsula<sup>26</sup> to be no longer operable, and announced its intention to pursue a nuclear weapons policy, citing threats from U.S. nuclear weapons as a major reason for these actions.<sup>27</sup>

*C. Non-State Actors*

*It is hard to imagine how the tragedy of 11 September could have been worse. Yet, the truth is that a single attack involving a nuclear or biological weapon could have killed millions.*

UN Secretary General Kofi Annan<sup>28</sup>

The acquisition of a nuclear explosive device, by theft or construction, and its threat or use by a terrorist organization, is becoming more likely. In Russia, there is concern over security of their nuclear warheads, particularly those decommissioned and on their tactical delivery vehicles. There is particular concern regarding suitcase-sized “mini-nukes,” though even larger nuclear weapons could be stolen with a large truck.<sup>29</sup> Of even greater concern is the possibility that a sub-national group could acquire the key ingredients for a nuclear warhead, highly enriched uranium or plutonium, to manufacture a bomb. The smuggling of highly enriched uranium has been intercepted on a couple of occasions,<sup>30</sup> as has the smuggling of plutonium.<sup>31</sup> While the construction of a nuclear bomb is difficult, the U.S. Office of Technology Assessment has reported that it is definitely within the capabilities of a non-state group:

[A] small group of people, none of whom have ever had access to the classified literature, could possibly design and build a crude nuclear explosive device. They would not necessarily require a great deal of technological equipment or have to undertake any experiments. The group would have to include at a minimum, a



person capable of researching and understanding the literature in several fields and a jack-of-all trades technician.<sup>32</sup>

In other words, as the International Physicians for the Prevention of Nuclear War has stated, “[u]nless radical steps are taken urgently, it will not be a question of whether terrorists can acquire or build a nuclear device, but when.”<sup>33</sup> The United States has developed a range of policies to respond to the threat of terrorist acquisition of nuclear weapons. These include threats to use force against states supporting terrorist groups and the use of nuclear weapons in the “war against terror.”<sup>34</sup> However, these efforts are not likely to have any significant preventative impact on such threats, since terrorist organizations do not have their personnel or military equipment concentrated in geographical locations that can easily be destroyed, nor are they necessarily beholden to the host or supporting governments.

Therefore, the only way to prevent nuclear terrorism is through nuclear disarmament and international control of fissile materials.<sup>35</sup> This perspective is shared by Jyanatha Dhanapala, Under-Secretary-General of the United Nations who, following the September 11 terrorist acts in the United States, noted that “[w]e need to eliminate WMD [Weapons of Mass Destruction] because they could fall into the hands of terrorists.”<sup>36</sup>

#### IV. OFF WITH THEIR HEADS: RUNAWAY NUCLEAR DOCTRINE

*The players all played at once, without waiting for turns, quarreling all the while, and fighting for the hedgehogs; and in a very short time the Queen was in a furious passion, and went stomping about, and shouting ‘Off with his head!’ or ‘Off with her head’ about once a minute.*

*Alice began to feel very uneasy: to be sure, she had not as yet had any dispute with the Queen, but she knew that it might happen any minute, ‘and then’ thought she, ‘what would become of me? They’re dreadfully fond of beheading people here: the great wonder is, that there’s anyone left alive!’*

Lewis Carroll.<sup>37</sup>

*A. New Nukes and Plans for Their Use*

NWS do not appear to be curbing nuclear development. In 2000, at a conference of States parties to the Non-Proliferation Treaty,<sup>38</sup> the NWS made a commitment to reduce the role of nuclear weapons in security policies and to achieve nuclear disarmament. Since then, they have shown no signs of implementing these commitments, and in some cases are instead moving backwards. For instance, in January 2002, the U.S. administration completed a Nuclear Posture Review,<sup>39</sup> which affirmed disturbing developments in nuclear policy including development of “more usable”<sup>40</sup> nuclear weapons, and the deployment of anti-ballistic missile defence,<sup>41</sup> following the United States withdrawal from the Anti-Ballistic Missile Treaty in 2002.<sup>42</sup>

The review also included contingency plans for the use of nuclear weapons against particular countries including Iraq, Iran, North Korea, Russia, China, Libya, and Syria, and an increased readiness for nuclear testing,<sup>43</sup> despite the fact that the United States in 1996 signed the Comprehensive Test Ban Treaty, which prohibits all nuclear detonations for test purposes.<sup>44</sup>

The most dangerous plan is a larger role for nuclear weapons, not just to deter a nuclear strike, but to have a role in deterring, or pre-emptively destroying, *any* WMDs.<sup>45</sup> This contrasts with negative security assurances given by the NWS not to threaten or use nuclear weapons against non-NWS. Such negative security assurances were given in order that the non-NWS would agree to forgo the option of nuclear weapons and were reaffirmed in 1995 in order that non-NWS would agree to an indefinite extension of the Non-Proliferation Treaty.<sup>46</sup>

The developments in U.S. nuclear doctrine have acted as a stimulus for other states to also alter their nuclear doctrines, thus reversing nuclear disarmament gains made in the past decade. Russia has responded by rescinding its ratification of Strategic Arms Limitation Talks II (SALT II). Similarly, China has responded by refusing to join other NWS in

negotiating a treaty to curtail production of fissile material on the basis that it may need to increase its numbers of warheads to deal with the threat from U.S. anti-ballistic missile systems.

*B. Pre-emptive Use of Force*

The most dramatic development affecting international law and nuclear doctrine has been the pre-emptive use of force, possibly nuclear force, in response to the proliferation of WMD. The United States and UK justified their use of force against Iraq in March 2003 on the basis of pre-emptive self-defence to prevent Iraq from using WMD and on the claim that the Security Council authorized the use of force to ensure compliance with resolutions requiring Iraq to eliminate its WMD.<sup>47</sup> This military assault by the United States and its small coalition, including the United Kingdom, waged on the basis of suspected WMD programs indicates this policy is no paper tiger, but rather a very real indication of the types of actions the U.S. government will take to pursue its interests.

The illegality of the pre-emptive use of force against Iraq, the damage this precedent could render to international law, and the prevention of future use of force was outlined in an International Appeal by Lawyers and Jurists against the Preventive Use of Force. This appeal was endorsed by over 300 legal experts from forty countries and was submitted to the United Nations by Judge Weeramantry, former Vice-President of the International Court of Justice (ICJ).<sup>48</sup> The appeal recognized that “[t]he development of WMD anywhere in the world is contrary to universal norms against the acquisition, possession and threat or use of such weapons and must be addressed”<sup>49</sup> but argued that “the ‘preventive’ use of force currently being considered against Iraq is both illegal and unnecessary and should not be authorized by the United Nations or undertaken by any State.”<sup>50</sup> The appeal based its conclusion on a number of principles of international law, enshrined in the UN Charter and other legal instruments.

In international legal opinion, there is some affirmation of the right to pre-emptive use of force as a form of “anticipatory self-defence” if there is an *imminent* threat of attack from an enemy. However, this right is generally held to be restricted in application to instances where there is no other choice but to use force. In other words, while anticipatory self-defence is “normally unlawful, it is not necessarily unlawful in all circumstances, the matter depending on the facts of the situation including in particular the seriousness of the threat and the degree to which pre-emptive action is really necessary and is the only way of avoiding that serious threat.”<sup>51</sup>

In discussing the use of force in the *Caroline Incident* of 1837, UK Secretary of State Daniel Webster noted that it will be for the government to show that the “necessity of [the use of force in] self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”<sup>52</sup> The development of the law over the 150 years since the *Caroline Incident*, and particularly in light of more recent state practice, suggests that the use of force by a state can only be justified as self-defence under international law if it meets certain criteria. These are:

- (a) an armed attack is launched, or is immediately threatened, against a state’s territory or forces (and probably its nationals);
- (b) there is an urgent necessity for defensive action against that attack;
- (c) there is no practicable alternative to action in self-defence, and in particular another state or other authority which has the legal powers to stop or prevent the infringement does not, or cannot, use them to that effect;
- (d) the action taken by way of self-defence is limited to what is necessary to stop or prevent the infringement, i.e. to the needs of defence. . . .<sup>53</sup>

The use of force by the United States and the United Kingdom failed to meet any of these conditions. Iraq had not launched an attack or made any

indications it was about to attack the United States, United Kingdom, or any other state. There was no urgent necessity for defensive action against any attack. Alternative actions were being undertaken by the United Nations to deal with Iraq's potential WMDs.<sup>54</sup> Finally, the military action by the United States did not focus primarily on the supposed threat from WMD, but instead on overthrowing the Iraqi government.

The UN Charter prohibits the use of force by states<sup>55</sup> except in the case of self-defence in response to an actual attack.<sup>56</sup> Article 51 of the UN Charter provides states the right to act in self-defence when attacked, but only until the Security Council moves to relieve the situation. The Security Council was acting to address the threats posed by Iraq, relieving individual states of any right to respond with force. More importantly, as indicated earlier, Iraq had not attacked another state, nor threatened to attack another state, and so the Article 51 right to self-defence would not apply even if the United Nations was not responding.

Possession or development of WMD relates more closely to Chapter 7 of the UN Charter, regarding a threat to peace. The Security Council can authorize the use of force by states or by UN forces in a situation creating a threat to international peace,<sup>57</sup> and has done so on a number of occasions.<sup>58</sup> However, the Security Council is generally reluctant to authorize the use of force, one reason being that this would imply a failure of the primary aim of the United Nations, which is to "save succeeding generations from the scourge of war."<sup>59</sup> The UN Charter thus provides for recourse to force only when methods for restoring peace and security not involving the use of force have failed.<sup>60</sup> In addition, each time authorization for the use of force has been given, it has been in response to actual invasion, large-scale violence, or humanitarian emergency. The Security Council has never authorized the use of force based on a potential, non-imminent threat of violence.<sup>61</sup>

Finally, in the recent case with Iraq, the United States and United Kingdom claimed that under Resolutions 678,<sup>62</sup> 687,<sup>63</sup> and 1441,<sup>64</sup> the

Security Council had authorized members to use force. However, the United States and the United Kingdom found little support for this claim, either in the Security Council<sup>65</sup> or from legal scholars.<sup>66</sup> Resolution 678 related to the restoration of Kuwait's sovereignty following the invasion by Iraq in 1990, which had been achieved. Resolution 687 related to the terms of surrender and did not include authorization for the use of force. Resolution 1441 provided Iraq a "final opportunity to comply with its disarmament obligations"<sup>67</sup> and warned Iraq that "it will face serious consequences as a result of its continued violations of its obligations,"<sup>68</sup> but the resolution did not authorize force. Instead, if Iraq did not comply, it called for the convening of the Security Council "in order to consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security,"<sup>69</sup> an indication that the Security Council had not yet devolved authority for enforcing compliance to member states.

