

THE NONPROLIFERATION BESTIARY: A TYPOLOGY  
AND ANALYSIS OF NONPROLIFERATION REGIMES

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## I. INTRODUCTION

As even the most casual newspaper reader will know, these are days of unprecedented stress on the nuclear non-proliferation regime. Iran continues to pursue its nuclear weapons dreams in defiance of its obligations under articles II and III of the Nuclear Nonproliferation Treaty (NPT)<sup>1</sup> and its nuclear safeguards agreement with the International Atomic Energy Agency (IAEA),<sup>2</sup> while North Korea has long since cast aside even an Iranian-style pretense of peaceful ambitions, repudiating the NPT it previously violated and testing a nuclear weapon. The international community is still struggling with these grave proliferation challenges.

It is therefore quite proper to ask questions about the future of the NPT system and about the institutional structures that are supposed to promote nonproliferation. In the hope of enriching the ensuing debate over these important matters, this Essay offers some thoughts on the strengths and weaknesses of various international approaches to addressing proliferation problems. It aims to impress upon the reader

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1. See Treaty on the Non-Proliferation of Nuclear Weapons arts. II, III, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 169 [hereinafter NPT] (“Each non-nuclear weapons State Party to the Treaty undertakes . . . 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. Each non-nuclear-weapon State Party to the Treaty undertakes to accept safeguards, as set forth in an agreement to be negotiated with the International Atomic Energy Agency in accordance with the Statute of the International Atomic Energy Agency and the Agency’s safeguards system, for the exclusive purpose of verification of the fulfillments of its obligations assumed under this Treaty with a view to preventing diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices. Procedures for the safeguards required by this article shall be followed with respect to source or special fissionable material whether it is being produced, processed or used in any principal nuclear facility or is outside any such facility. The safeguards required by this article shall be applied to all source or special fissionable material in all peaceful nuclear activities within the territory of such State, under its jurisdiction, or carried out under its control anywhere.”).

2. International Atomic Energy Agency [IAEA], *The Text of the Agreement Between Iran and the Agency for the Application of Safeguards in Connection With the Treaty on the Non-Proliferatio [sic] of Nuclear Weapons*, IAEA Doc. INFCIRC/214 (Dec. 13, 1974), available at <http://www.iaea.org/Publications/Documents/Infcircs/Others/infcirc214.pdf> [hereinafter Iranian Safeguards Agreement].

some of the complexities of this subject, which is by no means as clear-cut as some in the international arms control community often assume.

The pages that follow sketch a structural typology of nonproliferation regimes, dividing them, for analytical purposes, into three basic types: (1) “universalist” regimes such as the NPT, which stress formal legal obligations, generally aspire to universal application, and are often (though not invariably) accompanied by the creation of an international institutional framework including inspection authorities and declaration obligations; (2) “particularist” regimes such as the Nuclear Suppliers Group (NSG) or the Proliferation Security Initiative (PSI), which revolve around coordinating action by a discrete sub-community of states that share some common capability, interest, or perspective; and (3) what this paper will call “hybrid” regimes that fall cleanly into neither category, with special emphasis upon the approach embodied in United Nations Security Council Resolution 1540. This essay outlines these various approaches and discusses the structural and practical strengths and weaknesses of each.

As should become clear, each approach does have notable weaknesses, and sensible policymaking without a keen understanding of these will be much more difficult. With a proper appreciation for the relative merits and demerits of each approach, however—an understanding which may require partially deflating some “theological” assumptions about the unalloyed advantages of universalist regimes—it ought to be possible for sensible policymakers to layer and prioritize approaches, depending upon the circumstances, in complementary ways that contribute usefully to nonproliferation goals.

## II. UNIVERSALIST APPROACHES

### A. *The Appeal of Universality*

The first instinct of most people in the arms control community and in international legal circles seems to be to address nonproliferation challenges by turning to formal treaty regimes that aspire to be universal in scope. This instinct finds its expression in the major conventions of our time. The NPT is a key element of the broader nuclear nonproliferation re-

gime, just as the Chemical Weapons Convention (CWC)<sup>3</sup> and the Convention on Biological and Toxin Weapons (BWC)<sup>4</sup> try to address chemical weapons and biological weapons proliferation.

With the exception of the BWC—a verification-focused protocol that collapsed some years ago under the weight of its inability to enable effective verification—such treaty regimes tend to combine formal legal obligations with declaration procedures and international inspectorate bureaucracies. The NPT does admit different sets of obligations for nuclear weapons-possessor and non-possessor states, but universalist regimes generally prefer to eschew contextual application in favor of one-size-fits-all rules that attempt to be non-discriminatory by means of treating different situations in the same way. The governing bodies and bureaucracies of such regimes tend to be broad and globally “representative” and to include at least informal participation by different groups of states (e.g., various regional clusters or semi-organized groups of states professing some sort of specific alignment) that loosely fill the functional role that political parties might play in a national legislature. Finally, such regimes tend to have a decided preference for consensus-based decision-making.

1. *Relative Credibility in a Political World*

When universalist regimes work, they can contribute in very important and perhaps indispensable ways to nonproliferation goals. One of these contributions can be in producing politically credible verification-related information upon which governments can rely in making compliance-enforcement decisions. As an example, the United States was issuing warnings about the secret nuclear weapons aspirations of Libya and Iran as early as the 1993 noncompliance report of the U.S. Arms Control and Disarmament Agency (ACDA).<sup>5</sup>

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3. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, *opened for signature* Jan. 13, 1993, 32 I.L.M. 804.

4. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, *opened for signature* Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163.

5. See U.S. ARMS CONTROL AND DISARMAMENT AGENCY, ADHERENCE TO AND COMPLIANCE WITH ARMS CONTROL AGREEMENTS AND THE PRESIDENT'S RE-

The world now knows—from the 2004 U.S. and U.K. removal from Libya of centrifuge equipment, uranium hexafluoride centrifuge feedstock, hundreds of tons of uranium conversion equipment, and nuclear weapons designs<sup>6</sup>—that these early U.S. warnings about Libya were quite correct. And the world

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PORT TO CONGRESS ON SOVIET NONCOMPLIANCE WITH ARMS CONTROL AGREEMENTS (Jan. 14, 1993) [unclassified version], at 17 (“Iran has demonstrated a continuing interest in nuclear weapons and related technology that causes the U.S. to assess that Iran is in the early stages of developing a nuclear weapons program.”), 18 (“Despite Libya’s NPT membership, Libyan leader Qadhafi has a well-known and long-standing desire for nuclear weapons and may be attempting to lay the foundation for a more serious effort to produce them.”). These statements were all that it was possible to say at the unclassified level at that time. By August 2005, the unclassified version of the U.S. Government’s noncompliance report had become much clearer and more detailed in its discussions and its findings. See U.S. DEP’T. OF STATE, ADHERENCE TO AND COMPLIANCE WITH ARMS CONTROL, NONPROLIFERATION, AND DISARMAMENT AGREEMENTS AND COMMITMENTS 80 (Aug. 30, 2005), available at <http://www.state.gov/documents/organization/52113.pdf> [hereinafter NONCOMPLIANCE REPORT 2005] (concluding that “[t]he breadth of Iran’s nuclear development efforts, the secrecy and deceptions with which they have been conducted for nearly 20 years, its redundant and suspicious procurement channels, Iran’s persistent failure to comply with its obligations to report to the IAEA and to apply safeguards to such activities, and the lack of a reasonable economic justification for this program leads us to conclude that Iran is pursuing an effort to manufacture nuclear weapons, and has sought and received assistance in this effort in violation of Article II of the NPT. This weapons program combines elements of not only the activities declared to the IAEA and ostensibly run by the Atomic Energy Organization of Iran (AEOI), but also any still undeclared fuel cycle and other activities that may exist, including those that may be run solely b[y] the military. In addition, Iran’s past failure to declare the import of UF<sub>6</sub>, failure to provide design information to the IAEA on the existing centrifuge facility prior to the introduction of nuclear material, and its conduct of undeclared laser isotope separation, uranium conversion experiments, and plutonium separation work further reinforce this assessment and also make clear that Iran has violated Article III of the NPT and its IAEA safeguards agreement.”). The report also discussed U.S. government conclusions about Libya’s treaty violations with regard to Weapons of Mass Destruction (WMD): “The United States finds that prior to its decision to rid itself of its WMD and long-range missile programs, Libya pursued an active nuclear weapons development program, and that various aspects of this program violated Libya’s obligations under Articles II and III of the NPT, as well as its IAEA safeguards agreement.” *Id.* at 86.

6. See generally *Completion of Verification Work in Libya: Hearing on Libya’s WMD Disarmament Before the Subcomm. on International Terrorism, Nonproliferation, and Human Rights of the S. Comm. on International Relations*, 108th Cong. 933 (2004) (statement of Paula A. DeSutter, Assistant Secretary of State, Bu-

also now knows much about Iran's secret weapons efforts, which involved two decades' worth of black market purchases and lies to the IAEA and which, at the time of writing, are still underway and preoccupying international diplomatic circles and the United Nations (UN) Security Council. Until this information became public by other means, however, there was obviously a limit to the diplomatic coalition-building that the United States could effect on the basis of years of unspecific public warnings and underlying intelligence information it could not reveal in any detail.

The IAEA-based inspection regime under the NPT has therefore done nonproliferation a great service in providing politically credible and unclassified information on Iran's program. The national governments that make up the IAEA's Board have quite appropriately found Iran to be noncompliant with its safeguards obligations on the basis of the IAEA's information and have invited the UN Security Council to hold Iran accountable—which it has begun to do with Resolutions 1737 (2006) and 1747 (2007).<sup>7</sup> Such progress would have been far more difficult merely on the basis of one country's exhortation to "trust me," however unambiguous the information upon which the plea was based.

## 2. *The Symbolic Weight of Universal Regimes*

Universal regimes also provide at least some "compellance" pressure by their very existence. Even without an international verification mechanism, a legally binding treaty regime exerts some force in constraining state behavior. This is in part because states party continue to look for problems through their own national means and methods of verification and thus violators cannot be certain that they will not be discovered and that their actions will not provoke alliances against them. Moreover, states are not homogeneous monoliths, and the discovery of dishonest and provocative behavior can play into the hands of rival factions or regime opponents. Finally, one might optimistically suggest that most states, like most people, do not like to think of themselves (or be thought

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reau of Verification and Compliance, Department of State) [hereinafter DeSutter], available at <http://www.state.gov/t/vci/rls/rm/2004/37220>.

7. S.C. Res. 1737, U.N. Doc. S/RES/1737 (Dec. 27, 2006); S.C. Res. 1747, U.N. Doc. S/RES/1747 (Mar. 24, 2007).

of) as scofflaws. Hypocrisy, after all, is the tribute vice pays to virtue—and most governments would not sign to a treaty regime were they not at least somewhat eager to get credit for compliance.

As more states join, universalist regimes become “status magnets,” or at least non-membership becomes increasingly unattractive in political terms. Some governments, such as that of North Korea—and, increasingly, Iran—almost seem to relish the prospect of being considered pariah states. Others, such as India, Pakistan, and Israel, appear to feel that very specific national interests require their non-participation in the NPT. But most governments have a weaker stomach for being the odd man out, and universalist regimes can clearly acquire some appeal to those who are not yet “in the club.”

This “status factor” may be a neutral phenomenon in itself, but it can have positive effects insofar as even ill-intentioned participants enticed into a regime for such reasons will be subjected to some kind of safeguards, inspection regime, or other transparency measures, making deviant behavior (through proliferation) at least somewhat more costly, difficult, and detectable. Ideally, transparency and inspection regimes have enough of a chance of leading to the detection of malfeasance—accompanied by the possibility of meaningful adverse consequences for the violator—that membership alone can help make even the most cynical government behave.

Finally, in what one hopes is not a trivial additional benefit, universalist regimes also carry important symbolic weight. They appear to scratch something of an “itch,” at least with international lawyers and in many political circles, for solutions that seek to apply uniform legal rules in support of good causes across all humanity. (This impulse toward a universal and progressive rule of law may underlie persistent, though still logically and legally flawed, efforts to pretend that the NPT’s rules are norms of customary international law, or even *jus cogens*.) The very fact of a universalist regime’s existence seems to provide psychological value for many, for it arguably speaks not only to governments’ formal commitment to a specific substantive end, such as nuclear nonproliferation, but also to mankind’s aspirations to a just international order in which substantive and procedural fairness count for more than the perquisites of power and circumstance. And when the rul-

ing bodies or general conferences of such institutions speak, their very universality and representativeness are felt to give them special political and moral impact.

### B. *Paralysis and Politicization*

#### 1. *The Limits of Inspection*

Notwithstanding their appeal, universalist regimes also have stark weaknesses, many of which are corollaries of their strengths. To begin with, there is always the danger that an inspection or transparency regime will have the undesirable side effect of providing “cover” for noncompliance. Many observers tend to overestimate the effectiveness of inspections as a verification tool, forgetting how dependent such mechanisms are on negotiated or time-delayed access provisions with the host government and the limited ability of inspections to reveal anything beyond the time and the place of the inspection. When looking for what is concealed, unless they are lucky—or the host government is inept—inspectors remain largely dependent for direction upon exogenous sources of information. Inspectors can be quite good at confirming data in a country’s declarations, but are generally much less able to detect undeclared activities.

For example, for all the outstanding information that has been developed by IAEA investigators on Iran’s previously-secret nuclear efforts, one should not forget that the Agency inspected Iran for many years while Tehran’s nuclear efforts were underway and repeatedly gave the regime clean bills of health. The IAEA’s breakthrough only came in 2002, when stories of the secret Natanz centrifuge facility appeared in the press and gave the Agency a reason to investigate further. One should also not forget that, during the course of these IAEA visits, the Iranians learned a good deal about how to stymie inspectors.

