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THE NON-PROLIFERATION TREATY AS A NON-FACTOR: THE TRUE FOUNDATIONS OF THE NONPROLIFERATION REGIME

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Abstract
The Treaty on the Non-Proliferation of Nuclear Weapons (NPT) is apparently one of the more crucial legal tools in the world. Yet even the most ardent supporters of the NPT now acknowledge its deficiencies. The NPT’s failings have led to a situation where neither states with nuclear weapons nor those without such armament are pleased with the current state of affairs. Nonetheless, virtually all scholars and policy-makers continue to maintain that the NPT can and must be fixed in order to sustain the nonproliferation regime. This Note contends that the inadequacy of the NPT exists at such a fundamental level that part of the solution for the ailing nonproliferation regime is to concede the treaty’s failure in the modern world and, therefore, that attention would be better paid to alternative mechanisms for countering proliferation.

Part I of this paper will lay out the initial theoretical groundwork, emphasizing the need for an empirical perspective. Part II will conclude that the NPT, as a legal tool, does not influence the decision of states whether to go nuclear but instead merely declares an independently-arrived at choice. Part III argues that, regardless of the NPT’s track record, the treaty is susceptible to, and is experiencing, blatant exploitation, possibly on multiple fronts. Finally, Part IV searches for the legal tools and other strategies that may actually manage the proliferation problem in the NPT’s stead.
INTRODUCTION

Taking for granted that one of the most serious threats to human welfare remains the use of nuclear weapons,¹ it would then follow that the Treaty on the Non-Proliferation of Nuclear Weapons (Non-Proliferation Treaty, or simply NPT)² is one of the more crucial legal tools in the world. The NPT, signed in 1969 by the United States, the Union of Soviet Socialist Republics, the United Kingdom, and 59 other nations, has since that time been the signature piece of the international regime responsible for controlling the nuclear proliferation that began in the late 1940’s when the Soviet Union joined the United States as a nuclear power.³ In order to judge the NPT’s efficacy over time, many turn to predictions from the past in order to compare them with present conditions. Within nonproliferation literature, it has become virtually required to note that the President of the United States forewarned of the spread of nuclear weapons well beyond the participants of World War II. John F. Kennedy surmised that, by 1980, there may well be 25 nuclear-armed nations.⁴ Given the failure of such dire predictions to come to pass,⁵ one may be initially tempted to conclude that the nonproliferation regime in place must have been working.

Such an assumption would give the regime’s cornerstone, the NPT, lofty place among the great accomplishments of international law. Many proponents of the body of international law contend that, at the very least, the NPT has a normative gravity about it, drawing in most members of the international community, and likely make the further claim that the NPT, if not fully successful in the stemming of the nuclear tide or crucial in what nonproliferation successes

¹ Despite the continuing danger that nuclear weapons pose to the United States in particular and the world generally, nuclear proliferation as an issue nonetheless fails to receive the attention it deserves by policy-makers. JAMES E. BAKER, IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES 280 (2007).
have been witnessed to date, still has some integral role to play. Yet murmurs of annoyance with the NPT have been growing into cries of discontent in recent years, as the current nonproliferation establishment is on the edge of the proverbial abyss. Countries with and without nuclear weapons are unhappy with the state of proliferation, a state which is largely a product of what was supposed to be the definitive compromise and touchstone on the subject, the NPT.

The management of proliferation, once a two-sided zero-sum equation to be balanced by a pair of seasoned and relatively steady players (U.S. and U.S.S.R.), has now evolved into a complex kaleidoscope of a calculus resisting solution. There are more nuclear states in the world than when the Soviet empire fell, with more members of the nuclear “club” on the horizon. Not only does the addition of more nuclear actors to the world stage raise the possibility of war simply through the production of more nuclear weapons via arms races, but it becomes more likely that, among the prospective members, one of them will be the most irresponsible to date. Still more troubling than the growing number of countries with nuclear weapons programs is the dire prospect of stateless actors arming themselves with these most deadly of weapons. It is fair to say, without indulging in revisionist history, that the passing of the Cold War, at least on this front, is cause for warranted nostalgia among many policy makers in the nonproliferation arena.

This Note contends that not only is the NPT not up to the critical task of containing the spread of nuclear arms to the most dangerous actors in this new century, but it has likely not been essential in the decision of states to forego or give up their nuclear armament in the past. This latter conclusion, the more controversial of the two, is hardly superfluous to the first. The implications of the latter conclusion do not merely drive home the point that the NPT is not up to

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its self-declared task, but actually helps shape whatever remedies for proliferation will take the
NPT’s place. It is one thing to determine that what ails the nonproliferation regime in part is the
NPT, upon which so much effort is exerted and hope pinned, being in critical condition; it is
another to say that triage is the best way to go forward, as resussitating a lost cause is only
wasted time and effort.

Speaking with certainty in this field is notoriously difficult. One expert in the field of
nuclear arms control noted that the issue appears to be nothing short of intractable, leading to a
profound gloom among the entire nonproliferation community. Even with the Cold War
successfully concluded in the United States’ favor, the jury is still out upon many questions in
the nuclear proliferation field that experts vociferously argued over decades ago. Has the
proliferation policy of the United States in supporting the use of nuclear power among, and only
among, its allies been a success given the nuclear peace post-WWII, or is such a policy simply
adding to the tally of nuclear weapons, unequivocally raising the risk of a nuclear strike, theft, or
accident? Does nuclear deterrence, provided by a fearsome U.S. arsenal, keep the peace
through its paradoxical logic, or does it add to global instability by fueling arms races and
creating brinksmanship? Can the international community, and the U.S. as its leader,

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effectively verify the proliferation of nuclear weapons,\textsuperscript{12} or are inspection mechanisms and intelligence estimates not up to the task?\textsuperscript{13}

While it would be the height of hubris to claim to have solved Gordian knots of this type, this Note must take a side, explicitly or implicitly, on some thorny issues of this variety on the way to making a conclusion. At the end of the day, recognizing the failure of the NPT is only a preliminary step. The more important next move is to come up with alternatives that can cope with the tide of proliferation. Ultimately, nuclear weapons are here to stay, and as this Note hopes to make clear, so too are strategies that have kept the nuclear genie in the bottle thus far. These strategies simply do not include a treaty from a bygone era.

Part I of this paper will lay out the initial theoretical groundwork within which to evaluate the NPT, emphasizing that the often airy world of international law (IL) must be tempered with the hardened realism of its estranged sibling, international relations (IR), particularly in a context such as nuclear proliferation wherein success of an international legal regime should be measured not by the consistency of the legal doctrines but instead purely by the effects the regime has on the ground. To wit, are there more or less nuclear weapons, or more or less nuclear nations? Part II, having continued the development of the theoretical framework and having looked at the factors that go into a state’s determination to acquire nuclear weapons, will conclude that the NPT, as a purely legal instrument, does not influence the decision of states whether to go nuclear but instead merely declares the otherwise autonomous choice. Part III turns attention toward the current state of near-anomie among nonproliferation experts. Even if


the NPT, against the grain of the available evidence, had helped preclude nuclear propagation in the past, it has now shown its fatal flaws for even the most optimistic to acknowledge, and there is no remedy in sight. Finally, Part IV searches for the legal tools and other strategies that may actually manage this dire problem in the NPT’s stead.

**Part I: The Need for a Multi-Disciplinary Approach in Gauging the NPT’s Effectiveness**

*Constructivism vs. Realism*

Before one can understand how the NPT stands today, one must understand how a legal tool like the NPT comes to be in the first place and what it is meant for. Before there is a treaty, or any sort of law for that matter, there is a germ of that law present in the form of a norm. Eventually, this norm accrues recognition and validation, and thus becomes law. After the law is enacted, there is now a definitive statement concerning conduct. If someone enacts a law against the proliferation of nuclear weaponry, then there is proof that the norm of nonproliferation has ‘crystallized,’ and the world is now in a better state. But there is a counter-narrative, and it proceeds as follows: law is just the byproduct of the needs and wants of its proponents. The former story of constructivism is more at home within the IL community, while the latter story of realism is more at home within the IR community. A lawyer’s preference for viewing a piece

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15 *Id.* at 727 fn. 24.
of international law like the NPT as a ‘crystallized’ norm is easy enough to explain. If the pieces of international law have independent causal effects upon the world, then lawyers are, by extension, contributory agents as well. Maybe it seems peculiar for a reader to find a piece in a legal journal taking a non-constructivist stance, but that is precisely the problem: it should not be anathema for someone in the legal field to determine that the law is more a product than a cause of social action. Having recognized the potential bias among those in the legal community when it comes to declaring cause and effect regarding the law, one can proceed with a fresh pair of eyes.

Rather than hastily adopting as a controlling assumption either that the NPT is more validly viewed as the work product of idealists seeking to forestall nuclear annihilation or cynics seeking to use it to their advantage, this Note will seek to proceed in a more scientific fashion. The data should inform the quality of the theory at the end of the day, not vice versa. Therefore, the realist-constructivist divide between IR and IL, respectively, is less important than the empirical-normative divide that has sundered IL and IR. 

