

STATE RESPONSIBILITY FOR FAILURE TO CONTROL THE EXPORT OF WEAPONS OF MASS DESTRUCTION

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INTRODUCTION

In acquiring a multi-billion dollar arsenal of modern non conventional weaponry from both the former USSR and private Western companies in the decade prior to the Gulf War,¹ Iraq propelled itself into a military position that enabled it to wreak havoc on both Kuwait and Israel as well as threaten global peace and security. The purpose of this article is to explain how this situation arose and then to present a legal analysis of whether the failure of the former USSR or relevant Western states² to prevent the transfer of these weapons to Iraq constituted "wrongfulness" in the sense prescribed by either Articles 3 or 27 of the Draft Articles on State Responsibility adopted by the International Law Commission (ILC)³ or constituted "indirect aggression."

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1. The combined value of conventional and non conventional acquisitions was \$50 billion. See Michael Ledeen, *Iraq's German Connection*, 91 COMMENTARY 27 (1991).

2. Subsequently referred to as "supplier states."

3. Documents of the 32nd Session (1980), 2 Y.B. Int'l L. Comm'n 14, 30-34, U.N. Doc. A.CN.4/SER.A/1980/Add.1 [hereinafter Draft Articles]. The International Law Commission's role as outlined by Article 13(1)(a) of the U.N. Charter is to encourage the "progressive development of international law and its codification." Yet, the nature of its work as a source of international law in general is unsettled. See IAN SINCLAIR, *THE INTERNATIONAL LAW COMMISSION 121-38* (1987). Some deny that it can be a source at all (citing Maarten Bos, *id.* at 22). Others are reserved in their opinion that "any appreciation of the work of the commission as a body of publicists has to be made on an individual basis, rule by rule," (quoting Ramcharan, *id.*). But there are those who view its work as being at least as equivalent to the status of the writings of the most highly qualified publicists (citing Parry, *id.* at 121). However, it is significant that many see the ILC as being even more important than this. For example, Jennings sees it as "law-shaping machinery of actual as well as political importance, which has already reached a stage of considerable sophistication." (citing Jennings, *id.* at 123). And Viliger declares that "the close ties between the Commission and the States lend to these materials a special status going beyond that of studies of learned writers. . . . As a result, because [they] constitute the basis and departing point for states engaging in practice and ultimately for the consolidation of existing, or the development of new, customary law, they are essential for the understanding of the customary rule." (quoting Villager, *id.* at 124).

More specifically, with respect to its codification of State Responsibility in the Draft Articles, because the ILC has adopted a "secondary rules" approach (*see infra* note 9) rather than attempting to codify "primary rules" (*see infra* note 5), it has been suggested by some that it deserves little attention. See Richard Lillich, *The Current Status of the Law of State Responsibility for Injuries to Aliens in State Responsibility, Self-Help and International Law*, 73 AM. SOC. INT'L L. PROC. 244, 246-47 (1979). However, since it is "easier to achieve international agreement on broad organizing principles rather than specific rules, the secondary rules approach lends itself to consensus building" as well as providing "a broad conceptual framework containing uniform and straight forward requirements." See Sterling Scott, *Codification of State Responsibility in International Law: A Review and an Assessment*, 9 ASILS INT'L L.J. 1, 26 (1985). Moreover, Judge Schwebel in describing Article 27 of the Draft Articles as illustrating "elemental aspects of accepted international law" in his dissenting opinion in Nicara-

Article 3 states: "There is an internationally wrongful act of a state when: (a) conduct consisting of an action or omission is attributable to the state under international law; and (b) that conduct constitutes a breach of an international obligation of the state."

Wrongfulness under Article 3 in the present case, therefore, depends first upon the existence⁴ of an international obligation⁵ that binds states to prevent the transfer of weapons of mass destruction⁶ either *erga omnes*⁷ or merely to some states,⁸ and secondly, upon conduct consisting of acts or omissions, attributable to the state, which constitute the breach of that obligation.⁹

Alternatively, where a state's conduct is not in itself wrongful under Article 3, but merely aids another state's "wrongful act" under Article 3 or act of aggression as defined by the U.N. Charter,¹⁰ then it is appropriate to apply Article 27 and the notion of indirect aggression. The relevance of both of these concepts with regard to Iraq and its acquisitions of weapons of mass destruction will be analyzed below.

Further, the article will examine the nature of any international legal responsibility that would be owed to Kuwait and Israel as a consequence of any of these outcomes. This will involve an analysis of the available remedies, as well as a discussion of the appropriate forums in which they might be received.

Before proceeding to this analysis some explanation is required as to why this article focuses only on non-conventional weaponry and only on the role of states instead of individual persons or companies. The focus on non-conventional weapons derives from their qualitative difference to other types of weapons. In distinct contrast to conventional arms, international law has continually expressed the need to regulate their proliferation as well as the

gua v. U.S., 1984 I.C.J. 4, 219, thereby recognized the importance of the ILC's work.

In this article the Draft Articles are utilized as a general framework as they are accepted by many as reflective of international law and they provide us with an intelligent basis for the articulation of both primary and secondary rules.

4. It must be shown to be in existence at the time of its purported breach. *See* Draft Article, *supra* note 3, at 18.

5. Such an obligation is often referred to as a "primary rule" of international law.

6. Weapons of mass destruction, interchangeable with the term non-conventional weaponry, is defined as: "nuclear weapons and any other weapon which may produce comparable effects, such as chemical weapons and biological weapons," 1990 SIPRI YEARBOOK: WORLD ARMAMENTS AND DISARMAMENT xx (1990) [hereinafter SIPRI Y.B.]. As it is increasingly common to include ballistic missiles in this category as well (*see, e.g.*, Gulf War Cease Fire Agreement, U.N. Security Council Res. 687 (Apr. 3, 1991, *reprinted in* 45 Yearbook of the United Nations 172 (1991)), weapons of mass destruction includes ballistic missiles for the purpose of this article.

7. In other words to all states. Subsequently referred to as the "broad" obligation.

8. Principally to those states where it is reasonably foreseeable that they will be used aggressively. Subsequently referred to as the "narrow" obligation.

9. These requirements, often referred to as "secondary rules," form the subject matter of both the Draft Articles and III, *infra*.

10. U.N. CHARTER, art. 2, ¶ 4.

mass destruction, they are designed to cause immense and widespread damage and users have no capacity to discriminate between military and civilian targets. The focus on the role of the state derives from our contemporary international political context which totally prohibits the aggressive use of force in international relations.¹¹ Friedmann asserts that:

No modern government has found it impossible to enact the necessary measures of control over private enterprise where over-riding objectives of national or international policies so require. The power of governments to impose drastic restrictions on the personal lives and activities of its citizens and organizations in time of war is nowhere disputed and it was drastically applied by all belligerents in World War II.¹²

Similarly, a comparable modern day "over-riding objective" is the avoidance of aggression. As the proliferation of weapons of mass destruction implies an increased risk of such an outcome, it correlates with a need to widen the sphere of the responsibility of governments in the conduct of international relations. It is this reality that leads to particular emphasis being placed on the role of the state, as it is both its responsibility and in its best interests to prevent by all available means the use of such force as a means of international dispute settlement.

I. THE FACTUAL CONTEXT

Before engaging in any legal analysis of wrongfulness and indirect aggression it is necessary to outline the factual context of this discussion. This involves detailing the means by which Iraq procured its enormous non-conventional weapons arsenal in the decade prior to the Gulf War.¹³ This also involves discussing the level of awareness of and involvement in these weapons dealings by the governments of supplier states, and a discussion of the damage suffered during the Gulf War, as a consequence of these procurements.

11. *Id.*

12. WOLFGANG FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 273 (1964).

13. During that period, while Iraq was engaged in the Iran-Iraq War (September 1980-June 1988) most argued that Western interests were best represented by supporting Iraq, so as to prevent the spread of fundamentalist Shiite Islam "westward" from Iran. Yet, however valid these political motivations were, they are of no legal worth considering that for the greater part of that decade most export control regimes were fully functional and there were repeated calls for their strengthening. For example, as far back as November 1982, President Reagan signed National Security Decision Directive 70, seeking ways to combat the "dangerous trend" of missile proliferation. See Don Oberdfrer, *U.S. Bid to Halt Missile Spread*, SYDNEY MORNING HERALD, Sept. 8, 1988, at 7.

A. Non-Conventional Arms Procurements

Iraq acquired its non-conventional armaments and components by using a network of front companies in the U.S. and Europe,¹⁴ which operated to contravene the Western system of export controls over sophisticated technology. Specifically, Iraq pursued highly developed military programs with respect to each of the four weapons of mass destruction: biological weapons, chemical weapons, nuclear weapons and ballistic missiles. (See Appendix). Each will now be examined in turn.

1. Biological Weapons

By the end of 1988, Iraq's biological warfare¹⁵ program was capable of producing certain toxins in military quantities.¹⁶ The Reagan Administration had discovered Iraq's capabilities by 1989,¹⁷ however Iraq continued to vehemently deny the program's existence.

Of greater importance for present purposes is not the scale or capacity of Iraq's biological weapons facilities but the means by which they were achieved. Principally, assistance was received from a number of West German¹⁸ companies in the building of a biological weapon "factory" at Salman Pak near Baghdad.¹⁹ The findings of the U.N. Commission charged with eliminating Iraq's weapons of mass destruction after the Gulf War²⁰ have confirmed this, as well as, the fact that the facility had the capacity to produce in excess of 230 liters of Anthrax each week, an amount capable of contaminating approximately 1500 square kilometers. This same plant also

14. Ledeem, *Iraq's German Connection*, *supra* note 1, at 27. See also special report commissioned by the Simon Wiesenthal Centre for Med. News 1990, at 1 [hereinafter *The Wiesenthal Report*] (on file with author). 207 Western companies were engaged in the supply of weaponry to Iraq.

15. Biological warfare can be defined as the intentional use or manufacture by culture or cloning of disease producing viruses, bacteria, fungi, insects, or toxins produced by these organisms, for the purpose of causing disease or death to humans, animals and plants. See Leonard S. Wolfe, *Chemical and Biological Warfare: Medical Effects and Consequences*, 28 MCGILL L.J. 733, 741 (1983). Examples of bacteria known to be used for biological warfare are Cholera, Typhoid and Anthrax. An example of a toxin synthesized by one of these organisms is Botulinum Toxin which is extraordinarily toxic to mankind—as little as one microgram (one thousandth of a gram) is sufficient to cause fatal paralysis of the respiratory muscles. See JAMES CROSSLAND, *LEWIS' PHARMACOLOGY* 236 (5th ed. 1980).

16. Anthony H. Cordesman, *Creating Weapons of Mass Destruction*, ARMED FORCES JOURNAL INT'L, 56 (Feb. 1989).

17. *Iraq Building Germ Weapons says U.S.*, SYDNEY MORNING HERALD, Jan. 19, 1989, at 7.

18. Now that East and West Germany have reunified subsequent references are merely to "Germany."

19. The company allegedly involved is Karl Kolb, the same company tied to the chemical weapons factory at Samarra. See *infra* note 29.

20. This was formed under the auspices of the Gulf War Cease Fire Agreement. See *supra* note 6, ¶ 9(b).

had the ability to produce Botulinum toxin in "vast quantities."²¹ In addition to the assistance in building the factory, the Iraqis obtained toxins from a small German firm located in Neustadt Am Rubenberge.²² Also, in 1989, the U.S. Centers for Disease Control (CDC) sent three shipments of West Nile Fever Virus to Iraq claiming that at the time of export, it believed the organisms would be used for research.²³

Despite the extent of Iraq's biological weapon program, even greater efforts were concentrated on other non-conventional weapons.

2. Chemical Weapons²⁴

Iraq's capacity to produce chemical weapons was well documented as early as 1983.²⁵ In a statement made in 1989, William H. Webster, Director of the CIA, indicated that Iraq had produced "several thousand tons of chemical agents," and had used them extensively during the Iran-Iraq War and against the Iraqi Kurdish population after the ceasefire of June 1988. More importantly, however, Webster gave evidence that:

From the inception of Iraq's chemical weapons program, firms and individuals from Western Europe were key to the supply of chemical process equipment, chemical precursors and technical expertise. West Europeans remained at Samarra after it began operations. But after several years of experience in producing chemical weapons, Iraq's well established effort is now far less dependent on foreign assistance.²⁶

Samarra, referred to by Webster, is a complex about 70 kilometers north west of Baghdad built to produce Mustard gas and the two Nerve agents Tabun and Sarin.²⁷ In addition, there are two other main chemical weapon production sites located at Fallujah and Akashat,²⁸ which, as Webster indicated and according to other intelligence reports, were built for the Iraqis

21. *U.N. finds Iraqis Made Anthrax*, Aug. 16, 1991, THE AGE, at 9.

22. The toxins involved were the fungal myco toxins TH-2 and T-2, which can ultimately cause death by wide spread hemorrhaging. See The Wiesenthal Report, *supra* note 14, at 9.

23. First reported by NBC News on April 11, 1990.

24. Chemical weapons as opposed to biological weapons involve the use of synthetic chemical substances such as Mustard gas, Nerve gas, Phosgene, Sarin and Tabun which are also designed to kill and incapacitate humans, animals and plants. Their potential to devastate is also horrifying. For example, one milligram (one tenth of a gram) of nerve gas is enough to kill a human being. By extrapolation, the amount of nerve gas in a one liter Coca-Cola bottle could kill ten thousand people. See W. Seth Carus, *Chemical Weapons in the Middle East*, 9 POLICY FOCUS 1 (1989).

25. See *Missile Proliferation in the Third World*, Testimony of W. Seth Carus, Fellow, Washington Institute for Near East Policy—before the U.S. Senate Armed Services Committee, Sub-Committee on Defence Industry and Technology, May 2, 1989, at 3 (on file with author).

26. Testimony of William H. Webster, Director of the CIA before the Senate Committee on Government Affairs, Hearings on the Global Spread of chemical weapons and biological weapons, Sept. 2, 1989, at 12 (on file with author).

27. *Id.*

28. The Wiesenthal Report, *supra* note 14, at 7.

by a number of European (principally German) companies.²⁹ This has now been verified by the report of the U.N. Commission which also described a chemical weapons plant at Mutthana as probably being the third largest chemical weapon facility in the world. The inspectors were told the plant could produce 2.5 tons of Sarin and 5 tons of Mustard gas every day. At the last count, the Commission had discovered 46,000 chemical weapons, among them 30 Nerve gas tipped Scud missiles of the Al-Hussein variety, capable of reaching Israel.³⁰ However in addition to these manufacturing facilities, Iraq acquired from Western companies³¹ both the precursor³² chemicals essential for the production of chemical weapons and a plant capable of their production.³³ It is important to realize at this point, that all of these precursor chemicals are on the list of chemicals prohibited from export under the "Australia Group" Regime.³⁴

It is clear, therefore, that the Iraqi Government was able to set up a vast chemical weapons manufacturing capability through the import of both manufacturing technology and precursor chemicals from Western companies.

3. Nuclear Weapons

Perhaps even more elaborate were Iraq's attempts to obtain nuclear weapons. A nuclear facility—albeit for supposedly peaceful purposes—was first pursued in 1974 when discussions took place between the then French Premier Jacques Chirac and Saddam Hussein. These discussions resulted in the partial production of the 'Osiraq' reactor which was later destroyed by the Israeli Air Force in June 1981, just prior to completion.³⁵ Yet despite this setback, Iraq became even more determined to establish a comprehensive nuclear weapons program.

29. The companies primarily responsible for constructing the plants at Samarra were identified as Karl Kolb and its subsidiary Pilot Plant See P. Harris & P. Woolwich, *The Secrets of Samarra* (BBC), a Panorama television documentary aired in Britain on Oct. 27, 1986. See also Michael Ledeen, *The Curious Case of Chemical Warfare*, 88 *Commentary* 37-41 (1989) [hereinafter Ledeen, *Chemical Warfare*]. The Plant at Akashat was completed in 1983, and appears to have been built with the aid of Italian chemical giant, Mont Edison. See Herbert Krosney *Iraq Making Deadly Form of Nerve Agent*, JERUSALEM POST, Nov. 24, 1986, at 11 (on file with author).

30. Leonard Doyle, *The Secrets of Iraq's Biggest Chemical-Warfare Factory*, THE AGE, Aug. 5, 1991, at 1.

31. It was alleged that 500 tons of Thiodyglycol manufactured in Belgium was shipped to Iraq illegally. See Michael R. Gordon, *U.S. Companies Tied to Chemical Sales*, N.Y. TIMES, Jan. 30, 1989, at 3, col. 4.