After IAEA environmental sampling detected enriched uranium at Natanz to Iran’s great embarrassment, the Iranians subjected the Kalaye Electric facility to a thorough internal cleanup before letting Agency inspectors visit. When the inspectors were finally allowed to visit Kalaye Electric, the recently sanitized facility still yielded traces of enriched uranium inconsistent with Iran’s nuclear materials inventory declarations. After this second discovery, Iran seemed to figure things

out. By the time it finally let IAEA inspectors visit the location known as Lavisan, the suspect enrichment facility there had been torn down and carted away—even including the topsoil.<sup>8</sup>

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8. See IAEA Director General Report, Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran, ¶¶ 4-5, 8, IAEA Doc. GOV/2003/40 (June 6, 2003) (discussing original visit to Natanz and original claims about Kalaye), *available at* <http://www.iaea.org/Publications/Documents/Board/2003/gov2003-40.pdf>; IAEA Director General Report, Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran, ¶¶ 32, 34-36, IAEA Doc. GOV/2003/63 (Aug. 26, 2003) (recounting discovery of enriched uranium residue at Natanz inconsistent with Iran's declared inventory of nuclear material and noting "considerable modification of the premises" at Kalaye prior to Iran giving permission to take environmental samples), *available at* <http://www.iaea.org/Publications/Documents/Board/2003/gov2003-63.pdf>; IAEA Director General Report, Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran, ¶¶ 30, 32, IAEA Doc. GOV/2003/75 (Nov. 10, 2003) (recounting Iran's acknowledgment that undeclared experiments with foreign-procured UF<sub>6</sub> had in fact taken place at Kalaye and noting both that Iran had falsely declared material used in these experiments as having been lost due to "leaking valves" and that production of centrifuge components had occurred at Kalaye); IAEA Director General Report, Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran, ¶ 39, IAEA Doc. GOV/2004/11 (Feb. 24, 2004) (noting that Iranian claims of past work at Natanz and Kalaye were inconsistent with sampling data on enriched uranium contamination); IAEA Director General Report, Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran, ¶ 27, IAEA Doc. GOV/2004/83 (Nov. 15, 2004) (noting that "Iran took a number of steps to conceal the origin, source, and extent of Iran's enrichment programme, including: denying access to the Kalaye Electric Company workshop in February 2003 and refusing to permit the Agency to take environmental samples there in March 2003; dismantling equipment used at the workshop and moving it to Pars Trash . . . renovating part of the Kalaye Electric Company workshop in order to prevent detection of the use of nuclear material; and submitting incorrect and complete declarations"), *available at* <http://www.fas.org/nuke/guide/iran/iaea1104.pdf>; *id.* ¶ 32 (noting that renovation at Kalaye, "which was carried out in connection with Iran's attempt to conceal the activities carried out there, has interfered with the Agency's ability to resolve issues associated with Iran's centrifuge enrichment programme"); IAEA Director General Report, Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran, ¶¶ 27-29, Annex 1 ¶¶ 25-28, IAEA Doc. GOV/2004/34 (June 1, 2004) (discussing enriched uranium contamination findings at Natanz and Kalaye), *available at* <http://www.iaea.org/Publications/Documents/Board/2004/gov2004-34.pdf>; IAEA Doc. GOV/2004/83, *supra*, ¶¶ 37-40 (same); IAEA Director General Report, Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran, ¶¶ 42-44, IAEA Doc. GOV/2004/60 (Sept. 1, 2004) (describing "the possibility of a concealment effort through the removal of the buildings" at

Not surprisingly, the Agency found nothing there. Today, the IAEA Director General has made it clear that finishing the Agency's work in Iran will require more information from and access to authority in Iran than permitted even under the IAEA's Additional Protocol, but Iran has not allowed the IAEA this additional access and information.<sup>9</sup>

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Lavisan-Shian after IAEA requested access to site), *available at* <http://www.iaea.org/Publications/Documents/Board/2004/gov2004-60.pdf>; *cf.* IAEA Doc. GOV/2003/75, *supra*, ¶¶ 38-40, Annex 1 ¶¶ 59-62 (recounting Iran's admission of laser uranium enrichment experiments at Lashkar Ab'ad only after IAEA inspectors took environmental samples there). *See also* Dr. Hassan Rowhani, Address to the Supreme Cultural Revolution Council, *in* TEHRAN RAHBORD (Iran), Sept. 30, 2005, at 7-38 (FBIS translation IAP20060113336001) ("Of course, we did not know precisely how accurate their sampling would be or how contaminated our centers truly were.").

9. After the IAEA's failure to detect the relatively advanced secret nuclear weapons program of Saddam Hussein's Iraq prior to the Gulf War of 1991, the Agency developed a Model Additional Protocol designed to help IAEA inspectors do a better job at finding undeclared nuclear work. When signed and ratified by a host government, this Additional Protocol provides the IAEA with certain investigative authorities in that country beyond those entailed by a regular Comprehensive Safeguards Agreement. *See* IAEA Information Circular, Model Protocol Additional to the Agreement(s) Between State(s) and the International Atomic Energy Agency for the Application of Safeguards, IAEA Doc. INFCIRC/540 (Sept. 1997), *available at* <http://www.iaea.org/Publications/Documents/Infcircs/1998/infcirc540corrected.pdf>. Iran refused to ratify the Additional Protocol, but nonetheless pledged to follow its procedures before finally renouncing it altogether. *See* Paul Kerr, *Iran, EU Struggle to Start Nuclear Talks*, ARMS CONTROL TODAY, Oct. 2006, at 24, *available at* [http://www.armscontrol.org/act/2006\\_10/IranEU.asp](http://www.armscontrol.org/act/2006_10/IranEU.asp).

After the experience at Natanz and Kalaye Electric, the IAEA stated that "[i]n view of the fact that the Agency is not yet in a position to clarify some important outstanding issues after two and a half years of intensive inspections and investigation, Iran's full transparency is indispensable and overdue. Given Iran's past concealment efforts over many years, such transparency measures should extend beyond the formal requirements of the Safeguards Agreement and Additional Protocol and include access to individuals, documentation related to procurement, dual use equipment, certain military owned workshops and research and development locations. Without such transparency measures, the Agency's ability to reconstruct, in particular, the chronology of enrichment research and development, which is essential for the Agency to verify the correctness and completeness of the statements made by Iran, will be restricted." IAEA Director's Report, Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran, ¶ 50, IAEA Doc. GOV/2005/67 (Sept. 2, 2005). As already noted, Iran has not permitted the IAEA this additional access, and the U.N. Security Council has yet to require, pursuant to its Chapter VII authority to maintain international peace and security, that Iran provide such transparency.

The IAEA safeguards system has produced the most intrusive and capable inspection regime that currently exists to support any nonproliferation objective. Nonetheless, even this system has been unable to effectively monitor compliance by Iran. We should be careful, therefore, not to overestimate the capabilities of inspection regimes faced with denial and deception efforts by a determined and sophisticated violator. Furthermore, without the ability to take some kind of action to bring violators back into compliance, offset the threat presented by noncompliance, and/or deter future violators from taking a similar course of action, there is little point in conducting inspections or even in detecting a violation.<sup>10</sup>

Likewise, if an inspection regime misses something important, the fact that the violator has “passed” an inspection will constitute a noncompliance “false negative” which in turn can create complacency and undercut the ability of those in the international community who do perceive a problem to mobilize diplomatic pressure against the violator. Particularly in a culture that still overestimates the ability of inspection regimes to defeat sophisticated denial and deception, “false negatives” can be very damaging, for the false sense of security they create is directly proportional to regime participants’ determination to rely upon the international mechanism in question. Such dynamics work against the ability to mobilize action against violators and undercut the efficacy of efforts to verify regime compliance in the first place.

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10. See, e.g., U.N. GAOR, 59th Sess., First Comm., 15th mtg. at 13, U.N. Doc. A/C.1/59/PV.15 (Oct. 22, 2004) (“In January 1961, in an article in *Foreign Affairs*, Dr. Fred C. Ikle, a former Director of the U.S. Arms Control and Disarmament Agency, grappled with the issue of compliance in a seminal article that you all might find as fascinating as I have. That article was entitled ‘After Detection . . . What?’ In the article, Dr. Ikle made the critical point that detecting violations is not enough. What really counts is to ensure that there are sufficient consequences to a violation once it has been detected. Dr. Ikle pointed out that these consequences alone will determine whether or not the violator stands to gain in the end. His words are as true today as when he wrote them: only by making violators face consequences for their violations can they be expected to take compliance seriously, and only by making them face such consequences will other would-be violators be deterred.”).

## 2. *The Challenge of Intentions*

The weaknesses of inspection mechanisms and, correspondingly, the challenges of verification may be increasing as technological changes make the possession of dual-use technology more prevalent and less obvious than ever. Biotechnology is already probably well past the point of no return with respect to international verification mechanisms. Most of the capabilities needed to make biological weapons overlap with the everyday tools of sophisticated science, medicine, and bio-engineering and are both so easily acquired and so easily concealed that there was apparently no real chance of a meaningfully verifiable protocol for the BWC. Chemical weapons (CW) technology is now moving in this direction as well, with sophisticated modern chemical plants increasingly able to provide on-call CW mobilization capability with very few warning signs and with the technology for making chemical reactors itself shrinking rapidly.

Nuclear technology probably remains the most easily verified of the three main types of weapons of mass destruction,<sup>11</sup> but the significance of this distinction is limited. Already, for instance, it is becoming clear that proliferators who are not necessarily in a great hurry and who are keen to hide their activity may have different ideas about what constitutes a “big enough” cascade of uranium enrichment gas centrifuges than observers trained in the technology of Cold War-era, super-power-style mass production of fissile materials. More troubling still is the problem of judging intention—a challenge that

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11. Another important field for arms control, nonproliferation, and disarmament verification relates to delivery systems (e.g., ballistic or cruise missiles). However, even in that arena—traditionally one in which outside observers can gain useful information from observations of flight testing—the proliferation of sophisticated modeling and simulation software and the availability of high-performance computing are making it easier to hide large amounts of development work. Existing arms control regimes such as the Strategic Arms Reduction Treaty (START) between the United States and the Soviet Union/Russia have relied upon a limited number of carefully structured, highly formalized, bilaterally-conducted on-site visits, coupled with extensive use of each party’s national means and methods of verification (e.g., reconnaissance satellites and long-range radar observation). They have not involved international inspection mechanisms. *See, e.g.*, Treaty on the Reduction and Limitation of Strategic Offensive Arms (START I), U.S.-U.S.S.R., July 31, 1991, S. TREATY DOC. 102-20 (1991).

nonproliferation regimes increasingly encounter as dual-use technology becomes more prevalent.

Most famously, it is becoming commonplace to fret about how easily, under the NPT, a country may lawfully acquire the capability to *almost* produce a nuclear weapon.<sup>12</sup> The IAEA Director General has called this a “virtual” weapons capability, and—notwithstanding Iran’s public pretense of peaceful uses—Hassan Rowhani, Secretary to Iran’s Supreme National Security Council, has practically boasted about this loophole. According to Rowhani, “having [a] fuel cycle capability almost means that the country that possesses this capability is able to produce nuclear weapons, should that country have the political will to do so.”<sup>13</sup> Fortunately for its hardworking inspectors, the IAEA is authorized merely to investigate compliance with nuclear materials safeguards, an intent-neutral issue, and is not charged with investigating whether or not particular activities were undertaken with the *purpose* of furthering a nuclear weapons program, which is what would help identify an NPT article II violation.<sup>14</sup> Agency inspectors can still do their jobs

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12. As U.S. officials have explained it, understanding “the purpose of a particular activity” is critical in making Article II compliance assessments. Facts, for instance, “indicating that the purpose of a particular activity was the acquisition of a nuclear explosive device would tend to show noncompliance.” While “compliance assessments are highly contextual, and no single, comprehensive definition, unrelated to specific factual situations, would be useful,” uranium enrichment does not seem to be unlawful in itself. Rather, such activity must be undertaken with the intent of producing fissile materials for a nuclear weapon in order to be in violation of the treaty. Some activities may demonstrate purpose on their face, but assessing the implications of dual-use activities may require further inquiry into underlying intent. “[A]ctivities related to the acquisition or testing of the non-nuclear components of the nuclear explosion are an example of the type of activities that would provide a more direct indicator of a weapons program. Informed by the analysis of such factors, judgments as to the purpose of a Party’s nuclear activities therefore lie at the core of Article II compliance assessments.” NONCOMPLIANCE REPORT 2005, *supra* note 5, at 64-65.

13. Rowhani, *supra* note 8, at 7-38.

14. This, for instance, is presumably why key phrasing in IAEA safeguards agreements refers to “verification of non-diversion.” Diversion to purposes unknown—i.e., unaccounted-for nuclear materials that should be covered by safeguards—is safeguards noncompliance, and no affirmative finding of weapons intent is required. *See, e.g.*, Iranian Safeguards Agreement, *supra* note 2, at art. 28 (“The objective of the safeguards procedures set forth in this part of the Agreement is the timely detection of diversion of significant quantities of nuclear material from peaceful nuclear activities to the manu-

because fuel-cycle activity has some relatively clear radioactive “observables,” and to detect undeclared nuclear activity is in itself to identify a safeguards problem.

Even if the “virtual weapons capability” problem does not in fact undercut IAEA inspections, the issue nonetheless points to a weakness in inspection mechanisms. In a world of near-weapons programs acquired legally, maintained (for now) under safeguards, and employing apparently legitimate dual-use technology, what kind of international verification protocol could possibly address program purpose? (For that matter, what could guard against a sudden *change* of intention, which is another way of articulating the danger of regime “breakout” by a member that has acquired the capability to make nuclear weapons through dual-use technology?)

This is one of the key problems that have made a Fissile Material Cutoff Treaty unverifiable and which would plague any future international attempt to provide verification of NPT article II compliance.<sup>15</sup> How can an inspector distinguish fissile material produced for weapons purposes from that pro-

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duction of nuclear weapons or other nuclear explosive devices or for purposes unknown, and deterrence of such diversion by the risk of early detection.”); *see also id.* at arts. 18-19 (discussing permitted steps in the event that “the Agency is not able to verify that there has been no diversion of nuclear material required to be safeguarded under this Agreement, to nuclear weapons or other nuclear explosive devices”).

15. The IAEA’s authority currently runs only to nuclear materials accountancy (under safeguards agreements) and to searching for undeclared nuclear activity that should be subject to safeguards rules (under the Additional Protocol). The Agency is not authorized to verify compliance with Article II—though this has not stopped Director General Mohammed ElBaradei from making comments *ultra vires* that wrongly imply such authority even as they refuse to draw obvious inferences from the evidence collected by his own inspectors. *See, e.g.,* IAEA Doc. GOV/2003/75, *supra* note 8, ¶ 52 (“To date, there is no evidence that the previously undeclared nuclear material and activities referred to above were related to a nuclear weapons programme.”). ElBaradei subsequently revised his phrasing to speak of “proof” instead of “evidence.” *See* Mohammed ElBaradei, Introductory Statement to the Board of Governors (Nov. 20, 2003), *available at* <http://www.iaea.org/NewsCenter/Statements/2003/ebsp2003n025.html> (“[W]e have no proof to date that Iran’s past undeclared activities have been linked to a nuclear weapons program.”). In 2005, he spoke more accurately to the press in qualifying his earlier—and widely-quoted—remarks by noting that “I don’t read intentions” and by making clear that, while all *declared* nuclear material in Iran had been placed under IAEA safeguards, “[w]ith regard to the country as a whole, the jury is still out.” Press Release, Mohammed

duced for some other purpose? How can inspectors from an international organization “prove” to the satisfaction of a politically fractious international community the intent behind an enrichment program if they do not fortuitously stumble upon that rare bit of activity, technology, or information that has essentially no non-weapons application?<sup>16</sup> Hoping for serendipitous host-government mistakes is not serious verification planning, and an international system designed to ferret out such information would likely quickly collapse under its own weight. All in all, it seems safe to conclude that the most meaningful insights available into questions of intent will remain those which international organizations are least equipped to provide: complicated inferences drawn from circumstantial evidence and conclusions based upon the stealing of secrets (e.g., through intelligence collection).<sup>17</sup>

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ElBaradei, IAEA Dir. Gen. (Aug. 11, 2005), *available at* <http://www.iaea.org/NewsCenter/Transcripts/2005/transcr11082005.html>.

Whether or not it is actually true that the IAEA had, by November 2003, “no evidence” of Iranian nuclear weapons intent is a subject beyond the scope of this essay. In any event, by November 2005, the Agency reported having found in Iran documentation “related to the procedural requirements for the reduction of UF<sub>6</sub> to metal in small quantities, and on the casting and machining of enriched, natural and depleted uranium into hemispherical forms.” IAEA Director’s Report, Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran, at ¶ 6, IAEA Doc. GOV/2005/87 (Nov. 18, 2005). Quite apart from the accumulated weight of circumstantial evidence reasonably explainable only by weapons intent, this new documentation was clearly related to manufacturing the core of a nuclear implosion device and had no use in a legitimate civilian nuclear power program. *See, e.g.*, NONCOMPLIANCE REPORT 2005, *supra* note 5, at 64-65, 72-80.

