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The United Nations Security Council and Arms Control: A Failure of Responsibility

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Humanity has long accepted the link between weapons proliferation and the risk of war. Tsar Nicholas I organized the 1899 Hague Peace Conference to slow the competition for new, industrial-age weapons.[1] He feared that the armaments advantages of other countries would tempt them to threaten a less-well-armed Russia. The same concern led to efforts after World War I to place quantitative limits on weapons systems.[2] Again, after World War II, the designers of the United Nations Organization had arms control very much in mind as they sought to establish an organization that could "save succeeding generations from the scourge of war."[3] The responsibility to respond to slower-acting, less immediate causes of conflict, such as failure to respect human rights and economic underdevelopment, went to the General Assembly. The powerful Security Council was created to respond to immediate threats, including arms proliferation.[4]

The Charter drafters were right to be concerned about weapons and war. Evidence supports the link between decisions to resort to military force and weapons possession.[5] A well-documented case involves the United States' decision to deploy military force in an effort to assassinate Osama bin Laden in 1998. President Bill Clinton's advisers "reinterpreted" a presidential executive order restricting assassination to clear the way for an operation aimed at killing Bin Laden, who was located in Afghanistan at the time.[6] The new interpretation laid

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[1] See *generally* J Brown Scott, *The Hague Peace Conferences of 1899 and 1907* (Johns Hopkins Press 1909).

[2] See*, e.g.*, Treaty of Versailles (signed 28 June 1919, entered into force 10 January 1920) (1919) UKTS 4 arts 159–219 (placing quantitative limits on German troops, armaments, munitions, ships, and airplanes).

[3] UNCh preamble.

[4] See UNCh arts 24–26. Article 26 specifically provides: "In order to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world's human and economic resources, the Security Council shall be responsible for formulating, with the assistance of the Military Staff Committee referred to in Article 47, plans to be submitted to the Members of the United Nations for the establishment of a system for the regulation of armaments."

[5] The link between weapons and resort to conflict is generally reflected in the pursuit of arms control treaties and peace treaty with provisions that require disarmament. See*, e.g.*, JD Maurer, 'The Purposes of Arms Control' (2018) 2 *Texas National Security Review* 9, available at <https://repositories.lib.utexas.edu/handle/2152/73737> accessed 1 May 2021; and RL O'Connell, *Of Arms and Men, A History of War, Weapons, and Aggression* (Oxford University Press 1989) 303. At least some empirical data also supports the link. See, e.g., BO Fordham, 'A Very Sharp Sword, The Influence of Military Capabilities on American Decisions to Use Force' (2004) 48 *Journal of Conflict Resolution* 632, 632: "Results show that military capabilities indeed increase the frequency with which force is used…." See also, R Jervis, 'Arms Control, Stability, and Causes of War' (1993) 108 *Political Science Quarterly* 239.

[6] National Commission on Terrorist Attacks upon the United States, *The 9/11 Commission Report* (Official Government Edition, 2006) 132 ("The administration's position was that under the law of

the foundation for numerous subsequent attempts to kill Bin Laden and other members of Al Qaeda and similar groups. Without the emergence of the drone the US would not have engaged in these operations.[7] The new technology made the decision to use force politically palatable. It did not make it lawful.[8]

The drafters of the UN Charter were wise, therefore, to single out arms control as an effective way for the Security Council to support peace beyond enforcing the Charter's legal prohibition on the use of force in Article 2(4). Given the acute threat to peace posed by weapons, the drafters properly chose the Security Council as the appropriate body to work for weapons restrictions. Yet, for reasons that will only be touched on briefly here, the Council has generally failed to play a constructive role in promoting peace through arms control.[9] For the most part, it has abandoned its responsibilities to the General Assembly, which has made real progress in developing important arms limitations treaties.[10] The General Assembly's initiative in sponsoring the Nuclear Non-Proliferation Treaty (NPT) has led to the one important exception to Council inaction. The Assembly included a provision in the NPT for the International Atomic Energy Agency to bring enforcement issues to the Security Council.[11] As a result, the Council has devoted considerable time to nuclear issues. Nevertheless, at the same time, the Council's Permanent Five have worked at cross-purposes with the NPT. They have aided in the spread of nuclear weapons to Israel, India, Pakistan, and North Korea. Russia and China have provided nuclear technology to Iran.[12] The US undermined the initiative to deter Iran from acquiring nuclear weapons through the 2015 Nuclear Agreement aimed at preventing Iran from turning that technology into a weapon.[13] France and the UK have evaded or avoided attempts to hold them accountable for failure to move to nuclear disarmament at the International Court of Justice.[14]

Other than NPT oversight, the Council has considered weapons issues in its many resolutions imposing arms embargoes on conflict zones. The Council has often restricted the right to import weapons as part of a suite of measures aimed at specific situations where the Council is attempting to end or prevent violence.[15] Because UN peacekeeping forces are typically

armed conflict, killing a person who posed an imminent threat to the United States would be an act of self-defense, not assassination.").

[7] G Chamayou, *A Theory of the Drone* (The New Press 2015) 17; See *also* ME O'Connell, 'Review Essay: Game of Drones' (2015) 109 *American Journal of International Law* 889.

[8] See UN News, 'All Drone Strikes "in Self-Defence" Should Go Before Security Council, Argues Independent Rights Expert' (*UN*, 3 July 2020) <https://news.un.org/en/story/2020/07/1068041> accessed 1 May 2021 and ME O'Connell, 'Seductive Drones: Learning from a Decade of Lethal Operations' (2012) 21 (2) *Journal of Law, Information and Science* 116.

[9] See *infra*.

[10] See *infra* notes 22–30.

[11] Treaty on the Non-Proliferation of Nuclear Weapons (opened for signature 1 July 1968, entered into force 5 March 1970) 729 UNTS 161 (NPT).

[12] See *infra*.

[13] See *infra*.

[14] See *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v France) Case* [1995] ICJ Rep 288 and *Obligations Concerning Negotiations Relating to the Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom) Preliminary Objections, Judgment* [2016] ICJ Rep 833.

[15] At time of writing, the UN lists 13 peacekeeping operations that remain ongoing. 'Where We Operate' (*United Nations Peacekeeping*) <https://peacekeeping.un.org/en/where-we-operate> accessed 16 July 2020.

deployed to implement the Council's measures, including disarmament mandates, this arms control topic will be left to discussions of peacekeeping. Here the focus will be, first, on the UN Charter provisions respecting the Security Council and weapons and, second, the Council and nuclear arms control.

