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Working Toward a Legally Enforceable Nuclear Non-Proliferation Regime

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Ronald J. Sievert

Abstract

The foundation of the international effort to stop the proliferation of nuclear weapons is the Nuclear Non-Proliferation Treaty ("NPT"). This Article proceeds in three parts. Part I proposes a new Nuclear Non-Proliferation Treaty. Part II contains preliminary observations regarding the Security Council, General Assembly and Zanger Committee provisions of the new treaty and then addresses the basic question of why nations might be willing to scrap the established NPT in favor of this new proposed agreement. Finally, Part III discusses how the advent of international institutions and the increasing incorporation of international law into the framework of domestic, regional and international tribunals may enhance the enforcement of the proposed non-proliferation treaty.

WORKING TOWARD A LEGALLY ENFORCEABLE NUCLEAR NON-PROLIFERATION REGIME

*Ronald J. Sievert**

INTRODUCTION

*An Honest Appraisal of the Ability to Legally Enforce the Apparent
Commitments Made by the 1968 NPT*

The foundation of the international effort to stop the proliferation of nuclear weapons is the Nuclear Non-Proliferation Treaty (“NPT”).¹ To be legally enforceable, however, a treaty must contain provisions that can be realistically achieved by the parties.² Accordingly, in an effort to determine if the current NPT is enforceable, the first step must be to objectively analyze the wording of the treaty to determine if it contains reasonable objectives.

There has been some debate in recent years over the actual meaning of the key provisions of the NPT. The non-nuclear weapons states (“NNWS”) maintain that, in essence, the “bargain” reflected in the treaty is that they will refrain from obtaining or developing nuclear weapons in return for assistance in acquiring peaceful nuclear energy and a promise that the

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

2. See Vienna Convention on the Law of Treaties arts. 61–62, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter VCLT]. The United States has not ratified the VCLT, but it has been ratified or adopted by 110 nations, and it is generally regarded as customary international law for all states.

nuclear weapons states (“NWS”) will completely disarm.³ Conservative advocates for the NWS, on the other hand, emphasize that the treaty only requires, on their part, a cessation of the arms race and a good faith effort at disarmament (with the possibility of even preserving some nuclear capability as a necessary hedge against aggressor states).⁴ Such good faith efforts could, theoretically, continue in perpetuity, but the fact that they have not achieved the ultimate goal of weapons elimination does not, in their opinion, in any way relieve the NNWS of their obligation not to engage in proliferation.⁵

Legally, treaties, as contracts, are interpreted by looking at the ordinary meaning of the language with a supplementary reference to the surrounding statements of the parties when the language is somewhat ambiguous.⁶ Application of these basic rules demonstrates that the non-nuclear weapon states have the better of the argument as to the actual meaning of the NPT. The preamble to the NPT states the purpose of the treaty is to facilitate the “elimination from national arsenals of nuclear weapons . . . pursuant to a treaty on general and complete disarmament.”⁷ The treaty itself calls specifically for “negotiations in good faith on effective measures relating . . . to nuclear disarmament, and on a treaty on general and complete disarmament.”⁸ If there were any question as to the plain meaning of the words, at least from the perspective of the United States, it can be settled by resort to the statements of a succession of US presidents from Presidents Nixon and Reagan to President Obama as well as their advisors. They have *verbally and in writing* embraced the objective of immediate efforts to achieve complete

3. See Adel Ali, *Treaty on the Non-Proliferation of Nuclear Weapons and Its Recent Issues: A Legal Perspective*, 1 INT’L J. NUCLEAR L. 305, 307 (2007); see also Chamundeeswari Kuppaswamy, *Is the Nuclear Non-Proliferation Treaty Shaking at Its Foundations? Stock Taking After the 2005 NPT Review Conference*, 11 J. CONFLICT & SECURITY L. 141, 142–43 (2006).

4. See Christopher Ford, *The Nonproliferation Bestiary: A Typology and Analysis of the Nonproliferation Regime*, 39 N.Y.U. J. INT’L L. & POL. 937, 957–66 (2007); Paul Nelson, *Book Review: Abolishing Nuclear Weapons by George Perkovich and James M. Acton*, 3 ATOMS FOR PEACE: AN INT’L J. 143, 154 (2010).

5. See Ford, *supra* note 4, at 960–62; Scott Sagan, *Good Faith and Nuclear Disarmament Negotiations*, in *ABOLISHING NUCLEAR WEAPONS: A DEBATE* 203, 209–10 (George Perkovich & James M. Acton eds., 2009).

6. See VCLT, *supra* note 2, arts. 31–32.

7. NPT, *supra* note 1, pmbl.

8. *Id.* art. VI.

nuclear disarmament.⁹ Former US Secretaries of State Kissinger and Shultz have noted that the “[NPT] envisioned the end of all nuclear weapons” and have stated that states should cease reliance on such weapons.¹⁰ US Secretary of State Clinton proclaimed at the NPT Review Conference on May 3, 2010, “I represent a President and a country committed to a vision of a world without nuclear weapons”¹¹ In the face of such fairly categorical pronouncements, any argument by the United States that the existing treaty really only required that it generally work towards some extremely far off objective of eventual disarmament rings hollow.

Of course even if a general “good faith” effort was the only obligation under the treaty, it would be difficult to say that the United States has met this condition. Legally, “good faith” means “faithfulness to an agreed common purpose and consistency with the justified expectations of the other party” and not evading the spirit of the bargain.¹² Based on such actions as the withdrawal from the Anti-Ballistic Missile (“ABM”) Treaty and failure to ratify the Comprehensive Nuclear Test Ban Treaty (“CNTBT”), many could legitimately argue that the United States has not engaged in a “good faith” effort.¹³ This is not to make light of the thirty-year effort of the United States and USSR, beginning with the Strategic Arms Limitation Talks, to reduce their nuclear arsenals. The elimination of 13,000 nuclear weapons by the United States is an incredible accomplishment,¹⁴ especially considering that China has presumably increased its stock of weapons. But however laudable this achievement, it does not represent a practical commitment by the leaders of either the United States or Russia to actually abolish nuclear weapons.

9. See, e.g., George P. Shultz et al., *A World Free of Nuclear Weapons*, WALL ST. J., Jan. 4, 2007, at A15 (referencing Presidents Nixon and Reagan’s commitment to a nuclear-free world); Lawrence Wittner, *How Feasible is Obama’s Nuclear Disarmament Agenda?*, HIST. NEWS NETWORK, Apr. 20, 2009, <http://hnn.us/articles/76303.html> (stating that Carter, Reagan, and Obama all called for “abolishing nuclear weapons”).

10. See Shultz et al., *supra* note 9, at A15.

11. Hillary Clinton, Sec’y of State, Remarks at the Review Conference of the Nonproliferation Treaty (May 3, 2010) (transcript available at <http://www.state.gov/secretary/rm/2010/05/141424.htm>).

12. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981).

13. See, e.g., Sagan, *supra* note 5, at 207–08.

14. Ford, *supra* note 4, at 963.

Given that a possible interpretation of the wording and contemporary statements surrounding the passage of the NPT might require, at the very least, immediate efforts to achieve complete nuclear disarmament, it could even be charged, if the NPT was a legally enforceable treaty, that the United States, Russia, and other NWS are now in material breach.¹⁵ The Group of Non-Aligned States party to the NPT certainly seems to believe that this may be the case. Their Elements for a Plan of Action for the Elimination of Nuclear Weapons, issued April 30, 2010, begins by citing the “multilaterally agreed commitments [by the NWS] to achieve general and complete disarmament” and states that “[t]he NWS need to implement the unequivocal undertaking that they had provided in 2000 so as to accomplish the total elimination of their nuclear weapons.”¹⁶ The United States would of course counter a charge of material breach by stating that its failure to eliminate nuclear weapons was caused by the refusal of other states to disarm, while they in turn would blame the United States. Such allegations would, in all likelihood, dissolve into an endless round of finger-pointing with no resolution.