The wording of the Gulf War resolutions show that, when the Security Council intends to authorize the use of force, it does so in clear terms. Resolution 678 referred to the use of "all necessary means," phrasing which does not appear in any subsequent resolution relating to Iraq.<sup>70</sup> The United States and the UK acted in accordance with such an understanding when they attempted to secure a follow-up resolution to 1444 to specifically authorize the use of force, but then failed in this endeavor.

There are persuasive reasons to support the argument that the United States, United Kingdom, and the "coalition of the willing"<sup>71</sup> were in violation of international law in conducting the military operation against Iraq. While the Security Council has been unable to condemn the use of force against Iraq,<sup>72</sup> in the past it has condemned similar pre-emptive military action by one state against another on the grounds of the suspected development of WMD. In particular, the Security Council condemned Israel for its pre-emptive strike against an Iraqi nuclear reactor in 1981, stating that it "strongly condemns the military attack by Israel in clear

violation of the Charter of the United Nations and the norms of international conduct.”<sup>73</sup> A justification for pre-emptive military action was also rejected by the International Military Tribunal sitting at Nuremberg in response to defendants’ argument that Germany was compelled to attack Norway to forestall an Allied invasion.<sup>74</sup>

The pre-emptive use of force employed against Iraq does not appear to be an aberration of special circumstances but an example of U.S. policy in action. This policy now holds that the United States “must be prepared to stop rogue states and their terrorist clients before they are able to threaten or use [WMD] against the United States and our allies and friends.”<sup>75</sup> U.S. President Bush has announced that the United States “will act against such emerging threats before they are fully formed.”<sup>76</sup>

This new doctrine establishes dangerous precedent that is already increasing instability around the world with a number of other states, now claiming the same right to use force preventively against other states by means of WMD. For example, tensions between India and Pakistan over Kashmir have entered a new and more dangerous dynamic as a result of the pre-emptive doctrine precedent. While India and Pakistan were previously constrained to respond only to an actual attack or military incursions by the opposing side, now they feel encouraged to take pre-emptive actions, making the likelihood of full-scale war more likely. Indian Foreign Minister Yashwant Sinha has, for example, noted that India has “a much better case to go for pre-emptive action against Pakistan than the United States has in Iraq.”<sup>77</sup>

There is a very real danger that a full-scale war between India and Pakistan would quickly turn into a nuclear disaster. In April and May 2002, tensions between India and Pakistan increased dramatically, with leaders from both sides acknowledging that nuclear war was very possible. For example, Pakistan’s military ruler, General Pervez Musharraf, said that Indians should not treat Pakistanis “as if we are some kind of scum, a very weak country which cannot handle itself. We’re not going to crawl. As a

last resort, the atom bomb is also possible.”<sup>78</sup> General V.R. Raghavan, former Director General of Indian military operations replied that, “India’s aggressive plans for fighting conventional wars are now matched against Pakistan’s aggressive doctrine for nuclear ones. An escalation from a conventional to a nuclear war, within one or two days of the outbreak of the war, is not implausible.”<sup>79</sup>

North Korea has responded to the pre-emptive strike precedent by claiming for itself a right of preemption in order to respond to threats from the United States, South Korea, and Japan,<sup>80</sup> and Japan has responded to this by suggesting that it may also develop a pre-emptive doctrine against North Korea.<sup>81</sup> In addition, the pre-emptive use of force by the United States against Iraq was a major factor in moving North Korea to withdraw from the Non-Proliferation Treaty and pursue a nuclear weapons program in order to protect itself from a possible pre-emptive attack by the United States. The Korean Committee for Solidarity with World Peoples explained North Korea’s response to the United States war against Iraq by noting:

The Iraqi war taught the lesson that “nuclear suspicion,” “suspected development of WMD” and suspected “sponsorship of terrorism” touted by the U.S. were all aimed to find a pretext for war and one would fall victim to a war when one meekly responds to the IAEA’s inspection for disarmament. Neither strong international public opinion nor [other members of the Security Council’s] opposition to war nor the U.N. Charter could prevent the U.S. from launching the Iraqi war. It is a serious lesson the world has drawn from the Iraqi war that a war can be averted and the sovereignty of the country and the security of the nation can be protected only when a country has a physical deterrent force, a strong military deterrent force capable of decisively repelling any attack to be made by any types of sophisticated weapons.<sup>82</sup>

The implications of a pre-emptive doctrine are obvious: each side will claim the right to pre-emptively attack the other in order to prevent the other from attacking. The pre-emptive doctrine of the other side can be perceived as sufficient proof of an intention to attack, and thus sufficient



justification for a pre-emptive attack on the opposing side. The practice of pre-emptive use of force is “in disregard of the principles of international law and would threaten the fabric of international law giving rise to the potential for further violations and an increasing cycle of violence and anarchy.”<sup>83</sup>

#### V. RULE OF LAW: LEGAL METHODS AND MECHANISMS TO DEAL WITH NUCLEAR PROLIFERATION

The Iraq situation has raised a number of questions on how to deal effectively with nuclear proliferation, including verification of and ensuring compliance with disarmament and non-proliferation obligations. The United States and United Kingdom claimed that the use of force against Iraq was required because Iraq was not in compliance with its disarmament obligations and because the United Nations failed to enforce these obligations by other means.

An alternative viewpoint, favored by the United Nations Monitoring, Verification, and Inspection Commission (UNMOVIC) and most of the other Security Council members, was that

- (a) UN mechanisms for verification and enforcement were working well. Iraq was cooperating with the UN and UNMOVIC, which was able to confirm that WMD had been destroyed and facilities for producing them rendered incapable of continuing such production.
- (b) Whilst it was not possible to ascertain with complete confidence that there were no remaining useable WMD, such confidence could be achieved given further work by UNMOVIC.
- (c) In order to achieve full cooperation by Iraq and complete confidence, there were additional measures that could be taken not involving the use of force against Iraq.<sup>84</sup>

The methods and mechanisms, utilized by the United Nations to deal with the proliferation of WMD by Iraq, are part of a growing body of unilateral and multilateral approaches that have been

developed, some very recently, to address proliferation and achieve disarmament. The methods include declarations, monitoring, inspections, preventive controls, diplomacy, negotiation, mediation, adjudication, disarmament assistance (voluntary or imposed), and diplomatic and economic pressure, including sanctions.<sup>85</sup>

In order to implement these methods, organizational and multilateral mechanisms have been developed to address disarmament and non-proliferation requirements. These include National Technical Means, the International Atomic Energy Agency (IAEA), the Comprehensive Test Ban Treaty Organisation (CTBTO), bilateral treaties (e.g., U.S.–Russia, Brazil–Argentina), UN General Assembly, UN Security Council, and the ICJ.<sup>86</sup> (See Table III).

With regard to Iraq's WMD programmes, the UN Security Council established mechanisms to employ or implement diplomatic pressure, negotiations, sanctions on certain goods with military application, destruction of stockpiles of WMD and inspections of facilities with capabilities to assist in production of WMD. Prior to the invasion of Iraq, there was sufficient evidence to claim that while these mechanisms were not perfect, they worked 'effectively enough to have led to the destruction and curtailment of most of the Iraqi WMD capability.'<sup>87</sup>

The United States and the United Kingdom also raised the issue of the Iraqi government's suspected support of terrorism, human rights violations, and war crimes of the Iraqi regime as other rationales for the use of force. However,

[m]echanisms are available to address charges against Iraq and the Iraqi leadership of serious human rights violations, war crimes, crimes against peace and crimes against humanity. These include domestic courts utilizing universal jurisdiction, the establishment by the Security Council of an ad hoc international criminal tribunal, use of the International Criminal Court for any crimes committed after July 2002, and the International Court of Justice.<sup>88</sup>

**TABLE II: EXAMPLES OF METHODS TO VERIFY COMPLIANCE OF DISARMAMENT AND NONPROLIFERATION OBLIGATIONS**

**Declarations**

- *UN Security Council Resolution 1441* required Iraq to make a complete declaration of all aspects of its programs to develop chemical, biological, and nuclear weapons, ballistic missiles, and other delivery systems. UNMOVIC then compared this declaration with information it had gathered through inspections and other sources to develop an account of these programs.
- The International Atomic Energy Agency's (IAEA) *Model Additional Safeguards Protocol* (1997) requires states parties to declare all nuclear facilities and nuclear materials being used or produced in nuclear facilities.

**Monitoring**

- Monitoring technologies currently being employed at nuclear facilities, remote stations, or by satellites, include: photography, seismic measuring, radio-isotope sampling, data analysis, and portal controls. An example of remote monitoring being used is that of satellite photography, released by a non-governmental organization in 1996, which correctly indicated that China was about to conduct an underground nuclear test.

**Inspections**

- States parties to the *Chemical Weapons Convention* and the *Non-Proliferation Treaty* (except the NWS) are subject to routine and challenge inspections by the Organisation for the Prohibition of Chemical Weapons and the IAEA. Iraq was subject to more intrusive inspections authorized by the Security Council. The United States and Russia inspect some of each other's missiles under the Intermediate Nuclear Forces Treaty and the Strategic Arms Limitation Treaty.

**Preventive controls**

- Preventive controls are technical barriers to the development of WMD or their use. This could include configuration of nuclear power plants to ensure that weapons grade fissile material could not be produced and constructing access controls on stored nuclear weapons and fissile material.

**Diplomacy**

- With the break-up of the Soviet Union, three new states apart from Russia, inherited nuclear weapons: Belarus, Kazakhstan, and Ukraine. The U.S. and Russia used diplomacy to convince these states to give up their nuclear weapons and join the Non-Proliferation Treaty as non-NWS.

**Negotiation**

- In the 1970s, Brazil and Argentina were developing a nuclear weapons program, partly as a result of tensions between the two countries. Negotiations between them in the early 1980s on confidence building and nuclear non-proliferation were successful, and in 1991, the two countries concluded an agreement to forego any nuclear weapons option and inspect each others' nuclear power facilities.

