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LAW AND ALTERNATIVE SECURITY

*Burns H. Weston**

Rightly or wrongly, nuclear weapons are regarded, in their threat role at least, as effective guardians of national security.¹ Yet nothing is more menacing to the survival of our planet than the credibly communicated threat to use nuclear weapons if and when sufficiently provoked. *Ergo*, to escape the mind-boggling risks posed by nuclear deterrence, thinking about how to ensure world security without relying upon nuclear weapons, either extensively or at all, is as much a political as it is a moral imperative — in truth, a matter of physical survival. Without an effective alternative to nuclear deterrence, there is no letting go of the nuclear option, and without letting go of the nuclear option the world never can be free of the possibility of radioactive annihilation. Of course, because humankind has the knowledge of how to build nuclear weapons, a knowledge that never can be reversed, it is highly doubtful that the world ever can be *completely* free of the threat of nuclear war. Still, given an effective alternative to nuclear deterrence, with appropriate political will to match, it is possible that the world can be free of such a threat *almost completely* — to a degree sufficient, at any rate, to eliminate or reduce drastically the current predisposition to rely upon nuclear weapons as a matter of routine, with few safeguards but the willingness of the nuclear weapons States to perceive the common interest of continued human survival inclusively.

Now, when contemplating the role of law and legal institutions in this particular regard, one cannot help but feel a special inspiration from the unswerving commitment to the world rule of law that so marked the career of the wise and gentle man, William W. Bishop, Jr., to whom these pages are posthumously dedicated. As he counseled

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1. With due respect to the cultural anthropologists who properly counsel against the "killer ape" theory of human nature, *see, e.g.*, A. ALLAND, *THE HUMAN IMPERATIVE* (1972), R. DUBOS, *BEAST OR ANGEL* (1974), conflict is endemic to the human condition and the average person is not easily dissuaded from a deterrence system that seems to have worked for better than four decades now.

over two decades ago, "under present conditions all [States] need international law in order to continue to exist together on this planet."² But as Bill Bishop also would have said, ever skeptical of legal exhortations divorced from socio-economic and political reality: beware the limitations of law and legal institutions. "[F]actors other than the law may be of great importance," he cautioned in the Preface to his famous casebook, "often greater in a particular situation than are the rules and principles of international law."³

Bearing this caution in mind and noting, in particular, the contemporary State-centric structure of international relations, it seems futile to try to imagine some legal initiative or set of legal initiatives that *alone* might compete with nuclear weapons as a means of safeguarding core national interests, real or perceived. Manifestly, nuclear weapons are weapons of military decisiveness, and as a consequence any substitute for them must be more or less decisive also. Yet, embarked though the world surely is upon a sea-change of historical transformation (at least as great as what took place following the end of the Thirty Years' War and the onset of the Westphalian system in 1648), we still live in the *global* Middle Ages, characterized by more than 150 separate fiefdoms, each with a monopoly control over the military instrument and each only barely accountable in any formal sense either to each other or to the larger arena in which they operate. And under such historical circumstances, clearly, it is difficult to secure legal initiatives that alone can rise to the challenge of an essentially nuclear-weapons-free world. Barring some truly radical change in the existing world order, unforeseeable in the near term, it is not unreasonable to conclude that there really is no such thing as a purely legal alternative or even a set of purely legal alternatives to nuclear deterrence, and that there likely never will be.

This is not to say that international law is without any utility at the present time. Indeed, as the Bishop casebook itself makes clear, it performs, all things considered, remarkably well. Every hour of every day ships ply the sea, planes pierce the clouds, and artificial satellites roam outer space. Every hour of every day communications are transmitted, goods and services traded, and people and things transported from one country to another. Every hour of every day transactions are made, resources exploited, and institutions created across national and equivalent frontiers. And in all these respects, international law — by which I mean the many processes of authoritative and control-

2. Bishop, *General Course of Public International Law*, 115 RECUEIL DES COURS 147, 467 (1965-II).

3. W. BISHOP, *INTERNATIONAL LAW: CASES AND MATERIALS* viii (3rd ed. 1971).

ling transnational decision at all levels of social organization that help to regulate such endeavors — is rather well observed on the whole; it is an important and relevant force in the ordering of human relationships worldwide. True, the international legal system is by no means adequate in its force and effect, particularly in the realm of war and peace. But no legal system, not even the most advanced, can boast complete effectiveness; and all legal systems, again including the most advanced, typically display a certain impotence when it comes to politically volatile or otherwise intractable issues of public policy.

