At the Vanishing Point of International Law: A Classical Realist Analysis of Arms Control and Disarmament

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Thesis submitted for the award of the degree of
Doctor of Philosophy in International Relations
University of Kent
May 2023

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98,100 words

Abstract

This thesis addresses the questions that the laws of war present as the vanishing point of international law, wherein they are subject to the forces of political and national interests, and examines the limits of the law as seen through arms control and disarmament treaties. It does this through the use and employment of international law and international relations theory, focusing primarily on what international law can achieve when regulating heavily political issues. The research conducted in this thesis is guided by the following three questions: a) Why and how did an international legal regime emerge in relation to arms control and disarmament? b) Has this international legal regime been successful in maintaining a taboo over the use of biological, chemical, nuclear, and conventional weapons? c) How can instances of failure to observe the taboo be best explained? This thesis is, therefore, an investigation into the 'how' and 'why' of the laws of arms control and disarmament and, more particularly, into the relevance of the principle *inter arma enim silent lēgēs*—in times of war the laws are silent. It confronts the prevailing analysis of the international laws of arms control and disarmament, deepening it through the application of classical realist scholarship, as well as the notion that the way we conventionally think about international law is in need of serious revision. The usage of the works of E.H. Carr, Hans J. Morgenthau, and Georg Schwarzenberger allows for new insights which would otherwise not be possible. The works and theories of these three theorists allow us to think through the implications of eroded taboos by political necessity and what it means for the fabric and overriding logic

of international society. By employing them, this thesis bridges the divide between international law and international relations scholarship, and benefits from the expertise of both of these fields.

Acknowledgements

I would first and foremost like to express my deepest gratitude to my supervisors, Dr Seán Molloy and Dr Rubrick Biegon, as without them I would not have been able to carry this project to completion. I have benefitted enormously from their intellectual guidance and encouragement over the past five years. It is only through their continuous mentorship and kind support that I have been able to develop and complete this project. I am also extremely thankful for their guidance and support in the preparation of journal articles, which allowed me to develop my writing and research skills to what they are today and without which I would not have been able to publish part of this thesis' fourth chapter as a journal article. I consider myself deeply fortunate to have had them as my supervisory team over the past five years.

I would also like to extend my sincere thanks to the School of Politics and International Relations at the University of Kent for awarding me the Vice Chancellor's Research Scholarship, which allowed me to pursue my doctoral studies and granted me the opportunity to work as an Assistant Lecturer. I would not have been able to achieve the status of Associate Fellow of Advance HE without this experience, for which I am deeply grateful. I am also thankful to the School of Slavonic and Eastern European Studies, the Institute of the Americas, the Department of Philosophy, and the Institute for Risk and Disaster Reduction at the University College London, which also indirectly supported my doctoral studies and professional development through my stay as a Post Graduate Teaching Assistant. Teaching students has been a vital aspect of my doctoral

studies, and I would therefore like to express my thanks to Dr Luca Mavelli, Dr Ben Turner, Dr Harmonie Toros, Dr Aglaya Snetkov, Dr Rasmus Nilsson, Dr William A. Booth, Dr Colin Chamberlain, and Dr Philip Cunliffe for allowing me to teach in their modules. I would also like to sincerely thank Dr Seán Molloy for giving me the opportunity to work as a research assistant, which I deeply enjoyed.

A special thanks also goes to my family, which encouraged me to undertake my doctoral studies. I would like to thank my parents, Pedro Luis Chas Alonso and Carmen Bartolomé Peña, for their continuous and ever-present support throughout my studies. I would not have been able to undertake my undergraduate, master's, and doctoral studies without their constant encouragement and financial support. Finally, I would also like to thank Thomas James Jenkins for his constant support throughout this project.

Table of Contents

ABSTRACT ..... **I**

ACKNOWLEDGEMENTS ..... **III**

LIST OF ABBREVIATIONS AND ACRONYMS ..... **IX**

INTRODUCTION **1**

0.1 ARMS CONTROL AND DISARMAMENT **1**

0.2 INTER ARMA ENIM SILENT LEGES **8**

0.3 THEORY, METHODOLOGY, AND FOCUS **10**

0.4 ARCHITECTURE OF THE THESIS **26**

CHAPTER I. TREATIES, TABOOS, AND WEAPONS PROHIBITIONS: NORMS AND LEGAL PRINCIPLES **31**

1.1 INTRODUCTION **31**

1.2 NUCLEAR WEAPONS **37**

1.2.1 The Nuclear Taboo 38
1.2.2 Nuclear Arms Control and Disarmament Treaties 43
1.2.2.1 Early treaties *44*
1.2.2.2 The SALT agreements *49*
1.2.2.3 Post-Cold War Treaties *52*

1.3 CHEMICAL AND BIOLOGICAL WEAPONS **57**

1.3.1 Early Chemical and Biological Treaties 60
1.3.2 The Biological and Chemical Conventions 65
1.3.2.1 The Biological Weapons Convention *66*
1.3.2.2 The Chemical Weapons Convention *69*

1.4 CONVENTIONAL WEAPONS **72**

1.4.1 Origins of Conventional Arms Control 73
1.4.1.1 Pre-WW1 Treaties *73*
1.4.1.2 Interwar Treaties *78*
1.4.1.3 The Significance of these Treaties *82*
1.4.2 Conventional Weapons in Contemporary International Law 87
1.4.2.1 The Convention on Certain Conventional Weapons *87*
1.4.2.2 The Convention on Anti-Personnel Mines *90*
1.4.2.3 The Convention on Cluster Munitions *92*
1.4.2.4 The Arms Trade Treaty *97*

1.5 CONCLUSION **100**

CHAPTER II. VIOLATIONS OF INTERNATIONAL ARMS CONTROL AND DISARMAMENT TREATIES **106**

2.1 INTRODUCTION **106**

2.2 ISSUES CONCERNING TREATY VIOLATIONS **109**

2.2.1 The unreliability of information 110
2.2.1.1 Transparency *113*
2.2.1.2 Verification *115*
2.2.2 Political interests in allegations of noncompliance 116

2.3 NUCLEAR WEAPONS **120**

2.3.1 Non-Proliferation Treaty ... 120
2.3.1.1 Iraq ... 121
2.3.1.2 North Korea ... 124
2.3.1.3 Iran ... 127
2.3.1.4 Libya ... 130
2.3.1.5 Article VI ... 132
2.3.2 Anti-Ballistic Missile Treaty ... 136
2.3.3 Threshold Test Ban Treaty ... 138
2.3.4 SALT II ... 139
2.3.5 Intermediate-Range Nuclear Forces Treaty ... 142
2.3.5.1 New allegations of non-compliance ... 143
2.3.5.2 Underlying Interests and Reaction ... 145
2.3.6 New START ... 148

2.4 CHEMICAL WEAPONS ... 152

2.4.1 Iraq's Chemical Weapons ... 153
2.4.1.1 The UNSCOM Investigation ... 154
2.4.1.2 Motivations and Significance ... 156
2.4.2 Syria's Chemical Weapons ... 158
2.4.2.1 Overview of the Events ... 159
2.4.2.2 Significance of the events ... 163
2.4.3 Russia and Navalny ... 167
2.4.4 Other Allegations of Non-Compliance ... 172
2.4.4.1 Libya ... 172
2.4.4.2 South Africa ... 174

2.5 BIOLOGICAL WEAPONS ... 175

2.5.1 The Soviet Biological Weapons Program ... 177
2.5.1.1 The Sverdlovsk Incident ... 179
2.5.1.2 Biopreparat: Soviet Development of Biological Weapons ... 181
2.5.1.3 Interests behind the biological weapons program ... 184
2.5.2 Iraq's Biological Weapons Program ... 188
2.5.3 Other Allegations of Non-Compliance ... 190
2.5.3.1 Iran ... 191

