

SLOWING PROLIFERATION: WHY LEGAL TOOLS MATTER*

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Dean Shields, distinguished guests, members of the Vermont Law School faculty, students, and other members of the VLS family, it is a great honor to have this opportunity to speak here today.

When one receives an invitation like this, one has many months to consider one's remarks, but I must say that in the last two months or so my thinking has shifted a bit, so that rather than discussing the question of *Why Legal Tools Matter* in slowing proliferation of weapons of mass destruction—nuclear, chemical, and biological weapons—we need to be asking the much more difficult question of *Will Legal Tools Matter* in this crucial area of international security. Will legal tools matter or will the legal instruments and structures we have built so carefully over the past five decades to contain the spread of these weapons become little more than empty shells?

In many respects, the web of legal restraints on proliferation is very impressive. Under the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT), for example, some 182 countries have renounced nuclear arms and agreed to place all of their nuclear activities under the inspection system of the International Atomic Energy Agency (IAEA)¹ to ensure that these activities are used only for peaceful purposes.² The five countries that had detonated nuclear tests before the treaty was finalized—the United States, the Soviet Union (now Russia), Great Britain, France, and China—

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1. International Atomic Energy Agency Homepage, <http://www.iaea.org/index.html> (last visited Jan. 17, 2010).

2. Treaty on the Non-Proliferation of Nuclear Weapons, art. III, ¶ 1, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 (entered into force Mar. 5, 1970) [hereinafter NPT].

were permitted to keep their nuclear weapons under the treaty but agreed to negotiate in good faith towards their eventual elimination. Of course, we also know that India, Pakistan, and North Korea—who are outside the treaty—have conducted nuclear tests and have nuclear arsenals³ and that Israel is widely presumed to have one as well.⁴ But the fact that only nine states have such weapons is a significant achievement, and the NPT regime has contributed greatly to this result—although, as we will see, there are powerful counter-currents that raise questions about the nuclear regime’s future effectiveness.

The 1993 Chemical Weapons Convention prohibits *all* states from possessing and manufacturing chemical weapons, and states’ compliance is verified by the Organization for the Prohibition of Chemical Weapons.⁵ One hundred and eighty-three states are parties to this treaty, although a number of states, including Egypt, Israel, Syria, and North Korea, have not joined, and Syria and North Korea are believed to have substantial stockpiles of these weapons.⁶ As comprehensive as the chemical weapon non-proliferation regime may be, it too is under challenge.

The biological weapons non-proliferation regime is the most problematic of the three. The 1972 Biological Weapons Convention (BWC) has 159 parties; Syria, Israel, and Egypt, along with a number of smaller states, are not parties to the convention.⁷ Even the basic prohibition in this

3. *Statements from India and Pakistan*, BBC NEWS, June 16, 1998, http://news.bbc.co.uk/2/hi/events/asia_nuclear_crisis/world_media/114139.stm; *KCNA Report on One More Successful Underground Nuclear Test*, KOREAN CENTRAL NEWS AGENCY, May 25, 2009, <http://www.kcna.co.jp/item/2009/200905/news25/20090525-12ee.html>.

4. See AVNER COHEN, ISRAEL AND THE BOMB 1 (1998) (discussing the universal presumption that Israel possesses nuclear weapons, although the country has never acknowledged a nuclear program).

5. Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction, art. I & III, Jan. 13, 1993, Sen. Treaty Doc. No. 103-21, available at http://www.nti.org/e_research/official_docs/inventory/pdfs/aptcwc.pdf. For text and a list of current parties to the treaty, see Organisation for the Prohibition of Chemical Weapons, OPCW Member States, <http://www.opcw.org/about-opcw/member-states> (last visited Mar. 25, 2010).