Nor is an admission of the limitations of international law as a substitute for nuclear weaponry the same as saying that international law, fragile though it is at this historical time, cannot or should not play an important role in some alternative strategy to nuclear deterrence. On the contrary, it can and must. But only as part of a larger complex or medley of interdependent policy options — military, technological, economic, political, psychological, and spiritual, as well as legal — that *jointly* can define an integrated, comprehensive and, above all, decisive security system more or less free of nuclear weapons and the threat of nuclear war. It is not that legal initiatives cannot contribute to an alternative to nuclear deterrence capable of effectively safeguarding core national interests, but that they cannot do so alone.⁴ Indeed, any alternative to nuclear deterrence must be a composite or medley of interpenetrating policy options if it is to do the job and do it well. An alternative international security system must be conceived as an integrated plan.

Which thus leads one to ask what some of the integral legal initiatives might be. What legal initiatives might contribute to a global security system more or less free of nuclear weapons and do so effectively?

One obvious answer to this question is of course a genuine commitment to the enactment of the kinds of “deep cuts” and related arms reduction proposals that are contemplated in, for example, the Final Act of the First U.N. General Assembly Special Session on Disarmament adopted by consensus in June 1978.⁵ Indeed, it would be no small contribution were the superpowers and the other actual and would-be nuclear weapons States seriously to commit themselves to the twenty or so principal nuclear arms control/arms reduction agree-

4. As J. L. Brierly, whom Bill Bishop was fond of quoting, once wrote, international law “is neither a myth on the one hand, nor a panacea on the other, but just one institution among others which we can use for the building of a better international order.” J. BRIERLY, *THE LAW OF NATIONS* v (6th ed. 1963), *quoted in* Bishop, *supra* note 2, at 171.

5. G.A. Res. S-10/2 (S-X), 10 (Special) U.N. GAOR Supp. (No. 4) at 3, U.N. Doc. A/S-10/4 (1978).

ments reached since 1959 which still are in force or immediately relevant to the quest for peace in 1989 — and notwithstanding that only one, the newly ratified INF Treaty, mandates any actual dismantling of existing weapons or weapons systems and that many prohibit weapons in environments where the military do not particularly want them in the first place.⁶

Another answer, perhaps not so obvious but one that merits special emphasis given the contempt of at least the superpowers toward the international law of peace in recent years, is greatly increased respect

6. See the Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71; the Memorandum of Understanding Between the United States and the Union of Soviet Socialist Republics Regarding the Establishment of a Direct Communication Link ("the Hot Line Agreement"), June 20, 1963, 14 U.S.T. 825, T.I.A.S. No. 5362, 472 U.N.T.S. 163; the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water ("the Partial Test Ban Treaty"), Aug. 5, 1963, 14 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43; the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies ("the Outer Space Treaty"), *opened for signature* Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205; the Treaty for the Prohibition of Nuclear Weapons in Latin America ("the Treaty of Tlateloco"), Feb. 14, 1967, 634 U.N.T.S. 326; the Treaty on the Non-Proliferation of Nuclear Weapons ("the NPT"), *opened for signature* July 1, 1968, 21 U.S.T. 483, T.I.A.S. No. 6839, 729 U.N.T.S. 161; the 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 ("the Seabed Arms Control Treaty"), *opened for signature* Feb. 11, 1971, 23 U.S.T. 701, T.I.A.S. No. 7337, 955 U.N.T.S. 115; the Agreement on Measures to Reduce the Risk of Outbreak of Nuclear War Between the United States and the Union of Soviet Socialist Republics ("the Accident Measures Agreement"), Sept. 30, 1971, 22 U.S.T. 1590, T.I.A.S. No. 7186, 807 U.N.T.S. 57; the Agreement Between the United States of America and the Union of Soviet Socialist Republics on Measures to Improve the USA-USSR Direct Communications Link ("the Hot Line Modernization Agreement"), Sept. 30, 1971, 22 U.S.T. 1598, T.I.A.S. No. 7187, 806 U.N.T.S. 402; the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems ("the ABM Treaty"), May 26, 1972, 23 U.S.T. 3435, T.I.A.S. No. 7503, 944 U.N.T.S. 13; the Interim Agreement Between the United States of America and the Union of Soviet Socialist Republics on Certain Measures with Respect to the Limitation of Strategic Offensive Arms, May 26, 1972, 23 U.S.T. 3462, T.I.A.S. No. 7504, 94 U.N.T.S. 3; the Declaration of Basic Principles of Relations Between the United States of America and the Union of Soviet Socialist Republics, May 29, 1972, 66 DEP'T STATE BULL. 898 (1972); the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Underground Nuclear Weapon Tests, July 12, 1974, 71 DEP'T STATE BULL. 217 (1974); the Limitation on Anti-Ballistic Missile Systems Treaty Protocol, July 3, 1974, United States-Union of Soviet Socialist Republics, 27 U.S.T. 1645, T.I.A.S. No. 8276; the Joint Statement on the Limitation of Strategic Offensive Arms ("the Vladivostok Agreement"), April 29, 1974, 70 DEP'T STATE BULL. 677 (1974); the Final Act of the Conference on Security and Cooperation in Europe ("the Helsinki Accords"), Aug. 1, 1975, Dep't State Pub. No. 8826 (Gen'l For. Pol. Ser. 298); the *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies* ("the Moon Treaty"), *Report of the Committee on the Peaceful Uses of Outer Space*, 34 U.N. GAOR, Supp. (No. 20) 33, U.N. Doc. A/34/20 Annex II (1979); the South Pacific Nuclear-Free Zone Treaty, Aug. 6, 1985, 24 I.L.M. 1440; and the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles ("the INF Treaty"), Dec. 8, 1987, 88 DEP'T STATE BULL. 24 (Feb. 1988). See also the US-USSR Treaty and Protocol on Underground Nuclear Explosions for Peaceful Purposes, May 28, 1976, 74 DEP'T STATE BULL. 802 (1976) and the Treaty Between the United States of America and the SALT II Treaty, June 18, 1979, S. Exec. Doc. Y, 96th Cong., 1st Sess. 37 (1979).