1 THE CHARTER, THE COUNCIL, AND ARMS CONTROL

The UN Charter expressly tasks the Security Council with regulating weapons with the aim of eventual disarmament.[16] After the catastrophe of World War II, the Charter drafters and national delegations that met in San Francisco in 1945 for the final Charter negotiations determined to carry on the earlier efforts of the League of Nations toward ending arms races. The new organization would have a new concept and new approach, however. Rather than complete disarmament, regulation became the goal. The Charter reflects the idea that some weapons would be needed to prevent future aggression. It was thought that certain states had reduced armaments to a point where they had left themselves vulnerable to aggression by the Axis powers. Better to have a negotiated level of weapons left in place with a monitoring system by the Council.[17] At the Charter drafting and negotiating stages, much discussion went into which UN organ should have the role of working to reduce and monitor weapon stockpiles. The Soviet Union wanted the General Assembly in that role. The United States and Great Britain agreed that the Assembly would have a general role but wanted the Security Council to have a more specific role. The details of the Council's role were left to future determination.[18] The Cold War intervened, however, before any meaningful steps could be taken. Council members not only failed to create a system for arms regulation in general; they aided in the proliferation of nuclear weapons and in countering disarmament norms.

Understanding the Security Council's intended role in arms control begins with Chapter V of the Charter, which is devoted to the Security Council and begins in Article 24(1) by stating that the Council has "primary responsibility for the maintenance of international peace and security."[19] Article 24(2) reiterates that the Council must carry out its responsibilities in con-

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[16] See UNCh art 24 ("In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security..."); ibid art 26 ("In order to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world's human and economic resources, the Security Council shall be responsible for formulating...plans to be submitted to the Members of the United Nations for the establishment of a system for the regulation of armaments."); ibid art 47 ("There shall be established a Military Staff Committee to advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament.").

[17] RB Russell, *A History of the United Nations Charter* (Brookings Institution Press 1958) 209–210; See *also*, ibid 265–271, 476–7, 685–6.

[18] Ibid 476–7.

[19] Art 24 UNCh:

1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

formity with the UN's purposes and principles. The UN was founded for the purpose of ending war. The first line of the preamble confirms this purpose. Every aspect of the organization aims at ending and preventing armed conflict in either the near or longer term. The Security Council has greater capacity to respond than any other UN organ. Article 25 is the real source of the Council's power. It pledges Member States to accept and carry out the Council's decisions. Those decisions may relate to Chapter VI and the peaceful settlement of disputes, Chapter VII and threats to and breaches of the peace, or Chapter XII and judgments of the International Court of Justice. As Article 24 makes clear, the Council has duties respecting all three areas. All relate to the prohibition on the use of force.

Article 26 of Chapter V is somewhat different. It tasks the Security Council with the "establishment of a system for the regulation of armaments" that will lead to "the least diversion for armaments of the world's human and economic resources…." The Charter drafters envisioned that the Council would work through its Military Staff Committee on developing the new program for arms control. The Charter established the Military Staff Committee principally for creating agreements for national stand-by forces for use by the Council in responding to emergency situations, per Chapter VII, Article 43. Article 26 provided that the Council and the Military Committee would also develop plans for arms control to present to UN Members, presumably in the General Assembly. After several years of deadlock, the Military Staff Committee stopped meeting in 1948. No arms control efforts came through that avenue. Another initiative was also tried. Soon after the UN began its work in 1945, the Council established "the Commission for Conventional Armaments" with a mandate to provide for "the general regulation and reduction of armaments and armed forces."[20] The Commission, like the Military Staff Committee, however, was stymied by the competing political interests of the Permanent Five Security Council members. The Commission was dissolved in 1952.[21]

Following this inauspicious start, the Council has yet to develop disarmament plans of a general nature. As will be discussed in the next two sections, it has, at the request of the International Atomic Energy Agency, become involved with control of nuclear weapons.[22] The Council has also imposed arms embargoes, considered chemical weapons use, and taken up other weapons-related issues.[23] It has taken no action under Article 26. In 1978, the General Assembly finally stepped in, and added arms control to its other programmatic work.

The General Assembly and *ad hoc* groups of UN members created a number of committees and commissions, stepping in where the Security Council had failed. These efforts

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2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.
3. The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration.

[20] UNSC Res 18 (13 February 1947) UN Doc S/RES/18.

[21] See UNGA Res 502 (VI) (11 January 1952) UN Doc A/RES/502(VI); UNSC Res 97 (30 January 1952) UN Doc S/RES/97. For a look at the behind-the-scenes disagreements among the P5 (and others) that led to the dissolution, see UN GAOR 6th Session annexes at agenda items 66 and 16.

[22] See notes 120–122 and accompanying text.

[23] See*, e.g.*, UNSC Res 2270 (2 March 2016) UN Doc S/RES/2270 imposing, among other sanctions, an arms embargo on North Korea; UN News, 'Security Council Fails to Adopt Three Resolutions on Chemical Weapons Use in Syria' (*UN,* 10 April 2018) <https://news.un.org/en/story/2018/04/1006991> accessed 1 May 2021; UNSC Res 2117 (26 September 2013) UN Doc S/RES/2117 attempting to combat the illicit trade in small arms and light weapons.

have included, the Disarmament Commission,[24] the Ten Nation Disarmament Committee,[25] the Eighteen Nation Committee on Disarmament,[26] the Conference of the Committee on Disarmament,[27] the second Disarmament Commission,[28] and the Conference on Disarmament.[29] These initiatives have resulted in a number of treaties, and some of the treaties bring the Security Council back into arms control in an enforcement capacity. The Biological Weapons Convention,[30] the Chemical Weapons Convention,[31] and certain specialized treaties restricting nuclear weapons are examples.[32] These arms control regimes have had a positive impact on reducing the possession and use of the weapons specified in the treaties.[33] The most important of the treaties dealing with weapons of mass destruction is the 1968 Nuclear Non-Proliferation Treaty (NPT), the foremost instrument limiting the spread of nuclear weapons.[34] The NPT's

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[24] UNGA Res 502 (VI) (11 January 1952) UN Doc A/RES/502(VI) ("The General Assembly… establishes under the Security Council a Disarmament Commission." (emphasis removed)).

[25] See UNGA Res 1378 (XIV) (20 November 1959) UN Doc A/RES/1378(XIV) (requesting the Secretary-General to make certain disarmament documents available to the "ten-nation disarmament committee" which had been established outside the UN system).

[26] See UNGA Res 1722 (XVI) (20 December 1961) UN Doc A/RES/1722(XVI) (recognizing, but not establishing, the Eighteen Nation Committee on Disarmament which had been negotiated outside the auspices of the UN).

[27] UNGA Res 2602 (XXIV) (16 December 1969) UN Doc A/RES/2602(XXIV).

[28] UNGA Res S-10/2 (30 June 1978) UN Doc A/RES/S-10/2, para 118.

[29] Ibid at para 120. The Conference on Disarmament was initially called the Committee on Disarmament, and it is referred to as such in the cited document.

[30] Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (adopted 10 April 1972, entered into force 26 March 1975) 1015 UNTS 163 arts VI, VII.

[31] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (adopted 13 January 1993, entered into force 29 April 1997) 1974 UNTS 45 art VIII (36), art XII (4).

[32] See*, e.g.*, Treaty on the Southeast Asia Nuclear Weapon-Free Zone (adopted 15 December 1995, entered into force 28 March 1997) 1981 UNTS 129 art 14; Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof (adopted 11 February 1971, entered into force 18 May 1972) 955 UNTS 115 art III (4); Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (adopted 14 February 1967, entered into force 22 April 1968) 634 UNTS 281 art 21. In addition to the treaties listed, there are other nuclear-weapon-free zone treaties, as well as treaties limiting the militarization of outer space and Antarctica, though strictly speaking the space and Antarctic regimes do not have specific provisions for Security Council enforcement.