2.6 CONVENTIONAL WEAPONS ... 193

2.6.1 Anti-personnel Mines ... 194
2.6.1.1 Turkey ... 195
2.6.1.2 Yemen ... 196
2.6.2 The Arms Trade Treaty ... 197
2.6.2.1 Reports to the Arms Trade Treaty ... 198
2.6.2.2 Non-compliance with the ATT ... 202

2.7 CONCLUSION ... 204

CHAPTER III. E.H. CARR'S THEORY OF INTERNATIONAL LAW ... 209

3.1 INTRODUCTION ... 209

3.2 CARR'S THEORY OF LAW ... 213

3.2.1 Pre-1939 Works ... 216
3.2.1.1 The Nature of International Law ... 216
3.2.1.2 National Interests ... 220
3.2.1.3 The Problems of Treaties ... 224
3.2.2 Post-1939 Works ... 229
3.2.2.1 Nationalism ... 229
3.2.2.2 Uncertainty in Treaties ... 233
3.2.2.3 The historical bias of the law ... 235

3.2.2.4 Status Quo and National Interests ... 238

3.3 THE QUESTION OF DISARMAMENT ... 240

3.3.1 General Aspects of Disarmament ... 243
3.3.1.1 Interwar Naval Limitations ... 243
3.3.1.2 The Disarmament Conference ... 246
3.3.1.3 Implications ... 247
3.3.2 Germany's disarmament and rearmament ... 249
3.3.2.1 The Treaty of Rapallo ... 250
3.3.2.1 Military and Naval Collaboration ... 252
3.3.3 Soviet and German foreign policy ... 254
3.3.3.1 Germany ... 254
3.3.3.2 The Soviet Union ... 256

3.4 CONCLUSION ... 261

CHAPTER IV. INTERNATIONAL LAW, ARMS CONTROL, AND DISARMAMENT IN HANS J. MORGENTHAU'S THEORY OF LAW ... 268

4.1 INTRODUCTION ... 268

4.2 MORGENTHAU'S PRE-1939 WORKS ... 273

4.2.1 The nature of the law ... 273
4.2.2 Domestic law vs international law ... 277
4.2.3 Legal sanctions ... 281
4.2.4 The concept of the political ... 286

4.3 MORGENTHAU'S POST-1939 WORKS ... 291

4.3.1 Domestic law vs international law ... 291
4.3.2 International treaties ... 295
4.3.3 International organisations ... 299
4.3.4 Politics, justice, and ethics ... 302
4.3.5 National interests, imperialism, and the 'status quo' ... 308

4.4 DISARMAMENT AND ARMS CONTROL ... 313

4.4.1 Concepts and definitions ... 313
4.4.2 The political background of arms control and disarmament ... 315
4.4.3 Historical cases ... 320
4.4.4 Nuclear arms control and disarmament ... 323

4.5 CONCLUSION ... 330

4.5.1 The nature and role of international law ... 331
4.5.2 The effect of politics on international law ... 335

CHAPTER V. GEORG SCHWARZENBERGER: THE REALITY AND POWER OF INTERNATIONAL LAW ... 340

5.1 INTRODUCTION ... 340

5.2 PRE-1939 WORKS ... 346

5.2.1 Force and morality in international law ... 346
5.2.2 The question of universality ... 353
5.2.3 The balance of power ... 357

5.3 POST-1939 WORKS ... 359

5.3.1 Municipal vs international law ... 359
5.3.2 The historical and sociological perspectives of international law ... 364
5.3.3 Ethics in international law ... 369
5.3.4 The laws of power, co-ordination, and reciprocity ... 372
5.3.5 Sovereignty and Nationalism ... 378

5.4 THE LAWS OF WAR 382

5.4.1 DE JURE BELLI ET PACIS 382
5.4.2 THE FUNCTION OF THE LAWS OF WAR 385
5.4.3 THE STANDARD OF CIVILISATION 388
5.4.3.1 The idea of humanity 388
5.4.3.2 Loss of civilisation 391
5.4.4 NUCLEAR WEAPONS 395

5.5 CONCLUSION 399

CONCLUSION 407

6.1 THE LEGAL RESTRICTIONS AND TABOOS SURROUNDING ARMS RESTRICTIONS HAVE BEEN ERODED DUE TO POLITICAL NECESSITIES AND INTERESTS 411

6.2 NUCLEAR WEAPONS ARE UNIQUELY AFFECTED BY POWER POLITICS 416

6.3 ARMS CONTROL AND DISARMAMENT TREATIES ALL ORIGINATE WITHIN A NECESSARY POLITICAL BACKGROUND 418

6.4 DISARMAMENT AND ARMS CONTROL TREATIES ARE DEFINED BY THEIR FUNCTION AND ROLE IN INTERNATIONAL SOCIETY 421

6.5 INTERNATIONAL AND NATIONAL LAW ARE INHERENTLY DIFFERENT 424

6.6 THE PROBLEMS RELATED TO THE STRUCTURE, STRENGTH, AND REACH OF INTERNATIONAL TREATIES AFFECTS THEIR ROLE IN INTERNATIONAL SOCIETY 428

6.7 INTERNATIONAL ORGANISATIONS ARE PROFOUNDLY AFFECTED BY POWER POLITICS 432

6.8 POWER AND ETHICS HAVE PROMINENT AND COMPETING EFFECTS ON INTERNATIONAL LAW 434

6.9 THE ROLE OF NATIONAL INTERESTS, SOVEREIGNTY, AND NATIONALISM 438

BIBLIOGRAPHY 443

List of Abbreviations and Acronyms

ABM	Anti-Ballistic Missile
ANC	African National Congress
ATT	Arms Trade Treaty
BWC	Biological and Toxin Weapons Convention
CCM	Convention on Cluster Munitions
CCW	Convention on Certain Conventional Weapons
CIA	Central Intelligence Agency
CTBT	Comprehensive Test Ban Treaty
CWC	Chemical Weapons Convention
FMCT	Fissile Material Cut-off Treaty
FSB	Federal Security Service
GLCM	Ground Launched Cruise Missile
IAEA	International Atomic Energy Agency
ICBM	Intercontinental Ballistic Missile
ICRC	International Committee of the Red Cross
INF	Intermediate-Range Nuclear Forces Treaty
Interim Agreement	Interim Agreement on Offensive Arms
KGB	Committee for State Security
LTBT	Limited Test Ban Treaty
MIRV	Multiple Independently Targetable Re-Entry Vehicle
NATO	North Atlantic Treaty Organization
NPT	Non-Proliferation Treaty
OPCW	Organization for the Prohibition of Chemical Weapons
SALT	Strategic Arms Limitation Talks
SALW	Small Arms and Light Weapons
SLBM	Submarine-Launched Ballistic Missile
SLCM	Sea-Launched Cruise Missile
SORT	Strategic Offensive Reductions Treaty
START	Strategic Arms Reduction Treaty
TPNW	Treaty on the Prohibition of Nuclear Weapons
TRC	Truth and Reconciliation Commission
TTBT	Threshold Test Ban Treaty
U.K.	United Kingdom
U.N.	United Nations
U.N. G.A.	United Nations General Assembly
UNSCOM	United Nations Special Commission
U.S.	United States of America
U.S.S.R.	Union of Soviet Socialist Republics

Introduction

0.1 Arms control and disarmament

Arms control and disarmament encompass a number of different fields ranging from studies focused on weapons of mass destruction to conventional weapons and the international arms trade. Throughout the twentieth century, the Covenant of the League of Nations and the Charter of the United Nations have provided the foundations for subsequent legal instruments designed to outlaw or control the use of certain instruments of war. These measures, previously referred to as the laws of war and currently deemed to be a part of international humanitarian law or international criminal law, apply in relation to weapons of mass destruction and conventional weapons.[1] This last category of weapons, despite being less sophisticated than weapons of mass destruction, remain lethal devices employed by states in their relations against each other and against non-state actors, both within and outside their borders.[2] The laws of war share the main purpose of the law of armed conflict as something that aims to fundamentally protect combatants and non-combatants from unnecessary suffering.[3]

[1] This thesis will refer to the 'laws of war' as 'international humanitarian law' throughout its text due to the fact that this term is no longer commonly in use. It should be noted, however, that it will retain the use of this term whenever relevant to preserve the original intent, meaning, or phrasing of the sources being referenced.
[2] Howard M. Hensel, "Introduction", in *The Law of Armed Conflict: Constraints on the Contemporary Use of Military Force*, ed. Howard M. Hensel (Hampshire: Ashgate, 2005), X.
[3] U.K. Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: Oxford University Press, 2004), 3; Ingrid Detter, *The Law of War* (Surrey: Ashgate, 2013), 243.