32. For example, to produce Mustard gas the essential precursor is Thiodyglycol.

33. This plant was run under the auspices of SEPP (State Establishment for the Production of Pesticides) and was built by German companies. In November 1987, the German Government intervened to prevent a German company from completing the facility but all the production equipment was delivered to Iraq before this action was taken. The companies involved were WTB and Infracplan. See DER SPIEGEL, Jan. 23, 1989, at 9.

34. See *infra* note 118 and accompanying text.

35. *Disputed target in the desert*, TIME, June 22, 1981, at 14.

Its strategy was to first obtain the two alternative types of fissile³⁶ material required for a nuclear bomb: plutonium and uranium. Plutonium³⁷ is a non-natural material which results as a by-product of the irradiation of U-238³⁸ in a nuclear reactor. Even after the destruction of Osiraq, there were still widely held suspicions,³⁹ which were confirmed by the U.N. Commission, that Iraq continued to pursue this option.⁴⁰

The production of a uranium bomb on the other hand is a more difficult engineering feat, as it requires 15-20 kilograms of "enriched uranium."⁴¹ It was already known that Iraq was in possession of approximately 40 kilograms of such material that was under the supervision of the International Atomic Energy Agency (IAEA).⁴² However, in order to enrich its own natural uranium, Iraq secretly obtained the technology required for the gas centrifuge⁴³ and electro-magnetic enrichment⁴⁴ techniques that it began to employ. Apart from the fissile material, Iraq also tried to acquire the other advanced technological components required to actually detonate a bomb.

36. This is material whose atoms can easily split, scattering tiny fast moving particles called neutrons, which hit the nuclei of neighboring atoms and split them, unleashing still more neutrons, which in turn cause more break ups, all of which release energy. In a nuclear reactor, this process is controlled, but in a bomb the process is speeded up to produce a nuclear explosion. See Frederic Golden, *The ABC's of A-Bomb Making*, TIME, June 22, 1981, at 19.

37. About 5-10 kilograms are needed to manufacture a plutonium bomb. See FRANK BARNABY, *THE INVISIBLE BOMB* 170 (1989).

38. Natural Uranium contains two isotopes, Uranium 235 (U-235) and Uranium 238 (U-238). The former is the fissile material required for a bomb, yet it is the rarer comprising only .7% of naturally mined uranium.

39. For example, it was argued that the excessive quantity of U-238 imported from Portugal, Brazil and Nigeria in the mid 1980s for supposed use in "research" activities could only have been meant for plutonium production. See Timothy L.H. McCormack, *Israel's Bombing of the Iraqi Nuclear Reactor and Self-Defence in International Law* (unpublished Ph.D. thesis, Law Library, Monash University, 1989) (on file with author).

40. It revealed that Iraq admitted to having extracted three grams of plutonium from spent fuel in a small research reactor. See Jerry Gray, *Iraqi Plutonium Disclosure Troubles U.N.*, THE AGE, Aug. 7, 1991, at 7. Yet most still believe this figure to be highly underestimated. See Michael Wise, *Experts to Disclose Iraqi Nuclear Supplier*, THE AGE, Aug. 23, 1991, at 6.

41. "Enriched uranium" contains a much higher percentage of U-235, which is required, since to explode a uranium bomb, the U-235 must be relatively pure, preferably 90%. The higher the content of U-235, the easier it is to make a bomb. By way of comparison, commercial U.S. reactors contain only 3% U-235. See Golden, *supra* note 36, at 39.

42. This material was obtained from the former USSR and France. See WEISSMAN & HERBERT KROSNEY, *THE ISLAMIC BOMB* 91 (1981).

43. This method requires at least 1000 sophisticated centrifuges to work together in computer controlled concert for approximately one year to produce enough uranium for one bomb. See BARNABY *supra* note 37, at 179. In mid 1987, the company H & H Metalform, agreed to set up an entire centrifuge uranium enrichment facility in Taji, Iraq. But along with it, other companies were involved including the Swiss manufacturer Schmiedecemeccanica and Leifeld and Company, a machine tool builder in Ahlen, Germany. See DER SPIEGEL, Mar. 3, 1990, at 7. The U.N. inspection team also reported the discovery of a plant at Al-Farat, that used imported technology and had the capacity to produce about 200 centrifuges annually. See Wise, *supra* note 40, at 6.

44. The revelation by the U.N. inspection team of two plants that would have been able to produce 30 kilograms of enriched uranium by next year using this more cumbersome technique is more surprising. See Wise, *supra* note 40, at 6.

This is demonstrated by Iraq's failed attempt in April 1990, to import 40 "Kryton" nuclear bomb triggers.⁴⁵

4. Ballistic Missiles

Aided by sizeable infusions of foreign technology and expertise, Iraq established a modern industrial program for ballistic missile development and production.⁴⁶ This involved the acquisition of both ballistic missiles and their related technologies. The core of the Iraqi ballistic missile program was more than 300 Scud-B missiles supplied by the former USSR.⁴⁷

The best known research and development facility, Saad 16, is located near Mosul in Northern Iraq.⁴⁸ According to intelligence reports the German firm Messerschmidt—Boelkow—Blohm (MBB) served as prime contractor for the plant.⁴⁹ Also, the Swiss based consortium Consen ran an international network for the procurement of foreign expertise seeking technology through a number of different Western companies.⁵⁰ The extent of German involvement was later disclosed by investigations undertaken during the Gulf War, leading Chancellor Helmut Kohl's top intelligence adviser Lutz Stavenhagen to acknowledge that German companies helped modify Iraq's Scud missiles in 1986-1987.⁵¹ Furthermore, Germany's Foreign Minister, Mr. Hans Dietrich Genscher, while on a visit to Israel during the Gulf War, confessed that he was ashamed of the role his country had played in helping build the Iraqi war machine.⁵²

To add a further dimension, Iraq also pursued the "supergun technology"⁵³ of artillery genius, Gerard Bull. Iraq repeatedly denied such reports,⁵⁴ however, after the Gulf War, Iraq was forced to reveal the gun to the U.N. inspection team. The inspection team confirmed that the gun was

45. These were seized by British and U.S. customs at London's Heathrow airport. See *Iraqi Nuclear Deionating Ring Cracked*, GUARDIAN WEEKLY, Apr. 8, 1990, at 6.

46. Mark Eisenstadt, *The Sword of the Arabs: Iraq's Strategic Weapons*, The Washington Institute Policy Paper, No. 21 Aug. 1990, at 18 (on file with author).

47. See Carus, *supra* note 25, at 3.

48. *Id.* at 5.

49. See Eisenstadt, *supra* note 46, at 22.

50. The Wiesenthal Report, *supra* note 14, at 24.

51. He said, "German technology illegally helped to increase the range of the Scud missiles. . . ." See *German FM denies all blame, 'didn't know' about aid to Iraq*, JERUSALEM POST, Feb. 2, 1991, at 7.

52. Cameron Forbes, *Holocaust's Shadow goes from Hitler to Sadaam*, THE AGE, Feb. 4, 1991, at 6.

53. This technology stems from attempts in the 1960s to project missiles over long distances and even into space. See *Aiming for a Long Reach*, THE MIDDLE EAST 17 (1990) (on file with author).

54. *The Iraqi Gun: Some Parts were Sent*, INTERNATIONAL HERALD TRIBUNE, Mar. 14-15, 1990, at 1.

built from the type of piping which was seized in August 1990 at Heathrow Airport and was capable of firing shells that could reach Israel.⁵⁵

B. Government Involvement and Awareness

Several governments were involved in varying degrees with Iraq's arms acquisitions. These different levels of involvement can be summarized into three categories:

- (1) Direct involvement—i.e. governments produced weapons and directly sold them to Iraq;
- (2) Indirect involvement—i.e. governments were not involved in manufacture but assisted in sales; and
- (3) Awareness—i.e. governments were not involved in either manufacture or sales assistance but were aware that sales by non government producers were taking place.

1. Direct Involvement

Putting aside conventional weaponry, there appears to be only two countries directly involved in non-conventional weapons sales to Iraq.⁵⁶ As outlined above, the former USSR directly supplied Scud-B missiles which formed the basis of Iraq's ballistic missile program. Another direct actor was France, who in the initial stage was actively involved in establishing Iraq's nuclear weapon capacity. In the late 1970s, France contracted with the Iraqi government to sell enriched uranium, to build a nuclear reactor and to train Iraqi scientists.⁵⁷ It justified its actions by arguing that since Iraq had signed the Nuclear Non-Proliferation Treaty, it would honor its commitment and would not develop nuclear weapons.⁵⁸ With the benefit of hindsight, it appears clear that this was an erroneous assumption.

2. Indirect Involvement

In the conventional arms field, several governments were heavily involved in the negotiation of arms sales.⁵⁹ In particular, during the late 1980s, France through the direction of its Minister for Defence, Mr.

55. *Iraq lets U.N. team examine supergun*, THE AGE, Aug. 14, 1991, at 8.

56. France and the former USSR supplied the backbone of Iraq's conventional armaments. These included tanks, aircraft, air to air missiles, surface to air missiles etc. See *Middle East Military Balance 1988-1989*, MILITARY POWER ENCYCLOPEDIA (New York: International Institute For Strategic Studies) (on file with author).

57. For one of many reports, see TIME, *supra* note 35.

58. *Traders in Terror*, L.A. TIMES, July 21, 1980, at 7.

59. Principally, the former U.S.S.R. and France.

Chevenment “led the drive to sell military hardware.”⁶⁰ This culminated in his January 1990 visit to Baghdad and subsequent signing of several large conventional arms deals.⁶¹ However, with respect to non-conventional Arms, government involvement appears to be limited to the category of “Awareness.”

3. Awareness

Despite denials and claims to the contrary, it seems highly unlikely that certain governments, in particular the German government, did not have awareness of these dealings.⁶² In order to show this, it is important to delineate two types of awareness: actual and constructive. The first approach requires positive evidence that governments *actually* knew that weapons were leaving their country for Iraq. Without access to government documents this is a difficult task, however such evidence is available on the public record.

For example, according to the German television program *Panorama*,⁶³ since August 1989 the German Federal Ministry of Economic Affairs, the Federal Office of the Economy and the Federal Intelligence Service knew that project numbers given in business papers were code numbers for an Iraqi missile project. The program claimed that in spite of this knowledge, the Eschborn Office granted export licenses for some of the parts ordered from Germany by Iraq. The program based this report on a confidential paper it claims to have had from the Bonn Foreign Ministry dated 4 January 1990 which showed that these exports were even backed by a “Hermes” export credit guarantee provided by the Ministry of Economic Affairs. The sales were thus transacted with the consent of the Minister of Finance and in agreement with the Minister of Economic cooperation.⁶⁴

To give this evidence more veracity, in April 1991, German Economics Minister Helmut Haussman said that the unwritten rule when granting export licenses at Eschborn was: “When in doubt decide in favour of the company.”⁶⁵ Furthermore, Eschborn licensing officials apparently saw their role as “helping industry rather than hindering it.”⁶⁶

60. *French Cringe over their War Role*, SUNDAY HERALD, Jan. 27, 1991, at 5.

61. He agreed in principle to supply the Dassault Mirage 2000—and have it produced in Iraq. William Safire, *Who Helped Arm Iraq? America, France and Italy*, INTERNATIONAL HERALD TRIBUNE, May 24, 1990, at 7.

62. Ledeen, *German Connection*, *supra* note 1, at 27. The U.K. government was also aware of exports of nuclear material to Iraq. See Tom Wilkie & Alex Renton, *Revealed: British N-exports to Iraq*, THE SUNDAY AGE, July 28, 1991, at 11.

63. Aired on January 29, 1991.

64. The claims were made in a press release by the Centre for Security Policy—Washington No. 91-P17, Mar. 1, 1991, at 3 (on file with author). They also appear frequently in other sources, e.g. Ledeen, *German Connection*, *supra* note 1, at 29.

65. *Iraq's Silent Allies in the Quest for the Bomb*, BUSINESS WEEK, Jan. 14, 1991, at 51.

66. The Wiesenthal Report, *supra* note 14, at 13. These claims are based on those made in *Der Spiegel*, June 24, 1989, where it was alleged that Eschborn inspectors were working as paid consultants for a German exporter (IWKA) to help it evade export legislation.

However, despite the existence of evidence of actual knowledge, it may be more appropriate to adopt the constructive awareness approach. To constitute constructive knowledge, evidence of actual awareness is not required. Instead, the inquiry is whether the governments should have been aware of these dealings in light of their sheer extent and their vast documentation in numerous public sources. This approach has led to a common perception, that the lack of actual awareness was due principally to neglect; a condition which afflicted the German Government in particular. According to the influential New York Times columnist, William Safire:

What did they know and when did they know it? This question about an official cover-up of illegal acts . . . is now being asked by a belatedly aroused free press in West Germany. Certainly for months and probably for years, the Kohl-Genscher Government had evidence that German 'merchants of death' were illegally supplying the technological know-how and materials for the production of poison gas in Iraq, Syria and Libya, as well as ballistic missile technology that would hold the world cities hostage to "the poor man's atomic bomb." But the men at the top of the world's largest exporting nation were afflicted with "Wunschdenken"—stubbornly wishful thinking. . . . Today's German leaders did not want to know who built the plant for Iraq in Samarra. . . .⁶⁷

It is difficult to imagine how multi-billion dollar arsenals of sophisticated military equipment could have passed into Iraq's hands without the awareness of the government of the supplier state. United States Senator John McCain when leading a group of twelve Senators and Representatives to a Defence Conference in Munich in January 1989, made this point clearly when he asserted that:

The time has come to be frank . . . it is a matter of public record that many West German companies and some of the most senior officials and Ministers of the West German Government must have known since the early 1980s that West German firms were contributing to the proliferation of chemical weapons and biological weapons.⁶⁸

The example of the Libyan chemical weapons plant at Rabta is also instructive in this regard. It was only after considerable pressure was exerted on the German Government by the U.S. and others that the assistance provided by German companies was halted.⁶⁹

67. *Germans too are asking: What did Germans know?*, INTERNATIONAL HERALD TRIBUNE, Jan. 17, 1989, at 7.

68. *See Chemical Double-Talk*, SECURITY AFFAIRS, Jan. 30, 1989, at 2 (on file with author).

69. *Germany bows to U.S. and restricts weapon exports*, FINANCIAL REV., Jan. 12, 1989, at 17 (on file with author). The director of the Imhausen Chemie Company that built the plant, was subsequently jailed for five years for his involvement in the Libyan deal. *See Chemical Firm Chief jailed for Five Years in Auschwitz in the Sand Case*, THE GERMAN TRIBUNE, July 15, 1990, at 6.

Using the constructive awareness analysis, it is clear that many governments were aware of the illicit arms trade with Iraq but did little, if anything, to halt it.

C. Damage

The damage resulting from Iraq's acquisition of non-conventional weapons, from a factual perspective, can be briefly classified into several categories. The first is material damage. The most apparent examples of this are Iraq's invasion of Kuwait and the attack with Scud-B Missiles on residential centers in Israel which caused enormous destruction to homes and apartment blocks as well as significant civilian casualties.⁷⁰ Second are the "hidden" economic costs associated with protecting against non-conventional attacks, such as the provision of gas masks to the entire population as well as keeping defense forces on full alert.⁷¹ Finally, there is the non-material or "psychological" damage caused by the exposure to the risk of annihilation by non-conventional weaponry.

It must be stressed at this point, however, that these categories are only designed to organize the factual background. A fuller legal analysis of the damage caused by Iraq's possession of non-conventional weaponry will be discussed later.

To summarize the previous discussion, Iraq managed to procure a vast non-conventional arms supply from the former USSR and Western companies, and it did so with the awareness and at times the involvement of Western governments. Moreover, the extent of the damage suffered as a consequence of these acquisitions was both widespread and substantial.

Bearing these facts in mind, it is now possible to undertake a legal analysis of whether this constituted "wrongfulness" under Article 3 of the Draft Articles. The starting point for such an analysis is therefore an examination of the existence of both broad and narrow customary international law obligations.