[33] This is not to say there is perfect compliance or curtailment, with the use of chemical weapons in Syria being the prime example, but nevertheless these treaties have been largely successful in keeping these weapons out of use, out of stockpiles, and out of the relevant geographically restricted zones.

[34] Treaty on the Non-Proliferation of Nuclear Weapons (adopted 1 July 1968, entered into force 5 March 1970) 729 UNTS 161. According to the UN, there are 191 states parties to the treaty. 'Treaty on the Non-Proliferation of Nuclear Weapons' (*UNODA*) <https://disarmament.un.org/treaties/t/npt> accessed 21 June 2019. They still count North Korea, which announced its withdrawal from the treaty on January 10, 2003, and has since developed nuclear weapons. See 'North Korea Withdraws from Nuclear Treaty' *Guardian* (London, 10 January 2003) <https://www.theguardian.com/world/2003/jan/10/northkorea1> accessed 2 May 2021; DE Sanger, 'North Koreans Say They Tested Nuclear Device' *New York Times* (New York, 9 October 2006) <https://www.nytimes.com/2006/10/09/world/asia/09korea.html> accessed 2 May 2021. Putting North Korea aside, this means there are only four UN-recognized states not in any way party to the treaty: India, Israel, Pakistan, and South Sudan. Of those, three have nuclear weapons. South Sudan, the odd country out, is a fairly new state, founded in 2011.

provisions respecting the Security Council have resulted in the Council's largest contribution to arms control.

2 THE COUNCIL AND NUCLEAR ARMS CONTROL

The NPT was the work of the UN's Eighteen Nation Committee on Disarmament.[35] The Committee created the treaty in just under 23 years following the invention of the atomic bomb.[36] At the time the NPT was adopted, five states – all permanent members of the Security Council – were the only nations in possession of nuclear weapons. The NPT aimed in the first instance at preventing more states from acquiring these exceptionally destructive weapons, and in that it has largely succeeded.[37] Since then, five additional states have acquired nuclear weapons. Of those, South Africa voluntarily gave them up in compliance with its NPT obligations,[38] leaving four non-recognized nuclear-weapons states: Israel, India, Pakistan, and North Korea.[39] Iran could well join them.[40] Paradoxically, Security Council members have played a role in each case of expansion.[41] In the case of Iran, the United States instituted a regime of unilateral sanctions that undermined the Council's mandates supporting the collective efforts to prevent Iran from acquiring weapons through the Iran Nuclear Deal of 2015.[42]

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[35] See M Willrich, 'The Treaty on Non-Proliferation of Nuclear Weapons: Nuclear Technology Confronts World Politics' (1968) 77 *Yale Law Journal* 1447, 1447–48 fns 2–3. Professor Willrich was a member of the US delegation to the Eighteen Nation Committee on Disarmament.

[36] The Manhattan Project successfully tested the first atomic or nuclear weapon on July 16, 1945. 'Trinity Site' (*National Park Service,* 18 September 2017) <https://www.nps.gov/whsa/learn/historyculture/trinity-site.htm> accessed 2 May 2021 ("On July 16, 1945 … the world's first atomic bomb was detonated…."). The site of the test is now a National Historic Landmark in the United States. Ibid.

[37] See NPT art IX (3) ("[A] nuclear-weapon State is one which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January 1967."). The nuclear-weapons states thus recognized by the treaty are the United States, Russia (as the successor to the Soviet Union), China, the United Kingdom, and France.

[38] See A von Baeckmann, G Dillon and D Perricos, 'Nuclear Verification in South Africa' (1995) 37 *IAEA Bulletin* 42. South Africa voluntarily declared the past presence of nuclear weapons in 1993, two years after NPT accession, and worked with the IAEA to verify that the program and the weapons had been dismantled. Ibid 46–48.

[39] See*, e.g.*, S Bagheri, 'Expanding Nuclear Threats to Peace: Prospects for the Non-Proliferation Regime' (2018) 35 *International Journal on World Peace* 9, 10.

[40] See *generally* DH Joyner, *Iran's Nuclear Program and International Law* (Oxford University Press 2016). See *also* P Wintour, 'Iran Announces Partial Withdrawal from Nuclear Deal' *Guardian* (London, 8 May 2019) <https://www.theguardian.com/world/2019/may/07/iran-to-announces-partial-withdrawal-from-nuclear-deal> accessed 2 May 2021.

[41] Bagheri takes the view that this assistance has been indirect and, therefore, not a technical breach of the treaty: "[T]he nuclear-weapons states did assist [India, Pakistan, Israel, and North Korea] in developing their nuclear industry, indirectly assisting their weapons program…. Essentially, the [NPT's] avoidance obligation means that any ways of direct assistance (not indirect assistance) in manufacturing weapons is prevented." Bagheri (n39) 1.

[42] See, e.g., M Landler, 'Trump Abandons Iran Nuclear Deal He Long Scorned' *New York Times* (New York, 8 May 2018) <https://www.nytimes.com/2018/05/08/world/middleeast/trump-iran-nuclear-deal.html> accessed 2 May 2021. See also, Reimposing Certain Sanctions with Respect to Iran, 83 Fed. Reg. 38,939 (7 August 2018).

Compounding these lapses, the Permanent Five Council Members have done little or nothing to fulfill the second major purpose of the NPT. In addition to stopping the spread of nuclear weapons, the treaty requires nuclear weapons states to move toward complete elimination of nuclear weapons.[43]

The account of the Permanent Members' counter-productive role in nuclear arms control begins with France and Israel.[44] In September 1956, shortly after Egyptian President Gamal Abdel Nasser nationalized the Suez Canal but before the UK, France, and Israel alliance completed their illegal plan to take it back by force,[45] France agreed in principle to aid Israel in developing its nuclear program. France made the promise apparently to incentivize the Israelis to participate in the plot.[46] It is likely that the French understood that the Israelis wanted to pursue a nuclear weapon and not just nuclear power, though this was not explicitly discussed.[47] About a year later, on October 3, 1957, France and Israel reached a formal agreement according to which France would assist Israel both in building a reactor capable of producing plutonium[48] and in building an underground reprocessing facility to extract plutonium from that reactor's spent fuel.[49] The reprocessing plant, a necessary element for turning spent nuclear fuel into a weapon, was kept so secret that no mention was made of it in the official text of the agreement. The French contractor responsible for building the reactor created a shell entity to hide the fact that the purchaser was Israel.[50] France did extract a signed commitment from Israel

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[43] NPT art VI. The Marshall Islands recently tried to litigate this point before the ICJ, but the Court found it lacked jurisdiction in the absence of a "justiciable dispute." *Obligations Concerning Negotiations Relating to the Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom*) *Preliminary Objections* [2016] ICJ Rep 833, 845. See *also*, N Tannenwald, 'Justice and Fairness in the Nuclear Nonproliferation Regime' (2013) 27 *Ethics & International Affairs* 299, 304 ("[T]he nonproliferation regime enshrines a norm of nonproliferation (nonpossession) for a majority of states of the world while permitting the five declared nuclear powers to possess nuclear weapons. This asymmetrical arrangement appears to violate one of the bedrock principles of the international state system, namely, that sovereign states have an equal right to security, self-defense, and self-help, including in the possession of weapons. This infringement on sovereign equality can be tolerated as long as a principled basis for this inequality exists. If the principled basis is instead replaced by the naked self-interest of the powerful few, however, then the legitimacy of the arrangements will break down.").