**Mediation**

- *Rainbow Warrior Affair.* In 1985 the DGSE (French Secret Service) committed a terrorist act in New Zealand by bombing the Greenpeace boat *Rainbow Warrior*, which was en route to Moruroa to protest against French nuclear testing. New Zealand convicted and sentenced two DGSE agents. France responded by placing trade barriers on New Zealand products within the European Community. Mediation by the UN Secretary-General brought about a mutually acceptable solution. New Zealand released the agents to France and in exchange, France removed trade barriers and provided compensation to Greenpeace and New Zealand.<sup>89</sup>
- *North Korea 1994.* In 1993, North Korea suspended inspections of its nuclear facilities by the IAEA and announced its intention to withdraw from the Non-Proliferation Treaty. The United States considered using force against North Korea to prevent it from developing nuclear weapons. Former U.S. President Carter mediated between the two countries with the result that they adopted an Agreed Framework, whereby North Korea suspended its withdrawal from the Non-Proliferation Treaty and allowed IAEA inspections to resume in return for energy assistance from the United States.<sup>2</sup> (This agreement however broke down in 2003.)

**Adjudication**

- *Nuclear Tests Case.* In 1973, Australia and New Zealand lodged a case against France in the ICJ on the legality of French atmospheric testing of nuclear weapons in the Pacific. In 1974, as a result of political and legal pressure, France announced it would cease atmospheric testing and only test underground. In 1995, New Zealand called on the ICJ to re-open the case in order to include a legal ruling on underground testing. France discontinued underground testing the following year and joined the Comprehensive Test Ban Treaty.<sup>3</sup>

**Disarmament assistance—voluntary or imposed**

- *Cooperative Threat Reduction.* This program, initiated by U.S. Senators Nunn and Lugar, provides technical and financial aid to Russia in order to dismantle and destroy nuclear missiles and safely store fissile material.
- The *UN Special Commission on Iraq* (UNSCOM) was given a mandate by the UN Security Council to find and destroy Iraq's WMD, a task that they conducted from 1991 until 1998. There is no reliable evidence that any WMD remained after UNSCOM left Iraq.

**Diplomatic and economic pressure including sanctions**

- The UN Security Council imposed economic sanctions on Iraq in 1990 and extended these until it was assured that Iraq had no remaining WMD in 2003.

<sup>1</sup> See DAVID LANGE, NUCLEAR FREE THE NEW ZEALAND WAY 120-34 (1990).

<sup>2</sup> See JOZEF GOLDBLAT, ARMS CONTROL: THE NEW GUIDE TO NEGOTIATIONS & AGREEMENTS 339 (2002.)

<sup>3</sup> See KATE DEWES & ROBERT GREEN, AOTEAROA/NEW ZEALAND AT THE WORLD COURT (1999).

**TABLE III: EXAMPLES OF MECHANISMS TO VERIFY COMPLIANCE OF  
DISARMAMENT AND NONPROLIFERATION OBLIGATIONS**

**National Technical Means**

- Information gathering by States on compliance by other States. Can include satellite surveillance, open source information gathering, and mutually agreed inspections and data exchanges.

**International Atomic Energy Agency (IAEA)**

- The *Non-Proliferation Treaty* requires all non-NWS parties to conclude safeguards agreements with the IAEA to detect and prevent diversion of fissile materials from nuclear fuel cycles for weapons purposes.

**Organisation for the Prohibition of Chemical Weapons (OPCW)**

- The *Chemical Weapons Convention* (CWC) includes comprehensive verification and compliance mechanisms including: onsite and remote monitoring, challenge and routine inspections, establishment of a technical secretariat for data gathering and analysis, incentives for compliance, and graduated responses to non-compliance including sanctions and recourse to the ICJ and the Security Council for further action. These are all administered by the OPCW.

**Comprehensive Test Ban Treaty Organisation (CTBTO)**

- The CTBTO establishes an international monitoring system to detect nuclear tests including seismic, audio-acoustic, and radio-isotope monitoring stations. The CTBTO also includes procedures for dealing with non-compliance similar to the CWC.

**Bi-lateral treaties (U.S.-Russia, Brazil-Argentina)**

- The U.S. and Russia have a range of verification measures included in the *Intermediate Nuclear Forces Treaty* and the *Strategic Arms Limitation Treaty*. These include portal monitoring, data sharing, inspections, physical sampling, tracking of vehicles carrying nuclear weapons and delivery vehicles, and agreements on display of missiles for satellite monitoring. The United States and Russia have concluded additional confidence building and verification mechanisms including information sharing through *Nuclear Risk Reduction Centers*.
- Under the *Agreement between the Republic of Argentina and the Federative Republic of Brazil for the Exclusively Peaceful Use of Nuclear Energy*, Brazil and Argentina established a joint agency for accounting and control of nuclear materials, which is empowered to carry out inspections of each country's nuclear facilities.

**UN General Assembly (UNGA)**

- The UNGA provides a forum for states to raise issues of compliance and generate political pressure on states to comply with their obligations. The UNGA is also a forum for discussion and development of general principles for verification, compliance, and for initiating negotiations on disarmament agreements.

**UN Security Council (UNSC)**

- The UNSC can call on states to settle compliance disputes through negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or other peaceful means. The UNSC can also determine that a case of non-compliance constitutes a threat to the peace requiring collective action, such as severance of diplomatic relations and interruption of economic relations. If all measures not involving the use of force fail to restore peace, the Security Council can authorize the use of force. In addition to Iraq's WMD, the UNSC has, for example, acted in response to nuclear testing by India and Pakistan (Resolution 1172, 1998).

**UN Department of Disarmament Affairs (UNDDA)**

- The UNDDA can act, when authorized by the organs of the UN, to assist in verification and compliance of disarmament obligations. It services meetings of the Non-Proliferation Treaty and UNGA Disarmament and Security Committee, hosts the register of arms transfers, and has played an active role in small arms disarmament programs in Albania and Mozambique.

**International Court of Justice (ICJ)**

- The ICJ can make legal determinations on compliance issues. Relevant cases include the *Nuclear Tests Case 1974* and *Legality of the Threat or Use of Nuclear Weapons Case 1994*.

**Nuclear Weapons Convention**

- A nuclear weapons convention would provide a comprehensive regime for the prohibition of nuclear weapons including a range of mechanisms for verification and compliance. A nuclear weapons convention has not yet been negotiated. However, a Model Convention has been circulated by the UN Secretary-General, and the UNGA has adopted a number of resolutions calling for negotiations to conclude a nuclear weapons convention.

The international community has developed collaborative mechanisms for the suppression of terrorism through a number of global and regional treaties.<sup>90</sup> Together, these methods and mechanisms provide a range of alternatives to the use of force for ensuring compliance with disarmament and non-proliferation. The success of these methods and mechanisms is indicated by the fact that compliance with disarmament and non-proliferation obligations has generally been very high and that, in the case of non-compliance, force has rarely been used.<sup>91</sup>

While there is still room for improvement in these methods and mechanisms, particularly relating to ensuring compliance by the NWS with their disarmament obligations, the main problem leading states to use force

to ensure compliance is not that the compliance mechanisms are inadequate, but that they are not sufficiently used, and often intentionally prevented from being used. In the case of Iraq, the United States and United Kingdom undermined the United Nations Monitoring Verification and Inspection Commission (UNMOVIC)<sup>92</sup> and prevented it from completing its disarmament verification work.<sup>93</sup> They also prevented the UN General Assembly from meeting to address the issue<sup>94</sup> and ruled out the use of an international criminal tribunal.

#### VI. MUTUALLY EXCLUSIVE: THE LAW AND NUCLEAR WEAPONS

*Nuclear weapons, the ultimate evil, destabilize humanitarian law, which is the law of the lesser evil. Nuclear war and humanitarian law therefore appear to me to be mutually exclusive; the existence of one automatically implies the non-existence of the other.*

Mohammed Bedjaoui,  
President of the International Court of Justice<sup>95</sup>

A vital principle of international law is that it must be consistently applied. To do otherwise is to remove it from the realm of law and relegate it to being another tool of the powerful to subjugate the weak.

International law cannot be utilized to support State practices which deviate from fundamental principles and mainstream aspirations. Otherwise we would be legitimizing the principle that might is right and we would have to come to the frightening conclusion that international law is on the side of the powerful, as interpreted by the powerful.<sup>96</sup>

While Iraq had legal obligations to eliminate its WMD programs, and the international community had a right and responsibility to act to ensure compliance with such obligations, such action is only valid if it is also undertaken to ensure compliance by other States with their obligations to eliminate WMD programs—in particular the obligations of the NWS to

eliminate their nuclear weapons programs, which are far more advanced than those of Iraq.

The Security Council, in Resolution 687, setting forth the terms of the ceasefire that ended the Gulf War, acknowledged that the elimination of Iraq's WMD is not an end in itself, but "represents steps towards the goal of establishing in the Middle East a zone free from WMD."<sup>97</sup> Yet there has been no action to ensure the elimination of Israel's nuclear weapons programs. In fact, the Security Council has not even condemned the imprisonment of Mordechai Vanunu, the nuclear technician who exposed the Israeli nuclear weapons program.

Similarly, the Security Council has failed to take any action to ensure compliance by the NWS with their obligations to eliminate nuclear weapons. This obligation was undertaken by the NWS when they ratified the Non-Proliferation Treaty,<sup>98</sup> and was affirmed by the ICJ in 1996 when it unanimously determined that there is an obligation on all states to "pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control."<sup>99</sup>

The ICJ also declared that "[t]he threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law."<sup>100</sup> The only situation in which the court could not clearly determine whether the threat or use would necessarily be illegal was "in an extreme circumstance of self-defence, in which the very survival of a state would be at stake,"<sup>101</sup> and even in this circumstance the nature of use, including the size of the nuclear weapons and the location of use, would have to be such that would not violate humanitarian laws. These laws hold that the use of any weapon must:

- Be proportional to the initial attack;
- Be necessary for effective self-defence;



- Not be directed at civilians or civilian objects;
- Be used in a manner that makes it possible to discriminate between military targets and civilian non-targets,

and that the use of any weapon must not:

- Cause unnecessary or aggravated suffering to combatants;
- Affect states that are not parties to the conflict; or
- Cause severe, widespread, or long-term damage to the environment.<sup>102</sup>

The humanitarian laws of warfare are considered to be part of customary international law, meaning that they are binding on all states. They are further affirmed within the military law of most states and in a number of international conventions including The Hague Convention, Geneva Convention, Statutes of the International Criminal Tribunals for Rwanda and Yugoslavia, and the Statute for the International Criminal Court (“Rome Statute”). Thus, not only do the NWS have an obligation to eliminate their nuclear arsenals, but to not use their arsenals pending such elimination. The United States, the United Kingdom, France, and Russia in particular are in violation of these obligations. All four states maintain policies of First Use of nuclear weapons, and to use them in a variety of circumstances far beyond the extreme circumstance identified by the ICJ as the only circumstance which the Court could not affirm illegality.<sup>103</sup> They also maintain nuclear weapons the nature of which would make their use, even in such an extreme circumstance, in violation of the humanitarian laws of warfare.<sup>104</sup> It is arguable that other nuclear weapons–possessing states China, India, Israel and Pakistan are also in violation of the ICJ opinion.<sup>105</sup>

## VII. CATCHING THE BIG FLIES: IMPLEMENTING THE LAW ON NUCLEAR DISARMAMENT

*When it comes to those very weapons of mass destruction which pose a greater threat to human rights and the environment than anything else imaginable, these [Nuclear Weapons] States ask you to set aside that body of principles and rules so carefully put in place over the past 50 years. They ask you, in effect, to re-situate yourself in 1945, to ignore all subsequent developments and to follow Balzac's dubious proposition, "that laws are spider webs through which the big flies pass and the little ones get caught."*

Phillipe Sands<sup>106</sup>

After the ICJ affirmed the illegality of the threat or use of nuclear weapons and the obligation to negotiate for their elimination, one might expect the UN Security Council to take action to enforce the law on this issue. In light of the fact that the five acknowledged NWS each hold a veto power in the Security Council, it is unlikely that this will happen. "[T]he political role of the Security Council is clearly dominated by a powerful group of countries, the nuclear powers, and in that context there is little hope of placing the issue of nuclear weapons before such a Council for an objective and fair consideration."<sup>107</sup> This does not mean, however, that there are no other possibilities for advancing the rule of law in international and national forums. For instance, the ICJ decision has led to action in the UN General Assembly, international treaty fora, domestic parliaments and courts, and by non-governmental organizations (NGOs).