**Centrality of Empiricism**

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18 Cf. Kenneth W. Abbott, Commentaries on Kenneth Abbott, Modern International Relations Theory: A Prospectus for International Lawyers, 25 YALE J. INT’L L 273, 275 (2000). For Abbott, the idealists would be the individuals and NGOs driven by values and armed with persuasion, and these idealists are the favorite actors of constructive, and thus IL, theorists. The realists, by contrast, would be the statesmen motivated by power and armed with coercion, and these realists are the preferred unites of analysis for realist, and thus IR, theorists.

So long as the IL theorists are positivist (as opposed to, say, Austinians or other natural law theorists20), they could actually be either constructivists or realists.21 Realism and constructivism are both amenable to empirical analysis even though realism may be more naturally, or at least more commonly, associated with scientific analysis. They may have varying etiologies, and probably come to different conclusions,22 but this author acknowledges that constructivists can have (somewhat) testable and falsifiable etiologies.23 A constructivist empiricist simply puts more, and a realist empiricist puts less (likely no), predictive weight upon norms.24

One may look to no less than Justice Oliver Wendell Holmes for validation of empiricism in the law, as he, in describing the effect of the legal realist movement upon American law, noted that a synthesis of the law and science could lead to an actual “prediction of what a court will do.”25 Likewise, it should also be feasible to make other predictions, such as what the law itself will do in response to this or that stimuli, or what actors will do in response to the law. The analog within international law would be a forecast of what states will do, or not do, in reaction to, say, a treaty. The NPT, like other treaties of its kind, is considered above all a bargain

21Totaro, supra note 14, at 1.
22In William Bradford’s taxonomy of theorists in the IL field, all of the realists and most of the rational choice theorists who approached realism were skeptics of the effect of treaties on compliance, while all of but one of the constructivists were not. See generally Bradford, supra note 17.
between different actors. The crucial point of this metaphor is not that the parties have arrived at a mutually beneficial conclusion to a previous feud, but that legal rules are projections into the future and are supposed to act as incentives. Whether the bargain has worked, then, is a function of how it has constrained state behavior. For too long now, too few in IL have asked tough questions of this sort, and in an area where results are all that matter such as the nonproliferation arena, such a failure is untenable. The call has already gone out in other corners of the law for a fact-based evaluation of the efficacy of law, and for good reason.

Determining what specific methodologies are required in the nonproliferation arena, and specifically with regard to the NPT, would require the input of a bona fide sociologist or similar expert, but a few preliminary suggestions may be put forth here. A regression analysis would be ideal, wherein every important factor that goes into the decision of states to go nuclear would be measured. This might be highly problematic because of the resistance of certain factors, such as the motivation of political leaders, to quantification. Yet, as considered in Part II, even variables such as these may be roughly calculated through the appropriate analyses. Much easier to conduct would be case studies country by country. A blend of both regression and case studies would obviously be ideal. Work in the case study camp has already been conducted, and even though they have not taken the NPT as a focal point, the NPT was an inescapable element that the authors considered in determining the driving forces behind the nuclearization.

28 Abbott, supra note 18, at 276. There have been a few stand-outs, though, and the tide may have turned already in favor of a more scientific IL. See generally Bradford, supra note 17. Still, it may be some time before there is sufficient, unbiased IL work done in the area of treaties. See generally Daniel E. Ho, *Compliance and International Soft Law: Why Do Countries Implement the Basle Accord?*, 5 J. Int’l Econ. L. 647 (2002).
30 Franck, supra note 19, at 785-86.
31 Id. at 787.
of examined countries. The key is to recognize behavior as the dependent variable and then to canvass the likely candidates for independent variables, including the probability and heft of sanctions for legal violations and the extent of involvement among state legal apparati. The work of William Bradford, which will be relevant in the next session, has made an impressive foray into the complicated, onerous, and rewarding matter of unifying international law, and in particular treaty compliance, with relevant scientific methods.

**Part II: The Presence of the NPT and Absence of Rampant Nuclearization:**

**Correlation Is Not Causation**

Many might pause at this point to remind the author of the instances that the nonproliferation regime has seen when states have chosen to remain non-nuclear, or even more dramatically, have voluntarily denuclearized, during the NPT-era. The spread of nuclear weapons has apparently been a crawl when compared to what many thought could have been by this point in time. Still, the NPT and its backers may be overreaching in claiming credit, both because there has been proliferation and, more subtly, in that the NPT has not held back a single state from proliferation. Evidence derived from the work of both lawyers and non-lawyers points to the NPT as a non-factor in keeping the possible surge of nuclearization at bay.

**Not About the Norms**

Why does a country decide to go nuclear? Two factors must come together in order for a state to tread down that path. In addition to the requisite technological ability, a state must have

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32 Hymans, supra note 5; Andrew O’Neil, Proliferation in Northeast Asia: The Quest for Security 48 (2007); Etel Solingen, Nuclear Logics: Contrasting Paths in East Asia and the Middle East 268 (2007).
34 Bradford, supra note 16, at 1394-95. Whatever the analysis, it is clear that simple tally of membership does not capture the impact of the NPT. Walker, supra note 26, at 21.
35 Libya’s nuclear program ceased before producing a nuclear weapon, while South Africa disarmed having already constructed several nuclear devices.
36 The orthodox story is that, at least until more recently, the NPT was a success story for much of its career. Walker, supra note 26, at 21.
the necessary political drive to acquire “the bomb.” The NPT seems to tackle each issue, as its watchdog, the International Atomic Energy Agency (IAEA), handles the technological aspect, while the treaty itself creates a norm or a club that creates political pressure to adhere to or join, respectively. Yet the truth of the NPT’s impact in both of these areas falls short of expectations. More will be said in Part IV concerning the technological aspect, the International Atomic Energy Agency, whose bark has and will continue to have little bite behind it. Our concern at this point is with the purported normative (legal) force of the NPT. The conclusion on this issue is uncomfortable, but, given the weight of evidence behind it, should not be ignored or obfuscated: joining the NPT is little more than a formal recognition of a decision that was arrived at quite independent of the Treaty itself.

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37 Reiss, supra note 6, at 247. For a reminder that neither the technical/knowledge side nor the psychology side of the equation should be neglected in today’s increasingly diffuse and adaptable global environment, see Phil Williams, Intelligence and Nuclear Proliferation, in GLOBALIZATION AND WMD PROLIFERATION: TERRORISM, TRANSNATIONAL NETWORKS, AND INTERNATIONAL SECURITY 149 (James A. Russell and James J. Wirtz eds., 2008). Often, the industrial and wealth base necessary to develop weapons still clearly distinguishes similarly vehemently anti-American actors from one another based upon technological capacity. H. H. Gaffney, Globalization and Nuclear Proliferation, in GLOBALIZATION AND WMD PROLIFERATION: TERRORISM, TRANSNATIONAL NETWORKS, AND INTERNATIONAL SECURITY 24 (James A. Russell and James J. Wirtz eds., 2008).


39 Hymans, supra note 5, at 214; O’Neil, supra note 32, at 50; Reiss, supra note 6, at 261. See Martin Briens, The Future of the NPT: A Prognosis, in NATO AND THE FUTURE OF THE NON-PROLIFERATION TREATY 38 (Joseph F. Pilat and David S. Yost eds., 2007) (“[A] weakening of the NPT would be more of a symptom, and a consequence, of a proliferated world, than a reason for it.”); Michael Ruhle, The Non-Proliferation Treaty in Crisis, in NATO AND THE FUTURE OF THE NUCLEAR NON-PROLIFERATION TREATY 37 (Joseph F. Pilat and David S. Yost eds., 2007) (“[T]he image of the NPT as a set of norms that transcend national interests is increasingly being revealed as a myth”); Paul Wilke, Political Requirements to Fulfill the Non-Proliferation and Disarmament Bargain, in NATO AND THE FUTURE OF THE NUCLEAR NON-PROLIFERATION TREATY 30 (Joseph F. Pilat and David S. Yost eds., 2007) (“The [nonproliferation] regime was and remains highly dependent on — and vulnerable to — specific political and economic developments.”); But see; Rudiger Ludeking, Safeguarding the Future of the NPT: Preparing for the NPT Review Conference 2010, in NATO AND THE FUTURE OF THE NUCLEAR NON-PROLIFERATION TREATY 55 (Joseph F. Pilat and David S. Yost eds., 2007) (“The NPT provides the indispensable normative basis to address the dangers of nuclear proliferation and nuclear war. Without it, there is no legitimacy for efforts undertaken to fight nuclear proliferation; nor will such efforts be effective”); Wilke, supra note 39, at 30 (“While certain states have always acquired nuclear weapons for their own political and security reasons, it has always been understood that intensive international cooperation and a commitment to the rule of law are of mutual interest of all countries in all categories within and outside of the NPT.”)
Mitchell Reiss perhaps captures it best when he finds that the NPT is valuable as an indicator of what countries have chosen regarding the nuclear dilemma, but little more.\textsuperscript{40} Granted, as commentators have noted,\textsuperscript{41} this signaling can itself become a cause for nonproliferation by easing the ambitions of rival nations, but this effect is only derivative of the initial choice of nations to join the NPT — a choice driven by non-NPT considerations. Maybe the NPT is a tool used by member nations to shame non-member neighbors into joining,\textsuperscript{42} but even cast as such, the shamed nations are not joining out of a sense of guilt for having violated sacred norms.\textsuperscript{43} Rather, such shaming is simply another way of describing the leverage that is acquired and used against one nation by another.

