

**NUCLEAR PROLIFERATION AND THE NEW WORLD ORDER:
WHAT ROLE FOR INTERNATIONAL LAW? ***

Abstract

The article discusses the role of international law in nuclear proliferation and the new world order. It adopts a doctrinal approach hinged on tracing: international laws of nuclear proliferation, current world order, and the role of international law by making insightful consideration on the need for a global framework for responsible nuclear conduct, arms control and disarmament, realistic enough to gain traction while capturing the aspiration of a world free of nuclear dangers, that is at least as strong as 60 years ago, when arms control was first introduced. The article reveals that on the way to a new world order, we do not yet know, disorder is the near normal. It therefore recommends that unless there is a change of security thinking in the United States – the leading military power – nuclear arms control and disarmament has a bleak future.

Keywords: Disarmament, Role, World Order, Nuclear Proliferation, International Law

1. Introduction

Soon after the first use of nuclear weapons by the United States against Japan, international community formed international law rules to prevent nuclear weapons proliferation among states. On the way to a new world order, we do not yet know, disorder is the new normal and the world is in a state of flux. Six features are particularly noteworthy: Sovereign states are reemphasized and reconfirmed as the basic building block of international affairs; Trade and technology wars and economic sanctions have moved to the top of international agenda; International norms, institutions and agreement are falling apart; Geopolitically, the tense relationship between the United States and China is increasingly dominant; New technologies nurture new forms of influence and capacities for violence. Inherent in all of this, international affairs have become more unpredictable. Such a world does not leave many options for cooperative action. In the military field, states have returned to unilateral security policies as primitive as those of the cold war. There is one overriding common concern, however; to avoid nuclear wars. To this end, stability measures – the primary objective of arms control – are of the essence. There is no longer consensus on the basic premises of global governance; international norms are increasingly questioned; multilateralism and the institution upholding it are under pressure; arms control and disarmament agreement are unraveling; and big-power relations are strained by arms modernization and expansion. Zero-sum thinking is gaining ground and negotiated solutions for the common benefit are a rare commodity. In such a turbulent world, where big powers compete for position and influence in the face of an unpredictable future, what are the prospects, if any for cooperative security policies, arms control and disarmament?¹ It is against this background this article will examine ‘nuclear proliferation and the new world order: what role for international law?’ In other to control self-interest behaviours with respect to very universal values which present foundations of the contemporary international community as a whole.

2. International Laws of Nuclear Proliferation

The foundational structure for the international legal regime of nuclear non-proliferation comprises the NPT and its supporting organizational arrangement of International Atomic Energy Agency (‘IAEA’) for monitoring compliance of NPT member states with NPT’s provisions. The NPT applies directly only to states. It extracts two basic promises from member states, namely, that nuclear weapons states will not help non-nuclear weapon states acquire nuclear weapons² and; that non-nuclear weapons states

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¹ Sverre Lodgaard, ‘Arms Control and World Order’, (2019) 2(1) *Journal for Peace and Nuclear Disarmament*, 1 – 18.

² NPT, *supra*, note 2, Article I. (‘Each nuclear-weapon State Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly,

will not acquire nuclear weapons and will accept the International Atomic Energy Agency ('IAEA') safeguards to ensure that their nuclear activities are undertaken only for peaceful purposes.³ The NPT, however, acknowledges nations' right to use nuclear technology for peaceful purposes and promises that countries possessing nuclear technology will share the technology with others for peaceful uses.⁴ Further, the NPT requires that members shall strive toward cessation of nuclear arms race and eventual nuclear disarmament.⁵ As Sievert noted, the NPT struck a 'bargain' wherein the signatory non-nuclear weapon nations were promised access to nuclear energy for peaceful purposes in return for a promise that they would desist from manufacturing nuclear *weapons* or transferring nuclear weapons-related materials and technologies.⁶ As part of the bargain, the nuclear-weapons states promised to begin good faith negotiations on measures to stop the ongoing nuclear arms race and, over time, achieve nuclear disarmament.⁷ The NPT required, under Article III, non-nuclear weapons signatory states to submit to the IAEA inspection and verification regime to assure the international community that they were not diverting nuclear materials and technologies for belligerent purposes. The NPT-based regime was amended with the Additional Protocol in 1977 to supplement the existing IAEA safeguards system. The objective of the Additional Protocol was to tighten regulations against countries that, with access to nuclear materials, knowledge, and technologies that the NPT membership granted, could surrender to temptations to develop nuclear weapons. This whole NPT-based arrangement applied to consenting states that voluntarily agreed to be bound by it. The legal rules of the NPT-based regime of nuclear nonproliferation have had no competence for controlling non-state actor's activities. Thus, in the context of possible nuclear terrorism, NPT-based international laws of nuclear nonproliferation are irrelevant, except to the extent that they seek to control states' nuclear behaviours, such as transference of nuclear materials, expertise, and know-how in ways that create risk of nuclear weapons falling into terrorists' hands.⁸

The U.N. Charter does not mention 'proliferation,' as the issue did not exist at the time the document was written. It mentions, however, 'disarmament,' in articles 11, 26, and 47. In article 11(1) disarmament and regulation of armament appear as principles, among others, that signatory nations are required to follow and cooperate upon for maintenance of international peace and security. Article 26(1) holds the Security Council responsible, with assistance from the Military Staff Committee, for planning a system of regulating disarmament. Article 47(1) enjoins the Military Staff Committee to advise and assist the Security Council on matters related to regulation and possible disarmament. While under the Covenants of the League of Nations, disarmament had meant absence of arms,⁹ under the U.N. Charter, it came to mean arms control under international law as, by then, experience had taught that maintenance of a certain level of arsenal was necessary.¹⁰ Soon after the writing of the U.N. Charter, the issue of nuclear weapons proliferation surfaced, but the Charter made no distinction between

or indirectly; and not in any way to assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices.')