### *A. UN General Assembly*

The UN General Assembly responded to the 1996 ICJ decision by adopting a resolution that called on states to implement the decision by commencing negotiations that would lead to the conclusion of a nuclear weapons convention—a treaty prohibiting the possession, threat or use of nuclear weapons, and providing a program for their elimination.<sup>108</sup> The

resolution has been reaffirmed every year since 1996 by an overwhelming majority of states, including some of the NWS.

*B. International Treaties*

State parties to the Non-Proliferation Treaty met in 2000 to review progress in implementing the treaty's key provisions of non-proliferation and disarmament. A group of states called the New Agenda Coalition<sup>109</sup> generated considerable political momentum for a disarmament agenda. This group successfully moved the NWS to make an unequivocal commitment to the elimination of nuclear weapons and to take a number of immediate steps towards this goal. The 1996 ICJ decision was used as an important tool to help generate the political momentum and was specifically referred to in the final outcome of the meeting.<sup>110</sup>

During the negotiations of the Rome Statute for the International Criminal Court (ICC),<sup>111</sup> the United States proposed that any employment of chemical weapons, biological weapons, and expanding bullets in wartime be included as a war crime under the jurisdiction of the court.<sup>112</sup> A number of states argued that nuclear weapons should be added to this list on the basis of the 1996 ICJ advisory opinion and that landmines should be added on the basis that they do not discriminate between soldiers and civilians.<sup>113</sup> In recognition of the fact that the NWS and most of their allies would not be able to ratify the statute if it included employment of nuclear weapons as a war crime, the proposal was dropped, and instead the ICC includes the employment of "indiscriminate weapons" as a crime.<sup>114</sup> This definition could be interpreted to include nuclear weapons. On ratifying the statute, France attempted to exclude any threat or use of nuclear weapons from ICC jurisdiction.<sup>115</sup> In response, New Zealand made a declaration on ratification, citing the ICJ opinion in support of its argument that the threat or use of nuclear weapons could not be excluded. This opinion stated:

It is the view of the Government of New Zealand that it would be inconsistent with principles of international humanitarian law to

purport to limit the scope of article 8, in particular article 8(2)(b), to events that involve conventional weapons only. The Government of New Zealand finds support for its view in the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons (1996) and draws attention to paragraph 86, in particular, where the Court stated that the conclusion that humanitarian law did not apply to such weapons “would be incompatible with the intrinsically humanitarian character of the legal principles in question which permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future.”<sup>116</sup>

### *C. Parliaments*

A number of parliaments, including the UK House of Commons, United States House of Representatives, and European Parliament, have taken actions to encourage their governments to implement their disarmament obligations. These include the introduction or adoption of resolutions referring to the ICJ decision and calling for its implementation through negotiations leading to a Nuclear Weapons Convention.<sup>117</sup>

### *D. Citizen Weapons Inspections, Disarmament Actions, and Domestic Courts*

The ICJ decision has encouraged anti-nuclear activists to take new and stronger actions against nuclear weapons facilities in the NWS and in the territories of allies where nuclear weapons are deployed. Using the precedent of United Nations weapons inspectors in Iraq that were empowered by the Security Council to ascertain whether Iraq was complying with its disarmament obligations, NGOs have formed teams of citizen weapons inspectors to determine whether the NWS are implementing their disarmament obligations as affirmed by the ICJ.

These inspectors have experienced similar difficulties as those faced by the UN Special Commission on Iraq (UNSCOM) inspectors, such as obstruction, denial of access, and refusal by the authorities to release

adequate information. The citizen weapons inspectors face an additional hurdle: the NWS' refusal to eliminate their arsenals anytime in the near future as required. Some citizen weapons inspectors have been arrested, but they are usually discharged in order to prevent the generation of negative publicity.<sup>118</sup>

Some NGOs, in particular the "Ploughshares" activists,<sup>119</sup> enter nuclear weapons facilities and conduct a "disarmament action," once they have confirmed there are nuclear weapons systems on site and that the government is not implementing its disarmament obligations. This does not aim to go as far as the UNSCOM inspectors, who physically destroyed the WMD they found in Iraq. Ploughshares actions are more symbolic, undertaken to draw attention to the illegality of the weapons systems and to generate political momentum for nuclear disarmament. However, some nuclear equipment or support equipment is usually damaged and the activists arrested.

The courts have taken a range of approaches to these cases, with some defendants' cases being dismissed on technicalities, some being convicted, and some acquitted.<sup>120</sup> An example of an acquittal is the Trident Ploughshares case in Scotland, where the judge concluded that "the threat or use of Trident . . . is an infringement of international and customary law. If Trident is illegal . . . [the activists] had the obligation in terms of international law to do whatever little they could to stop the deployment and use of nuclear weapons."<sup>121</sup>

#### VIII. WRAPPING IT UP: A NUCLEAR WEAPONS CONVENTION

*The goal [of nuclear disarmament] is no longer utopian and it is the duty of all to seek to attain it more actively than ever.*

Mohammed Bedjaoui,  
President of the International Court of Justice<sup>122</sup>

In its action to implement the 1996 ICJ Advisory Opinion, the UN General Assembly called on all states to commence negotiations leading to the conclusion of a nuclear weapons convention prohibiting the development, production, testing, deployment, stockpiling, transfer, threat, or use of nuclear weapons, and providing for their elimination.<sup>123</sup> Such a convention would provide a path towards nuclear disarmament as called for by the ICJ. This General Assembly resolution is supported by an overwhelming majority of countries and public opinion polls in countries not yet supporting the resolution show support of 80 percent.<sup>124</sup> An appeal calling for a treaty to ban nuclear weapons has gained over 60 million signatures, making it the largest petition in the world.<sup>125</sup>

In 1997, a consortium of lawyers, scientists, and disarmament experts, convened by the Lawyers' Committee on Nuclear Policy, released a Model Nuclear Weapons Convention (Model Convention).<sup>126</sup> This Model Convention outlines general obligations of states and individuals under a nuclear weapons abolition regime and a phased program for dismantling and destroying existing nuclear stockpiles. It also outlines control mechanisms for nuclear facilities and materials, elements of a verification regime, protection measures for whistleblowers, dispute resolution and enforcement procedures, measures for dealing with delivery vehicles and dual use materials, national implementation measures, an agency for overseeing the convention, entry into force options, relationship to other nuclear related agreements and regimes, and a protocol concerning nuclear energy.<sup>127</sup>

The Model Convention was circulated by the United Nations as "an effective and helpful instrument in the deliberative process for the implementation of General Assembly Resolution 51/45 M (on follow-up to the 1996 ICJ Advisory Opinion)."<sup>128</sup> Since then, the Model Convention has stimulated considerable discussion on the feasibility and practicalities of nuclear abolition by academics, scientists, government officials (including from the NWS), and civil society representatives.<sup>129</sup> The Model

Convention encompasses successful elements from other legal regimes, such as the Chemical Weapons Convention, ICC, IAEA Safeguards, and Intermediate Nuclear Forces Treaty, and it suggests a number of groundbreaking solutions to problems that have thwarted other nuclear disarmament negotiations.

A key aim of the Model Convention is to demonstrate that nuclear disarmament is indeed no longer utopian and to move officials and leaders of the NWS to consider not whether nuclear weapons should be abolished, but the practicalities of how such a task could be accomplished. It outlines legal approaches and mechanisms that could be used to address the concerns and situations that prompt the NWS to maintain their nuclear weapons and doctrines. These concerns typically include verification, enforcement, breakout, nuclear terrorism, safeguarding nuclear materials, and nuclear research.

#### *A. Verification*

The verification system envisaged by the Model Convention would be more comprehensive than verification regimes established by the Intermediate Nuclear Forces Treaty, IAEA, Comprehensive Test Ban Treaty Organisation, and the UN Security Council. It would include declarations and reports from states, routine inspections, challenge inspections, on-site sensors, satellite photography, radionuclide sampling and other remote sensing, information sharing with other organizations, and citizen reporting. In addition, an international monitoring system would be established to gather information.<sup>130</sup>

Currently, a key difficulty in verification is that many states, including the NWS and the states not parties to the Non-Proliferation Treaty, have not placed their nuclear facilities under any inspection regime. A number of other states are yet to accept the strengthened IAEA safeguards agreements. A nuclear weapons convention would require all facilities to be placed under a robust verification regime.

A novel feature of the Model Convention is the focus it places on the responsibility of individual citizens for verification. Citizens often have the motivation to determine nuclear activities that governments might oversee. An example of successful citizen verification occurred in 1995, immediately following the agreement made at the Non-Proliferation Treaty Review Conference by all NWS to refrain from nuclear testing: the Verification Research, Training and Information Centre (VERTIC) used satellite photographs bought from Russia and noticed that China was preparing for a nuclear test.