But the United States need not fear being forced to defend itself against charges of material breach of the NPT. This is because, to the extent the NPT manifestly requires an immediate attempt to completely abolish nuclear weapons, it has established, from a legal standpoint, an objective that in the current state of world affairs is impossible to achieve. A responsible government cannot disarm knowing that not only have its traditional adversaries been armed with nuclear warheads, but smaller unstable states, such as Iran, North Korea, and Pakistan, and non-state actors, have acquired or are hoping to obtain such weapons. Furthermore, as a nuclear weapon can be as small as an artillery shell and hidden in any house, shed, or cave, every practical world leader knows it is impossible to verify that a potential adversary has not kept any nuclear weapons in hiding; in the absence of absolute verification, the leader must be

15. See VCLT, *supra* note 2, art. 60.

16. INST. FOR SCI. & INT’L SEC., ELEMENTS FOR A PLAN OF ACTION FOR THE ELIMINATION OF NUCLEAR WEAPONS BY GROUP OF THE NON-ALIGNED STATE PARTIES TO THE NPT 1 (2010), http://isis-online.org/uploads/conferences/documents/NAM_Plan_of_Action_for_2010_NPT_RevCon_30April2010.pdf.

prepared to respond in kind. Secretary of State Clinton acknowledged this latter reality when she said in her May 3, 2010 speech, "The United States will retain a nuclear deterrent for as long as nuclear weapons exist."¹⁷ As no one will ever be able to conclusively prove the nonexistence of nuclear weapons, there will always have to be a deterrent.

In addition, a solid case can be made that nuclear weapons have actually continued to prevent major catastrophic wars by, for example, deterring a Soviet invasion of Western Europe, a Chinese assault on Taiwan, or attempts by the Arab states to overrun Israel.¹⁸ NWS, like England, France, and the United States, that might wish to protect themselves and their allies against attack by larger states are simply not financially capable of permanently maintaining huge regular armies that can always deter a highly populous aggressor state by means of conventional weapons only.

This author noted above that the objectives of the NPT could not be met "in the current state of world affairs" because theoretically one could imagine that the threats to security outlined above could be at least greatly reduced in a utopian future if all states were united in the creation of a UN that could actually prevent wars between states. This would require a Security Council ("SC") that was not hamstrung by the veto and had established a record of acting quickly, without endless debate, to not only prevent aggression but capture and punish those who initiated aggressive war. Even this newly empowered ideal UN would need to possess nuclear weapons so as not to be at the mercy of a rogue state which had managed to conceal a few of its own. But at least such an organization would provide the cover that would enable states to disarm. Unfortunately, there has not been any attempt in the last few decades by the NWS and the NNWS to create this model international

17. Clinton, *supra* note 11.

18. See Heewon Han & Jongho Kim, *How Hot?, 'Real' Hot: Can We Control North Korean Nuclear Weapons Through International Law? Hints from the International Court of Justice's Advisory Opinion*, 2 *ATOMS FOR PEACE: AN INT'L J.* 236, 240 (2009); Nelson, *supra* note 4, at 145 (citing Kenneth N. Waltz, *The Spread of Nuclear Weapons; More May Be Better*, *ADELPHI PAPERS*, Autumn 1981). The reference to Waltz is not meant as an endorsement of the theory that more weapons in the hands of more states is better. Such a development would contradict the basic principle that it is important to keep weapons out of the hands of a significant number of leaders.

organization. Such an organization does not exist and in all likelihood will not exist in the foreseeable future.

What remains is a real world in which complete nuclear disarmament is impossible. The promise and hope of no nuclear weapons in the NPT is a fantasy. Despite the hard work of the delegates, and a strengthened International Atomic Energy Agency (“IAEA”), the decision at the 2010 NPT review conference essentially to hold another meeting later to discuss the Middle East does absolutely nothing to alter this view.¹⁹ These statements are not meant to denigrate those who advocate the honorable goal of a nuclear free world. But, in this author’s ideal world, not only would nuclear weapons be eliminated, but also tanks, artillery, high explosives, automatic weapons, and many of the other terrible devices that have repeatedly caused horrific destruction in the last 500 years. An improvised explosive device or car bomb exploding next to a group of soldiers and civilians has the same devastating impact on them as a nuclear explosion ten miles distant. The world will not be able to completely abolish nuclear weapons, for the reasons already stated, any more than it has been able to eliminate “conventional” weapons. In the history of mankind, no weapon has just disappeared. Their use generally only diminishes when replaced by a more fearsome weapon; the clock cannot be turned backwards.

Law generally has a way to accommodate reality. Article 61 of the Vienna Convention on the Law of Treaties (“VCLT”) provides that a treaty is unenforceable (by means of termination or withdrawal) based on impossibility of performance if an object indispensable to the treaty no longer exists.²⁰ Article 62 of the VCLT states that a treaty may not be enforced if there has been a fundamental change in essential circumstances.²¹ If the party seeking to withdraw has caused the elimination of the object or the change in circumstances, it is still obligated by the treaty. The

19. See Press Release, The White House Office of the Press Sec’y, Statement by the National Security Advisor, General James L. Jones, on the Non-Proliferation Treaty Review Conference (May 28, 2010), available at <http://www.whitehouse.gov/the-press-office/statement-national-security-advisor-general-james-l-jones-non-proliferation-treaty>.

20. VCLT, *supra* note 2, art. 61.

21. *Id.* art. 62.

indispensable objects and essential circumstances of the NPT are (1) the reduction and (2) eventual elimination of nuclear weapons states with (3) the assistance of a Security Council that would effectively act in response to reports of violations and diversion of nuclear materials by the IAEA.²² But the fact is that the number of nuclear weapons states have expanded since 1968, not reduced, and the Security Council has repeatedly demonstrated an inability to prevent more states from acquiring weapons.

The refusal of some of the original NWS to completely disarm may have “caused” the other existing nuclear-armed states to retain their weapons. This did not, however, “cause” the additional proliferation and attempted acquisition of weapons that followed. France, the United Kingdom, the United States, and the USSR, were not serious enemies of India, Iraq, Israel, or Pakistan prior to 1990, and the major powers did not seriously threaten the sovereignty of North Korea. The development of nuclear weapons by four new states since 1968 with relative alacrity (not including Libya and South Africa which disbanded their programs), along with the reported efforts of non-state actors to obtain them, has legally subverted the foundation of the NPT and made it impossible for the original NWS to eliminate their own weapons. In addition, the United States and the United Kingdom, at least, certainly are not responsible for the failure of the Security Council to prevent proliferation. This body, despite the end of the Cold War, has been constrained by national self-interest instead of empowered by the need to insure global security. Its weakness has been one of the great disappointments of our time. Regardless, its inability to be effective in the face of threats of proliferation has also completely undermined one of the core premises of the NPT. If a NWS were ever to be challenged before an international tribunal because of its failure to disarm, it would thus have a very strong legal case that the 1968 treaty simply could not be enforced against that state because of impossibility of performance and fundamental change of circumstances.

22. Ben Sanders, *A Short History of Nuclear Non-Proliferation*, 62 *NUCLEAR L. BULL.* 7, 18–19 (1998) (referencing the “basic measures that underpin the non proliferation regime,” discussing the IAEA safeguards and reporting requirements, and noting that the Security Council formally took responsibility for non-proliferation in 1992).