\textit{NPT as a Superfluous Construct}

Nuclear considerations, it turns out, can for the most part be accounted for by the IR schools of realism theory and rational choice theory (RCT); therefore, under the principle of parsimony, IL-IR should generally not have to make room for incompatible, rivalrous, and substitute theories like constructivism.\textsuperscript{44} Applying realism and RTC to key proliferators, it can be demonstrated that these nations’ actions can be explained in large part. The key question with North Korea, which reflects the hard-liners and pragmatist divide in Iran, is whether its pursuit of weapons is as a means to a better bargaining position or instead as an end in itself.\textsuperscript{45} The latter rationale is more likely the truth, not only because North Korea’s security situation may be

\begin{footnotes}
\footnotetext[40]{Reiss, \textit{supra} note 5, at 263.}
\footnotetext[41]{\textit{Id.} at 264.}
\footnotetext[42]{Thanks to Chief of the Fraud Section, Criminal Division, Department of Justice, for bringing this cogent defense of international law to my attention.}
\footnotetext[43]{Jack Snyder, \textit{One Word, Rival Theories}, FOREIGN POL’Y No. 145 Nov.-Dec. 2004 60.}
\footnotetext[44]{Goldsmith and Posner, \textit{supra} note 17, at 142; Goldsmith Posner, \textit{supra} note 16, at 1113. For an elaboration on the role of the ontological concept of parsimony as applied in this field, see generally Posner, \textit{supra} note 16. Rather than proving a negative, i.e., that the NPT is a non-factor, which is virtually impossible (as any regression will show some predictive improvement by the addition of a random variable), invoking the universal principle of parsimony allows us to determine if the NPT is an active force.}
\footnotetext[45]{Sung-Joo Han, \textit{Back to Square One on the Korean Peninsula, in Double Trouble: North Korea and Iran as Challenges to International Security} 93 (Patrick M. Cronin ed., 2008).}
\end{footnotes}
driven in part, as Iran’s, by the American threat, but also because of economic motivations in having the technology to sell on the black market and, ultimately, the goal of Kim Jong-II in having the deterrent to keep it status in a region full of economic and military powers. For Iran, the story is similar, being one of security. Iran is the most likely target of American military aggression on the world stage at the moment. On a more regional note of security, Iran’s program was reborn during its 1980’s era conflict with Iraq, and has possibly been accelerated since the United States effected a regime change in Iraq in 2003. Closely connected to the security rationale is also the more nebulous concern with status and influence in the region, although Iran may be inviting American or possibly Israeli attacks moreso if it possesses nuclear weapons than otherwise. It has been suggested that Iran may be pursuing nuclearization only until the point that it can use the possibility as a bargaining chip at the negotiating table with Western powers. This is unlikely, though, as it is not the Iranian pragmatists who are in power currently, but instead the hard-liners who seem to view the nuclear option as an end in itself that will bring Iran status that it has not had before. Some have posited that millenarian tendencies are at work with the nuclear program, but Iran’s leaders are likely more worldly than this.

Realism (and RTC) 2.0

46 Id.
48 Olsen, supra note 47, at 14.
49 Shahram Chubin, Understanding Iran’s Nuclear Ambitions, in DOUBLE TROUBLE: IRAN AND NORTH KOREA AS CHALLENGES TO INTERNATIONAL SECURITY, 50 (Patrick M. Cronin ed., 2008).
50 Id. at 52.
52 Chubin, supra note 49, at 58.
That being said, realism and RTC have not adequately explained every instance of state behavior, thereby still leaving empirical room for complementary theories like psychology, which ratchet down the level of generality from the macro-level of the state and its sub-parts (agencies, ministries, departments) down to the micro-level actors who occupy positions of powers within those various sub-parts. The possible interaction between psychology and realism/RCT can be likened to the relationship between economics and psychology insofar as economics, like realism and RCT, in assuming that all actors to have the same motivation of wealth or power maximization, could improve itself as a school of thought were it to pay more heed to more nuanced understandings of human nature. While one could argue of the impossibility of such a merger due to incompatibility, such a position is too strong. It would be more accurate to say that realism simply has not paid much attention to what psychology could bring to the table, thus precluding the opportunity to round itself out as a theory, rather than that realism is overtly hostile toward psychology. Similarly, while RCT does not delve into the personality of key decision-makers, this failure to do so is based not upon an irreconcilable difference with psychological theories but instead an overly simple (and also easily operationalizable) assumption about human behavior.

The need to supplement existing theories seeking to explain behavior as relating to law is as clear as the inadequacy of constructivism to be up to this very task. Take, for example, the theorem that democracies are less likely to opt for violent, such as nuclear, solutions. Such a

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54 For the shortcomings of realism, see Bradford, supra note 17, at 1278; for the inadequacies of RTC, see Id. at 1280-81.  
55 Id. at 1252  
56 Id. at 1257-58.  
58 Id. at 1422.  
59 Id. at 1423-24.  
60 SOLINGEN, supra note 32, at 37.
theorem seems to take the state as the primary actor, which is a realist move, and combine this with the constructivist notion that democracies are more peaceful and prudent than autocracies. This theory may bear out in Northeast Asia, where democracies like Singapore, Japan, and South Korea refrained from the nuclear option whereas North Korea did not; however, the Middle East provides the opposite picture where the democratic state of Israel went nuclear but autocracies such as Saudi Arabia, Syria, and Jordan have not, and furthermore, the consensus is that the most scathing nuclear rhetoric in that region has come from one of the least autocratic regimes in the area, Iran. Some explanatory ingredient has been missing and must be added.

Political Psychology

At this point it would be useful to pay some heed to a particular branch of the general IL-IR community that has been largely neglected despite its potential impact. These thinkers remind us that the ultimate actors are not states, laws, or norms, for in the end humans are the agents of any activity, proliferation included. Jacques Hymans, who has suggested that the nations that have decided to pass by the nuclear path despite their ability to travel down that road have refrained not because they were effectively deterred by treaties, but instead because of domestic dynamics involving their leadership. Hymans has company in his claim that the political leadership is the paramount factor in determining whether a nation goes nuclear. Rather than assuming that generalized objective variables about a given state will inform

61 Id. at 37-40, 272-73.
63 Id. at 1285. Political psychology is the oft cited moniker for this field. Id. at 1289. For the outright view that a psychological, anthropocentric theory has such explanatory power that, instead of complementing realism/rational choice theories, it actually supersedes them, see Lloyd S. Etheredge, A World of Men: The Private Sources of American Foreign Policy 100 (1978). See also ROGER FISHER, IMPROVING COMPLIANCE WITH INTERNATIONAL LAW (1981) (emphasizing the ethical and cultural considerations of state leaders); ORAN R. YOUNG, COMPLIANCE AND PUBLIC AUTHORITY (1979) (similarly declaring psychological theories paramount in understanding state behavior).
64 See generally HYMANS, supra note 5.
65 BAHGAT, supra note 9, at 5; Andrew L. Strauss, Overcoming the Dysfunction of the Bifurcated Global System: The Promise of a People’s Assembly, 9 TRANSNAT’L L. & CONTEMP. PROBS. 489 (1999).
analysts as to when, how, and why countries do or do not “go nuclear”, he posits that the particular leader of a country merits closer examination, as his research has indicated that the nuclear decision is often reducible to those particular persons in power.\textsuperscript{66} For Hymans, the richest sources of data to mine when examining the make-up of a state leader were statements from the leader himself, which could be interpreted according to speech patterns (references to the outside world, for example) in order to determine the critical traits of the speaker.\textsuperscript{67} A particular type of leader identified by Hymans, dubbed as “oppositional nationalist” for their us-against-them mentality, act rashly on the international scene based upon pride and fear.\textsuperscript{68} The lesson to be drawn from Hymans’ insightful analysis is that those who seek to understand proliferation need not be prophets, but must simply “learn to read,” as adroitly stated by Senator Daniel Patrick Moynihan during the aftermath of India’s nuclear tests.\textsuperscript{69}

William Bradford arrives at a similar conclusion as Hymans in that leader preferences are critical in understanding what states go nuclear and under what conditions.\textsuperscript{70} Various typologies of leaders are proposed by Bradford, the full vindication of which may come with research in the near future.\textsuperscript{71} Bradford has already identified several associative relationships\textsuperscript{72} and notes that the legal arguments offered in response to decisions to comply or defy international obligations may well be cover for the true rationales.\textsuperscript{73} A specific focus of Bradford has been anticipatory self-defense, and his finding was that the law, rather than molding behavior, had become warped