³ Ibid, Article II ('Each non-nuclear-weapon State Party to the Treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices.')

⁴ Ibid, Article IV 1('Nothing in this Treaty shall be interpreted as affecting the inalienable right of all the Parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes without discrimination and in conformity with Articles I and II of this Treaty.')

⁵ Ibid, Article VI ('Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.')

⁶ Ronald J. Sievert, 'Working Toward a Legally Enforceable Nuclear Non-Proliferation Regime', (2010) 34, *Fordham Int'l L.J.*, 93, 93.

⁷ Ibid, at 93 – 94.

⁸ Imrana Iqbal, 'International Law of Nuclear Weapons Nonproliferation: Application to Non-State Actors', (2018) 31(1), *Pace International Law Review*, 6 – 8.

⁹ Andrew Webster, 'The Transnational Dream: Politicians, Diplomats and Soldiers in the League of Nations' Pursuit of International Disarmament, 1920 – 1938', (2005) 14, *Contemp. Eur. Hist.*, 493, 493.

¹⁰ Daniel H. Joyner, 'Non-proliferation Law and the United Nations System: Resolution 1540 and the Limits of the Power of the Security Council', (2007) 20, *Leiden J. Int'l L.*, 489, 491.

conventional and non-conventional weapons. Non-proliferation issues, therefore, fell under the general category of issues regarding arms control.¹¹

The main weakness of international laws, including provisions of the Charter of the United Nations, and the one which renders these laws ineffectual against non-state actors, has been traditionally regarded as their state-centric character.¹² For that reason, with its focus on states, the NPT does not represent the dominant legal and political approach when significance of non-state actors striving for dominance with nuclear weapons has increased.¹³ Former United States President Barack Obama conveyed this sense to the world in his 2009 speech in Prague, Czech Republic, in which he all but conceded to the failure of the global non-proliferation regime in the new context, noting ‘terrorists are determined to buy, build or steal (nuclear weapons). Our efforts to contain these dangers are centered on a global non-proliferation regime, but as more people and nations break the rules, we could reach the point where the center cannot hold.’¹⁴

In our times, there exist ongoing concerns regarding nuclear terrorism.¹⁵ With little confidence that the international legal regime of nuclear nonproliferation, based on the NPT and its complementary verification regime under the IAEA, can reach non-state actors,¹⁶ many scholars of nuclear terrorism express dismay: they are certain that terrorists will seek and use nuclear weapons to terrorize without impediment from international law. Albright and Hinderstein, for instance, argued that the inability of the global nuclear nonproliferation regime, including the NPT-based system and the system of international export controls, to detect private individuals’ and groups’ clandestine nuclear activities – such as those of the A. Q. Khan network, which violated global nonproliferation objectives by large scale black market trading of nuclear technologies and material around the world – attests to inadequacy

¹¹ Ibid.

¹² Since early in the development of international law, scholars have pointed out that the effectiveness of international law lies not in its power of enforcement of laws but in its influence in regulating international relations and struggle for power. Unlike a national legal system, where the government exercises coercive powers over its subjects, international law lacks enforceability due to the consent requirement for its enforcement measures, its decentralized character, the imprecise nature of its obligations, the varied interpretations of law that nations are able to construe to suit their individual interests, and the multiple ways in which nations can implement the law to fit their preferences and purposes. It follows that an individual perpetrator of a crime like nuclear terrorism can be punished by the state of which the individual is subject: international law does not directly reach the individual – at least not as yet. See HANS J. MORGENTHAU ET AL., *supra*, note 3; see also Prosper Weil, *supra*, note 3 (discerning in the last quarter of the twentieth century, a shift in the axis of general international law from states to the community of states for directing expansion of binding international legal rules). Bederman wrote in the early twenty-first century that the international legal order is still state-centered. David J. Bederman, *supra*, note 3; Charlotte Ku & Paul F. Diehl, *supra*, note 3 (noting that the scope of international law has expanded to include international organizations, non-governmental organizations (NGOs), multinational corporations, and even private individuals). Not many international legal scholars would yet say, though, that individuals are direct subjects of international law.

¹³ See David P. Fidler, ‘International Law and Weapons of Mass Destruction: End of the Arms Control Approach?’ (2004) 14, *Duke J. Comp. & Int’l L.*, 39, 64 (arguing that the state-centric focus in the WMD policies are anachronistic with rise of the threat of WMD terrorism).

¹⁴ Barack Obama, Remarks by President Barack Obama in Prague (Apr. 5, 2009) (transcript available at <https://obamawhitehouse.archives.gov/the-press-office/remarks-president-barack-obama-prague-delivered>) (indicating a conviction that the existing global non-proliferation system is inadequate to meet the threat of nuclear terrorism), accessed 21st September, 2020.