The promise of a world free of nuclear weapons in the NPT may be utopian, but the goal of no nuclear war is both possible and real. The way to reach this important objective is to fashion a legally enforceable non-proliferation treaty and regime that actually limits the number of leaders who possess nuclear weapons while providing the NNWS with the civilian energy many desire.²³ President John F. Kennedy's great concern was a world in which twenty-five states had nuclear weapons²⁴ because, of course, the more leaders who have such weapons the greater, the danger that they may be placed under the control of a Hitler or genocidal chief of state who has no fear of Armageddon.²⁵ Accordingly, the world needs to work honestly to create a structure that insures there are "no loose nukes, no nascent nukes and no new nuclear weapons states."²⁶ Such a regime, based on a legally enforceable treaty reflecting twentieth century progress in international law, can be constructed.

This Article proceeds in three parts. Part I proposes a new Nuclear Non-Proliferation Treaty. Part II contains preliminary observations regarding the Security Council, General Assembly ("GA") and Zanger Committee provisions of the new treaty and then addresses the basic question of why nations might be willing to scrap the established NNPT in favor of this new proposed agreement. Finally, Part III discusses how the advent of international institutions and the increasing incorporation of international law into the framework of domestic, regional and international tribunals may enhance the enforcement of the proposed non-proliferation treaty.

I. *A PROPOSED NEW TREATY*

This section outlines a proposed Nuclear Non-Proliferation Treaty that is both realistic and enforceable. The reader need not devote inordinate time to an analysis of every word in the proposal as it is well recognized that draftsmen and negotiators would spend hours if not months quibbling over every nuance and phrase before such a treaty was ever submitted for

23. See Nelson, *supra* note 4, at 146.

24. See Glenn Seaborg, *Explosive Issues*, N.Y. TIMES, Apr. 25, 1982, at sec. 7, p. 10.

25. See Nelson, *supra* note 4, at 146; see also Han & Kim, *supra* note 18, at 237.

26. Kuppuswamy, *supra* note 3, at 147 (citing GRAHAM ALLISON, NUCLEAR TERRORISM, THE ULTIMATE PREVENTABLE CATASTROPHE 140 (2004)).

ratification. What is important are the concepts. An enforceable NPT might look something like this:

Article I

Each NWS agrees not to transfer nuclear weapons to NNWS or encourage or assist them in the development of nuclear weapons as outlined in current Article I of the NPT.

Article II

Each NNWS agrees not to receive or manufacture nuclear weapons as outlined in current Article II of the NPT.

Article III

The parties agree that a committee similar to the current Nuclear Exporters Committee will be formed to reach a common understanding on (a) an evolving list of “proscribed material,” such as equipment or material especially designed or prepared for the processing, use, or production of special fissionable material; and (b) the conditions, procedures, and safeguards that would govern exports of such equipment or material in order to meet the obligations of Article IV. Each party agrees to accept and abide by IAEA safeguards as outlined in current Article III of the NPT.

Article IV

Each party agrees to facilitate to the fullest extent the transfer of information and technology for the peaceful uses of nuclear energy as outlined in current Article IV of the NPT. Each party agrees that “proscribed material” may only be transferred and received under the conditions, procedures, and safeguards mandated by the Committee established pursuant to Article III or the IAEA.

Article V

The parties recognize that the following states possess nuclear weapons: China, France, India, Israel, North Korea, Pakistan, Russia, United Kingdom, and United States. The parties agree not to engage in a nuclear arms race as understood in former Article V of the NPT. Nuclear Weapons States agree not to utilize nuclear weapons against any other state unless there has been (1) first use by the other state or a non-state actor assisted by that state, or (2) the other state has initiated a war of aggression as that term has been defined by the International Criminal Court with intent to temporarily or permanently occupy the territory of a recognized state in violation of the UN Charter.

Article VI

The parties agree that any factual or legal dispute as to whether a nation is transferring weapons technology, violating IAEA safeguards, acquiring weapons, refusing to facilitate the peaceful use of nuclear energy, or otherwise acting in violation of this treaty shall be first submitted to the Permanent Court of Arbitration in the Hague unless an emergency would not allow time for arbitration. If arbitration fails, the aggrieved party may bring the case before the International Court of Justice (“ICJ”) at which time the complaining party will have the burden of proof by a preponderance of the evidence to demonstrate the other party is acting in violation of the treaty or appropriate IAEA safeguards.

Article VII

The parties agree that if the ICJ finds that a party is acting in violation of the treaty or appropriate safeguards, the ICJ may order fines, sanctions, or other remedies in accordance with this treaty that it deems appropriate. The parties agree that any state upon which fines, sanctions, or other remedies have been imposed may appeal the findings of the ICJ to the General Assembly or Security Council which may by majority vote (a) reverse the court order or (b) increase or modify the fine, sanctions, and remedies. The order of the ICJ shall be

considered final if the General Assembly or Security Council has not taken action within thirty days.

Article VIII

If a party does not comply with the orders of the ICJ, General Assembly, or Security Council within a reasonable time, the parties agree that the Security Council may order appropriate action by majority vote. If a party has violated Articles I, II, or V of this treaty and the violations threaten international peace and security, the parties agree that the Security Council may order military action as deemed necessary if such action is authorized by a vote of at least ninety percent of the sitting permanent and non-permanent members of the Security Council.

Article IX

The parties agree that they will support the adoption in accordance with the Statute of the International Criminal Court of a proposal specifically stating that knowing, intentional, and deliberate violation of Articles I, II, or V of this treaty by a State party will constitute a crime under that statute and that individuals who violate or have responsibility for such violation, by being in a position to exercise control over or direct the actions of a state, may be prosecuted in accordance with the rules of that court.

Article X

The parties agree that they will support the adoption in accordance with the Statute of the International Criminal Court of a proposal specifically stating that knowing, intentional, and deliberate unauthorized transfer, or attempted transfer, of nuclear weapons or proscribed materials and technology by any individual to any individual or state will constitute a crime under that Statute.

Article XI

No party may terminate or withdraw from the obligations of this treaty unless in accordance with the requirements of Articles 60, 61, 62, and other relevant provisions of the Vienna Convention on the Law of Treaties, the application of which may be reviewed by the International Court of Justice.

Article XII

The terms of this treaty are not meant to be aspirational, but self-executing and shall be considered as such by those judicial and governing bodies called upon to interpret the treaty.

II. *PRELIMINARY OBSERVATIONS ON GENERAL ASSEMBLY AND SECURITY COUNCIL PROVISIONS AND MOTIVATION FOR NEW TREATY*

As a preliminary matter, this author readily acknowledges that proposed Articles VII and VIII, by not requiring a unanimous vote, reflect an effort to circumvent the fact that the Security Council has been in gridlock for years because of the ability of any one of the Permanent Five to veto decisive action. The result has been weak, lowest-common-denominator decision making at best. The exact terms of these provisions, however, are not absolutely critical, and they should not distract the reader from looking at the totality of the concepts mentioned in the proposed treaty. At the same time, they have been included because this issue should be seriously discussed in any negotiations on a new treaty. The international community has sought to find some reasonable alternative to the obstacles presented by the UN Charter's Security Council veto provisions since the adoption of the first United for Peace proposal in 1950.²⁷ The terms of Articles VII and VIII of the proposed treaty are consistent with at least the spirit of the insightful 2004 UN Report of the High Level Panel on Threats, Challenges and

27. G.A. Res. 377(V), U.N. GAOR, 5th Sess., Supp. No. 20, U.N. Doc. A/1775 (Nov. 3, 1950) (allowing the General Assembly to vote to take action when the Security Council has been unable, due to lack of unanimity, to assume its primary responsibility for the maintenance of international peace and security).