for, and adherence to, the already existing norms of restraint upon the use of force in international relations as evidenced in, *inter alia*:

- the 1928 Kellogg-Briand Pact (or Pact of Paris);⁷ UN Charter Article 2(4); the 1961 Declaration on the Prohibition of the Use of Nuclear Weapons and Thermo-nuclear Weapons; the 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty;⁸ the 1970 UN General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in accordance with the Charter of the United Nations;⁹ the 1972 Declaration on the Non-use of Force in International Relations and Permanent Prohibition on the Use of Nuclear Weapons;¹⁰ the 1974 Resolution on the Definition of Aggression;¹¹ the 1980 Resolution on the Non-use of Nuclear Weapons and Prevention of Nuclear War;¹² — all outlawing the non-defensive threat and use of force in the conduct of foreign relations¹³ and some outlawing specifically the use and threat of use of nuclear weapons;
- the principles established at Nuremberg and reaffirmed by the United Nations thereafter;¹⁴
- the 1948 Convention on the Prevention and Punishment of the Crime of Genocide;¹⁵ and
- the humanitarian rules of international armed conflict, as embodied

7. Treaty Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, T.S. No. 796, 94 U.N.T.S. 57.

8. G.A. Res. 2131 (XX), 20 U.N. GAOR Supp. (No. 14) at 11, U.N. Doc. A/6014 (1966).

9. G.A. Res. 2625 (XXV), 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1971).

10. G.A. Res. 2936, 27 U.N. GAOR Supp. (No. 30) at 5, U.N. Doc. A/8730 (1972).

11. G.A. Res. 3314 (XXIX), 29 U.N. GAOR Supp. (No. 31) at 142, U.N. Doc. A/9631 (1975).

12. G.A. Res. 35/152D, 35 U.N. GAOR Supp. (No. 48) at 69, U.N. Doc. A/35/48 (1980).

13. See also Convention on the Rights and Duties of States, Dec. 26, 1933, arts. 8, 10-11, 49 Stat. 3097, T.S. No. 881, 165 L.N.T.S. 19 (also known as the "Montevideo Convention"); Pact of the League of Arab States, March 22, 1945, art. 5, 70 U.N.T.S. 237; Charter of the Organization of American States, April 30, 1948, chs. II, IV, V, 2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. 3 and Protocol of Amendment, Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847 (also known as the "Protocol of Buenos Aires"); the Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, 62 Stat. 1681, T.I.A.S. No. 1838, 121 U.N.T.S. 77 (also known as the "Rio Pact"); the American Treaty on Pacific Settlement, April 30, 1948, 30 U.N.T.S. 55 (also known as the "Pact of Bogota"); and Charter of the Organization of African Unity, May 25, 1963, arts II, III, 479 U.N.T.S. 39.