6. *Current and Projected National Security Threats to the United States, Statement for the Rec. S. Select Comm. on Intelligence*, 110th Cong. 13, 15 (2007) [*hereinafter* Maples] (statement of Lt. Gen. Michael D. Maples, U.S. Army Director, Defense Intelligence Agency) (“DIA believes North Korea has had a longstanding chemical weapons stockpile of nerve, blister, blood, and choking agents. . . . Syria has had a chemical weapons program for many years and already has a stockpile of the nerve agent sarin, which can be delivered by aircraft or ballistic missiles.”).

7. Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163, available at http://www.nti.org/e_research/official_docs/inventory/pdfs/btwc.pdf. [*hereinafter* Biological Weapons Convention]. For current members of the Biological Weapons Convention, see The Biological and Toxin Weapons Convention Homepage, <http://www.opbw.org> (follow the “The Convention” hyperlink; then follow the “State Parties to this Convention” hyperlink) where the website provides a full list of the treaty’s signatories and state parties. For a comparative list to the signatories to the Chemical Weapons Convention and the Biological

treaty, however, is weak: BWC parties are specifically prohibited only from possessing agents “of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes[.]”⁸ allowing parties to pursue defensive research that can involve pathogens and technologies that may be little different from the work needed to develop offensive weapons. Verifying that research—for example, work related to the virulence of pathogens—is being pursued for peaceful, medical reasons and not for weapons purposes is extremely difficult because the purpose of such work is so easy to mask and because any illicit activities can be so easily cleaned up before investigators might arrive at a suspect location. Indeed, for such reasons, the treaty’s drafters could not agree on a verification system, and the treaty has no verification provisions, other than allowing states to request a U.N. investigation of activities they consider suspicious in other countries. Still, only a handful of states are thought to have active offensive biological weapons programs of any kind.⁹ As in the case of the other regimes, however, new challenges faced by the biological weapons regime mean that even the modest benefits it provides in establishing an international norm against biological weapons development may be drastically eroded.

The advanced countries that can manufacture nuclear, chemical, and biological technology, equipment, and materials have adopted parallel, uniform export controls and related export licensing requirements to limit the spread of these technologies. The supplier countries collaborate in implementing this critically important legal tool through the Nuclear Suppliers Group¹⁰ with respect to nuclear commodities and through the Australia Group¹¹ in the case of chemical and biological commodities.

Weapons Convention, see The Chemical Weapons Convention, Biological and Toxin Weapons Convention, Geneva Protocol, app. VII Apr. 23, 2009, http://www.nti.org/e_research/official_docs/inventory/pdfs/apmcbw.pdf.

8. Biological Weapons Convention, *supra* note 7, at art. I, sec. 1.

9. Information on biological weapon programs is limited. The United States believes Iran is pursuing a biological weapon capability, that North Korea has the ability to produce biological weapons, and that Russia and China are engaged in activities relevant to the possible future production of biological weapons. See Maples, *supra* note 6, at 13–15 (listing North Korea, Iran, China, Russia, India, Pakistan, and Syria as countries with potential offensive programs). Israel has been reported to have conducted research and development related to biological weapons. See Avner Cohen, *Israel and Chemical/Biological Weapons: History, Deterrence, and Arms Control*, 8 THE NONPROLIFERATION REV. 27, 29 (2001).

10. See Nuclear Suppliers Group, <http://www.nuclearsuppliersgroup.org> (last visited Feb. 9, 2010) (providing guidelines for nuclear exports in member countries in order to contribute to non-proliferation).

11. See Australia Group, <http://www.australiagroup.net> (last visited Feb. 9, 2010) (seeking to harmonize export controls over chemical and biological weapons within the informal forum of participating countries).

I want to concentrate this afternoon on threats to these legal rules arising from the inability to enforce these rules in the face of direct violations. Before turning to this issue, however, it is important to appreciate that international non-proliferation treaties and related legal instruments face additional challenges from other directions that may be just as serious as the enforcement problem.