16. *See, e.g.*, IAEA Doc. GOV/2005/87, *supra* note 15, ¶ 6 (noting IAEA discovery in Iran of documentation about machining enriched uranium into hemispherical shells).

17. One final note is in order about the limitations of international inspection regimes. Inspectors’ dependence upon cueing information makes international verification bureaucracies surprisingly dependent on external information windfalls (e.g., through opposition groups or national intelligence services) to help them know where to look. But international organizations are seldom ideal intelligence-sharing partners. Regardless of who wins the endless finger-pointing game between national capitals and international organizations about who leaks more to the media, international organizations are by their nature counterintelligence risks. They hire personnel from all over the world, often on a crude basis of geographic proportionality, and are structurally unable to perform serious security vetting of the people they hire. No national government would share sensitive information

One of the strengths of universalist regimes is that they help states of good will demonstrate their compliance to others—e.g., through inspectors' verification of the accuracy and apparent completeness of nuclear material and facility declarations. Most states that are complying will presumably feel it is in their interest for other states to understand this. Such approaches are sorely tested, however, by states that desire credit for complying when they are not. After all, as noted above, a "false negative" reading from an inspectorate can be more valuable to proliferators than the mere international ignorance that would result from non-participation in the inspection regime. Non-participation elicits at least a degree of heightened suspicion and scrutiny; false negatives dissuade such attention, even within an inspection regime. And when a clandestine violator is relatively sophisticated in its denial and deception efforts, a universalist regime's institutional answer—more aggressive and wide-ranging inspections—can become unwieldy if actually applied on a "nondiscriminatory" basis. For example, most participating governments would be likely to find a costly and intrusive inspectorate unpalatable even if it were capable of answering the verification questions posed to it.

### 3. *Multilateralism and Its Discontents*

#### a. *Lowest Common Denominator Decisions*

The decisionmaking bodies of universalist regimes can also present frustrations. Simply put, such regimes are often composed of a small number of countries that care greatly about the end the regimes are structured to promote and a generally much larger number that care somewhat less about that goal. Those that care less must nonetheless be accommo-

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within its own ranks on such a basis, and the necessary presumption that international organizations are widely penetrated by multiple foreign security services makes intelligence-sharing with them uncomfortable at best. A prudent international organization can help reduce the risks by engaging in internal compartmentalization—e.g., by keeping Iranian inspectors off the Iran team, and by reducing to a minimum the circle of those "in the know" about information on a suspect facility—but for the most part these problems are structural and unavoidable. This does not mean that governments never share intelligence with international organizations, but it means that such sharing, when it occurs, is necessarily awkward and likely incomplete.

dated in internal debates and given the consideration due their numbers—even though their principal concerns are not always congruent with the purpose of the overall undertaking. In universalist regimes with broad, globally “representative” memberships, particularly those which prize and generally operate by consensus—the IAEA Board’s famous “Spirit of Vienna” comes to mind<sup>18</sup>—decisionmaking can often tend toward lowest common denominator politics.

It can be difficult to reach real decisions in such consensus-driven bodies, largely because repeated efforts at continued dialogue and compromise draw fewer objections than does resolute and effective action against violators—which often entails bearing costs and taking risks. For most purposes, the Iranian noncompliance resolution vote at the IAEA in September 2005<sup>19</sup> and the UN Security Council report resolution vote of February 2006<sup>20</sup> being hard-won exceptions, the IAEA Board of Governors operates not unlike the Security Council itself, except that all thirty five members of the large Board have de facto veto powers.

b. *Warping Regimes Against Their Goals*

If the threat targeted by the treaty regime is regarded by many participants as a problem that seriously affects only a few, these drawbacks may be particularly pernicious. Nonproliferation may be such a case, since many participants in the NPT system seem to prize important but secondary interests served by the regime more than they prize the nuclear nonproliferation norms that lie at its core. In theory, of course, every country has a strong security interest in preventing its neighbors from acquiring nuclear weapons. Indeed, as

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18. See, e.g., David Waller, IAEA Deputy Dir. Gen., Statement at the “Atoms for Peace: A Future After 50 Years?” Conference: Atoms for Peace: A perspective from the IAEA (Dec. 8, 2003), available at <http://www.iaea.org/NewsCenter/Statements/DDGs/2003/waller08122003.html>.

19. IAEA Board of Governors Resolution, “Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran,” IAEA Doc. GOV/2005/77 (Sept. 24, 2005), available at <http://www.iaea.org/Publications/Documents/Board/2005/gov2005-77.pdf>.

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

will be discussed below, this understanding is the foundation of the NPT. In practice, however, such “atomic neighbor” concerns can sometimes seem to be merely hypothetical and distant worries, because the rogue states that present the worst noncompliance challenges do not directly threaten most states party. (No one, for example, thinks that Iran wants nuclear weapons in order to “wipe” Malaysia “off the map,”<sup>21</sup> or to deter China’s potential involvement in support of its allies in the Middle East.<sup>22</sup>) It is a continuing challenge of compliance diplomacy to ensure that all parties remember and act upon their real shared interests in preventing proliferation. Moreover, even states party with real “atomic neighbor” fears may tend to assume that the small number of countries with interests *very* directly affected will act on their own to solve a compliance problem—and that if these countries do not, there is no point in others getting involved anyway, because the problem is likely insoluble. Such beliefs would reflect enormous cynicism about the multilateral nuclear nonproliferation regime, but they may be surprisingly common.

To many states party in such an environment, things like technology transfers, development project assistance, and the price of oil may loom as far more significant issues than mere nonproliferation—making simple conflict avoidance preferable to the detection, remedy, and deterrence of noncompliance, and therefore making violations costless and all the more attractive. In such circumstances, a universalist nonproliferation regime can cut against the interests it is supposed to serve, turning into a politicized weapon of entanglement, inhibition, and delay more useful against the governments

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21. Cf. Aljazeera.net, *Ahmadinejad: Wipe Israel Off the Map*, <http://english.aljazeera.net/English/archive/archive?ArchiveId=15816> (last visited July 3, 2007) (quoting Iranian President Mahmoud Ahmadinejad that “[a]s the Imam said, ‘Israel must be wiped off the map’”).

22. Compare Brian Whitmore, *Tension Grows over Iran’s Nuclear Aims*, BOSTON GLOBE, Sept. 26, 2004, at A27 (quoting Iranian Defense Minister Ali Shamkhani that Iran is “ready to confront all regional and extraregional threats”), with General James H.B. Peay III, Commander of U.S. Central Command, Remarks to the Association of Military Surgeons (Nov. 12, 1996) (“The first pillar, power projection, reflects our military’s ability to rapidly move extraregional forces to the region during crisis and posturing them for combat operations.”), in DEFENSE ISSUES, vol. 11, no. 102, available at <http://www.defenselink.mil/speeches/1996/s19961112-peay.html>.

that care the most about achieving the real goals of the regime than against its violators.

In the NPT context, the IAEA has flirted with this unhappy fate, although its Board of Governors did ultimately report Iran's flagrant safeguards noncompliance to the UN Security Council. (Additionally, the Agency's Safeguards Division has done outstanding work in developing and making available to the public a great deal of information about the massive nuclear development project that was secretly underway in Iran for nearly two decades before being revealed in the press in August 2002.) The IAEA Board was once a fairly quiet, uncontroversial, and technically-focused body. After the centrifuge plant at Natanz was discovered, however, a chapter of the self-described Non-Aligned Movement (NAM) became very active in Vienna.<sup>23</sup> Following this innovation, it took the newly fractious and histrionic Board three years to even report Iran to the Security Council. Meanwhile, Iran put this extra time to good use. Notwithstanding its earlier promises to suspend enrichment-related activities, which apparently did not stop the production of centrifuge components anyway,<sup>24</sup> Iranian centrifuge research continued apace until Iran claimed in April 2006 to have mastered uranium enrichment technology.<sup>25</sup> No wonder Hassan Rowhani has bragged about how the regime used negotiations to delay and confound the Ameri-

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23. The NAM's Vienna Chapter was apparently established under Malaysia's chairmanship of the Movement in late 2002 or early 2003 in order to "deal mainly with IAEA Safeguard issues." Meeting of the Ministers of Foreign Affairs of the Non-Aligned Movement at the 58th Session of the General Assembly of the United Nations, *Report on the Activities of the Non-Aligned Movement*, ¶ 9, U.N. Doc. NAM/FMM/GA58/Chair/Report (Sept. 26, 2003), available at <http://www.un.int/malaysia/NAM/RptNAMActFMM26Sept03.html>; see also XIV Ministerial Conference of the Non-Aligned Movement, Aug. 17-19, 2004, *Report of the Chair on the Activities of the Non-Aligned Movement*, available at <http://www.nam.gov.za/media/040920b.htm> ("The NAM Chapter in Vienna, comprising 51 Member States of the Movement, was established to coordinate the NAM's positions on issues of disarmament and peaceful uses of nuclear power.").

24. See, e.g., IAEA Doc. GOV/2004/83, *supra* note 8, ¶ 126 (noting that despite "the suspension of centrifuge component production," Iran had notified IAEA that "three private companies would continue with centrifuge component production").

25. See, e.g., *Iran Says It Joins 'Countries with Nuclear Technology'*, CNN.com, Apr. 11, 2006, <http://www.cnn.com/2006/WORLD/meast/04/11/iran.nuclear/index.html> (quoting Iranian President Ahmadinejad's declaration

cans and the Europeans while Iran continued nuclear work on its own schedule.<sup>26</sup>

c. *The Perils of Attractiveness*

If, as suggested earlier, regimes become attractive “clubs” to join for status-related reasons independent of a participant’s real belief in the merits of the regime’s nonproliferation goals, one must expect at least some states party not to share or not to fully share such goals. According to Rowhani,

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that “I officially announce that Iran has joined countries with nuclear technology”).

26. See Mehdi Mohammadi, *Nuclear Case from Beginning to End in Interview with Dr. Hassan Rowhani (Part 1): We Are Testing Europe*, TEHRAN KEYHAN (Iran), July 23, 2005, at 12 (FBIS translation IAP20050726008002):

On the surface, it may seem that it has been a year and nine months since we accepted the suspension [as part of diplomatic dialogue with the United Kingdom, France, and Germany]. But the fact of the matter is that we have fixed many of the flaws in our work during this period. We continued our production and assemblage activities until the time of the Paris agreement [with the Europeans]. It is true that at a certain juncture between February and June 2004, there was [a] pause in this process according to the Brussels agreement [also with the Europeans]. But after June, we made up for that pause with extra effort. We didn’t suspend the Esfahan [uranium conversion] project for even a moment until the project was completed and tested and its product [uranium hexafluoride centrifuge feedstock] was achieved. The Arak [heavy water reactor] project was never suspended either. . . . [T]he matter that we constantly had in mind was that when it came to suspension [of enrichment-related activities], we should suffice to the minimum extent, in order to suspend as little of our activities as possible. More importantly, when a certain activity was suspended, during that period we would concentrate all of our effort and energy on other activities. The day when [construction of the centrifuge enrichment facility at] Natanz was suspended, we put all of our efforts into [uranium conversion activity at] Esfahan. Now that Esfahan is in suspension, we are fixing other existing flaws.

See also Rowhani, *supra* note 8, at 7-38 (“While we were talking with the Europeans in Tehran, we were installing equipment in parts of the facility in Esfahan, but we still had a long way to go to complete the project. In fact, by creating a calm environment [through negotiations], we were able to complete the work in Esfahan. Today, we can convert yellowcake into UF<sub>4</sub> and UF<sub>6</sub>, and that is a very important matter . . . . As far as technology is concerned, we are in better shape than we were last year . . . . But today the Esfahan facility has become operational, and we have made good progress in this area from a technical point of view. We are also in a good situation as far as building [centrifuge] parts and assembly is concerned.”).

for instance, the Iranian government participated in both the CWC and the NPT simply to relieve “pressure” against Iran.<sup>27</sup> The degree to which Iran actually cared about complying with the NPT and safeguards obligations is clear from the clerical regime’s secret twenty-year-long enrichment program, which it hid from the IAEA behind what the United States has aptly called a “cloud of lies.”<sup>28</sup> As for the CWC, Rowhani has pointedly observed that, despite the fact that “in the discussion about chemicals, the Americans and the British have accused Iran of a thing or two,” he was not concerned because if “a country has chemical weapons,” it “would not create all that much sensitivity.”<sup>29</sup> Status-joiners are not always particularly good treaty partners, and even those without Iran’s malevolent intent may be difficult countries to depend upon for nonproliferation seriousness when noncompliance challenges loom and collective action is required in order to return violators to the straight and narrow.

d. *The NPT and Fidelity to Nonproliferation Goals*

i. *The Nonproliferation Core of the NPT*

As suggested earlier, universalist regimes that couple nonproliferation norms with technology-sharing or developmental policies can add to these difficulties, because preserving secondary benefits may come to seem far more important to many states party than achieving the fundamental nonproliferation goals of the regime. As its name indicates, the NPT is, above all else, a treaty intended to prevent nuclear proliferation. The preamble of the Treaty makes this clear, focusing first and

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27. See Rowhani, *supra* note 8, at 7-38 (“We are a member of the IAEA and a member of the NPT (of course, the former Majles ratified those treaties). We did so to reduce the political and propaganda pressure—and other forms of pressure—against us. It is for the same reason that we have accepted the chemical convention.”).

28. NONCOMPLIANCE REPORT 2005, *supra* note 5, at 78 (reporting that U.S. government officials interpreted the IAEA reports as showing that it was “unequivocally clear that Iran chose—as a matter of government policy sustained for well over a decade—to violate its safeguards obligations in full knowledge that its actions and omissions were violations” and declared that Iran had concealed its secret nuclear program “behind a cloud of lies” and quoting IAEA Director General Mohammed ElBaradei as stating that Iran engaged in a longstanding “policy of concealment”).

29. Rowhani, *supra* note 8, at 7-38.

foremost on “the devastation that would be visited upon all mankind by a nuclear war,” the conviction of all states party that “the proliferation of nuclear weapons would seriously enhance the dangers of nuclear war,” and the conformity of the treaty effort with United Nations calls for “the conclusion of an agreement on the prevention of wider dissemination of nuclear weapons.”<sup>30</sup> Secondary issues such as the exchange of scientific information paled in comparison to the risk of nuclear holocaust, and indeed the NPT finds some of its origins in the UN General Assembly’s adoption in December 1961 of an Irish resolution calling upon all states to conclude a non-proliferation agreement.<sup>31</sup> This resolution called on all states to:

use their best endeavors to secure the conclusion of an international agreement containing provisions under which the nuclear States would undertake to refrain from relinquishing control of nuclear weapons and from transmitting the information necessary for their manufacture to States not possessing such weapons, and provisions under which States not possessing nuclear weapons would undertake not to manufacture or otherwise acquire control of such weapons.<sup>32</sup>

In 1957, the United States and its allies submitted a package to the UN Disarmament Commission that included a commitment to the non-transfer of nuclear weapons. In the wake of the Irish resolution, the Eighteen-Nation Disarmament

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30. NPT, *supra* note 1, at pmb1.