14. See Charter of the International Military Tribunal, annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, art. 6, Aug. 8, 1945, 59 Stat. 1544, E.A.S. No. 472; 82 U.N.T.S. 279; Resolution Affirming the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, G.A. Res. 95(1), 1 U.N. GAOR at 1144, U.N. Doc. A/236 (1946). See also JUDGMENT OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE TRIAL OF GERMAN MAJOR WAR CRIMINALS (1946).

15. Dec. 9, 1948, 78 U.N.T.S. 277.

in, *inter alia*, the 1907 Hague Regulations Respecting the Laws and Customs of War;¹⁶ the 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases;¹⁷ the Hague Draft Rules of Aerial Warfare;¹⁸ the 1949 Convention [No. I] for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field;¹⁹ the 1949 Convention [No. II] for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea;²⁰ the 1949 Convention [No. III] Relative to the Treatment of Prisoners of War;²¹ the 1949 Convention Relative to the Protection of Civilian Persons in Time of War;²² and the 1977 Geneva Protocol I Additional Relating to the Protection of Victims of International Armed Conflicts.²³

Failures or refusals to adhere to these articulated norms may sometimes yield viscerally pleasing results over the short run, but rarely if ever do they yield genuine security, to say nothing of justice, over the long run. In a world that can easily and quickly reinvent nuclear weapons, it is respect — or lack of respect — for the legal prohibitions against the threat and use of force, both defensive and non-defensive, that will determine the fate of the Earth.

But what else can be done beyond a commitment to the principal arms control/arms reduction agreements reached since 1959 and to the international law of peace in general? What other legal initiatives might contribute effectively to a global security system more or less free of nuclear weapons?

The answer to this question does not come easily or swiftly. Nevertheless, drawing heavily upon my colleagues from the Independent Commission on World Security Alternatives,²⁴ the Lawyers' Committee on Nuclear Policy,²⁵ and the World Policy

16. Annex to the 1907 Hague Convention [No. IV] Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539.

17. Geneva Gas Protocol, June 17, 1925, 26 U.S.T. 575, T.I.A.S. 8061. 94 L.N.T.S.

18. *Reprinted in* 17 AM. J. INT'L L. 245 (Supp. 1923).

19. Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31.

20. Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85.

21. Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135.

22. Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

23. U.N. Doc. A/32/144, Annex I (1977).

24. The Commission is headquartered at 325 Ninth Street, San Francisco, CA 94103. Members of the Commission, in addition to the author, are Anders Boserup, William Epstein, Willis Harman, Donald Keys, Ward Morehouse, James O.C. Jonah, Betty Reardon, Indarjit Rikhye, and Louis B. Sohn.

25. The Committee is headquartered at 225 Lafayette Street, Suite 207, New York, NY 10012.

Institute,²⁶ the following series of initiatives seem the most worthy of responsible attention. Cast in terms of the normative, procedural, and institutional dimensions of legal process, all presuppose at least three conclusions deducible from an analysis of the present three to four century-old international security system: *first*, that the present militarily competitive international order cannot be expected to prevent large-scale conventional or nuclear war for very long; *second*, that the international system (legal and otherwise) *can* change; and *third*, that the prospects for peace and security increase as societies demilitarize, depolarize, denationalize, and transnationalize.²⁷

A. Normative Policy Options

Four normative regimes come immediately to mind as capable of helping at least to demilitarize and depolarize the international system:

1. *A Comprehensive Nuclear Weapons Ban.*²⁸

The enforcement of existing relevant international law norms, which interdict virtually any planned strategic or tactical use of nuclear weapons,²⁹ is seriously encumbered by a tradition of political leadership — Machiavellian in character — that typically indulges self-serving interpretations of the legal status of controversial uses of force. A pervasive subjectivity in world politics makes it exceedingly hazardous to tie restraint vis-à-vis nuclear weapons to characterizations of warfare as “defensive” or “aggressive,” these labels commonly masking politically congenial and politically hostile uses of force. Thus, while allowing, perhaps, for the possession and retention of some nuclear weapons for use in extreme circumstances, a comprehensive anti-nuclear-weapons regime is needed, one that would embrace at least the following:

1 an absolute prohibition on first strike and other destabilizing weap-

26. The Institute is headquartered at 777 United Nations Plaza, New York, NY 10017.

27. See Johansen, *Toward an Alternative Security System*, in *TOWARD NUCLEAR DISARMAMENT AND GLOBAL SECURITY: A SEARCH FOR ALTERNATIVES* 569, 582-92 (B. Weston ed. 1984). Explains Johansen: “Whereas demilitarization pertains to military affairs, depolarization applies to political and economic conditions, denationalization to social, cultural, and psychological factors, and transnationalization to institutions.” *Id.* at 586.