The non-proliferation regimes, for example, establish rules for states, but today we must also be concerned about violent non-state extremist groups—Al Qaeda, the Taliban, Iraqi insurgent groups, Hezbollah, and others. Under a 2004 Resolution, the U.N. Security Council has now required all states to enact laws to secure weapon-of-mass-destruction commodities within their respective territories and to make it a criminal offense for individuals or groups to develop weapons of mass destruction (WMDs) there.¹² We have a long way to go, however, before such laws are in place worldwide and before they are effectively implemented, especially because some of the places where implementing them is the most important are, as a practical matter, not under the control of central governments whose job it is to impose such laws—for example, along the Pakistan–Afghanistan border, in Southern Lebanon, or in parts of Iraq.¹³

In the meantime, our focus has been on counter-terrorism efforts, where legal tools are not the leading edge of how we go about our business, although classic law enforcement plays a role—as we saw in the arrest in September 2009 of Najibullah Zazi.¹⁴ Rather, the focus of counter-terrorism efforts at the moment is on the use of intelligence resources and military intervention.

In addition to the challenge posed by non-state actors, it is also important to appreciate that the non-proliferation treaties and regimes are under challenge by what I will call “the march of science.” New technologies are emerging in the nuclear, chemical, and biological realms that the existing regimes are simply not equipped to regulate or constrain. The use of lasers to enrich uranium—a key step in developing nuclear weapons—and the use of microreactors for synthesizing chemical compounds, for example, could soon enable proliferators to develop nuclear and chemical weapons in facilities with greatly reduced “foot prints”

12. S.C. Res. 1540, at 2–3, U.N. Doc. S/RES/1540 (Apr. 28, 2004).

13. The U.N. Security Council has established a special committee to monitor the implementation of Resolution 1540. *Id.* at 3. The committee issues periodic reports on the progress being made, which may be found on the committee’s website. 1540 Committee Homepage, <http://www.un.org/sc/1540> (last visited Feb. 9, 2010).

14. William K. Rashbaum, *Suspect Pleads Not Guilty in Bomb-Conspiracy Case*, N.Y. TIMES, Sept. 29, 2009, at A25, available at <http://www.nytimes.com/2009/09/30/nyregion/30terror.html>.

compared to similar facilities that might be built today.¹⁵ This change could make detecting clandestine facilities even more difficult than it is currently and further erode the effectiveness of the nuclear and chemical weapon inspection systems.

And in the area of biological weapons, revolutionary advances in the life sciences have created new technologies, like protein engineering and synthesis of viral genomes, that could greatly facilitate the development of potent new biological weapons—or the reconstitution of deadly diseases that have been eradicated, such as smallpox. Imagine how powerful smallpox would be as a weapon in a world where populations were no longer vaccinated against the disease—that is, in the world we live in today. To be clear, the only known examples of this virus are held today in the United States and Russia in highly secure facilities: But scientists believe that the techniques to reconstitute this extremely complex virus could be in wide use in as little as two years.

So, with that reminder that non-state actors and the march of science are threatening to undermine existing non-proliferation legal instruments, let me turn to the main focus of my remarks: the violations of the basic rules of the nuclear non-proliferation regime, the great difficulty we have encountered in enforcing these rules, and the potential fallout on other international legal principles from what I will call the “enforcement gap.”

Let us begin by reminding ourselves of the basics. Leaving aside the five countries that had detonated a nuclear device before 1967, when a non-nuclear-weapon state—a state not in that group—joins the NPT, it pledges not to manufacture nuclear weapons and to put all of its nuclear facilities and materials under IAEA inspection so that the agency can track the materials and verify they are not being used for nuclear weapons. If a country is found to be violating this rule, the Statute of the IAEA provides that the agency may refer the matter to the U.N. Security Council “as the organ bearing the main responsibility for the maintenance of international