A government can often hide its activities from foreign governments, but it is very difficult for it to hide them from its own scientists and other citizens. For example, evidence confirming that Israel was building nuclear weapons was revealed not by a governmental or international agency, but by an Israeli worker at the Dimona nuclear facility.<sup>131</sup> The Model Convention includes obligations for individuals to report nuclear activities in violation of the Convention, and protection for individuals exposing any violations.<sup>132</sup>

### *B. Enforcement Mechanisms*

Dissatisfaction by some governments of treaty-based regimes often focuses on lack of confidence in the enforcement mechanisms. This is not surprising given that most current disarmament and non-proliferation treaties have very weak enforcement mechanisms.<sup>133</sup> The Model Convention, on the other hand, envisages a range of compliance and enforcement mechanisms, including restrictions of states' rights with regard to the use of nuclear weapons, suspension of technical cooperation, and sanctions. It includes a provision making the threat or use of nuclear weapons a "threat to the peace" requiring action by the UN Security Council.<sup>134</sup> In addition, it makes the threat or use of nuclear weapons a crime for which individuals would be held responsible either through domestic courts or through the ICC.<sup>135</sup> Thus, the Model Convention aims to establish mechanisms that



would ensure compliance and prevent breakout. This includes incentives for compliance, security assurances to prevent a perceived requirement for nuclear weapons, and irreversible preventive controls on dismantled weapons and fissile material to make it technically difficult to breakout.<sup>136</sup>

### *C. Prevention Mechanisms*

A nuclear abolition regime needs to address not only the possibility of states breaking out and developing or retaining a nuclear weapons option, but also the possibility of non-state actors acquiring or building a nuclear weapon, then using it. The increasing risk of terrorists acquiring a nuclear bomb has been highlighted by a number of observers.<sup>137</sup> Attempts have been made to develop an international mechanism to deal with the risks of non-state acquisition and/or threat of use of nuclear weapons. These efforts have floundered, partly due to resistance by many states to the hypocrisy of the NWS prohibiting non-state nuclear programs while retaining their own programs. It is also partly due to the difficulties of developing preventive measures while the NWS refuse to submit their nuclear facilities to safeguards and their nuclear stockpiles to adequate verification. Thus, the New Agenda Coalition has concluded that

the retention of nuclear weapons carries the inherent risk of contributing to proliferation and falling into the hands of non-State actors . . . the only real guarantee against these weapons is their complete elimination and the assurance that they will never be used or produced again.<sup>138</sup>

The comprehensive preventive controls implemented through a nuclear weapons convention would make it difficult, if not impossible, for non-state actors to acquire or build a nuclear weapon. Unlike chemical or biological weapons, nuclear weapons require specific materials—highly enriched uranium or plutonium. These materials cannot be manufactured easily and are not required for other purposes. Thus, under a nuclear weapons

convention, highly enriched uranium and plutonium would become proscribed and production facilities closed.<sup>139</sup>

#### D. Conclusion

The drafters of the Model Convention do not claim to have all the answers to the security concerns of the NWS and recognize that there are still “questions that are yet to be fully answered.”<sup>140</sup> However, advocates of the Convention envisage states bringing their security concerns relating to nuclear weapons to the negotiating table, rather than using such concerns to block progress and continue a destabilizing and potentially catastrophic path of nuclear possession. In resolving security concerns through negotiations and the conclusion of a nuclear weapons convention, states would have less of a need to maintain military options and capabilities to respond, either unilaterally or in alliance, to the current threats from proliferation of nuclear weapons.

The development of a nuclear weapons convention can be part of a global development of legal instruments that are gradually constructing an international order conducive to the interests of all states and global civil society rather than one of competition and conflict—one that truly is based on the Rule of Law rather than the Rule of Force.

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<sup>2</sup> J. Robert Oppenheimer, principal architect of the world’s first nuclear bomb, commenting at its test explosion, 16 July 1945. ROBERT JUNGK, *BRIGHTER THAN A THOUSAND SUNS: A PERSONAL HISTORY OF THE ATOMIC SCIENTISTS* 183 (James Cleugh trans., Penguin Books 1960).

<sup>3</sup> “For myself, I certainly regret the necessity of wiping out whole populations because of the ‘pigheadedness’ of the leaders of a nation. . . . My object is to save as many American lives as possible. . . .” Letter from President Truman to Senator Richard B. Russell (Aug. 9, 1945), at [http://www.trumanlibrary.org/whistlestop/study\\_collections/bomb/large/opinions\\_responses/text/bmd2tx.htm](http://www.trumanlibrary.org/whistlestop/study_collections/bomb/large/opinions_responses/text/bmd2tx.htm) (last visited Nov. 13, 2003).

<sup>4</sup> U.S. security doctrine, for example, holds that “[o]ur national military policy is first and foremost to deter aggression by means of a strong nuclear and conventional capability. Should deterrence fail, our forces must be prepared to end the conflict on terms favorable to the United States, its interests, and its allies. Units capable of delivering nuclear weapons should be integrated with other forces in a combined arms, joint approach.” U.S. JOINT CHIEFS OF STAFF, DOCTRINE FOR JOINT THEATER NUCLEAR OPERATIONS JOINT PUB. 3–12.1 I-2 (1996), available at [http://fas.org/nU.K.e/guide/usa/doctrine/dod/jp3\\_12\\_1.pdf](http://fas.org/nU.K.e/guide/usa/doctrine/dod/jp3_12_1.pdf).

<sup>5</sup> NATO security doctrine, for example, holds that “[t]he fundamental purpose of the nuclear forces of the Allies is political: to preserve peace and prevent coercion and any kind of war. They will continue to fulfill an essential role by ensuring uncertainty in the mind of any aggressor about the nature of the Allies’ response to military aggression.” Press Release, NATO, The Alliance’s Strategic Concept (Apr. 24, 1999), at <http://www.nato.int/docu/pr/1999/p99-065e.htm> (last visited Dec. 18, 2003).

<sup>6</sup> J. Robert Oppenheimer, principal architect of the nuclear bomb, noted its significance by quoting Lord Krishna in the Bhagavad Gita, “I am become Death, the shatterer of worlds.” JUNGK, *supra* note 2 at 183. Albert Einstein, who had convinced U.S. President Eisenhower to launch the Manhattan Project to build the bomb, lamented, “If only I had known I would have been a blacksmith.”

<sup>7</sup> The overwhelming international response was that nuclear weapons were so horrific that they should be banned. The very first resolution of the newly formed United Nations, for example, called for the control and elimination of nuclear weapons. See *Establishment of a Commission to Deal with the Problems Raised by the Discovery of Atomic Energy*, G.A. Res. U.N. GAOR, 1st Sess., Part I, U.N. Doc A/12 (1946).

<sup>8</sup> The Tokyo District Court, for example, found that the bombing of Hiroshima was in violation of the international laws of warfare. *Shimoda v. State*, 355 HANREI JIHŌ 17 (Dist. Ct. Dec. 7 1963), translated in 8 JAPANESE ANNUAL OF INT’L LAW 231 (1964), available at <http://www.icrc.org/ihl-nat.nsf/0/aa559087dbcf1af5c1256a1c0029f14d?OpenDocument> (last visited Dec. 18, 2003).

<sup>9</sup> The Hiroshima and Nagasaki Appeal, condemning the use of nuclear weapons and calling for nuclear prohibition, has become the largest petition in the world with approximately 100 million signatures. See Message to Gensuikyo from Jayantha Dhanapala, Under-Secretary-General for Disarmament Affairs, United Nations, at <http://disarmament.un.org/speech/goki.htm>, where he “saluted the extraordinary achievement of Japan Gensuikyo and numerous other citizen groups in gathering over 100 million signatures in support of the ‘Appeal from Hiroshima and Nagasaki for a Total Ban and Elimination of Nuclear Weapons.’”

<sup>10</sup> The Nuclear Non-Proliferation Treaty acknowledges five countries as nuclear weapon states, those that tested nuclear weapons prior to 1970, i.e. China, France, UK, U.S.A., and USSR (Russia). These are the same five states that have veto power in the UN Security Council, the enforcing body for international peace and security. See <http://fas.org/nU.K.e/control/npt>.

<sup>11</sup> In its statement to the International Court of Justice in the Nuclear Weapons case, for example, Malaysia argued that “we have here a very clear case, as is also attendant in the Security Council, where a handful of countries arrogate to themselves, the right to assess and the right to determine what is world peace and security, exclusively in the context of

their own national imperatives.” Request for an Advisory Opinion Submitted by the General Assembly of the United Nations, Legality Of The Threat Or Use Of Nuclear Weapons, CR 95/27 I.C.J. Oral Proceedings 45 (Nov. 7, 1995), *available at* [http://www.icj-cij.org/icjwww/icasess/iunan/iunan\\_cr/iUNAN\\_iCR9527\\_19951107.pdf](http://www.icj-cij.org/icjwww/icasess/iunan/iunan_cr/iUNAN_iCR9527_19951107.pdf).

<sup>12</sup> The Security Council has, for example, never taken action to stem the development and testing of nuclear weapons by China, France, the UK, United States, or Russia, nor their proliferation to allied states (such as in NATO), but it has taken action on actual or suspected nuclear weapons development and testing by other states including India and Pakistan. *See* U.N. SCOR, 3890th mtg., U.N. Doc. S/Res/1172, 37 I.L.M. 1243 (1998), and Iraq, *see* U.N. SCOR, 2981<sup>st</sup> mtg., U.N. Doc. S/Res/687, 30 I.L.M. 846 (1991).

<sup>13</sup> The support of the majority of states for comprehensive disarmament as opposed to counter-proliferation and deterrence is indicated by the numerous UN General Assembly resolutions adopted overwhelmingly in favour of comprehensive nuclear disarmament. For a list of many of these resolutions, see Peter Weiss et al., *Draft Memorial in Support of the Application by the World Health Organization for an Advisory Opinion by the International Court of Justice on the Legality of the Use of Nuclear Weapons Under International Law, including the W.H.O. Constitution*, 4 TRANSNAT’L LAW & CONTEMP. PROBS. 721, 812, 814 (1994).

<sup>14</sup> *See, e.g.*, MERAV DATAN & ALYN WARE, SECURITY AND SURVIVAL: THE CASE FOR A NUCLEAR WEAPONS CONVENTION, 14–18 (1999).

<sup>15</sup> *See* RULE OF POWER OR RULE OF LAW? AN ASSESSMENT OF U.S. POLICIES AND ACTIONS REGARDING SECURITY-RELATED TREATIES 130 (Nicole Deller et al. eds., 2003).

<sup>16</sup> *See* Canberra Commission on the Elimination of Nuclear Weapons (Aug. 1996), *at* <http://www.dfat.gov.au/cc/cchome.html> (last visited Nov. 13, 2003).

<sup>17</sup> *See* G.A. Res. 12, *supra* note 7.

