PART I

Introduction

1

Foundational elements of the study

1.1 The problem and solution

In a dramatic exchange within the Security Council during the 1962 Cuban missile crisis, US ambassador to the UN Adlai Stevenson asked USSR ambassador to the UN Valerian Zorin point-blank whether the USSR had placed in Cuba missiles capable of carrying out a nuclear attack on the United States, to which Zorin sneered that he was not in a courtroom and that he did not appreciate being interrogated as if in a courtroom.[1] Stevenson retorted that Zorin was in the "courtroom of world opinion" and that he was prepared to provide evidence of such missiles as if in a courtroom, after which he presented evidence of intelligence photographs of the missile sites in courtroom-like fashion.[2] Apart from its rhetorical value, was there any significance to Stevenson's reference to the Security Council as a courtroom and to his procedural formalism? Some commentators assert that fairness and legitimacy depend partly on the procedures followed during a decision-making process, with legal resolution providing a better quality process vis-à-vis that of the Security Council on account of legal resolution's structural impartiality and due-process safeguards.[3] A desire on the part of Stevenson to improve the perceived fairness and legitimacy of those proceedings conceivably could have been the reason behind his words and actions in this case. Regardless, this suggests that problems with resolving nuclear non-proliferation disputes could arise partly out of shortcomings in the process, with the procedures of legal resolution improving on those shortcomings, thus presumably increasing the chances that the disputant State(s) respect the final determination. At the

[1] See Robert F. Kennedy, Thirteen Days: A Memoir of the Cuban Missile Crisis 53–54 (2nd edn, 1971).
[2] Ibid.
[3] See ch. 5.3 *infra*; see also Thomas M. Franck, Fairness in International Law and Institutions 7–8, 218–244, 316–349 (1995).

same time, Zorin's response reflects the relatively common notion that legal resolution is inappropriate with politically sensitive disputes.[4] This study attempts to reconcile these two conflicting notions in exploring the possibility of legal resolution of nuclear non-proliferation disputes. Given how the International Court of Justice (ICJ) and international arbitral tribunals can find jurisdiction through compromissory clauses in nuclear non-proliferation agreements and the favorable jurisprudence on justiciability, legal resolution represents an option for States trying to resolve their nuclear non-proliferation disputes. Given the destructive potential of war, especially nuclear war, and the shortcomings of the Security Council's decision-making process when it comes to its Chapter VII measures, States should see legal resolution as a somewhat attractive option in terms of the procedural fairness it provides. This study represents an invitation to States to further consider legal resolution as an option with nuclear non-proliferation disputes.

The nuclear non-proliferation regime is one of the most important treaty regimes in existence, inasmuch as nuclear weapons possess the capability to end modern civilization as we know it. This regime also seems to be one of the most fragile, with any one State's noncompliance having the potential to unravel the entire regime.[5] Combine this fragility with the relative regularity of noncompliance (although at times minor),[6] and it is not difficult to see international peace and security as

[4] See ch. 6.5 *infra*.

[5] See generally Lewis A. Dunn, *The Collapse of the NPT: What If?*, in BEYOND 1995: THE FUTURE OF THE NPT REGIME 27 (JOSEPH F. PILAT and ROBERT E. PENDLEY ed., 1990); Giorgio Franceschini, *Assessing the Nuclear Non-proliferation Regime: What Are the Loopholes? What Are the Challenges?*, in EUROPE FACING NUCLEAR WEAPONS CHALLENGES 155 (GRÉGORY BOUTHERIN ed., 2008); JAMES F. KEELEY, *Compliance and the Non-proliferation Treaty: Developments in Safeguards and Supply Controls*, in TREATY COMPLIANCE: SOME CONCERNS AND REMEDIES 21, 22 (Canadian Council on International Law ed., 1998); Joseph F. Pilat and Charles W. Nakhleh, *A Treaty Reborn? The NPT after Extension*, in THE NUCLEAR NON-PROLIFERATION REGIME 41, 51–52 (RAJU G. C. THOMAS ed., 1998).