Arms control and disarmament are the two main currents that exist within this literature. They have traditionally covered a wide variety of weapons, ranging from weapons of mass destruction—nuclear, radiological, chemical, and biological—to different types of conventional weaponry. They are processes of a political and technical nature, both in substance and over time, with close ties to states and national security which render questions on verification and compliance at the heart of the negotiations of every major treaty.[4] The scope of the debates relating to arms control and disarmament are wide-ranging, with studies ranging from the current challenges facing international treaty law to analyses of the different articles of arms control and disarmament treaties and their impact. They have typically been seen as essential for the preservation of international peace and security, as it seeks to control or limit both the numbers of weapons the ways in which they can be used.[5] For Salvador de Madariaga, the relationship between disarmament, arms control, and peace is clear. The existence of armaments is both a formidable loss of resources—both material and human—and a formidable danger.[6] Preparedness for war leads to increasing causes of friction and possibilities of war. This makes of armaments:

> A waste of money and life; a shame and a blot on mankind; a danger for peace, armaments were the first evil which the drafters of the League Covenant sought to secure.[7]

[4] Simon Dalby, "Critical Geopolitics and the Control of Arms in the 21st Century", *Contemporary Security Policy* 32, no. 1 (2011): 40-56; Patrick M. Morgan, "The State of Deterrence in International Politics Today", *Contemporary Security Policy* 33, no. 1 (2012): 85-107; Madeleine K. Albright, *Focus on the Issues: Building Peace and Security around the World* (Washington DC: U.S. Department of State, 2000), 31; Kenneth L. Adelman, "Arms Control with and without Agreements", *Foreign Affairs* 63 (1984): 240-263; Thilo Marauhn, "Dispute Resolution, Compliance Control and Enforcement of International Arms Control Law", in *Making Treaties Work; Human Rights, Environment and Arms Control*, ed. Geir Ulfstein (Cambridge: Cambridge University Press, 2007), 243.

[5] Dan Smith, "Introduction: International Security, Armaments, and Disarmament", in *SIPRI Yearbook 2017: Armaments, Disarmament and International Security*, ed. Stockholm International Peace Research Institute (Oxford: Oxford University Press, 2017), 7; Nicholas Williams and Simon Lunn, *Global Security Policy Brief, Modernising Conventional Arms Control: An Urgent Imperative* (London: European Leadership Network, March 2020), 2; Stuart Casey-Maslen and Tobias Vestner, *A Guide to International Disarmament Law* (London and New York: Routledge, 2019), 1.

[6] Salvador de Madariaga, *Disarmament* (New York: Kennikat Press, Inc., 1967), 3-15.

[7] This relationship, however, is not fully clear-cut: "armaments are not only a waste and a shame, they are also a danger. It has become the fashion to minimize it. There is a certain type of fanatical pacifist who, by insisting on armaments as the sole cause of

The relationship between disarmament, arms control, and peace is also present in Philip Noel-Baker's works, wherein he argues that the arms race was "a powerful and constant contributory cause" for the breakout of the Second World War.[8] Furthermore:

> And why, once more, does disarmament matter? Above all other reasons, because it is a part, and an essential part, of the great complex of changes which at long last will rid the world of war.[9]

An important moral element therefore stands at the heart of disarmament and arms control treaties.[10] This can be prominently seen in relation to the rise in the destructive power brought about by the extraordinary technological change in conflicts and in military capabilities.[11] We live in a nuclear age from which there is no going back: "Unforeseeable as the future of nuclear non-proliferation and disarmament is, there is one certainty: the human know-how and physical means to destroy the world, portions of it, or various life forms exist."[12] Furthermore, we are "conscious that as long as nuclear weapons have not been eliminated there is also a risk of attacks caused by misunderstandings and errors or detonations by accident."[13] The potentially destructive nature of autonomous weapons systems has played a similar role in calls for their regulation, particularly in relation to pressure to reduce human decision-making and the

all wars, has brought discredit to the view that they can be the cause of *some* war, and that they are in any case *one* of the causes of *all* wars." Ibid, 13-14.

[8] Philip Noel-Baker, *The Arms Race: A Programme for World Disarmament* (London: John Calder, 1958), 74.

[9] Philip Noel-Baker, *Disarmament*, (Great Britain: The Hogarth Press, 1926), 328.

[10] The destructive nature of nuclear, biological, and chemical weapons is a particularly prominent aspect of this. This fact can be seen particularly prominently in relation to nuclear weapons, with debates ranging on the role played by the nuclear taboo in preventing the use of nuclear weapons. This will be analysed in depth in chapter one. See for example: Nina Tannenwald, "Stigmatizing the Bomb, Origins of the Nuclear Taboo", *International Security* 29, no. 4 (2005): 5-49; Nina Tannenwald, "How Strong Is the Nuclear Taboo Today?", *The Washington Quarterly* 41, no. 3 (2018): 89-109; Ray Acheson, "Modernization of nuclear weapons: Aspiring to 'indefinite retention'?", *Bulletin of the Atomic Scientists* 68, no. 5 (2012): 88-95; Louis Maresca and Eleanor Mitchell, "The human costs and legal consequences of nuclear weapons under international humanitarian law", *International Review of the Red Cross* 97, no. 899 (2015): 621-645; Hans Blix, *Why Nuclear Disarmament Matters* (Cambridge and London: Cambridge University Press, 2008).

[11] Rain Liivoja, "Technological change and the evolution of the law of war", *International Review of the Red Cross* 97, no. 900 (2015): 1158; Ramesh Thakur, "Japan and the Nuclear Weapons Prohibition Treaty: The Wrong Side of History, Geography, Legality, Morality, and Humanity," *Journal for Peace and Nuclear Disarmament 1, no. 1* (2018): 24; Tad Daley, *Apocalypse Never: Forging the Path to a Nuclear Weapon-Free World* (New Brunswick, New Jersey, and London: Rutgers University Press, 2010), 2-3.

[12] Merav Datan and Jürgen Scheffran, "The Treaty is Out of the Bottle: The Power and Logic of Nuclear Disarmament", *Journal for Peace and Nuclear Disarmament* 2, no. 1 (2019): 114-132.