31. U.S. ARMS CONTROL AND DISARMAMENT AGENCY, NO. 48, INTERNATIONAL NEGOTIATIONS ON THE TREATY ON THE NONPROLIFERATION OF NUCLEAR WEAPONS ix (1969) [hereinafter INTERNATIONAL NEGOTIATIONS].

32. G.A. Res. 1665, ¶ 1, U.N. GAOR, 16th Sess., Supp. No. 17, U.N. Doc. A/RES/1665 (Dec. 4, 1961). The Irish Foreign Minister spoke up on behalf of this idea as early as 1959, suggesting the importance of nuclear non-proliferation rules as a prerequisite for more general disarmament measures. The Irish proposed “an agreement between the nuclear Powers not to give the weapons to non-nuclear Powers, and an agreement between the non-nuclear Powers not to make or accept nuclear weapons.” Address by Foreign Minister Aiken of Ireland to the U.N. General Assembly (Sept. 23, 1959), in U.S. DEP’T OF STATE, II DOCUMENTS ON DISARMAMENT: 1945-1959 [hereinafter DOCUMENTS ON DISARMAMENT], at 1475-77; *see also id.* at 1521-24 (similar comments in Aiken’s statement to the First Committee on November 13, 1959).

Committee (ENDC) took the lead in negotiations. In 1962, during the first session of the ENDC, both the United States and the Soviet Union proposed plans that included provisions to prevent the further spread of nuclear weapons. (In both cases, nonproliferation prohibitions were, quite logically, “first-stage” provisions—that is, they were prerequisites for further disarmament steps.<sup>33</sup>) In 1964, the United States proposed a nonproliferation agreement based in large part upon the Irish resolution,<sup>34</sup> and it submitted a full draft treaty in 1965 which revolved around prohibiting both the dissemination of nuclear weapons by nuclear powers and the acquisition or development of nuclear weapons by non-nuclear states.<sup>35</sup>

Nor was this focus on nonproliferation a preoccupation of only nuclear weapons states. In 1964, the Cairo summit of the Organization of African Unity (OAU) and the Cairo declaration of the second Non-Aligned Summit both endorsed the idea of a treaty on nuclear non-dissemination and non-acquisition.<sup>36</sup> In fact, the representative of the United Arab Republic (today split into Egypt and Syria), Ambassador Hani Khallaf, complained that the draft treaty text did not go far enough in imposing rock-solid nonproliferation guarantees because it did not explicitly prohibit dissemination by private organizations and individuals and did not explicitly bar assistance in acquiring nuclear weapons given by one non-nuclear-weapons state to another.<sup>37</sup> According to Ambassador Khallaf, “the risk of nuclear catastrophe is bound to increase automatically with every new addition to the nuclear club.”<sup>38</sup> It was thus gener-

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33. INTERNATIONAL NEGOTIATIONS, *supra* note 31, at 5-6 (discussing disarmament proposals containing nonproliferation provisions).

34. *Id.* at ix; *see also id.* at 9-10.

35. *Id.* at x.

36. *Id.* at 11.

37. *Id.* at 81 (quoting Ambassador Khallaf of the United Arab Republic). In response to Ambassador Khallaf’s concerns, Canadian representatives argued that the text—which was essentially the same as the final provisions of articles I and II in the NPT—implicitly covered such possibilities. *See id.* According to U.S. ACDA Director William Foster, moreover, a non-nuclear-weapon state that provided assistance to a nuclear weapons program in another non-weapon state could be presumed to intend to develop nuclear weapons for itself in violation of the treaty. *Id.* at 101. In any event, the ENDC declined to reopen the text. *Id.* at 88.

38. *Id.* at 123 (quoting the comments of Ambassador Khallaf of the U.A.R. from May 1968).

ally understood, as U.S. officials repeatedly noted, that the spread of nuclear weapons—and the concomitant danger of nuclear blackmail and potential nuclear warfare—was a serious danger to all states and not only to the weapons-possessing powers.<sup>39</sup> After all, the greatest nuclear threat to the average developing country came not from the distant, nuclear-armed great powers, which neither then nor today needed nuclear weaponry in order to threaten smaller states, but rather from the possibility that its neighbor would acquire a nuclear weapon. As the Irish resolution unanimously adopted by the General Assembly described it, an increase in the number of States possessing nuclear weapons was growing more imminent, threatening to extend and intensify the arms race and to increase the difficulties of avoiding war and of establishing international peace and security based on the rule of law.<sup>40</sup>

A subsequent General Assembly resolution sponsored by Burma, Ethiopia, India, Mexico, Nigeria, Sweden, and the United Arab Republic and adopted by a vote of ninety-three to zero similarly noted that “the proliferation of nuclear weapons would endanger the security of all States.”<sup>41</sup> This mantra was repeated in subsequent resolutions throughout the negotiating process that led to the eventual adoption of the NPT.<sup>42</sup>

For these very good reasons, the basic nonproliferation principles of non-dissemination and non-acquisition were endorsed by all, and duly evolved—in a draft treaty submitted by the United States in 1965, a draft text jointly submitted by the United States and the Soviet Union in 1967,<sup>43</sup> and ultimately

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39. *See, e.g., id.* at 22, 24 (paraphrasing ACDA Director William Foster’s remarks to the U.N. General Assembly’s First Committee in 1965); *id.* at 29 (quoting Secretary of State Dean Rusk’s testimony to the Joint Committee on Atomic Energy in 1966); *id.* at 58 (describing U.S. Ambassador Goldberg’s arguments to the ENDC in 1966); *id.* at 115-16 (describing Goldberg’s remarks to First Committee in 1968).

40. G.A. Res. 1665, pmbi., U.N. GAOR, 16th Sess., Supp. No. 17, U.N. Doc. A/RES/1665 (Dec. 4, 1961).

41. G.A. Res. 2028 (XX), ¶ 6, U.N. Doc. A/6097 (Nov. 19, 1965), *available at* <http://www.un.org/documents/resga.htm>.

42. *See, e.g.,* G.A. Res. 2149 (XXI), U.N. Doc. A/6316 (Nov. 4, 1966) (adopted by vote of 110 to 1, with only Albania opposing), *available at* <http://www.un.org/documents/resga.htm>; G.A. Res. 2153 (XXI), U.N. Doc. A/6509 (Nov. 17, 1966) (relevant portion adopted by vote of 48 to 1), *available at* <http://www.un.org/documents/resga.htm>.

43. INTERNATIONAL NEGOTIATIONS, *supra* note 31, at xiv, 17, 78.

in the final treaty itself—into the core provisions of the non-proliferation regime: the NPT's articles I and II.<sup>44</sup> Though the treaty's negotiation certainly did result in the inclusion of the important follow-up goal of eventual disarmament<sup>45</sup> and the ancillary goal of sharing nuclear technology for peaceful purposes,<sup>46</sup> the NPT was thus clearly built upon the rock of

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44. Article II was discussed earlier in this Essay. Article I provides that “[e]ach nuclear-weapon State Party to the Treaty undertakes not to transfer to any recipient whatsoever any nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, 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.” NPT, *supra* note 1, at arts. I, II.

45. *See id.* at art. V.

46. *See id.* As the ACDA history of the NPT negotiations recounts, “[o]ne of the principal concerns of the non-nuclear weapon nations was the possible effect of a nonproliferation treaty on peaceful nuclear development.” INTERNATIONAL NEGOTIATIONS, *supra* note 31, at 63. Accordingly, a number of so-called non-aligned governments raised the issue of technology-sharing in 1965 and 1966, urging that a nonproliferation treaty be coupled with or followed by disarmament measures as well as increases in assistance to peaceful nuclear programs in developing countries. *Id.* at 53 (quoting joint memorandum). Even developing countries, however, were content to make peaceful nuclear uses subsidiary to the basic nonproliferation obligations of the treaty. The origins of article IV, for instance, apparently lie in a Mexican proposal in 1967 to make explicit reference to “the right of the contracting parties to use nuclear energy for peaceful purposes *in any manner not contrary to the obligations assumed under the treaty itself.*” *Id.* at 67 (quoting Ambassador Alfonso García Robles of Mexico) (emphasis added); *see also id.* at 83 (discussing a proposed Mexican provision to make technology-sharing a “duty”); *id.* at 120 (noting Mexican desire to add a paragraph on technology access). A variation on this notion—absent, however, the strong Mexican conception of sharing as a “duty,” *see, e.g., id.* at 117 (citing Nigerian complaint that treaty failed to require possessors to share nuclear scientific and technological information)—was ultimately adopted in the first paragraph of the NPT's eventual article IV, which refers to peaceful use rights “in conformity with articles I and II of this Treaty.” NPT, *supra* note 1, at art IV; *see also* INTERNATIONAL NEGOTIATIONS, *supra* note 31, at 98 (noting that article IV incorporated changes suggested by Mexico), 123 (discussing changes to article IV text). Article IV's phrasing about “inalienable right[s]” came later, apparently originally at the suggestion of the Italians, but was both unclear and somewhat controversial. *See id.* at 103. Somewhat bizarrely to modern ears, many of the early peaceful-uses discussions revolved around the idea of using nuclear *explosions* for peaceful purposes. *See, e.g., id.* at 63-64, 84-85, 104-06. This concept evolved into article V of the current treaty, which provided for the possibility of making the benefits of “peaceful applications of nuclear explosions” available to non-weapons states “under appropriate interna-

nonproliferation. The “bargain” at the core of the NPT, in other words, is the exchange of non-acquisition and non-dissemination pledges between and among nuclear weapons states and non-weapons states alike, to the collective security benefit of all. As one Canadian representative described it in 1967, the non-dissemination and non-acquisition provisions constituted “the core of the treaty.”<sup>47</sup>

ii. *Technology-Proliferation as a Goal-Competitor*

But this nonproliferation legacy is increasingly either forgotten or willfully erased. Today, one hears mounting allegations that at least a coequal purpose is to spread nuclear technology as widely as possible and that nonproliferation compliance should only be expected in return for unrestricted access to nuclear technology. The earlier, pre-NPT “Atoms for Peace” culture that helped prompt the establishment—and that underlies the institutional culture—of the IAEA might thus seem to be swallowing the nonproliferation principle of the NPT itself. Most members of the Non-Aligned Movement can quote the technology-sharing provisions of the NPT’s Article IV by heart, but they almost always leave out the last ten words of the relevant paragraph. The first paragraph of article IV does not merely talk about each state party’s right to “develop research, production and use of nuclear energy for peaceful purposes without discrimination.” Rather, it talks about each state party’s right to do so “*in conformity with articles I and II of this Treaty.*”<sup>48</sup> The repeated, deliberate omission of

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tional observation and through appropriate international procedures.” NPT, *supra* note 1, at art. V.

47. INTERNATIONAL NEGOTIATIONS, *supra* note 31, at 81 (quoting General Burns of Canada); *see also id.* at 182 (quoting U.S. President Lyndon Johnson’s message transmitting the NPT to the U.S. Senate and noting that “[i]ts central purpose is to prevent the spread of nuclear weapons”).

48. NPT, *supra* note 1, at art. IV (“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.”). The author of this Article has noted on a previous occasion that:

Some States Party [to the NPT] have argued that Paragraph 1 of Article IV provides an unconditional right to nuclear energy for peaceful purposes—and that steps by other states to deny them some technology somehow violates their NPT rights. Nothing could be further from the truth: by agreeing to the NPT, countries

those vital ten words about nonproliferation compliance speaks volumes, and helps empower even the scofflaw Iranian regime to work itself into a lather about its “right” to produce enriched uranium.<sup>49</sup>

iii. *Disarmament: Progress and Confusion*

Nor do the distractions stop there. Article VI of the NPT specifies that all states party must 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.<sup>50</sup>

An observer from another planet, or even from this one only a quarter century ago, would surely be impressed by how much the United States and Russia have done in this regard. Negotiations between the United States and Russia, followed by a dramatic change in the strategic relationship between the two countries, first brought the spiraling superpower nuclear arms race under control and then ended it, making possible breathtaking reductions in nuclear armaments.

The United States, for instance, has reduced its nuclear weapons stockpile by more than 13,000 weapons since 1988—the equivalent of scrapping nearly seventy nuclear weapons for

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have agreed that their nuclear activities must be in ‘conformity with articles I and II’ (as well as with Article III). Article IV does not provide States Party that have violated the nonproliferation provisions of the Treaty any protection from the consequences of breach, including the imposition of measures by other states, jointly or separately, against their nuclear programs. States Party that claim it does are quite wrong.

Press Release, U.S. Mission to the United Nations, Statement by Christopher Ford, Principal Deputy Ass’t Sec’y of State, Bureau of Verification and Compliance, on Article IV, in the Third Committee of the 2005 Review Conference of the Treaty on the Non-Proliferation of Nuclear Weapons (May 19, 2005), *available at* [http://www.usunnewyork.usmission.gov/05print\\_101.htm](http://www.usunnewyork.usmission.gov/05print_101.htm).

49. *See, e.g.*, Ali Akbar Dareini, *Iran Vows to Resist UN Pressure Over Nukes*, ASSOCIATED PRESS, Mar. 14, 2006, <http://abcnews.go.com/International/print?id=1722330> (“Rest assured that the technology to produce nuclear fuel today is in the hands of the youth of this land and no power can take it back from us,” President Mahmoud Ahmadinejad said in a speech attended by thousands in northern Iran. The crowd responded with chants of ‘nuclear energy is our right.’”).

50. NPT, *supra* note 1, at art. VI.

every state party of the NPT. Twelve entire types of nuclear weapons have been eliminated unilaterally under the U.S. Presidential Nuclear Initiatives (PNIs), and deployed strategic warheads are in the process of being reduced by 80% (from their 1991 totals) by the year 2012. From 1994 through 1997, the United States eliminated nearly 1000 strategic nuclear-tipped missiles and nuclear-capable bombers, took the B-1 Lancer bomber entirely out of nuclear service, destroyed or dismantled some 150 intercontinental ballistic missile (ICBM) silos, took out of nuclear service and converted to non-nuclear use four of its most sophisticated ballistic missile submarines, and eliminated its entire force of Peacekeeper missiles—the newest and most sophisticated model of ICBM in the American arsenal. Furthermore, the Intermediate Nuclear Forces Treaty between the United States and the Soviet Union eliminated an entire class of nuclear delivery systems, the first time this had ever been accomplished.<sup>51</sup>

With regard to nonstrategic nuclear weapons, the United States has reduced its stockpile by nearly 90% since 1989, removed nuclear weapons from all naval surface ships and attack submarines, and reduced the different types of nuclear systems in Europe by 80%. By 2003, it had withdrawn from service worldwide and eliminated more than three thousand tactical nuclear warheads—that is, artillery shells, short-range missile warheads, and naval depth bombs. Meanwhile, the United States has maintained its unilateral moratorium on fissile material production for use in nuclear weapons since 1988, has not produced highly enriched uranium (HEU) for nuclear weapons since 1964, and has removed 34 tons of plutonium and 174 tons of HEU from its military stockpile. The

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51. See U.S. DEP'T OF STATE, PUB. 11220, ARTICLE VI OF THE NON-PROLIFERATION TREATY (2005), *available at* <http://www.state.gov/documents/organization/42229.pdf> [hereinafter DOS PUB. 11220]; U.S. DELEGATION TO THE 2005 NPT REVIEW CONFERENCE, COMMITMENT OF THE UNITED STATES OF AMERICA TO ARTICLE VI OF THE TREATY ON THE NONPROLIFERATION OF NUCLEAR WEAPONS (2005), *available at* <http://www.reachingcriticalwill.org/legal/npt/RevCon05/nonpapers/USArtVI.pdf> [hereinafter COMMITMENT OF THE US]. For the most up-to-date U.S. paper on the country's disarmament record at the time of writing, see Christopher A. Ford, U.S. Special Rep. for Nuclear Nonproliferation, Address at the Conference on Preparing for 2010: Getting the Process Right: Disarmament, the United States, and the NPT (Mar. 17, 2007), *available at* <http://www.state.gov/t/isn/rls/other/81946.htm> [hereinafter Ford I].