Change, which noted that “the veto has an anachronistic character that is unsuitable for the institution in an increasingly democratic age.”²⁸ Moreover, the idea of a Security Council agreeing to action in the narrow non-proliferation arena without a unanimous vote may not be as improbable as it might first appear. The Permanent Five are all nuclear weapons states and therefore are unlikely to be the targets of UN action for violating this new treaty. Finally, the existing UN Charter does not legally preclude these terms as the proposed non-proliferation treaty is a separate document and can include any provisions agreed upon by the parties.

The new treaty also formally acknowledges in Articles III and IV the need for an organization similar to the current informal Zangger Committee, which serves as a faithful interpreter of the NPT by attempting to define specific items that can produce special fissionable materials or that should trigger safeguards if exported or manufactured.²⁹ The treaty itself, of course, cannot contain a list because technology evolves. The Zangger Committee of thirty-seven states, many of which were originally nuclear suppliers, has endeavored to keep up with the technology and define potentially dangerous materials with the understanding that some of these may be exported with safeguards in pursuit of peaceful nuclear energy.³⁰ The committee’s work has been repeatedly referenced favorably during the NPT review conferences with a consensus document in 1995 stating that “[t]he conference notes that the application by all States of the understandings of the Zangger Committee would contribute to the strengthening of the non-proliferation regime.”³¹ It follows that the proposed new treaty should officially authorize and incorporate such a useful organization.

The larger question is why the NNWS should agree to this treaty when they have one that apparently promises

28. High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, ¶ 256, U.N. Doc. A/59/565 (Dec. 2, 2004).

29. ZANGGER COMMITTEE and NPT, <http://www.zanggercommittee.org/NPT/Seiten/default.aspx> (last visited Sept. 18, 2010). This is also known as the Nuclear Exporters Committee.

30. *Id.*

31. Int’l Atomic Energy Agency [IAEA], *1995 Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons*, 3 IAEA Doc. INFCIRC/482 (Aug. 23, 1995).

disarmament. The basic answer is that the NWS will never completely disarm for the many reasons already stated, and the NPT has no enforcement mechanisms to insure disarmament, non-proliferation, or peaceful uses of nuclear energy. What the NNWS get in this treaty is what may be most important to them: (1) a legal (versus rhetorical) promise of no first use with possible criminal punishment for violation; (2) a strong deterrent to an aggressive war designed to take over their territory by the suggestion that nuclear weapons may be used by a NWS for their defense in the event of such an invasion; (3) concrete steps to insure non-proliferation of weapons, backed up by enforcement provisions so that there is less likelihood that nuclear weapons may be acquired by an unstable neighbor prone to use them; and (4) a promise to facilitate peaceful uses of nuclear energy with the ability to obtain compliance by seeking redress through the Permanent Court of Arbitration ("PCA"), ICJ, UN General Assembly, and UN Security Council. In short, they would be exchanging an empty promise for enforceable benefits. The NWS, on the other hand, would get exactly what they want: a legal regime with clear procedures that could actually prevent proliferation.

The NPT of 1968, and perhaps more generally the entire edifice often termed as the non-proliferation regime, disregards the fact that in the last century international law has developed in a manner designed to encourage compliance with international agreements and customary international law. These developments occurred with the advent of international institutions, some of which have been referenced above, and the increasing incorporation of international law into the framework of domestic and regional tribunals. The next section will review some of these improvements with an eye to how they may enhance the enforcement of the proposed non-proliferation treaty.

III. *ENFORCEMENT*

In his article on the 2005 NPT review conference, Chamundeewari Kuppaswamy stated that the NPT is strong on law but weak on enforcement.³² The same might be said of

32. Kuppaswamy, *supra* note 3, at 142.

international law generally. Over the years an extensive body of law has developed through the ratification of treaties, recognition of the customary practice of nations, identification of general legal principles, judicial and scholarly writings, and adherence to fundamental norms common to all civilized nations.³³ But there is no judiciary with automatic jurisdiction over disputes or a powerful executive to enforce the law. One might wonder why states bother to comply with treaties and other forms of international law at all. The answer lies in a series of practical, and sometimes moral, judgments. Treaties contain benefits for both parties, and states generally will not enter into agreements with states that have a reputation for disregarding still feasible obligations that have been accepted in prior treaties. States that ignore treaties, customary law, general principles, and fundamental norms can become pariah states and suffer diplomatic and economic sanctions as well as internal pressure to make good on their promises and adhere to standards of civilized behavior. This is why England, in accordance with the requirements of the European Convention on Human Rights, would submit to the judgment of the European Court of Human Rights and pay UK£40,000 to the families of slain IRA terrorists,³⁴ why Russia paid US\$300,000 to England after arbitration when its fleet accidentally and understandably shelled English fishing boats in the North sea during the Russo-Japanese war,³⁵ and why Norway abandoned its claims to Greenland based on a casual oral commitment made by its foreign minister.³⁶

In addition, in limited circumstances in certain countries, international law may be incorporated into domestic law so that a state's judiciary and law enforcement authorities may enforce international law at least within that states' boundaries. Thus, as early as the Spanish-American war, the US Supreme Court applied recognized international laws of war to captured vessels³⁷

33. See Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1031, T.S. No. 993 [hereinafter ICJ Statute].

34. See *McCann v. United Kingdom*, 324 Eur. Ct. H.R. (Ser. A) (1996).

35. See *Dogger Bank (Gr. Brit. v. Russ.)*, Hague Ct. Rep. (Scott) 403, 403 (Perm. Ct. Arb. 1905).

36. See *Legal Status of the South-Eastern Territory of Greenland (Den. v. Nor.)*, 1933 P.C.I.J. (ser. A/B) No. 55, at 158 (May 11).

37. *Paquette Habana*, 175 U.S. 677, 712-15 (1900).

and later enforced domestically the general terms of a treaty intended to prevent discrimination.³⁸

But these principles, while helpful, obviously do not carry enough weight and global force to insure that states and individuals do not often violate international law with impunity. There have been, of course, innumerable violations of the Geneva Conventions,³⁹ the Torture Convention,⁴⁰ and the Universal Declaration of Human Rights⁴¹ that have never been legally prosecuted. The international community also never took decisive legal action against Saddam Hussein or his advisers as punishment for his 1980s nuclear program, attack on Iran, or invasion of Kuwait; against Israel for its 1981 attack on Iraq's nuclear reactor; or against North Korea⁴² and Iran⁴³ for their repeated non-compliance with the requirements imposed by the IAEA, despite the fact that all of these actions were in violation of specific treaties or the UN Charter. This lack of enforcement is due in part to that fact that the relevant treaties do not contain provisions which take advantage of the many significant advances in international law that have occurred in the twentieth century. The proposed new NPT treaty regime does exactly that.

A. *Arbitration*

Article VI of the proposed treaty requires that any factual or legal dispute as to whether a state is transferring weapons technology, violating IAEA safeguards, acquiring weapons,

38. *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924).

39. Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

40. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85.

41. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

42. *UN Declares N Korea in Nuclear Breach*, BBC NEWS WORLD EDITION, Feb. 13, 2003, <http://news.bbc.co.uk/2/hi/asia-pacific/2751509.stm>.

43. See Jacqueline Shire & David Albright, INST. FOR SCI. AND INT'L SEC., *Iran's NPT Violations-Numerous and Possibly Ongoing?*, Sept. 29, 2006, <http://www.isis-online.org/publications/iran/irannptviolations.pdf>.

refusing to facilitate the peaceful use of nuclear energy, or otherwise acting in violation of this treaty be first submitted to the PCA in the Hague unless there is an emergency that would not allow time for arbitration. As written, this is non-binding arbitration, meaning that the parties do not have to accept as final the panel's findings but can seek redress through the other organizations mentioned in the treaty.