[13] Hans Blix, foreword to *Verifying Nuclear Disarmament*, by Thomas Shea (London and New York: Routledge, 2019), xi.

question of whether they can legitimately harm humans or end human life.[14] Moral vision, diplomatic craft and moral progress has, thus, been often held to be "decisive in bringing about the evolution of new norms and regimes on conventional arms."[15] Indeed:

> Why would states want to protect enemy soldiers and foreign civilians in the middle of a war? The practical importance of these norms is fairly obvious; conformance to humanitarian norms makes the world a safer and more pleasant place to live.[16]

There exists a wide range of rules—both formal and informal—governing international security.[17] The combination of this wide range of formal and informal rules creates a complex international security regime that leaves open space for interpretive strategies that generate uncertainty.[18] These rules provide a means of thinking about international security that other concepts do not, and are:

> [O]ne of the primary languages through which international affairs takes place. State and even non-state actors employ the language of rules to explain what they are doing. The language of rules makes international security possible.[19]

International arms control and disarmament treaties, however, have suffered from weaknesses relating to the fact that they have not been able to resist the pressure of military expedience in hostilities.[20] States, which stand at the centre of arms control and disarmament treaty regimes, are at once both the primary violators and foremost

[14] Ingvild Bode and Hendrik Huelss, *Autonomous Weapons Systems and International Norms* (Montreal and Kingston, London, and Chicago: McGill-Queen's University Press, 2022), 29; Aaron M. Johnson, and Sidney Axinn, "The morality of autonomous robots", *Journal of Military Ethics* 12, no. 2 (2013): 129-141; Noel E. Sharkey, "Saying 'No!' to Lethal Autonomous Targeting", *Journal of Military Ethics* 9 (2010): 369-383; Alex Leveringhaus, *Ethics and Autonomous Weapons* (London: Palgrave MacMillan, 2016).

[15] Denise Garcia, *Disarmament Diplomacy and Human Security: Regimes, norms and moral progress in international relations* (London and New York: Routledge, 2011), 3.

[16] Martha Finnemore, *National Interests in International Society* (Ithaca and London: Cornell University Press, 1996), 70.

[17] Anthony F. Lang Jr., Nicholas Rengger, and William Walker, "The Role(s) of Rules: Some Conceptual Clarifications," *International Relations* 20, no. 3 (2006): 276; Anthony F. Lang Jr., "Introduction: Rules and international security: dilemmas of a new world order," in *War, Torture, and Terrorism: Rethinking the Rules of International Security*, eds. Anthony F. Lang Jr. and Amanda Russell Beattie (Oxon and New York: Routledge, 2009), 4-5.

[18] Lang, "Introduction. Rules and international security: dilemmas of a new world order", 4-5.

[19] Ibid, 5.

[20] Jozef Goldblat, *Agreements for Arms Control: A Critical Survey*, Stockholm International Peace Institute (Massachussets: Taylor & Francis Ltd, 1982), 89.

defenders of them.[21] This idea has been explored in relation to the question of why states conclude highly legalised agreements if a lack of legalisation can make it easier for states to come to an agreement.[22] Highly legalized agreements can create the risk of constraining states in an agreement with which others might not comply.[23] The impact uncertainty has on international arms control and disarmament treaties is therefore significant:

> In short, states may be concerned about opportunism in terms of enforcement, but are more concerned about tying their hands in the face of future uncertainty through highly formalized forms of arms control cooperation.[24]

Questions of compliance stand at the centre of this literature, particularly in relation to when, where, and why states and soldiers adhere to, or violate, these treaties.[25] Faulty or irregular compliance records have been a particularly prominent issue in this area of international law due to the overarching desire to prevent unnecessary suffering and destruction.[26] The variance in the compliance records of states has been seen to be particularly problematic when a state at war has not signalled its acceptance of the relevant treaty through ratification, inhibiting the reciprocal enforcement of relevant treaties.[27] If rules are consistently ignored or violated with no consequences, "they cease to be rules and become suggestions for behavior."[28]

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[21] Wade M. Cole, "Mind the Gap: State Capacity and the Implementation of Human Rights Treaties", *International Organisation* 69, no. 2 (Spring 2015): 405.
[22] Sarah E. Kreps, "The Institutional Design of Arms Control Agreements," *Foreign Policy Analysis* 14 (2018): 129; Tuba Inal, *Looting and Rape in Wartime: Law and Change in International Relations* (Philadelphia: University of Pennsylvania Press, 2013), 1.
[23] Kreps, "The Institutional Design of Arms Control Agreements", 131.
[24] Ibid, 144.
[25] Tanisha M. Fazal, *Wars of Law: Unintended Consequences in the Regulation of Armed Conflict* (Ithaca and London: Cornell University Press, 2018), 110; Tanisha M. Fazal, "Rebellion, War Aims & the Laws of War", *Daedalus* 146, no. 1 (Winter 2017): 78.
[26] Laura Perna, *The Formation of the Treaty Law of Non-International Armed Conflicts* (Leiden and Boston: Martinus Nijhoff Publishers, 2006), xv.
[27] James D. Morrow, "When Do States Follow the Laws of War?", *The American Political Science Review* 101, no. 3 (August 2007): 561.
[28] As Lang notes, however, international legal theorists have tended to downplay the centrality of enforcement because, without it, it is frequently assumed it does not exist. As a result, they "emphasize the fact that international law can function without the need for sanctions or enforcement. These functional arguments are found in a wide range of analyses of international law, including those governing international security." Lang, "Introduction. Rules and international security: dilemmas of a new world order", 15.

Furthermore, the question of the influence played by the political system of states in treaty compliance has been raised and explored by a number of studies together with its relation to human rights law and their effect on states' preferences.[29]

This compliance literature is inherently linked to the question of how to strengthen international arms control and disarmament treaties. The utility of relying on legal restraints is a poignant element in this literature, as the lack of enforceability of treaties has been broadly perceived to be a weakness of international society and international law.[30] There can be no assurances of enforceability and increased security unless all states implement a treaty.[31] The importance of international law in arms control and disarmament can be misleading, as legal rules are "almost impossible to draft without allowing the parties some degree of latitude in interpreting their scope."[32] Compliance with norms is rarely absolute, and often entails the question of enforcement when states choose to either actively defy norms or have limited understandings of their obligations; a fact that is complicated by how their multiple interests may result in non-proliferation and disarmament not ranking first in their interest calculations.[33] At the same time, however, despite this compliance, these norms:

[29] See for example: Jana von Stein, "Do Treaties Constrain or Screen? Selection Bias and Treaty Compliance", *The American Political Science Review* 99, no. 4 (November 2005): 611; Jana von Stein, "Making Promises, Keeping Promises: Democracy, Ratification and Compliance in International Human Rights Law", *British Journal of Political Science* 46, no. 3 (July 2016): 655-679; Sharanbir Grewal and Erik Voeten, "Are New Democracies Better Human Rights Compliers?", *International Organization* 69, no. 2 (Spring 2015): 497-518; Boyd van Dijk, "Human Rights in War", *The American Journal of International Law* 112, no. 4 (October 2018): 553-582; David P. Forsythe, *Human Rights in International Relations* (Cambridge: Cambridge University Press, 2012).

[30] This idea has featured prominently in nuclear proliferation debates. For Amiard, nuclear proliferation "is a failure; it has not prevented the number of states possessing atomic weapons from almost doubling. And this is likely to continue, as more states are expected to acquire the nuclear bomb in the coming years. Only the renunciations of Brazil, and especially South Africa, can be credited to non-proliferation." Jean-Claude Amiard, *Volume 4: Disarmament and Decommissioning in the Nuclear Domain* (London and Hoboken: Wiley, 2021), 275.

[31] Keith Wilson, "Standing the test of time – efforts to achieve universality of the CWC," in *The Chemical Weapons Convention: Implementation, challenges and opportunities*, ed. Ramesh Thakur and Ere Haru (Tokyo, New York, and Paris: United Nations University Press, 2006), 170-171.

[32] Richard A. Falk, "Inhibiting Reliance of Biological Weaponry: The Role and Relevance of International Law", *American University International Law Review* 1, no. 1 (1986): 17-18.

[33] Jeffrey W. Knopf, "After diffusion: Challenges to enforcing nonproliferation and disarmament norms", *Contemporary Security Policy* 39, no. 3 (2018): 372 and 376; Edward M. Spiers, *Agents of War: A History of Chemical and Biological Weapons*, 2nd ed. (London: Reaktion Books, 2010), 202.