United States has shut down plutonium production reactors at its Hanford (Washington) and Savannah River (Georgia) facilities, and it closed the K-25 plant at Oak Ridge (Tennessee) in 1987. HEU production at the Portsmouth Gaseous Diffusion Plant (Ohio) was ended in 1992, and the plutonium “pit”-making plant at Rocky Flats has long been closed and, since 1989, subject to extensive and successful environmental remediation efforts. To top it off, billions of American dollars have been spent to dispose of fissile material from former Russian nuclear weapons.<sup>52</sup>

Nor has such progress stopped. The Administration of President George Bush dismantled the United States’ last nuclear artillery shell in 2003, dismantled the last Minuteman II missile warhead in June 2006, and has announced that it will eliminate over 400 Advanced Cruise Missiles currently deployed with its B-52 bomber fleet. Meanwhile, the United States announced in late 2005 that it would be removing an additional 200 metric tons of HEU from its nuclear weapons programs—enough (according to IAEA figures) to make some 8,000 nuclear weapons—and increased the pace of warhead dismantling by about 50% between Fiscal Years 2006 and 2007. Pursuant to the Administration’s Nuclear Posture Review of 2001, moreover, the United States has been reducing its formerly exclusive reliance upon nuclear weapons for strategic deterrence, replacing its traditional Cold War “Triad” of missiles, submarines, and bombers with a “New Triad” that incorporates important *non*-nuclear elements (including missile defenses).<sup>53</sup>

This remarkable United States record of bilateral, multilateral, and indeed entirely unilateral reductions could scarcely have been imagined a generation ago, and had any U.S. public official actually suggested or tried to bring it about at that time, he or she would surely have been thought perilously naive or simply pernicious. Because, from an NPT perspective, both nonproliferation compliance and the cessation of nuclear arms races are steps logically prior to actual dis-

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52. See DOS PUB. 11220, *supra* note 51; COMMITMENT OF THE US, *supra* note 51, Ford I, *supra* note 51.

53. See, e.g., Release, U.S. Dep’t of State, Disarmament, the United States, and the NPT (Mar. 17, 2007), available at <http://www.state.gov/t/isn/rls/other/81946.htm>.

armament—a position clearly understood during the negotiating history of the NPT and which formed the fundamental basis for the 1961 Irish resolution<sup>54</sup>—it is remarkable that so many disarmament steps have been taken by the superpowers notwithstanding proliferation problems such as North Korea, pre-1991 Iraq, Libya, and Iran (not to mention the Indian and Pakistani nuclear tests of 1998). After all, maintaining solid nonproliferation compliance becomes ever more important as the nuclear arsenals of great powers are reduced, because as the total number of nuclear weapons in the world shrinks, the marginal utility of having even a very small number of them increases. (At the extreme, of course, the events of 1945 make clear that in a world free of nuclear weapons, the sudden acquisition of even one or two devices can end a global war.) For this reason, it is hard to imagine that much more progress in disarmament will be possible without greater success in holding the line against proliferation. Without solid assurances that others will not acquire nuclear weapons, it would seem madness for the great powers to dispose of the ones they retain.

But as much as the superpowers *have* done in order to fulfill the requirements of article VI, it is difficult to have any discussion of the nonproliferation challenges currently facing the NPT regime without wading through wild and breathless accusations from the NAM or non-governmental organizations that it is somehow a lack of progress by the United States in disarmament that remains the central article VI problem in the world today (or, even more bizarrely, that the United States currently presents the most important “compliance” challenge to the treaty). Such accusations fail to take into account, among other things, that China (an NPT nuclear weapons state) is still engaged in a build-up of its strategic arsenal and that, far from engaging in good faith negotiations to end nuclear arms races and achieve disarmament, would-be weapons states such as Iran are busily starting nuclear arms races in their own regions. The surreal quality of assertions of U.S.

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54. See, e.g., DOCUMENTS ON DISARMAMENT, *supra* note 32, at 1475-77 (remarks of Irish Foreign Minister explaining rationale for nonproliferation as step towards eventual disarmament); see also *id.* at 1521-24 (additional such comments); INTERNATIONAL NEGOTIATIONS, *supra* note 31, at 5-6 (discussing U.S. and Soviet disarmament proposals predicated upon “first-stage” of nonproliferation).

blame by the NAM and others underlines how close the political culture of the NPT regime has come to entirely losing its moorings.

e. *Cacophony*

It was mentioned earlier, in discussing the strengths of universalist regimes, that when their governing bodies or full memberships speak, they speak with great political and moral authority. The corollary to this, however, is that it is rarely possible for such broad, globally representative, and often consensus-focused bodies to agree upon coherent speech in the first place. Lowest common denominator politics seldom make for stirring or useful Review Conference Final Documents, and it should be no surprise that so few such documents or authoritative statements materialize. If a nonproliferation regime became dominated, numerically, by parties with only weak dedication to its goals and a preference for using the regime as a weapon against those who have more dedication, such unproductiveness would be bad enough. But many delegations seem to measure a forum's worthiness by the paragraph, and the periodic sessions and conference meetings of such organizations tend to elicit repeated attempts to say *something*. Too often, the result is empty posturing or sterile, symbolic coup-counting with little real relevance to the regime's underlying nonproliferation goals—and with decreasing relevance, over time, to the real challenges confronting the regime.<sup>55</sup>

f. *“Non-Discrimination”*

Finally, even when admirably intentioned, the workings of universalist regimes may sometimes find themselves distorted by pressures to seem nondiscriminatory. The purpose of nuclear safeguards, for instance, is to provide warning in the event that an attempt is made to divert nuclear material to a

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55. It is for this reason, one suspects, that the United States does not regard the 2005 NPT Review Conference as a dismal failure on account of its inability to produce a Final Document, as many allege. Instead, it is seen as a qualified success because of the degree to which the Conference continued an ongoing process, begun by the United States at the 2004 NPT Preparatory Committee meeting, of slowly redirecting NPT debates from 1970s arms control and disarmament theology to a focus upon 21st century proliferation threats such as A. Q. Khan-style black market networks and rogue state noncompliance.

non-peaceful purpose.<sup>56</sup> But the IAEA spends considerable amounts of time and money applying and monitoring safeguards in places such as Germany and Canada—which certainly have extensive nuclear programs, but which no one thinks are in any danger of undertaking a covert nuclear weapons program.

To be sure, there is certainly value in watching nuclear material carefully in order to ensure that it stays out of the hands of terrorists. Moreover, safeguards systems cannot rely overmuch on a government's good intentions, because such intentions may change over time. Nevertheless, in a world of finite resources, there are powerful arguments for directing available money and effort to where the proliferation risks are most acute.<sup>57</sup>

Notwithstanding these realities, the IAEA safeguards regime feels great pressure to seem non-discriminatory and thus to apply safeguards on a "country-neutral" basis. Fortunately, the safeguards system is not so inflexible that an obvious violator such as Iran does not quite properly soak up vast amounts of inspector time and effort. Except for such extraordinarily provocative circumstances, however, safeguards work follows the distribution of nuclear material—not the distribution of diversion risk. From a nonproliferation perspective in a world of finite resources, this is at the very least inefficient. Efforts are now underway to explore more useful concepts of "information-driven" safeguards capable of taking into account

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56. See, e.g., Iranian Safeguards Agreement, *supra* note 2, at art. 28.

57. Much can also be done by governments of good faith acting together. The United States, for instance, spends great sums of money on such efforts through a variety of programs, including so-called Nunn-Lugar money channeled through the Cooperative Threat Reduction (CTR) program administered by the U.S. Department of Defense (DOD). See, e.g., Written Statement from Robert Joseph, Under Sec'y of State for Arms Control and Int'l Security, to the U.S. Senate Armed Services Committee's Subcommittee on Emerging Threats and Capabilities (Mar. 29, 2006), available at <http://www.state.gov/t/us/rm/63877.htm> ("U.S. assistance to other countries to reduce and prevent the proliferation of weapons of mass destruction and delivery vehicles—through DOD's CTR program, the Department of Energy's nuclear nonproliferation programs, and the smaller but nonetheless important State Department programs—has been at record funding levels. The President has committed an average of \$1 billion a year to these critical efforts . . .").

country-specific factors relevant to proliferation risk,<sup>58</sup> but the Agency has a long way to go.

### III. PARTICULARIST REGIMES

#### A. *A Typology*

This essay suggests the term “particularist” regime as a sort of catch-all to encompass at least three different approaches that nonetheless share some common elements. In general, such regimes tend to eschew aspirations to universality, revolve around political commitments rather than binding legal obligations, and avoid formal verification or enforcement mechanisms in favor of self-policing. Some have fixed memberships defined by formal accession procedures, usually by consensus. Others are somewhat more fluid, with state participation defined by a political commitment to general principles and along what is, in practice, a sliding scale of commitment evidenced by concrete actions taken unilaterally or in conjunction with other “like-minded” state colleagues.

Particularist approaches are, in a sense, efforts to define a specific international subcommunity of state participants and to identify a common agenda and/or set of standards for this group to follow. Some try to build this community around shared possession of specific technology and urge participants to engage in self-restraint in transfers of sensitive items to prevent non-possessors from gaining improper access. Others seek to define this subcommunity not by its technological possessions but rather by a substantive “like-mindedness” and commitment to particular courses of action against non-proliferation—e.g., to the interdiction of proliferation-sensitive shipments to or from entities whom participants regard as

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58. *See, e.g.*, Jim Casterton, Dir. of Int’l Safeguards Div., Can. Nuclear Safety Comm, remarks delivered on behalf of John Carlson, Dir. Gen., Austl. Nuclear Safeguards Org., to the 48th Annual Meeting of the Institute for Nuclear Materials Management (July 9, 2007) (discussing efforts of the IAEA’s Standing Advisory Group on Safeguards Implementation to develop information-driven safeguards that emphasize “differentiation” by relying upon “state-specific factors”). Casterton admitted, however, that not all advice given by the Standing Advisory Group is accepted by the IAEA Director General, to whom it reports. *See id.*

“state and non-state actors of proliferation concern.”<sup>59</sup> In either case, however, the relevant group is exhorted and expected to behave differently from non-participants in order to retard or prevent such non-participants’ ability to acquire WMD or associated delivery systems. They represent a very different approach, therefore, from universalist regimes which seek to impose obligations directly upon would-be proliferators.

### 1. *Technology-Control Models*

Particularist regimes include non-universalist systems that involve formal membership participation but tend to revolve around politically-binding (as opposed to legally-binding) commitments and self-policed guidelines for conduct by participating states. The Missile Technology Control Regime (MTCR) is one example. Except for a de facto ban on all transfers of complete production facilities for Category I ballistic missiles, defined as those that can send a payload of at least 500 kilograms at least 300 kilometers, there are few “hard” rules in the MTCR system. Instead, members are subject to what are in effect process rules subject only to individual participants’ good faith and self-enforcement. Under the MTCR Guidelines,<sup>60</sup> missile transfers are subject to requirements of careful export licensing review and, for Category I transfers, presumptions of license denial. The MTCR also<sup>61</sup> provides lists of controlled items.

Consistent with the MTCR’s role as an informal non-proliferation regime, each MTCR Partner implements the MTCR Guidelines in accordance with national legislation and practice and on the basis of sovereign national discretion.<sup>62</sup> The regime does not make licensing decisions as a group,<sup>63</sup>

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59. Proliferation Security Initiative, Statement of Interdiction Principles (September 23, 2003), *available at* <http://usinfo.state.gov/products/pubs/proliferation/#statement> [hereinafter Statement of Interdiction Principles].

60. Agreement on Guidelines for the Transfer of Equipment and Technology Related to Missiles, Apr. 16, 1987, 26 I.L.M. 599 [hereinafter MTCR].

61. Missile Technology Control Regime [MTCR], Equipment, Software, and Technology Annex, MTCR/TEM/2005/Annex/002 (Nov. 17, 2005), *available at* <http://www.mtc.info/english/Annex2005-002.pdf>.

62. *Id.* ¶ 1 (discussing Category I transfers).

63. The informality of MTCR procedures contrasts with the Coordinating Committee for Multilateral Export Control (COCOM) established by the

and it does not review Partners' individual national licensing decisions for conformity with the Guidelines. There also are no penalties for "wrong" decisions. However, Partners are supposed to regularly exchange information relevant to licensing issues in order to try to ensure consistency with the regime's overall nonproliferation goals. When questions arise, concerned Partners consult bilaterally in the hope of promoting a common understanding of the issue and a consistent approach to the regime's overarching nonproliferation objectives. Partners are expected to exercise appropriate accountability and restraint in all missile trade, and exports of MTCR Category I items to any destination for any reason are subject to an unconditional "strong presumption of denial" and are supposed to be licensed only on rare occasions. According to the Guidelines, "[r]estraint will be exercised in the consideration of all transfers," and "all such transfers will be considered on a case-by-case basis."<sup>64</sup> When and how the presumption of denial can be overcome, however, is left to the good faith and discretion of each participant.

In the nuclear arena, the Nuclear Suppliers Group (NSG) is roughly analogous to the MTCR. Formed at the initiative of the United States after the Indian nuclear explosion of 1974, the NSG provides certain guidelines that participating states agree to follow in exporting nuclear technology. The items covered are specifically identified by a "Trigger List"<sup>65</sup> and a

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U.S. and its allies in 1949 to prevent militarily-useful technology transfers to the Soviet Union and its Warsaw Pact allies. Under COCOM, participants could often actually *block* transfers by fellow participants of goods appearing on one of three different control lists: a munitions list, an atomic energy list, and a list of dual-use technologies. COCOM, however, was disbanded in 1994 after the collapse of the Soviet Empire and was succeeded by the much weaker Wassenaar Arrangement. See generally U.S. GEN. ACCOUNTING OFFICE [GAO], GAO-03-43, NONPROLIFERATION: STRATEGY NEEDED TO STRENGTHEN MULTILATERAL EXPORT CONTROL REGIMES 6 n.3, n.8 (2002) [hereinafter GAO REPORT], available at <http://www.gao.gov/new.items/d0343.pdf>; *Excerpt: Commerce's Reinsch on Multilateral Export Control*, U.S. INVESTIGATIONS SERVICES WASH. FILE, Apr. 12, 2000, available at <http://fas.org/nuke/control/export/news/000412-export-usia2.htm> [hereinafter USIS].