[44] See*, e.g.*, H Smith, 'U.S. Assumes the Israelis Have A-Bomb or Its Parts' *New York Times* (New York, 18 July 1970) 1, 1, available at <https://www.nytimes.com/1970/07/18/archives/us-assumes-the-israelis-have-abomb-or-its-parts-us-assumes-israelis.html> accessed 2 May 2021 ("For at least two years the United States Government has been conducting its Middle East policy on the assumption that Israel either possesses an atomic bomb or has component parts available for quick assembly, reliable sources report.").

[45] See A Hofer, 'The Suez Canal Crisis – 1956' in O Corten and T Ruys (eds), *The Use of Force in International law – a Case-Based Approach* (Oxford University Press 2018).

[46] See A Cohen, *Israel and the Bomb* (Columbia University Press 1998) 52–55, 362–63 nn 50–52 (citing Interview by Avner Cohen with Andre Finkelstein, former senior official at the CEA (*Commissariat l'Energie Atomique*), in Marburg, Germany (3 July 1997); Interview by Avner Cohen with Bertrand Goldschmidt, one of CEA's founders, in Paris, France (15 June 1993)). Bertrand Goldschmidt was a direct party to these negotiations. Ibid.

[47] See Ibid 54 ("[T]here is little doubt that the French understood what the deal was about."). It is worth noting that, at this time, France itself had not yet developed a nuclear weapon.

[48] Ibid 58–59. The reactor was to be modelled after France's newly minted G-1 reactor at Marcoule which entered service the previous year. Ibid.

[49] Ibid.

[50] Ibid 59 (citing P Péan, *Les Deux Bombs* (1981) 113–121).

that the technology it was providing would be reserved for peaceful purposes, but the measure was only intended to further obscure the real purpose of the deal. The secret acquisition of a plutonium-producing nuclear reactor with an attached underground reprocessing facility is for the production of nuclear weapons, not nuclear power, which France had to know.[51]

France, however, is not the only P5 member implicated in the Israeli acquisition of a nuclear weapon. France was able to provide the reactors, but the UK provided the heavy water needed to make those reactors operational.[52] The UK had purchased heavy water from Norway, then shipped an excess 20 tons to Israel, while officially presenting the shipment as a transaction purely between Norway and Israel.[53] In fact, the evidence shows the British made the deal and shipped the heavy water from UK ports. The whole arrangement was kept secret from the United States because the US had refused to sell Israel heavy water due to Israel's unwillingness to commit to safeguards against weapons production.[54] The British apparently had regrets by 1961, when a request by Israel for a further 5 tons of heavy water was rejected.[55] It was too late. Israel had begun working on the bomb in earnest with the resources already made available by two members of the P5, and by 1968, they had developed, or were at least very close to developing, a functioning nuclear weapon.[56]

These events took place before the NPT was opened for signature. France and the UK, therefore, had no NPT-based obligations not to provide Israel with the means of producing nuclear weapons. France itself was developing its own nuclear weapons program during the period. Yet, France and the UK were both states parties to the IAEA Statute from its entry into force on July 29, 1957, which committed them to taking at least *some* measures to ensure that any nuclear technology they shared was not used for military purposes.[57] When the NPT did come into force, Israel was not included among the exempted "nuclear-weapons" states, which means NPT parties are required to take certain steps to induce it to give up its weapons.[58] France and the UK had begun the pattern of proliferation-facilitating behavior by members of the Security Council.

Around the time that Israel was pursuing nuclear weapons, India, too, was embarking upon its own nuclear path. In 1948, Prime Minister Nehru declared, "We must develop this atomic energy quite apart from war…Of course, if we are compelled as a nation to use it for

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51 Ibid 58–60.

52 Ibid 62. While technically the Norwegians were the vendor, the heavy water transferred to Israel had already been bought by the British, and could only be resold with their blessing. Ibid.

53 See M Crick, 'How Britain Helped Israel Get the Bomb' *BBC Newsnight* (London, 3 August 2005) <http://news.bbc.co.uk/2/hi/programmes/newsnight/4743493.stm> accessed 2 May 2021.

54 See ibid ("On the whole I would prefer NOT to mention this to the Americans." (quoting a contemporaneous document by Donald Cape of the Foreign Office)).

55 Ibid.

56 See *supra* (n46) and accompanying text.

57 Statute of the IAEA (adopted 23 October 1956, entered into force 29 July 1957) 276 UNTS 3 art VII ("Each member should make available such information as would, in the judgment of the member, be helpful to the agency.); See *also* ibid art II, *Objectives* ("[The Agency] shall ensure, so far as it is able, that assistance provided by it or at its request or under its supervision or control is not used in such a way as to further any military purpose."). It seems inarguable that conveying to the IAEA the extent of their transactions with Israel would be helpful to the Agency's mission of preventing nuclear material being used for military purposes. As states parties, therefore, France and the UK should have made that information available pursuant to Article VII.

58 See NPT art IX (3).

other purposes, possibly no pious sentiments of any of us will stop the nation from using it that way."[59] India took the opportunity to move forward toward acquiring a weapon in 1954, under US President Dwight D. Eisenhower's Atoms for Peace Plan.[60] The US trained over a thousand Indian nuclear scientists and provided them with thousands of newly declassified documents on a variety of topics, including plutonium reprocessing.[61] In 1955, the UK worked with the Indian government to set up its first nuclear reactor, and even provided India with the uranium to take it critical.[62] Working with the United States and Canada, India was able to secure a second deal to build the so-called CIRUS reactor (Canadian-Indian Reactor, US), which was based on a Canadian design, was partly financed by Canada, and used American heavy water. It became active in 1960.[63]

The CIRUS-type reactor produced excess plutonium as a byproduct of normal operation. India was able to divert some of the excess for use in later nuclear weapons tests.[64] While CIRUS was under construction, India secured a further deal with an American company to build a nuclear reprocessing facility. India needed to perform reprocessing to produce weapons-grade plutonium.[65] It obtained the designs for the facility through the Atoms for Peace program.[66] These actions paralleled what the Israelis were doing at the same time in their leadup to developing weapons.[67] Unlike Israel, India did not hurry to produce nuclear weapons. The Indian Prime Minister publicly stated his strong objection to the very existence of nuclear weapons.[68] Perhaps this explains why the UK, the US, and Canada all felt comfortable handing India such dangerous technology. Regardless, times change as do officeholders. Following the Sino–Indian War of 1962 and the two Indo–Pakistani Wars of 1965 and 1971, and with a new Prime Minister in office, Indira Gandhi, production of nuclear weapons began.[69]

On May 18, 1974, after years of research, India conducted a "peaceful nuclear explosion experiment," becoming the sixth state to successfully develop and detonate a nuclear bomb.[70] It was the culmination of years of efforts by Indian nuclear scientists, but was made possible, in large part, owing to the aid of the US, UK, and Canada. Even France, which had not participated in the direct provision to India of critical technology and material to create weapons,

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[59] 5 Constituent Assembly of India (Legislative Debates) 3333–34 (6 April 1948).