> [A]ddress the political communities that would invoke them as much as the agents who act for them and as such it is not open to those communities simply to set aside the rules to which they cleave under any circumstances; that is why the rules are as they are.[34]

Norms and interests can be in conflict. When this happens interests can trump support for norms, with the possible presence of competing interests hindering efforts to marshal support for norm enforcement.[35] The paradoxical nature of some of the prohibitions against the use of certain weapons, wherein certain means of killing enemy soldiers in wartime are forbidden whilst other equally ghastly means are honoured, has been further noted in the literature:

> [T]here are strong norms against the use of poison gas and other chemical weapons but no similar restrictions on many other types of weapons that are arguably no more humane or militarily effective.[36]

It is this seeming contradiction that has given rise to the question of whether legal commitment to international law has the potential to change state behaviour.[37] This question remains relevant, with war—and arms control and disarmament through it—remaining a problem and a puzzle.[38] It is this idea—that international humanitarian law constitutes the vanishing point of international law—that gives rise to the main focus and research questions of this thesis. Much of what follows is framed by the inherent links between international humanitarian law and state interests and behaviour.

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[34] Nicholas Rengger, "Inter arma, silent leges? The Political community, Supreme Emergency and the rules of war," in *War, Torture, and Terrorism: Rethinking the Rules of International Security*, eds. Anthony F. Lang Jr. and Amanda Russell Beattie (Oxon and New York: Routledge, 2009), 203.

[35] Knopf, "After diffusion: Challenges to enforcing nonproliferation and disarmament norms", 380.

[36] Ward Thomas, *The Ethics of Destruction: Norms and Force in International Relations* (Ithaca and London: Cornell University Press, 2001), 1.

[37] Audrey L. Comstock, *UN Human Rights Treaties and Legal Paths for Commitment and Compliance* (Cambridge: Cambridge University Press, 2021), 4.

[38] This field of study is enormously expansive and varied, with publications ranging from contemporary studies of war to detailed analyses of international law: Geoffrey Best, *War and Law since 1945* (Oxford: Clarendon Press, 1994), 3; Robert O'Connell, *Ride of the Second Horseman: The Birth and Death of War* (New York and Oxford: Oxford University Press, 1995), 225 and 243; Anthony J. Colangelo and Peter Hayes, "An International Tribunal for the Use of Nuclear Weapons," *Journal for Peace and Nuclear Disarmament* 2, no. 1 (2019): 222-223.

0.2 Inter arma enim silent leges

This thesis is fundamentally linked to the questions which international humanitarian law presents as the vanishing point of international law. They stand at the vanishing point of international law due to how they are subject to both political and national interests rather than to generally recognised legal principles. They are unique in how they are shaped by reference to considerations of humanity, of the survival of civilization, and of the sanctity of individuals rather than references to existing law.[39] It is because of the unique nature of international humanitarian law that this thesis examines the limits of the law as seen through arms control and disarmament treaties. It does this through the use and employment of international law and international relations theory, focusing primarily on the question of what international law can achieve in the regulation of heavily political issues.[40] The research conducted in this thesis is therefore focused on and guided by the following three questions:

[39] Hersh Lauterpacht, "The Problem of the Revision of the Law of War," in *British Yearbook of International Law 1952* (London: Oxford University Press, 1962), 379.

[40] The importance of weapons in relation to a state's national security makes this area of international law particularly heavily political. "States", Casey-Maslen and Vestner argue, "continue to rely on armaments to fulfil their security needs, often referring to their inherent right to self-defence, which is reflected in Article 51 of the 1945 UN Charter." Casey-Maslen and Vestner, *A Guide to International Disarmament*, 45. This aspect of international arms control and disarmament treaties has been particularly noted in relation to weapons of mass destruction. Upon learning about the existence of nuclear bombs after the death of Roosevelt in April 1945, President Truman was already thinking of the potential of these weapons as a tool of coercion: "It could kill, yes, but it also promised to be a massive version of the pistol displayed prominently on the lawman's gunbelt. That seemed useful to a nation aspiring to be the world's policeman." Gerard J. DeGroot, "'Killing is Easy': The Atomic Bomb and the Temptation of Terror," in *The Changing Character of War*, ed. Hew Strachan and Sibylle Scheipers (Oxford: Oxford University Press, 2011), 95. Current nuclear diplomacy can similarly be described as an "as an inclusive notion, ranging from strategic issues to energy, humanitarian to economic." Emanuelle Maitre, "Nuclear diplomacy: a niche diplomacy for middle powers," *Fondation pour la recherché stratégique* 8 (July 2018): 8. The political nature of this area of international law has also been further noted in relation to how international treaties or the taboo of these weapons has been applied in cases of suspected noncompliance. Michelle Bentley argues this prominently in relation to President Obama's narrative of the chemical weapons taboo as the basis of U.S. foreign policy on Syria: "The taboo as a feature of rhetoric appears suddenly out of nowhere more than two years into the actual conflict, and explicitly after an extended period during which Obama did all he could to avoid any reference to Assad's chemical stockpiles and ambitions." Michelle Bentley, *Syria and the Chemical Weapons Taboo: Exploiting the Forbidden* (Manchester: Manchester University Press, 2016), 39.

a) Why and how did an international legal regime emerge in relation to arms control and disarmament?
b) Has this international legal regime been successful in maintaining a taboo over the use of biological, chemical, nuclear, and conventional weapons?
c) How can instances of failure to observe the taboo be best explained?

This thesis is, in short, an investigation into the 'how' and 'why' of the laws of arms control and disarmament and, more particularly, into the relevance of the principle *inter arma enim silent lēgēs*—in times of war the laws are silent. This focus is fundamentally determined by the political nature of international humanitarian law, and, in turn, of arms control and disarmament, which has been noted amply in the literature. Hersh Lauterpacht's commentary, introduced at the beginning of this subsection, stands out in this regard:

> If international law is, in some ways, at the vanishing-point of law, the law of war is, perhaps even more conspicuously, at the vanishing-point of international law.[41]

This idea—that the laws of war, that is international humanitarian law, stand at the vanishing point of international law due to the influence of political interests—remains a prominent aspect of arms control and disarmament in international law.[42] Tied to the very beginning of international law as we know it today, treaties and international agreements relating to the usage of conventional weapons were amongst the first to be developed. Their emergence represents the humanitarianism of the nineteenth century

[41] Lauterpacht, "The Problem of the Revision of the Law of War", 382.
[42] Joseph Rotblat provides a good synthesis of the issues which this vanishing point presents, particularly in relation to nuclear weapons: "All these obstacles cannot be easily removed; one cannot simply rule that the above perceptions and interests should be redefined and set aside through the adoption of a time-bound framework for nuclear disarmament." Joseph Rotblat, "Toward a Nuclear Weapon-free World as a Prelude to a War-free World", in *Nuclear Disarmament: Obstacles to Banishing the Bomb*, ed. Jozef Goldblat (London and New York: I.B. Tauris, 2000), 18.

in its relation to war.[43] The normative and theoretical bases of international law arises from its historical evolution.[44] Understanding these rules and what flows from them is, therefore, "central to any attempt to understand the current character of international relations."[45] It is because of the contradiction between these political interests and this humanism that this thesis examines the three research questions listed above. It does this by confronting the prevailing analysis of the international laws of arms control and disarmament, deepening and developing it further through the application of classical realist scholarship. Above all, the thesis raises and confronts the notion that the way we have conventionally thought about international law is in need of serious revision.

0.3 Theory, methodology, and focus

The approach taken by this thesis in answering the three research questions listed above will produce original knowledge that improves and challenges the existing scholarship through the use and employment of classical realist theory. The usage of classical realist theory and scholarship in an examination of arms control and disarmament treaties allows for new insights relating to this topic, which would not be possible through a more limited approach. This is particularly the case when examining the seemingly paradoxical relationship which the moral component of treaties of arms control and disarmament—the moral opprobrium, or 'taboo'—and related state interests have.