\textsuperscript{66} HYMANS, supra note 5, at 208. Hymans casts a wide net, from the democracy of Australia to the socialist state of Argentina.
\textsuperscript{67} Id. at 50-51.
\textsuperscript{68} Id. at 31.
\textsuperscript{69} Id. at 217. See Bradford, supra note 16, at 1297-98.
\textsuperscript{70} Id. at 1427.
\textsuperscript{71} Id. at 1430.
\textsuperscript{72} Id. at 1416.
\textsuperscript{73} Id. at 1416-17.
by the interests of states in pursuing preemptive action.\textsuperscript{74} The law as a product of state and personal preferences would mean that the NPT will mean what self-interested actors want it to mean, and so it has, as shall be illustrated in Part III. Jack Goldsmith and Eric Posner, despite their theoretical disagreements with Bradford, come to the same place (evincing the compatibility of their theories) when concluding that international law is fraught with hypocrisy among state leaders and mismatched conceptions of the law itself among states. In the end, no one obeys because they should, but only because they so desire.\textsuperscript{75}

Even if one does not subscribe to the categories or methods put forth by Hymans or Bradford because their theories are too individualized to offer broad policy prescriptions,\textsuperscript{76} or because one may question how one can truly obtain an accurate read on the head of a “rogue” state, the answer to such doubts it to develop better theories rather than to give up on the endeavor.

**Preliminary Conclusion**

Evaluating the macro level factors of the state as per realism and RTC, particularly with an eye towards its global trading partners,\textsuperscript{77} as well as the micro level factors of the leader in conjunction with the leader’s political situation as per political psychology,\textsuperscript{78} are required to maximize the accuracy of forecasts of what states will aspire for the nuclear option.\textsuperscript{79}

\textsuperscript{72} *Id.* at 17.
\textsuperscript{73} Goldsmith and Posner, *supra* note 17, at 143.
\textsuperscript{74} For more on the ecological fallacy, see Bradford at 1419.
\textsuperscript{76} Hymans, *supra* note 5, at 204 (ardent supporter of nuclearization John Gorton, then Prime Minister of Australia, was unable to push through his agenda despite his position of influence).
\textsuperscript{77} Bradford presents a caveat to an incorporation of different theories such as realism, rational choice, and personality theory: at one extreme, the craving for more and more explanatory power comes at the expense of its ever-present ontological opposite, parsimony. To put it simply, the theory may become too unwieldy to be useful. Bradford, *supra* note 16, at 1421. This author is grateful for the warning, but believes that, because the type of work that Bradford and others is conducting is trail-blazing, we may be forgiven for being ambitious. After all, Bradford presents a contrasting caveat as well: personality theory on its own, and likely any other one theory, errs too much
Unadulterated realism and RTC track stark areas of the law such as national security and armament issues particularly well, but focusing merely on states as monolithic actors as realists do can cause one state to look like any other and blur important distinctions. Each country’s unique domestic considerations, such as defense policy and strategic alternatives to nuclear weaponry, should be examined in order that the forecast of membership of the nuclear club in coming years be fine-tuned. Whatever the final form that a fully integrated theory unraveling the mystery of proliferation takes, it is apparent that the NPT will not be a necessary feature.

Part III: Collapse of the NPT

Part II has posited that the NPT has never effectively functioned as a brake on proliferation, and if that is so, it likely does not do so now. Now, in Part III, this Note seeks to make clear that even those who believe that the NPT used to operate as intended are all too ready to declare the treaty as failing. Firsthand accounts of the state of affairs regarding the NPT speak of the most recent Review Conference in 2005 as a “debacle” and found the attitude among many diplomats to be “cynical.” Those states that we most fear having nuclear weapons can simply opt out of the treaty, or even worse, work towards nuclearization within the treaty while disregarding its founding principles. Worse yet, stateless actors, while now somewhat within the purview of the NPT by virtue of UN Security Council action, are still on the side of parsimony and too far from the need for explanatory power. According to Bradford, personality theory does have something to add to both realism and rational choice theory. Compare the cases of Japan and North Korea: the former arguably dismissed nuclear weapons because of the U.S. nuclear umbrella while the latter had designs to go nuclear even with Soviet and Chinese security guarantees. See Solingen, supra note 32, at 255.

82 Briens, supra note 39, at 41 in NATO and the Future of the Nuclear Non-Proliferation Treaty.

83 Pierre Goldschmidt, Measures Needed to Strengthen the Nuclear Non-Proliferation Regime, in NATO and the Future of the Non-Proliferation Treaty 49 (Joseph F. Pilat and David S. Yost eds., 2007) (noting that the 2005 NPT Review Conference was a “complete failure”).


85 Article X of the NPT provides for this simple escape hatch. The pursuit of peaceful nuclear power under Article IV should not violate the principles of nonproliferation in Articles I and II.
completely unfettered by the constraints that even Iran and North Korea faced, such as the formalities of either opting out of the NPT or paying lip service to the distinction between civilian and military uses of nuclear energy. Thus, the NPT is at once impotent and inapposite in confronting the leading threats to peace.

The “Haves” and the “Have-nots”

The foregoing conclusion in Part II that domestic considerations drive the membership and compliance with the NPT does not imply that a scientific approach to the law would or should entirely preclude textual and doctrinal analysis. The text of the NPT holds clues as to why disenchantment with the NPT has set in so widely and deeply, even among international lawyers who likely count themselves constructivists. Assuming arguendo that consensus norms do have some effect upon state activity, it is not even clear what the norm enshrined by the NPT is. Nuclear weapons states (NWS) believe that it is the preclusion of nuclear war, but much of the rest of the world, being Non-Nuclear Weapons States (NNWS) believes that the most important part of the treaty is something quite different. At root, the NPT juggles two goals in tension with one another in an attempt to placate both the NWS and NNWS. On the one hand, in order to decrease the chance of nuclear war, Articles I and II ban the transfer of nuclear weaponry or assistance in acquiring them (taking care of potential NWS), and Article VI calls for the NWS to work toward disarmament in good faith (taking care of present NWS). On the other hand, the drafters, fully realizing that the NNWS would balk at a monopoly on nuclear power controlled by the NWS, included a provision contained in Article IV allowing for the peaceful research, development, and utilization of nuclear energy. This compromise has turned out to be one of the unfortunate kinds that please neither side. NWS believe that the NNWS use Article

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87 Treaty on the Non-Proliferation of Nuclear Weapons, supra note 2.
IV as a cover to circumvent Articles I and II despite the explicit warning against this maneuver in Article IV, and NNWS believe that the NWS have fallen well short of their duties under Article VI. Who is right? To answer this question, we must depart at this point from the sometimes insular world of textual interpretation and examine, armed with data points, how the parties have responded to their respective pertinent Articles and how their reactions have shaped the course of the NPT.

The NWS argument goes something like this. According to a 2007 National Intelligence Report, Iran has in the past been working toward the acquisition of weapons-grade nuclear material despite its protestations of the contrary, while the U.S. has cut its nuclear stockpile by almost ninety percent since 1989. For a counterpoint, the NNWS respond that the United States is still pushing the envelope on the quality, if not quantity, front nuclear arms, while Iranians are merely claiming nuclear energy, which is their “right.” No agnostic view is necessary here for the sake of political nicety. Being realistic, in both the formal and colloquial senses, provides the answer. Iranian action in covering up nuclear activity is a red flag of illicit activity, signifying that Iran is working itself toward a “virtual” nuclear capacity, thus bolstering the NWS argument. Yet it is equally clear that the United States, even if it is no longer engaged in an active arms race with a clear rival, is not going to completely disarm itself of

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88 Ruhle, supra note 39, at 31-32 in NATO. According to Ruhle, the pro-NNWS story is told by liberal “doves” and the pro-NWS narrative is given by conservative “hawks.”
89 OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, NATIONAL INTELLIGENCE REPORT: IRAN 7 (2007) [hereinafter NIE].
90 Ford, supra note 86, at 964.
92 Christopher A. Ford, supra note 86, at 949. Albert Wohlstetter foresaw this eventuality even in the 1970’s, but the Treaty has not been amended to cover for this subterfuge.
nuclear weaponry anytime soon.\textsuperscript{93} This may seem to view the state of proliferation as half-empty by taking the negative implications of both the NWS and the NNWS arguments, but the only positive interpretations in these accounts are self-serving. The NPT, then, seems to be failing insofar as both sides are concerned. Some would even contend that the NPT has not only failed to succeed, but has even made proliferation more valuable because of the increased rarity.\textsuperscript{94} The NWS and NNWS divide, though, is not the only dilemma that everyone, no matter what their theoretical perspective, can agree on as a fatal flaw of the treaty.