[60] See DD Eisenhower, 'Atoms for Peace Speech' (470th plenary Meeting of the United Nations General Assembly, New York, 8 December 1953) <https://www.iaea.org/about/history/atoms-for-peace-speech> accessed 2 May 2021.

[61] G Perkovich, *India's Nuclear Bomb: The Impact on Global Proliferation* (University of California Press 1999) 30.

[62] Ibid 27.

[63] Ibid 27, 30.

[64] Ibid 27–28.

[65] Ibid 28.

[66] Ibid 28.

[67] See (nn45–47) and accompanying text.

[68] See Perkovich (n61) 13–15, 34–37. There is doubt and ambiguity as to how privately committed Prime Minister Nehru was to India obtaining nuclear weaponry, but undoubtedly his publicly expressed opinion was against their development. Ibid.

[69] Ibid 42–47, chs 4–7.

[70] See B Weinraub, 'India Becomes 6th Nation to Set Off Nuclear Device' *New York Times* (New York, 19 May 1974) 1, 1, *available at* <https://www.nytimes.com/1974/05/19/archives/india-becomes-6th-nation-to-set-off-nuclear-device-india-signed.html> accessed 2 May 2021.

actually congratulated India on the result.[71] Only later, realizing that the bomb test violated the NPT regime (to which neither France nor India was a party) did France decide to walk back its praise by imposing stricter regulations on its nuclear relationship with India.[72]

Pakistan, India's neighbor, rival, and opponent in three wars and many lesser armed confrontations, was in a dispute at the time of India's test. Pakistan had every reason to be concerned and took no comfort in India's claims of "peaceful" intentions. The NPT is based on the fact that any move to acquire nuclear weapons can spark rivals to do the same.[73] Proliferation begets proliferation, which is why even a state believed to be trustworthy must not be provided assistance that can be used in weapons development.[74] Pakistan reacted predictably and quickly ramped up its own efforts to acquire a nuclear arsenal. It launched its program in 1972.[75] Five months after India's so-called "peaceful nuclear explosion," Pakistan announced that it was building 24 new reactors and signed an agreement with a French company to build a plutonium reprocessing plant.[76]

In light of these developments, the United States was genuinely concerned about the prospect of further proliferation of nuclear weapons. It wanted the French–Pakistani plutonium reprocessing deal scrapped.[77] Pakistan refused to end its research into developing weapons but did advocate for a nuclear-free South Asia. The US was able to persuade France to cancel the reprocessing plant.[78] Pakistan simply turned to China. China, like Pakistan, was alarmed at India's new nuclear status and sought ways to check India's growing power in the region. It provided technical expertise, weapons-grade uranium, and assistance in constructing two uranium enrichment facilities to Pakistan. Within a few years, Pakistan acquired a nuclear weapons program and China had its additional check on India.[79] Ultimately, the United States, too, became receptive to Pakistan's nuclear program as it shifted its foreign policy further toward realist balance-of-power politics. Following the Soviet invasion of Afghanistan in 1980, the US lifted nonproliferation sanctions as a way to cultivate an alliance and check the spread of Soviet influence.[80] Moreover, even under the now lax nonproliferation standards to which the US nominally was holding Pakistan, the Reagan administration ignored indications

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[71] See J Sarkar, 'From the Peaceful Atom to the Peaceful explosion: Indo-French Nuclear Relations During the Cold War, 1950–1974' (2013) Nuclear Proliferation International History Project Working Paper #3, 14–15.

[72] Ibid.

[73] The idea that nuclear weapons are needed for solely peaceful purposes is, frankly, so absurd that it is hard to believe it was actually claimed.

[74] See, *e.g.*, Henry J. Hyde United States–India Peaceful Atomic Energy Cooperation Act of 2006, Pub. L. No. 109–401, tit. I, 120 Stat. 2726 (2006) (exempting India from the NPT for US foreign policy purposes); Agreement for Cooperation Between the Government of the United States of America and the Government of India Concerning Peaceful Uses of Nuclear Energy (123 Agreement) (India–USA) (signed 8 October 2008) TIAS No 08-1206. Both these documents represent an acceptance, on the United States' part, of an ongoing NPT violation as a new normal.

[75] See S Weissman and H Krosney, *The Islamic Bomb: The Nuclear Threat to Israel and the Middle East* (Crown Publishing Group 1981) 42–46.

[76] Perkovich (n61) 186.

[77] See S Ahmed, 'Pakistan's Nuclear Weapons Program: Turning Points and Nuclear Choices' (1999) 23 *International Security* 178, 184–185.

[78] See Weissman and Kroseny (n75) 161–173 (describing in great detail the process through which France was convinced to renege).

[79] See Ahmed (n77) 186.

[80] Ibid.

that China had provided Pakistan with the design for a nuclear weapon and that Pakistan was violating its agreed-upon uranium enrichment thresholds in order to certify the nonexistence of a nuclear-weapons program and circumvent the express will of the US Congress.[81] President Reagan violated US and international law in the interest of hindering the Soviet Union from continuing to provide military and economic assistance to Pakistan.

President Bush (the elder) did eventually decertify Pakistan and reimpose sanctions, in 1990,[82] by then it was too late. Pakistan shortly thereafter began publicly claiming it had all the necessary material to make a bomb. The pieces just needed to be "hooked together."[83] By 1996, President Clinton was back to selling arms to Pakistan under a one-time waiver of the nonproliferation sanctions.[84] The inevitable occurred. Shortly after India held a new round of nuclear weapons tests in May 1998, Pakistan could not be talked down by President Clinton, and on May 28 and 30 Pakistan detonated a total of five nuclear devices. The government stated explicitly that it wanted to "settle […] scores" with India.[85] While the Security Council did manage to pass a resolution on June 6 condemning both India's and Pakistan's tests, the tests were largely a result of the actions of individual Security Council members.[86]

So far, bad acting by the United States, France, China, and the United Kingdom has taken centerstage on this historical tour of nuclear proliferation. The Soviet Union, and later Russia, was not, unfortunately, an exception. The Soviet Union and North Korea signed a nuclear cooperation agreement in 1959 as the culmination of a series of knowledge-sharing agreements,[87] which marked the beginning of the North Korean nuclear program. Three years later, in line with this cooperation agreement, the DPRK began building its first research reactor.[88] The two-megawatt reactor was completed in 1965 with the aid of Soviet and Chinese technical expertise and, most importantly, Soviet fuel.[89] This marked the high point, for a time, of the incipient North Korean nuclear program. The ensuing years, however, were marked by failed efforts to convince Russia (and China) to provide even more nuclear support or even nuclear weapons.[90] The Soviets and Chinese hesitated at the prospect that yet another state would gain access to the exclusive nuclear club. They feared the destabilizing effect of further proliferation. Moreover, North Korea's leaders' erratic behavior and hawkish rhetoric towards the South convinced the Soviets that they could not provide the level of nuclear support to North

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81 Ibid 187, 187 nn 16–19.