[43] James L. Tryon, "The Regulation of War", *The Yale Law Journal* 20, no. 7 (1911): 535.
[44] Anthony F. Lang Jr., *International Political Theory: An Introduction* (London and New York: Palgrave, 2015), 58.
[45] Lang, Rengger, and Walker, "The Role(s) of Rules: Some Conceptual Clarifications", 275.

The originality of this thesis thus stems from the use and application of classical realist theory to the research questions written above. A purely legal examination of these treaties would be unable to bridge the gap that exists within current legal and political literature on the subject and, through this, see beyond it. This is particularly the case in relation to investigating the 'how' and 'why' of arms control and disarmament. Though the insights offered by legal theorists such as O'Connell, Toope, Brunnée, Teitel, and Cassese are valuable, they are limited in relation to this topic and the research questions written above. Even though current legal theory recognises the need to address the weaknesses in current international law, its exclusive focus on the nature and contents of international law limits its effectiveness.[46] O'Connell's argument in this regard is illustrative:

> International law needs improvement. The new work being done in the areas of natural law and process law theory—and even in rational choice analysis—can improve the system. International law needs improvement, however, not demolition, because it remains the single, generally accepted means to solve the world's problems.[47]

Though Brunnée and Toope also provide an excellent analysis of the use of force in international law, their analysis does not provide an account of the reasons underlying the successes or failures of the international legal regime on this topic. Instead, it limits itself to a defence of the role and necessity of international law in this field, arguing for

[46] The need to reform or make current international law more effectively is recognised by a number of recent international legal theory literature. For example: Jutta Brunnée and Stephen J. Toope, "The Use of Force: International Law after Iraq," *The International and Comparative Law Quarterly* 53, no. 4 (October 2004): 790; Mary Ellen O'Connell, "New International Legal Process," *The American Journal of International Law* 93, no. 2 (April 1999): 349-351; Mary Ellen O'Connell, "Rules of Evidence for the Use of Force in International Law's New Era," *Proceedings of the Annual Meeting (American Society of International Law)* 100 (March 29—April 1, 2006): 44; Ruti G. Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000), 3-4, Ruti G. Teitel, *Globalizing Transitional Justice: Contemporary Essays* (Oxford: Oxford University Press, 2014), xi; Antonio Cassese, *The Human Dimension of International Law: Selected Papers* (Oxford: oxford University Press, 2008), 3-33; Antonio Cassese, "Gathering Up the Main Threads," in *Realizing Utopia: The Future of International Law*, ed. Antonio Cassese (Oxford: Oxford University Press, 2012), 656.

[47] Mary Ellen O'Connell, *The Power and Purpose of International Law: Insights from the Theory and Practice of Enforcement* (Oxford: Oxford University Press, 2008), 370.

the importance of legal categories retaining relative normative clarity and coherence, and international law in general if wishing preserve peace.[48]

Teitel argues that international law posits institutions and processes that transcend both domestic law and politics, and that in periods of political turmoil it "offers an alternative construction of law that, despite substantial political change, is continuous and enduring."[49] Though Brunnée and Toope affirm that international law "cannot be blamed for failures that are properly attributed to the States operating within institutional structures", no further analysis is undertaken to examine why this is the case.[50] This is also the case in Finnemore and Toope's analysis of legalisation in world politics, where they defend the utility of legalisation as a concept when accounting for the influence of international law on State behaviour.[51] Similarly, Cassese, despite providing a profound account of the legal intricacies of international criminal justice, does not account for the role the political origins of the International Tribunal for the former Yugoslavia impinge on its later status as a judicial body.[52]

The absence of a deeper analysis of the 'how' and 'why' of instances of failure to observe international humanitarian law is, in this sense, noteworthy. O'Connell's examination of the use of force by states only analyses the legal aspects of this question.[53] Her response to Bethlehem's critique that international law does not shape the operational thinking of states, despite its theoretical strengths, fails to account for

[48] Brunnée and Toope, "The Use of Force: International Law after Iraq", 791-793.
[49] Teitel, *Transitional Justice*, 20.
[50] Ibid, 796.
[51] Martha Finnemore and Stephen J. Toope, "Alternatives to "Legalization": Richer Views of Law and Politics," *International Organization* 55, no. 3 (Summer 2001): 751-754.
[52] Antonio Cassese, "Reflections on International Criminal Justice," *The Modern Law Review* 61, no. 1 (January 1998): 8.
[53] Mary Ellen O'Connell, "The Limited Necessity of Resort to Force," in *Imagining Law: Essays in Conversation with Judith Gardam*, ed. Dale Stephens and Paul Babie (The University of Adelaide, South Australia: University of Adelaide Press, 2016), 37-60.

why this is not the case by limiting the reach of its argument. Here, scholarship on current law shapes government thinking due to the fact that "[f]ew states use military force against nonstate actors on the territory of other states to counter terrorist threats."[54] Though Teitel's account of international law analyses some of the effects of politics on international law, this exploration is limited to international legal norms and international humanitarian law.[55] This is also the case in Brunnée's and Toope's exploration of the legitimacy and legality of the responsibility to protect and self-defence international law.[56]

International law is often depicted as one of the few tools for responding to the problems currently facing humanity—such as the challenges of major violence, environmental decline, human rights abuse, and more—within these legal theory works.[57] The limitations this exclusive focus on international law gives rise to are best seen through O'Connell's argument on the problems the lack of a clear definition of armed conflict in international law has caused.[58] The following extract illustrates the over-emphasis legal theory has placed on international law as opposed to the aforementioned 'how' and 'why':

> On the other hand, much remains to be done in the struggle to suppress resort to armed force and toward mitigating the suffering of those caught up in war. Hundreds of unlawful wars have been fought since the adoption of the UN Charter. Civilian casualties continue to be higher than military casualties in most wars. Progress toward new laws or renewed commitment to current law will

[54] Mary Ellen O'Connell, "Dangerous Departures," *The American Journal of International Law* 107, no. 2 (April 2013): 380.
[55] Ruti G. Teitel, *Humanity's Law* (Oxford: Oxford University Press, 2011), 60 and 187-188.
[56] Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law* (New York: Cambridge University Press, 2010), 349.
[57] Mary Ellen O'Connell, *The Art of Law in the International Community* (Cambridge: Cambridge University Press), 1.
[58] Mary Ellen O'Connell, "Introduction: Defining Armed Conflict in the Decade after 9/11," in *What is War: An Investigation in the Wake of 9/11*, ed. Mary Ellen O'Connell (Leiden and Boston: Martinus Nijhoff Publishers, 2012), 10-11.

> require new leadership and a renewed vision of what law can accomplish against war.[59]

Though the influence of international law should not be discounted, neither should other factors: "Judicial reckoning, while necessary in order to uphold and enforce the international rule of law, should run parallel to steps taken on the political level."[60] Classical realism can provide a critical way of understanding how and why international legal treaties concerning arms control and disarmament are violated by treaties. The usage of this theory allows for the identification of substantive problems, the explanation of the function and structure of particular rules, and the reconceptualization of the legal restrictions surrounding arms control and disarmament. It provides the tools with which to understand breaches of arms control and disarmament treaties that transcends the limits of current legal theory. Classical realist theory also allows us to think through the implications of eroded taboos by political necessity and what it means for the fabric and overriding logic of international society without discounting or dismissing the role and influence of international law.