<sup>18</sup> Robert S. Norris & William M. Arkin, *NRDC Nuclear Notebook: Global Nuclear Stockpiles, 1945–2000*, 56 BULL. OF ATOM. SCIENTISTS 2, 79 (Mar./Apr. 2000), *available at* <http://www.thebulletin.org/issues/2000/ma00/ma00toc.html>.

<sup>19</sup> *Interview with Mikhail Gorbachev, in* JONATHAN SCHELL, THE GIFT OF TIME: THE CASE FOR ABOLISHING NUCLEAR WEAPONS NOW (1998).

<sup>20</sup> Comprehensive Nuclear Test-Ban Treaty, Sept. 24, 1996, S. TREATY DOC. NO. 105-28, 35 I.L.M. 1439 (1996), *available at* <http://disarmament2.un.org/TreatyStatus.nsf>. This treaty will enter into force 180 days after all forty-four states with nuclear reactors have ratified it.

<sup>21</sup> *See* Treaty on the Elimination of Their Intermediate-Range and Shorter-Range Missiles (Intermediate-Nuclear Forces Treaty), Dec. 8, 1987, U.S.-U.S.S.R., S. TREATY DOC. NO. 100-11 (1988), *available at* <http://www.state.gov/tnp/trty/18432.htm>; Treaty on Reduction and Limitation of Strategic Offensive Arms (START I), July 31, 1991, U.S.-U.S.S.R., S. TREATY DOC. NO. 102-20 (1992), *available at* <http://www.state.gov/www/global/arms/starthtm/start/toc.html>; Treaty on Further Reduction and Limitation of Strategic Offensive Arms (START II), Jan. 3, 1993, U.S.-U.S.S.R., S. TREATY DOC. NO. 103-1, *available at* <http://www.state.gov/www/global/arms/starthtm/start2/st2intal.html>.

<sup>22</sup> *See Sliding Towards the Brink: More Useable Nuclear Weapons and the Dangerous Illusions of High-Tech War*, INFO. BULL. (Western States Legal Found., Cal.), Mar. 2003, *available at* <http://www.wslfweb.org/docs/nucpreppdf.pdf>.

<sup>23</sup> Press Release, Embassy of India, Press Release Issued in New Delhi on UN Security Council Resolution on India's Nuclear Tests (May 15, 1998), at [http://www.indianembassy.org/pic/PR\\_1998/May98/prmay1598.htm](http://www.indianembassy.org/pic/PR_1998/May98/prmay1598.htm) (last visited Nov. 13, 2003).

<sup>24</sup> Peter Hounam, *Revealed: The Secrets of Israel's Nuclear Arsenal*, SUNDAY TIMES, (London) Oct. 5, 1986. Vanunu was arrested and convicted by Israel for releasing this information and is now serving a fourteen year sentence.

<sup>25</sup> For a translation of the Joint Declaration on the Denuclearization of the Korean Peninsula, Jan. 20, 1992, see [http://www.nti.org/e\\_research/official\\_docs/inventory/pdfs/koreanuc.pdf](http://www.nti.org/e_research/official_docs/inventory/pdfs/koreanuc.pdf) (last visited Dec. 20, 2003). See also Article IV of the NPT, which guarantees a right to share in nuclear technology for peaceful purposes. Treaty on the Non-Proliferation of Nuclear Weapons, 21 U.S.T. 483, T.I.A.S. No. 6839 (July 1, 1968), available at <http://www.disarmament2.un.org/TreatyStatus.nsf>.

<sup>26</sup> Agreed Framework to Negotiate Resolution of the Nuclear Issue on the Korean Peninsula, Oct. 21, 1994, U.S.-N. Korea (DPRK), 34 I.L.M. 603 (1995), available at <http://www.ceip.org/files/projects/npp/resources/koreaaf.htm>.

Section III: Both sides will work together for peace and security on a nuclear-free Korean Peninsula.

- 1) The U.S. will provide formal assurances to the DPRK, against the threat or use of nuclear weapons by the U.S.
- 2) The DPRK will consistently take steps to implement the North-South Joint Declaration on the Denuclearization of the Korean Peninsula.
- 3) The DPRK will engage in North-South dialogue, as this agreed framework will help create an atmosphere that promotes such dialogue.

Section IV: Both sides will work together to strengthen the international nuclear nonproliferation regime.

- 1) The DPRK will remain a party to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and will allow implementation of its Safeguards Agreement under the Treaty.

<sup>27</sup> "After the emergence of the Bush administration, the U.S. hostile policy toward the DPRK reached its zenith and the process of denuclearization on the Korean peninsula has been derailed in actuality.... The 'report on nuclear posture' the U.S. Defense Department worked out and submitted to Congress noted that the U.S. forces can use nuclear weapons in case of "contingency" on the Korean peninsula and the U.S. should develop smaller nuclear weapons to be used for destroying underground facilities in the above-said case and to this end it should recoil from honoring the nuclear test ban treaty." *U.S. to Blame for Derailing Process of Denuclearization on Korean Peninsula*, KOREAN CENT. NEWS AGENCY, May 13, 2003, available at <http://www.kcna.co.jp/index-e.htm>.

<sup>28</sup> Press Release, UN Secretary-General Kofi Annan, Addressing Assembly on Terrorism, Calls for 'Immediate, Far-Reaching Changes' in UN Response to Terror, U.N. Doc. SG/SM/7977, GA/9920 (Jan.10, 2001), available at <http://www.un.org/News/Press/docs/2001/sgsm7977.doc.htm>.

<sup>29</sup> International Physicians for the Prevention of Nuclear War, *Nuclear Terrorism: A Briefing Paper* (2002), <http://www.ippnw.org/NU.K.eTerrorism01.html> (last visited Dec. 18, 2003).

<sup>30</sup> For example, in the Czech Republic in 1994 and in Odessa in 1993. See Gururaj Mutalik et al., *Crude Nuclear Weapons: Proliferation and the Terrorist Threat*, Global Health Watch Report 1 (IPPNW, Cambridge, MA) (1996) at 12, available at <http://www.ippnw.org/crudenukes.pdf> (last visited Dec. 18, 2003).

<sup>31</sup> For example in Germany in 1994. See *id.*

<sup>32</sup> OFFICE OF TECHNOLOGY ASSESSMENT, NUCLEAR PROLIFERATION AND SAFEGUARDS 17 (1977), at <http://www.wws.princeton.edu/cgi-bin/byteserv.prl/~ota/disk3/1977/7705/7705.pdf> (last visited Dec. 18, 2003).

<sup>33</sup> Mutalik, *supra* note 30, at 4.

<sup>34</sup> *Pentagon Recommends Use of Nuclear Weapons*, KYODO NEWS, Sept. 19, 2001, at [http://www.pnnd.org/pentagon\\_recommends\\_use\\_of\\_nuclear\\_weapons.htm](http://www.pnnd.org/pentagon_recommends_use_of_nuclear_weapons.htm) (last visited Dec. 18, 2003).

<sup>35</sup> Mutalik, *supra* note 30, at 41–50.

<sup>36</sup> Suman Guha Mozumdar, *Need for Nuclear Disarmament*, REDIFF NEWS, Sept. 19, 2001, at <http://www.rediff.com/us/2001/sep/19ny26.htm> (last visited Dec. 18, 2003).

<sup>37</sup> LEWIS CARROLL, *ALICE'S ADVENTURES IN WONDERLAND AND THROUGH THE LOOKING-GLASS AND WHAT ALICE FOUND THERE* 74 (Oxford University Press 1971).

<sup>38</sup> Program of Action agreed to at the 2000 NPT review Conference: “The Conference agrees on the following practical steps: A diminishing role for nuclear weapons in security policies to minimize the risk that these weapons will ever be used and to facilitate the process of their total elimination.” Nuclear Non-Proliferation Treaty Review Conference, *Programme of Action on Nuclear Disarmament*, at <http://disarm.igc.org/parag15.html>. See also Nuclear Non-Proliferation Treaty Conference, *2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons Final Document*, at <http://disarmament.un.org:8080/wmd/npt/2000FD.pdf> (last visited Dec. 18, 2003).

<sup>39</sup> U.S. DEP'T OF DEFENSE, NUCLEAR POSTURE REVIEW REPORT (2001), at <http://www.globalsecurity.org/wmd/library/policy/dod/npr.htm> (last visited Dec. 18, 2003).

<sup>40</sup> *Id.* See also John A. Gordon, Under Secretary for Nuclear Sec. & Admin., Nat'l Nuclear Sec. Admin., Dep't of Energy, Statement before the U.S. Senate Committee on Armed Services (Feb. 14, 2002), [http://www.senate.gov/~armed\\_services/statemnt/2002/Gordon.pdf](http://www.senate.gov/~armed_services/statemnt/2002/Gordon.pdf) (last visited Dec. 18, 2003).

<sup>41</sup> U.S. DEP'T OF DEFENSE, *supra* note 39.

<sup>42</sup> *Bush Tells Congress of Decision to Withdraw From ABM Treaty*, AFP, Dec. 31, 2001, at <http://www.rense.com/general18/abm.htm>.

<sup>43</sup> *Id.* See also Gordon, *supra* note 40.

<sup>44</sup> See Preparatory Commission for the Comprehensive Test Ban Treaty Organization, *Signature and Ratification Status*, at <http://www.ctbto.org> (last visited Nov. 29, 2003).

<sup>45</sup> U.S. DEP'T OF DEFENSE, *supra* note 39.

<sup>46</sup> See S.C. Res. 984, U.N. SCOR, 3514th mtg., U.N. Doc. S/RES/984 (1995).

<sup>47</sup> Draft resolution sent to the US Congress on Sept. 19, 2002 by President Bush to authorize military action against Iraq, at [http://www.pnnd.org/iraq\\_bush-resolution.htm](http://www.pnnd.org/iraq_bush-resolution.htm) (last visited Dec. 18, 2003); Press Release, The White House, President Says Saddam

Hussein Must Leave Iraq Within 48 Hours (Mar. 17, 2003), at <http://www.whitehouse.gov/news/releases/2003/03/20030317-7.html> (last visited Dec. 18, 2003); Press Release, U.S. Secretary of State Colin Powell Addresses the U.N. Security Council (Feb. 5, 2003), at <http://www.whitehouse.gov/news/releases/2003/02/20030205-1.html> (last visited Dec. 18, 2003). UK Attorney General's Statement, March 17, 2003, cited in Rabinder Singh QC and Charlotte Kilroy, *In the Matter of the Legality of the Use of Force Against Iraq and the Alleged Existence of Weapons of Mass Destruction*, Opinion for Campaign for Nuclear Disarmament and Peacerights, June 6, 2003 (on file with *Seattle Journal for Social Justice*).