The NPT “club” is supposed to be a centripetal force for nonproliferation, but notable outliers are exerting a centrifugal force of their own upon the NPT’s fabric. Three nations that are allied, to various extents, with the United States are at once nuclear powers and outside the NPT: Israel, India, and Pakistan.\textsuperscript{95} India’s aforementioned situation is particularly troublesome, as the U.S. has gone so far as to reach deals with that nation regarding nuclear energy.\textsuperscript{96} Although the IAEA director has expressly embraced the agreement, in part because it does come with some strings attached that would inhibit India’s ability to proliferate, the deal strikes a blow to the essential principle of the NPT that the only NWS are the NWS that existed at the dawn of the Cold War, highlighting the NPT as anachronism.\textsuperscript{97} In sum, this pact with India has been a leveler of U.S. high ground on nonproliferation.\textsuperscript{98} None of these aforementioned nations is or has been close to joining the NPT during the Review Conferences in recent years.\textsuperscript{99}

\textbf{INTERNATIONAL INSTITUTIONS}

\textsuperscript{93} For a spirited defense of U.S. efforts in disarming, see id. at 937 963; John R. Harvey, \textit{U.S. Nuclear Weapons Programmes: Implications for Non-Proliferation}, in NATO AND THE FUTURE OF THE NUCLEAR NON-PROLIFERATION 70 (Joseph F. Pilat and David S. Yost eds., 2007).
\textsuperscript{94} Garvey, supra note 4, at 344.
\textsuperscript{95} Wilke, supra note 39, at 27.
\textsuperscript{96} Ruhle, supra note 39, at 31.
\textsuperscript{97} Id. at 37 in NATO.
\textsuperscript{99} Briens, supra note 39, at 39.
International Atomic Energy Agency

For those that are within the NPT, the eyes and ears watching them is the IAEA. Over time, the IAEA has made tangible efforts to keep pace with the subterfuge of covert nuclearization programs, particularly with the introduction of the Model Additional Protocol. This Protocol allows IAEA personnel to detect undeclared nuclear activities — a clear improvement over a Protocol-less situation wherein the IAEA usually takes the object nation at its word. However, the IAEA presence in a nation is subject to the will of the sovereign leaders, just as membership in the Treaty is. Likewise, the Protocol has participation issues, and the lack of many important members has weakened its effectiveness in many eyes. Moreover, despite the superiority in detection abilities that the Protocol confers upon IAEA inspectors, many still claim it even comes up short as a technical matter. Finally, the IAEA, in addition to struggling to adapt its methods to detect hidden sources of nuclear materials has found itself often out of the loop concerning intelligence about problematic nations. Just as the IAEA was taken by surprise when the U.S. and Israel struck a Syrian facility evidently built with help from the North Koreans, the IAEA has traditionally been behind the curve compared to agencies like the U.S.’s CIA and Israel’s Mossad, possibly because the IAEA’s security is poor and any information handed over to them is basically handed over to the world. Until and unless the IAEA is able to respond to its membership, sovereignty, technical, and security deficiencies, its usefulness will remain limited.

100 Kittrie, supra note 38, at 421.
103 Id. at 12.
Perhaps the most deflating situation with respect to the IAEA is that even when it successfully identifies violations and brings them to the United Nations Security Council, the end result may be little different than had the violation continued undetected. The lax punitive measures against North Korea and Iran will be examined below.105

United Nations Security Resolution 1540

If the IAEA has the Protocol as its patch, the NPT has Security Resolution 1540. As a doctrinal matter, the NPT now covers not only inter-State proliferation but also the transference of nuclear weaponry or knowledge to non-State actors.106 In order to remedy a birth defect of the NPT, the U.N. Security Council brought forth Resolution 1540, finally creating the important link within the body of international law between state and stateless actors regarding transference of nuclear materials and knowledge. A further modification to the NPT has purported to ensure that stateless actors, having been denied cooperation by a state in their bid for nuclear weaponry by Resolution 1540, would now face the additional obstacle of physical defenses for sensitive nuclear materials.107 Resolution 1540, though, can hardly be seen as an example of how to easily remedy the failing nonproliferation regime, as some have argued.108 The process used to pass Resolution 1540, referred to as “global legislative resolutions,” gives rise to both domestic and foreign issues. Firstly, on the American domestic front, such resolutions do not readily fit into a recognized category of international law that is subsumed by domestic law.109 Secondly, on the international scene, there is a prevalent belief that forcing through such “global resolutions” without the usual wider vote required by more common procedure, is emblematic of the NWS’

105 Pilat and Yost, supra note 102, at 14. The U.N. Security Council finally mandated a full suspension of nuclear activity in the case of Iran in 2006. Meanwhile, North Korea has been protected over the years by the votes of China and Russia. Mark Fitzpatrick, Is Iran’s Nuclear Capability Inevitable?, in DOUBLE TROUBLE: IRAN AND NORTH KOREA AS CHALLENGES TO INTERNATIONAL SECURITY 34-36, 43 (Patrick M. Cronin ed., 2007).
106 Kittrie, supra note 38, at 420.
107 Id. at 420.
108 Id. at 419-20.
109 Ford, supra note 86, at 982 fn. 90.
attempt to keep the NNWs in their place. Moreover, some nations simply lack the funding and infrastructure to put into place the requirements of the Resolution. Besides this procedural dilemma, a substantive issue is here as well. The problem of circularity confronts the NPT here, for the nations that would refrain from supporting terrorists and would sufficiently guard their nuclear stockpiles do not need to be told to act in such and such manner, while it is exactly those rogue states and the terrorists harbored and welcomed therein that are using the NPT as a cover or are outside of it altogether. Thus, even if the NPT were a truly stabilizing force within the current regime and is worth patching up as necessary, Resolutions such as 1540 are not the appropriate band-aid.

**United Nations Security Council**

The U.N.’s problems run much deeper, though. Russia and China, two nations sharing both NWS and Security Council status with the U.S., have engaged in ballistic missile market transactions with several states over the years, assisting North Korea, Syria, Iran, Iraq, Egypt, Libya, Pakistan, and Saudi Arabia. Eventually, some of the clients to Russia and China became sellers in their own rights, as Iran, Syria, Libya, and North Korea developed their own networks. On the North Korean front, the U.S. has been unable to unite the Six Parties talks thus far even after the nuclear explosion on October 9 2006 due in large part to China’s attempts to counter American influence, which is par for the course. The truth is that no one wants

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111 Id. at 934
113 Id. at 35.
114 Note the Shanghai Cooperative (SCO) as a prime example. While some consider it an open question as to whether Russia and China are using the SCO as a security tool in Central Asia are rather as a counterweight to the United States, see Globalization, Security, Nation State, Regional and Global Security 16, it seems that at least the Russians believe the Cooperative to be an important contribution to a “multipolar” world, see Katja Mirwaldt with
Pyongyang to go nuclear, Beijing included, and China has taken more of a hard line in recent years given worsening relations between Beijing and Pyongyang.\textsuperscript{115} Still, the U.S. realizes that China, as well as South Korea, place peninsular stability as their first priority rather than its denuclearization.\textsuperscript{116} On the Iranian front, Russia has been an obstacle thus far in taking a hard line given its trading ties to the oil rich nation.\textsuperscript{117} Russia has already attempted to become the chief broker in the Iranian impasse, as Putin sought to enrich uranium for Iran on Russian soil.\textsuperscript{118} However, Iran has rejected this proposal and continued its obstinate stance.\textsuperscript{119} Again, while Russia is amenable to a civilian nuclear program in Iran, it probably does not ultimately want a nuclear armed Iran anymore than the United States.\textsuperscript{120} The U.S. has evidently not spent enough political capital towards Russia to bring it around to ensuring a solution to Iran, though both Russia and China in their capacity on the UN Security Council agreed to strict measures in 2007.\textsuperscript{121} Some commentators have latched onto the idea that the U.S. support of Ukrainian and even Georgian membership in NATO may have to be compromised for the sake of Russian assistance in the Iranian arena.\textsuperscript{122} Whatever the package of carrots and sticks is that the U.S. needs to deploy regarding China and Russia, the take home point is that the solution in this arena

\textsuperscript{115} Vladimir I. Ivanov, \textit{Russia: Struggling for Dignity}, in \textit{GLOBAL SECURITY GOVERNANCE: COMPETING PERCEPTIONS OF SECURITY IN THE 21\textsuperscript{ST} CENTURY} 248 (Emil J. Kirchner & James Sperling eds., 2007), even if the Chinese are less obvious in their zeal to reduce American influence, see Liselotte Odgaard, \textit{China: Security Cooperation with Reservations, in GLOBAL SECURITY GOVERNANCE: COMPETING PERCEPTIONS OF SECURITY IN THE 21\textsuperscript{ST} CENTURY} 211 (Emil J. Kirchner & James Sperling eds., 2007).
\textsuperscript{117} Id. at 79.
\textsuperscript{118} Id., supra note 39, at 35.
\textsuperscript{119} Id.; Mike Bowker, \textit{RUSSIA, AMERICA AND THE ISLAMIC WORLD} 119 (2007).
\textsuperscript{120} Alexei G. Arbatov, \textit{The Inexorable Momentum of Escalation, in DOUBLE TROUBLE: IRAN AND NORTH KOREA AS CHALLENGES TO INTERNATIONAL SECURITY} 70 (Patrick M. Cronin ed., 2008); Goldschmidt, supra note 82, at 49.
\textsuperscript{121} Fitzpatrick, supra note 105, at 34.
\textsuperscript{122} Arbatov, supra note 82, at 75; see Hall Gardner, \textit{AVERTING GLOBAL WAR: REGIONAL CHALLENGES, OVEREXTENSION, AND OPTIONS FOR AMERICAN STRATEGY} 99 (2007); Goldschmidt, supra note 82, at 49.
defies legal wrangling and is squarely within the political realm. This point shall be taken up now in Part IV.