In order to achieve this, the thesis will examine, use, and employ the works and theories of the following three classical realist authors: E.H. Carr, Hans J. Morgenthau, and Georg Schwarzenberger. Their works, though of a varied focus, will allow for the production of original knowledge relating to the legal structures surrounding arms control and disarmament, and the underlying power structures and limits which they present. This thesis therefore seeks to bridge the divide between international law and

[59] Ibid, 3.
[60] Cassese, *The Human Dimension of International Law: Selected Papers*, 430.

international relations scholarship.[61] It seeks to benefit from the expertise of both of these fields. As such, it follows and finds its origins in the literature arguing that international law is now pervasive in international politics and that an understanding of law "is crucial for all IR theorists because legalism percolates through every level of our society."[62] Reus-Smit's account of the interplay between politics and law is relevant in this regard:

> This interplay between politics and law is a recurrent feature of international relations at the beginning of the twenty-first century, but our existing frameworks of understanding are poorly equipped to comprehend this phenomenon.[63]

This thesis therefore aims to respond to the question and challenge posed by Slaughter in 1993:

> [I]f it could be reliably shown that a great-power condominium was the best guarantee of international peace, then international law and organization should accommodate and support an arrangement that confers special privileges on a group of great powers. On the other hand, if the prospects for peace hang on some other set of state characteristics, then international security organizations and norms designed to regulate the use of force should be reshaped accordingly.[64]

The advantages that this would present is perhaps best seen through classical realist scholarship; particularly through Carr, Morgenthau, and Schwarzenberger themselves.[65]

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[61] Emilie Marie Hafner-Burton, David G. Victor, and Yonatan Lupu, "Political Science Research on International Law: The State of the Field", *The American Journal of International Law* 106, no. 1 (2012): 48; Andreas Paulus, "Realism and International Law: Two Optics in Need of Each Other", *Proceedings of the Annual meeting (American Society of International Law)* 96 (2002): 270-272.

[62] Adriana Sinclair, *International Relations Theory and International Law: A Critical Approach* (Cambridge: Cambridge University Press, 2010), 1. Koskenniemi's account of this point is particularly influential: "We need the legal vocabulary to justify our decisions and to support or critique the choices of others. But the vocabulary does not decide on our behalf. we remain responsible … That international law itself tends to become, to use a well-worn phrase, 'part of the problem', is often a consequence of the emotional and political intensity of its vocabularies." Martti Koskenniemi, *The Politics of International Law* (Oxford and Portland, Oregon: Hart Publishing, 2011), vi.

[63] Christian Reus-Smit, "Preface," in *The Politics of International Law*, ed. Christian Reus-Smit (Cambridge: Cambridge University Press, 2004), xiii.

[64] Anne-Marie Slaughter Burley, "International Law and International Relations Theory: A Dual Agenda", *The American Journal of International Law* 87, no. 2 (1993): 205-206.

[65] The similarities in the intellectual origins of Carr, Morgenthau, and Schwarzenberger has been noted in prior literature, particularly in relation to Carr and Morgenthau. Gismondi epitomises these similarities as follows. Though only Morgenthau was German by

Carr is a thinker on international affairs who has defied easy categorisation, and whose thought has been fairly consistently misrepresented.[66] Despite mainstream international relations scholarship discouraging venturing beyond his *The Twenty Years' Crisis*, Carr's works have a noticeably interdisciplinary focus, and tackle a multitude of questions which the narrow view of realism omits.[67] Contrary to the prevailing view of Carr being uninterested or dismissive of ethics in international relations, his ethics are filled with a pragmatic sense of usefulness.[68] He was concerned with the identification of the processual logic of transformation, asking "what is becoming, as opposed to asking how might we preserve what is or what has been."[69] His writings contain a "striking analysis of the changing nature of the modern state and the possibility of new forms of political association"[70], with Carr seeking to find "an appropriate balance of synthesis between voluntarism and determinism, structure and agency, or context and conduct."[71]

Morgenthau's works and theory, rather than a crude reduction of politics to pure power, emerges as a "sophisticated, self-conscious, and highly political interrogation of the relationship between power and politics."[72] He perceived himself as contributing to

birth, both were "heavily influenced by the *Kulturpessimismus* of late nineteenth century German thought", and neither was amoral in their approach to politics or ethics." Though Schwarzenberger is not included in Gismondi's analysis, these intellectual origins—which will be introduced and outlined in chapter five of this thesis—are similarly clear in his work. Mark D. Gismondi, *Ethics, Liberalism and Realism in International Relations* (London and New York: Routledge, 2008), 131.

[66] Paul Howe, "The Utopian Realism of E. H. Carr", *Review of International Studies* 20, no. 3 (1994): 277-278; Michael Cox, "E.H. Carr and the Crisis of Twentieth-Century Liberalism: Reflections and Lessons", *Millennium: Journal of International Studies* 38, no.3 (2010): 524; Peter Wilson, "Radicalism for a Conservative Purpose: The Peculiar Realism of E. H. Carr", *Millenium: Journal of International Studies* 30, no. 1 (2001): 123-125; Joseph M. Parent and Joshua M. Baron, "Elder Abuse: How the Moderns Mistreat Classical Realism", *International Studies Review* 13, no. 2 (2011): 202.

[67] Milan Babik, "Realism as Critical Theory: The International Thought of E.H. Carr", *International Studies Review* 15 (2013): 504.

[68] Seán Molloy, "Pragmatism, Realism and the Ethics of Crisis and Transformation in International Relations", *International Theory* 6, no. 3 (2014): 467.

[69] Ibid, 485.

[70] Andrew Linklater, "The Transformation of Political Community: E. H. Carr, Critical Theory and International Relations", *Review of International Studies* 23, no. 3 (1997): 321.

[71] Keith Smith, "The realism that did not speak its name: E. H. Carr's diplomatic histories of the twenty years' crisis", *Review of International Studies* 43, no. 3 (2017): 586.

[72] Michael C. Williams, "Why Ideas Matter in International Relations: Hans Morgenthau, Classical Realism, and the Moral Construction of Power Politics", *International Organisation* 58, no. 4 (2004): 633-634.

the preservation of the "social fabric of democracy from the threats posed to it by the untrammelled exercise of power by un-reflexive politicians and their intellectual aides de camp."[73] His early works, which were written within the discipline of international law and with, at most, occasional references to contributions of other disciplines, were the basis from which his distinctive theory of international relations emerged.[74] Through these, he reveals a state that is constructed by the international community of which it is a part, presenting a state agent that is shaped by and pursues normative goals in a world of anarchy.[75]

This is also the case with Schwarzenberger's works which, though not as well-known as those of Carr and Morgenthau, provide an incisive analysis and critique of international law. A bitter interlocutor of Hersch Lauterpacht, Schwarzenberger graded court decisions as decisive evidence of international law "on the basis of the extent to which the court was impartial, free from personal interest of the judges, had an international outlook and had high technical standards."[76] Schwarzenberger's works develop and go beyond Carr's and Morgenthau's perspectives, allowing this thesis to triangulate the theories of these three classical realists.

The usefulness of these three classical realists—and of classical realism in relation to the research questions of this thesis—cannot be overstated. Reengagement with this theory provides us with a subtle and sophisticated understanding of the role

[73] Seán Molloy, "Realism and reflexivity: Morgenthau, academic freedom and dissent", *European Journal of International Relations* 26, no. 2 (2020): 338.
[74] Niels Amstrup. "The 'Early' Morgenthau. A Comment on the Intellectual Origins of Realism," *Cooperation and Conflict* 13, no. 2 (1978): 170.
[75] Anthony F. Lang Jr., "Morgenthau, agency, and Aristotle", in *Realism Reconsidered: The Legacy of Hans Morgenthau in International Relations*, ed. Michael C. Williams (Oxford and New York: Oxford University Press, 2007), 37.
[76] Robert Cryer, "Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study", *Journal of Conflict and Security Law* 11, no. 2 (2006): 247.

international law's role within international society. Far from offering an "institutionally complacent vision of global politics, wedded to the existing state system and congenitally opposed to far-reaching global reform" realism provides us with an incisive critique of international law.[77] It allows us to reconsider the "increasingly tired clichés that dominate thinking about global-level change."[78] Whatever stance one takes with regards to realism, there is little doubt that it remains:

> [A]t the heart of theoretical and political dispute in world politics, constituting a continuing reference point against which competing positions consistently define themselves and a conceptual and rhetorical fulcrum around which both analytic and political debates revolve.[79]

The usage and application of classical realism to the research questions above is one of the main contributing factors to the originality of this thesis. A purely legal examination of these treaties would be unable to bridge the gap that exists within current legal and political literature on the subject and, through this, see beyond it. Classical realism provides a critical way of understanding 'how' and 'why' international legal treaties concerning arms control and disarmament are violated by states. The insights that this theory reveals—which are not limited to the standard account that states seek their own interests—also take into account the role played by both ethics and morality in international law, allowing it to account for it fully.