¹⁵ The Washington Post, *Nuclear Terrorism FAQ*, Harv. Kennedy Sch. For Sci. & Int’l Aff. Belfer Ctr. (Sept. 26, 2007), <https://www.belfercenter.org/publication/nuclear-terrorism-faq>. accessed 21st September, 2020 The Harvard Kennedy School’s Belfer Center finds it plausible that terrorists can acquire nuclear weapons and commit nuclear terrorism: ‘Unfortunately, terrorist use of a nuclear bomb is a very real danger ... Published estimates of the chance that terrorists will detonate a nuclear bomb in a U.S. city over the next ten years range from 1 percent to 50 percent. In a 2005 poll of international security experts taken by Senator Richard Lugar (R-Ind.), the median estimate of the chance of a nuclear attack in the next ten years was 29 percent – and a strong majority believed that it was more likely that terrorists would launch a nuclear attack than that a state would. Given the horrifying consequences of such an attack, even a 1 percent chance would be enough to call for rapid action to reduce the risk.’ see William C. Potter, ‘The NPT and the Sources of Nuclear Restraint’, (2010) 2, *AM. Acad. Arts & Sci.*, 68, 81 (arguing that the Treaty’s inattentiveness to non-State actors who have risen either as suppliers or potential end-users of nuclear technology, materials, and weapons is one critical challenge that the NPT faces and which may cause the NPT-based regime’s demise).

¹⁶ Gilles Arbellot du Repaire, ‘The Nuclear Weapon Non-Proliferation Treaty and Terrorism: The Consequences of II September 2001 on the Treaty Review Process’, (2003) 71, *Nuclear L. Bull.*, 15, 17.

of the system.¹⁷ These scholars argue that international legal tools are fraught with gaps that make nuclear security precarious, with the possibility that terrorists may gain ability to acquire and use nuclear weapons.¹⁸ With heightening perception of the possibility of nuclear terrorism, skeptics doubted whether the international legal system of nuclear nonproliferation could survive the prevailing conditions of the twenty-first century.¹⁹ When scholars, such as Graham Allison, listed ways of preventing possible nuclear terrorism attempts, they did not take into account the NPT-based international legal regime.²⁰ The NPT-based system was not designed to deal with sub-national terrorism and it does not. With the rise of fear of nuclear terrorism, particularly after the 9/11 attacks on the United States, the international community scrambled to develop other measures to hinder possible attempts by non-state actors to acquire and use nuclear weapons.²¹ The international community has sought to close gaps in the current international nuclear nonproliferation laws through various unilateral and multilateral measures, initiatives, and proposals; the growing trend is to establish remedial measures and standards outside the NPT-based nuclear nonproliferation regime.²²

The Post-Cold War fears of Weapons of Mass Destruction ('WMD') terrorism led the United Nations General Assembly to establish an *ad hoc* committee with the mandate 'to elaborate an international convention for the suppression of terrorist bombings and, subsequently, an international convention for the suppression of acts of nuclear terrorism, to supplement related existing international instruments, and thereafter to address means of further developing a comprehensive legal framework of conventions dealing with international terrorism.'²³ The *ad hoc* committee's work resulted in conclusion of three treaties under the auspices of the U.N. General Assembly: the International Convention on the Suppression of Terrorist Bombings (adopted in 1997 and entered into force in 2001);²⁴ the International Convention for the Suppression of Financing of Terrorism (adopted in 1999 and entered into force in 2002);²⁵ and the International Convention on the Suppression of Acts of Nuclear Terrorism (adopted in 2005 and entered into force in 2007).²⁶ The preamble of the International Convention on the Suppression of Acts of Nuclear Terrorism, specifically states that 'acts of nuclear terrorism may result in the gravest

¹⁷ David Albright & Corey Hinderstein, 'Unraveling the A. Q. Khan and Future Proliferation Networks', (2005) 28, *Wash. Q.*, 111, 111.

¹⁸ *Ibid.*, at 111, 113.

¹⁹ Mitchell B. Reiss, *Combating Weapons of Mass Destruction: The Future of International Nonproliferation Policy ix – xv*, (Nathan Busch & Daniel H. Joyner eds., 2009) (noting the following current conditions that substantiate the doubt regarding efficacy of the NPT in the 21st century: 'ongoing political and technical hurdles to corralling and safeguarding the nuclear materials and weapons of the former Soviet Union; concerns over the safety and security of Pakistan's nuclear arsenal; anxieties over the spread of increasingly sophisticated, dual-use biotechnology capabilities; spread of medium-and long-range missiles around the world; fears over the possible acquisition of nuclear weapons or radioactive materials by terrorist groups; and variegated challenges to the Nuclear Nonproliferation Treaty (NPT), International Atomic Energy Agency (IAEA) inspections system, and regional security by the nuclear ambitions of North Korea and Iran').

²⁰ See Graham Allison, 'How to Stop Nuclear Terror', (2004) 83, *Foreign Aff.*, 64, 68 – 74. Allison concurs with President Bush's characterization of nuclear terror as the 'defining threat the (United States now) face(s)', at 64. The scholar proposes a national security strategy 'based on the 'Three No's': no loose nukes, no nascent nukes, and no new nuclear states', at 65. It is clear that neither the politician, President Bush, nor the scholar, Graham, considered international legal remedies to address the possibility of nuclear terrorism. See Mitchell B. Reiss, *supra*, note 24 (pointing out that the dominant method of preventing nuclear terrorism is state control of sensitive materials through national and international political and legal frameworks). States have, clearly, not considered remedies founded on the NPT-based international legal system to prevent the feared nuclear terrorism.