**Part IV: Next Best Hopes in Place of the NPT**

Parts II and III have argued that, firstly, the NPT has never not been a causal factor in nonproliferation, and secondly, the NPT, regardless of its past achievements or lack thereof, is at the point of obsolescence. We must turn now to other prospects. The tact to be taken by the new Obama administration is not clear, given the failures of both the multilateral approaches represented by the NPT and the unilateral policies represented by the Bush administration. Most believe that the NPT, or a replacement treaty of comparable qualities, is the only feasible choice in sight, and in an ideal situation would-be proliferations could be dissuaded from acquiring weapons in the first place rather than being dealt with down the road, but if the NPT is truly a failed piece of international law and bargaining, then policy makers must let go of the idealistic ambitions embodied in the NPT. Many of the proposed fixes to the NPT, from dialing up the IAEA’s detection capacity to tying success to the efficacy of global norms or to put in place pre-set benchmarks or sanctions in the U.N. Charter for proliferators to avoid political battles, are fighting an uphill battle against past experience. Similarly, many suggested ad hoc replacements to fill the void left by the NPT’s collapse, such as an American

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123 Walker, *supra* note 26, at 23.
124 *Id.* at 23-24.
125 Pilat and Yost, *supra* note 102, at 18.
126 Even Garvey, who lambasts the NPT for some of its shortcomings, believes that an NPT-anchored regime is still workable. Garvey, *supra* note 4, at 357.
127 Ruhle at 37 in NATO (pro-sanctions discussion) and Wilke at 30 in NATO (pro-IAEA and pro-IL discussion).
128 Garvey, *supra* note 4, at 346. Garvey’s hope for putting in place a predetermined sanctions regime, which would hopefully avoid the need to wrangle over particular and divisive actors, would likely still founder because Russia and China would know full well how the stipulated system would work against their interests. Garvey believes that these two nations have come around, *Id.* at 356, but his optimism is, in this author’s opinion, unwarranted.
boycott of Chinese and Russian goods because of their support for rogue regimes or nuclear strikes against Iran seem little more than futile, and possibly dangerous, hopes.

Providing a comprehensive answer is impossible at this point, but through a survey, we may point out some possible pieces for this puzzle. The discussion here will be contented with politico-legal options, leaving aside military alternatives. If the criticism of overreliance on legal tools such as the NPT in Parts II and III has not convinced the reader of the need to rely on informal political measures as much as formal legal acts, then it should be recalled at this point that the substance into which we are about to delve, national security law, is an insoluble mixture of law and policy practiced, for the most part, off the record.

States

Deterrence

If the NPT is a case of having to fix something because it is broken, then deterrence may be a case of not fixing something because it has never been broken. Deterrence is a concept familiar both to foreign policy experts in the nuclear arena and lawyers in general, coexisting as it has with the NPT for many years despite their inherent tensions. As lawyers are painfully aware, deterrence on a micro-level cannot always prevent the worst offenses, such as murder or treason, and yet, the nuclear deterrence has stood the test of time and may yet have work to do. Though deterrence no doubt contains its own contradictions and may have led to close calls in many instances in the past, from the Cuban missile crisis to the past tensions in Europe

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129 Kittrie, surpa note 38, at 428-29.
131 Wilke, supra note 39, at 28.
133 Walker, supra note 26, at 20.
134 MELMAN & JAVEDANFAR, supra note 104, at 227; O’NEIL, supra note 32, at 127.
between NATO and Warsaw Pact forces, the Cold War never did go hot with nuclear fire. Instead of the Soviet Union looming as the nuclear threat, North Korea and Iran stand out as the states most likely to utilize nuclear force. Whether they are accounted for by deterrence would depend upon the motivations behind their pursuit of nuclear arms. As noted above in Part II, the assumption in the realist and RCT camps that states and humans are always rational should be modified in light of the latest psychological research and the plain intuition that humans often fall short of rationality. Nevertheless, deterrence can still work with actors that are less than fully rational; it is simply a matter of knowing how hard and when to push with respect to particular actors.

Recalling the discussion of North Korea and Iran above in Part II, which concluded that these two nations are mostly by practical considerations together with the egos of their leaders, the U.S. should view deterrence as a critical piece of foreign policy vis a vis both North Korea and Iran, as it did before with the Soviet Union, a rival with worldly motivations combined with idiosyncratic, but in the end reasonable, leaders. All three of these states pursued nuclear weapons for security, prestige, leverage, or to become a supplier. In any of these cases, the goal was rational in some sense, and so must be the answer: deterrence.

Sanctions

While the case for deterrence may be made plainly, the case for sanctions is much weaker. Although the American intelligence community has noted that sanctions have had a more profound influence on Iran than previously believed, the baseline from which this

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135 Bradford, supra note 16, at 1281-82.
136 The lack of rationality may, ironically, be a deliberate ploy. For an explanation of the rationality of irrationality, by which a nation may deliberately act erratically in order to give other nations pause, see THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 130-31 (1963).
138 NIE, supra note 89, at 6.
revelation was measured was one that assumed sanctions had hardly worked at all. President Bush himself has admitted that the consistent ramping up of sanctions with Iran has essentially led the U.S. into a dead-end and caused American interests to depend on other nations that can exercise influence in Iran such as Russia. Also, Iran’s position geopolitically insulates it from external pressure, as it inhabits a crucial region in Central Asia and the Gulf while sitting upon more oil than any other nation save Saudi Arabia and more natural gas than any other nation besides Russia. Also recall here Russia and China’s support for Iran. As such, sanctions have been little more than symbols. Despite the revelations of 2003 regarding Iran’s abuses under the NPT in pursuing more than peaceful nuclearization, the UN did not act decisively; despite Iran’s continued intransigence, the Security Council sanctions under Resolution 1737 in December 2006 were weak in that the ban on technology to Iran was no more than that already embargoed by the Nuclear Suppliers Group (NSG) and Missile Technology Control Regime (MTCR). Furthermore, despite the failure of Iran to report as required by Resolution 1737 regarding its enrichment, the subsequent Resolution 1747 in March 2007 had only one mandatory sanction, that barring Iranian export of arms, and merely asked rather than required nations to put financial pressure on Iran by cutting off loans.

If sanctions can be said to have at least retarded the Iranian quest for the bomb, the evaluation of sanctions regarding North Korea must be less charitable. Sanctions meant to destabilize Kim Jong-Il left him in power and in pursuit of nuclearization while the North Korean people suffered; in the meantime, negotiations and threats of preemption all failed to

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139 BAHGAT, supra note 65, at 33.
140 Id. at 32, 41.
141 MELMAN & JAVEDANFAR, supra note 104, at 174.
142 Id. at 168.
143 BOWKER, supra note 119, at 120; Fitzpatrick, supra note 105, at 34.
144 Fitzpatrick, supra note 105, at 34.
145 MELMAN & JAVEDANFAR, supra note 104, at 174.
prevent the nuclear test, as the White House and Pyongyang could scarcely sit down together. North Korea has been willing to simply take its brinksmanship to a high enough level that the United States, despite its desire to set the agenda and not reward “bad behavior,” has had to come to back to the table with North Korea and hope that North Korea will be forthcoming about its nuclear program. The United States needs China on board, but Beijing continues to play the fence.

Yet what of the possible analog here, Libya, whose nuclear u-turn would suggest a positive solution to Iran, as well as the NIE’s assertion that such sanctions have at least stalled Tehran’s drive toward a nuclear bomb? Libya does provide a case where a government that was very much reminiscent of the current state of Iran not only due to its “populist, nationalist inward-looking” nature but also its support for terrorism. Although some have supposed that Libya’s dictator, Qadhafi, was simply worried about suffering Saddam Hussein’s fate, as the invasion of Iraq occurred in the very year that the WMD programs in Libya were surrendered, Qadhafi had been directly confronted by U.S. military force back in 1986 by the Reagan administration and continued on his nuclearization path. This pattern suggests that it was not President Bush’s novel preemptive doctrine at work but instead the effects of multilateral sanctions and second order effects thereof such as a weakened power base and popular opposition. Yet generalizing this success story may be problematic. Again, Iran’s leadership

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does not seem to face the same vulnerability that Qadhafi faced given its geopolitical position, leaving Iran less susceptible to the pressure of sanctions, while the issue with North Korea is quite different in that they must be coaxed into giving up, rather than abstaining from acquiring, “the bomb.”