28. Many of the ideas enumerated here are derived from Falk, *Toward a Legal Regime for Nuclear Weapons*, 28 *MCGILL L.J.* 519, 537-38 (1963).

29. See, in particular, Weston, *Nuclear Weapons Versus International Law: A Contextual Reassessment*, 28 *MCGILL L.J.* 542 (1983). See also Arbess, *The International Law of Armed Conflict in Light of Contemporary Deterrence Strategies: Empty Promises or Meaningful Restraint?*, 30 *MCGILL L.J.* 89 (1984); Boyle, *The Relevance of International Law to the “Paradox” of Nuclear Deterrence*, 80 *N.W. U. L. REV.* 1407 (1986); Meyrowitz, *The Opinions of Legal Scholars on the Legal Status of Nuclear Weapons*, 24 *STAN. J. INT’L L.* 111 (1988).

- ons systems, in particular the MX missile, the Trident II (D-5) missile (under development), and the Pershing II and Soviet SS-20 missiles (because such weapons increase the pressure to "launch on warning" and thereby increase the possibility of nuclear war by accident or miscalculation);
- 2 a declaration that all research and development (R&D), war plans, strategic doctrines, and strategic threats having first-strike characteristics would be illegal *per se*, and that all persons knowingly associated with them would be deemed engaged in a continuing criminal enterprise;
 - 3 a presumption that virtually any actual use of nuclear weapons, particularly a first use of such weapons (even in a "defensive" mode), but also a second or retaliatory "countervalue" use (against cities and other civilian targets), would violate the international law of war and constitute a "crime against humanity";
 - 4 a clear obligation on the part of all States to pursue nuclear disarmament and otherwise minimize the role of nuclear weapons in inter-State conflict (per Article VI of the Nuclear Non-Proliferation Treaty, or "NPT"³⁰) by way of, *inter alia*,
 - 4.1 a renunciation of the policy of first use and the war-fighting doctrines and capabilities that accompany it;
 - 4.2 a comprehensive test ban (CTB);³¹ and
 - 4.3 a strengthened nuclear non-proliferation treaty (NPT)³² regime;
 - 5 a ban on space-based missile defense systems (because such systems, especially if not preceded by deep cuts in offensive ballistic missiles, are likely to encourage a proliferation of the most destabilizing weapons and weapons systems); and
 - 6 a clear mandate for all citizens to take whatever steps may be available to them, including acts of non-violent civil disobedience, to expose the illegality of the use of nuclear weapons and to otherwise insist upon the lawful conduct of the foreign policies of their own governments.³³

2. A NATO-Warsaw Pact Nonaggression Regime.

The question of across-the-board reductions in strategic and other

30. *Supra* note 6.

31. *See, e.g.*, the Draft Treaty Banning Nuclear Weapons Tests in All Environments, 47 DEP'T STATE BULL. 411 (1962).

32. *See* the NPT Treaty, *supra* note 6.

33. For pertinent discussion of such matters, see F. BOYLE, DEFENDING CIVIL RESISTANCE UNDER INTERNATIONAL LAW (1987).

nuclear forces is commonly seen as inextricably linked to a claimed comparative advantage in conventional forces on the part of the Warsaw Pact countries relative to the NATO powers. A NATO-Warsaw Pact mutual nonaggression regime, therefore, would seem a minimal necessity for a nuclear weapons ban and, indeed, for a nuclear-weapons-free alternative security system as a whole. As former U.S. Ambassador to the Soviet Union, George F. Kennan, "confessed" a few years ago:

I am now bound to say that while the earliest possible elimination of Soviet weaponry is of no less importance in my eyes than it ever was, this would not be enough, in itself, to give Western civilization even an adequate chance of survival. War itself, as a means of settling differences at least between the great industrial powers, will have to be in some way ruled out. . . .³⁴

In other words, to rid ourselves of the *nuclear* option we must rid ourselves also of the *war* option, and this is, of course, a prescription for basic system transformation worldwide. A not illogical place to begin, however, would be in the negotiation and conclusion of a mutual nonaggression regime between the NATO and Warsaw Pact countries that, in turn, would facilitate the dismantling of the vast military establishments of the major powers that heretofore have provided, in substantial part, the excuse for the invention and deployment of nuclear weapons and their supporting systems.