²¹ Robert Litwak, *Preventing a Nuclear 9/11: State-Based Strategies to Deter Non-State Threats*, Lawfare (July 30, 2017) <https://www.lawfareblog.com/preventing-nuclear-911-state-based-strategies-deter-non-state-threats>. accessed 21st September, 2020 Litwak writes that, following 9/11, the threats of nuclear terrorism led to re-consideration of the two classical deterrence strategies- deterrence by punishment and deterrence by denial. The former entails punitive responses, and the latter seeks to block acquisition of means to conduct terrorism. Following 9/11, state cooperation emerged as a new, dominant deterrence strategy instead.

²² See Saira Bano & Srinii Sitaraman, *supra*, note 4; Imrana Iqbal, *supra*, note 13, at. 8 – 12.

²³ G. A. Res. 51/210, 9 (Dec. 17, 1996).

²⁴ G. A. Res. 52/164, annex (Dec. 15, 1997); International Convention for the Suppression of Terrorist Bombings, Jan. 12, 1998, 2149 U.N.T.S. 259 (entered into force May 23, 2001).

²⁵ G. A. Res. 54/109 (Dec. 9, 1999); International Convention for the Suppression of the Financing of Terrorism, Jan. 10, 2000, 21978 U.N.T.S. 197 (entered into force Apr. 10, 2002).

²⁶ G. A. Res. 59/290 (Apr. 13, 2005); International Convention for the Suppression of Acts of Nuclear Terrorism, Sept. 14, 2005, 2245 U.N.T.S. 89 (entered into force July 7, 2007).

consequences and may pose a threat to international peace and security ... (and) that existing multilateral legal provisions do not adequately address those attacks.²⁷

After the September 11, 2001 terrorist attacks on the United States, a series of multilateral state efforts emerged to address the heightened fear of nuclear terrorism including:

- i. IAEA's Plan of Activities outlined in GOV/2002/10 to prevent nuclear terrorism: In 2002, the Board Governors of the IAEA approved a three-year Plan of Activities concerning IAEA's nuclear security activities, such as those related to prevent theft of nuclear weapons or other nuclear weapons-related materials and attacks on nuclear facilities. The Agency acknowledged, however, that the primary materials lay with states and that the Agency's assistance is circumscribed by scope permitted by each state;²⁸
- ii. The G8 Global Partnership Against the Spread of Weapons and Materials of Mass Destruction, 2002: The Partnership sought to raise and spend fund on activities to support non-proliferation of nuclear weapons;²⁹
- iii. Amendment to the 1980 Convention on the Physical Protection of Nuclear Materials: Among other things, the Convention created expanded duties for states to secure nuclear materials in storage and during transit and to criminalize sabotage against civilian nuclear facilities (2005).³⁰

In the post-9/11 times, multilateral efforts accelerated particularly rapidly following President Obama's speech in 2009 at Prague, in which the U.S. President declared nuclear terrorism as 'the most immediate and extreme threat to global security.'³¹ The speech called on states to set new standards and cooperate in new partnerships to protect nuclear materials.³² However, the standards that emerged are general and lack enforceability.³³ Since President Obama's 2009 Prague speech, there have been four Nuclear Security Summits. The Summits sought to secure nuclear materials, including stockpiles of highly enriched uranium ('HEU') and plutonium, in several countries and to increase border, airports, and ports security through use of sophisticated technology and international cooperative efforts.³⁴ The various international treaties, organizations, and initiatives that emerged as a result of the Summits, constituting the current international security regime, rely on voluntary engagement of participating countries.³⁵ These treaties require states to judicially and logistically cooperate with one another to prevent terrorism and to punish terrorists. For instance, the International Convention for the Suppression of Acts of Nuclear Terrorism criminalizes nuclear terrorism under domestic laws of state parties and through promotion of inter-state police and judicial cooperation for investigating and punishing individuals' acts of intentional and unlawful possession and use of nuclear device and radiological materials to threaten or harm other persons.³⁶ In the wake of the discovery of the A. Q. Khan's illicit nuclear proliferation network, former U.S. President George Bush's Proliferation Security Initiative ('PSI') is another testimony to lack of confidence in the existing system. The PSI is a U.S.-led international effort to interdict WMD-related shipments and stop proliferation-related financing. A coalition of eleven states took matters in their hands – so to speak – in self-defense through the multilateral cooperation initiative of PSI to prevent terrorists from acquiring nuclear weapons or their

²⁷ Ibid.

²⁸ Int'l Atomic Energy Agency (IAEA), *supra*, note 5.

²⁹ *Global Partnership Against the Spread of Weapons and Materials of Mass Destruction ('10 Plus 10 Over 10 Program')*, NTI, <https://www.nti.org/learn/treaties-and-regimes/global-partnership.against-spread-weapos-and-materials-mass-destruction-10-plus-10-over-10-program/> accessed 21st September, 2020

³⁰ Int'l Atomic Energy Agency (IAEA), *supra*, note 5; see Int'l Atomic Energy Agency (IAEA), *Amendment to the Convention on the Physical Protection of Nuclear Material*, in IAEA International Law Series No. 2 (2006) (establishing legally-binding measures for the prevention, detection, and punishment of offenses relating to nuclear material). The 2005 amendment sought to strengthen its provisions for protecting nuclear facilities and materials being used, stored, or transported for peaceful domestic purposes. The added Article 2A 1(b) of the amendment calls on states to expand the scope of inter-state cooperation on measures to recover stolen or smuggled nuclear material, *inter alia*.

³¹ Barack Obama, *supra*, note 19.