64. USIS, *supra* note 63.

65. See IAEA, *Communications Received from Certain Member States Regarding Guidelines for the Export of Nuclear Material, Equipment, and Technology*, IAEA Doc. INFCIRC/254/Rev.7/Part 1 (Feb. 23, 2005), available at <http://www.nuclearsuppliersgroup.org/PDF/infcirc254r7p1-050223.pdf> (appending latest guidelines and Trigger List).

list of controlled dual-use goods.<sup>66</sup> The NSG guidelines establish standards for caution in the transfer of sensitive items and for recipient government assurances concerning nuclear safeguards, physical protection of nuclear materials, and retransfer.

The Australia Group (AG) is an informal arrangement of states that aims to reduce the proliferation risks of chemical- and biological-related technology transfers. Here also, participants do not undertake legally-binding obligations. They do, however, pledge to carefully review export licensing in order to minimize the chances that a transfer will contribute to the development of chemical or biological weapons. Not unlike the MTCR and the NSG, the AG provides participating states with a set of Guidelines<sup>67</sup> and a collection of subject-specific common control lists<sup>68</sup> to help each government manage its own good-faith implementation of these standards. Each government retains the “discretion to determine whether and to what extent to apply expedited licensing measures in the case of transfers to destinations it judges possess consistently excellent non proliferation credentials.” While “[v]igilance will be exercised in the consideration of all transfers of items on the AG control lists,” it is understood that “the decision to transfer remains the sole and sovereign judgment of the Government.”<sup>69</sup>

## 2. “Like-Mindedness” Models

The second particularist model has been suggested by the U.S.-led Proliferation Security Initiative (PSI). This approach is characterized by a rather fluid structure and highly informal

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66. See IAEA, *Communications Received from Certain Member States Regarding Guidelines for Transfers of Nuclear-related Dual-use Equipment, Materials, Software and Related Technology*, IAEA Doc. INFCIRC/254/Rev.6/Part 2 (Feb. 23, 2005), available at <http://www.nuclearsuppliersgroup.org/PDF/infirc254r6p2-050223.pdf> (appending latest guidelines and Trigger List).

67. Australia Group, *Guidelines for Transfers of Sensitive Chemical or Biological Items*, (June 2004), available at <http://www.australiagroup.net/en/guidelines.html> [hereinafter AG Guidelines].

68. The AG’s common control lists cover chemical weapons precursors, dual-use manufacturing technology, dual-use biological equipment, biological agents, and animal and plant pathogens. See *The Australia Group, AG Common Control Lists*, <http://www.australiagroup.net/en/agcomcon.htm> (last visited July 9, 2007).

69. AG Guidelines, *supra* note 67, ¶ 2.

coordinated relationships among “like-minded” state participants in the service of nonproliferation goals—specifically, in the PSI’s case, the interdiction of WMD and missile proliferation shipments worldwide. Intended to supplement rather than supplant other nonproliferation regimes, the PSI aims to facilitate coordination among participating governments in using their existing legal and regulatory authorities, under existing norms of international law, to “stop the flow of [WMD and delivery systems] to and from states and non-state actors of proliferation concern.”<sup>70</sup>

PSI participants commit themselves politically to a series of “interdiction principles” and pledge to work together to maximize the effectiveness of individual and collective efforts to impede such shipments. There are no legally-binding obligations, implementation is self-regulated and self-policed, and membership is highly informal. Membership is defined by un-

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70. Statement of Interdiction Principles, *supra* note 59, at pmb1. It is perhaps sometimes assumed that the aim of PSI effort is to help develop new norms of customary international law against the movement of WMD-related technology in international commerce—perhaps in the same fashion that assertive Royal Navy interdictions and a web of British bilateral arrangements with West African kingdoms in the early- and mid-19th century helped develop the subsequent norm of international law against slave trading. *See, e.g.*, Stephen Krasner, *How Britain Ended Slavery Around the Globe*, *THE GLOBALIST*, Jan. 1, 2000 (recounting role of British naval interdictions and ship-boarding agreements in ending slave trade), <http://www.theglobalist.com/DBWeb/printStoryId.aspx?StoryId=2202> (last visited July 4, 2007); Royal Navy of the United Kingdom, *Slavery*, <http://www.royal-navy.mod.uk/server/show/conWebDoc.1592/changeNav/3533> (last visited July 4, 2007) (discussing activities of Royal Navy “preventative squadron” off West Africa, U.S.-British “Right of Search Treaty” in 1862 on ship-boarding, and British efforts to secure treaties with West African kingdoms in order to end the slave trade). Such an effort to develop new norms of state practice and the accompanying *opinio juris* necessary to create new customary law, however, is not given as one of PSI’s goals, and official pronouncements are quite clear that PSI focuses on *existing* authorities under international law and on each participating state’s sovereign legal and regulatory powers. *See* Statement of Interdiction Principles, *supra* note 59 (“The PSI seeks to use existing authorities—national and international—to defeat proliferation.”). That said, the statement of principles adopted by the PSI founding participants in September 2003 does describe PSI as being part of “new and stronger actions by the international community” that are “consistent with and a step in the implementation of the UN Security Council Presidential Statement of January 1992, which states that the proliferation of all WMD constitutes a threat to international peace and security, and underlines the need for member states of the UN to prevent proliferation.” *Id.*

dertaking a political commitment to the interdiction principles, but it is implicitly understood that some participants are more “like-minded” than others and will participate accordingly. As the U.S. State Department’s website explains:

States are becoming involved in PSI in varying ways. Some states, for example, have attended interdiction training exercises or informational meetings to help build the basis for effective cooperation. Participation in the PSI will continue to expand based on countries’ responses to the initiative.<sup>71</sup>

More than sixty countries have professed support for the PSI in some form, but there also exists a group of “core participants” more explicitly committed to the PSI interdiction principles.<sup>72</sup> In reality, it would seem, membership in a PSI-style particularist regime is something defined only in practice, depending on each state’s degree of involvement in periodic exercises aimed at improving coordination in interdiction activity and each state’s willingness and ability to take effective unilateral steps in furtherance of common ends. Membership in such clubs, in other words, may be conceived as existing on a sliding scale, keyed to participants’ degree of “like-mindedness.”

Such regimes aim to create an interlocking web of unilateral, bilateral, and multilateral relationships, habits, and standard operating procedures that support specific concrete goals. They do not require the negotiation of formal legal instruments, but they can employ this tool—as demonstrated by the United States’ negotiation of bilateral ship-boarding agreements with major “flag of convenience” ship-registry states such as Liberia and Panama.<sup>73</sup> (As suggested by some PSI par-

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71. See U.S. DEP’T OF STATE, THE PROLIFERATION SECURITY INITIATIVE (2004), available at <http://usinfo.state.gov/products/pubs/proliferation/proliferation.pdf>.

72. See, e.g., Australian Gov’t, Dep’t of Foreign Affairs & Trade, Proliferation Security Initiative (PSI), <http://www.dfat.gov.au/globalissues/psi/> (last visited July 4, 2007).

73. See, e.g., Press Release, U.S. Dep’t of State, Proliferation Security Initiative Ship Boarding Agreement Signed with Liberia (Feb. 12, 2004), available at <http://www.state.gov/r/pa/prs/ps/2004/29338.htm>; Fact Sheet, U.S. Dep’t of State, The United States and Panama Proliferation Security Initiative Ship Boarding Agreement (May 12, 2004), available at <http://www.state.gov/r/pa/prs/ps/2004/32414.htm>. The Liberian and Panamanian agree-

ticipants' efforts to develop a Memorandum of Understanding (MOU) on denying overflights to suspect proliferation shipments,<sup>74</sup> less formal political instruments may also be available.) The United States may be able to adapt PSI-style models to other situations, such as the prevention of WMD terrorism.

## B. *Promise and Limitations*

### 1. *Strengths*

One of the strengths of particularist regimes is their focus on collective action by participants who by definition share some degree of common interest and perspective. The strength of these common views will vary, of course, and it is unlikely that multilateral nonproliferation regimes such as the MTCR, AG, and NSG are characterized by common levels of nonproliferation seriousness equal to those obtained among at least the "core" participants in PSI-style approaches. After all, the mere fact of having certain technical expertise is a highly-imperfect predictor of policy agreement, and participants in technology-control regimes may be expected to frequently disagree on when, and to whom, transfers should occur. Indeed, the decisionmaking procedures for the MTCR, NSG, and AG are consensus-based, so when it comes to issues such as amending control lists, a single member can block a decision<sup>75</sup> and lowest common denominator politics may prevail.

PSI-style approaches, however, have advantages over universalist regimes not just in being able to coordinate effectively on common goals, but also in not being entirely hamstrung by participants whose nonproliferation seriousness flags. The fluidity of such regimes' structures allows those who remain closely "like-minded" to work around, sideline, or in effect "expel" less committed participants—let alone those inside the re-

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ments were followed by similar arrangements with the Marshall Islands, Croatia, Cyprus, and Belize. See, e.g., U.S., *Belize Sign Ship-Boarding Agreement*, CARIBBEAN NET NEWS, Aug. 5, 2005, <http://www.caribbeanetnews.com/2005/08/05/sign.shtml>.

74. See, e.g., Proliferation Security Initiative, Chairman's Conclusions from the Fifth Plenary Meeting (Mar. 5, 2004), available at <http://www.fco.gov.uk/Files/kfile/Proliferation%20Security%20Initiative.0.pdf> (encouraging states to "establish a concrete basis for cooperation with PSI efforts (e.g., MOU on over-flight denial)").

75. See, e.g., GAO REPORT, *supra* note 63, at 3 (noting problems of consensus-based decision-making in multilateral export control regimes).

gime who may incline toward actual mischief—simply by pursuing coordination and cooperation projects only with those who take the project seriously. While such marginalization is not exactly punishment, such an ability to exclude uncooperative would-be partners can help organizations remain effective cooperative institutions.<sup>76</sup> Over time, a PSI-style regime might perhaps degenerate into inactivity, but it would be hard to imagine it being used to block action against those who violate their nonproliferation obligations—a potential pitfall for universalist regimes.

Particularist approaches also cope relatively well with the challenges of addressing a policy remedy to a nonproliferation wrong and of focusing efforts upon clear problems with less distortion than in universalist regimes from pressures to appear country-neutral or non-discriminatory. Technology-possession regimes revolve around regulating the flow of technology to “have-nots,” and their focus on self-enforced process rules related to transfers leaves implementation highly disaggregated and in the hands of national governments that freely make non-country-neutral policy choices as a matter of course. (For their part, PSI-style regimes address this problem even more directly, their foundation in “like-mindedness” obviously giving them an advantage in permitting agreement on the threats that they face.)

Because of their relative lack of an international bureaucratic structure and focus on disaggregated member government decisions, particularist regimes also make information-sharing—including intelligence-sharing—easier. After all, governments routinely practice varying degrees of intelligence-sharing on a bilateral basis, which takes advantage of established intelligence liaison channels, allows authorities the ability to better estimate risks, and reduces the risk of unvetted third-party transfer. Because most of the important decisions in particularist regimes are individual national ones (e.g., to withhold an export license or to seize a shipment tran-

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76. Sociological studies suggest that in groups that lack some kind of process for internal discipline, cooperative efforts are quickly undermined by participants' self-interested behavior. See, e.g., Benedict Carey, *Study Links Punishment to an Ability to Profit*, N.Y. TIMES, Apr. 7, 2006, at A22 (recounting results of experiment by economists to identify concrete factors that give advantages to groups with ability to punish members who seek to exploit other members).

siting one's territory), the relatively comfortable modalities of bilateral sharing can be very useful.

## 2. *Limitations*

But particularist regimes also suffer from weaknesses, which tend to be byproducts of their very informality and lack of clear structure. Particularist regimes depend on the independent variable of country motivation, and they succeed in producing something more than uncoordinated unilateralism only to the extent that enough participants share enough seriousness about fighting proliferation and are themselves well-enough positioned to act effectively.

For technology-control regimes on the MTCR or NSG model, there is also the possibility that substantive disagreements between members, if not resolved effectively, can undercut the restraint value of the system. This is not simply the product of consensus-based processes within their decision-making organs, though such dynamics can certainly impede efforts to update control lists, modify guidelines, or otherwise reform these regimes to reflect changing circumstances. More fundamentally, disagreement between participants about proper standards of conduct cuts directly against regime objectives by permitting widely divergent behavior in implementing the self-policed rules.

Technically, for instance, membership in the MTCR does not mean that the United States or Russia, or any one of the thirty-four MTCR Partners, cannot sell Category I missiles to all comers. Rather, they must only "consider" such exports carefully in terms of the nonproliferation factors specified in the Guidelines, weigh for themselves whether the attendant circumstances justify overcoming the strong presumption of denial, and assume responsibility for taking whatever steps might be necessary to ensure that an item is put only to its stated end use. Such a system works well so long as participants agree on who may—and who should not—be allowed to possess the controlled technology in question. When they stop agreeing and decide to act unilaterally, however, it provides little meaningful restraint.

More perniciously, a proliferator state's accession to a regime such as the MTCR can serve to undercut other states' efforts to pressure it to cease such activity, because problem

transfers can be defended, not always implausibly, as being technically MTCR-compliant. Notwithstanding its MTCR membership, for instance, Russia has “continued . . . to supply sensitive missile-applicable items, technology, and expertise to missile programs in India, Iran, and China.”<sup>77</sup> Some of these transfers raise serious missile proliferation concerns. Even Russian missile exports to Iran are not directly precluded by Russia’s commitments under the MTCR Guidelines, however inconsistent they might be with other countries’ ideas of nonproliferation “best practices.”<sup>78</sup> With a degree of exporter good faith and transparency in relation to other regime partners, bilateral overtures from other participants may be able to prevent some particularly noxious sales, but such fortunate alchemy does not always occur. And even with good faith would-be exporters willing to place nonproliferation concerns ahead of whatever economic or other advantages might be offered by a particular deal, such measures can only succeed when other participants acquire timely information on export licensing decisions.<sup>79</sup>

Lacking the internationalist political imprimatur of universalism and global representation, particularist regimes can also become somewhat provocative from the perspective of non-participants, with technology-control systems liable to accusations of “cartel” and PSI-style approaches vulnerable to charges of heavy-handedness and coercion. Partly for this reason, it can also be difficult to tighten the rules of such regimes against emerging proliferation threats—e.g., to reach new

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77. NONCOMPLIANCE REPORT 2005, *supra* note 5, at 107.

78. *Id.* at 107-08. To the extent that such transfers have occurred with the knowledge of the Russian government, they are an eloquent commentary on Russia’s seriousness about nonproliferation. To the extent, on the other hand, that such exports are *not* authorized, they “raise concerns regarding Russia’s *ability* to implement controls on missile-related technologies.” *Id.* at 108 (emphasis added).