[6] See, e.g., Richard L. Williamson, Jr., *Hard Law, Soft Law, and Non-law in Multilateral Arms Control: Some Compliance Hypotheses*, 4 CHI. J. INT'L L. 59, 69–70 (2003) (asserting that compliance with arms control and disarmament treaties might be impossible or unimportant at times, but noting that such noncompliance might be tolerable because these States might not have any nuclear program or intentions to develop one); Barry Kellman, *International Consensus and States Non-parties*, in FUTURE LEGAL RESTRAINTS ON ARMS PROLIFERATION 151, 167–168 (JULIE DAHLITZ ed., 1996) (asserting that limited bureaucratic resources might make it impossible for some States to comply with reporting requirements contained in nuclear non-proliferation agreements); GLORIA DUFFY, *Arms Control Treaty Compliance*, in 1 ENCYCLOPEDIA OF ARMS CONTROL AND DISARMAMENT 279, 289 (Richard Dean Burns ed., 1993) (seeing

being in a very precarious situation indeed.[7] A glance at the newspapers from the past two decades reveals that international peace and security actually have been in such a precarious situation for some time now, with the alleged nuclear proliferation efforts of India, Pakistan, Iraq, Iran, and North Korea grabbing countless headlines. As if the situation were not precarious enough, certain States have threatened war – even nuclear war – against these allegedly noncompliant States,[8] thus escalating tensions even further. Certain commentators have tried to develop new

as inevitable disputes arising over the control of weapons such as nuclear weapons); Antonia Handler Chayes and Abram Chayes, *From Law Enforcement to Dispute Settlement: A New Approach to Arms Control Verification and Compliance*, 14 INT'L SEC. 147, 163 (1990) (asserting that disputes over the meaning and application of the rules of complex regulatory regimes such as that relating to nuclear non-proliferation are "an inevitable feature of life" under that regime); Joseph D. Douglass, Jr., WHY THE SOVIETS VIOLATE ARMS CONTROL TREATIES (1988) (exploring the alleged violations by the USSR).

[7] See, e.g., LOUIS RENÉ BERES, APOCALYPSE: NUCLEAR CATASTROPHE IN WORLD POLITICS (1977); BEFORE IT'S TOO LATE: THE CHALLENGE OF NUCLEAR DISARMAMENT (PAUL ABRECHT and NINAN KOSHY ed., 1983); KATHLEEN C. BAILEY, DOOMSDAY WEAPONS IN THE HANDS OF MANY: THE ARMS CONTROL CHALLENGE OF THE 90S (1991); LISL MARBURG GOODMAN and LEE ANN HOFF, OMNICIDE: THE NUCLEAR DILEMMA (1990); GEORGE H. HAMPSCH, PREVENTING NUCLEAR GENOCIDE (1988); BERTRAND RUSSELL, HAS MAN A FUTURE? (1961); LAWRENCE S. WITTNER, ONE WORLD OR NONE: A HISTORY OF THE WORLD NUCLEAR DISARMAMENT MOVEMENT THROUGH 1953 (1993); AT THE NUCLEAR PRECIPICE: CATASTROPHE OR TRANSFORMATION? (RICHARD FALK and DAVID KRIEGER ed., 2008).

[8] The Bush Administration made clear in its 2001 Nuclear Posture Review Report that the United States would use force, including nuclear weapons, to "dissuade adversaries from undertaking military programs or operations that could threaten U.S. interests or those of allies and friends." U.S. DEP'T OF DEF., NUCLEAR POSTURE REVIEW REPORT, Dec. 31, 2001, at 9. The Obama administration has taken a step back from this bellicose position. With regard specifically to alleged noncompliance with nuclear non-proliferation norms, commentators have heralded the Obama administration's recent push to bring real progress through multilateral co-operation as providing "new ideas" for "old worries," *Old Worry, New Ideas*, THE ECONOMIST, April 17–23, 2010, at 55, yet the proposals surprisingly lack significant substance, at least in terms of trying to engage with Iran and North Korea in a meaningful dialogue. In fact, the United States' repeated promise not to use nuclear weapons against non-nuclear-weapon States that comply with the NPT, made in the 2010 Nuclear Posture Review, seems more antagonistic than reassuring. See U.S. DEP'T OF DEF., NUCLEAR POSTURE REVIEW REPORT, April 2010, at viii, ix, 15, 17, 46 ("declaring that the United States will not use or threaten to use nuclear weapons against non-nuclear weapons states that are party to the NPT and in compliance with their nuclear non-proliferation obligations"); see also Barack Obama, *Renewing American Leadership*, FOR. AFF., July/Aug. 2007, at 8–9 (refusing to take "the military option off the table" with supposed nuclear proliferators Iran and North Korea). Apparently such lightly veiled threats of nuclear attack are not new. See CHARLES MOXLEY, NUCLEAR WEAPONS AND INTERNATIONAL LAW IN THE POST-COLD