³² Ibid.

³³ George Bunn, 'Enforcing International Standards: Protecting Nuclear Materials from Terrorists Post-9/11', 37, *Arms Control Today* (Jan./Feb. 2007).

³⁴ Saira Bano & Srini Sitaraman, *supra*, note 4.

³⁵ Ibid.

³⁶ G. A. Res. 59/290 (Apr. 13, 2005), *supra*, note 31.

materials: the PSI prevent sensitive shipments to suspected destinations. The PSI is ‘A regime ... designed for a new era, recognizing that proliferation threats today are different than those in the decades when the Nuclear Non-Proliferation Treaty (NPT) was negotiated and supplier regimes such as the Nuclear Suppliers Group (NSG) and the Australia Group were established’.³⁷ In designing the tool of interdiction to respond to the challenge of nuclear weapons proliferation, the drafters of the Statement of Interdiction Principles claimed to have built the PSI upon existing treaties and regimes and under Security Council’s authority to address situations that threaten world peace and security, i.e., under general international law.³⁸ Measures devised by multilateral treaties remain of uncertain kinship with international law. The Vienna Convention on the Law of Treaties (‘VCLT’), which codified the pre-existing general law on the subject to treaties, states in article 26 – entitled *Pacta Sunt Servanda* (‘agreements must be kept’): ‘Every treaty in force is binding upon the parties to it and must be performed by them in good faith.’³⁹ As such, treaties do not create obligations on non-parties. Under this view of treaties, scholars favour positivist construction of international law rules, stating that ‘state consent is the foundation of international law. The principle that law is binding on a state only by its consent remains an axiom of the political system, an implication of State autonomy.’⁴⁰ International law, according to this viewpoint, emerged for states by their consent. This viewpoint leaves non-state actors, lacking competence to consent to formation and implementation of international laws, outside the pale of international law. The treaties mentioned in this section are indirect attempts to hold non-state actors, specifically, possible nuclear terrorists, responsible and culpable under international law.⁴¹

3. Current World Order and the Role of International Law

The concept of ‘international order’ refers to the fundamental rules, principles, and institutions that make up the governing arrangements among states.⁴² It can be based on hegemonic coercion, on convergence of state interests, or on more or less formalized norms, regimes, and institutions. Throughout modern history, new orders have typically been formed after major wars. After the Peace of Westphalia in 1648, relations between states were for the first time organized on the basis of state sovereignty. In the nineteenth century, after the Napoleonic Wars, the ‘Concert of Europe’ shaped interstate relations on the basis of mutual respect and self-restraint, which kept the peace for many decades. Liberal internationalism can be traced back to the end of World War I and the League of Nations, which underperformed. It was reinvigorated after World War II with the United Nations and the Bretton Woods institutions – the World Bank, International Monetary Fund (IMF), and General Agreement on Tariffs and Trade (GATT) – as primary governing bodies. Over time, many more agreements and organizations were added to it. The liberal world order, with democratic countries at its core, became an increasingly institutionalized order. Distinctly Western from the beginning, the driving force and undisputed leader was the United States.⁴³

When Russia annexed Crimea (2014), it violated all relevant international law: the UN Charter, the Helsinki Final Act, and the Budapest Memorandum of 1994, in which Russia, the United Kingdom, and the United States extended security guarantees to Ukraine. Foremost among the critics were states that usually violate international law when they go to war, which they frequently do. It is hard to escape the conclusion that on questions of war and peace, international law is increasingly ignored and used as matter of convenience, even in Europe.

Other examples are equally unnerving. When the International Court of Justice ruled that China’s claim to historic rights in the South China Sea was ‘extinguished’ by the UN Convention on the Law of the

³⁷ Andrew C. Winner, ‘The Proliferation Security Initiative: The New Face of Interdiction’, (2005) 28, *Wash. Q.*, 129, 130.

³⁸ *Fact Sheet: Statement of Interdiction Principles*, U.S. Dept. of State, <https://www.state.gov/t/isn/c27726.htm> accessed 21st September, 2020

³⁹ Vienna Convention on the Law of Treaties Article 26, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

⁴⁰ Duncan B. Hollis, ‘Why State Consent Still Matters – Non-State Actors, Treaties, and the Changing Sources of International Law’, (2005) 23, *Berkley J. Int’l L.*, 137, 141 (quoting Louis Henkin, *General Course on Public International Law*, in IV *Recueil Des Cours* 46 (1989)).

⁴¹ Imrana Iqbal, *supra*, note 13, at 12 – 17.

⁴² Ikenberry, G. J., *supra*, note 6.

⁴³ Sverre Lodgaard, *supra*, note 1, at 5.

Sea, which China had ratified, China reacted with contempt. The disputed area covers 90 percent of the South China Sea, an area of the size of Mexico. The Philippines, which had filed the case, won on virtually all points by unanimous decision. In the Chinese narrative, however, control of the South China Sea is an essential part of the restoration of the country to global greatness after the century of humiliation (1839 – 1949). International law, however unambiguous, was brushed aside. When the United States withdrew from the nuclear deal with Iran (the Joint Comprehensive Plan of Action (JCPOA) and announced that it would reimpose the highest level of international sanctions, this was a blatant violation of international law. The agreement was negotiated by Iran and the big powers (United States, United Kingdom, France, Russia, China, Germany, and the European Union) and unanimously endorsed in UN Security Council Resolution S/RES/2231, so it was binding on all member states. The withdrawal was made without any mention of international law or for that matter, of the United Nations.⁴⁴ The United States used to be the champion of liberal internationalism – in principle, that is. In practice, the values underpinning it were often put aside. Trump has abandoned the principle as well. Today, the remaining bulwark of liberal internationalism is the European Union. The Europeans, too, are bound to make compromises. Hard economic and political interests sometimes take the front seat.