3. *A Conventional Non-Proliferation Regime.*

Just as there has been a proliferation of nuclear weapons since the late 1940s, so also has there been a proliferation in the manufacture and export of conventional weapons, particularly to the Third World. This fact is well known.³⁵ Yet, notwithstanding that this traffic in conventional arms increases not only the destructiveness of conflict but also the likelihood of bloody conflict erupting in the first place, the world community stands by and does essentially nothing.

The world community does so, however, at great peril — indeed greater peril than commonly is realized. Just as conventional arms are "trip-wires" to conventional wars, so are conventional wars — and their arms — "trip-wires" to nuclear conflict, capable of engaging the superpowers and other nuclear-weapons States and thereby risking escalation to nuclear war. In the absence of a ban on the manufacture and export of conventional weapons, a world more or less free of nu-

34. G. KENNAN, *THE NUCLEAR DELUSION* xxviii (1982).

35. See, e.g., R. SIVARD, *WORLD MILITARY AND SOCIAL EXPENDITURES 1987-88*, at 10-13 (1987).

clear weapons would be similarly endangered. To the extent that, in such a world, conventional wars could seriously jeopardize the real and perceived interests of nuclear-prone States, so too could they serve as catalysts to the "reinvention" and subsequent actual use of nuclear weapons to safeguard those interests.

Thus, a conventional non-proliferation regime, greatly limiting if not altogether prohibiting conventional arms traffic, would seem as much a necessity to a nuclear-weapons-free security system as the existing nuclear non-proliferation regime is to the present-day nuclear deterrence system. Particularly does it seem a necessity *vis à vis* such large items as tanks, armored cars, warships, jet aircraft, and missiles which, in addition to being the most easily detected, are the most destructive of conventional weapons. At the very least, such a regime should ensure an effective surveillance and record-keeping system, capable at least of alerting responsible elites of the presence of dangerous world practices and trends.

4. *A US-USSR Nonintervention Regime.*

It is clear to the informed citizen at least that the current nuclear deterrence system is in reality a system of extended deterrence, meant to guard against far more than European battlefield confrontations and intercontinental strategic attacks. Both the United States and the Soviet Union have strong hegemonic interests in keeping the other out of their respective spheres of influence and, beyond that, out of so-called nonaligned countries. But it is clear, too, that this extended or hegemonic deterrence system is of necessity nuclear because the economies of neither the United States nor the Soviet Union can afford, without major domestic sacrifice, a conventional one. Thus, because the strong economic and political interests of the two superpowers simply will not go away, it is essential that an alternative security system make as one of its cornerstones a compact by each government to refrain from sending any of its armed forces into the other's clear sphere of influence or into any nonaligned country, even if invited. A mutual promise of self-restraint on the part of both superpowers, especially one that would ensure their observance of the territorial integrity and political independence of Third World countries, would go a long way toward guaranteeing the viability of a global security system essentially free of nuclear weapons. Where force may be needed to prevent or minimize deprivations of fundamental human rights and freedoms, then resort should be had to the global and regional inter-governmental organizations that are designed to police such matters on a multilateral basis.

B. Procedural Policy Options

An alternative security system that forswears reliance upon nuclear weapons can provide no security at all without clearly established and respected procedures for both peacekeeping and peacemaking. If inter-State disputes can be prevented from degenerating into armed hostilities or settled by peaceful means, then they are unlikely to escalate into threats to the peace or acts of aggression and war. It is true that the past record of undertakings to keep the peace under the aegis of the United Nations and to achieve dispute settlement through international tribunals, arbitration and similar peaceful means has not been, until very recently, encouraging. But established and respected procedures for multilateral peacekeeping and for the mediation, conciliation, arbitration, and adjudication of international disputes would seem nevertheless to be a *sine qua non* for the maintenance of world peace and security. Without the active participation of States in peaceful efforts to accommodate each other, there is little likelihood of achieving the stability and harmony that a nuclear-weapons-free world requires.

