ARMS CONTROL AND THE RULE OF LAW: NATIONAL MEASURES FOR ENFORCEMENT AND VERIFICATION

presented to the
Conference on
Contemporary Issues in Controlling Weapons of Mass Destruction

Duke University
Durham, North Carolina

April 19, 1997

presented by

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Work supported by Argonne National Laboratory through contract DNA001-90-C-0177. The opinions expressed herein are those of the author and not necessarily those of Argonne National Laboratory or its sponsors.
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1 INTRODUCTION

Much has been written about the deterrence strategies that justified the arms race. Walter Slocombe explained that "[t]he dominant problem of U.S. nuclear strategy is credibly using U.S. nuclear power to deter and if necessary resist nonnuclear as well as nuclear threats to America's allies, forces, and interests overseas."1 As a result, the "flexible response" doctrine was developed to declare "that the United States, in consultation with its allies, is prepared to use nuclear weapons should other means of protection from Soviet attack threaten to fail."2 In contrast, Freeman Dyson pointed out the Soviet Union was committed to the concept of "counterforce," which meant that "if the Soviet Union sees a nuclear attack coming or has reason to believe that an attack is about to be launched, the Soviet Union will strike first at the attacker's weapons with all available forces, and will then do whatever is necessary in order to survive."3 Out of these military postures a tense peace ironically emerged, but the terms by which decisions were made about controlling weapons of mass destruction (i.e., nuclear, chemical, and biological weapons) were the terms of war.

The thesis of this paper is that the end of the Cold War marks a shift away from reliance on military might toward an international commitment to control weapons of mass destruction through the "rule of law." John Rawls wrote that "[a] legal system is a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation. . . . [T]he regular and impartial administration of public rules, becomes the rule of law when applied to the legal system."4 Among the characteristics of a society governed by the rule of law are "its comprehensive scope," "a well-defined territory," "the fundamental nature of the interests it is defined to secure," and "the exclusive legal right to at least the more extreme forms of coercion. . . ." In short, "the law defines the basic structure within which


2. Id.

3. F. DYSON, WEAPONS AND HOPE 250 (1984). "It is important to understand two facts about the Soviet concept of counterforce. First, that the Soviet Union intends to survive, if the worst comes to the worst, by striking first. And second, that this intention does not imply that the Soviet authorities believe they could come through a nuclear war without immense losses and catastrophic damage." Id.

the pursuit of all other activities takes place." If arms control is increasingly a subject of the rule of law, then these qualities should be evident in the means by which arms control initiatives are implemented.

This theme is addressed in three parts. Section 2 briefly reviews the progression of major United States arms control agreements, illustrating their increasing complexity. Section 3 shows how the most comprehensive arms control agreement to date — the Chemical Weapons Convention of 1993 — necessitates extensive national implementing legislation in order to promote verification and enforcement. Section 4 presents the conclusions.

2 PROGRESSION OF ARMS CONTROL AGREEMENTS

The progression of agreements during this century to limit weapons of mass destruction testifies to this new development. A review of arms control agreements to which the United States is a party shows clear growth of the rule of law. A structure of international weapons regulation that is contrary in its vocabulary and in its methods to the rule of military force is emerging. The remainder of this discussion will briefly illustrate this development, which is also pictured in Figure 1.

2.1 EARLY ARMS CONTROL AGREEMENTS

Early arms control agreements were unverifiable and unenforceable declarations of mutual self-interest. For example, the Geneva Protocol of 1925 declared a ban on the wartime use of chemical and biological weapons, but contained neither a definable scope nor an implementation structure. Similarly, the Limited Test Ban Treaty of 1963 simply states a ban on nuclear test explosions that result in radioactive debris escaping the territory of the testing nation. Even the Biological Weapons Convention of 1972 (BWC), which defines the conduct it prohibits with greater specificity and requires States Parties to take the affirmative step of destroying or diverting their existing stockpiles, lacks the definition or structure that corresponds to the rule of law.

5. Id. at 236.


unimportance of the rule of law to these kinds of arms control agreements is perhaps best illustrated by the fact that during World War II "[a]lthough no point was the fact that chemical weapons were banned under international law a major consideration in the decision not to go ahead and use them. . . ."

This is not to argue by any means that these treaties are unimportant. The fact that these agreements were negotiated successfully communicated to the world that certain military activities were outside international norms. The 1972 BWC, for example, showed progress towards more legal structure, including that agreement's specific reference to the United Nations as a venue for resolving disputes and its establishment of a Conference of States Parties to the Convention to review its operation. But the hallmarks of these treaties are their simplicity and unenforceability; their success or failure cannot be ascribed to their legality.