II. OBLIGATIONS

In general, international obligations arise either directly from a treaty or by derivation from customary international law.⁷² The broad and narrow international obligations⁷³ which are the concern of this article are derived from customary international law. As such, it is necessary to show the

70. According to information personally received from the Israeli Embassy in Canberra, as yet there are no official statistics of the economic costs of the Gulf War to Israel.

71. For example, David Levy, Israel's Foreign Minister said in mid-January 1991, that Israel's entire budget had been used up in the first six weeks of the year. See Douglas Davis, *German visit tops off Israel's traumatic week*, THE AUSTRALIAN, Jan. 26, 1991, at 6.

72. Statute of the I.C.J., Article 38, 59 Stat. 1055, TS 993, 3 Bevans 1179.

73. See *supra* notes 7-8.

presence of its two distinct elements—state practice and *opinio juris*. In other words, for there to be an affirmative international obligation known as a custom, states must behave in a uniform and consistent way and believe that they are required to behave in such a manner.⁷⁴

In order to provide evidence of the existence of such a custom, it is possible to use a number of different sources. Brownlie for example, cites diplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions, comments by governments on drafts of the ILC, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, U.N. resolutions and the practice of international organs, all as evidentiary items that may be used to substantiate a custom.⁷⁵

There are various obligations that exist with respect to the transfer of each of the non-conventional arms outlined above. Some arise directly from treaties, while others derive from customary international law. In addition to exploring these individual obligations, this article attempts to coalesce them and extract both broad and narrow customary international law obligations that require States to prevent the transfer of weapons of mass destruction. Again, the obligation can be either *erga omnes* (Broad Obligation), or only covering some States (Narrow Obligation). To that end, it is intended to utilize several of the “sources” cited by Brownlie as evidentiary items that can be used to substantiate a custom.

A. The Evidence

1. Treaties

Treaties can be used as evidence of international law in three separate ways. First, they may be the direct source of an international obligation. Second, they may be of a fundamentally “norm creating” character, so as to be regarded as forming the basis of a general rule of customary law.⁷⁶ Lastly, they may be only one piece of evidence, along with many others, that

74. North Sea Continental Shelf, 1969 I.C.J. 4 (Feb. 20).

75. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 5 (4th ed. 1990); *see also The Paquet Habana*, 175 U.S. 677 (1900) (Gray, J.).

76. These are also referred to as “law making” treaties. For example, the Genocide Convention (1948), the Hague Conventions (1899) and (1907) and parts of the United Nations Charter (e.g. Articles 2(3) and 2(4)) are of such a type. *See* BROWNLIE, *supra* note 75, at 12. The importance of this alternative lies in its effect upon states that are non-signatories to a particular convention. For if a treaty is norm creating, then a party will be bound by it irrespective of whether it is a signatory, as the treaty merely reflects a customary international law obligation, which is by definition universally binding. There are several factors influencing whether a treaty is of such a character: 1) The declaratory nature of the provisions in the treaty—the existence of a clause allowing countries to make reservations is a factor that would detract from a treaty obligation reflecting a general custom; 2) The “quality” and “quantity” of the number of signatory parties; and 3) Whether there is explicit acceptance of the rules of law therein, North Sea Continental Shelf, 1969 I.C.J. 4 (Feb. 20).

substantiate a custom. In considering each of the following treaties, it is necessary to bear in mind these possibilities.

a. The Biological Weapon's Convention

The Biological Weapons Convention⁷⁷ is the only treaty in existence which totally outlaws an entire category of weapons.⁷⁸ Under Article I, each State party agrees to never produce, stockpile or otherwise acquire or retain:⁷⁹

1. Microbial or other biological agents or toxins whatever their origin or method of production of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes; and
2. Weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.

Article III requires each state party to the Convention not to "transfer" directly or indirectly, or in any way "assist, encourage or induce" any state, group or states or international organizations to manufacture or otherwise acquire any of the agents, toxins, weapons or equipment or means of delivery specified in Article I.

These Articles present two issues relevant to the current context. First, we need to question the meaning of the terms "weapons, equipment or means of delivery" mentioned in Article I. Apart from conventional bombs and shells, of considerable pertinence here is whether a ballistic missile would be covered by this definition. It is clear that ballistic missiles are designed to deliver biological weapons (as well as nuclear weapons and chemical weapons). Even though biological weapons have traditionally been uncontrollable and unpredictable, the onset of recent genetic engineering programs makes it more likely that biological weapons will be coupled to ballistic missiles in the future.⁸⁰ Therefore, a strong argument exists for the inclusion of ballistic missiles within this definition. Disappointingly however, there is no guidance given by the treaty as to the meaning to be given to these terms.

77. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, U.N. Resolution 2826 (XXVI—1972), 26th U.S.T. 583, T.I.A.S. No. 8062, 11 I.L.M. 309 (1972), entered into force on March 26, 1975. There are 97 parties to the Convention.

78. Marie I. Chevrier & Jessica E. Stern, *Chemical Weapons and Biological Weapons in the Third World*, 11 B.C. THIRD WORLD L.J. 45 (1991).

79. Note that use of biological weapons is outlawed by The Geneva Protocol. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare (The Geneva Protocol), Feb. 8, 1928, 26 U.S.T. 571, T.I.A.S. No. 8061, 94, I.N.T.S. 65.

80. See S.J. Lundin *Chemical and Biological Warfare: Developments in 1988*, SIPRI Y.B. 14 (1989).

The second issue relates to the meaning of the terminology in Article III. "Transfer," which suggests a direct transfer or sale from one state to the other, is relatively clear. However, what does "assist, encourage or induce," mean? Would indifference to a state known to be developing biological weapons be encouragement or inducement? Or would more concrete actions be required to constitute such conduct? For example, perhaps encouragement and inducement would mean granting material aid to a country known to be acquiring or manufacturing biological weapons. More importantly in the present case, where the evidence suggests state awareness of trade in such materials, it is necessary to question whether failing to properly control this activity, would constitute "assistance, encouragement or inducement." If this were its meaning, then clearly in this case there is a breach by some parties of the Article III obligations. Again, however, because the treaty is phrased in broad terms, it provides little guidance.

Nevertheless, irrespective of the precise content of these obligations, the outstanding question is whom they actually bind. The convention clearly binds signatory states.⁸¹ But if it is a norm creating type treaty it will bind non-parties as well.⁸² To make this determination it may be helpful to apply the factors outlined above in the *North Sea Continental Shelf Cases*.⁸³ First, the Biological Weapons Convention is signed by a large percentage of states.⁸⁴ Second, there is general acceptance of the provisions in the treaty. Lastly, even though there is no clause which allows a country to make reservations, under Article XIII Para. 2 each state party has a right to withdraw, if it decides that extraordinary events related to the subject matter of the Convention jeopardize its interests.

Because this provision is substantially similar to a reservation clause, the treaty cannot be viewed as universally binding. However, the Biological Weapons Convention is an important piece of evidence along with others demonstrating a customary international law obligation banning the proliferation of biological weapons. Perhaps most importantly for present purposes, it should be viewed as a component of the whole body of evidence supporting both the narrow and broad customary international law obligations.

81. The most relevant parties here would be Germany and the former USSR.

82. This is of particular relevance in this case, as several states are not parties. France and China both refused to sign the convention because they argued that the prohibition on biological weapons should not have been separated from chemical weapons, while Iraq has signed, but not yet ratified the Convention. See JOSEF GOLDBLAT, *ARMS CONTROL AGREEMENTS: A HANDBOOK S.I.P.R.I.* 5 (1983). Where a signature is subject to ratification, signature does not establish consent to be bound—it merely qualifies the signatory state to proceed to ratification. See BROWNLIE, *supra* note 75, at 606.

83. See *supra* note 76.

84. There are 97 signatories including all the major powers (except China and France).

b. The Geneva Protocol

Turning to chemical weapons, the Geneva Protocol,⁸⁵ in prohibiting the use of both chemical weapons and biological weapons, ratified a prohibition previously declared in other international instruments.⁸⁶ The major problem with the Geneva Convention however, is that it does not ban the proliferation of chemical weapons as well.⁸⁷ In that regard, the Chemical Weapons Convention, which was opened for signing in Paris on January 13, 1993, will attempt to effect a universal, verifiable ban on the development, acquisition, and transfer of chemical weapons.⁸⁸

c. Chemical Weapons Convention

The Chemicals Weapons Convention was negotiated and drafted by the Conference on Disarmament⁸⁹ during the period from 1971 to 1993. The Conference on Disarmament reported its progress on negotiations at regular intervals in a "rolling text" which contained the provisions which were progressively agreed upon by negotiators.⁹⁰ In August 1992 a complete revised text of the Chemical Weapons Convention was accepted by the Conference on Disarmament and was approved soon thereafter by the UN General Assembly. Since opening for signature on January 13, 1993, 141 States have signed the Convention. The Convention will enter into force on the later of the 13th of January 1995 or 180 days after the 65th State has ratified the convention. To date only two States have ratified the convention.⁹¹ Among other things, the provisions of the Convention address the prohibitions on the transfer of chemical weapons and the adoption of national measures by states for their implementation.

It is clear that since 1987-88, the scope of obligations that were agreed upon included obligations not to "transfer" chemical weapons to anyone as

85. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare (The Geneva Protocol), 26 U.S.T. 571, T.I.A.S. No. 8061, 94, I.N.T.S. 65, *done at Geneva* on Feb. 8, 1928.

86. These included the 1899 Hague Declaration IV, 2, under which contracting powers agreed to abstain from the use of projectiles for the diffusion of asphyxiating gases, as well as the 1907 Hague Convention IV which had a similar effect. There is an increasing tendency to see this prohibition as representing customary international law and this is reflected in the practice of states. See Timothy L.H. McCormack, *International Law and the Use of Chemical Weapons in the Gulf War*, 21 CAL. W. INT'L L.J. 3 (1990).

87. With respect to biological weapons, this is achieved by the Biological Weapons Convention.

88. See J.G. Starke, *The Final Declaration of the Paris Conference on Chemical Weapons, 11th January 1989*, 63 AUST. L.J. 434 (1989).

89. See *The Origins, Aims and Structure of the Conference on Disarmament*, DEPARTMENT OF FOREIGN AFFAIRS AND TRADE BACKGROUNDER, May 17, 1991, at 12.

90. Forty nations were represented in the negotiations. See S.J. Lundin, *Multilateral and Bilateral Talks on Chemical and Biological Weapons*, SIPRI Y.B. 521 (1990).

91. As of April 8, 1993.

well as not to "assist, encourage or induce" others to engage in these activities.⁹² These would appear to carry a similar conceptual and practical meaning to those enunciated in the Biological Weapons Convention, although here there is somewhat more guidance.

For example, in response to a question from the former USSR as to how a different but related obligation to destroy chemical weapons "under the jurisdiction and control of a state party" would relate to transnational corporations which had manufacturing operations in another country which was not a party to the Chemical Weapons Convention, the U.S. replied that any corporation incorporated under U.S. law wherever its activities took place, would be prohibited from aiding a non-party in chemical weapon production.⁹³ Thus presumably, just as a state would be required to control corporations when carrying out an obligation to destroy chemical weapons, it would also be required to exercise such control with respect to an obligation not to "transfer" chemical weapons or "assist, encourage or induce" other states to engage in chemical weapons activities.

However, the question still remains as to whether it can be said that such an obligation with respect to chemical weapons presently exists and whether it existed at the time that certain Western companies were aiding Iraq; a time which preceded the finalization of the Chemical Weapons Convention. Because the Convention has not entered into force, it cannot yet directly bind potential signatories, or be norm-creating. However, its value lies in its ability to support a custom with respect to chemical weapons. Such an argument depends upon the value of an unfinished convention as a component of customary international law. Some argue that a convention has no status until it is formally agreed upon and ratified.⁹⁴ However, as treaties may be invoked as evidence of customary international law, there is force behind the argument that negotiated drafts of a convention, or preparatory work may also be used in that fashion. Indeed, Judge Lachs in *The North Sea Continental Shelf Cases* said that "It is generally realized that provisions of international instruments may acquire the status of general rules of international law. Even unratified treaties may constitute a point of departure for a legal practice."⁹⁵

Therefore, if in the "rolling text," there had been agreement for some time upon these obligations with respect to chemical weapons, it is cogent to argue for the Chemical Weapons Convention to be used along with other

92. See Josef Goldblat, *Multilateral Arms Control Efforts*, SIPRI Y.B. 348 (1988) and see the "rolling text."

93. *Conference on Disarmament document*, CD. PV. 424 (on file with author).

94. For example, once the Chemical Weapons Convention is accepted by the U.N. General Assembly and then ratified by signatory States. Heinz Gärtner, *Multilateral Arms Control Efforts*, SIPRI Y.B. 427 (1989).

95. *North Sea Continental Shelf*, 1969 I.C.J. at 255 (Feb. 20).

instruments⁹⁶ as evidence of an existing custom with respect to both chemical weapons and all weapons of mass destruction.

For example, on January 11, 1989, over 140 countries attended a conference on chemical weapons in Paris which was designed to support the Geneva negotiations at the Conference on Disarmament on a Chemical Weapons Convention.⁹⁷ Although it did not succeed in implementing negotiations of the Chemical Weapons Convention, an important final declaration was adopted outlawing chemical weapons.⁹⁸ It recognized the importance of the Geneva Protocol, the UN's role in disarmament and the necessity of concluding, at an early date, a Chemical Weapons Convention which would be: (a) global; (b) comprehensive; (c) effectively verifiable; and (d) of unlimited duration.⁹⁹

While not a treaty, this declaration¹⁰⁰ was intimately linked with the negotiations on the Chemical Weapons Convention. Its legal significance lies in its ability to help form a custom with respect to chemical weapons, and all weapons of mass destruction. The cogency of using the Paris Declaration in this fashion is underlined by the fact that in the Gulf War Ceasefire Resolution, Iraq while being warned of its obligations, was reminded that:

1. It was a party to the Geneva Protocol;
2. It had signed the Biological Weapons Convention; and
3. That it *had subscribed to*¹⁰¹ the Declaration of the Paris Conference.

In addition, in 1989, there was yet another Conference held to facilitate the conclusion of the Chemical Weapons Convention by the Conference on Disarmament. Delegates from 56 countries, the UN, the EEC and the World Chemical Industry attended. In similar fashion to the Paris Conference, a

96. This custom is evidenced by many other agreements and instruments which will be examined below.

97. See Carlo Costka, *Arms Control: Declaration of the Paris Chemical Weapons Conference*, 30 HARV. INT'L L.J. 495 (1989).

98. *Id.*

99. *Id.*

100. The legal status of such a declaration is unsettled. Schachter considers that as such instruments are official acts of states, they are evidence of the positions taken by states and: "It is appropriate to draw inferences that the states concerned have recognized the principles, rules, status and rights acknowledged. This does not mean that 'new law' or a new obligation is created. However, where the points of law are not entirely clear and undisputed, the evidence of official positions drawn from these instruments can be significant." Oscar Schachter, *International Law in Theory and Practice*, 178 REC. DES. COURS 21, 129 (1982). Henkin also argues that such a non legal text may over time become customary law on the basis of state practice and opinio-juris and that consequence does not depend on the original intent of the parties to the instrument, LOUIS HENKIN, ET AL., *INTERNATIONAL LAW* 136 (2d ed. 1987). O'Connell on the other hand, sees such a political declaration as not carrying legal weight especially when it is based on broad principles and/or is indefinite, D.P. O'CONNELL, *INTERNATIONAL LAW* 199-200 (2d ed. 1970).

101. Emphasis added.

declaration was adopted which supported the early completion of a Chemical Weapons Convention.¹⁰²

In addition to the declaration, a number of national initiatives were made. For example, Australian Foreign Minister Gareth Evans announced the intention of Australia to create the nucleus of a national authority for the implementation of a Chemical Weapons Convention.¹⁰³ Other countries also announced similar moves.

Despite the foregoing, even if the obligation with respect to chemical weapons does not yet exist, it is still a relevant issue for the following three reasons. First, because chemical weapon proliferation is becoming an increasingly important international issue, it is possible that the obligation is merely emerging as customary international law.¹⁰⁴ Second, and perhaps more importantly, because it is becoming increasingly obvious that a Chemical Weapons Convention will enter into force in the near future,¹⁰⁵ the treaty will crystallize the obligation, at least with respect to party states, so that firm steps will have to be taken to prevent chemical weapon proliferation. Third, under the terms of the Gulf War Ceasefire Resolution¹⁰⁶ it seems clear that at least with respect to Iraq, all states are now obliged to prevent the flow of chemical weapons to that country, as well as all weapons of mass destruction.

d. The Nuclear Non-Proliferation Treaty

Turning to nuclear weapons, the cornerstone of international nuclear non-proliferation is the Nuclear Non-Proliferation Treaty,¹⁰⁷ now adhered to by 140 nations, encompassing both "nuclear weapon states" and "non-nuclear weapon" states.¹⁰⁸

102. J.G. Starke, *The Government Industry Conference v. Chemical Weapons, Canberra 18-22 September 1989*, 63 AUST. L.J. 786 (1989).