In the days of the British Empire, London had its eyes fixed on the ‘second country’ – that is, on the one(s) next to it in the international hierarchy of power, which might be able to overtake it. For the United States, the ‘second country’ is China. China is growing faster than its competitors, but will not be on a par with the United States for many years to come. The growth of its comprehensive national strength has slowed down, and the rate of growth may continue to decrease, but the gap between China and those next to it in the hierarchy is also growing. The United States and China will make up an increasingly dominant bilateral dimension in the wider multipolar setting. The contours of a revived Middle Kingdom emerge with heightened clarity, locate midway between the mighty American competitor and the world’s largest trading bloc on the European side of the landmass. Historically, China stayed in Asia while Western empires took control of other regions by military means. In classical geopolitical parlance, contemporary China is reaching out economically to the World Island⁴⁵ - the Eurasian landmass and Africa – by means of the gigantic Belt and Road Initiative (BRI). This effort, which is laying the groundwork for comprehensive cooperation, initially aroused enthusiasm along its routes. But conflict as well as cooperation is unavoidable on its heels, in a mix that cannot be foreseen.

The United States and China are facing a classical dilemma, last illustrated by the nuclear competition between the United States and the Soviet Union in the 1970s. The Soviets said they were aiming for no more than parity, but the United States saw a rising curve threatening to overtake its own – and in the beginning of the 1980s a formidable arms race followed. That time, the world escaped Armageddon. Historically, however, power shifts at the top of the pyramid often ended in war. Graham Allison identified 16 such shifts over the latest 500 years and found that 12 of them ended in war⁴⁶ the outcome of the US-Chinese rivalry is not a given and in the USA, the theoretical debate between those who believe it can be managed peacefully and those who believe it will end in war continues. Opponents meet in discussions of hedging, of what is enough and what is excessive – that is, provoking a war that should be avoided.

The worrisome state of the multipolar setting appears very clearly when juxtaposed with the Concert of Europe. Henry Kissinger, an authority on concert diplomacy, described it as a system in which ‘the great powers work together to enforce international norms ... Power emerges from a sense of community and it is exercised by an allocation of responsibilities related to a country’s resources. It is a kind of world order either without a dominating power or in which the potentially dominating power

⁴⁴ The United States also left important international agreements under George W. Bush. Unilateralism and exceptionalism were in high gear. However, if the agreements had a withdrawal clause, the administration withdrew the way the clause prescribed. Trump’s unilateralism and exceptionalism represent a more naked exercise of power.

⁴⁵ Mackinder, H. J., *Democratic Ideals and Reality*. (New York: W.W. Norton, 1962). Mackinder’s basic reasoning was as follows: Who rules Eastern Europe rules the Heartland (the Eurasian landmass); who rules the Heartland commands the World-Island; who commands the World-Island commands the World.

⁴⁶ Allison, G., *Destined for War: Can America and China Escape Thucydides’s Trap?* (New York: Houghton Mifflin Harcourt, 2017).

leads through self-restraint.’ Kissinger believed that the Obama administration favoured some kind of concert diplomacy.⁴⁷

Today, there is no common willingness to enforce international norms and no allocation of responsibilities in this respect. Mutual respect and self-restraint are rare commodities. The dominating power strives to maintain its dominance and other powers try to reduce it. The sense of community that characterized concert diplomacy is totally absent. In the big-power dyads, conflict of interest is the rule and conflict manifestations flourish. Common interests are at best of a tactical nature.

Imposition and threats of sanctions is a much favoured US foreign policy instrument. The president’s authority to issue sanctions rests on the International Emergency Economic Powers Act (IEEPA) of 1977 and the main implementing body is the Treasury Department’s Office of Foreign Assets Control. Since 2000, Presidents have used Treasury Department’s Office of Foreign Assets Control. Since 2000, Presidents have used IEEPA in more than 400 executive actions. Not all of them were new; some extended the timetable or expanded the scope of previous orders.⁴⁸ The United States has imposed sanctions on Iran, North Korea, Russia, Syria, South Sudan, Venezuela, Cuba, and many others. Among the stated reasons are threats of terrorism, proliferation of weapons of mass destruction, human rights violations, narcotics trafficking and money laundering. In some cases, the EU, other Western countries, Japan, and others in East Asia have joined in and taken similar action. The selection of targets is guided by realpolitik and has become a foreign-policy tool of choice. Sanctions are a humiliating, top-down form of conflict manifestation and they seldom work as intended. Rather than giving in, states mobilize to stand up to the pressure. The topical cases of the day have proved it beyond doubt. In the case of North Korea, the world witnessed the same sequence over and over again: North Korea tests, the world condemns, the UN Security Council meets, the United States proposes more sanctions, China negotiates to dilute them, and North Korea continues – till serious negotiations began. Similarly, with the case of Iran: from 2006 to 2013, more sanctions and more enrichment. The lesson is clear: for sanctions to work as intended and lead to conflict resolution, they must be combined with good-faith negotiations and realistic prospects of sanctions belief.