2.2 NUCLEAR NONPROLIFERATION MODEL SAFEGUARDS AGREEMENT

The Nuclear Nonproliferation Model Safeguards Agreement of 1972 was a watershed in establishing legal regulation of weapons of mass destruction. Building on the structure established by the International Atomic Energy Agency (IAEA) Statute of 1956 and the Nuclear Nonproliferation Treaty of 1968 (NPT), the Model Safeguards Agreement combined for the first time a comprehensive system of compliance "verification," with an international organization — the IAEA — to implement it. The list of regulated activities is comprehensive and detailed. An international inspector corps was assembled. The threat of sanctions for noncompliance was included in the form of limitations on technical assistance, in the possibility of exclusion from the benefits of membership in the IAEA, and in a procedure for referral of violations to the United Nations Security Council. In contrast to earlier arms control agreements, the NPT regime as elaborated through the Model Safeguards Agreement took on the trappings of the rule of law; recent responses to NPT violations by Iraq and North Korea indicate that this system is growing stronger.

9. R. HARRIS & J. PAXMAN, A HIGHER FORM OF KILLING 136 (1982). "Gas was not used because at any given stage in the war there were sufficient military disincentives to stay the hand of the belligerent who reached for the gas weapons." Id.

10. IAEA Doc. INFCIRC/153.


2.3 POST-COLD WAR ARMS CONTROL AGREEMENTS

Arms control agreements that coincide with the end of the Cold War are notable for their extensive and complex legal structures. Although they apply only to a few States Parties and to only a portion of the nuclear stockpiles, the Intermediate-Range Nuclear Forces Agreement of 1987\(^{13}\) and the Strategic Arms Reduction Agreement of 1991\(^{14}\) spell out their destruction obligations with mind-numbing specificity and catalog their verification processes in painstaking detail. In stark contrast to the brief and broad-minded declarations of the early arms control agreements, the major part of the text of these treaties is occupied with the procedures for their implementation and for resolving disputes.

The Chemical Weapons Convention of 1993\(^{15}\) (CWC) will, upon entry into force, become the high water mark to date of arms control through the rule of law. The CWC bans possession of chemical weapons and chemical weapons production facilities and creates a regulatory system for dual use chemicals and production facilities. It contains extremely detailed substantive obligations and the most extensive verification declaration and inspection scheme ever included in an arms control agreement, as well as establishing a new Organization for the Prohibition of Chemical Weapons (OPCW) to carry out its terms, which include the threat of international sanctions.

Furthermore, it goes beyond any prior arms control agreement in requiring explicit national implementing measures to assure that private persons observe its requirements in addition to national governments. For example, the CWC requires each State Party to enact "penal legislation" to "[p]rohibit natural and legal persons anywhere on its territory or in any other place under its jurisdiction . . . from undertaking any activity prohibited to a State Party under this Convention."\(^{16}\) The CWC, which is now universally acknowledged as the model for future multilateral arms control agreements, unambiguously brings the rule of law to chemical weapons regulation.

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16. Id. art VII, ¶ 1(a).
Figure 1: Rule of Law Attributes of Major United States Arms Control Treaties

<table>
<thead>
<tr>
<th>Treaty</th>
<th>Attribute</th>
<th>Forswear Actions</th>
<th>Take Actions</th>
<th>Refer Disputes to U.N.</th>
<th>Establish Org.</th>
<th>Verify</th>
<th>Provide for Sanctions</th>
<th>Require National Measures</th>
</tr>
</thead>
<tbody>
<tr>
<td>Geneva Protocol of 1925</td>
<td></td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Limited Test Ban Treaty of 1963</td>
<td></td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Biological Weapons Convention of 1972</td>
<td></td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Nuclear Nonproliferation Model Safeguards Agreement of 1972</td>
<td></td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Intermediate-Range Nuclear Forces Agreement of 1987</td>
<td></td>
<td>X</td>
<td>X</td>
<td></td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Strategic Arms Reduction Treaty of 1991</td>
<td></td>
<td>X</td>
<td>X</td>
<td></td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Chemical Weapons Convention of 1993</td>
<td></td>
<td>X</td>
<td>X</td>
<td></td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
</tbody>
</table>
Even if the CWC did not contain an express requirement for national implementing measures, States Parties would probably have to enact them anyway in order to enable them to meet their international obligations. This is particularly true for the commitments to verify compliance with the Convention and to enforce its provisions because regulation of private industry is required. Arms control will no longer be something that only affects diplomats and the defense industry.

This adds a whole new dimension to the process of developing arms control agreements. Not only will negotiators have to be concerned about how to ensure that an agreement can be verified effectively and contains appropriate mechanisms for international enforcement, they will also need to be aware of how their government will ensure that balanced domestic mechanisms can be devised that will support compliance by their own private citizens. Furthermore, assessing the compliance of other States Parties will require analysis of their implementing legislation in addition to other factors. Thus, if this pattern continues, it will be necessary to learn how to compare the analogous national implementing statutes that will result from the agreements of the future.