Thus the following modest procedural initiatives would seem necessary and useful (perhaps especially at the early stages of international accommodation and nuclear disarmament):

1. *Improve UN Peacekeeping Opportunities and Capabilities*³⁶
 - 1.1 by *assuring peacekeeping finances* on an automatic basis, possibly through a percentage surcharge added to annual assessed contributions;
 - 1.2 by *guaranteeing military units* on a more or less permanent standby basis (as envisaged in UN Charter Article 43), trained for peacekeeping by the member States in the course of their armies' basic training and on the basis of expertise and additional training provided by an appropriate UN agency;
 - 1.3 by *regularly stockpiling military equipment and supplies* needed to enhance the UN's capacity to undertake peacekeeping operations on short notice;
 - 1.4 by *ensuring access to conflict areas* without requiring the initial or continuing permission of the conflicting parties;
 - 1.5 by *facilitating automatic peacekeeping action* on the basis of pre-determined levels of crisis or thresholds of conflict; and

36. Some of the ideas enumerated here are derived from REPORT OF THE INDEPENDENT COMMISSION ON DISARMAMENT AND SECURITY ISSUES: COMMON SECURITY — A PROGRAMME FOR DISARMAMENT, also known as the "Palme Commission Report," U.N. Doc. A/CN.10/38 (1983).

- 1.6 by *tying peacekeeping to peacemaking* (i.e., *pacific settlement*) so as to ensure that the merits of any given dispute will receive the attention that is needed to achieve long-term stability in the troubled area.

2. *Improve Peacemaking Opportunities and Capabilities*³⁷

- 2.1 by *enhancing and making greater use of UN dispute settlement mechanisms*, most of which have been rarely if ever used (such as the General Assembly's 1949 Panel for Inquiry and Consultation, a 1950 Peace Observation Commission, and a 1967 Register of Experts on Fact-Finding);
- 2.2 by *establishing a joint inter-State consultation commission* with a permanent staff composed of the nationals of both parties (among others) capable of handling potential disputes by way of routine review rather than the usual procedure of consulting only in extraordinary circumstances;
- 2.3 by *creating a joint inter-State negotiating commission* composed of nationals from both parties working together to find a solution acceptable to all concerned;
- 2.4 by *encouraging consent to mediation, conciliation, arbitration, and adjudication* via
- 2.4.1 *guarantees limiting the scope of the third-party judgment to the determination of the doctrines, principles and rules that could guide the parties in approaching settlement; and*
- 2.4.2 *greater use of technically non-binding advisory opinions;*
- 2.5 by *increasing reliance on private persons and NGOs as neutral intermediaries* (and thereby helping to avoid escalating the argument to a full-scale inter-State dispute)
- 2.5.1 *in pre-dispute consultations and in post-dispute negotiated settlements; and*
- 2.5.2 *before international tribunals for the purpose of clarifying a customary law norm or a clause in an international agreement; and*
- 2.6 by *adopting a code of international peacemaking procedures* (drawn from a variety of existing instruments) that would allow governmental officials to develop confidence in available procedures and that States could accept as binding upon them in whole or in part.

37. The ideas enumerated here are derived from Sohn, *Peaceful Settlement of Disputes and International Security*, a "preliminary draft" of an unpublished manuscript submitted to the Independent Commission on World Security Alternatives, *supra* note 24.

Of course, all of these and similar procedural initiatives have their share of difficulties: winning the confidence of contentious sovereign powers; achieving genuine neutrality in disputes; maintaining effective communication; and so forth. But all are nonetheless worthwhile because they would directly help to demilitarize, depolarize, denationalize, and transnationalize the international system: outcomes that, as indicated above, enhance the prospects for international peace and security.³⁸

C. Institutional Policy Options

At least four institutional responses recommend themselves to an alternative security system, each directly helping — some perhaps within the framework of the United Nations, some not — to denationalize and transnationalize the international system.³⁹

1. *Create an international technological development and weapons program agency* to foster joint research of defensive technologies by a multilateral team of scientists and to prevent and restrain arms buildups. Such an organ would, for example, provide the United States with the opportunity to make good on election pledges to share defensive technology with the Soviet Union and to facilitate missile defense research without imperiling the ABM Treaty⁴⁰ or otherwise exacerbating the arms race. Also, it could reduce inclinations to surprise the other side with new and threatening developments. As such it could well provide a turning point in world affairs.

2. *Establish an international satellite observation agency* that would supplement national means of verification and would be capable of the transnational monitoring of world military capabilities and movements. Such an agency could (a) oversee the implementation of arms control and arms reduction agreements; (b) provide an impartial means of detecting and possibly discouraging secret nuclear tests by countries on the threshold of developing nuclear weapons; (c) discourage provocative military buildups and maneuvers; and (d) otherwise acquire the vital experience and reliability needed if arms reductions are ever to proceed very far.

3. *Convene periodic regional conferences on security and cooperation* similar to the one launched in Helsinki for Europe in 1975. Such conferences, which would reflect the priorities and circumstances of

38. See R. SIVARD, *supra* note 35 and accompanying text.

39. For the first two proposals enumerated here I am indebted to Arbess & Epstein, *Disarmament Role for the United Nations?*, 41 BULL. OF THE ATOMIC SCIENTISTS 26, 28 (May 1985).