15. See JAMES MARTIN CENTER FOR NONPROLIFERATION STUDIES, PANEL ON THE PROLIFERATION CONSEQUENCES OF LASER ENRICHMENT 11 (2009), available at http://cns.miiis.edu/activities/pdfs/event_transcript.pdf (including transcript). “Uranium enrichment and spent fuel reprocessing are the key technologies that enable countries to produce direct-use materials for nuclear weapons. The more countries to which either technology, enrichment or reprocessing, spreads, the greater the proliferation risks.” *Id.* (internal quotations omitted); see also DR. CHARLES D. FERGUSON, LASER ENRICHMENT OF URANIUM: POWER PROMISES AND PROLIFERATION PERILS (2009), available at http://cns.miiis.edu/activities/media/ferguson_laser_enrichment.ppt (including Powerpoint presentation given at same event); Chris Schneidmiller, *Nations to Consider Future of Chemical Weapons Pact*, GLOBAL SECURITY NEWSWIRE, Apr. 3, 2008, http://www.nti.org/d_newswire/issues/2008_4_3.html#09ED5959 (detailing matters expected to be considered at the 2008 review conference for the Chemical Weapons Convention).

peace and security”¹⁶ So these are the basic rules governing nuclear activities for some 182 countries and the key measure for enforcing them.

Secondly, to refresh your understanding of the technologies at issue, to make the bomb, a country needs to produce either highly enriched uranium in an enrichment plant, or plutonium, which is produced in spent nuclear reactor fuel that is subsequently treated in a reprocessing plant to separate out the plutonium. So if a state wants nuclear weapons, it is going to have to have either a uranium enrichment facility or a reactor and an associated plant for separating plutonium.

The trouble is that there are legitimate reasons for countries to have enrichment or reprocessing capabilities, since both can be used to produce fuel for nuclear power reactors. Unfortunately, if a state develops these plants, it can build a stockpile of material that is very close to what is needed for a bomb. If it were to suddenly pull out of the NPT and tell the IAEA to go home and if it had prepared non-nuclear components for nuclear weapons in advance, it could produce nuclear arms in a matter of weeks, under some scenarios.

For some countries, including Japan, Germany, or the Netherlands, we consider this risk acceptable, since these states have strong non-proliferation credentials. But in other cases, we do not.

This brings us to Iran, a non-nuclear weapon state that is a party to the NPT, with the obligation to place all of its nuclear activities under IAEA inspection. From 1985 to 2002, however, Iran pursued secret uranium enrichment and plutonium production programs.¹⁷ Obviously, in these circumstances the assumption would be made that these facilities were not intended for peaceful purposes but rather for a clandestine nuclear weapon program.

Adding to concerns, U.S. intelligence agencies obtained evidence that Iran was secretly working on designing a nuclear weapon and a nuclear

16. Statute of the International Atomic Energy Agency art. III(B)(4), Oct. 26, 1956, 8 U.S.T. 1093, 276 U.N.T.S. 3.

17. See, e.g., Int'l Atomic Energy Agency [IAEA], *Implementation of the NPT Safeguards Agreement and relevant provisions of Security Council resolutions 1737 (2006), 1747 (2007), 1803 (2008) and 1835 (2008) in the Islamic Republic of Iran*, at 5, IAEA Doc. GOV/2009/74 (Nov. 16, 2009) [hereinafter IAEA Iran 2009 Safeguards Report] available at <http://www.iaea.org/Publications/Documents/Board/2009/gov2009-74.pdf>. The most authoritative reviews of the Iranian nuclear program have been prepared by the IAEA in periodic reports to the IAEA Board of Governors. These reports are released publicly after some delay to permit review by the board and can be found on the IAEA website. IAEA News Center, IAEA & Iran, <http://www.iaea.org/NewsCenter/Focus/IaeaIran/index.shtml> (last visited Feb. 9, 2010). Copies of the reports are sometimes made available by a number of non-governmental organizations prior to their official release, along with commentary on them. See, e.g., Institute for Science and International Security Iran, <http://isis-online.org/countries/category/iran/> (last visited Feb. 9, 2010).

warhead for a missile. One piece of evidence was that Iran had obtained documents describing how to machine perfect hemispheres of highly enriched uranium.¹⁸ The sole known purpose for such hemispheres is to serve as the core of a nuclear bomb.