<sup>48</sup> Int'l Assoc. of Law. Against Nuclear Arms, International Appeal by Lawyers and Jurists Against the 'Preventive' Use of Force, available at [http://www.pnnd.org/lawyers\\_appeal.htm](http://www.pnnd.org/lawyers_appeal.htm) (last visited Dec. 4, 2003); Mark Turner, *Conflict would be Deemed Illegal*, FINANCIAL TIMES (London), Feb. 14, 2003, at 7.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> LASSA OPPENHEIM, OPPENHEIM'S INTERNATIONAL LAW 41–42 (Robert Y. Jennings & C. Arthur Watts eds., 9th ed. 1991), cited in Singh & Kilroy, *supra* note 47.

<sup>52</sup> Letter from Daniel Webster, Secretary of State, to Lord Ashburton (Aug. 6, 1842), reprinted in JOHN BASSETT MOORE, 2 A DIGEST OF INTERNATIONAL LAW § 217, at 412 (1906).

<sup>53</sup> OPPENHEIM, *supra* note 51, at 412.

<sup>54</sup> S.C. 678, U.N. SCOR, 2963d mtg., U.N. Doc. S/RES/678 (1990); S.C. 687, U.N. SCOR, 2933d mtg., U.N. Doc. S/RES/687 (1991); S.C. 1441, U.N. SCOR, 4644<sup>th</sup> mtg., U.N. Doc. S/RES/1441 (2002); see also Dr. Hans Blix, Briefing of the Security Council: Update on Inspection (Jan. 27, 2003), United Nations Security Council, at <http://www.un.org/Depts/unmovic/Bx27.htm> (last visited Dec. 18, 2003); Dr. Hans Blix, Briefing of the Security Council: Oral Introduction of the 12<sup>th</sup> Quarterly Report of UNMOVIC (Mar. 7, 2003), available at <http://unmovic.org>.

<sup>55</sup> "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." U.N. CHARTER art. 2, ¶ 4.

<sup>56</sup> "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security." U.N. CHARTER art. 51.

<sup>57</sup> "Should the Security Council consider that measures [not involving the use of force] provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations." U.N. CHARTER art. 42.

<sup>58</sup> The Security Council authorized the use of force in Korea in 1950 (see S.C. 82, U.N. SCOR, 473d mtg., U.N. Doc. S/1501 (1950)); against Iraq in 1990 (see S.C. 678, *supra* note 54); and in Haiti, Rwanda, Somalia and Bosnia in the 1990s (see John Burroughs & Andrew Lichterman et. al., Lawyers Committee on Nuclear Policy, *The United Nations Charter and the Use of Force Against Iraq* (Oct. 2, 2002), available at <http://www.lcnp.org/global/Iraqstatemf.3.pdf>).

<sup>59</sup> U.N. CHARTER pmbl.

<sup>60</sup> Article 39 of the Charter provides: “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.” Article 41 provides: “The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions.” Article 42 provides: “Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.”

<sup>61</sup> See Burroughs & Lichterman, *supra* note 58.

<sup>62</sup> S.C. Res. 678, *supra* note 54.

<sup>63</sup> *Id.*

<sup>64</sup> S.C. Res. 687, *supra* note 54.

<sup>65</sup> See Uchenna Emeagwali & Jeannie Gonzalez, Lawyers’ Committee on Nuclear Policy, *UN Security Council Deliberations Regarding Iraq: February 14, 2003 through March 26, 2003* (July 2003), available at <http://www.lcnp.org/global/reportSCIraq.pdf>

<sup>66</sup> Int’l Assoc. of Law. Against Nuclear Arms, *supra* note 48.

<sup>67</sup> S.C. Res. 1441, *supra* note 54.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> S.C. Res. 678, *supra* note 54. See Singh & Kilroy, *supra* note 47, at 19.

<sup>71</sup> The coalition of forces that joined U.S. and UK in the military assault on Iraq. See Alan Perrott, *Coalition of the Willing? Not Us, Say Solomon Islanders*, N.Z. HERALD, Nov. 12, 2003, available at 2003 WL 16645549.

<sup>72</sup> Both the U.S. and UK hold the power of veto in the Security Council and so could prevent any resolution condemning their actions. See U.N. CHARTER art. 24 and 27.

<sup>73</sup> S.C. Res. 487, U.N. SCOR, 2288th mtg., U.N. Doc. S/Res/487 (1981).

<sup>74</sup> See Nurnberg Trial, 6 F.R.D. 69, 101 (1946).

<sup>75</sup> NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (Sept. 2002), at 14, available at <http://www.whitehouse.gov/nsc/nss.html> (last visited Dec. 18, 2003).

<sup>76</sup> *Id.* at Introduction.

<sup>77</sup> *Pakistan Fit Case For Attack By US: Sinha*, SIFY NEWS (New Delhi), Apr. 6, 2003, available at <http://headlines.sify.com/1895news1.html>.

<sup>78</sup> Rory McCarthy & John Hooper, *Musharraf Ready to Use Atom Bom*, GUARDIAN (London), Apr. 6, 2002, at 18.

<sup>79</sup> Sultan Shahin, *Looking Into the Nuclear Abyss*, ASIA TIMES (New Delhi), May 24, 2002, available at <http://www.atimes.com/ind-pak/DE24Df03.html>.

<sup>80</sup> John Hallam notes that “[t]he DPRK has made precisely such threats and at a time when it has clearly felt most threatened, stating specifically that pre-emptive strikes are



not the sole prerogative of the US.” John Hallam, Memo on North Korean nuclear crisis, (Friends of the Earth, Australia) May 15, 2003. *See also North Korea warns of pre-emptive attack on US troops*, AGENCE FRANCE-PRESSE, May 2, 2003, available at <http://www.freerepublic.com/focus/news/837116/pos>.

<sup>81</sup> *Japan Flirts With Preemption Strategy*, THE SUNFLOWER 73 (Nuclear Age Peace Foundation, California), June 2003, at [http://www.wagingpeace.org/menu/resources/sunflower/2003/06\\_sunflower.htm](http://www.wagingpeace.org/menu/resources/sunflower/2003/06_sunflower.htm).

<sup>82</sup> U.S. to Blame, *supra* note 27.

<sup>83</sup> Int'l Assoc. of Law. Against Nuclear Arms, *supra* note 48.

<sup>84</sup> *See* Letter dated 24 February 2003 from the Permanent Representatives of France, Germany and the Russian Federation to the United Nations Addressed to the President of the Security Council, U.N. Doc S/2003/214 (2003), available at <http://www.un.org/Docs/journal/asp/ws.asp?m=S/2003/214>.

<sup>85</sup> Table II includes examples of the use of these methods relevant to disarmament and non-proliferation.

<sup>86</sup> Table III describes elements of the mechanisms demonstrated in Table II.

<sup>87</sup> Int'l Assoc. of Law. Against Nuclear Arms, *supra* note 48.

<sup>88</sup> *Id.*

<sup>89</sup> The United States, for example, indicated that it had information regarding WMD that Iraq had not declared and was hiding from UNMOVIC. However, the United States would not hand this information over to Hans Blix, Executive Chairman of UNMOVIC, despite his requests. Other information given to UNMOVIC by the United States and the UK to support claims of an Iraqi nuclear weapons program was affirmed by the IAEA as comprising forged documents. Joby Warrick, *Some Evidence on Iraq Called Fake: U.N. Nuclear Inspector Says Documents on Purchases Were Forged*, WASH. POST, Mar. 8, 2003, at A1.

<sup>90</sup> Currently, there are twelve global or regional treaties pertaining to the subject of international terrorism. The global treaties are:

- 1) Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963
- 2) Convention for the Suppression of Unlawful Seizure of Aircraft, 1970
- 3) Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971)
- 4) Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973
- 5) International Convention against the Taking of Hostages, 1979
- 6) Convention on the Physical Protection of Nuclear Material, 1980
- 7) Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1988
- 8) Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988
- 9) Protocol for the Suppression of Unlawful Acts against the Safety of Fixed 10) Platforms Located on the Continental Shelf, 1988

- Convention on the Marking of Plastic Explosives for the Purpose of Detection, 11) 1991
- 12) International Convention for the Suppression of Terrorist Bombings, 1997
- 13) International Convention for the Suppression of the Financing of Terrorism, 1999

See U.N. Office of Drug and Crime, *Conventions Against Terrorism*, at [http://www.unodc.org/unodc/en/terrorism\\_conventions.html](http://www.unodc.org/unodc/en/terrorism_conventions.html) (last visited Dec. 4, 2003).

<sup>91</sup> See, e.g., DELLER ET AL., *supra* note 15.

<sup>92</sup> The United States., for example, indicated that it had information regarding WMD that Iraq had not declared and was hiding from UNMOVIC. However, the United States would not hand this information over to Hans Blix, Executive Chairman of UNMOVIC, despite his requests. Other information given to UNMOVIC by the United States and the UK to support claims of an Iraqi nuclear weapons program was affirmed by the IAEA as comprising forged documents. Joby Warrick, *Some Evidence on Iraq Called Fake: U.N. Nuclear Inspector Says Documents on Purchases Were Forged*, WASH. POST, Mar. 8, 2003, at A01.

<sup>93</sup> In its March 17, 2003, report to the UN Security Council, UNMOVIC reported that Iraq was cooperating, that its inspectors had found no prohibited WMD with the exception of missiles of prohibited range (which were then destroyed by Iraq), but that UNMOVIC needed more time to complete its inspections. See United Nations Monitoring, Verification, and Inspection (UNMOVIC), *Security Council Briefings*, at <http://www.unmovic.org> (last visited Dec. 18, 2003). The United States and UK disregarded the request, called on UNMOVIC to leave Iraq, and later launched a military assault on Iraq.

<sup>94</sup> Thalif Deen, *Iraq: U.S. Moves to Block U.N. Emergency Session on War*, U.N. INTER PRESS SERVICE, Mar. 28, 2003, available at 2003 WL 6914718.

<sup>95</sup> Legality of the Threat of Use of Nuclear, International Court of Justice, 1996 ICJ 95, (July 8), (Opinion of President Mohammed Bedjaoui). English translation available by ANN FAGAN GINGER, *NUCLEAR WEAPONS ARE Illegal* 79–88 (1998).

<sup>96</sup> Legality of the Use by a State of Nuclear Weapons, 1995 ICJ 27 (Nov. 7) (Oral Testimony of H.E. Razali Ismail, Permanent Representative of Malaysia to the United Nations).

<sup>97</sup> *Supra* note 54.