The creation of the PCA was one of the most concrete accomplishments of the 1899 Hague Convention on the Pacific Settlement of International Disputes.⁴⁴ The PCA has, for the most part, maintained a low profile since its founding and its work has been largely unrecognized.⁴⁵ But in reality, the PCA can be, and has been in the past, an invaluable asset as a mechanism to unravel complicated disagreements as well as to provide time for rational thinking to prevail when there is an intense clash between states. In 1905, Great Britain's animosity towards Russia turned into a clamor for war when the Russian fleet, as referenced above, mistook English trawlers for Japanese torpedo boats.⁴⁶ But international agreement on a five-member arbitration board, inspired by the creation of the PCA, acted as an escape valve to divert public outcry.⁴⁷ The panel sorted out the facts, dispelled rumor, and found an acceptable resolution.⁴⁸ More recently, in 1996 after war broke out between Eritrea and Yemen over possession of the Hanish Islands, the PCA served as a neutral arbiter to sift through the complicated history of the area and determine rightful ownership.⁴⁹ It is not unusual for the parties to a treaty to foresee the potential for future quarrels and to include mandatory arbitration in the document's basic provisions. Thus, when Libya signed concession agreements with Texaco and other oil companies in 1955, the documents contained arbitration clauses that were utilized to provide just compensation when Libya nationalized private oil properties in

44. See PERMANENT COURT OF ARBITRATION, *History*, http://www.pca-cpa.org/showpage.asp?pag_id=1044 (last visited Oct. 3, 2010).

45. See MARK JANIS & JOHN NOYES, *INTERNATIONAL LAW CASES AND COMMENTARY* 273 (2006).

46. See *Dogger Bank* (Gr. Brit. v. Russ.), Hague Ct. Rep. (Scott) 403, 403 (Perm. Ct. Arb. 1905).

47. Richard Lebow, *Accidents and Crises: The Dogger Bank Affair*, 31 *NAVAL WAR C. REV.* 66, 70-73 (1978).

48. *Id.* at 72-73.

49. See *Eri.-Yemen Arbitration*, 40 *I.L.M.* 983 (Perm. Ct. Arb. 1999).

1974.⁵⁰ On a larger scale, the 1982 United Nations Convention on the Law of the Sea (“UNCLOS”) included various means to arbitrate nautical disputes under the auspices of the PCA,⁵¹ and the 1994 European Energy Charter Treaty contained similar provisions.⁵² These terms have resulted in approximately twenty-four arbitration cases involving investors under the Energy Charter⁵³ and referral of five major cases related to UNCLOS.⁵⁴ In light of the continuous disagreements pertaining to nuclear proliferation and civilian use of nuclear power, it only follows that the international community should routinely look to arbitration as a first step in addressing disputes that may grow out of a non-proliferation treaty.

B. *International Court of Justice*

Non-binding arbitration is theoretically an informal proceeding in which all parties seek to come together to find an equitable solution. When arbitration does not succeed, adversarial litigation often follows. Accordingly, Article VI of the proposed treaty is structured to permit the parties to proceed to the International Court of Justice if arbitration fails.

The ICJ was established under the UN Charter in 1946 to interpret international law, serve as a fact finder, and assess reparations in cases involving disputes between states.⁵⁵ The court may also give advisory opinions when requested by a UN organization.⁵⁶ An important first step is for the court to acquire jurisdiction to decide a contested case. This can be obtained in advance by the general consent of the parties,⁵⁷ by special agreement in a particular case or, as provided in proposed Article VI, over “matters specifically provided for . . . in treaties

50. See *Texaco Overseas Petrol. Co. v. Libya*, 17 I.L.M. 1, *5 (Int’l Ct. Arb. 1977).

51. See United Nations Convention on the Law of the Sea art. 287, Dec. 10, 1982, 1833 U.N.T.S. 397; see also PERMANENT COURT OF ARBITRATION, *Ad Hoc Arbitration Under Annex VII of the United Nations Convention on the Law of the Sea*, http://www.pca-cpa.org/showpage.asp?pag_id=1288 (last visited Sept. 18, 2010).

52. See The Energy Charter Treaty art. 26, Dec. 12, 1994, 34 I.L.M. 382.

53. See ENERGY CHARTER, *Investor-State Disputes*, <http://www.encharter.org/index.php?id=213&L=1> (last visited Sept. 18, 2010).

54. See *Ad Hoc Arbitration*, *supra* note 51.

55. ICJ Statute, *supra* note 33, art. 36.

56. See *id.* art. 65.

57. See *id.* art. 36(2).

and conventions.”⁵⁸ The ICJ has been fairly active since its inception, deciding such highly contested issues as sovereignty over the Channel Islands⁵⁹ and drilling rights in the North Sea.⁶⁰

Parties to the NPT have recognized that the ICJ could potentially be an extremely valuable tool in any non-proliferation regime because “non compliance is a very grey area; it is not easy to decide what amounts to non compliance.”⁶¹ It is perhaps even more difficult to decide when one organization has been assigned the role of adjudicator and enforcer, as is the case with the Security Council in the NPT, as opposed to utilizing a completely independent judicial body like the ICJ.⁶²

Assigning the task of adjudication to the ICJ after an adversarial hearing necessarily raises the important question of burden of proof. One of the current problems in the NPT is the demand by some for absolute proof when it is often impossible to produce such evidence. As Perkovich and Acton state in their treatise on nuclear disarmament:

Actually proving that a state has violated an agreement can be very difficult and often takes time, no matter how effective and well funded safeguards are. . . . Enhanced IAEA safeguards are unlikely to inspire enough confidence . . . unless the international community is willing to accept a considerably lower standard for assessing evidence, such as balance of probabilities rather than proof beyond a reasonable doubt.⁶³

The burden of proof in civil cases is preponderance of the evidence, which is very close to the “balance of probabilities” referenced by Perkovich and Acton. Preponderance of the evidence is generally defined as meaning that the fact is more likely true than not true.⁶⁴ Proof beyond a reasonable doubt is only required in criminal cases that would result in the infliction

58. *Id.* art. 36(1).

59. *See* *Miniquiers and Ecrehos*, (Fr./U.K.), 1953 I.C.J. 47 (Nov. 17).

60. *See* *North Sea Continental Shelf* (Ger./Den.; Ger./Neth.), 1969 I.C.J. 3 (Feb. 20).

61. *See* Kuppaswamy *supra* note 3, at 147 (referring to the position of discussants at the 2005 NPT review conference).

62. *See* Nelson, *supra* note 4, at 159 (citing George Perkovich and James M. Acton, *Abolishing Nuclear Weapons: Adelphi Paper 396*, in *ABOLISHING NUCLEAR WEAPONS: A DEBATE*, *supra* note 5, at 107–08).

63. Perkovich & Acton, *supra* note 62, at 89–90.

64. BLACK’S LAW DICTIONARY 1301 (9th ed. 2009).

of punishment upon individual human beings as opposed to general sanctions on corporate and state entities. Accordingly, the burden of proof for the ICJ that has been included in proposed Article VI is preponderance of the evidence.

According to the proposed treaty, the ICJ may be overruled by a majority vote of the General Assembly or Security Council.⁶⁵ Military action that would directly impose physical punishment could only be authorized by a ninety percent vote of the Security Council. It is expected that each state in the General Assembly or Security Council would apply its own individual standards of proof before voting on these matters. Clearly, such a procedure would insure that severe punitive measures were not imposed without substantial, convincing evidence to justify such actions.