rules of international law that would allow the unilateral use of force against would-be proliferators, which has not helped the situation.[9] In an apparent attempt to alleviate tensions and resolve the matter, the Security Council occasionally has intervened. However, the Security Council's heavy-handed method of imposing and enforcing obligations through its UN Charter Chapter VII powers might have exacerbated the situation, arguably leading some target States to further recalcitrance. The stage is set to explore new alternatives that might help avoid war over these kinds of disputes. As Albert Einstein once said, "The unleashed power of the atom has changed everything save our modes of thinking, and we thus drift toward unparalleled catastrophe." Nobel laureate and former director-general of the IAEA Mohamed ElBaradei concludes his recent book by asserting, "The final reason not to lose faith that diplomacy and dialogue can prevail as the strategy for dealing with nuclear crises is based on a point of logic: the alternative is unacceptable."[10] The "alternative" to diplomatic resolution that ElBaradei referred to was nuclear war.[11] This study emphasizes a third alternative distinct from diplomatic resolution and nuclear war – a new "mode of thinking" with nuclear non-proliferation disputes – by proposing legal resolution as an option, especially in the face of war, on the one hand, and coercive Security Council measures, on the other. The cover art of this book captures the essence of its thesis, with Roman general Gaius Marius disarming the soldier that had been sent to kill him through his legal authority, as opposed to his physical strength.

War World 515–520 (2000) (asserting that the United States "explicitly threatened to use nuclear weapons on at least five occasions during the Cold War, including in Korea in 1950–1953, Suez in 1956, Lebanon in 1958, Cuba in 1962, and the Middle East in 1973, and after the Cold War in Iraq during the Gulf War); Robert S. McNamara, Argument without End: In Search of Answers to the Vietnam Tragedy (1999) (mentioning the threat of using nuclear weapons in Vietnam).

[9] See, e.g., Matthew C. Waxman, *The Use of Force against States that Might Have Weapons of Mass Destruction*, 31 Mich. J. Int'l L. 1 (2009); Cody Coombs, *Blue Morning-Glories in the Sky: Correcting Sanctions to Enforce Nuclear Nonproliferation in Iran*, 19 Ind. Int'l & Comp. L. Rev. 419, 457–458 (2009) (advocating the formation of a coalition of nations to enforce nuclear non-proliferation norms outside the NPT and outside the UN system); Matthew Lund, *The Eighty Percent and Twenty Percent Solutions to Nuclear Proliferation*, 2009 BYU L. Rev. 741 (2009) (same).

[10] Mohamed ElBaradei, The Age of Deception: Nuclear Diplomacy in Treacherous Times 321 (2011).

[11] See ibid. See also D. M. Edwards, *International Legal Aspects of Safeguards and the Non-proliferation of Nuclear Weapons*, 33 Int'l & Comp. L.Q. 1, 22 (1984) (calling for individuals to "keep searching for ways of reducing the fears and insecurity which States feel and which may encourage them to consider the nuclear option seriously").

Likewise, the legal authority of the ICJ and international arbitral tribunals might be a crucial element in helping resolve nuclear non-proliferation disputes, as opposed to the realpolitik of the Security Council and war.

Admittedly, this study is not unique in asserting that legal resolution can become a more attractive option in the face of coercive action.[12] Nor is this study unique in believing that all disputes can be peacefully resolved, with the determining factor being finding the right method of resolution and the appropriate incentives for those particular actors in that particular situation.[13] This study is highly unique, however, in its application of these ideas to arguably the most politically sensitive disputes. In an era that some commentators characterize with the belief that even the most difficult problems can be solved,[14] the time is now ripe to test that notion with regard to legal resolution of nuclear non-proliferation disputes, thereby pushing the current boundaries of the legal literature. To be clear, while previous studies have explored *how* to interpret nuclear non-proliferation agreements,[15] this study explores *who* should be allowed to interpret such agreements, or, to be more specific, whether the ICJ and international arbitral tribunals ought to be given the opportunity to resolve disputes over these agreements before the Security Council gets involved with its Chapter VII powers.