103. *Id.*

104. That is, it has not yet crystallized.

105. See *supra* note 91 and accompanying text.

106. U.N. Security Council Resolution 687 (Apr. 2, 1991), G.A. Res. 687, U.N. Doc. S/23165 (1991).

107. Treaty on the Non-Proliferation of Nuclear Weapons, *entered into force*, Mar. 5, 1970, 21 U.S.T. 483.

108. There are three "nuclear weapon States"—the U.S., former USSR and U.K. The only two declared nuclear weapon states not party to the convention are France and China, yet they both sent observers to the NPT's 4th Review Conference (see John Lehman, Director of the U.S. Arms Control and Disarmament Agency, *Non-Proliferation Policy of the U.S.*, U.S.I.S. (U.S. Information Service) BACKGROUND, Apr. 15, 1991, at 5) and have announced their willingness to sign the NPT. The French plan was outlined in "Plan Francais De Maitrise Des Armements et de Disarmement" (The French Disarmament Plan), by President Mitterand, where it was stated that: "France has decided in principle to sign [the NPT] and hopes that all states will adhere to it." The document was obtained personally from the French Embassy in Canberra. The Chinese Premier, Li Peng announced similar Chinese intentions to the Japanese Prime Minister Toshiki Kaifu in Beijing, *China will sign Treaty*, THE SUNDAY AGE, Aug. 11, 1991, at 11. Under Article IX, a nuclear weapon state is one that had manufactured and exploded a

Under Article I, nuclear weapon states agree not to “transfer” nuclear weapons, nuclear explosive devices or control over such weapons directly or indirectly or in any way to “assist, encourage or induce” any non-nuclear weapon state to manufacture or otherwise acquire nuclear weapons or other devices. It seems clear by implication, that this undertaking also applies to non-nuclear weapon states.¹⁰⁹

Article II on the other hand, enunciates the converse proposition. That is, non-nuclear weapon states undertake not to “receive” the transfer of any nuclear weapons or to “manufacture or acquire” or “seek to receive any assistance” in manufacturing nuclear weapons or other devices.

However, under Article III (1) parties can provide fissionable material or equipment especially designed for peaceful nuclear purposes to non-nuclear weapon parties, provided this material is subject to the safeguard of the IAEA.¹¹⁰ It is clear, therefore, that Article III requires nuclear exporter states to request such safeguards on all relevant exports and to create the necessary legal and administrative conditions to live up to this obligation. Failure to do so would constitute breach of a treaty obligation.¹¹¹ In the present context, having regard to the enormous quantity of nuclear material acquired by Iraq from many Western (especially German) companies, it could be argued that Germany’s (and others) failure to properly create these necessary conditions breached their Nuclear Non-Proliferation Treaty obligations.

It is clear, therefore, that like other treaties outlined above, the Nuclear Non-Proliferation Treaty provides clear obligations with respect to the weapons it seeks to control. Yet whom do they bind? The parties to the Convention are clearly bound.¹¹² Moreover, if the Nuclear Non-Proliferation Treaty is seen as norm creating then non-parties will also be bound by its obligations. But it seems unlikely that, on its own, this treaty is of such a character. The reason is similar to that of the Biological Weapons Convention, in that each party has a right to withdraw (with at least 3 months notice)

nuclear weapon or other device prior to January 1, 1967.

109. Harold Müller, *Prospects for the 4th Review of the Non-Proliferation Treaty*, SIPRI Y.B. 2556 (1990).

110. The IAEA is the International organization that negotiates, safeguards and inspects nuclear facilities to assure there has been no diversion of nuclear material for nuclear weapons.

111. For example, in the past five years, German companies have exported without safeguard to India, Pakistan and South Africa. This led a German parliamentary investigation to reveal serious weaknesses in their export control system. It found that the responsible agencies were understaffed and underfunded, and the Ministries charged with their supervision held a policy of export first, control second. The law left wide gaps with ridiculously low penalties in comparison to the profits to be gained from illegally trading. Moreover, serious investigations were rarely launched lest companies suffer undue competitive advantages. This led at least one commentator to suggest that; “while Germany kept to the letter of the NPT, implementation was less than sufficient and the spirit of the NPT was violated.” Further, he claimed that: “The negligence of some exporters, notably Germany, raises serious doubts about the Article III (2) obligations having been properly met.” See Müller, *supra* note 109, at 565.

112. Iraq therefore, as a party, is clearly in violation of Article II especially in view of its admission of clandestine attempts to build nuclear weapons.

if it decides that extraordinary events related to the subject matter of the treaty jeopardize its interests.¹¹³ Consequently, it is more likely that the Nuclear Non-Proliferation Treaty is merely one piece of evidence together with others¹¹⁴ toward a custom prohibiting nuclear weapon proliferation. Perhaps most importantly, the Nuclear Non-Proliferation Treaty should be seen as forming part of the evidence supporting the more general customary international law obligations with respect to all weapons of mass destruction.

e. Other Treaties

There are two other relevant treaties, but as neither ever entered into force, they are solely supportive of the general customary international law. The first is the Convention of St. Germaine (1919) introduced by the League of Nations, which formed the basis of all subsequent arms control treaties. It attempted to prohibit all arms exports, except those permitted by means of export licenses granted by Governments. The second is the Geneva Convention on the Arms Trade (1925), whose purpose was to prevent illicit arms traffic rather than reduce the international arms trade. This was to be accomplished by "supervision" in the form of uniform export licensing by governments and publicity in the form of statistical returns of foreign trade in arms.¹¹⁵

2. Agreements

This category discusses the importance and effect of several international agreements that are supposedly "non-binding." In other words, unlike the treaties examined above, the following agreements apparently do not directly create binding international obligations upon party states. Rather, they appear to possess more of a political character. However, like treaties, these agreements are also legally important in three respects:

1. They may in fact be regarded as treaties, depending upon either the express or implied intention of the parties;¹¹⁶

113. Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 107, at art. X.

114. For example, the Nuclear Supplier Guidelines, the Nuclear Exporters Committee, U.N. Resolutions and Domestic Laws.

115. GOLDBLAT, *supra* note 82, at 5.

116. Vienna Convention on the Law of Treaties, May 23, 1969, art. 2, U.N. Docs. A/Conf. 39/27 (1969), defines treaty to mean "an international agreement concluded between states in written form and governed by international law. . . ." The agreements in question here, are concluded between states and are in written form, but whether or not they are "governed by international law" depends upon the express or implied intention of the parties, which if existent will mean the document is a treaty and thus subject to the rules of international law. See Jimenez de Arechaga, *International Law in the Past Third of the Century* 159 REC. DES. COURS 35-37 (1978). Such an intention can be gleaned from such factors as: (a) the nature of the language—if broad and indefinite—this is less likely to show an intention; (b) whether the agreement is treated as an agreement of legal character in submissions to national parliaments or courts; and (c) the level of authority of the governmental representatives who have signed the agreement. See Oscar

2. Like declarations and treaties, they may support the existence of a custom; and
3. While not engaging the legal responsibility¹¹⁷ of the parties, there are both political and moral expectations, so that as long as it lasts, it can be an authoritative and controlling document for the parties.

However, with respect to the following agreements, only the second and third variants are relevant because there is little room to argue that the intention (either express or implied) of the parties is sufficiently strong to support their characterization as treaties. Bearing in mind these considerations, it is now necessary to turn to the substance of the agreements.

a. The Australia Group

In 1984, in response to reports of the use of chemical weapons in the Iran/Iraq War, a group of Western nations formed the "Australia Group,"¹¹⁸ under which all members agreed to place a list of dangerous precursor chemicals¹¹⁹ under strict export control. There were 50 chemicals in all. Eleven of these were on a "core list," requiring restrictive review before being licensed, the other 39 were on a "warning list."¹²⁰ Recently however, multilateral consensus was reached between the members on the need to place all 50 chemicals under the same restrictive export controls.¹²¹ It is important to point out that it is not only Western nations that have been adopting such controls. In 1987, the Eastern Bloc States discussed similar measures in Leipzig.¹²²

Clearly then, it can be seen that many states are applying export controls either erga-omnes or only in respect of recipient states likely to use these chemicals for chemical weapons—such as Iran, Iraq and Syria.¹²³ Moreover, given its expanding membership and degree of implementation, the "Australia Group" reflects and supports the existence of a customary international law obligation to prevent the flow of chemical weapons and all weapons of mass destruction.

Schachter, *The Twilight Existence of Non-Binding International Agreements*, 71 AMERICAN J. INT'L L. 296 (1977).

117. Therefore, non-compliance by a party would not be a ground for reparation or judicial remedies (c.f. a treaty) *Id.*

118. There are now 20 members: Australia, Austria, Belgium, Canada, Denmark, West Germany, France, Ireland, Italy, Japan, Luxembourg, The Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, the U.K. and the former USSR (cf. the original seven). See Lehman, *supra* note 108, at 7.

119. See *supra* note 32.

120. Lehman, *supra* note 108, at 7.

121. See Stuart Auerbach, *19 Industrial Countries Agree to War Chemicals Control*, THE AGE, June 1, 1991, at 15.

122. *Id.*

123. See S.J. Lundin, et al., *Chemical and Biological Warfare: Developments in 1987*, SIPRI Y.B.1988: WORLD ARMAMENTS AND DISARMAMENT 101, 104 (1988).

b. The Nuclear Exporters Committee and the Nuclear Supplier Guidelines

These are two groups that are associated with the Nuclear Non-Proliferation Treaty. The former is involved in the delineation of those nuclear exports that will trigger the need for IAEA safeguards.¹²⁴ The Nuclear Supplier Guidelines on the other hand, brought nuclear suppliers who were not party to the Nuclear Non-Proliferation Treaty (principally France), into a similar control regime. Notably however, a recent meeting of the Nuclear Supplier Guidelines agreed that there was a need to extend the existing guidelines to control exports of so-called "dual use" items which are equipment not specifically designed for nuclear purposes but which can be so used.¹²⁵

As a result, it can be seen that as with chemical weapons, there is also a supply regime "informally" adhered to by a number of different states. It could also be argued that this contributes to the notion of a fairly uniform and widespread practice of non-proliferation of both nuclear weapons and all weapons of mass destruction.

c. The Missile Technology Control Regime

The close relationship between ballistic missiles and other weapons of mass destruction has created a new arms race among regional powers, so that the problem of ballistic missile proliferation has now reached global proportions. Yet at present there is no binding international treaty concerned with this issue. Rather, the central focus of international efforts in that regard is the missile technology control regime,¹²⁶ which like the Australia Group is a "non-binding" agreement. Thus, it is both a declaration of intent by its adherents to apply a common set of export controls over missiles and missile technology,¹²⁷ and a means to convince non-member suppliers to avoid technology exports which undercut the regime's non-proliferation controls.

In addition, the missile technology control regime presents detailed guidelines with respect to two broad categories of equipment, which member states by their practice have implemented quite rigorously.¹²⁸ Yet despite

124. Committee members made up of 23 nations meet twice a year to review and update the list as technology warrants. The committee is otherwise known as the Zanger Committee. See Lehman, *supra* note 108, at 6.

125. For example sophisticated metals could be used to make either machinery for peaceful purposes or to make uranium centrifuges. *Id.* at 7.

126. Membership consists of 15 countries. *Id.* at 8.

127. See Martha Fitzpatrick, *Arms Control: Export Controls on Missile Technology*, 29 HARV. INT'L L.J. 142 (1988).

128. For example, in the U.S., customs agents and courts have taken a leading role in cases of MTCR violation—U.S. citizens have been imprisoned for conspiring to sell to Egypt and South Africa. In Italy, charges were brought against a firm named SNIA—BDP for ballistic missile sales to the Egyptian-Argentinean Condor 2 missile program. In Germany there were

this, it would be difficult to argue that there is an intention for this to be regarded as a treaty, for legal sanction to attach to members for non-compliance with the regime. Therefore, the Missile Technology Control Regime is of primary importance for its contribution to a general customary international law obligation with respect to all weapons of mass destruction.

3. Security Council Resolutions

Under Article 24 of the U.N. Charter, the Security Council is given primary responsibility for the maintenance of international peace and security. Accordingly, under Article 25, all members agree to accept and carry out the decisions of the Security Council, which means that Security Council Resolutions are absolutely binding on all member states. In this context, there are two relevant sets of resolutions:¹²⁹ the Iran-Iraq war resolutions and the Gulf War cease fire resolution.¹³⁰

The former are two separate but substantially similar resolutions which were passed in the context of investigating the use of chemical weapons in the Iran-Iraq War. They call upon all states to:

establish or to strengthen strict control of the export of chemical products serving for the production of chemical weapons, in particular to parties to a conflict, when it is established or there is substantial reason to believe that they have used chemical weapons in violation of international obligations.

They thereby lay the basis for concluding that there is an international obligation incumbent on all states to prevent the export of chemical weapons, especially when it is foreseeable that they will be used.

The latter resolution, though it was promulgated after the Gulf War, is relevant because it states that as of the 2nd of April 1991, there was an absolute obligation on states to prevent the export of any weapons of mass destruction to Iraq.¹³¹ Although the resolution does not bear any relevance to the events of arms supply to Iraq prior to the Gulf War, it is yet another

judicial investigations into the MBB and Glob. Sat. companies for ballistic missile sales to Libya. See Aaron Karp, *Ballistic Missile Proliferation*, SIPRI Y.B. 1990: WORLD ARMAMENTS AND DISARMAMENTS 369 (1990).

129. S.C. Res. 612, U.N. SCOR, 43d Sess., 2812th mtg. at 10, U.N. Doc. S/INF/44 (1988), and S.C. Res. 620, U.N. SCOR, 43d Sess., 2825 mtg. at 12, U.N. Doc. S/INF/44 (1988).

130. See *supra* note 106.

131. The relevant parts of the resolution in this regard, are paragraphs 24 and 25. Paragraph 24 states "all states are to prevent the sale or supply or promotion or facilitation of such sale or supply to Iraq by their nationals or from their territories or using their flag, vessels or aircraft of: (a) arms and related material of all types; (b) biological weapons, chemical weapons, nuclear weapons and ballistic missiles; (c) technology; (d) personnel." Paragraph 25 calls upon all states to act strictly in accordance with paragraph 24 notwithstanding the existence of any contracts, agreements, etc.

piece of evidence contributing to the existence of a custom with respect to all weapons of mass destruction.

4. Domestic Legislation

Domestic or municipal law, while relevant to international law under Article 38 (1)(c) of the Statute of the International Court of Justice,¹³² its main purpose in this context is to serve as an additional item of evidence to substantiate the general customary international law obligations.¹³³

Bearing this in mind, it is important to realize that the content of legislative and administrative steps taken by many states¹³⁴ to implement the treaties and agreements outlined above, are substantially similar.

In the U.S., there has long been strict control over the export of all weapons and in particular weapons of mass destruction. For example, the relevant export authorities have always possessed a list of suspicious buyers and of "significant military equipment"¹³⁵ over which to exercise particular caution. Consequently, arms exports are totally prohibited¹³⁶ to certain states, including those upon which there is an embargo (South Africa, Angola, Chile) and those which have supported terrorism.¹³⁷ Moreover, the Department of State has discretion to suspend any export license at any time.¹³⁸

Of greater significance are two recently implemented measures designed to combat non-conventional weapons proliferation. The first is the *Exports Amendment Act*,¹³⁹ under which, the U.S. is required to pursue the controls outlined in the Missile Technology Control Regime, Australia Group, the Nuclear Supplier Guidelines and the proposed Chemical Weapons Conven-

132. Statute of the International Court of Justice art. 38(1)(c), as annexed to the Charter of the United Nations, 59 Stat. 1055, T.S. No. 993, 3 Bevens 1153, 1 U.N.T.S. (signed at San Francisco, June 26, 1945, entered into force October 24, 1945). Article 38(1)(c): "the Court whose function it is to decide in accordance with international law such disputes as are submitted to it, shall apply: (c) the general principles of law recognized by civilized nations."