Sanctions have seen great success in the case study of Libya, have had some effect on Iran, and continue to be pursued in North Korea. While sanctions should be pursued in hopes of emulating the Libyan accomplishment, at most they will probably only delay Iran and cannot turn back the clock in North Korea. Buying time, though, may provide U.S. policymakers the necessary window to put a deterrence strategy in place in Iran and continue to keep North Korean nuclear facilities in a novice stage.

Complete Disarmament

The most ambitious, and correspondingly some would contend the most naïve fix, is for the United States and all other NWS to give up nuclear weapons, one and all. No less eminent and often hawkish policy gurus than George Shultz, William Perry, Henry Kissinger, and Sam Nunn have declared deterrence as inadequate to keep nuclear arms from being used in the modern world. For them, nuclear abolition is and must be the solution. Yet the modern strategic environment counsels against this move. To invoke a game theory that has already been cited many times already in this field, the prisoner’s dilemma shows us that the U.S. should only give up its nuclear arms if it can ensure that other parties will remain nuclear-free as well. Therein lies the intractable issue of verification.

153 Thomas K. Scheber, US Nuclear Policy and Strategy and the NPT Regime: Implications for NATO, in NATO AND THE FUTURE OF THE NUCLEAR NON-PROLIFERATION TREATY 83 (giving up all nuclear weapons would give up valuable deterrence value and probably lead to U.S. allies, being bereft of the American nuclear umbrella, to start their own nuclear programs).
Conclusion on State Nonproliferation Policies

Notwithstanding the stingiest sanctions that the U.S. could muster and the most sincere efforts of supplier groups to provide adequate access to nuclear equipment and uranium, states will eventually be able to get their hands upon nuclear weapons, if they so desire, and desire some of them will, as shown by the tenacity of North Korea in its successful pursuit and Iran close behind. Deterrence will have to be retooled as more nuclear nations arise, hopefully inhibiting the new threats just as the Soviets were contained and also preventing further states from going nuclear out of fear of U.S. reprisals in the case of enemies and out of comfort from the American nuclear umbrella in the case of friends. The United States has already begun to overhaul the doctrine, particularly with regard to the nexus, already noted above, between states and stateless actors. Under George W. Bush, deterrence did in fact receive some modifications, as the U.S. president made it clear that states will receive retaliatory strikes if they are complicit in the actions of nuclear terrorists by willfully transferring the weaponry.154

State and Stateless Actors

Although this author believes that even inflammatory leaders like President Ahmoud Ahmadinejad of Iran and Premier Kim Jong-II would ultimately refrain from using such weapons directly just as First Secretary Nikita Krushchev and other Soviet leaders also resisted the urge to push the button, the link between at least one of these leaders and potential terrorists is no bogeyman. A North Korean official, Deputy Foreign Minister Kim Gae-gwan, stated that his government could supply terrorists with nuclear weapons,155 while the links between Iran and

foreign militants are well-documented.\textsuperscript{156} Thus, the true threat of a nuclear North Korea, or a nuclear Iran, is not use by the North Koreans \textit{per se} against a Japan or South Korea or by the Iranians against Israel or Saudi Arabia, but instead their selling nuclear weaponry to a bidder on the black market. Iran, on the other hand, is not as likely a candidate to hand over WMD to terrorists,\textsuperscript{157} as the only terrorists with which they are linked are the Shia militias in Iraq, Hezbollah in Lebanon, and Hamas in Iran, none of whom have a need for such a weapon unless they want to incur brutal retaliation in kind.\textsuperscript{158}

The stateless terrorist will remain an enemy immune of deterrence, for he is not tied to the interests of any state, even those that give sanctuary.\textsuperscript{159} Other tools are required.

\textbf{Cooperative Threat Reduction Program}

The Cooperative Threat Reduction Program, or the Nunn-Lugar, has attempted to reduce the main supply of radioactive/nuclear options for terrorists: unsecured Russian materials left over from the Cold War.\textsuperscript{160} The actions of those such as Alexander Tiulyakov, a deputy director of Russia’s state-run nuclear icebreaker service, drive home the importance of Nunn-Lugar, as he attempted to sell 1.1 kilograms of radioactive materials.\textsuperscript{161} Former Soviet satellites, particularly the Ukraine and Kazakhstan, have also been locations with dangerously available nuclear

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\item \textsuperscript{156} Bowker, \textit{supra} note 119, at 120; Gardner, \textit{supra} note 122, at 91.
\item \textsuperscript{157} Melman \& Javedanfar, \textit{supra} note 104, at 227.
\item \textsuperscript{158} Gaffney, \textit{supra} note 37, at 23.
\item \textsuperscript{159} Baker, \textit{supra} note 1, at 8. See Emil J. Kirchner, \textit{Regional and Global Security: Changing Threats and Institutional Responses}, in \textit{Global Security Governance: Competing Perceptions of Security in the 21\textsuperscript{st} Century} 7 (Emil J. Kirchner \& James Sperling eds., 2007); see Richard A. Clarke, \textit{Against All Enemies} 159 (2004).
\item \textsuperscript{161} Williams, \textit{supra} note 37, at 140.
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According to former National Security Council lawyer Jim Baker, the Nunn-Lugar has secured over 3,500 warheads, 750 missiles, and 630 launchers and bombers, and perhaps more importantly, guaranteed that over 5,000 unemployed Soviet weapon scientists will have civilian research careers ahead of them. Thomas Scheber adds the decommissioning of 26 nuclear submarines and the protection of 21 physical sites of nuclear material to that list. Many of Lunn-Lugar’s goals, though, have yet to be accomplished, and while the Cold War never truly went hot, its legacy in weapons may yet have fiery chapters to be written if terrorists are able to access such weapons. Policy makers such as Richard Clarke have been ringing the alarm bell for years in order to elicit the necessary funding to properly prepare for terrorists armed with WMD, but have found that the various executive branch departments have been slow in realizing the magnitude and possibility of such threats. While unfinished, this business is not forgotten, though, as the G8 (whose membership includes both the United States and Russia) has advanced the ‘10 plus 10 over 10’ initiative, which will raise up to twenty billion dollars through 2012 to fund non-proliferation projects, particularly in Russia.

**Proliferation Security Initiative**

The Bush administration, in line with its focus on reducing the supply of nuclear technology and infrastructure, has advanced the Proliferation Security Initiative (PSI), which intercepted components in transit from A.Q. Khan in Pakistan to Libya. While legally nonbinding, this effort allows intelligence and maritime interdiction to be coordinated on a

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162 Id. at 164; Lyudmila Zaitseva, Organized Crime, Terrorism and Nuclear Trafficking, in GLOBALIZATION AND WMD PROLIFERATION: TERRORISM, TRANSNATIONAL NETWORKS, AND INTERNATIONAL SECURITY 110 (James A. Russell and James J. Wirtz eds., 2008).
163 Baker, supra note 1, at 278-79.
164 Scheber, supra note 155, at 87.
165 Id.
166 Clarke, supra note 161, at 163-66.
167 Kirchner, supra note 161, at 15.
168 Bahgat, supra note 65, at 16.
global scale, with seventy countries included, fifteen as core members and others cooperating on a more irregular basis. Taking recommendations from the 9/11 Commission to heart, the PSI has expanded its membership to more and more nations over time, including Russia, but notables such as India and China (both NWS) remain uncommitted. Less than half of the NPT members had joined the PSI, which to the eyes of many appears to be a tool for U.S. policy. If expansion of the PSI proves difficult, the U.S. must seek to exact promises from the Shanghai Cooperation Organization (SCO) (members include Russia and China), which has rejected U.S. membership, to police the critical Central Asian region for micro-proliferation. This should not be too difficult, given Russia’s issues with the Chechens in the Caucasus and China’s issues with the Uighurs in Xinjian. Potential member of the SCO, India, has also had its taste of terrorism over the years with the Tamils in Sri Lanka. If the U.S. can mobilize nations from likely regions for terrorist acquisition of nuclear arms, which are the Middle East and Central Asia, then the PSI can be supplemented and its odds of success increased substantially.

Non-state actors, usually lacking the means to develop their own weapons, can be notoriously difficult to track as criminal networks are increasingly dispersed, transactional, and transnational in nature, meaning that tracking players and assets is difficult, especially when traditional methods of counter-proliferation have not taken the changing face of organized crime into account.