Generally, states that stick to the letter of the UN Charter of 1945 disapprove of unilateral sanctions because they violate core principles such as sovereign equality and noninterference. Only the Security Council has the right and obligation to take such measures to maintain international peace and security. Secondary sanctions are particularly objectionable. Strength decides, however, and the United States is quick to exploit its dominance of the international financial system. The comprehensive imposition of sanctions, like those against Iran, is a burden on international affairs that poisons the atmosphere for cooperative venture. However, to what extent this happens automatically or neatly controlled by national governments is hard to say. In a sense, it is analogous to the debate about spillover in international integration theory, the one being about the spread of conflict and the other about the spread of cooperation.⁴⁹

From the analysis, six features are particularly noteworthy. First, *sovereign states* are reemphasized and reconfirmed as the basic building blocks of international affairs. Second, *trade and technology wars and economic sanctions* have moved to the top of the international agenda and become major sources and expressions of conflict. Third, *international norms, institutions and agreements, are falling apart*. The glue is wearing thinner and the world is fragmenting. Fourth, international affairs have become more *unpredictable*. Unpredictability has become a part of US strategy. Fifth, in the multipolar geopolitical setting, *the bilateral relationship between the United States and China is increasingly dominant*. The United States perceives of China as an adversary and enemy, not as a partner. Sixth, *new technologies nurture new forms of influence and capacity for violence* – disinformation, cyber warfare,

⁴⁷ Kissinger, H., ‘Obama’s Foreign Policy Challenge.’ *Washington Post*, April 22, 2009.

⁴⁸ Arnold, A., ‘Where Does Trump Get the Power to Reimpose Sanctions?’ *Bulletin of the Atomic Scientists*, August 15, 2018.

⁴⁹ Neofunctionalism holds that integration within one sector will tend to generate its own impetus and spread to other sectors, while intergovernmentalism argues that national governments control the level and speed of integration; Sverre Lodgaard, *supra*, note 1, at 8 – 10.

military applications of artificial intelligence and hybrid warfare – posing new threats. These changes in the world order are mirrored in the unraveling of the arms-control architecture. The relationship between the United States and China is particularly worrisome. Economic warfare, geopolitical rivalry, technological change, and unpredictability coalesce into an atmosphere that militates against cooperative security ventures. The essence of common security – that security is something you have to promote in tandem with your adversary, not pursue unilaterally – is further away from big-power politics than ever since the darkest days of the Cold War.⁵⁰

What are the prospects of common security thinking and cooperative security policies in the world described above? What is the role, if any, of confidence building, arms control, and disarmament? The transitional nature of world affairs, where big powers compete for positions and influence in the face of an unpredictable future, leaves little space for such policies. For the time being, cooperative security policies are modest exceptions to the rule of unilateral, competitive arms buildups. There is one overriding common concern, however: *to avoid nuclear war*. To this end, stability measures are needed, and stability is the number-one objectives of arms control. The need for arms control is at least as strong as when it was introduced 60 years ago, but can it be revived? The superpower rivals of the Cold War adopted a number of measures both bilaterally and domestically to reduce the risk of Armageddon. They were two countries, 5000 kilometers apart, and they had no territorial conflict with each other. When the Cold War ended and the rivalry stopped, they no longer had any incentive to resort to nuclear weapons. The smaller nuclear-weapon states – the United Kingdom, France, and China – had no such incentive either. Exception for the residual risk of unintentional use, nuclear stability had been achieved.⁵¹ In today's world of nine nuclear-armed states, this is much different. In many dyads among these countries' stability concerns are not confined to nuclear forces. Conventional forces have assumed a larger role in nuclear calculations. Rather than accept defeat, the weaker state may feel compelled to resort to nuclear arms. Border skirmishes and clashes that do not raise the specter of regime collapse or territorial disintegration may not lead that far, but even such cases can put the parties' capacity to exercise restraint to a severe test. The Asian triangle – China, India, and Pakistan – is particularly complex and delicate in this respect, for these countries are not only bordering on each other, but also have unresolved territorial conflicts. In a sense, we are back to the logic of the Russell-Einstein Manifesto of 1955,⁵² which said that agreements reached in time of peace would no longer be considered binding in time of war. Both sides would set to work to manufacture H-bombs as soon as war broke out. In the starkest of terms, the manifesto therefore presented two alternatives: find a way to abolish war, or the human race will come to an end. Today, abolishing war between the nuclear-weapon states is a long shot, but confidence-building measures and arms control can reduce the risk of conventional conflicts breaking out and escalating to nuclear warfare.⁵³

In an unpredictable world of suspicions and distrust, states address their perceived security needs by enhancing their own relative strength. Cooperative arms control draws little attention, for such policies depend on a businesslike atmosphere in which mutual understandings can be developed in good faith. States therefore prepare for wars they do not want and that they usually do not wage. Wars are costly, and war between the nuclear-weapon states must by all means be avoided, so they look for less dramatic substitutes. The world's leading military power – the United States, which is by no means unfamiliar with the use of force – prefers cover action, economic sanctions, and cyber warfare to make others accommodate, but keeps the military option 'on the table.' The role of diplomacy has shrunk dramatically.

The field of cyber security is completely unregulated. The United States may be the technological front-runner and leading agent of offensive cyber operations, but US society is also among the most vulnerable to attack by others. It is not far-fetched, therefore, to imagine that broad common interests in international regulations may emerge, however complex the issues. Tentative suggestions have been

⁵⁰ Ibid, at 11.