1.2 Outline

This study is divided into four parts broken into seven chapters. Part I provides this relatively short introduction to the study (Chapter 1), as well as an introduction to the nuclear non-proliferation regime and an introduction to international dispute settlement generally (Chapter 2), all of which sets the foundation and framework for the substance of the study. Part II (comprising Chapter 3) elaborates on the problem alluded to in the preceding section with regard to Security Council involvement

[12] See, e.g., Richard B. Bilder, *Judicial Procedures Relating to the Use of Force*, 31 VA. J. INT'L L. 249, 268 (1991).

[13] See, e.g., Manfred Lachs, *The Law and the Settlement of International Disputes*, in DISPUTE SETTLEMENT THROUGH THE UNITED NATIONS 283, 286 (K. VENKATA RAMAN ed., 1977).

[14] See *A $300 Idea that Is Priceless*, THE ECONOMIST, April 30, 2011, at 66 (asserting that this is an era when the dominant belief is that even the most difficult problems can be solved).

[15] See, e.g., DANIEL H. JOYNER, INTERPRETING THE NUCLEAR NON-PROLIFERATION TREATY (2011) (providing an in-depth analysis of the Nuclear Non-proliferation Treaty in light of the Vienna Convention on the Law of Treaties).

with nuclear non-proliferation disputes under UN Charter Chapter VII. Indeed, States and the international community might prefer to use force when trying to remove the nuclear-weapon capabilities of allegedly noncompliant and recalcitrant States; alternatively, they might prefer to create a strong incentive for those States by using coercive language in Security Council decisions, or even imposing enforcement measures such as sanctions and the authorization of force.[16] The dangers of war are obvious, especially when nuclear weapons are involved.[17] This is particularly true when the notorious three fallacies of nuclear war are allowed to increase the chances of nuclear war happening: "1. That nuclear war is not *really* going to happen *or, if so, then only to other people*. 2. That nothing can be done to prevent nuclear war *except, perhaps, by someone else* . . . 3. That nuclear war can be averted by further armament, *unyielding threats etc*."[18] Instead of focusing on war, however, Part II focuses on the more subtle dangers of Security Council involvement in terms of the perceived flaws in the Security Council's procedures in adopting its Chapter VII measures.

Chapter 3 undertakes a comprehensive analysis of Security Council involvement, under Chapter VII, with nuclear non-proliferation disputes, including those disputes involving India, Pakistan, Iraq, Iran, and North Korea. Critics will be quick to assert that many, if not all, of those problems over nuclear non-proliferation are policy oriented and that policy-oriented solutions, not legal solutions, are needed in order to resolve these policy-oriented tensions. In other words, critics will argue that these are the exact situations where the ICJ and international arbitral tribunals cannot get involved, but where the Security Council should have, and does have, exclusive competence vis-à-vis the ICJ and international arbitral tribunals as the entity charged with maintaining international peace and security. One example of a policy-related problem is the West's policy of not allowing Iran to develop its civilian

[16] See Kellman, *supra* note 6, at 169.

[17] See B. V. A. Röling, *International Law, Nuclear Weapons, Arms Control and Disarmament*, in NUCLEAR WEAPONS AND LAW 181, 183 (ARTHUR SELWYN MILLER and MARTIN FEINRIDER ed., 1984) (asserting every war may eventually involve nuclear war). The obviousness of the dangers of nuclear war has not stopped some commentators from spelling out the dangers. See, e.g., J. Carson Mark, *Consequences of Nuclear War*, in THE DANGERS OF NUCLEAR WAR 7 (FRANKLYN GRIFFITHS and JOHN C. POLANYI ed., 1979); Marshal Costa Gomez, *Nuclear Arms and the Danger of an Atomic War*, in 2 TOWARDS A NUCLEAR WEAPON-FREE AND NON-VIOLENT WORLD (1990).