National legislation to implement the CWC is necessitated by the Convention’s difficult task of eliminating chemical weapons capabilities. Because so many chemicals can be used either for legitimate industrial purposes or to make illegal chemical weapons, an intrusive system for assuring compliance with its terms was determined by the negotiators to be a necessary component of the treaty regime. This compliance system includes both prohibiting conduct that could result in chemical weapons capacity and a verification scheme to enable independent confirmation of each State Party’s continuing obedience to the treaty. Where these dual-use chemicals, or the facilities that produce them, are in the hands of private entities, they must submit to the compliance scheme in addition to the government of the State Party itself.

This section compares progress among several States Parties in actually developing national CWC compliance legislation that addresses enforcement and verification. Enacted CWC legislation from Australia, Canada, Germany, Norway, South Africa, and Sweden were available at


this writing in English. Of course, it is important to note that this brief survey necessarily omitted examination of the existing "background" of other, related domestic laws that these signatories might also have adopted that affect CWC implementation.

3.1 NATIONAL ENFORCEMENT LEGISLATION

A key choice States Parties are making in their national enforcement legislation is to determine the penalties for violating the CWC. The obligation to penalize CWC violations permits each State Party to specify whether its penal legislation will apply only to "activities prohibited" by the Convention, or also to other actions that undermine the CWC but which may not be explicitly prohibited by the treaty. For example, acquiring or stockpiling chemical weapons clearly would be prohibited by Article I, paragraph 1(a), but impeding the verification process might also be a "prohibited activity."

As illustrated in Figure 2, review of the Australian, Canadian, German, Norwegian, South African, and Swedish national enforcement legislation indicates that five of the six have chosen explicitly to penalize not only direct violations of the CWC, but also acts that might impede its verification. The Australian legislation specifies fines and/or imprisonment not only for producing prohibited chemical weapons, but also for interfering with monitoring equipment and for making false or misleading statements. The Canadian legislation is very comprehensive, not only punishing with fines and/or imprisonment a host of acts or omissions that would undercut

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22. Summary of proposed legislation in English as presented in PC-IV/A/WP.9 (28 September 1993), reprinted in Regional Seminar on National Authority and National Implementing Measures for the Chemical Weapons Convention: Summary of Proceedings, Warsaw, Poland (7-8 December 1993) (Provisional Technical Secretariat Occasional Papers - No. 3) (hereinafter Summary of Swedish CWC Implementing Legislation). Of course, since this document is a summary, it presumably lacks the level of detail included in the implementing legislation itself.

23. Australian CWC Implementing Legislation, supra note 17, Part 6, § 77.

24. Id. § 78.

25. Id. § 80.
but also providing for forfeiture of the instrumentality of any offense. The German legislation provides for fines and/or imprisonment for failure to comply with a "statutory order" regarding declarations or government information requests, as well as for contravening inspection obligations. The South African legislation is as specific and comprehensive as that of Australia. It penalizes any person who "refuses or fails to comply to the best of his ability with any lawful requirement, request or order of an officer or employee of the Department [of Trade and Industry] . . ." It, too, punishes interference with an inspector's equipment, as well as making false statements. The Swedish legislation applies similarly. In contrast, the Norwegian legislation is less specific, simply punishing "[a]nyone violating this law or the provisions given with respect to this law . . ." But even though the Norwegian legislation is not explicit in penalizing interference with verification activities, it is written broadly enough to permit such sanctions. Thus, the national enforcement legislation enacted to date under the CWC appears to be uniformly broad in its reach.

26. See, e.g., Canadian CWC Implementing Legislation, supra note 18, §§ 6 and 7 (prohibits persons from doing the same acts prohibited to States Parties under Article I of the Convention), § 14(3) (prohibits interference with inspections), and § 17(3) (prohibits persons who possess "privileged information or documents" from knowingly communicating to any unauthorized person).

27. Id. § 23(1).


29. Id. ¶ 15(1)(3).

30. Id. ¶ 15(1)(4).

31. South African CWC Implementing Legislation, supra note 21, § 26(1)(h). Among such orders presumably would be a declaration that procurement or stockpiling of chemical weapons are prohibited pursuant to § 13(2)(e).