At this point, in late 2002 and early 2003, enforcement of the legal rules began. Caught red-handed, Iran took steps to comply with IAEA demands that it clarify the purpose of its clandestine activities and demonstrate that they were not intended for the development of weapons. And, in fact, although it left many questions unanswered, from 2003 to 2005, Iran suspended work on its nearly completed uranium enrichment facility at Natanz—the facility that was the greatest source of outside concern.¹⁹ It also slowed work on its plutonium production program, which was less advanced. And, it accepted a system of enhanced IAEA inspections. The timing of this—beginning in 2003—it may be noted, coincided with the invasion of Iraq by a U.S.-led coalition because of Iraq's suspected WMD programs, a development which undoubtedly contributed to Tehran's new restraint.

But in mid-2005, as the United States became bogged down in Iraq and as Mahmoud Ahmadinejad came to office as Iran's president, Iran reversed course, terminating the added inspection rights it had granted the IAEA and restarting work on its enrichment facility at Natanz and on its plutonium facilities.²⁰

And now we get to the crux of the issue. Because of Iran's refusal to disclose the full details of its past activities, the IAEA declared in September 2005 that it could not confirm that all nuclear activities in Iran were peaceful and that Iran was in breach of its inspection obligations. Then, in February 2006, following the procedures established in the IAEA Statute, the IAEA referred the matter to the U.N. Security Council.²¹ In December 2006, March 2007, April 2008, and December 2008, the Security Council adopted Resolutions 1737, 1747, 1803, and 1835, respectively, imposing a range of economic sanctions on Iran and demanding that it cease its work on uranium enrichment and plutonium production facilities, in view of the evidence

18. Ambassador Gregory L. Schulte, U.S. Permanent Representative to the United Nations Office in Vienna and the Int'l Atomic Energy Agency, Bd. of Governors Meeting-Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran (Sept. 13, 2006) (transcript available at http://vienna.usmission.gov/sp_iaea_board.html).

19. See IAEA Iran 2009 Safeguards Report, *supra* note 17, ¶ 2.

20. *Id.*

21. IAEA, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, at 2–3, IAEA Doc. GOV/2006/14 (Feb. 4, 2006), available at <http://www.iaea.org/Publications/Documents/Board/2006/gov2006-14.pdf>.

pointing to a secret nuclear weapon program.²² These were mandatory resolutions, adopted under Chapter VII of the U.N. Charter.²³

But despite this escalated and intensified effort to enforce the non-proliferation rules, Iran did not comply. Instead, it added more and more enrichment centrifuges, the machines that upgrade uranium, at its Natanz enrichment plant. Disregarding charges that it was actually planning to develop nuclear weapons, Iran asserted that it was only enriching uranium to the low level used for nuclear power plant fuel and insisted it had the right to operate the facility so that it might enjoy the full benefits of the peaceful uses of nuclear energy as guaranteed by Article IV of the NPT.²⁴

As of the end of 2009, Iran had built some 8,000 centrifuges at Natanz and was operating nearly 4,000 of them, compared to having only a handful in 2003.²⁵ In addition, Iran had built up a stockpile of more than 1,700 kilograms of low-enriched uranium, which, if further enriched—and that is the key—could rapidly provide fuel for two nuclear weapons.²⁶ And, Iran is continuing to add to this stockpile.

So let me just reiterate the key point here: The NPT, through the IAEA Statute, provides a mechanism for dealing with non-compliance, namely, referral to the U.N. Security Council. The process has been used, but Iran has disregarded the Security Council's demands and in direct defiance of the Council has significantly built up its uranium enrichment program since 2005.