133. It is in this vein that Brownlie argues that "acts of legislation provide prima facie evidence of the attitudes of states on points of international law and very often constitute the only available evidence of the practice of states," so that they are thus "important in any assessment of customary law," See BROWNIE, *supra* note 75, at 55.

134. The U.S., former USSR, France, Germany and the U.K. supply approximately 80% of annual arms exports. Thus, the states detailed here are representative of these suppliers in addition to several others. See Agnes Courades Allebeck, *Arms Trade Regulations*, SIPRI Y.B. 119 (1989).

135. See International Traffic in Arms Regulations (ITAR), 22 C.F.R. § 123.10 (1973). These are the implementing regulations of the Internal Security Assistance and Arms Export Control Act (1976) (AECA).

136. International Traffic in Arms Regulations (ITAR), 22 C.F.R. §§ 121.01-130.33 (1982).

137. Iran, Syria, North Korea, Cuba, Libya and South Yemen. Iraq appeared on the latter list in the early 1980s but was removed from the list to enable U.S. support in the Iran-Iraq War. See *supra* note 13.

138. International Traffic in Arms Regulations (ITAR), 22 C.F.R. §§ 121.03-130.33 (1982).

139. The Omnibus Export Amendments Act (1990), H.R. 4653, 101st Congress, 2d Sess., CONG. REC. S. 17,984-01 which is designed to re-authorize the Export Administration Act.

tion. More importantly, the Bill imposes mandatory sanctions on U.S. and foreign persons exporting such controlled goods or technologies without authorization, and also on foreign countries developing or using controlled items in violation of international law.¹⁴⁰

However, although the U.S. is committed to these proliferation controls, former President Bush consistently vetoed the Bill objecting to limitations on the President's discretionary power.¹⁴¹ Therefore, rather than approve the Bill, former President Bush issued the *Export Product Control Initiative* (EPCI), on December 13, 1990,¹⁴² which set forth specific measures for preventing the spread of weapons of mass destruction. It provides that:

1. The U.S. shall adopt worldwide export controls on all 50 chemical weapon precursors and shall urge all nations to adopt similar controls.

2. Licenses must be obtained for proposed exports of any potentially related chemical weapons industrial facilities, related designs or technology.

3. Licenses must be obtained for any export destined for a publicly listed company, government, agency or other entity engaged in activities of proliferation concern.

4. Licenses shall be required when an exporter knows¹⁴³ or is informed by the U.S. Government, that a proposed export may be destined for a project of proliferation concern. (A similar regulation already applies to exports of possible nuclear weapons material.)

5. Current regulations shall be supplemented by control lists of: (i) dual use equipment and technology related to weapons of mass destruction; and (ii) countries to which such equipment and technology shall be controlled.

6. Civil and criminal penalties shall be imposed upon U.S. citizens who knowingly participate in activities that promote the spread of ballistic missile technology and chemical weapons (similar penalties already apply in the areas of nuclear weapons and biological weapons.).

French export regulations are similar in content to those of the United States. Under French law, there can be no export of any arms without a license, and in some cases this will not be granted without special authorization from the Prime Minister.¹⁴⁴ More importantly, France has recently implemented both the Australia Group and missile technology control regime regulations in an attempt to prevent such proliferation.

In Germany, there can be no authorization of export of any weapons if: (a) there is a risk that they will be used in an action disturbing the peace, in

140. *Id.*

141. George N. Grammas, *Multilateral Responses to the Iraqi Invasion of Kuwait: Economic Sanctions and Emerging Proliferation Controls*, 15 MD. J. INT'L L. & TRADE 1 (1991).

142. These were issued by executive order 12,735 under the authority of The Internal Emergency Economic Powers Act, 50 U.S.C. app. §§ 1701-1706 (1982 & Supp. V. 1987).

143. An exporter will be deemed to "know" when that person "is aware that the good or technology will be used in the design, development, production or use of a weapons of mass destruction or that such result is substantially certain to occur." Imposition and Expansion of Foreign Policy Controls, 56 Fed. Reg. 10,765 (1991).

144. Allebeck, *supra* note 134, at 325.

particular an offensive war; or (b) there is reason to believe that transfer could damage Germany's commitments under international law or threaten their fulfillment.¹⁴⁵ However, according to more recent guidelines export licenses can be granted if motivated by "vital foreign policy and security interests of the FRG," but only if: (a) the internal situation of the importing country is positive; and (b) the weapons to be delivered will not exacerbate regional tensions.¹⁴⁶

More importantly, like the U.S., Germany has recently taken specific legislative and administrative measures to curb the flow of weapons of mass destruction.¹⁴⁷ These measures include:

- (1) Banning the export of all 50 chemical precursors (from the Australia Group) without a license;
- (2) Tightening controls on all technology transfers;
- (3) Requiring export licenses for anything that could be suited for production of biological weapons;
- (4) Banning all trade with Libya over chemicals; and
- (5) Increasing punishments for violations of the legislation.¹⁴⁸

The Italian Government has also recently introduced measures to forbid any "manufacture, import, export, and transit of biological weapon, chemical weapon and nuclear weapons; pre-arranged research for their production; or transfer of related technologies."¹⁴⁹ In addition, Italy is an original signatory of the missile technology control regime, and adheres to the guidelines of the Australia Group.

Subject to international agreements made by the Swedish Government and resolutions of the U.N. Security Council, Sweden restricts the export of all weapons unless the recipient state is *not*: (a) engaged in armed conflict with other states; (b) involved in international conflicts that may lead to armed conflicts; (c) a state in which internal armed disturbances are taking place; or (d) a state that can be expected to use Swedish weapons to suppress human rights.¹⁵⁰ In addition, Sweden regulates exports in accordance with both the Australia Group and missile technology control regime.

The U.K. requires an export license for virtually every export. In addition, it is an original signatory of both the Australia Group and missile technology control regime.

145. Gesetz Über die Krontrolle von Kriegswaffen (KWKG), 1961 § 6 (3) (F.R.G.) (on file with author).

146. Allebeck, *supra* note 134, at 329.

147. But only after considerable pressure was exerted on the German Government by the U.S. and others.

148. These laws are all outlined in a document received personally from the German Embassy in Canberra dated "Bonn 15/10/90." (on file with author).

149. Law No. 1985, Article 1.7, July 19, 1990. This information was received personally from Italian Embassy in Canberra. (on file with author).

150. Allebeck, *supra* note 134, at 332.

Extensive information on Japanese export regulations is unavailable. However, Japan is an original signatory to both the Australia Group and missile technology control regime.¹⁵¹

Legal documents and legislation regulating the Soviet arms trade were, in the past, not available on request.¹⁵² However, *Pravda* reported that in February 1986, the former USSR promulgated the "regulations on exports from the USSR of chemicals of dual use," in an attempt to control the flow of chemical weapons.¹⁵³

5. Policy Statements, Press Releases

Policy statements and press releases can provide evidence of the existence of customary international law. While substantiation of a custom would require reference to statements and releases prior to the time at which it is asserted to be in existence, to do so here would be too detailed a task. As such, reference will be made to statements made after that time. But these too are of considerable importance because they reflect a widespread appreciation of the need to prevent proliferation of weapons of mass destruction, especially since the Gulf War. It is such an appreciation that lends support to the existence of the general customary obligations.

There have been numerous French policy statements addressing this issue. On September 29, 1988, President Mitterand addressed the 43rd Session of the United Nations General Assembly on the then forthcoming Paris Conference. In that speech, he indicated the importance of enacting multilateral export regulations.¹⁵⁴ Subsequently, France has hosted the Conference and announced its "grand disarmament"¹⁵⁵ plan declaring its readiness to sign the Nuclear Non-Proliferation Treaty.

Prior to the Gulf War, there had been innumerable pronouncements by successive U.S. Administrations, congressmen and other officials advocating the need to stem the flow of non-conventional weaponry.¹⁵⁶ The culmination of these statements was an announcement by former President Bush in May 1991,¹⁵⁷ in which he declared the commitment of the U.S. to stopping the proliferation of weapons of mass destruction. To give meaning to this commitment, Bush advanced two proposals. The first was a plan to totally ban chemical weapons throughout the world, and the second was an initiative

151. See "Diplomatic Book 1990—Japan's diplomatic activities." Available from the Japanese Embassy, Canberra. (on file with author).

152. Allebeck, *supra* note 134, at 324.

153. *Id.*

154. S.J. Lundin, *Chemical and Biological Warfare; Developments in 1988*, SIPRI Y.B. 1989: WORLD ARMAMENTS AND DISARMAMENT 107-08 (1989).

155. See *supra* note 97.

156. For examples see the Factual Context above.

157. *Bush proposes arms control initiative for the Middle East*, *United States Information Service Backgrounder*, May 30, 1991, at 6 (on file with author).

to control proliferation of all weapons of mass destruction, which would be applied initially to the Middle East.¹⁵⁸

The name of the Australia Group bears testimony to the importance placed on non-proliferation (especially of chemical weapons) by the Australian Government. This concern is highlighted by repeated calls by Foreign Minister Gareth Evans for the conclusion of the Chemical Weapons Convention. At a May 1991 disarmament conference in Kyoto, Japan Former Minister Evans requested a meeting of Foreign Ministers in Geneva to conclude the convention.¹⁵⁹ He argued at the conference that the time was right to remove obstacles that have so far blocked agreements on the Chemical Weapons Convention.

B. *General Custom?*

Having reviewed the evidence and summarized the individual obligations, it is now necessary to return to the underlying theme and consider whether it can be said that there are either broad or narrow general customary international law obligations to control the export of weapons of mass destruction. More importantly, it must be determined whether they existed at the time of the alleged breaches. In order to answer these questions, a more thorough examination of the two elements of custom—state practice and *opinio-juris*—is required.

1. State Practice

The existence of a particular state practice depends upon several factors:

- (1) The passage of time over which the rule is followed;
- (2) The uniformity of the state practice; and
- (3) The extensiveness of the state practice—i.e. the number and type of states which adhere to the practice.¹⁶⁰

Are these factors present in the case under consideration? The evidence suggests that there have been widespread efforts to prevent the flow of assorted non-conventional weapons for many years, beginning as far back as the turn of the century when several attempts were made to create treaties regulating arms sales. However, significant momentum towards a consistent state practice was not achieved until approximately two decades ago, when the Biological Weapons Convention (1972) and the Nuclear Non-Proliferation Treaty (1970) were completed. Since then, non-proliferation controls on all weapons of mass destruction have blossomed. This is especially true in the last five to six years, primarily as a result of both the Iran-Iraq War and the

158. *Id.*

159. Tom Ormonde, *Evans wins new backing for chemical weapons ban*, THE AGE, May 28, 1991, at 7.

160. North Sea Continental Shelf, 1969 I.C.J. 4 (Feb. 20).

subsequent Gulf War. Hence, the Australia Group, Missile Technology Control Regime, domestic legislative regimes and Chemical Weapons Convention negotiations have all become predominant in this period.

Yet, is it sufficient to show a significant state practice only over a period of five to six years? According to the *North Sea Continental Shelf Cases*:

the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, [although] an indispensable requirement would be that . . . the practice . . . should have been both extensive and virtually uniform.¹⁶¹

Furthermore, Brownlie states that “provided the consistency and generality of a practice are proved, no particular duration is required. . . .”¹⁶² Therefore, the lack of an extensive period of time will not prevent the finding of a state practice if there is both uniformity and extensiveness of the state practice.

The requirement of uniformity only necessitates a demonstration of substantial uniformity of practice rather than complete uniformity in practice.¹⁶³ The evidence suggests there is substantial uniformity in the way in which states are preventing the export of weapons of mass destruction. The Biological Weapons Convention (96 parties), Nuclear Non-Proliferation Treaty (140 parties) and the Chemical Weapons Convention (40 negotiators and 26 observers) all contain an obligation not to “transfer” to any recipient or in any way “assist, encourage or induce” states to produce either biological weapons, nuclear weapons or chemical weapons.¹⁶⁴ The language and content of such obligations is uniform. Furthermore, it has been demonstrated that there is an increasingly consistent pattern of implementation of these responsibilities with various states having enacted laws and regulations in line with these treaties and non-binding agreements.

The requirement of extensiveness on the other hand, is problematic. For although a substantial number of states have signed the relevant treaties and non-binding agreements, the ultimate test of the existence of an obligation lies in the actual “quantity” and “quality” of parties who are conforming to the practice. There must be a representative participation in the practice of those states particularly affected. To adopt the example of the *Law of the Sea Convention*, if it were signed by one hundred land locked states, the importance of the extensiveness of the practice would be minimal. However,

161. *Id.*

162. BROWNIE, *supra* note 75, at 5.

163. Fisheries Case, 1951 I.C.J. 116, at 131 (Dec. 18).

164. See Article III, Biological Warfare Convention, *supra* note 77, Article I NPT, “rolling text” Chemical Weapons Convention.

if it were signed by only ten states, including the world's five greatest shipping states, this would be significant.¹⁶⁵

Applying that reasoning in this context, it is, therefore, very significant that those states that supply approximately 80% of all arms exports are all uniformly applying controls to non-conventional weapons. Therefore, given the time over which the practice has been implemented, its uniformity, and its extensiveness among those states of greatest significance, it is submitted that the evidence supports the existence of a "state practice."

2. *Opinio Juris*

In addition to state practice, there must also be a belief on the part of states that the practice is rendered obligatory by a rule of law. The essential problem with respect to this element is one of proof and who is to carry the burden of proof. There are two methods of addressing this problem. The first has been adopted in a significant minority of cases,¹⁶⁶ and it is the more exacting. It requires positive evidence of the recognition by a state of the validity of the rules in question. If this approach is adopted it must be positively shown that a state is acting a certain way because it believes it is bound not to export weapons of mass destruction. Thus, the outcome will depend upon the evidence in each case. Unfortunately, however, this notion of *opinio juris* raises a theoretical flaw which threatens to undermine the whole basis of legally proving the existence of any obligation. That is, a state would no doubt argue that its acquiescence in a uniform and widespread practice, (for example non-proliferation) was not due to any perceived "legal" obligation but rather only out of a sense of "political" or "moral" responsibility.

The second approach, is to presume the existence of *opinio juris* on the basis of evidence of state practice, or a consensus in the literature and previous decisions.¹⁶⁷ If this approach is taken, the answer becomes dependent upon state practice, which makes it easier to conclude the existence of customary international law obligations. Thus, in this case, given the reasonable certainty of the existence of state practice, use of this approach shifts the presumption in favour of the presence of *opinio juris*.

It has, therefore, been demonstrated that "state practice" exists and using the second method that there is "*opinio juris*." But, unless specific conduct can be shown to be positively prohibited by international law, a state will not be required to refrain from that conduct. In the absence of any guidance by

165. *North Sea Continental Shelf*, 1969 I.C.J. 4 (Feb. 20).

166. *See S.S. Lotus*, 1927 P.C.I.J. (ser. A) No. 10 at 28 (Sept. 7), and *North Sea Continental Shelf*, 1969 I.C.J. 4 (Feb. 20).

167. *See North Sea Continental Shelf*, 1969 I.C.J. 4 (Feb. 20) (Lachs, J. dissenting).

a competent tribunal, it cannot be stated if this custom has *definitely* come into existence or whether it is still in the process of emergence.¹⁶⁸

It is submitted, however, that at least by the latter half of the 1980s, the supporting structures of these customary international law obligations were all well affixed. In other words, by that time, all of the major treaties, agreements and pieces of domestic legislation were functioning. Since then, moreover, these core elements have been added to and strengthened by the various measures taken by national governments which translate the obligations into the domestic sphere. To use an analogy, the foundations of the building were laid two decades ago with the finalizing of several key treaties such as the Biological Weapons Convention and Nuclear Non-Proliferation Treaty. The following decade saw the assembly of the basic structure and scaffolding, thus strengthening these underlying basic building blocks. By the end of the 1980s, the "non-proliferation tower" had solidified with the adoption of the Missile Technology Control Regime, Australia Group, Zangger Committee and other regimes by domestic legislative and other administrative steps, all of which contributed to the stability of the custom.

Therefore, the general customary international law obligations were binding on states, at the time at which these exports occurred, obligating them to prevent the export of weapons of mass destruction. However, even if this is incorrect such that the obligations had not yet emerged at that time, then considering the developments since the Gulf War it must be clear that if they have not emerged since then, they are very close to doing so.