82 Ibid 190.

83 Ibid (quoting Pakistani Foreign Secretary Shahrayar Khan in Washington Post).

84 Ibid 192.

85 Ibid 194–195.

86 UNSC Res 1172 (6 June 1998) UN Doc S/RES/1172.

87 See A Zhebin, 'A Political History of Soviet-North Korean Nuclear Cooperation' in JC Moltz and AY Mansourov (eds), *The North Korean Nuclear Program: Security Strategy, and New Perspectives from Russia* (Routledge 2000) 27, 28–30.

88 See MS Ahn, 'What Is the Root Cause of the North Korean Nuclear Program' (2011) 38 *Asian Affairs: An American Review* 175, 178.

89 See Zhebin (n87) 31 ("The situation changed in 1965 after a 2 megawatt (MW) IRT-2000 nuclear research reactor built with Soviet assistance was put into operation at the nuclear center in Yongbyon.").

90 See B Szalontai & S Radchenko, 'North Korea's Efforts to Acquire Nuclear Technology and Nuclear Weapons: Evidence from Russian and Hungarian Archives' (2006) Cold War International History Project Working Paper #53, 3–14.

Korea that they had to their Eastern European allies without the potential of being drawn into a disastrous conflict.[91]

The situation took a turn for the worse in 1985, when the Soviet Union finally agreed to assist in the construction of a full-fledged nuclear power plant.[92] While this agreement followed North Korea's accession to the NPT that year, it seems that an agreement in principle was reached even before then as an attempt by the Soviets to push back against the diplomatic pressure and isolation they were experiencing as the Cold War was drawing to a close.[93] Initially, the agreement went well, with Russian scientists assisting North Korean scientists in choosing and developing an appropriate site for the plant as well as ensuring that IAEA safeguards were met, but in 1993, just as construction was ready to commence, Russia suspended the agreement due to North Korea's announced withdrawal from the NPT regime.[94] Of course by then, North Korea had already acquired from Russia what they needed to continue without assistance, albeit over a longer timeline.[95]

Even though Russia ceased cooperation upon North Korea's public withdrawal from the NPT, consistently with its own obligations under the treaty, in truth Russia believed that North Korea had a nuclear weapon or at least a fairly advanced nuclear weapons program in 1990, if not earlier.[96] This belief did not stop nuclear cooperation on Russia's part, as it should have under the NPT. Russia persisted until it was no longer possible to help North Korea and at least publicly adhere to the NPT regime; it had secretly been in violation for years. The United States, meanwhile, stepped in to try to prevent North Korea from breaking through to achieving a weapon. The US negotiated the 1994 Agreed Framework[97] under which the US would assist in the building of two light-water reactors. Light-water reactors in contrast to the heavy water variety make diversion of spent fuel to reprocessing for weapons more difficult. The US also promised to provide non-nuclear fuel – natural gas – to help with the DPRK's energy needs. The Framework also called for the US to lift economic sanctions in exchange for North Korea agreeing to allow an inspection and compliance-monitoring system to be established.[98] The agreement had great potential, but the US did almost nothing to implement its side of the bargain. What it did manage to do was only accomplished well past agreed deadlines.[99] Finally, in 2002, President Bush (the younger) declared North Korea part of an "Axis of Evil"[100] and indicated that he might be willing to use nuclear weapons against the country in that year's Nuclear Posture Review.[101] That chilling prospect effectively ended the Agreed Framework.

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91 Ibid 16–17

92 Ibid 20.

93 Ibid 20–21.

94 See Zhebin (n87) 32–34.

95 Ibid.

96 Ibid 35–36 (citing secret KGB documents as well as interviews conducted by the author with Soviet officials).

97 Agreed Framework Between the United States of America and the Democratic People's Republic of Korea (USA-North Korea) (signed 21 October 1994) 34 ILM 603.

98 See M Ryan, 'Why the US's 1994 Deal with North Korea Failed—And What Trump Can Learn from It' (*Conversation* 19 July 2017) <https://theconversation.com/why-the-uss-1994-deal-with-north-korea-failed-and-what-trump-can-learn-from-it-80578> accessed 2 May 2021.

99 Ibid.

100 President GW Bush, 'State of the Union Address' (Washington D.C., 29 January 2002).

101 See U.S. Department of Defense, 'Nuclear Posture Review' (2002); See *also* WM Arkin, 'Secret Plan Outlines the Unthinkable' *Los Angeles Times* (Los Angeles, 10 March 2002) <https://www.latimes.com/archives/la-xpm-2002-mar-10-op-arkin-story.html> accessed 16 May 2021.

The result of the US's breach of the Framework treaty was entirely predictable. North Korea publicly declared the existence of its nuclear program, claiming it had advanced to the stage of possessing a weapon in 2002.[102] Any doubt about that was eliminated in 2006, when North Korea tested a nuclear weapon.[103] Some of the plutonium used to create the bomb had originated from their first reactor built with Soviet assistance.[104] True to form, the UN Security Council managed to condemn the test a few days later.[105] Yet, in the nuclear nonproliferation context, a pound of condemnation is not worth an ounce of prevention or, as here, the lack thereof. "What's done cannot be undone."[106]

In sum, the four states that have acquired nuclear weapons in conflict with the NPT all received critical assistance from one or more P5 members of the Security Council. The most powerful members of the UN's most powerful body charged with arms control and designated as the enforcer of the NPT regime are those most responsible for the spread of weapons that can destroy life on earth. The failure is not one of omission, but commission – active efforts to aid weapons acquisition. To compound matters, even today's most recent case of a state on the cusp of nuclear weapons, Iran,[107] was created by the early P5's haphazard attitude toward distributing nuclear technology.

3 IRAN'S NUCLEAR PROGRAM AND THE COUNCIL

Iran's foray into the nuclear arena began in 1956, with the establishment of the Atomic Center of Tehran University.[108] The next year, Iran reached a nuclear cooperation deal with the United

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[102] See DE Sanger, 'North Korea Says It Has a Program on Nuclear Arms' *New York Times* (New York, 17 October 2002) <https://www.nytimes.com/2002/10/17/world/north-korea-says-it-has-a-program-on-nuclear-arms.html> accessed 16 May 2021.

[103] See DE Sanger, 'North Koreans Say They Tested Nuclear Device' *New York Times* (New York, 9 October 2006) <https://www.nytimes.com/2006/10/09/world/asia/09korea.html> accessed 16 May 2021.