<sup>98</sup> “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 complete disarmament under strict and effective international control.” Non-Proliferation Treaty Article VI. 1970 U.N.T.S. 169.

<sup>99</sup> Advisory Opinion, *Legality of the Threat or Use of Nuclear Weapons*, 1996 ICJ 226 ¶ 105.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> See C.G. WEERAMANTRY, *What principles of International Law Render the Use of Nuclear Weapons Illegal*, in *NUCLEAR WEAPONS AND SCIENTIFIC RESPONSIBILITY* 83–96 (2d ed., Vishva Lekha & Kluwer Law Int’l, 1999). See also Written Statement of the Government of Malaysia to the International Court of Justice on the Legal Status of the

Use of Nuclear Weapons 3–4 (June 19, 1995), available at [http://www.icj-cij.org/icjwww/icas/ianw/ianw\\_pleadings/ianw\\_ipleadings\\_199409\\_WriStats\\_31\\_Malaysia.pdf](http://www.icj-cij.org/icjwww/icas/ianw/ianw_pleadings/ianw_ipleadings_199409_WriStats_31_Malaysia.pdf).

<sup>103</sup> 1996 I.C.J. 226 ¶ 94.

<sup>104</sup> Nuclear weapons have been developed as part of deterrence policy in order to threaten mass destruction. The current nuclear weapons thus have incredibly large yields—most of which are many times more explosive than the bombs that destroyed Hiroshima and Nagasaki—and thus are of a nature which could not be used without violating the humanitarian laws of warfare. The ICJ recognized this when it addressed the arguments of the NWS that they could direct small nuclear weapons, including new low yield weapons, against military targets that would not therefore be indiscriminate and could be legal. The Court said that it “does not consider that it has a sufficient basis for a determination on the validity of this view.” Advisory Opinion, 1996 I.C.J. at ¶ 94.

<sup>105</sup> Israel does not support disarmament negotiations until there is peace in the Middle East. China, India, and Pakistan support negotiations on a nuclear weapons convention. However, they have not adapted their nuclear use policies to conform specifically with the ICJ’s determination on general illegality. In addition, the nuclear weapons that China, India, Pakistan, and Israel maintain, are of a yield that, if detonated on a specific target, would most likely not be containable (like nuclear weapons of other NWS), thus violating laws against indiscriminate weapons. India’s manufacture of nuclear weapons contradicts its own statement to the ICJ in 1995 where it said that “the threat or use of nuclear weapons in any circumstance, whether as a means or method of warfare or otherwise, is illegal or unlawful under international law. Since the production and manufacture of nuclear weapons can only be with the objective of their use, it must follow that if the use of such weapons itself is illegal under international law, then their production and manufacture cannot under any circumstances be considered as permitted.” Letter dated June 20, 1995 from the Ambassador of India, together with written statement of the Government of India, to the International Court of Justice. 1996 I.C.J. 226.

<sup>106</sup> Phillipe Sands, Oral Statement of Solomon Islands to the International Court of Justice, 1995 I.C.J. 32, at 54 ¶ 6.

<sup>107</sup> 1995 ICJ 27, ICJ Oral Statements, H.E. Razali on behalf of Malaysia, Nov. 7, 1995. *op. cit.* 43.

<sup>108</sup> G.A. Res. 53/77W, in *DATAN & WARE*, *supra* note 14, Documents 3.

<sup>109</sup> Brazil, Egypt, Ireland, Mexico, New Zealand, South Africa, and Sweden.

<sup>110</sup> Final document of the 2000 Review Conference of the Parties to the Treaty of the Non-Proliferation of Nuclear Weapons, at <http://disarmament.un.org/wmd/finaldoc.html> (last visited Oct. 22, 2003).

<sup>111</sup> Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998), art. 8.2(b)(xx).

<sup>112</sup> Alyn Ware, *International Criminal Court: A Crime to Poison and to Nuke*, 12 BOMBS AWAY 1 (Lawyers’ Committee on Nuclear Policy, New York, N.Y.), at 4 (regarding the preparatory committee meeting for the establishment of an International Criminal Court at the United Nations (Dec. 1-12, 1997).

<sup>113</sup> *Id.*

<sup>114</sup> *Crimes Against Humanity and the International Criminal Court*, in INTERNATIONAL AND NATIONAL LAW IN RUSSIA AND EASTERN EUROPE: ESSAYS IN HONOR OF GEORGE GINSBURG 139 (Roger Clark et. al eds., 2001), reprinted in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A CHALLENGE TO IMPUNITY 75 (Mauro Politi & Giuseppe Nesi, eds., 2001).

<sup>115</sup> Declarations made by France upon ratifying the Statute of the International Court of Justice (June 9, 2000), at <http://www.lcnp.org/global/french.htm> (last visited Oct. 22, 2003).

<sup>116</sup> Interpretive declaration made by the Government of New Zealand on Ratification of the Rome Statute of the International Criminal Court, at <http://untreaty.org/ENGLISH/bible/englishinternetbible/part/chapterXVIII/treaty10.asp> (last visited Oct. 22, 2003).

<sup>117</sup> See DATAN & WARE, *supra* note 14, Documents 6-12.

<sup>118</sup> See Saul Mendlovitz & John Burroughs, Survey and Preliminary Analysis of Domestic Cases in which the Defendants Raised the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons, Law Committee on Nuclear Policy, World Court Project (July 2001), at <http://lcnp.org/wcourt/surveyanalysis.htm> (last visited Oct. 22, 2003). See also Alyn Ware & Giovanni Nifosi, *Citizens Weapons Inspections*, 12 Bombs Away 3 (1999), available at <http://www.lcnp.org/pubs/bombs%20away!fall99/article13.htm>. See Reports of Citizens Weapons Inspections, at <http://www.motherearth.org/nU.K.e/inspection.php> (last visited Dec. 4, 2003).

<sup>119</sup> The name originates in the Bible, in the book of *Isaiah*: “There will come a time when nation shall not war against nation anymore—and they shall beat their swords into ploughshares and their sythes into pruning hooks.” *Isaiah* 2:4.

<sup>120</sup> See Mendlovitz & Burroughs, *supra* note 118.

<sup>121</sup> 2001 J.C. 143 (High Ct. of Justiciary) (ruling by Sheriff Gimblett, Greenock Ct., Oct. 20, 1999). For full decision see <http://www.tridentploughshares.org/greenock/crruling2.php>. See also Gerard Seanan, *Women Cleared as Court Rules Nuclear Arms Illegal*, GUARDIAN (London), Oct. 22, 1999, at 4.

<sup>122</sup> 1996 I.C.J. 226, Declaration of President Mohammed Badjaoui, President of the International Court of Justice, appended to the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons.

<sup>123</sup> G.A. Res. 51/45 M, U.N. GAOR, 79th Sess., U.N. Doc. A/RES/51/45 (Dec. 10, 1996); G.A. Res. 52/38 O, U.N. GAOR, 52d Sess., U.N. Doc. A/RES/52/38 (Dec. 9, 1997); G.A. Res. 53/77 W, U.N. GAOR, 53d Sess., U.N. Doc. A/RES/53/77 (Dec. 4, 1998).

<sup>124</sup> Public opinion polls conducted by independent polsters indicate support for a nuclear weapons convention at:

Australia	92%
Canada	93%
Germany	93%
Japan	78%
United Kingdom	87%
United States	87%

See Abolition 2000, Resources, *People Worldwide Want Nuclear Abolition*, available at [http://abolition2000.org/resources/docs/poll\\_worldwide.pdf](http://abolition2000.org/resources/docs/poll_worldwide.pdf) (last visited Oct. 22, 2003).

<sup>125</sup> Japan Council Against A & H Bombs (GENSUIKYO), *Appeal from Hiroshima and Nagasaki for a Total Ban and Elimination of Nuclear Weapons*, available at <http://www10.plala.or.jp/antiatom/html/e/egensu/hnappeal.htm> (last visited Oct. 22, 2003).

<sup>126</sup> Model Weapons Nuclear Convention: Convention on the Prohibition of the Development, Testing, Production, Stockpiling, Transfer, Use and Threat of Nuclear Weapons and on Their Elimination, U.N. Doc. A/C.1/52/7 (1997).

<sup>127</sup> See DATAN & WARE, *supra* note 14.

<sup>128</sup> U.N. GAOR 52d Sess., U.N. Doc. A/C.1/52/7 (1997).

<sup>129</sup> See Nuclear Weapons Convention Monitor: Updating the Debate on the Prohibition and Elimination of Nuclear Weapons 1 (IPPNW) Apr. 2000, at <http://www.ippnw.org/NWMonitor1-1.pdf> (last visited Dec. 18, 2003).

<sup>130</sup> DATAN & WARE, *supra* note 14. See Nuclear Weapons Convention Monitor, *supra* note 129.

<sup>131</sup> Moredchai Vanunu, the technician who revealed the nuclear weapons program, was subsequently kidnapped from Rome by Israeli agents, taken back to Israel, and sentenced to eighteen years in jail for his ‘crime.’ See Hounam, *supra* note 24.

<sup>132</sup> See DATAN AND WARE, *supra* note 14, § 2, at 27.

<sup>133</sup> See A. Walter Dorn and Douglas S. Scott, *Compliance Mechanisms for Disarmament Treaties*, VERIFICATION YEARBOOK 2000, (Trevor Findlay ed., 2000), available at [http://www.vertic.org/assets/VY00\\_Dorn-Scott.pdf](http://www.vertic.org/assets/VY00_Dorn-Scott.pdf).

<sup>134</sup> Model Nuclear Weapons Convention, *supra* note 126.

<sup>135</sup> See DATAN AND WARE, *supra* note 14, § 2, at 47–48, § 3, at 3–4.

<sup>136</sup> See *id.* at 38–42, § 3, at 7–8.

<sup>137</sup> Editorial, *The Next Terrorist Threat*, CHI. TRIB., Sept. 24, 2001, at 14. Gary Milhollin, head of the Washington-based Wisconsin Project on Nuclear Arms Control, foresees “a definite risk” of a nuclear attack by terrorists in the next decade—say by Sept. 11, 2011.

<sup>138</sup> U.N. GAOR 1st Comm., 58th Sess., Agenda Item 73(d), U.N. Doc. A/C.1/58/L.40/Rev.1 (Oct. 30, 2003) (introduced by Brazil on behalf the New Agenda Coalition, Oct. 22, 2003, and adopted by the UN General Assembly on Nov. 4, 2003).

<sup>139</sup> See DATAN AND WARE, *supra* note 14, § 2, at 39.

<sup>140</sup> See *id.* at 22–24.