The newest revelation is that Iran has yet another clandestine nuclear facility, this one, a smaller uranium enrichment plant, near the city of Qom.²⁷ U.S. officials say the facility is too small to be intended for the production of nuclear power plant fuel but is the right size to produce one bomb's worth of highly enriched uranium per year.²⁸ The facility was hidden at a heavily fortified Iranian Revolutionary Guards Corps facility, an added indication of its apparent military purpose.²⁹

Where do we go next? Iran has agreed to allow IAEA inspections of the new facility at Qom. That will make it more difficult for Tehran to

22. S.C. Res. 1835, at 1, U.N. Doc. S/RES/1835 (Sept. 27, 2008); S.C. Res. 1803, at 2–6, U.N. Doc. S/RES/1803 (Mar. 3, 2008); S.C. Res. 1747, at 2–4, U.N. Doc. S/RES/1747 (Mar. 24, 2007); S.C. Res. 1737, at 2–4, U.N. Doc. S/RES/1737 (Dec. 23, 2006).

23. U.N. Charter arts. 39, 41.

24. NPT, *supra* note 2, art. IV.

25. IAEA Iran 2009 Safeguards Report, *supra* note 17, at 1 n.2.

26. *Id.* at 2.

27. *Id.*

28. Press Release, Senior Admin. Official, White House, Background Briefing by Senior Administration Officials on Iranian Nuclear Facility (Sept. 25, 2009), *available at* http://www.whitehouse.gov/the_press_office/Background-Briefing-By-Senior-Administration-Officials-On-Iranian-Nuclear-Facility/.

29. *Id.*

misuse the plant unless it withdraws from the Non-Proliferation Treaty. But the existence of *this* secret plant raises the possibility that there may be *others*, for example, another hidden enrichment plant or a clandestine plant that would have provided the raw material—uranium gas—for the Qom enrichment facility.

The Obama Administration continues to hold talks with the Iranians to see if it is possible to find a negotiated solution to the impasse. The United States has said that if the talks do not bear fruit by the end of 2009, it will seek “crippling sanctions” on Iran in the Security Council.³⁰ It is by no means clear, however, that the United States will be able to obtain consensus on such measures in that body or, even if it does, that the Ahmadinejad government will change course.

In sum, the legal rules are being applied with some vigor in this case, but to date they have come up very short indeed, and there is all too much reason to fear they may very well soon fail again.

Sadly, Iran is not the only country engaged in suspicious WMD activities that has defied the U.N. Security Council in recent years. Most prominently, after North Korea’s first nuclear test in October 2006, the Council adopted a binding resolution, again under Chapter VII of the U.N. Charter, that required North Korea to eliminate its nuclear weapon program and rejoin the NPT, from which it had withdrawn in 2003. The Resolution also imposed an international embargo on conventional arms transfers and nuclear- and missile-related transfers to Pyongyang.³¹ But North Korea, as we know, disregarded these demands, continuing its nuclear weapon program and last May conducting a second nuclear test.³² The Council shortly afterward adopted a further resolution, imposing additional sanctions on North Korea and again demanding that North Korea end its nuclear weapon program, so far to no avail.³³

North Korea and Iran, I should add, have collaborated on the development of medium-range, nuclear-capable missiles,³⁴ and it is clear that they are closely watching the difficulty that the Security Council is having in responding effectively to their respective breaches of international non-proliferation rules. And, when one defies the Council with few consequences, the other gains confidence that it too can disregard Council demands.

30. David E. Sanger, *U.S. Weighs Iran Sanctions if Talks are Rejected*, N.Y. TIMES, Aug. 2, 2009, at A4, available at <http://www.nytimes.com/2009/08/03/world/middleeast/03nuke.html>.

31. S.C. Res. 1718, at 2, U.N. Doc. S/Res/1718 (Oct. 14, 2006).

32. *KNCA Reports on One More Successful Underground Nuclear Test*, *supra* note 3.

33. S.C. Res. 1874, at 1–4, U.N. Doc. S/Res/1874 (June 12, 2006).

34. Jennifer Kline, *Special Report: Challenges Of Iranian Missile Proliferation*, WMD INSIGHTS, Oct. 2006, http://www.wmdinsights.com/I9/I9_ME1_ChallengesofIran_1.htm.