40. *Supra* note 6.

the separate regions but to which representatives from the United Nations Secretariat might be invited, could serve the essential decision function of appraisal and recommendation not only on matters relating directly to international security but on economic, social, and cultural matters as well and upon which international security often depends.

4. *Create permanent global or regional police forces* consisting of individually recruited persons instead of contingents from various national military forces (as has occurred in past UN peacekeeping experience). Such a force, loyal to authorities acting on behalf of the world or regional community, could not be suddenly dissipated by the unanticipated withdrawal of national contingents (as has happened with *ad hoc* UN forces in the Middle East, for example). Because it would be more efficiently integrated, more readily available, less subject to charges of unreliability due to divided loyalties, and better able to build useful precedents over time, such a global or regional force would be a further significant step in assuring a successful security system not dependent on nuclear weapons.

Of course, in addition to these four institutional initiatives one could mention the possibility that the United Nations, because it mirrors the power structure that existed at its birth, has outlived its usefulness as a security system and therefore should be replaced by a new international authority (or cluster of authorities) that reflect(s) the growing aspiration for a restructured international order, possessing strengthened conflict resolution capabilities. So sweeping an initiative, however, seems beyond the capacity of existing international actors and, in any event, constitutes a precarious option for the foreseeable future. It could be deviously used, out of some nostalgic yearning for a bygone era, to banish the United Nations without in any way providing for its replacement. Still, this possibility should be noted.

* * *

Thus: some *legal* initiatives that could contribute effectively to a more or less nuclear-weapons-free global security system — but only, of course, as part of an integrated plan.

It bears emphasis, however, that no mention has been made of yet another initiative, legal as well as political and economic, that surely is indispensable to any such system: the promotion and protection of fundamental human rights and freedoms, including the right of all people to at least their basic economic, social, and cultural needs as well as to the basic decencies and participatory rights that are sub-

sumed within the meaning of civil and political rights.⁴¹ These and related human rights considerations are beyond the scope of this brief overview, but it should not go unnoticed that today's "zones of international peace" tend to be found primarily among the industrial democracies and that the industrial democracies, though clearly imperfect in their distribution of material rewards, tend to be rich as well as democratic.⁴²

Also, it bears emphasis that it is not, on final analysis, treaties and charters prescribing specific norms, procedures, and institutions that will guarantee an enduring condition of peace among nations. It is, rather, the ingrained assumptions and habits of men and women everywhere, above all men and women in government and other arenas of public responsibility, that ultimately will be determinative in this regard. And if an international security system that consciously abjures reliance upon nuclear weapons is to succeed, then these assumptions and habits will have to move beyond the present, singular focus on national security to the wider notion of *global* security. The entire human race — not one national constituent of it — must become the conscious beneficiary of all alternative security initiatives. A sense of species solidarity and a concern for all peoples, not just the ruling elites, must underwrite all proposals for alternative security as we proceed, in the words of Jesuit philosopher Pierre Teilhard de Chardin, in "the planetization of Mankind."

All this said, however, a haunting question hovers over this analysis, just as it hovers over every analysis about alternatives to nuclear deterrence: has humankind the acumen and the political will to do something constructive before it is too late? That is *the* real issue in these and all related discussions at the present time. And in this connection it is helpful to recall the sage words of Professor Bishop: "The 'nuclear balance of terror,' " he wrote, "sharpens the need for a workable system to keep international peace at the same time that it underlines the importance of international law and UN Charter prohibitions against the use of force in international relations."⁴³ The haunting question that hovers over us, in other words, is whether we can re-

41. For a wide-ranging discussion of these and related human rights concerns, see HUMAN RIGHTS IN THE WORLD COMMUNITY (R. Claude and B. Weston eds., The University of Pennsylvania Press 1989).

42. The nexus between a stable international peace, on the one hand, and political democracy and equitable distribution, on the other, is extensively explored in Russett, *The Politics of an Alternative Security System: Toward A More Democratic and Therefore More Peaceful World*, in ALTERNATIVE SECURITY: LIVING WITHOUT NUCLEAR DETERRENCE (B. Weston ed., Westview Press, forthcoming 1990).

43. Bishop, *supra* note 2, at 161.

spend to the need and perceive the importance of which Bill Bishop spoke. If so, then a new global security is a serious possibility.