Accordingly, keeping all of this in mind, it is now necessary to progress to an examination of the second component of Article 3, that being whether there is conduct constituting the breach of these obligations that is attributable to any of the relevant supplier states.

III. BREACH AND OTHER ELEMENTS

It is now necessary to turn to the second part of Draft Article 3, which involves the existence of conduct that constitutes a breach of the general customary international law obligations outlined above. It is also appropriate to examine two other elements about which Article 3 is completely silent and which may both be required before a finding of wrongfulness under Article 3 can be concluded. These are first, whether the conduct must be fault based and second, whether there must be damage suffered by the injured states.

168. S.S. Lotus, 1927 P.C.I.J. (ser. A) No. 10, at 28 (Sept. 7).

A. Conduct Constituting Breach of an Obligation

1. "Conduct" and "Result" Obligations

Article 16 of the Draft Articles enunciates the basic proposition that there is a breach of an international obligation when conduct of a state is not in conformity with that required of it by that obligation.¹⁶⁹ This in turn depends upon whether the obligation in question is one of either "conduct" or "result" as outlined respectively by Draft Articles 20 and 21.¹⁷⁰

Obligations of conduct, while having a particular object or result require that object or result to be achieved through action, conduct or means "specifically determined" by the international obligation itself.¹⁷¹ Failure to perform the conduct is sufficient to show the breach of an obligation—irrespective of whether there were any harmful consequences.

An obligation of result on the other hand, does not require such specific action. There may be a preference for a certain course of action, but the state is given the freedom to choose the means to achieve the required result. If the result is achieved by the state's choice of conduct there is no breach of the obligation. However, if it is not achieved, the state cannot subsequently reply that because it had "hoped" that the steps taken would adequately achieve the result, it is not guilty of any breach.¹⁷² Nevertheless, even if the result is not achieved by the states original choice of conduct, it is given a "second chance"¹⁷³ to discharge its obligation unless

169. Draft Article 16, *supra* note 3, at 235: "There is a breach of an international obligation by a state when an act of that state is not in conformity with what is required of it by that obligation."

170. See text of articles 20 to 22, with commentaries thereto, adopted by the Commission at its twenty-ninth session, [1977] 2 Y.B. Int'l L. Comm'n (part 2) at 11-30 [hereinafter Commentaries to Articles 20 and 21].

171. Commentaries to Article 21, *supra* note 170, para. 8, at 20-21.

172. *E.g.*, Commentary to Article 21, *supra* note 170, para. 23, at 27:

[A]rticle 2 paragraph 1 of the 1965 International Convention on the Elimination on all Forms of Racial Discrimination provides that: 'state parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms. . . .' Now it is obvious that if the administrative authority of a State party to the Convention in fact commits acts of racial discrimination, the State will not escape the consequences of being charged with the breach of the Convention by taking refuge behind some law which it may have enacted prohibiting such acts. It is not sufficient to enact a law, because if a practice contrary to the obligation is continued, the result intended by the obligation is not achieved in concreto.

173. See Article 21(2), [1977] Y.B. Int'l L. Comm'n (part 2) at 19: "When the conduct of a state has created a situation not in conformity with the result required of it by an international obligation, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the state, there is a breach of the obligation only if the state also fails by its subsequent conduct to achieve the result required of it by that obligation."

the required result has already been rendered "permanently unobtainable."¹⁷⁴ In other words, such obligations allow the state to remedy the situation it earlier created by adopting a different course of conduct capable of obliterating the consequences of the earlier conduct.

Given this conceptual difference, the main criterion to differentiate between obligations of conduct and result is that in the former there is a precise formula of implementation which may either be in the form of a duty to act or to refrain from action, whereas in the latter this is absent. Because such precision is much more commonly provided for by a treaty obligation due to its inherent capacity to verbalize specific demands,¹⁷⁵ the general customary international law obligations with which we are concerned are more likely to be classified as the result variety.

2. Breach of obligations

In order to determine whether a breach of the general customary international law obligations has occurred in the present case, it is necessary to compare the result required with the result achieved in each case.

If we first consider the broad obligation, the result required is the prevention of the export of all weapons of mass destruction, which can be achieved by whatever means the state chooses. For example, a state may legislate, make executive orders, employ more customs police, or instruct its courts to impose harsher penalties on law breakers. However, even if the required result is not achieved by these measures, a second chance will still be granted as long as it has not already been rendered permanently unobtainable.

The result achieved in this case, however, is that export has already occurred, specifically from Germany.¹⁷⁶ The measures Germany took were not adequate to achieve the required result. Moreover, as it is extremely difficult to "recall" these weapons of mass destruction, it seems likely that the required result has also been rendered permanently unobtainable. If this is the case, a second chance would not be given. On the other hand, if the result is still obtainable, for example if the weapons which were exported can now be neutralized (e.g. by operations of the U.N. Commission instructed

174. For example, if the required result is the protection of foreign diplomatic and consular staff, the required result is rendered "permanently unobtainable," if those persons are killed as a consequence of inadequate security measures having been taken by the host state.

175. For example, the Geneva Conventions outline typical conduct obligations in that they not only require states to take legislative action, they also specify its precise content: "Each party undertakes to incorporate into its own legislation, in accordance with its constitutional procedure . . . the uniform law on the international sale of goods . . . forming the annexe to the present convention," Convention Relating to a Uniform Law on the International Sale of Goods, Aug. 23, 1972, art. 1, para. 1, 834 U.N.T.S. 107.

176. Note that with respect to the former USSR, there is clearly a failure to achieve the required result as no measures were even taken for its achievement. In fact the direct governmental involvement in arms sales worked directly against such a result.

to destroy Iraq's weapons of mass destruction¹⁷⁷), then perhaps a second chance may still be granted.

Therefore, this comparison has revealed that it is more likely that the required result has been rendered permanently unobtainable, and thus, at least on the part of Germany,¹⁷⁸ there was in fact conduct constituting the breach of the broad obligation.

If on the other hand, the obligation is characterized as being the narrow one, the result required is also the prevention of export of weapons of mass destruction, but only to those states where it is reasonably foreseeable that these weapons would be used aggressively. Therefore, like the broad obligation, the state is given the freedom to choose how to achieve this result. Similarly, if by those means the result is not achieved, as long as it has not been rendered permanently unobtainable, the state would be given a second chance for its achievement. However, unlike the broad obligation, because this is contingent upon the additional element of "foreseeability," it is now necessary to discuss that requirement to fully comprehend the requirements of this obligation.

a. What would have to be foreseen?

What is required, is reasonable foreseeability of the aggressive use of these weapons, meaning use in a manner which would constitute an "act of aggression" or "breach of the peace" within the ambit of the U.N. Charter. A discussion of these concepts is clearly beyond the scope of the present article, yet the issue still requires a brief explanation. The key is Article 39 of the U.N. Charter which grants the U.N. Security Council power to determine the existence of any "act of aggression" or "breach of the peace" and gives it further powers of action under Part VII to deal with such an outcome.

To aid this determination, the most recent and the most widely accepted¹⁷⁹ definition of aggression is contained in the UNGA's *Definition of Aggression Resolution*,¹⁸⁰ which was intended to offer guidelines to the U.N. Security Council for use in its deliberations.¹⁸¹ Article 1 of that resolution is the cornerstone, defining aggression as the: "use of armed force by a state against the sovereignty, territorial integrity or political independence of another state or in any other manner inconsistent with the charter of the UN." However, the critical point for present purposes is the foreseeability or likelihood that the state receiving the arms would use them

177. See *supra* note 20.

178. The USSR's conduct also constituted a breach.

179. See YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* 120 (1988).

180. G.A. Res. 3314, U.N. GAR 6th Comm 29th Sess. at 142 (1974).

181. Under Articles 10 and 11 of the U.N. Charter, the UN General Assembly is authorized to make recommendations to the U.N. Security Council.

in a manner such that the UN Security Council would conclude that it constituted an act of aggression.

b. How to test if it was foreseen?

A more difficult question involves defining the test of foreseeability. Like many other areas of law, there appears to be two tests, one objective and the other subjective.

The application of an objective test would seem to involve applying a common set of criteria to the receiving state. These would be factors such as: 1) The nature of the receiving state's political system and leadership; and 2) Its history of internal repression and aggression.¹⁸² If these show that it could reasonably have been foreseen that the weapons would be used in an aggressive manner, then the test would be satisfied. On the other hand, use of a subjective test requires looking at the supplying state and asking whether it actually foresaw possible use. This is a more exacting test similar to the stricter test of *opinio juris* outlined in *The North Sea Shelf Cases*. The questions remains, which test should be used?

As will become evident in the later discussion on fault, it appears that international law tends to favor the use of the objective test to determine responsibility.¹⁸³ Furthermore, viewing the general evolution of the law of state responsibility since the beginning of this century, it has gone through different stages of objectivization in many areas.¹⁸⁴ Given this trend, it would therefore seem more appropriate to utilize the objective test.

There is an additional reason to use the objective test. If a subjective test were used, it would be almost impossible to make a determination that was not dictated by the supplying states political orientation. For example, if the receiving state's political philosophy had the goal of terminating monarchical systems in surrounding states, and the supplying state identified with that cause, then the supplying state may not have foreseen an act of aggression, because the destruction of those states would not be considered "aggression" by that state. An objective test on the other hand would apply a set of uniform factors to the receiving state making the supplying state's political orientation irrelevant. Using that approach, it would be foreseeable that the receiving state would use the arms aggressively.

A determination of the result achieved in this case, involves an application of the objective test, to determine if it was foreseeable that these weapons would be used aggressively. First, Iraq is a totalitarian dictatorship governed by the socialist Baath party, whose rule has been characterized by

182. These are the writer's own opinion.

183. IAN BROWNLIE, *SYSTEM OF THE LAW OF NATIONS STATE RESPONSIBILITY* (Part 1) 38 (1983) [hereinafter BROWNLIE, *STATE RESPONSIBILITY*].

184. Pierre-Marie Dupuy, *The International Law of State Responsibility: Revolution or Evolution?*, 11 MICH. J. INT'L L. 105, 127 (1989).

a brutal record of repression ever since it seized power in 1968.¹⁸⁵ Although this perception was impressed on Western populations by the events of the Gulf War, many had already expressed this conviction years before. For example, one commentator wrote in 1980: "the Iraqi regime . . . is no more than the rule of a clique which has survived only through the ruthless suppression of all potential rivals and opponents, and from which the great majority of the Iraqi population—Shiites and Kurds—are strongly alienated."¹⁸⁶

Second, the history of Iraq's internal violence, repression and aggression are well recorded. A few pertinent examples well known to the international community will suffice for present purposes. In September 1980, in an act of aggression under Article 39 of the U.N. Charter, Iraq launched a totally unprovoked invasion of Iran resulting in the eight year long Iran-Iraq War. During that war Iraq engaged in an internationally illegal use of chemical weapons against its enemy.¹⁸⁷ Moreover, in April 1988, Iraq attacked its own Kurdish population in Halabja with Mustard and Nerve gases indiscriminately killing and injuring thousands of civilians.¹⁸⁸

More specifically in relation to Kuwait, Iraq never fully relinquished its claim to part if not all of its territory. Iraq and Kuwait have a long history of boundary disputes. Therefore, the crucial point is that it was clear at least from the end of the Iran-Iraq war, that Iraq had never fully relinquished its claims on Kuwait, and that given its past history, pursuit of these ambitions by the use of force was not an unlikely possibility.

With regard to Israel, it is well known that since Israel's creation in 1948, Iraq continually refused to recognize its legitimacy, claiming that "the Zionist entity is not considered a state but a deformed entity occupying an Arab territory."¹⁸⁹ Moreover, Iraq committed weapons and troops in three Arab-Israeli Wars, even though the two countries share no contiguous borders.¹⁹⁰ In 1949, when the other belligerents agreed to U.N. sponsored armistice agreements, Iraq refused to enter these negotiations.¹⁹¹ As a result, Iraq is still technically at war with Israel. Perhaps the most telling evidence that an act of aggression against Israel was reasonably foreseeable

185. Majid Khadduri, *Iraq's Claim to the Sovereignty of Kuwait*, 23 N.Y.U. J. INT'L L. & POL. 5, 31 (1991).

186. Elie Kedourie, *The Illusions of Powerlessness*, NEW REPUBLIC, Nov. 29, 1980, at 17.

187. The findings of the U.N. investigation into Iraq's use of chemical weapons are detailed by Timothy L.H. McCormack. See generally McCormack, *supra* note 86.

188. *Id.* at 17.

189. Contained in a letter sent by the permanent representative of Iraq at the U.N., to the U.N. Secretary General. U.N. Doc. A/35/110: 5/13516 (27 Feb. 1980) (on file with author).

190. The three wars were: 1949—War of Independence, 1967—Six Day War, and 1973—Yom Kippur War.

191. General Armistice Agreement, Feb. 24, 1949, Israel-Egypt 42 U.N.T.S. 251; General Armistice Agreement, Israel-Lebanon, 42 U.N.T.S. 287; General Armistice Agreement, Israel-Jordan, 42 U.N.T.S. 303; General Armistice Agreement, Israel-Syria, 42 U.N.T.S. 327.

was Saddam Hussein's threat in April 1990 to let his "fire eat half of Israel."¹⁹² More than anything else this should have triggered alarm in all supplier states that the weapons being procured by Iraq were not for defensive but rather aggressive purposes.

In the light of all of these factors, it appears clear that it was reasonably foreseeable that these weapons would be used in an aggressive manner. Yet despite this, the relevant supplier states failed to prevent the export of these weapons to Iraq, rendering the required result unachieved.

This comparison has revealed that, as with the broad obligation, the required result has now most likely been rendered permanently unobtainable,¹⁹³ and a second chance to achieve the result would not likely be granted. Thus, there was conduct that failed to achieve the required result of preventing the export of weapons of mass destruction to a state when it was reasonably foreseeable that the weapons would be used aggressively.

B. Attribution of Acts to the State

1. Acts of state

It is not sufficient that there is conduct constituting the breach of an obligation—it must also be attributable to the state.¹⁹⁴ This occurs when the conduct in question is attributable to a "state organ."¹⁹⁵

The relevant state organs in this context are: 1) The Executive and the Administration; and 2) The Legislature. The first category includes the acts of ministers, senior police officers, customs officials, diplomatic agents and other less senior officials. Whenever misconduct on the part of such persons in the state service "results in failure of a nation to perform its obligations under international law, the state must bear responsibility for the wrongful acts of its servants."¹⁹⁶ The second category involves the legislature, most commonly in a situation where a treaty creates an obligation to incorporate certain rules into domestic law and there is a failure to do so.

In attributing an act to a particular organ, it is important to realize that there are additional situations where state action can be found. First, where an organ or official of an organ acts *ultra vires*, as long as they were acting

192. Jill Smolowe, *Turning Up the Heat*, TIME, Apr. 16, 1990, at 20.

193. In the same way as with respect to the broad obligation.

194. This is also referred to as an "act of state."

195. The governing criteria of a "state organ," is that it must be considered as such under a domestic law of the state. See Draft Article 5 ("conduct of any State organ having that status under the internal law of that State shall be considered as an act of the State under international law, provided that organ was acting in that capacity in the case in question.")

196. Massey Claim (U.S. v. Mex.), 4 R.I.A.A. 155 (1927).

within the actual or apparent scope of their authority their acts will be attributable to the state.¹⁹⁷

Second, because it is often impossible to specify the particular conduct that is the source of the breach, the act of state is said to consist of a combination of a number of factors (e.g. legislative and administrative). In such a case, the issue becomes the general policy of implementation of the obligation, and not the acts of particular state organs. The *Corfu Channel Case*¹⁹⁸ is such an example. In that case the source of the act was a combination of several unidentifiable omissions by different Albanian state organs (military, executive, legislature) that resulted in a failure to warn British ships of the existence of mines in their waters. Despite the impossibility of specific attribution, this did not prevent the finding of an act attributable to the state.¹⁹⁹

Finally, when a state organ approves and adopts the harmful acts of private persons, those acts will become attributable to the state organ. Indeed, this was held to be the case in the *Hostages Case*,²⁰⁰ where the Court concluded that: "the approval given to these [acts] by the Ayatollah Khomeini and other organs of the Iranian state and the decision to perpetuate them, translated the continuing occupation of the Embassy and detention of the hostages into acts of that state."²⁰¹ Therefore, bearing these considerations in mind, it is necessary to determine whether the conduct constituting the breach of these general customary international law obligations in the present case, are in fact attributable to a state organ.