The appeal and sanction mechanisms applied by proposed Articles VII and VIII are extremely important to the ultimate goal of enforcement. Currently, the UN Charter provides that ICJ decisions may be enforced by the Security Council, which means that if one of the permanent five members vetoes an action, the decision is not enforced. This was the case after the ICJ ruled against the United States for violating the sovereignty of Nicaragua.⁶⁶ Because of this and the previous concerns expressed about the Permanent Five veto, the proposed treaty does not rely upon unanimous Security Council approval to secure enforcement of an ICJ judgment.⁶⁷ The ICJ verdict is final unless the losing party decides to appeal to the Security Council or General Assembly. There is no lowest-common-denominator decision making. To discourage frivolous appeals, the GA and SC are authorized to not only overrule the ICJ judgment, but also increase the fines, sanctions, or penalties. If the decision is not overruled or modified by a majority vote of the GA or SC within thirty days, it then goes into effect. If there is non-compliance with the decision of the ICJ or modifications made by the GA and SC, the Security Council may then take non-military action by majority vote or utilize military force after a ninety percent vote if the parties actions threaten international peace and security.

65. *See supra* Part I, art. VII.

66. *See* Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 147 (June 27); U.N. SCOR, 2718th mtg. at 51, U.N. Doc. S/PV.2718 (Oct. 28, 1986).

67. *See supra* Part I, art. VIII.

C. *International Criminal Court*

Articles IX and X of the proposed treaty state that the parties will support the adoption by the International Criminal Court (“ICC”) of amendments that make it an international crime to transfer, receive, or manufacture nuclear weapons or technology in violation of Articles I and II, to engage in first use of nuclear weapons in violation of Article V, or to participate in unauthorized transfer of nuclear material as outlined in Article X.⁶⁸ These provisions are vital to the enforcement regime contained in the proposed treaty. Other commentators have also recognized the potential use of the ICC against “illicit proliferation of nuclear weapons and material”⁶⁹ and first use of nuclear weapons.⁷⁰ The utilization of the ICC and its associated criminal justice system is clearly the next logical step in anti-proliferation efforts.

The vision of a UN-sponsored International Criminal Court naturally followed from the success of the Nuremberg trials after World War II.⁷¹ By the late 1940s, however, politicization of virtually every UN effort, generated by the Cold War, prevented the creation of such a tribunal. Progress was not made until the conflict began to dissipate in the Reagan-Bush-Gorbachev era.⁷² In 1989, the United Nations International Law Commission was asked to draft the Charter for the ICC.⁷³ By 1998, the Rome Statute detailing the rules and procedures of the Court had been adopted.⁷⁴ The United States had a major role in drafting these procedures, but because of conservative concerns about possible politically motivated prosecutions of US officials,⁷⁵ the United States is not one of the 111 states that have ratified the Rome

68. See *supra* Part I, arts. IX–X.

69. Nelson, *supra* note 4, at 164 (quoting Perkovich & Acton, *supra* note 62, at 135).

70. See Han & Kim, *supra* note 18, at 250 (quoting David Krieger, *Nuremberg and Nuclear Weapons*, NUCLEAR AGE PEACE FOUNDATION, http://www.wagingpeace.org/articles/1996/00/00_krieger_nuremberg.htm (last visited Oct. 10, 2010)).

71. Ron Sievert, *A New Perspective on the International Criminal Court; Why the Right Should Embrace the ICC and How America Can Use It*, 68 U. PITT. L. REV. 77, 93 (2006).

72. *Id.*

73. G.A. Res. 44/39, ¶ 1, U.N. Doc. A/RES/44/39 (Dec. 4, 1989).

74. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

75. Sievert, *supra* note 71, at 95.

Statute by 2009.⁷⁶ The United States has reengaged with the ICC during the Obama administration, sending a delegation led by Ambassador Stephen Rapp to the 2010 negotiations on defining the crime of aggression.⁷⁷

The ICC has jurisdiction over genocide, war crimes, and crimes against humanity⁷⁸ “committed as part of a widespread or systematic attack directed against any civilian population.”⁷⁹ In addition, the Statute provides for amendments dictating new crimes to be adopted by the parties seven years after the initial ratification.⁸⁰ Currently, the Assembly of States parties is working on adding the crime of aggression or aggressive war to the list of substantive crimes.⁸¹

The ICC incorporates the key Nuremberg principle that individuals, not just states as abstract entities, are responsible for the commission of international crimes.⁸² The concept of command responsibility is embedded in the proposed treaty by the language stating that individuals “in a position to exercise control over or direct the actions of a state” may be prosecuted.⁸³ The international community had applied these principles during the International Criminal Trial for the Former Yugoslavia (“ICTY”) trial of Slobodan Milošević⁸⁴ and the proceedings against Augusto Pinochet,⁸⁵ and the ICC has carried them forward with the indictment of Sudan President Omar al-Bashir.⁸⁶

76. United Nations Treaty Collection, <http://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-10.en.pdf> (last visited Sept. 7, 2010).

77. Blake Evans-Pritchard & Simon Jennings, *US Takes Cautious Steps Towards ICC*, INST. FOR WAR & PEACE REPORTING, May 6, 2010, <http://iwpr.net/report-news/us-takes-cautious-steps-towards-icc>.

78. Rome Statute, *supra* note 74, arts. 6–8.

79. *Id.* art. 7.

80. *Id.* art. 123.

81. See Evans-Pritchard & Jennings, *supra* note 77; see also ROGER CLARK, THE REVIEW CONFERENCE ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT I (2010).

82. Rome Statute, *supra* note 74, art. 28; see also Sievert, *supra* note 71, at 93.

83. See *supra* Part I, art. IX.

84. Marlise Simons, *Milosevic Now Faces Genocide Charges*, N.Y. TIMES, Sept. 27, 2002, at A10.

85. *Bringing the General to Justice*, ECONOMIST, Nov. 28, 1998, at 23.

86. Marlise Simons et al., *Arrest is Sought of Sudan Leader in Genocide Case*, N.Y. TIMES, July 15, 2008, at A1.

Although the proposed treaty requires that the parties support the adoption by the ICC of a substantive law criminalizing the first use of nuclear weapons absent self-defense, it is arguable that the court may already have jurisdiction over such an attack. When asked for an advisory opinion about the legality of the use of nuclear weapons, the ICJ could not exclude their use in self-defense,⁸⁷ but noted that many argue that otherwise “nuclear weapons would in all circumstances be unable to draw any distinction between the civilian population and combatants, or between civilian objects and military objectives.”⁸⁸ The ICC prohibits crimes against humanity, and under the rules of international humanitarian law, such indiscriminate killing of civilians is prohibited.⁸⁹ Nevertheless, specifically including first use, along with unauthorized transfer, receipt, and manufacture of proscribed nuclear material and weapons as substantive crimes, will insure there is no dispute as to the illegality of the actions.

When leaders understand they can be held responsible for their decisions by a body such as the ICC, there can be a major deterrent to reckless actions. Professor John Norton Moore and others have noted that abuses take place when “regime elites,” usually within non-democratic governments that are not controlled by the people, engage in aggressive behavior with the knowledge that there is no “system wide deterrence.”⁹⁰ “Leaders can externalize the costs of their high-risk behavior by placing it on their own people and neighbors and internalize the benefits because there is no one to hold them accountable.”⁹¹ Because of the ICTY, Spanish and English Courts, and the ICC, Pinochet, Milosevic, and al-Bashir found that this is no longer possible. This is why it is critical that the proposed treaty take advantage of the opportunities created by the newly established ICC.

87. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 261–63 (July 8).

88. *Id.* at 262.

89. Han & Kim, *supra* note 18, at 248.

90. John N. Moore, *Toward a New Paradigm: Enhanced Effectiveness in United Nations Peacekeeping, Collective Security, and War Avoidance*, 37 VA. J. INT’L L. 811, 840–41 (1997).

91. Sievert, *supra* note 71, at 86.

D. *War of Aggression*

Article V prohibits the use of nuclear weapons unless in reaction to another's first use or response to another state's initiation of aggressive war in violation of the UN Charter.⁹² No one questions that nuclear weapons may be employed after they have been used by an adversary. Authorizing use in response to an aggressive war in which the enemy has not used nuclear weapons would be far more controversial. In this author's opinion, however, a commitment never to use nuclear weapons to combat a conventional attack would essentially invite a state with a large population and army to invade another that has fewer resources. States that have acted in the past to protect others, like the United States in South Korea and Kuwait, would have to maintain a huge military to be able to counter states like China and Russia, which can deploy a million soldiers in an attack. As it stands today, the US military has been strained to the limit simply maintaining 200,000 troops in Iraq and Afghanistan.⁹³ As noted earlier, nuclear weapons have very likely prevented wars and it would be folly to abandon that deterrence. Any policy statements to the contrary are asking for trouble.⁹⁴

There naturally would be significant debate as to what constitutes a war of aggression. The goal is to find words that would legally prohibit something like Hitler's attack on Poland, Japan's occupation of the Philippines and Southeast Asia, or Saddam's invasion of Kuwait, while making room for an allied invasion of France to reverse the consequences of Nazi tyranny; a US attack on Iraq based on violations of numerous UN resolutions and Saddam's genocide against over 100,000 Shiites

92. *Id.* at 127.

93. See John D. Banusiewicz, *Petraeus Explains Afghanistan Strategy*, AM. FORCES PRESS SERV., Sept. 03, 2010, <http://www.defense.gov//News/NewsArticle.aspx?ID=60737>; Alexandra Hemmerly-Brown, *Iraq Reaches New Dawn, Ends Combat Operations*, ARMY NEWS SERV., Aug. 31, 2010, <http://www.army.mil/-news/2010/08/31/44509-iraq-reaches-new-dawn-ends-combat-operations/index.html?ref=home-headline-title5>.

94. See Clinton, *supra* note 11. Clinton's statements come close to this assertion, noting that the United States' Nuclear Posture Review determined not to use nuclear weapons against NNWS in compliance with NPT. At least this would not apply to China, North Korea, and Russia.

and Kurds;⁹⁵ Israel's attacks against Lebanon, and possibly even Germany's moves into Norway and Italy in what some might call strategic self-defense.⁹⁶ In addition, provision should be allowed for humanitarian intervention where needed in states like Rwanda and Sudan.

This author believes the motivation for an attack should be a major factor in determining if military action amounts to an aggressive war. When one state invades another with intent to occupy it and exploit its resources, as with Germany's attacks on France, Poland, and the oil fields of Eastern Europe, that is clearly aggressive war. The United States, however, has never demonstrated intent to permanently occupy and exploit Iraq and Afghanistan (and of course has sought to return those states to democratic self-governance as soon as possible). Accordingly, these actions should not be labeled aggressive war. It is recognized, however, that it is not always easy to determine intent at the moment of invasion.

Fortunately, the ICC Review Conference in Kampala, after seven years of negotiation, recently adopted an international definition of aggression.⁹⁷ Although perhaps not technically perfect, it is both practical and reasonable and can be utilized in interpreting proposed Article V's provision permitting use of nuclear weapons in response to first use or a war of aggression. It provides that a state commits the crime of aggression when it uses armed force to commit acts of aggression "against the sovereignty, territorial integrity or political independence of another state or in any other manner inconsistent with the Charter of the United Nations."⁹⁸ Two paragraphs of "understandings" annexed to the resolution then assert that this is meant to cover acts that by their "character, gravity and scale"

95. Claus Kress, *The German Chief Federal Prosecutor's Decision Not to Investigate the Alleged Crime of Preparing Aggression Against Iraq*, 2 J. INT'L CRIM. JUST. 245, 261-64 (2004).

96. See MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, *THE INTERNATIONAL LAW OF WAR: TRANSNATIONAL COERCION AND WORLD PUBLIC ORDER* 211-12 (1994). Germany maintained that the invasion of Norway was necessary to preempt England's planned invasion of Norway to block iron ore shipments from Sweden to Germany. Post-war documents confirmed England's planned operations in Norway.

97. See ICC Review Conference, Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, ICC Doc. RC/Res.7, annex I, available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf.

98. See *id.* at 2 (referencing provision 8bis(2)).

are “manifest violation[s] of the Charter.”⁹⁹ This is followed by a list of acts in Resolution 3314 which qualify as aggression such as invasion, annexation, bombardment, blockade, and attack on the armed forces of another state.¹⁰⁰ The proposed definition includes further conditions such as a finding of aggression by the Security Council in advance of ICC proceedings if the Security Council submits the charge or dismissal of proceedings initiated by the prosecutor or another State if the Security Council affirmatively moves to block the charges.¹⁰¹ Accordingly, where the complaint is referred by another State or the prosecutor on his own, a Security Council veto by one nation alone could not interfere with the proceedings. Prosecution for the crime of aggression can be initiated against those “in a position effectively to exercise control over or to direct the political or military action of a State” if they were involved in “the planning, preparation, initiation or execution . . . of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.”¹⁰²

Despite the challenges interpreting legal terms, it will not always be difficult to recognize an illegal war of aggression that justifies the use of nuclear weapons in response under the proposed new NPT. As Professor Roger Clark stated at an ICC conference on defining the crime:

At Nuremberg and Tokyo there was no great need to define what was meant by aggression. It was sufficient to adopt something like Justice Stewart’s approach to dirty books. That is to say, we know that disgusting stuff when we see it, and in particular that is what the Germans and Japanese had done.¹⁰³

The Special Working Group on the Crime of Aggression will now, however, put what we may have been able to viscerally perceive when it happened in the past into black and white legal

99. *Id.* annex III, at 6. Article 51 of the UN Charter authorizes use of force in self-defense and Article 55 calls for observance of fundamental human rights.

100. G.A. Res. 3314 (XXIX), Supp. No. 31, U.N. Doc A/9631 (Dec. 14, 1974).

101. See ICC Review Conference, *supra* note 97, annex I, at 3–4 (referencing provisions 15*bis* and 15*ter*).

102. *Id.* annex I, at 2 (referencing Article 8*bis* (1)).

103. Roger S. Clark, Delegate from Western Samoa to the ICC, Justice Without Borders: the International Criminal Court, *in* 17 *TEMP. INT’L & COMP. L.J.* 90, 91 (2003).

terms that should be understood by all the nations of the world. The result will hopefully be to deter aggression by telling leaders that not only are their states subject to nuclear attack, but they personally are subject to criminal prosecution, if they engage in such military offensives against sovereign states.

E. *Self-Execution and Extraterritoriality*

Article XII of the proposed treaty states that the provisions will be “self-executing” as opposed to aspirational. This phrase is included to add another mechanism to assist in the enforcement of the treaty as it would permit domestic courts to implement the treaty within their jurisdiction.