⁵¹ Rennin, D., *Strategic Stability in the Changing World*. (Moscow: Carnegie Moscow Center, March 21 2019).

⁵² Russell-Einstein Manifesto, issued in London on 9 July 1955. <http://umich.edu/~pugwash/Manifesto.html>. accessed 21st September, 2020

⁵³ Sverre Lodgaard, *supra*, note 1, at 13 – 14.

made for some kind of Geneva Convention to regulate the field, as a starter.⁵⁴ Enforcement of rules is beyond the horizon, but an international initiative may help recognize the seriousness of the problem and put innovative minds on a constructive cooperative track. During the Cold War, arms control to reduce the risk of inadvertent escalation became a much-emphasized and sorely needed addendum to nuclear arms racing, for the stakes were the highest: all-out nuclear war. Today, the probability of nuclear-weapon use may be higher than ever before, but recognition of the dangers has slipped. Not only have arms control agreements disappeared, but the lines of communication have also deteriorated. This should be remedied as a matter of priority. Technical arrangements to reduce the risk of an inadvertent slide to war are low-hanging fruit that would serve the common interest.

As the fate of the INF Treaty has amply illustrated, arms control has become more of a global proposition. The structural problems are formidable, however. In terms of military strength, the United States remains the undisputed leader and is determined to maintain that position. To be serious, presidential candidates have to commit to it. In 2018, the US military budget stood \$649 billion and was 2.5 times that of China; China's was more than 4 times that of Russia, the United Kingdom, or France.⁵⁵ The US and Russian nuclear arsenals are an order of magnitude larger than Chinas. Still, Trump has aired the idea of a three-way deal with Russia and China, raising some fundamentally important issues of sequencing. The best approach may be extension of New START; US-Russian reductions of deployed nuclear warheads to three-digit figures with special limits on tactical weapons and missile-defense systems and maybe on other assets as well; and, on that basis, an invitation to China to join a subsequent phase of negotiations.⁵⁶

What might a global framework that is realistic enough to gain traction while capturing the aspirations for a world free of nuclear dangers look like? Starting from the assumption that there is a common interest in avoiding nuclear war, John Gower has introduced the concept of nuclear strategic stability (NSS) as a metric of international relations. NSS is high where the risk of any conflict being initiated using nuclear weapons, or of a conventional conflict escalating to the nuclear level, is low. Every posture, capability, or declaratory change should be assessed against this metric with a view to reducing the risk of nuclear weapon use.⁵⁷

Gower identifies six components of NSS that the nuclear-weapon states should use to guide their current and future actions, amounting to a code of conduct for nuclear responsibility. It starts with restraint in rhetoric, posture, activity and readiness; unambiguous communication pathways at the level of national control authorities; and abstention from using nuclear weapons as levers of statecraft except as strategic deterrents. It ends on a plea for nuclear-weapon states to sketch out reduction paths toward less complex, maximally stable strategic systems on the way to zero. The code therefore comprises the whole range of measures from declaratory policy to arms control and disarmament. Confidence-building measures, arms control, and disarmament in the conventional field should be built into it as well, with a view to reducing the risk of conventional war between nuclear-weapon states and to avoid escalation to the nuclear level should it nevertheless occur. Such measure must be tailored to regional specifics. The idea rests on the assumption that enhanced stability to reduce the risk of nuclear war can be discussed without linkage to other areas of contention, and that the recommended changes can stay clear of ongoing power struggles. If not, the idea would-be dead-on arrival. The NPT is an appropriate setting for elaboration and discussion of such a code. Article VI of this treaty clarifies that nuclear disarmament is a shared responsibility of all member states. Action items from previous review conferences may be drawn upon. Proponents of the ban treaty can be expected to join in; measures to reduce the risk of nuclear war have always been high on their list of practical follow-up actions.⁵⁸

⁵⁴ Sanger, D., *The Perfect Weapon: War, Sabotage and Fear in the Cyber Age*. (New York: Random House, 2018).

⁵⁵ SIPRI, 'Military Expenditure Database.' *Stockholm: Stockholm International Peace Research Institute*, April, 2019.

⁵⁶ Burt, R., and J. Wolfsthal, 'How Trump Can Transform Nuclear Arms Control.' *The National Interest*, May 10, 2019.

⁵⁷ Gower, G., 'Framing 21st Century Arms Control: Nuclear Strategic Stability & an Arms Control Pathway.' *Draft Working Paper for the Toda/NUPI conference on Exploring New Approaches to Arms Control in the 21st Century*. Oslo, October 21, 2018.

⁵⁸ Sverre Lodgaard, *supra*, note 1, at 15 – 17.

4. Conclusion

The current international legal regime of nuclear non-proliferation does not apply to non-state actors. The fear has arisen that they may acquire and use nuclear weapons to perpetrate nuclear terrorism. The direction of change that this article suggests will strengthen international laws reach over possible nuclear terrorist, prompting the emergence of peremptory norms against nuclear proliferation and incorporating them in the existing regime of nuclear non-proliferation which strengthen the international system against nuclear proliferation and use of terrorist. On the way to a new world order we do not yet know, disorder is the new normal. The world is in a state of flux. Such a world does not have many options for cooperative action. In the military field, states have returned to unilateral security policies as primitive as those of the Cold War. There is one overriding common concern, however: to avoid nuclear war. To this end, stability measures – the primary objective of arms control – are of the essence. It therefore recommends that unless there is a change of security thinking in the United States – the leading military power – nuclear arms control and disarmament has a bleak future.