[18] See JULIE DAHLITZ, NUCLEAR ARMS CONTROL 7 (1983) (emphasis in original).

nuclear program, notwithstanding Iran's "inalienable" right to do so, as alluded to in Article IV(1) of the Nuclear Non-Proliferation Treaty (NPT), as explained in Chapter 3.2.6 below. However, underlying such policy issues are legal ones, in the form of legally enforceable rights and obligations – for example, whether Iran actually has an inalienable legal right to develop its civilian nuclear program, and, if so, the scope of that right. Policy-oriented disputes that the Security Council and other political bodies should handle over legal resolution involve issues where no legally enforceable rights or obligations exist, such as with the argument of non-nuclear-weapon States that nuclear-weapon States are in violation of NPT Article VI for not relinquishing their nuclear weapons, where the norms in Article VI are overwhelmingly softened with phrases such as "undertakes to pursue" such negotiations to eventually stop the nuclear arms race "at an early date."[19] States and organizations that want to limit Iran's options when it comes to a civilian nuclear program are free to make policy arguments why Iran should not be allowed to develop its civilian nuclear program. However, these policy arguments do not strip the dispute of its underlying legal components, in the form of Iran's legal rights under the NPT. Chapter 6.4 below on treaty interpretation elaborates on this example of how the ICJ or an international arbitral tribunal could interpret such legal rights, with reference to previous cases that have interpreted similar language. At the same time, it is important to note how this study does not focus specifically on the actual nuclear non-proliferation disputes involving India, Pakistan, Iraq, Iran, and North Korea discussed in Chapter 3, at least when it comes to providing an example of how legal resolution would resolve one of these sensitive disputes, since the Security Council already has suspended many of their treaty rights through the adoption of conflicting obligations under UN Charter Chapter VII. If legal resolution had a stronger tradition of reviewing Security Council resolutions, then legal resolution might have remained more of a viable option with these particular disputes. Therefore, this study is geared more towards encouraging disputants of nuclear non-proliferation disputes *in the future* to invoke legal resolution, wherever the option exists, before the situation rises to the level of endangering international peace and security and the Security Council suspends treaty rights that the ICJ or an international arbitral tribunal might be well suited to interpret. Chapter 5.2.3 below attempts to identify when

[19] See Treaty on the Non-proliferation of Nuclear Weapons, Art. VI, July 1, 1968, 729 U.N. T.S. 161 (extended May 11, 1995, 34 I.L.M. 959).

the option of legal resolution might exist in the future and the present, with Chapter 6.4 exploring the possibility of legal resolution of issues involving China's building of two nuclear power plants for Pakistan. Despite the relatively forward-looking orientation of this study, Chapter 3 nevertheless provides ample examples throughout of how the ICJ or an international arbitral tribunal might have interpreted the rights and obligations of these States under the relevant nuclear non-proliferation agreements had the Security Council *not* intervened with its Chapter VII powers in those situations, which intervention suspended many of those rights and imposed its interpretation of those obligations. For example, as Chapter 3 below points out in numerous places, many of the Security Council's interpretations of nuclear non-proliferation agreements run counter to at least one of the principal pillars of the nuclear non-proliferation regime, namely the peaceful use of nuclear energy,[20] which presumably the ICJ or an international arbitral tribunal would not have done when interpreting these provisions "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose," as explained in Chapter 3.1.3 below.

With these problems in mind, Part III focuses on whether legal resolution is a viable option with such nuclear non-proliferation disputes. Part III starts with Chapter 4, painting the historical picture of legal resolution handling military-related disputes, which can be seen as having a similar degree of sensitivity as nuclear non-proliferation disputes. These examples show both how States have entrusted to legal resolution politically sensitive disputes and how the ICJ and international arbitral tribunals regularly have felt that they have the analytical tools to decide such sensitive disputes. When it comes to the "viability" of legal resolution, viability is believed to be determined if, on a balance of the probabilities, the ICJ or international arbitral tribunal will be able to satisfy itself that it has the requisite jurisdiction over the dispute (discussed in Chapter 5) and that it has the tools to properly address the matter (discussed in Chapter 6). While nuclear non-proliferation disputes conceivably involve a State's vital interests, this factor is seen as no longer a significant barrier to justiciability. Moreover, both disputants need not agree to legal resolution after the dispute has arisen in

[20] See, e.g., ch. 3.2.3.8, *infra* (discussing how Security Council Resolution 707 suspended Iraq's right to develop nuclear energy for peaceful purposes); ch. 3.2.6., *infra* (discussing how Security Council Resolution 1696 suspended Iran's "enrichment-related and reprocessing activities, including research and development, to be verified by the IAEA . . ."). See also JOYNER, *supra* note 15, at 1–2, 35–75 (noting how nuclear-weapon States interpret the NPT in such a way as to ignore this "pillar" of the NPT).