Although many states incorporate international treaties as the law of the land, some follow the US model established by Chief Justice Marshall in *Foster v. Neilson* to the effect that a treaty “operates of itself” only when it is clear that its terms do not require additional domestic legislation to activate its provisions for application by domestic courts.¹⁰⁴ An excellent case explaining this concept is the decision of the Supreme Court of California in *Sei Fujii v. California*.¹⁰⁵ In its opinion, the court analyzed the UN Charter to determine whether the Charter’s general non-discrimination provisions were self-executing and could thus be utilized by Japanese challenging the California alien land law.¹⁰⁶ The Court stated:

In determining whether a treaty is self-executing courts look to the intent of the signatory parties as manifested by the language of the instrument, and, if the instrument is uncertain, recourse may be had to the circumstances surrounding its execution. . . . In order for a treaty provision to operate without the aid of implementing legislation and to have the force and effect of a statute, it must appear that the framers of the treaty intended to prescribe a rule that, standing alone, would be enforceable in the courts.

It is clear that the provisions of the preamble and of Article 1 of the charter which are claimed to be in conflict with the alien land law are not self-executing. They state

104. See *Foster v. Neilson*, 27 U.S. 253, 314 (1829), *overruled on other grounds by* U.S. v. Percheman, 31 U.S. 51 (1833).

105. *Sei Fujii v. California*, 242 P.2d 617 (Cal. 1952) (in bank).

106. *Id.* at 619–20.

general purposes and objectives of the United Nations Organization and do not purport to impose legal obligations on the individual member nations or to create rights in private persons. It is equally clear that none of the other provisions relied on by plaintiff is self-executing. Article 55 declares that the United Nations 'shall promote: . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion,' and in Article 56, the member nations 'pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.' Although the member nations have obligated themselves to cooperate with the international organization in promoting respect for, and observance of, human rights, it is plain that it was contemplated that future legislative action by the several nations would be required to accomplish the declared objectives, and there is nothing to indicate that these provisions were intended to become rules of law for the courts of this country upon the ratification of the charter.

The language used in Articles 55 and 56 is not the type customarily employed in treaties which have been held to be self-executing and to create rights and duties in individuals.

. . . .

It is significant to note that when the framers of the charter intended to make certain provisions effective without the aid of implementing legislation they employed language which is clear and definite and manifests that intention. For example, Article 104 provides: 'The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.' Article 105 provides: '1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes. 2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.' In

Curran v. City of New York, these articles were treated as being self-executory.¹⁰⁷

There is a potential conflict between proposed Article IV of the proposed “self-executing” treaty in which the parties agree to “facilitate to the fullest extent the transfer of technology for the peaceful uses of nuclear energy”¹⁰⁸ and the Atomic Energy Act of 1954 that requires Congress to approve all such transactions after being assured of safeguards.¹⁰⁹ If there is an actual conflict, a self-executing treaty would prevail under the last in time rule.¹¹⁰ In practice, however, as the transfer would only take place in accordance with the conditions, procedures, and safeguards mandated by the new Nuclear Export Committee and the IAEA, it is expected that the basic technical conditions required by Congress will be met. On the other hand, a self-executing treaty may eliminate Congress’s ability to refuse to provide peaceful technology simply because it does not view a foreign state as cooperative or as an ally.

Not all states adhere to a view of treaty law that requires a demonstrated intent that an international agreement be self-executing before its terms can become operational in a domestic court. Germany, for example, follows a “systemic approach,” which, according to Eyal Benvenisti,

has been particularly helpful in constructing a global world view of law that delimits national sovereignty and governs inter-state relations. . . . The systemic view organizes . . . legal obligations arranged within a certain hierarchy and legal coherence. . . . A recent trend in international law scholarship, particularly in the United States, challenges this view, offering international law as no more than a mix of solitary treaties hovering over the abyss of international anarchy with no particular hierarchy. . . . Under this view, state sovereignty reigns supreme.¹¹¹

It is because of the competing views reflected in Benvenisti’s reference to the US approach that it is important to make clear that the terms of the proposed treaty are intended to be self-

107. *Id.* at 620–22 (citations omitted).

108. *See supra* Part I, art. IV.

109. 42 U.S.C. § 2153 (2009).

110. *See* Whitney v. Robertson, 124 U.S. 190, 194 (1888).

111. Eyal Benvenisti, *The Conception of International Law as a Legal System*, 50 GERMAN Y.B. INT’L L. 393, 394–95 (2007).

executing. All domestic courts may then enforce its provisions in matters that fall within their jurisdiction without further implementing legislation.

It is interesting to observe that the jurisdiction of domestic courts is not necessarily confined to what occurs within that state's boundaries but may be applied extraterritorially.¹¹² Under the "effects" doctrine, a state "may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders."¹¹³ Pursuant to "passive personality" jurisdiction, a state may punish acts that injure its citizens who are outside its territory.¹¹⁴ The "protective principle" allows a state to address conduct outside its territory that threatens its security or governmental operations.¹¹⁵ Finally, the doctrine of universal jurisdiction allows a state to take action to punish certain crimes against mankind regardless of the nationality of the victims or effect on the state. This has been applied to genocide, war crimes, torture,¹¹⁶ piracy, and acts of terrorism.¹¹⁷ Potentially violations of the new NPT might easily fit within one of these categories of extraterritorial jurisdiction.

Cases can generally be brought before domestic courts by any party that has standing because it has suffered injury as a result of violations of the treaty, though the rules of standing vary in each state. There would probably be a significant number of plaintiffs who could conceivably claim injury as a result of violations of the new NPT. One trend that could be effective in enforcing aspects of the proposed NPT is the recent recognition in Europe of non-governmental organizations, such as Human Rights Watch and Amnesty International, as parties who have standing in lawsuits. This is because of their role as (self-appointed) guardians of certain constituencies.¹¹⁸ Regardless of the status of the plaintiff, the goal is an NPT that is enforceable. The combination of a self-executing treaty with effects, passive

112. See JANIS & NOYES, *supra* note 45, at 778–79.

113. *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), *superseded by statute*, Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a (2009).

114. *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 31 (Sept. 7).

115. See *United States v. Pizzarusso*, 388 F.2d 8, 10 (2d Cir. 1968), *cert. denied*, 392 U.S. 936 (1968).

116. *Kadic v. Karadzic*, 70 F.3d 232, 239–40 (2d Cir. 1998).

117. *United States v. Yousef*, 927 F. Supp. 673, 681–82 (S.D.N.Y. 1996).

118. See Philippe J. Sands, *The Environment, Community and International Law*, 30 HARV. INT'L L.J. 393, 394 (1989).

personality, protective, and universal jurisdiction has unlimited potential to create new forums to insure the treaty is enforced.

CONCLUSION

The Nuclear Non-Proliferation Treaty of 1968 includes as a fundamental part of the bargain between nuclear and non-nuclear weapons states a promise to abolish nuclear weapons. Realistically, the United States and other nuclear weapons states will never completely meet this commitment. As long as it has not been met, the non-nuclear weapons states will have an excuse to engage in activities that lead to proliferation. The goal should be no loose nukes, no nascent nukes, no new nuclear weapons states, and no use of nuclear weapons. This can be accomplished by drafting an honest new treaty that recognizes the reality that at least some of the nuclear weapons states will always maintain a certain number of nuclear weapons, while promising no first use absent aggression and guaranteeing the development of peaceful nuclear energy. Most importantly, this treaty can be constructed in a way that it can be actually enforced through reliance on mechanisms that have evolved in twentieth century international law such as the PCA, ICJ, and ICC, combined with modifications to insure in this realm an effective General Assembly and Security Council. The world should not continue to provide lip service to the false promises of the 1968 NPT, nor can it afford to complacently tolerate in this area a largely ineffective United Nations. This Article presents concrete ideas that could establish a clear, realistic path towards non-proliferation. This author hopes they will serve as the basis for productive discussions in the future that will lead to an enforceable non-proliferation regime.