This brings us to the other side of the coin—if the internationally accepted enforcement measures are not working, can a state take the law into its own hands, in this case, international law?

Israel appeared to do just this when it attacked a site in Syria in September 2007.³⁵ That event was followed by a total news blackout in Israel, Syria, and the United States, but in April 2008, the CIA gave a briefing and released a video that described what had actually happened: Israel had destroyed a nuclear reactor in Syria that was “nearing operational capability.”³⁶ The reactor had been built in secret, the briefing continued, contrary to Syria’s obligations under the NPT; it was built with North Korean assistance and was modeled on the reactor North Korea used to produce plutonium for its nuclear weapon program; and it did not appear suited to nuclear power production or traditional nuclear research activities.³⁷ Syria had made extensive efforts, the briefing continued, to disguise the facility and, after the attack, Syria razed the ruins of the destroyed reactor, removing the debris to an unknown location in order to eliminate evidence as to the nature of the facility.³⁸ Syria denied the site housed a nuclear facility but said little else. The IAEA has since visited the site, where it found traces of processed uranium consistent with the presence of a reactor nearing start-up, but it is still continuing its investigation, demanding that Syria provide more information and access to additional locations. So far Syria has refused further cooperation.³⁹

Now, there can be little question that after it discovered the facility in early 2007, Israel must have considered the option of exposing its existence publicly, demanding that the IAEA inspect it, and pressing the Security Council to prevent it from operating. But Israel, it is clear, rejected this option, undoubtedly believing that this route—reliance on the enforcement mechanisms embodied in the Non-Proliferation Treaty and the IAEA Statute, that is, reliance on the legal rules—would simply not work. I believe we can all predict what would have happened if Israel had gone down this road: Syria would surely have played the game Iran played, insisting the reactor was intended for peaceful purposes, allowing IAEA inspections, and stalling for time as it completed and began operating the

35. OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, BACKGROUND BRIEFING WITH SENIOR U.S. OFFICIALS ON SYRIA’S COVERT NUCLEAR REACTOR AND NORTH KOREA’S INVOLVEMENT 3 (2008), available at http://www.dni.gov/interviews/20080424_interview.pdf.

36. *Id.* at 1, 3.

37. *Id.* at 1–2.

38. *Id.* at 3.

39. IAEA, *Implementation of the IAEA Safeguards Agreement in the Syrian Arab Republic*, at 2–3, GOV/2009/75 (Nov. 16, 2009), available at http://www.isis-online.org/publications/syria/IAEA_Report_Syria_19Nov2008.pdf.

facility, eventually building a stockpile of “peaceful plutonium” that would leave it only months away from having a completed nuclear weapon. And so, Israel turned to the military option.

But Israel did not only turn its back on the enforcement mechanism embedded in the nuclear non-proliferation regime: through this act of “anticipatory self-defense,” Israel also rejected the basic international rules that are supposed to govern the use of force.

As codified in Article 51 of the U.N. Charter, the only permissible use of force by a state is in self-defense, specifically, in response to an armed attack by another state.⁴⁰ Under some interpretations, the right of self-defense also permits a state to respond preemptively to a threatened attack, but only if that threatened attack is so certain and imminent that preventing the attack by force is dictated by necessity.⁴¹ The attack on the Syrian nuclear reactor, however, was launched years before Syria might have actually built a nuclear weapon that could have threatened Israel. In effect, Israel adopted the stance of the Bush Administration, to the effect that where weapons of mass destruction are at issue, the stakes are so high that early action to eliminate the threat is justified.⁴² Somewhat surprisingly, the international community has been virtually silent about the Israeli attack, implicitly seeming to tolerate Israel’s resort to force in this instance.

The bottom line here is that not only are the basic rules governing non-proliferation at risk of being swept aside, but the erosion of these strictures—the loss of confidence in them—is spilling over to threaten the major tenets of international law concerning the use of force.