79. For instance, fully half of the members of the Wassenaar Arrangement dual-use export control regime fail to submit information on their export denials on time. Indeed, even the United States failed to report a number of export denials to the Australia Group between 1996 and 2001. See GAO REPORT, *supra* note 63, at 2. And even fewer countries would be willing to share information on *future* export transactions, for fear of losing competitive advantage. Therefore, bilateral attempts to discourage transactions often depend on the collection of intelligence information that raises concerns for a fellow regime participant about a pending transaction.

proliferation practices that develop as proliferators learn how to shape their activity in ways that minimize exposure to control list restrictions. To the extent that such regimes rely upon guidelines established by consensus among participants, and to the extent that regime policies *do* attract controversy, it can become very hard to modify them—or to modify them quickly enough—to adapt the rules to the changing realities of proliferation threats. Fortunately, both the MTCR and the AG have amended their provisions to help keep pace with proliferation trends, including by adding useful provisions regarding “catch-all” export controls.<sup>80</sup> At the NSG, however, issues regarding alleged NPT article IV “rights” within the consensus-based NSG plenary body are currently complicating efforts to win support for important guideline changes regarding future transfers of proliferation-sensitive enrichment and reprocessing technology to countries that do not already possess nuclear fuel cycle capabilities.<sup>81</sup>

#### IV. HYBRID REGIMES

Finally, a third basic approach has been attempted as the international community struggles to come to grips with twenty-first century proliferation challenges. This approach is based on obligations imposed upon some or all governments

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80. “Catch-all” provisions are those that allow governments to require an export license for items that do not appear on any control list but which are nonetheless determined likely to contribute to a program of concern if exported. *See, e.g., id.* at 8 (discussing AG decision in 2002 to add “catch-all” provisions and controls on dual-use biological equipment and the intangible transfer of information and knowledge that could be used for chemical or biological weapons purposes).

81. The proposal for restricting enrichment and reprocessing (known as “E&R” or “ENR”) technology was a centerpiece of the nonproliferation initiatives announced by President Bush in February 2004. He proposed that further expansion of fuel cycle capabilities be stopped and that countries abandoning the pursuit of such technology be rewarded with assurances of reliable fuel supplies. *See* President George W. Bush, Address at Fort Lesley J. McNair—National Defense University (Feb. 11, 2004), *available at* <http://www.whitehouse.gov/news/releases/2004/02/20040211-4.html#>. This speech was also the one at which President Bush first publicly revealed the existence of the black market nuclear smuggling network led by renegade Pakistani nuclear weapons scientist A. Q. Khan—the network which had supplied both Libya and Iran with black market uranium enrichment centrifuges, uranium hexafluoride feedstock, and (in Libya’s case, at least) nuclear weapons designs. *See id.*

by the United Nations Security Council pursuant to its Chapter VII authority under the Charter of the United Nations to maintain international peace and security.<sup>82</sup>

In the nonproliferation community, Security Council Resolution 1540<sup>83</sup> is paradigmatic of this approach. In that document, the Council, acting under Chapter VII, imposed an obligation on all states to refrain from “providing any form of support to non-State actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery.” All states were also obliged to “adopt and enforce appropriate effective laws” criminalizing such activity and to establish effective internal controls and export controls in order to prevent the proliferation of such technology.<sup>84</sup> For the most part, actually implementing these requirements—e.g., determining what counts as “appropriate effective border controls”—was left to the good faith of each state. The Security Council did, however, establish and subsequently extend the life of<sup>85</sup> a committee made up of all Council members that was to report on implementation and call upon states to report on “steps they have taken or intend to take to implement this resolution.”<sup>86</sup>

Resolution 1540 was not the first attempt at such an approach, although it was the first to specifically address WMD proliferation. More than two years before Resolution 1540 was passed in 2004, the Security Council adopted Resolution

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82. *See, e.g.*, U.N. Charter art. 48, paras. 1-2 (providing that “[t]he action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine” and that “[s]uch decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members”); U.N. Charter art. 49 (“The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.”).

83. S.C. Res. 1540, U.N. Doc. S/RES/1540 (Apr. 28, 2004).

84. *Id.* ¶¶ 1-3.

85. *See* Press Release, Security Council, Security Council Extends for 2 Years Mandate of Committee Monitoring Implementation of Resolution 1540 (2004) on Mass Destruction Weapons, U.N. Doc. SC/8708 (Apr. 27, 2006), available at <http://www.un.org/News/Press/docs/2006/sc8708.doc.htm>.

86. *Id.* ¶ 4.

1373<sup>87</sup> to address international terrorist threats more generally. Passed shortly after the infamous September 11, 2001 attacks on New York City and Washington, D.C. by al-Qa'ida terrorists, Resolution 1373 invoked the Council's Chapter VII authority to impose on all states an obligation, inter alia, to "[p]revent and suppress the financing of terrorist acts," criminalize fundraising for terrorists, freeze the assets of those who commit or facilitate terrorist acts, refrain from giving any support to terrorists (including the provision of safe havens), and prevent terrorist movement through their territories.<sup>88</sup> Resolution 1373 also contains language—upon which analogous subsequent provisions of Resolution 1540 were modeled—setting up a Security Council committee to monitor implementation and receive national governments' reports about the steps they are taking pursuant to the Resolution.<sup>89</sup>

As these Resolutions indicate, the Chapter VII hybrid approach partakes of both universalist and of particularist elements. It is universalist insofar as it can impose formal legal obligations upon states rather than merely asking political commitments of them. Moreover, this approach is capable of imposing such legal requirements upon *all* states (or upon all UN members, at any rate). The Chapter VII approach is also a mechanism that derives its authority from an impeccably "universalist" source: the UN Charter. (Indeed, this approach is perhaps as close as the international community has been able to come to the paradigm of domestic lawmaking, in which an at least partly representative body with special authority imposes binding "legislation" on the universe of system participants.<sup>90</sup>) Finally, and intriguingly, the theoretical oversight

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87. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

88. *Id.* ¶¶ 1-2.

89. *Id.* ¶ 6.

90. The respectably universalist Charter-derived pedigree of Chapter VII authority, in internationalists' eyes, does not prevent it from being a highly unusual form of law-making from the perspective of the U.S. constitutional system. The U.S. Supreme Court famously declared in *The Paquete Habana*, 175 U.S. 677, 700 (1900), that "international law is part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdiction." Accordingly, it is generally assumed that customary international law is part of U.S. federal law. See, e.g., *United States v. Belmont*, 301 U.S. 324, 331 (1937). For treaty law, however, the U.S. Constitution reserves an intermediary role for the legislature, providing expressly that the President's power to make treaties is conditioned on the requirement that "two thirds of

functions of the Security Council committees established under Resolutions 1373 and 1540 to monitor implementation also give the Chapter VII approach some faint taste of compliance enforcement insofar as these committees would be well within their rights to analyze country declarations, give encouragement to governments that are taking resolute and effective steps to implement the respective Resolutions, and draw attention to states that do not take these legal obligations sufficiently seriously.

The Chapter VII approach is also particularist in the sense that it is not a treaty-type regime painstakingly negotiated among large numbers of founding member states. The substantive rules that a Resolution imposes are negotiated within a relatively representative international body, to be sure, but they are worked out among a small and clearly-defined subset of the international community—a subset, moreover, in which the veto-wielding Permanent Members of the Security Council enjoy obvious special advantages. Like the particularist regimes we have examined, implementation is also left principally to the good faith and self-policing of the states involved. The committees established by Resolutions 1373 and 1540 clearly have room to play some oversight role, and potentially a useful one, but this would presumably generally entail no more than acting as a sort of compliance-promotion “bully pulpit”—assuming these organs could muster the political will to play any such role at all.<sup>91</sup> In any event, neither Resolution

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the Senators present concur.” U.S. CONST. art. II, § 2, cl.2. If one accepts that customary law is derived from the collective weight of multiple diverse instances of state practice combined with *opinio juris* (i.e., general belief that a particular course of action is actually required by law rather than simply convenient), the U.S. system would thus seem to contain no express provision allowing a single act of choice by the Executive Branch to impose a binding legal obligation upon the country. This makes the invocation of the Security Council’s Chapter VII authority stand out, however, for the Council can impose treaty-like legal obligations upon all UN member states—the United States included—on the basis of a simple Council vote. From the U.S. perspective, therefore, a single Council resolution that is not vetoed by its UN ambassador can impose entirely new binding legal rules upon the country in an instant, subject neither to the practice-based processes of accretion (and possibilities for derogation) of customary law nor to the ratification requirements of treaty law.

91. Since the committees are made up of the full membership of the Security Council, one might imagine that, unless a committee finding of noncompliance were taken by majority vote over the opposition of one of

offers clear and specific guidance about what the details of a sound implementation plan should be.

The hybrid nature of this quasi-legislative Chapter VII approach gives it certain strengths. It boasts uniform, nondiscriminatory, and legally-binding rules of a respectable, Charter-derived, internationalist pedigree. Moreover, the establishment of these rules is not subject, as a treaty would be, to the vagaries of country-by-country ratification procedures—e.g., issues of potential entry-into-force requirements and wild-card treaty “reservations” on the part of some governments—and UN members do not have the choice of opting out of the regime. Its transparency and committee-based information clearinghouse functions permit a degree of state accountability for noncompliance, yet it eschews the creation of an unwieldy international bureaucracy, does not subject participating states to unpalatable and intrusive enforcement mechanisms, and leaves implementation to the sovereign discretion of participants.

However, this is not to say that such hybrids are ideal instruments. They are not immune to accusations of high-handedness by non-Security Council states that acquire legal obligations as a result of Security Council decisions. Moreover, the Security Council’s structure as a body dominated by the five veto-wielding permanent members is certainly a subject of significant discussion and controversy in contemporary UN reform debates and may perhaps become more so if it engages in further global “legislation.” Some particularly impoverished or dysfunctional states will probably always find it difficult to make serious progress in implementing their Chapter VII obligations—a prospect which Resolution 1540, at least, explicitly recognizes<sup>92</sup>—so the regime’s overall effectiveness

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the permanent members, it would not necessarily be that hard to translate such a finding into a subsequent Security Council action. It is not clear whether the Resolution 1373 and 1540 committees need be subject in their internal decision-making to Security Council veto provisions. *Cf.* S.C. Res. 96, R. 28, U.N. Doc. S/RES/96 (1983) (providing only that “[t]he Security Council may appoint a commission or committee or a rapporteur for a specified question”).

92. Resolution 1540 contains a hortatory paragraph recognizing that “some States may require assistance in implementing the provisions of this resolution within their territories” and “invit[ing] States in a position to do so to offer assistance as appropriate in response to specific requests to [sic]

and contribution to nonproliferation goals will depend to some extent on variables beyond governmental good faith (e.g., foreign capacity-building assistance). Nor is it certain how effective the Resolution 1373 and 1540 oversight committees will be in practice. For instance, it would be all too easy for their transparency and accountability functions to become ensnared in acquisitive politics if many states come to regard compliance with their legal obligations as a commodity to be sold in exchange for implementation money and assistance. (This is a potential side effect of any suggestion that noncompliance may be excusable for states that “[r]equire assistance in implementing the provisions” of a resolution.<sup>93</sup>) At any rate, the committees’ track record so far is limited. As of July 2007, for instance, fifty-six countries had yet to submit reports to the 1540 Committee, and the Committee still remained focused on “increasing awareness of the resolution” rather than on actually facilitating “its full implementation.”<sup>94</sup>

#### V. PUTTING IT ALL TOGETHER

So how do all these pieces fit together? To begin with, it should be emphasized that there is no such thing as a single “best” type of regime and that none of the approaches outlined above are mutually exclusive. International lawyers and non-governmental organizations’ (NGO) staffers often seem to look to universalist approaches as the first or even the only resort when dealing with arms control and nonproliferation questions, but in the real world of politics and diplomacy each approach has an important role to play. Arms control enthusiasm for the global treaty should neither blind policymakers to the limitations of universalist approaches nor lead them to ignore the ways in which particularist, hybrid, or potentially still different approaches can contribute to achieving nonproliferation goals.

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the States lacking the legal and regulatory infrastructure, implementation experience and/or resources for fulfilling the above provisions.” S.C. Res. 1540, *supra* note 83, ¶ 7.

93. *Id.*

94. Press Release, Security Council, Press Conference on Work of Security Council 1540 Committee (July 12, 2007), *available at* [http://www.un.org/News/briefings/docs/2007/070712\\_1540.doc.htm](http://www.un.org/News/briefings/docs/2007/070712_1540.doc.htm) (comments of Chairman Peter Burian).

The United States has certainly been very clear that it regards all such approaches as valuable contributors to sound nonproliferation policy. The PSI, for instance, was expressly designed to “reinforce, not replace, other nonproliferation mechanisms,”<sup>95</sup> and Resolution 1540 has been explicitly described as part of a “layered nonproliferation defense” that includes a range of regimes—including the NPT, CWC, BWC, NSG, MTCR, and AG.<sup>96</sup> This is good sense: All of these approaches are best regarded as complementary, and the wise policymaker should shun arms control fundamentalism and recognize the need to use universalist, particularist, and hybrid approaches to nonproliferation regime-building in complementary ways that build upon the strengths of each and minimize the impact of their weaknesses.

Another lesson of “layering” is the degree to which unilateral decisions can contribute to nonproliferation goals. Indeed, the success of all the non-universalist models we have examined herein relies in no small part upon unilateral decisions by sovereign governments undertaken without formal oversight by any international body, including the exercise of national discretion in export decisionmaking in technology-control particularist regimes, invocations of sovereign authority in undertaking interdictions in PSI-style regimes, and faithful implementation of general obligations imposed by the Security Council in hybrid systems. Without responsible unilateralism of this sort, the nonproliferation regime would be gravely weakened.

It is certainly the position of the U.S. Government that all of these regime types are important. Indeed, over the years, the United States has been a driving force behind the establishment and implementation of most of them.

The United States supported the initial British draft proposal in 1969 for the elimination of biological weapons. That same year, it unilaterally renounced the use of lethal or inca-

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95. White House Press Release, Statement on Proliferation Security Initiative (Sept. 4, 2003), *available at* <http://www.whitehouse.gov/news/releases/2003/09/20030904-10.html>.

96. *See, e.g.*, Andrew Semmel, Principal Deputy Ass’t Sec’y for Nuclear Nonproliferation, Remarks at Conference on Global Nonproliferation and Counterterrorism: United Nations Security Council Resolution 1540: The U.S. Perspective (Oct. 12, 2004), *available at* <http://www.state.gov/t/isn/rls/rm/37145.htm>.

pacitating chemical weapons, unconditionally renounced all methods of biological warfare, and began drawing up plans for the elimination of all existing stocks. The United States extended this policy in 1970 to toxin weapons. In 1971, the United States and the Soviet Union together introduced an agreed draft convention that subsequently became the BWC—the first international agreement since the Second World War to provide for the elimination of an entire class of weapons.<sup>97</sup>

As we have seen, in 1957, the United States and its allies submitted a package to the UN Disarmament Commission that included a commitment on the non-transfer of nuclear weapons. In the wake of the General Assembly's 1961 approval of the Irish resolution calling for an agreement banning the transfer or acquisition of nuclear weapons, the United States outlined a program in 1964 that included non-dissemination and non-acquisition proposals and the establishment of safeguards on transfers of nuclear materials. The United States submitted a draft nuclear nonproliferation treaty in 1965, which over the next three years evolved into today's NPT.<sup>98</sup>

The IAEA itself predates the establishment of the NPT, as it was originally set up in 1957 not specifically for nonproliferation but rather for verification of peaceful use, nuclear materials security, and peaceful and responsible nuclear technology sharing based on President Dwight Eisenhower's "Atoms for Peace" address to the United Nations in 1953.<sup>99</sup> Today, of

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97. U.S. ARMS CONTROL & DISARMAMENT AGENCY, ARMS CONTROL AND DISARMAMENT AGREEMENTS: TEXTS AND HISTORIES OF THE NEGOTIATIONS 129-31 (1990) [hereinafter ACDA HISTORIES].

98. *Id.* at 90-91.