32. Id. § 26(1)(b) (referring to § 12(7)(a)).

33. Id. § 26(1)(e).

34. Summary of Swedish CWC Implementing Legislation, supra note 22, at 74-75, 78.

35. Norwegian CWC Implementing Legislation, supra note 20, ¶ 5.
3.2 NATIONAL VERIFICATION LEGISLATION

The backbone of the CWC verification scheme is its requirement that all States Parties declare the existence of any chemical weapons, chemical weapons production facilities, or so-called "scheduled chemicals," which are controlled under the CWC because they can be chemical weapons precursors. Regardless of whether a State Party possesses chemical weapons or even a chemical industry, it must gather information for accurate and timely declarations. An important policy question is how to create a legal mechanism to ensure that private firms have an appropriate incentive to report relevant information, such as their possession of scheduled chemicals, to the national government for declaration to the OPCW. For example, filing such reports could become a prerequisite to carrying on a business involving scheduled chemicals; alternatively, the obligation to report could be imposed on private firms without affecting their ability to conduct business.

As summarized in Figure 3, the six pieces of national compliance legislation that were analyzed vary in their approach to implementing this CWC obligation. In order to "ensure that the Director [of the Chemical Weapons Convention Office] has knowledge of dealings with chemicals that facilitate the making of Australia's periodic declarations under the Convention,"36 the Australian implementing legislation creates an entirely new requirement for each firm "producing or otherwise dealing with scheduled chemicals in quantities such that the production or dealing needs to be part of the declaration process" to obtain an annual operating permit to continue its business.37 The

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36. Australian CWC Implementing Legislation, supra note 17, § 15(1).

37. Id. § 15(2). Those involved with declarable unscheduled discrete organic chemicals are required to notify the Director, but not to acquire a permit. Id. § 15(3).
Swedish system is analogous. The German legislation appears to permit, without requiring, the government to establish a licensing scheme that conditions possession of scheduled chemicals on compliance with declaration-related reporting requirements.

**Figure 3: Comparison of National Mechanisms for Acquiring Information to be Declared under the Chemical Weapons Convention**

<table>
<thead>
<tr>
<th>Nation</th>
<th>Reporting Obligation</th>
<th>Permits Required</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Canada</td>
<td>X</td>
<td>yes for Schedule 1 chemicals; possibly for others</td>
</tr>
<tr>
<td>Germany</td>
<td>X</td>
<td>possible</td>
</tr>
<tr>
<td>Norway</td>
<td>unspecific</td>
<td>unspecific</td>
</tr>
<tr>
<td>South Africa</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Sweden</td>
<td>X</td>
<td>X</td>
</tr>
</tbody>
</table>

In contrast, the South African legislation does not require firms for which the Republic must make declarations under the CWC to obtain permits as a way of gathering the information it must declare; rather, it imposes on such firms the duty, independently of their authorization to carry on business, to declare their involvement and to report relevant information to its Non-Proliferation Council. Failure to report could result in a fine or imprisonment. The burdens and costs of the South African reporting obligation are eased to some extent by an active Communication Plan to

38. Summary of Swedish CWC Implementing Legislation, supra note 22, at 77-78.


41. Id. §§ 13(3)(b), 14(1).

42. Compare id. §§ 26(1)(b), 26(1)(c) with §§ 26(ii), 26(iii).
reach out and elicit cooperation from the chemical industry. Like South Africa, the Canadian statute imposes a reporting obligation on its chemical industry independent of any business licensing. The Canadian legislation also authorizes the government to establish a licensing system for producing, using, acquiring, or possessing Schedule 1 chemicals, and authorizes regulation of imports and exports of chemicals listed on the other two schedules, but does not tie the reporting obligation to these licenses. A third approach is taken in the Norwegian legislation, which omits explicit mention of any reporting obligation and presumably intends that regulations will be issued to gather the necessary information. Thus, legislation to date shows that a State Party may impose the necessary legal obligations to report information for declaration to the OPCW either by making such reporting a condition of continuing in business or by punishing failures to comply.

4 CONCLUSIONS

Only history will tell whether the movement toward arms control under the rule of law will be a successful one. It is clear from the scope and complexity of recent arms control agreements that the world is making an enormous investment of faith and resources in building legal institutions to control weapons of mass destruction. Rawls points out that legal rules "constitute grounds upon which persons can rely on one another and rightly object when their expectations are not fulfilled." If, over time, these norms contribute to building such reliance in controlling weapons of mass destruction, then the rule of law will constitute a new basis for world peace.

The need for CWC national implementing legislation suggests that arms control enforcement and verification in the future will be the subject of domestic regulation in addition to international law. Comparison of existing CWC national enforcement and verification legislation demonstrates that sophisticated systems are already upon us and that different options are being enacted at the national level for implementing this international agreement.


45. *Id.* § 18(a).

46. *Id.* §§ 9, 10.

47. Norwegian CWC Implementing Legislation, *supra* note 20, ¶ 1, 3.