2. Application of these principles to the factual context

As previously stated, different governments were involved in Iraq's arms acquisitions on several different levels. Where there was direct involvement, for example by the former USSR, there were clearly acts of state, because all industry in the former USSR was centrally controlled by the state. But what about where there was simply awareness?

In those cases, it is still possible that there were acts attributable to the state as discussed above. First, in the case of Germany, it seems clear that the German Federal Ministry of Economic Affairs and the Federal Office of the Economy in approving export licenses and export guarantees, performed acts of state (even if the acts were *ultra vires*) because they were performed

197. Draft Article 10. See also BROWNLIE, STATE RESPONSIBILITY, *supra* note 183, at 145 (citing STRUPP, ELEMENTS DU DROIT, INTERNATIONAL PUBLIC 329 (2d ed. 1930)).

198. *Corfu Channel*, 1949 I.C.J. 4.

199. Another similar example is the allegation found in the Belgium submissions in the Barcelona Traction Case that there were general failures on the part of the Spanish administrative and judicial authorities to comply with certain international obligations. *Barcelona Traction*, 1970 I.C.J. 4.

200. *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 4.

201. *Id.* at 36.

within the scope of either actual or apparent authority. Second, it may be argued, either additionally or alternatively, that the act of state in question was the failure of the legislature to adequately legislate to ensure that the result required by certain international obligations was achieved.

Third, it is most likely that, as in the *Corfu Channel Case*, the act of state emerges from a multiplicity of factors. In other words, the act is not specifically attributable to any one state organ, but rather, stems from a general failure to implement a system of export laws. Thus, in that case, despite the difficulty of specific attribution, there should nonetheless be no impediment to concluding there was an act (or more specifically an omission) of state. Finally, if in failing to prevent the export of these weapons the acts were originally those of private persons followed by a continuing failure to prevent the exportation from occurring, there was an adoption of those acts by the relevant state organs in an analogous manner to the *Hostages Case*. Thus, in addition to the existence of conduct constituting the breach of the general obligations, it is also attributable to state organs.

C. Fault

1. Fault based liability versus strict liability

Despite the existence of the above elements, because there is no mention of "fault" in the Draft Articles, there remains a continuing controversy as to the exact "mental state" or degree of advertence required for the existence of wrongfulness under Article 3. On the one hand, it is argued by many that wrongfulness arises from the failure to fulfil the content of the obligation alone (in other words strict liability).²⁰² However, it is also asserted that an essential condition for the existence of wrongfulness is fault (either intent or negligence).

When writers and publicists have written on this topic, they have tended to adhere to either one of these approaches as a generally applicable principle. Grotius for example, the architect of fault based liability wrote: "That anyone without fault of his own is bound by acts of his agents is not a part of the law of nations."²⁰³ Anzilotti, on the other hand, formulated a theory of "absolute liability" which said that wrongfulness can *never* be conditioned on fault.²⁰⁴ Yet, a superior view seems to be that the question of fault "will not depend upon a general principle but upon the precise formulation of each obligation in international law."²⁰⁵ Thus, for example, if an obligation were to require all states "not to intentionally destroy rain

202. This is otherwise known as "objective responsibility."

203. SIR HERSCH LAUTERPACHT, *PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW* 135 (1970).

204. *Id.* at 137-38.

205. BROWNLIE, *STATE RESPONSIBILITY*, *supra* note 183, at 40.

forests," then it is clear that fault (intent) is an essential part of the content of that obligation.

It, therefore, appears pointless to embark upon an examination of the question of fault versus strict liability framed in global terms. The answer in each case depends upon the precise content of the obligation in question. However, where there is no indication as to the degree of fault required with respect to a particular obligation, a general rule or presumption will be significant.²⁰⁶

In this regard, Lauterpacht, claiming historical support,²⁰⁷ takes the view that: "It is believed that the [fault theory] corresponds with the conception of States as moral entities accountable for their acts and omissions—a conception which must form the foundation of any legal theory of responsibility."²⁰⁸

Lauterpacht cites further support²⁰⁹ for this proposition from the *Corfu Channel Case*,²¹⁰ where the International Court of Justice (ICJ) held that Albania was responsible for the damage to British war ships on the basis of its knowledge of the laying of mines.

However, this viewpoint is unconvincing for two reasons. First, the *Corfu Channel Case* was set in the context of a particular obligation, which was that "every state's obligation not to knowingly allow its territory to be used for acts contrary to the rights of other states."²¹¹ Just because a constituent element of the content of that obligation involved fault does not necessarily mean that fault governs all questions of responsibility.²¹² Second, contrary to Lauterpacht's view: "It is believed that the practice of states, the jurisprudence of arbitral tribunals and the international court have followed the theory of objective responsibility as a general principle (which may be modified or excluded in certain cases)."²¹³

Under this view a state bears:

responsibility for those acts committed by its officials or organs which they are bound to perform, despite the absence of fault on their part However, in order to justify the admission of this objective responsibility, it is necessary that the officials or organs should have acted as authorized officials or organs.²¹⁴

206. *Id.* at 40-41.

207. LAUTERPACHT, *supra* note 203, at 134.

208. *Id.* at 137.

209. SIR HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 88-89 (1982).

210. *Corfu Channel*, 1949 I.C.J. 4.

211. *Id.* at 22.

212. BROWNLIE, *STATE RESPONSIBILITY*, *supra* note 183, at 43.

213. *Id.* at 39; *see also* BIN CHENG, *GENERAL PRINCIPLES OF LAW* 218-32 (1987).

214. *Estate of Jean-Baptiste Caire (France) v. United Mexican States*, 5 R.I.A.A. 516, 529-31 (1929).

Although it seems that fault is not a general condition of liability, it will, however, play an important role in certain contexts where there is insufficient guidance to the existence of fault in the content of a particular obligation. Brownlie for example, cites obligations to control certain activities and suggests that in this type of case, questions of knowledge or awareness may be important in establishing an omission to act. This may be established in two ways—direct and constructive knowledge.²¹⁵ In the *Corfu Channel Case*, the court utilized the latter and concluded that it was not possible that the laying of the minefield could have been accomplished without the knowledge of the Albanian Government.²¹⁶

In summary, the clearest approach to fault can be stated in several propositions:

1. The need for fault is guided by the particular obligation in question.
2. If there is no indication as to the degree of fault in that obligation, look at the general rule.
3. The general rule seems to apply objective responsibility.
4. If the obligation involves the necessity to control certain activities—knowledge or awareness may be an important factor.

In light of these principles, it is necessary to analyze the general customary international law obligations to see if fault is a further prerequisite of wrongfulness under Article 3 in this case.

2. Application of these principles to the factual context

Because neither of the general customary international law obligations offer particular indications as to the presence of fault,²¹⁷ it is necessary to resort to the general rule of objective responsibility. In applying the general rule there appears to be wrongfulness by virtue of result alone. However, because these are obligations to control certain activities, knowledge may be an important factor in the present factual context. Whether or not states were aware that arms were being exported has already been addressed, resulting in the conclusion that a positive finding of constructive knowledge would be made.

In summary, if fault is not viewed as a requirement of either of the general obligations, the issue of fault is irrelevant. However, if it is

215. See *supra* *Government Involvement and Awareness*, sec. I.B.

216. *Corfu Channel*, 1949 I.C.J. at 18, 22. Note that “knowledge” in that case was part of the content of the particular obligation.

217. At this point, an explanatory note is needed so as to avoid confusion. Although the concept of foreseeability as explained with respect to this narrow obligation may at first glance appear similar to conceptions of fault, it is actually very different. Foreseeability as described constitutes part of the content of the obligation. The question of fault, on the other hand, involves asking whether or not in addition to the foreseeability of weapon use, the state also needs to intentionally or negligently supply arms. Hence, to use a domestic law analogy, “foreseeability” is a part of the “actus reus,” while fault relates to the “mens rea.”

required, wrongfulness would depend upon the knowledge of the export of weapons of mass destruction in either the direct or constructive senses.

D. Damage

Draft Article 3 does not mention the issue of damage, thus it is necessary to question whether it is also a precondition for the existence of an internationally wrongful act.

It is possible to place damage into three categories. First, there is "material" or "economic" damage which will exist where the wrongful act results in a loss which is capable of exact financial calculation. Second, there is "moral" or "political" damage which is less specific and for which the award of compensation is not quantifiable.²¹⁸ Lastly, there is "legal" damage which is the result of the actual breach of the international obligation alone. It is assumed that an obligation imposed on one state corresponds with the subjective rights of others, thus the mere breach of an obligation violates those subjective rights resulting in "legal" damage.²¹⁹ Further, the violation of the subjective rights of others, irrespective of some tangible injury will be a sufficient basis for wrongfulness under Article 3.²²⁰

Therefore, sufficient damage will always exist where there is a wrongful act—because "legal" damage is not an "element distinct from, but rather a constituent element of"²²¹ such an act. Hence, the issue of what damage was suffered by the materially injured state is more related to the "consequence of responsibility" to be discussed below. In other words, whether or not the injured state suffered "legal," "moral," or "material" damage, will effect the locus standi that state may have in order to seek a remedy, but it will not detract from the existence of a wrongful act.

Therefore, as there was a violation of the general customary international law obligations in this case, there was also a corresponding violation of subjective rights and thus sufficient damage for the existence of a wrongful act.

E. Summary

In summary, it has been demonstrated that there was conduct on the part of the relevant supplier states that constituted the breach of the general

218. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 458 (3d ed. 1979). For example, the violation of diplomatic immunities or trespass in the territorial sea. *Id.* at 457-58.

219. See Atilla Tanzi, *Is Damage a Distinct Condition for the Existence of an Internationally Wrongful Act?*, in UNITED NATIONS CODIFICATION OF STATE RESPONSIBILITY 1, 8 (Marina Spinedi & Bruno Simma eds., 1987).

220. *Id.* at 8; see also Bernhardt Graefrath, *Responsibility and Damages Caused: Relationship between Responsibility and Damages*, 185 REC. DES. COURS 34 (1984-II) (on file with author).

221. Commentary to Draft Articles YBILC (1973) II 183-184.

customary international law obligations, and at least in the cases of Germany and the former USSR, that conduct was shown to be attributable to the state. In addition, the two other preconditions of fault and damage were also analyzed. With regard to fault, we concluded that if it is required in the context of these obligations, it requires actual or constructive awareness (the presence of which is almost certain in the present circumstances). With regard to the latter, "legal" damage (which is necessarily present in this case by virtue of the violation of the subjective rights of others) was shown to be a sufficient precondition for the existence of wrongfulness.

The only conclusion that can be reached in light of these factors is that there is wrongfulness on the part of Germany, the former USSR and possibly the other supplier states in the sense prescribed by Article 3 of the Draft Articles. With this conclusion in mind, it is now necessary to consider whether there is also any wrongfulness under Draft Article 27, or any indirect aggression.

IV. ARTICLE 27 AND INDIRECT AGGRESSION²²²

A. Article 27

Whereas a wrongful act under Article 3 depends upon the breach of an international obligation, Article 27 will imply wrongfulness where conduct, although not in itself a violation of an obligation, aids or assists another state to commit an internationally wrongful act.²²³ This will occur when the following three elements are present.

1. Existence of the Principal Act

The existence of wrongful participation is necessarily dependent upon the existence of a principal internationally wrongful act, that is, an act by the assisted state which is wrongful under Draft Article 3. The present context demonstrates the presence of several such acts on the part of Iraq. Of primary importance is Iraq's breach of the prohibition on the use of force in Article 2(4) of the U.N. Charter.²²⁴ In addition, Iraq has also breached several other obligations:

222. Supplier states are now referred to as "participating states"—i.e., they participate in the wrongful act of another state.

223. Draft article 27, *supra* note 3 ("Aid or assistance by a State to another State, if it is established that it is rendered for the Commission of an internationally wrongful act even if, taken alone, such aid or assistance would not constitute the breach of an international obligation.").

224. In fact, such a breach of an international obligation would actually constitute an international crime, as it constitutes "the breach of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime. . . ." Draft Article 19, *supra* note 3.

(a) In clandestinely attempting to assemble nuclear weapons it breached Article III of the Nuclear Non-Proliferation Treaty;

(b) Assuming the Biological Weapons Convention is probably norm-creating,²²⁵ Iraq's efforts to produce biological weapons violated that international obligation; and

(c) Use of chemical weapons in the Iran-Iraq War was clearly in contravention of the Geneva Protocol.²²⁶

2. Aid or Assistance

The second element requires that the conduct of the participating state must actually "aid or assist" the primary act. In this regard, if it is presumed that Iraq's principal act is the act of aggression, then the examples of aid or assistance illustrated by the ILC are pertinent. First, is the placement of territory at the disposal of another state for it to use in perpetrating an act of aggression against a third state.²²⁷ Second, and perhaps more importantly it notes that: "another classic and frequently cited example of complicity is that of a state that supplies another with weapons to attack a third state."²²⁸

This example is most relevant if Iraq's principal act is characterized as an act of aggression. However, this example is also relevant in many other situations, so that supply of weapons to aid in the breach of any obligation would also, no doubt, constitute aid or assistance.

There is an important distinction here, because most states (apart from the former USSR) merely acquiescing in the supply or assisted by conduct of omission rather than commission. However, it appears likely that this can also be classified as aid or assistance because of the dual meaning given to the word "conduct" throughout the Draft Articles.²²⁹ Moreover, this acquiescence may also be said to constitute aid or assistance by virtue of an adoption by the state of the conduct of those private persons, similar to the adoption of the conduct of private persons in the context of Article 3.²³⁰

3. Intent

In addition to having materially facilitated the perpetration of the international offence by the other state, in order to imply a wrongful act the conduct must also have been intended to enable its commission:

225. See *supra* note 82.

226. *Id.*

227. Definition of Aggression Resolution, G.A. Res. 3314, U.N. GAOR, 29th Sess., 2319 mtg., at 393 (art. 3(f)) (1974).

228. *Id.*

229. See Draft Article 3, *supra* note 3 (defining "conduct" as including both acts and omissions. Thereafter, the Draft Articles merely refer to "conduct.").

230. See United States Diplomatic and Consular Staff in Teheran, 1980 I.C.J. 33.

The very idea of 'aid or assistance' to another state for the commission of an internationally wrongful act, necessarily presupposes an *intent* to collaborate in the execution of an act of this kind . . . and hence knowledge of the specific purpose for which the state receiving certain supplies intends to use them.²³¹

Application of this requires proof that the supplier states actually acquiesced in the supply to Iraq with more than merely reckless disregard or negligence. What is required is an intention to collaborate in either: (a) the invasion of Kuwait; (b) breach of the Nuclear Non-Proliferation Treaty; (c) breach of the Biological Weapons Convention; or (d) contravention of the Geneva Protocol. In light of the analysis in previous sections, however, where it was shown that the only fault present in the supplier state's conduct was either direct or constructive awareness, it seems clear that the intent required by this element is not present in this case.

Therefore, in conclusion, it seems unlikely that a wrongful act may be said to exist via Article 27.

B. Indirect Aggression

Aside from Article 27 there is the overlapping and almost identical concept of "indirect aggression" which is generally given two main meanings by international lawyers. First, there are those who illustrate the concept by reference to acts taken against another state involving an indirect or vicarious use of force by third parties.²³² The supply of weapons by one state to an aggressor would serve as such an example, as would aiding rebels within another state or the sending of armed bands to another's territory.²³³ It should be noted that some of these examples are now embodied in the Definition of Aggression Resolution adopted by the UNGA.²³⁴ However, the consequence of such acts would differ from Article 27, in that, if such an act is established and there is control by the state over the third party, instead of there being a wrongful act, there will in fact be an act of aggression by the assisting state.

Second, there are writers and publicists who speak of:

the increasingly numerous forms of attack upon the integrity of a state by other than the traditional means of military attack. . . . These range from the many types of ideological and political propaganda and psychological warfare, by radio, by aerial leaflets etc. to the organization of subversive, political movements inside another country, the systematic infiltration of

231. Report of the Commission to the General Assembly on the Work of its Thirtieth Session, [1978] 2 Y.B. Int'l L. Comm'n 62, U.N. Doc. A./CN.4/SER.A/1978/Add. 1 (Part 2) (emphasis added).