99. *See, e.g.*, IAEA, History of the IAEA, <http://www.iaea.org/About/history.html> (last visited July 9, 2007). Despite its contemporary focus on proliferation problems and increasing frustration with those who find technology-sharing to be more important than nonproliferation, the United States remains committed to promoting the development of peaceful applications of nuclear technology, especially in non-nuclear-weapon states party to the NPT, in conformity with articles I and II of the Treaty. The United States is the largest donor to the IAEA's Technical Cooperation (TC) program. Fact Sheet, U.S. Dep't of State, Bureau of Non-Proliferation, Article IV of the NPT: U.S. Support for Peaceful Nuclear Cooperation (Jan. 20, 2001), available at <http://www.state.gov/t/isn/rls/fs/2001/3052.htm>. From 2001 through 2004, the U.S. awarded nearly 3,800 research contracts to developing member states at a cost of over \$25 million. (During the same period, over 2,000 technical cooperation projects provided expert services, training, and equipment in support of national, regional, and inter-regional

course, the IAEA's monitoring of nuclear safeguards is a very important part of the international nuclear nonproliferation system. The United States is by far the largest supporter of the IAEA safeguards system, historically contributing more than a quarter of the IAEA's regular budget and nearly half of the "voluntary contributions" upon which the Agency relies to carry out its activities.<sup>100</sup>

During the 1970s, a U.S.-Soviet working group began discussing key ideas that eventually formed the building blocks of the CWC. As the Cold War thawed with the collapse of the Soviet Empire, the United States and the Soviet Union announced a joint plan in 1990 to end production of chemical weapons and begin destroying stockpiles. In 1992, President George H.W. Bush also announced—and obtained international support for—a one-year deadline for the successful negotiation of a chemical weapons convention, which led directly to the UN Conference on Disarmament's adoption of a full draft of the CWC that September.<sup>101</sup>

Further back, a United States initiative to ban the export of gases for use in war led directly to the development of the 1925 Geneva Protocol, which prohibited the use of chemical weapons and bacteriological warfare.<sup>102</sup>

It is also worth pointing out that the United States remains a supporter of attempts to achieve new universalist nonproliferation regimes wherever they would be useful. On May

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development priorities—with a total budget for these projects of about \$290 million.) The United States provides about one-third of all funding for TC projects, and one quarter of all funding for research contracts and other IAEA technical cooperation activities. In addition, during this same period, U.S. "extrabudgetary" contributions (for additional endeavors not included in the IAEA's regular program) amounted to twenty-five million dollars. *See, e.g.,* U.S. Dep't of State, U.S. Support for Peaceful Nuclear Cooperation (May 2005), at 1-4.

100. In general, the United States supplies 26% of the IAEA's regular budget and 45% of its voluntary contributions for a total U.S. contribution of \$121 million in 2004. CONGRESSIONAL BUDGET OFFICE, *THE COST OF IMPLEMENTING THE ADDITIONAL PROTOCOL TO THE TREATY ON THE NON-PROLIFERATION OF NUCLEAR WEAPONS* 5-6 (Mar. 4, 2003), available at <http://www.cbo.gov/ftpdocs/51xx/doc5160/IAEA.pdf>.

101. *See* Organization for the Prohibition of Chemical Weapons, *Genesis and Historical Development: History*, [http://www.opcw.org/en/CWC\\_History.html](http://www.opcw.org/en/CWC_History.html) (last visited July 6, 2007).

102. *See* ACDA HISTORIES, *supra* note 97, at 10.

18, 2006, for instance, the United States introduced a draft Fissile Material Cutoff Treaty (FMCT) at the UN Conference on Disarmament in Geneva. This step made the United States the first country—and, at the time of writing, the only one—to table a draft FMCT, which is a long-time goal of the Conference. As noted earlier, the United States itself has not produced new fissile material for nuclear weapons or other nuclear explosive purposes for many years—no HEU since 1964, and no plutonium since 1988—and President George H.W. Bush publicly announced a U.S. moratorium on such material in July 1992. Now, under the presidency of his son, the United States has taken the first concrete step toward placing the binding qualities of law behind an effort to ban such production everywhere.<sup>103</sup>

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103. The U.S. has urged that the so-called “Shannon Mandate”—that is, the report authored by Canadian Ambassador Gerald Shannon and endorsed by the CD in 1995 to guide consideration of an FMCT—be altered in order to make it possible to reach agreement on a treaty text. The Shannon Mandate called for an FMCT to be “internationally and effectively verifiable.” See Conference on Disarmament, *The Shannon Mandate* (Mar. 23, 1995), available at [http://www.armscontrol.org/events/FMCT\\_Shannon\\_Mandate.asp](http://www.armscontrol.org/events/FMCT_Shannon_Mandate.asp); Report of Ambassador Gerald E. Shannon of Canada on Consultations on the Most Appropriate Arrangement to Negotiate a Treaty Banning the Production of Fissile Material for Nuclear Weapons or Other Nuclear Explosive Devices, CD/1299 (Mar. 24, 1995), available at <http://www.reachingcriticalwill.org/political/cd/shannon.html>. After an extensive review of the issue, U.S. officials determined in 2004 that no feasible FMCT could be made “effectively verifiable” and that attempting to achieve this would do more harm than good and would significantly delay or even prevent success in achieving a ban at all. See, e.g., Press Release, U.S. Mission to the U.N. in Geneva, Statement by Stephen G. Rademaker, Ass’t Sec’y of State for Arms Control, on the Test of Effective Multilateralism: Meeting the Dangers of the World with Resolve (Oct. 8, 2004), available at <http://www.reachingcriticalwill.org/political/1com/1com04/statements/US.pdf>. See also Press Release, U.S. Mission to the United Nations in Geneva, Stephen G. Rademaker, Acting Ass’t Sec’y of State for Int’l Security and Nonproliferation, Statement to the Conference on Disarmament: Rising to the Challenge of Effective Multilateralism (May 18, 2006), available at <http://geneva.usmission.gov/Press2006/0518RademakerCDstatement.html>. For the most current United States Government explication of its approach to the FMCT, including verification, see Christopher A. Ford, U.S. Special Rep. for Nuclear Nonproliferation, Address at the Conference on Preparing for 2010: Getting the Process Right: The United States and the Fissile Material Cutoff Treaty (Mar. 17, 2007), available at <http://www.state.gov/t/isn/rls/other/81950.htm>.

As its name suggests, the Australia Group was an initiative led by Australia. The United States, however, was an enthusiastic participant and one of the fifteen founding members of the AG in 1985. (Its membership has since increased to thirty-nine.)<sup>104</sup> Today, the United States remains a champion of rigor in applying AG export control guidelines to prevent the proliferation of CW- and BW-related technology—and a staunch opponent of AG admission for countries which are noncompliant with their CWC and BWC obligations and/or otherwise lack good nonproliferation records.

The origins of the Nuclear Suppliers Group lie in 1971 in the formation of the Zangger Committee by several NPT states party and nuclear technology suppliers in an effort to ensure the adoption of nuclear safeguards by recipients of sensitive dual-use nuclear technology. After India's explosion of a nuclear device in 1974, several Zangger members and other states established the NSG in order to apply such trade restrictions to all states.<sup>105</sup> As mentioned earlier, the United States is currently working with the NSG in an effort—stemming from the nonproliferation initiatives announced by President George W. Bush in February 2004—to control the spread of enrichment and reprocessing technologies while endeavoring to ensure even more reliable alternative nuclear fuel supplies for countries that elect not to develop such proliferation-risky capabilities.

The Missile Technology Control Regime today has thirty-four participating countries, but it was founded in 1987 by only seven: Canada, France, Germany, Italy, Japan, the United Kingdom, and the United States.<sup>106</sup> In 1999, the MTCR Partners initiated the process that resulted in the Hague Code of Conduct against Ballistic Missile Proliferation, which was launched in November 2002. The Hague Code provides Subscribers with a forum for promoting ballistic missile non-

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104. See generally Zangger Committee, History, <http://www.zanggercommittee.org/Zangger/History/default.htm> (last visited July 6, 2007); Australia Group, The Origins of the Australia Group, <http://www.australiagroup.net/en/origins.htm> (last visited July 6, 2007).

105. See Fact Sheet, Arms Control Association, The Nuclear Suppliers Group at a Glance (May 2004), <http://www.armscontrol.org/factsheets/NSG.asp> (last visited July 6, 2007).

106. See MTCR, The Missile Technology Control Regime, <http://www.mtcr.info/english/> (last visited July 6, 2007).

proliferation. Subscribers to the Code pledge to undertake additional measures such as reporting on their space and ballistic missile policies and reporting missile tests.<sup>107</sup>

The Proliferation Security Initiative was also a U.S.-led effort. President George W. Bush announced the establishment of the PSI in Krakow, Poland, on May 31, 2003.<sup>108</sup> The United States has worked very hard in developing ever-improving ways for PSI partners to coordinate their efforts to stop WMD shipments, and has had some very notable successes. The interdiction of the merchant vessel *BBC China* in October 2003, for instance, was a critical factor in the clandestine U.S. and U.K. negotiations with Libya that led to that country's December 2003 decision to abandon its WMD and long-range missile programs—as well as a key part of the U.S.-led cooperative dismantling of the now-infamous A.Q. Khan nuclear proliferation network.<sup>109</sup>

The United States was also the original sponsor of Security Council Resolution 1540. This effort was an outgrowth of President George W. Bush's speech to the UN General Assembly in September 2003 calling for the Security Council to adopt a nonproliferation resolution.<sup>110</sup>

The United States has also taken unprecedented steps to integrate considerations of compliance with nonproliferation standards into its domestic law by adopting legislation impos-

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107. See, e.g., Center for Nonproliferation Studies, Hague Code of Conduct Against Ballistic Missile Proliferation, available at <http://cns.miis.edu/pubs/inven/pdfs/icoc.pdf>.

108. Press Release, White House Office of the Press Secretary, Remarks by the President to the People of Poland (May 31, 2003), available at <http://www.whitehouse.gov/news/releases/2003/05/20030531-3.html>.

109. See Robert G. Joseph, Under Sec'y of State for Arms Control and Int'l Security, Remarks to the Fletcher School Conference on the Proliferation of Weapons of Mass Destruction: Applying the Bush Administration's Strategy to Combat Weapons of Mass Destruction to Today's Challenges (Oct. 21, 2005), available at <http://www.state.gov/t/us/rm/55601.htm> [hereinafter Joseph I].

110. Press Release, White House Office of the Press Sec'y, President Bush Addresses United Nations General Assembly (Sept. 23, 2003), available at <http://www.whitehouse.gov/news/releases/2003/09/20030923-4.html> ("Today, I ask the U.N. Security Council to adopt a new anti-proliferation resolution. This resolution should call on all members of the U.N. to criminalize the proliferation of weapons—weapons of mass destruction, to enact strict export controls consistent with international standards, and to secure any and all sensitive materials within their own borders.").

ing a range of possible economic penalties upon foreign entities. By making it clear that one cannot be both a WMD proliferator and a full trading partner of the world's largest economy, the United States has made it harder and more costly for would-be proliferators to do the wrong thing. These steps are not part of any international nonproliferation regime, but the triggers for such sanctions under U.S. federal law are often tied to specific actions (e.g., WMD- or missile-related transfers) that violate nonproliferation norms. This is another example of the sort of responsible unilateralism that strengthens international nonproliferation efforts.

The United States has also led the way in exploring other innovative approaches to fighting proliferation threats in conjunction with international partners. The successful effort to first negotiate, then implement, and ultimately to verify Libya's elimination of its WMD programs is a case in point. While the United States and the United Kingdom worked closely in Libya with both the IAEA and the Organization for the Prohibition of Chemical Weapons, it is important to note that most work in that country was done on a cooperative trilateral basis between the United States, the United Kingdom, and their Libyan partners. It was not as much a "regime" success, in other words, as it was a triumph of cooperative diplomacy built upon a foundation of years of hard-nosed pressure and international isolation of the Libyan government.

Once Libya made its strategic commitment to renounce WMDs, for instance, it was possible to work with the Libyans to actually eliminate their nuclear weapons program instead of simply to place seals on it and monitor it pursuant to IAEA safeguards. Thanks to patient diplomatic efforts and a keen U.S. focus throughout 2003 on stopping WMD proliferation—and following years of international pressure on Libya in connection with terrorism, human rights, and regional security problems—the United States was able to achieve a WMD rollback on a voluntary and cooperative basis.<sup>111</sup>

The Libyan success presents an extraordinary model. As Assistant Secretary of State Paula DeSutter testified to Congress:

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111. For a more detailed account of the extraordinary Libya operation, see DeSutter, *supra* note 6.

I have been involved in verification for a long time, and the opportunity presented by Libya's decision is unique. This is one of those rare times that a state has volunteered to rid itself of its WMD programs—and it is a first for a state sponsor of terror to do so without regime change. We must do our best to ensure that Libya's voluntary decision stands as a model for others as a pathway to restore themselves to international legitimacy.<sup>112</sup>

Today, as former Under Secretary of State Robert Joseph declared, "Libya has been established as a second model for proliferators to follow—give up your weapons programs and receive the benefits of being in good-standing within the international community."<sup>113</sup> With perseverance, skill, and some luck, the United States may be able to build upon this Libyan experience and achieve another success in North Korea, or perhaps Iran. U.S. officials have not been shy about suggesting this possibility, noting that after years of thoroughgoing isolation growing out of the international community's concern about Libya's support for terrorism, human rights abuses, and interest in weapons of mass destruction and delivery systems, Libya's return to the international community illustrates how relations with a proliferator can be turned around by policies that induce it to make a wise strategic decision to abandon the pursuit of WMD.<sup>114</sup>

These myriad examples suggest how sound nonproliferation policymaking can weave multiple universalist, particular-

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112. *Id.*

113. Joseph I, *supra* note 109. In his previous capacity as Senior Director for Nonproliferation Strategy on the U.S. National Security Council staff, Robert Joseph was the lead United States policy official working secretly on the U.S./U.K. negotiations with Libya in the months prior to the Libyans' December 2003 announcement. After this initiative was publicly announced, the State Department coordinated the interagency effort to implement and verify the elimination of Libya's WMD and long-range missile programs. This coordination project was run by the Bureau of Verification and Compliance—subsequently renamed the Bureau of Verification, Compliance, and Implementation—under Assistant Secretary of State DeSutter, reporting to Under Secretary John R. Bolton.

114. Christopher Ford, U.S. Special Rep. for Nuclear Nonproliferation, Remarks to NATO seminar in Vilnius, Lithuania: Nuclear Proliferation: Some Context and Consequences (Apr. 18, 2007), *available at* <http://www.state.gov/t/isn/rls/rm/83206.htm>.

ist, hybrid, and unilateral endeavors into a complex, layered approach to preventing the spread of weapons of mass destruction and their delivery systems. Only such layering can provide an acceptable answer to the challenges presented by the limitations of given universalist, particularist, and hybrid approaches to nonproliferation regime-building. Serious policymaking in this arena should shun both muddle-headed romanticism about global regime-building and reflexive cynicism about the very possibility of progress. Without an understanding of the strengths and weaknesses of each approach, nonproliferation policy would be impoverished and ineffective. It is my hope that the typology set forth here—and candid discussions of the relative strengths and weaknesses of these various approaches—will contribute to helping the United States and all its current or potential international partners further refine and add to such layered defenses in the future.