[104] See D Albright, P Brannan and J Shire, 'North Korea's Plutonium Declaration: A Starting Point for an Initial Verification Process' (Institute for Science and International Security 2008) 1–2 ("[T]his roughly 30 kilograms of plutonium apparently refers to a stock of plutonium that North Korea separated from irradiated fuel produced in the five megawatt-electric reactor at Yongbyon…. [S]ome of the separated plutonium was used in the 2006 test explosion."). See *also* T Shanker and DE Sanger, 'North Korean Fuel Identified as Plutonium' *New York Times* (New York, 17 October 2006) <https://www.nytimes.com/2006/10/17/world/asia/17diplo.html> accessed 16 May 2021 ("American intelligence agencies have concluded that North Korea's test explosion last week was powered by plutonium that North Korea harvested from its small nuclear reactor….").

[105] UNSC Res 1718 (14 October 2006) UN Doc S/RES/1718.

[106] W Shakespeare, *The Tragedy of Macbeth* act 3, sc 2.

[107] See*, e.g.*, DD Kirkpatrick and F Fassihi, 'Rouhani Says Iran Will Begin Enriching Uranium at Higher Level in Days' *New York Times* (New York, 3 July 2019) <https://www.nytimes.com/2019/07/03/world/middleeast/iran-uranium-enrichment-rouhani.html> accessed 16 May 2021.

[108] DH Joyner, *Iran's Nuclear Program and International Law: From Confrontation to Accord* (Oxford University Press 2016) 5 (citing A Asghar Soltanieh, 'Lecture at the University of Vienna' (Vienna, 18 April 2007) <http://afa.at/sispr/v20070418-text.pdf> accessed 16 May 2021; M Sahimi, 'Atoms for Peace' (*Cairo Review of Global Affairs,* Summer 2013) <https://www.thecairoreview.com/essays/atoms-for-peace/> accessed 16 May 2021).

States.[109] Under the terms of the agreement, as might be expected by this point,[110] the United States agreed to provide Iran with technical expertise, uranium, and a light-water reactor.[111] In 1967, the United States agreed to provide Iran with yet more uranium and even a small amount of plutonium in connection with a new research reactor Iran was having built under a contract with a US company.[112] During this time, all indications pointed to Iran genuinely wanting to pursue nuclear power purely for peaceful reasons. The Shah signed the NPT on the first day it was opened for signature, and the deal Iran made with the United States was approved through the IAEA process.[113]

By 1974, following years of US–Iranian nuclear cooperation, France, too, became involved in Iran's state nuclear program, helping it to develop technology to create a domestic uranium enrichment program.[114] Of course, that same year, India conducted its "peaceful nuclear explosion."[115] The Shah responded to this on the record by stating, notwithstanding being a party to the NPT, that Iran would develop nuclear weapons as well, "without any doubt, and sooner than one would also think."[116] While he later tried to walk this statement back, in 1979 he was ousted in the Iranian Revolution,[117] meaning that all the nuclear technology the West had handed to Iran under the Shah's leadership was now in the hands of very different actors, ones unconcerned with the previous regime's treaty obligations and relations.

At first, the new regime had its hands full with the loss of US support and Iraq's initiation of the Iran–Iraq War, in which Saddam Hussein received American assistance.[118] But following the long years of that brutal conflict, and needing a new nuclear patron, Iran once again sought nuclear assistance from whatever source would provide it in order to push back against Iraq and the United States.[119] Naturally, given the players on the other side, Russia and China answered the call. China provided plant blueprints and uranium hexafluoride, necessary for uranium enrichment, and Russia agreed to build a light-water reactor.[120] Moreover, as the West grew more distrustful of Iran's revolutionary regime, Russia provided more nuclear fuel and materiel. The Russian provisions were likely crucial to the buildup of the secret enrichment

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[109] Ibid; Agreement for Co-operation Concerning Civil Uses of Atomic Energy (USA–Iran) (5 March 1957) 10 UST 733.

[110] See (n44–52) and accompanying text (describing France and the UK's agreements with Israel to provide expertise, uranium, reactors, and reprocessing facilities); (n60–64) and accompanying text (describing US and Canadian agreements to provide India with expertise, uranium, reactors, and reprocessing facilities); (n77) and accompanying text (describing China's agreement with Pakistan to provide expertise, uranium, and enrichment facilities); (n87–89) and accompanying text (describing Russia's agreements with North Korea to provide expertise, uranium, and a reactor).

[111] See Joyner (n106) 5 (citing D Patrikarakos, *Nuclear Iran: The Birth of an Atomic State* (I.B. Tauris 2012) 15–16).

[112] Ibid 5–6; Contract for the Transfer of Enriched Uranium and Plutonium for a Research Reactor in Iran (IAEA–Iran–USA) (10 March–7 June 1967) 614 UNTS 109.

[113] See Joyner (n108) 6; Contract for the Transfer of Enriched Uranium and Plutonium for a Research Reactor in Iran (n112).

[114] See Joyner (n108) 7 (citing M Hibbs, 'U.S. in 1983 Stopped IAEA from Helping Iran Make UF6' (2003) 28 *Bonn Nuclear Fuel* 16).

[115] See (n68) and accompanying text.

[116] Patrikarakos (n111) 59.

[117] See Joyner (n108) 10–11.

[118] See ibid 12–19.

[119] Ibid 19.

[120] Ibid 19–20.

facility at Natanz that was finally discovered and then inspected by the IAEA in 2003.[121] Following the discovery of this facility, the international community started taking the threat of Iran becoming a nuclear-weapons state much more seriously.

This concern culminated, after years of negotiation, in the 2015 Joint Comprehensive Plan of Action (JCPOA), intended to allow Iran to continue to develop a purely civil nuclear power program subject to an onerous system of inspections, in exchange for relief from the sanctions imposed by the Security Council but also by the US and Europe.[122] The JCPOA also provides that the Security Council has a robust role in the enforcement regime. The Agreement had the potential to create the opportunity for the Security Council to finally fulfill its Charter obligations with respect to nonproliferation of extraordinarily dangerous weapons. Following the coming into force of the JCPOA, the Council's first important step was a resolution of support.[123] Then, in line with the treaty's timeline of interrelated duties, the Council lifted the sanctions it had imposed on Iran since 2006. Iran, in turn, met its obligations, confirmed by the IAEA from Implementation Day on January 16, 2016, until mid-2019.[124]

P5 member United States, however, began breaching its own commitments under the JCPOA following its unilateral withdrawal on May 8, 2018, despite the lack of any evidence of an Iranian breach. The US returned to its pattern of unilateral sanctions on Iran, in defiance of the JCPOA and Security Council decisions.[125] Most destructively, the president imposed third-party sanctions so that non-US companies faced penalties for doing business with Iran.[126] These sanctions not only violated the terms of the nuclear deal and ended Iran's incentives to comply, but they ended Iran's legal obligations to do so as well.[127] For Iranian hard-liners, the case was clear that Iran needed nuclear weapons to protect itself from the US. The old narrative resurfaced, which had first developed owing to the US's role in the Iran–Iraq war. The US was such a threat to Iran, which required nuclear capabilities to check.[128]

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[121] See ibid 22–25. Of note, the IAEA inspectors believed that though the facility was far more advanced than anticipated, it was still in compliance with IAEA safeguards as Iran was not technically required to disclose the existence of the facility until nuclear material was present in it, which at that time of inspection had not yet occurred. Naturally, whether nuclear material was present at any time prior to the IAEA inspection, and the degree to which Iran's undeclared importation of nuclear material regardless of its presence in the facility constituted a violation all its own, is a matter of dispute. Ibid 25–27.