232. ANN V.W. THOMAS & A.J. THOMAS, JR., THE CONCEPT OF AGGRESSION IN INTERNATIONAL LAW 65 (1972).

233. IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 369 (1963).

234. E.g. Art. 3(g).

political agents and the systematic strangulation of a regime by comprehensive trade boycott.²³⁵

The literature is considerably vague as to the precise consequence of these acts. Some would simply label it "aggression,"²³⁶ yet others complain that this is "liable to extend the concept of aggression indefinitely,"²³⁷ citing omission of these acts from the *Definition of Aggression Resolution* as support for this view.

In the ultimate analysis however, like Article 27, the essence of both of these concepts of "indirect aggression" is the presence of intention and a deliberateness to undermine the security of another state. In the absence of this it is, therefore, difficult to argue that the act should be categorized as "aggression."

Therefore, in this case, the conclusion from the analysis of Article 27 is equally applicable. Even though, *prima facie*, the supply of weapons to an aggressor would constitute an act of indirect aggression, this conclusion is negated by the absence of deliberateness on the part of those supplying states to either commit an act of aggression or directly "strangle" the injured states by non-military means. As a consequence, the foregoing analysis reveals that in the present case, it cannot be stated that the omissions of the supplier states were wrongful under Article 27 or indirect aggression because of the absence of deliberateness or intent.

Nevertheless, it must be remembered that this does not detract in any way from the presence of any wrongfulness that may exist through the Article 3 type analysis. Therefore, it is to that form of wrongfulness that it is now necessary to return in order to consider its legal consequences.

V. CONSEQUENCES OF A WRONGFUL ACT

Having examined the determinants of an internationally wrongful act, consideration will now be given to the proposition that the consequence of every such act is to entail the state's international responsibility.²³⁸ Simply, this means that the defendant state is obliged to make reparation to the "injured state" in an adequate form.²³⁹

235. FRIEDMANN, *supra* note 12, at 262.

236. THOMAS & THOMAS, *supra* note 232, at 88-89.

237. THOMAS & THOMAS, *supra* note 232, at 88-89.

238. Draft Article 1: "Every internationally wrongful act of a state entails the international responsibility of that state."

239. *Factory at Chorzów*, (F.R.G. v. Pol.), 1928 P.C.I.J., (ser. A) No. 13, at 21-23 (Sept. 13).

A. Remedies

All remedies in international law are covered by the generic term "reparation" and their object is to: "wipe out as far as possible all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."²⁴⁰

There are three main types of reparation: compensation, restitution, and satisfaction. Compensation refers to the payment of money as a valuation of the wrong done,²⁴¹ while restitution involves actual restoring the parties to their original position.

Satisfaction, on the other hand, may be defined: "as any measure which the author of a breach is bound to take under customary law or under an agreement by the parties to a dispute, apart from compensation or restitution."²⁴² These measures which are essentially "moral" or "political" will include: the taking of steps to prevent recurrence of the wrongful act, apologies, or the acknowledgement of wrongdoing by other means.

Bearing this in mind, both Kuwait and Israel would most likely be seeking a mixture of satisfaction and compensation type remedies. First, acknowledgement of the wrongdoing would be sought, either as an apology or perhaps in the form of a token payment.²⁴³ The only restraint on such demands are that the measures should not be humiliating or excessive.²⁴⁴ Second, there would no doubt be a request for immediate measures to be taken to tighten export controls to prevent recurrence of the wrongful acts. Finally, compensation would most likely be requested for the material damage suffered.

This last demand would be difficult to satisfy because of the problem of its quantification. In the average claim for compensation:

The duty to make reparation extends only to those damages which are legally regarded as the consequences of an unlawful act. These are damages which would normally flow from such an act, or which a reasonable man in the position of the wrongdoer would have foreseen as likely to result. . . .²⁴⁵

In the current context, it would have had to have been foreseen that the consequence of failing to prevent the export of weapons of mass destruction would be damage of the type Kuwait and Israel suffered. This is intimately

240. *Id.* at 47.

241. BROWNLIE, *supra* note 75, at 458.

242. *Id.* at 46.

243. As for example where the U.S., even though ordered not to pay compensation to Canada, was required to pay the sum of \$25,000 to the Canadian Government "to apologize to His Majesty's Canadian Government therefore," *I'm Alone Case*, 1935 R.I.A.A. iii 1609.

244. BROWNLIE, *supra* note 75, at 460-61.

245. CHENG, *supra* note 213, at 253; *see also* *The Angola Case*, Award I, 1928 R.I.A.A. II 1011.

connected with the analysis of foreseeability discussed previously. If (as concluded there) it was foreseeable that the weapons would be used in an aggressive manner, then this would also suggest that the resulting damage from such use would also have been foreseen, thus making it a proper claim for compensation.

Conversely however, it is clear that much of the damage caused to Kuwait was simply not foreseeable. Was it a foreseeable consequence of the failure to control non-conventional weapons exports to Iraq, that Iraq would use conventional explosives to destroy Kuwait's oil wells? This clearly appears to be an inadmissible extension of responsibility because only damage from the use of non-conventional weapons could have been foreseen.

Assuming that these would be the types of remedies sought, we now need to examine how the injured state might seek such redress.

B. Forum

1. Preliminary Observations

At this point, before surveying the forums in which such reparation could be sought, it is worth observing that in fact, such remedies were in essence already partly made to the injured states. At the peak of the Gulf crisis for example, Germany undertook the following measures with respect to Israel:

- (1) It made promises that it would tighten its export regulations;²⁴⁶
- (2) It advanced \$213 million in "Emergency Aid";²⁴⁷ and
- (3) It agreed to send substantial military aid.²⁴⁸

With respect to Kuwait—supplier states essentially tried to make good their "wrong" by rescuing Kuwait from virtual liquidation. However, as significant as these measures are in politically satisfying the injured states, they do not acknowledge any wrongful or illegal activity.

In that sense, this case is very similar to the Nuclear Tests Case.²⁴⁹ There, Australia sought both a cessation of atmospheric nuclear testing by France, and a judgement declaring such tests to be inconsistent with international law. The majority held that because France had agreed to cease testing and had given an undertaking to that effect, the "dispute" had

246. Jonathan Karp, *Germany and France Move to Soothe Israel*, THE AGE, Jan. 26, 1991, at 7.

247. Richard Murphy, *Kohl Promises Allies Cash and \$213m for Israel*, THE AUSTRALIAN, Jan. 25, 1991, at 6.

248. Germany advanced \$A870m in military aid for Israel, including two submarines and equipment such as the Fox armored cars for the detection of chemical weapons. See Forbes, *supra* note 52, at 8.

249. Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253 (Dec. 20).

resolved itself, no further judicial action was required.²⁵⁰ However, the minority,²⁵¹ in a vigorous dissent, concluded that:

In our view the dispute between the parties has not disappeared since it has concerned, from its origin, the question of the legality of the tests. . . . It is true that from a factual point of view, the extent of the dispute is reduced . . . but from a legal point of view, the question which remains in dispute is whether the atmospheric nuclear tests which were in fact conducted in 1973 and 1974 were consistent with the rule of international law.²⁵²

A declaratory judgement would have answered this question, it would have given Australia the legal "satisfaction" it requested in its application. Similarly in the present case, if the injured states sought further vindication of their claims in addition to political satisfaction, they would have to pursue one of the traditional methods of dispute settlement.

2. Methods of Dispute Settlement²⁵³

The principle methods of dispute settlement involve Negotiation, Good Offices, Arbitration and Judicial settlement.²⁵⁴ The final two differ significantly in that the parties will be legally bound by the decision of a third party. Because the first three methods are essentially political in nature, and Arbitration depends specifically upon the appointment of an arbitrator, our attention will be focussed on Judicial settlement, which involves recourse to the I.C.J. Access to that forum requires the Court to have jurisdiction to hear the case, as well as standing on the part of the plaintiff state.

With regard to the first requirement, in order for the I.C.J. to hear either Israel's or Kuwait's case, it must have either "conventional"²⁵⁵ or "compulsory"²⁵⁶ jurisdictions granted to it by Articles 36(1) and 36(2) respectively of the *Statute of the I.C.J.* Considering first Article 36(1), if the defendant state agreed to refer the matter to the I.C.J., jurisdiction would be acquired over the dispute. However, this is unlikely to occur. Furthermore, this is *not* a matter specifically provided for under any other treaty or convention

250. *Id.* at 271, para. 56.

251. *Id.* at 312-19 (separate opinion of Judge Onyeama, et al.).

252. *Id.* at 319, para 19.

253. U.N. Charter art. 33. Under Article 33 of the U.N. Charter, the parties to any dispute are obliged to seek a peaceful settlement by means of their own choice.

254. JULIUS STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* 67 (1954).

255. That is, it will have jurisdiction over "all cases which the parties refer to it and all matters specifically provided for in the charter of the U.N. or in treaties and conventions in force."

256. It enables the Court to hear all legal disputes between States that have declared "as compulsory ipso facto and without special agreement in relation to any other State accepting the same obligation, the jurisdiction of the Court."

in force. Accordingly, we need to turn to Article 36(2). There is also a difficulty with this alternative because none of the states concerned—Israel, Kuwait, Germany, France, Italy, the U.S. or the former USSR—presently recognize the jurisdiction of the Court.²⁵⁷

Therefore in this case, it appears there exists no possibility of Judicial settlement. The question of standing, even though a legally important and complicated question, merely becomes a moot point. Further, unless an arbitrator can be appointed, the only forum to address the issue is an essentially political one.

C. Summary

In summary, there are a number of types of reparation available that might be sought by injured states in various different forums. Unfortunately, however, the analysis above can only lead to the conclusion that the solution to such a dispute is essentially political. Moreover, in view of the fact that the ICJ, is in essence, representative of the role of international law in international relations, its importance in the context of this issue is quite symbolic. Despite this, it must still be kept in mind that although the legal effect here is unsatisfying, this does not mean that international law on this point is non-existent. In other words, just because an injured state would have difficulty achieving a remedy, this does not detract from the existence of a wrongful act or lessen the effect that this may have in deterring future wrong-doers.²⁵⁸

CONCLUSION

The foregoing analysis has revealed a number of legal conclusions. First, it was demonstrated that the two components required for the existence of wrongfulness under Article 3 were present, at least with respect to Germany and the former USSR. That is, it was demonstrated that there are international obligations that bind states to prevent the export of weapons of mass destruction either *erga omnes* or merely to some states, and, that these obligations were breached by conduct consisting of acts and omissions, attributable to the state organs of these states.

Second, because neither of these states harbored any intention to undermine the security of either Kuwait or Israel, these acts or omissions

257. See 1978-88 I.C.J. YEARBOOK 62. n.1. Israel, France and the U.S. have all withdrawn their declarations of acceptance, while Kuwait, Germany and the former USSR never made any at all.

258. At this point, it would be worthwhile providing some suggestions as to how international law might strengthen its enforcement machinery with respect to these anti-proliferation obligations. Unfortunately, however, this discussion is beyond the boundaries of this article.

cannot be characterized as either wrongful under Article 27 or as “indirect aggression.”

Finally, it was demonstrated that the consequence of this wrongfulness is to engage the international responsibility of these states and to require the provision of some form of reparation, be it either compensation, restitution or satisfaction. However, in this case, it was shown that the means to achieve such reparation would be limited to non-judicial forums due to the ICJ’s lack of jurisdiction. Accordingly, despite the existence of substantive wrongs under international law, procedural hurdles would frustrate facilitation of any such redress, rendering the resolution of any such dispute dependent on political rather than legal considerations.

It is the placement of this entire issue within the framework of such political realities that leads to another conclusion which is more far reaching in its effect upon the future of non-conventional arms proliferation. For in a sense, the elements of this case crystallize the essence of the debate between realism and idealism in international affairs. On the one hand, classic realists such as Morgenthau would argue that “The struggle for power is universal in time and space and is an undeniable fact of experience. It cannot be denied that throughout historic time, regardless of social, economic and political conditions, states have met each other in contests for power.”²⁵⁹

On this view, because non-conventional armaments represent a crucial element in the attainment of such power, international law would be overridden by this reality and denied an effective role in the regulation and control of these weapons. Indeed, many have expressed the opinion that the ICJ’s implicit refusal to deal with the politically important issue of nuclear testing in the Nuclear Tests Case²⁶⁰ reflects such an appreciation on its part.²⁶¹

On the other hand, however, idealists would argue that such realism viewed on its own is a flawed perception because realism divorced from idealism is likely to be self-defeating and counterproductive to a state’s national interests and would lead to stagnation in its development and relations with other states. It is in that sense that international law acts as an important restraint upon the forces of realism and pushes forward the processes of consensus and cooperation. It is this conception that led Schachter to conclude that: “power is, so to speak absorbed and in a degree transcended by an arrangement in which common standards and rules are

259. He defines power to mean man’s control over the acts and minds of other men. HANS J. MORGENTHAU, *POLITICS AMONG NATIONS* 4, 31 (4th ed., 1967).

260. *Nuclear Tests*, 1974 I.C.J. 253.

261. See Pierre Lellouche, *The International Court of Justice, The Nuclear Tests Cases: Judicial Silence v. Atomic Blasts*, 16 HARV. INT’L L.J. 614 (1975).

reciprocally observed and implemented by [the] institutional mechanism of international law."²⁶²

Therefore, perhaps in contrast to the stark pessimism of *realpolitik*, a more satisfactory analytical and normative view is that international law is an effective controlling influence upon the action of states in their pursuit of political power. This is important because it shows that when international law proposes rules for the regulation of a state's conduct, any state that acts in their violation is not acting in its own best interests.

Similarly, in this case, this leads to the conclusion that the existence of obligations to prevent the export of weapons of mass destruction does much more than simply govern the present dispute. It places an important warning on other states concerning their future conduct and demonstrates that by avoiding the breach of these international obligations, they will ensure their own best interests and avoid international opprobrium. Therefore, the major importance of international legal obligations such as those considered in this article is to achieve a result whereby "most nations will observe most rules for most of the time."²⁶³ For it is only the clarification of such recognized rules of international behavior, coupled with a decrease in ideological and political tensions, that will help restrain the naked pursuit for power, and enable it to be channelled in directions that help preserve the most basic human interests of peace and security.

262. Oscar Schachter, *The Structure and Purpose of International Law*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW* 745, 753 (R. St. J. MacDonald & Douglas M. Johnston eds., 1983).

263. LOUIS HENKIN, *HOW NATIONS BEHAVE* 47 (2d ed. 1979).

APPENDIX

Type of Weapon	Obligation	Source	Whom it binds	Why
Biological Weapons	1. Not to use	Geneva Protocol 1925	All P & NP	Binds NP because it is accepted that Gen. Protoc. is "norm-creating"
	2. Not to transfer, assist, induce, encourage	Article III biological weapon Conven.	All P & Possibly NP	NP will be bound if this is seen as "norm creating"
	3. Not to produce	Article I biological weapon Conven.	All P & Possibly NP	As above
Chemical Weapons	1. Not to use	Geneva Protocol 1925	All P & NP	As for biological weapons use
	2. Not to transfer, assist, induce, encourage	Custom or emerging custom. Evidence=(i) Chemical Weapons Convention, "rolling text." (ii) Paris Declaration (iii) Canberra Conf. Declaration (iv) Australia Group Agreement (v) SC Resolutions (vi) Widespread Domestic Legislation (vii) Policy Initiatives & Announcements	All states	If the custom exists as a rule of customary international law, it will prima facie bind all states
Ballistic Missiles	1. Not to transfer	Custom or emerging custom	All states	Unsure if custom as yet
Nuclear Weapons	1. Not to transfer, assist, induce, encourage	Articles I and III Nuclear Non-Proliferation Treaty or Custom Evidence = (i) Nuclear Non-Proliferation Treaty (ii) Nuclear Supplier Guidelines and Nuclear Exporters Committee (iii) SC Resolutions (iv) Domestic Legislation	All P to Nuclear Non-Proliferation Treaty - probably not NP All states (i.e.: would bind P & NPs to Nuclear Non-Proliferation Treaty)	It seems unlikely that the Nuclear Non-Proliferation Treaty is norm-creating
	2. Not to Produce	Article II Nuclear Non-Proliferation Treaty	All P to Nuclear Non-Proliferation Treaty - probably not NP	Unlikely that Nuclear Non-Proliferation Treaty is norm-creating

*P=Parties, NP=Non-Parties