By the way, whether preventive self-defense is justified where a WMD is at issue is a matter of considerable debate. The rules codifying international law regarding the use of force, as I mentioned, are set out in Article 51 of the U.N. Charter. Not only was that document drafted before the existence of nuclear weapons became known to the world with the use of the bomb against Hiroshima and Nagasaki, but even the key U.S. negotiators were in the dark during the drafting of the Charter, unaware that the United States was pursuing the Manhattan project.⁴³ Possibly, had the drafters been aware that the world would soon be living in the nuclear age,

40. U.N. Charter art. 51, para. 1. See Ivo Daalder & James Steinberg, *The Future of Preemption*, THE AM. INTEREST, Winter 2005, at 30, 30 (discussing the scope of Article 51); Anthony Clark Arend, *International Law and the Preemptive Use of Military Force*, WASH. Q., Spring 2003, at 89, 89–92 (same). But see YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 85–88 (4th ed. 2005) (describing the permissible uses of force under the U.N. Charter).

41. See Arend, *supra* note 40, at 91.

42. THE DEP’T OF STATE, NAT’L STRATEGY TO COMBAT WEAPONS OF MASS DESTRUCTION 1 (2002), available at <http://www.state.gov/documents/organization/16092.pdf>.

43. This was brought to the author’s attention by Dr. Michael O. Wheeler.

Article 51 would have come out differently. Some scholars believe the provision needs to be expanded, perhaps by means of informal international understandings.⁴⁴ Indeed, state practice may be starting to reshape customary international law in this area.⁴⁵

Against this background and with the stakes so high in Iran, my guess is that the United States is going to back up the threat of sanctions with the veiled application of military pressure of some kind—perhaps the increased presence of U.S. naval forces in the Persian Gulf; possibly the accelerated deployment of missile defense systems in Turkey and the Gulf States; maybe a delay in actually deploying additional troops to Afghanistan until the outcome of the upcoming negotiations with Iran is known; maybe the hint that because the Qom facility bears all the hallmarks of a military facility, it is like the Syrian reactor and may therefore be an appropriate target for a preventive strike.

Without doubt, however, I believe the question *Will Legal Tools Matter in Slowing Proliferation?* is likely to be decided in this case.

Let me close by recounting an episode that occurred a number of years ago. When I was an arms control official in the Clinton Administration, I was in Geneva as a member of the U.S. delegation to the ultimately unsuccessful negotiations on a verification protocol for the Biological Weapons Convention. The negotiations were held in the U.N. Palace of Nations on Lake Geneva, a complex of several interconnected buildings on a north-south axis fronting the lake. One enters in the southernmost building, where your credentials are checked, and you proceed to the northernmost building where the negotiations take place in a hall that looks a lot like the U.N. General Assembly in New York.

On the way, however, you walk through a third building. This is the Hall of the League of Nations, a classic Art Deco building that is immediately evocative of the 1930s. And, when I did that for the first time—as I am sure is true for many other diplomats walking through that hallway—I wondered whether the legal structures that I and many others had worked on for so many years in the field of non-proliferation would endure as meaningful restraints against extremely dangerous state behavior or would be swept aside by the force of events, as happened to the League. And I wondered, in particular, whether my own hopes and expectations for the non-proliferation regimes were any more well-founded than the hopes and expectations of the diplomats in the League of Nations hall, say, in

44. See DANIEL H. JOYNER, INTERNATIONAL LAW AND THE PROLIFERATION OF WEAPONS OF MASS DESTRUCTION 279–89 (2009) (arguing that Article 51 would have to be revised in order to sanction the use of force against countries developing or possessing WMDs).

45. See Arend, *supra* note 40, at 99–101.

1934, before the League proved ineffective in dealing with the Italian invasion of Ethiopia, the Japanese invasion of China, or of course, Germany's expansion into Czechoslovakia and Poland.

That moment of reflection occurred nearly ten years ago, but I fear that today there is far greater reason to have such concerns.

Thank you for your attention.