[122] This agreement, also known as the Iran nuclear deal, was concluded between the EU/E3 (Germany, France, and the UK), the US, China, Russia, and Iran, and promised Iran sanctions relief in exchange for nuclear compliance. Joint Comprehensive Plan of Action (14 July 2015) 55 ILM 108 (JCPOA).

[123] UNSC Res 2231 (20 July 2015) UN Doc S/RES/2231.

[124] The IAEA's May 2019 report to the Security Council concluded that Iran was in compliance with the JCPOA. IAEA, 'Verification and Monitoring in the Islamic Republic of Iran in Light of United Nations Security Council Resolution 2231 (2015)' (31 May 2019) GOV/2019/19 <https://www.iaea.org/sites/default/files/19/06/gov2019-21.pdf>.

[125] See, *e.g.*, Reimposing Certain Sanctions with Respect to Iran, 83 Fed. Reg. 38,939 (7 August 2018). This is an executive order by President Trump reimposing nuclear-related sanctions on Iran, following the US withdrawal from the JCPOA, also known as the Iran nuclear deal. Under the JCPOA, the human rights-related sanctions did not have to be lifted, and therefore did not have to be reimposed.

[126] See, *e.g.*, 'Trump Abandons Iran Nuclear Deal He Long Scorned' *New York Times* (New York, 8 May 2018) <https://www.nytimes.com/2018/05/08/world/middleeast/trump-iran-nuclear-deal.html> accessed 16 May 2021.

[127] See Kirkpatrick and Fassihi (n107).

[128] See D Albright and A Stricker, 'Iran Primer: Iran's Nuclear Program' *Tehran Bureau* (20 October 2010) <https://www.pbs.org/wgbh/pages/frontline/tehranbureau/2010/10/iran-primer-irans-nuclear-pro

Whether Iran will ultimately develop nuclear weapons capabilities is very much an open question, though it appears to be moving in that direction.[129] However, what is clear is that members of the P5, and particularly the United States, are responsible both for bestowing upon Iran its initial nuclear capabilities as well as failing to live up to their obligations to prevent Iran from developing a nuclear weapons program, most notably by abandoning its commitments under the 2015 JCPOA. The US is the principal party in breach of the treaty,[130] but it must also be said that the other parties did not find it important enough to limit the impact of US sanctions to preserve the deal. French President Macron publicly promised to assist Iran with finance but failed to do so in the years that followed. Even China, which needed Iranian oil, cut back on purchases to preserve the benefits of its economic relations with the US.[131]

4 CONCLUSION

The Permanent Members of the Security Council have failed time and time again to meet nuclear nonproliferation obligations. Far from preventing proliferation, members of the Security Council are responsible for every state that has acquired nuclear weapons in violation of the NPT since the treaty's inception. This failure is not without consequence. For decades, there was a sense of prestige and a degree of deference that the Security Council and its P5 members enjoyed. This was true to such an extent that many countries actively lobbied to expand the P5 membership that they, too, might have what was then perceived to be a stronger hand in the governance of global affairs.[132] While these calls have not altogether fallen

gram.html> accessed 16 May 2021 ("A 2009 internal IAEA working document reports that in April 1984, then President Ali Khamenei announced to top Iranian officials that Khomeini had decided to reactivate the nuclear program as the only way to secure the Islamic Revolution from the schemes of its enemies, especially the United States and Israel.").

[129] See M Specia, 'Iran Says It Has Surpassed Critical Nuclear Enrichment Level in 2015 Deal' *New York Times* (New York, 8 July 2019) <https://www.nytimes.com/2019/07/08/world/middleeast/iran-uranium.html> accessed 16 May 2021.

[130] While not a treaty in the sense of Article II, section 2 of the US Constitution, as the agreement was not presented to the Senate for ratification, the JCPOA is still a treaty in the sense of the Article 2 of the Vienna Convention on the Law of Treaties ("'[T]reaty' means an international agreement concluded between States in written for and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation[.]"). Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

[131] See Y Chazan, 'US Sanctions Prompt China to Cut Most Iran Oil Supplies, Officially at Least' *Diplomat* (Tokyo, 21 May 2020) <https://thediplomat.com/2020/05/us-sanctions-prompt-china-to-cut-most-iran-oil-supplies-officially-at-least/> accessed 16 May 2021.

[132] See*, e.g.*, 'Love at Second Sight' *Economist* (London, 23 May 2005) <https://www.economist.com/united-states/2005/03/23/love-at-second-sight> accessed 16 May 2021 (describing a proposal by Secretary-General Kofi Annan to expand Security Council permanent membership by six, as well as a concurrent effort by Germany, Japan, Brazil, and India to present their joint candidacy for permanent membership).

silent,[133] they are now being met with others that signal the Council's growing irrelevance.[134] The teleological purpose of the UN, as defined in Article 1(1) of the UN Charter is

> [t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.[135]

Clearly, arms control, and nuclear arms control most of all, falls under this ambitious mandate. By failing to carry out its responsibilities in this area, the Security Council casts doubt on whether it is up to the task of removing the gravest of threats to the peace: nuclear weapons. And if it cannot fulfill its duties in this arena, the arena most suited for a body of global reach, with control over the vast majority of nuclear weaponry, who are themselves perhaps the biggest beneficiaries of nuclear disarmament, then there is reason for serious doubts that are growing about the Security Council's efficacy generally. This is not a welcome development. The entire world benefits from a body empowered to view the maintenance of international peace and security as its *raison d'être*. The Security Council has its power through the authority imparted by law. Its failure to comply with the law undermines the very basis of its status. The Council, together with the United Nations as a whole, is in a weakened condition just at a time the UN is needed most to deal with the problems of pandemic illness, military conflict, the environment, human rights, and poverty. The Security Council's standing is eroded by its continual and obvious failures in the very area that justifies its existence.

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[133] See*, e.g.*, 'India Offers to Temporarily Forgo Veto Power if Granted Permanent UNSC Seat' *Huffington Post* (New York, 3 August 2017) <https://www.huffingtonpost.in/2017/03/08/india-offers-to-temporarily-forgo-veto-power-if-granted-permanen_a_21876304/>.

[134] See*, e.g.*, H Grant, 'UN Security Council Must Be Revamped or Risk Irrelevance, Kofi Annan Warns' *Guardian* (London, 23 September 2015) <https://www.theguardian.com/world/2015/sep/23/un-security-council-must-be-revamped-or-risk-irrelevance-kofi-annan-warns> accessed 16 May 2021 ("I firmly believe that the council should be reformed: it cannot continue as it is. The world has changed and the UN should change and adapt. If we don't change the council, we risk a situation where the primacy of the council may be challenged by some of the new emerging countries…. We have seen an example in the financial area where there was resistance to reform in the IMF. The Chinese government is [now] putting on its own version of a fund. We risk doing the same with the council.").

[135] UNCh art 1(1).