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169 BAKER, supra note 1, at 279.
170 9/11 COMMISSION, supra note 162, at 381.
172 O’NEIL, supra note 32, at 49.
173 Baker has stressed that liaison between the domestic intelligence community and foreign agencies is critical in light of the chronic inability of the United States to penetrate certain foreign cells. BAKER, supra note 1, at 137.
174 GARDNER, supra note 122, at 127-28. Bringing in members of the Middle East also seems important, in light of the fact that the free trade zone at Dubai was critical for the Khan network and may be important again if that network or another like it seeks to transport goods in the region. See Albright and Hinderstein, supra note 152, at 60-61.
and the law enforcement procedures taken in response into account.\(^{175}\) The PSI does indeed borrow a law enforcement paradigm in its efforts to board suspicious vessels: the “broken tail-lights” hypothesis has been used to sum up the strategy of PSI enforcers who will lay claim to any valid justification or excuse necessary to gain proper access to a ship that may possess contraband, just as a police officer in the U.S. may use a generic traffic violation to detain a suspect wanted for much more.\(^{176}\) Such self-help puts the onus of responsibility on nations seeking to prevent proliferation rather than seeking to modify the behavior of possible proliferators through unwieldy, universal measures such as the NPT.\(^{177}\)

As police cannot prevent or even solve every crime, so too is a proliferator likely to slip the net sooner or later, and even one failure is inexcusable here.\(^{178}\) The PSI must be highly aggressive, taking the war to the terrorists, as the CIA did in Afghanistan, though the battle fields are now different and broader tools are needed.\(^{179}\) Most importantly, intelligence sharing is crucial,\(^{180}\) and the PSI is likely an excellent vehicle for the easy dissemination of information between members as it is more a collective of activities rather than an organization *per se* and thus lacks the bureaucratic entanglements that one might expect.\(^{181}\) Although the PSI was meant to complement the NPT, the PSI, Nunn-Lugar and other tools will need to do more work in the future as the NPT loses whatever value that it still has left.

**Intelligence Predictions and Predicting Intelligence**

Having noted that the PSI operates chiefly as a preventative measure against state proliferation, it would be prudent now to determine what else intelligence and law enforcement

\(^{175}\) Zaitseva, *supra* note 164, at 107.
\(^{177}\) Ford, *supra* note 86, at 969; Caves, supra note 150, at 44.
\(^{181}\) Ford, *supra* note 86, at 976.
agencies should be doing in light of modern threats. As of yet, there have been no reports of terrorists successfully buying nuclear materials, but it seems only a matter of time before this dreaded transaction consummates.\(^\text{182}\)

*Enemy at the Gates?*

At least two separate weapons traffickers have claimed to have access to nuclear and radioactive materials, one of a Syrian arms dealer purporting to be able to deliver five kilograms of uranium into Turkey from Russia via Georgia, putting American allies at risk, and another an Armenian trafficker who offered highly enriched uranium (HEU) to an undercover FBI agent in New York in 2005.\(^\text{183}\) Neither incident actually involved the transfer of the radioactive materials; nonetheless, the Syrian dealer displayed adequate knowledge about the black market while the Armenian, who may have offered the HEU in response to an inquiry by the undercover Agent, at least proves the proposition that arms dealers will smuggle anything for profit.\(^\text{184}\) These transactions would seem to be what is considered the “ant-trade” in which direct cross-border trading occurs from places where weapons are quite available and cheaply priced to regions that have the converse situation. Even if significant black/grey markets or networks do not exist in trafficking WMD on any kind of significant scale, a break-through simply on this small scale could mean thousands of lives lost.\(^\text{185}\) In addition, three incidents, while not involving terrorists, nonetheless showed that criminals were able to acquire weapons-grade plutonium or highly enriched uranium: one incident in Germany involving a counterfeiter and another again in Germany involving amateur criminals, and a third incident in France.\(^\text{186}\)


\(^{183}\) *Id.* at 115-116

\(^{184}\) *Id.*


\(^{186}\) Williams, *supra* note 37, at 139.
H. H. Gaffney, for one, is confident that terrorists are not likely to be able to harness and utilize WMD. Yet terrorists have made use of much modern technology despite their distaste for the culture that accompanies such technology. The terrorists do not need to understand anything other than how to detonate the bomb, just as all they need to know about cell phones is not how to build them but how to detonate bombs at a distance with them and all they need to know about airlines is how to fly them in the air rather than land them. The terrorists are seeking nuclear material; arms dealers are seeking to sell nuclear material, and nuclear material still exists in great quantity. The questions becomes not if, but when and who?

National Security Community

Knowing what someone can do is hard; knowing what someone wants to do in conjunction with what they can do is difficult by yet another order of magnitude. The 9/11 Commission found that the intelligence community had lost much of this foresight over the years, and the failures following thereof have been stark. First, underestimation of Iraq nuclear program in 1991; then, no estimation whatsoever of the A.Q. Khan network, as it persisted for years under the radar; finally, overestimation of Iraq’s WMD program in 2003. Simply put, the world is not a known or even knowable quantity at this point, meaning that tried and true practices of the best and analytical analyses that depend upon a readily understandable system are not effective.

Phil Williams argues that a sea change is in order for the intelligence community, one that requires an understanding of the adaptability of the new world order and the evolution of the

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187 Gaffney, supra note 37, at 25.
188 HYMAN, supra note 5, at 216 (chief Iraq weapons hunter told the U.S. Senate that “[t]he real challenge for intelligence is going to be getting to our political leadership not just judgments about capabilities, but judgments about real intentions. And that is tough.”).
189 9/11 COMMISSION, supra note 9, at 91.
190 Williams, supra note 37, at 143.
191 Id. at 144
networks, from Russian mafia to networks like Khan’s, as these groups change with globalization: an apt analogy in more ways than one is that of a parasite to an organism, as they both evolve over time in response to one another.\footnote{Id. at 139-40, 145-46. See Anthony Burke, \textit{Cause and Effect in the War on Terror}, in \textit{Security and the War on Terror} 26 (Alex J. Bellamy, Sara E. Davies, & Richard Devetak eds., 2008).} Proliferation, through the Khan network and others like it yet undetected, act as “super-spreaders,” and in the battle between such “spreaders” and counterproliferating governments, it would seem that the “spreaders” have adapted better to the globalized world thus far.\footnote{Williams, \textit{supra} note 37, at 146-48.} Nonetheless, the PSI and similar efforts have shown adaptation by the U.S. and its allies. The NPT seems to figure into this equation as a creature that has seen evolution pass it by, as proliferations and their counterparts have long recognized that, in the information age, the old bright lines between martial and civilian nuclear use and between NWS and NNWS are at best unenforceable and dysfunctional and at worst virtually meaningless.\footnote{Id. at 151-52. See Caves, \textit{supra} note 150, at41 (exhorting policy makers to assume that some parts of the network are still in play).} The thinking in the intelligence community needs to be as agile and suspicious as the PSI. Put another way, every scenario should be fair game for analysis. For example, are alliances are possible between scientists and organized crime, or has the Khan network actually survived and mutated to some other form?\footnote{Id.} Also, group-think and lazy assumptions about the nature of proliferation must be assiduously avoided to ensure that theories compete in the community so that as many scenarios as possible are given credence. One analyst might play the status quo role and assume that proliferation has peaked; another analyst might play counterpoint and assume that proliferation will continue in a step-wise fashion; yet another analyst might assume that proliferation may suddenly accelerate. Intelligence, in conjunction with other agencies domestically and abroad, should endeavor to understand how these networks

\begin{thebibliography}{196}
\footnote{Id. at 139-40, 145-46. See Anthony Burke, \textit{Cause and Effect in the War on Terror}, in \textit{Security and the War on Terror} 26 (Alex J. Bellamy, Sara E. Davies, & Richard Devetak eds., 2008).}
\footnote{Williams, \textit{supra} note 37, at 146-48.}
\footnote{Id.}
\footnote{Id. at 151-52. See Caves, \textit{supra} note 150, at41 (exhorting policy makers to assume that some parts of the network are still in play).}
\footnote{Cf. Williams, \textit{supra} note 37, at 152-53.}
\end{thebibliography}

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from Central Asia through the Middle East as well as Southern Asia and the outlier North Korea are structured. Undercover work should be supplemented by dummy interdictions meant to test the networks for their adaptability and behavior as well as by follow-up analysis on how the networks regenerate following successful interdictions.  

Conclusion

Perhaps more than other lawyers, international lawyers pursue their goals with a sense of optimism, hoping that the world will be a better place because of their work. Hope may be a fine starting place for any project meant to improve human welfare; however, it would be a grave mistake for hope to be the first and the last foundation of an international project. History is only too replete with such instances of the designs of men crumbling, and when the last pillar holding up the structure, hope, finally gives way, it does so with a resounding thud. After World War I, there was the League of Nations; thus, no more Great Wars. After World War II, there were the trials at Nuremberg; thus, no more genocide. After the Great Depression, there was the Securities and Exchange Commission; thus, no more severe boom and bust cycles. After the Cold War, there was a complete victory by the West; thus, no one was left to challenge the new world order. And after the NPT, there was widespread consensus against the dangers of the newly unleashed atom; thus, no further nuclear proliferation. Time has exposed each of these promises as idealistic dreams, often with little more than futile hopes remaining. In the case of the NPT, even hope has largely abandoned ship.

At the end of the day, nuclear technology, like any other expertise, will continue to spread the world over, while the will of state leaders to seize the opportunity to go nuclear will depend much less on the NPT and the norm it enshrines and much more on self-interested

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197 Id. at 154-55
considerations, tempered only somewhat, if at all, by external influences such as sanctions.\textsuperscript{198}

There is no holding back the tempest of proliferation; there is only a hope of weathering the storm.

\textsuperscript{198} Opposing Viewpoints, Russell at 228 (Pakistan).