The originality of this thesis will also be augmented through how, in undertaking a classical realist analysis of arms control and disarmament treaties, this thesis will also challenge the prevailing understanding and conception of realism as a theoretical

[77] William E. Scheuerman, *The Realist Case for Global Reform* (Cambridge and Malden, MA: Polity, 2011), vi.
[78] Ibid, ix.
[79] Michael C. Williams, *The Realist Tradition and the Limits of International Relations* (Cambridge: Cambridge University Press, 2005), 1.

tradition that both disregards the influence of international law and can speak only of state power. This understanding of realism as a theory that disregards international law and can account only for power—which dominates international legal theory works—misunderstands its insights.[80] In doing this, legal theory disregards the nuance and detail of its insights, simplifying them excessively. This thesis will show through its analysis why this prevailing understanding and caricature of classical realism is profoundly mistaken. Through this, it will originally contribute to international relations theory scholarship and push it forwards.

This thesis will also make an original contribution to the realist tradition of international relations theory by bringing Schwarzenberger into dialogue with Carr and Morgenthau. In doing this, it will advance our understanding of how realism—and more particularly classical realism—addresses the practice and function of international law. Carr's, Morgenthau's, and Schwarzenberger's analysis of the role of morality in international law, different aspects of legal theory, universality, and the standard of civilisation will be particularly prominent examples of this. This originality is augmented, in turn, by the usage of Carr's, Morgenthau's, and Schwarzenberger's wider works. This fact is particularly salient in relation to Georg Schwarzenberger works, which have been neglected in prior international relations literature, and Hans J. Morgenthau's French works, which have rarely been used in international relations literature despite their theoretical value.[81]

[80] See for example: O'Connell, "New International Legal Process", 336; O'Connell, *The Art of Law in the International Community*, 14-15; Teitel, *Transitional Justice*, 3-4 and 168-169; Brunnée and Toope, *Legitimacy and Legality in International Law*, 3-5 and 10-12. The way in which E.H. Carr's, Hans J. Morgenthau's, and Georg Schwarzenberger's challenge this limited conception of realism as a theory will be expanded in chapters three, four, five of this thesis, together with its conclusion.

[81] The relevant extracts of Hans J. Morgenthau's French works have been translated for the purpose of this thesis and are displayed fully in English. Hans J. Morgenthau's and Georg Schwarzenberger's occasional Spanish-language texts have also been translated to English where necessary. This has been done by the author unless otherwise noted and adds to the originality of this thesis.

The choice to engage with Carr's, Morgenthau's, and Schwarzenberger's works and thought as opposed to that of theorists whose works and thought have been explored more substantially—such as Hedley Bull's—contributes to the originality of this thesis. Hedley Bull explored questions of arms control and disarmament incisively throughout a number of his works.[82] Successive international relations scholarship has explored and drawn on his insights substantially.[83] By not drawing on the work of Hedley Bull, this thesis will demonstrate a creative use of international relations theorists who one would not expect to explore these themes in both the practice of international law and the violation of international legal treaties.

The methodological approach followed by this thesis will then, by necessity, be an interpretive one, with its chosen methodology being that of hermeneutics. The use and benefits of using a hermeneutical method above other differing methodologies follows the arguments introduced by Zimmermann in his introduction to hermeneutics, where he argues that: "Contrary to the popular understanding of law as static application of rules, legal practice is hermeneutical all the way down. To judge is to interpret."[84] Gadamer provides a particularly stark argument in favour of this chosen approach:

> We recall the hermeneutical rule that we must understand the whole in terms of the detail and the detail in terms of the whole … The anticipation of meaning in

[82] See for instance: Hedley Bull, "Strategic Studies and Its Critics," *World Politics* 20, no. 4 (1968): 593-605; Hedley Bull, "Rethinking Non-Proliferation," *International Affairs* 51, no. 2 (1975): 175-189; Hedley Bull, "Arms Control and World Order," *International Security* 1, no. 1 (1976): 3-16.

[83] The following are a few notable examples: Regina Karp, "Nuclear Disarmament: Should America Lead?" *Political Science Quarterly* 127, no. 1 (Spring 2012): 47-71; Robert Ayson, "Old wine in new bottles? The continued relevance of Cold War strategic concepts," in *New Directions and Strategic Thinking 2.0: ANU Strategic & Defence Studies Centre's Golden Anniversary Conference Proceedings*, ed. Russel W. Glenn, 63—76 (Acton, Australia: Australian National University Press, 2018), 63-76; Stanley Hoffman, "Hedley Bull and His Contribution to International Relations," *International Affairs* 62, no. 2 (Spring 1986): 179-195; Robert O'Neill, "Hedley Bull and Arms Control," in *Remembering Hedley*, ed. Coral Bell and Meredith Thatcher, 31—45 (Canberra, Australia: Australian National University Press, 2008); Robert Ayson, "'A Common Interest in Common Interest': Hedley Bull, Thomas Schelling and Collaboration in International Politics," in *Remembering Hedley*, ed. Coral Bell and Meredith Thatcher, 53—71 (Canberra, Australia: Australian National University Press, 2008).

[84] Jens Zimmermann, *Hermeneutics, A Very Short Introduction* (Oxford: Oxford University Press, 2015), 101.

> which the whole is envisaged becomes actual understanding when the parts that are determined by the whole themselves also determine this whole.[85]

Furthermore:

> This implies that the text, whether law or gospel, if it is to be understood properly—i.e., according to the claim it makes—must be understood at every moment, in every concrete situation, in a new and different way. Understanding here is always application.[86]

This methodological approach fundamentally affects the ways in which the disarmament and arms control treaties, as well as the literature surrounding them, will be interpreted. It allows for this thesis to apply Gadamer's idea of understanding as application, implying that laws, in order to be properly understood, must be "understood at every moment, in every concrete situation, in a new and different way."[87] This allows for the research conducted as part of this thesis to go beyond the articles of arms control and disarmament treaties and their enforcement, something which will, in turn, offer access to a deeper understanding of the different issues which affect and determine arms control and disarmament. As Caputo argues:

> Laws have to be structurally appealable and repealable, constitutions amendable, codes of conduct revisable, religious myths demythologizable … The misguided attempt to be literally loyal to the past makes the past into a monster, closes down the future and deprives tradition of its inherent ability to renew itself.[88]

This approach, which facilitates the classical realist examination of the international laws of disarmament and arms control, is essential in order to answer the research questions listed above. To reinterpret realism:

[85] Hans-Georg Gadamer, *Truth and Method* (London: Continuum International Publishing, 2012), 291.
[86] Ibid, 307-308.
[87] Ibid, 308-309.
[88] John D. Caputo, *Hermeneutics: Facts and Interpretation in the Age of Information* (United Kingdom: Pelican, 2018), 100.

> [I]s to step backward, look wider, and dig deeper, not to excavate some reality that has been lost or lurks beneath the surface of things, but to lay bare persistent myths of a reality that can be transcribed by a school of thought and yet still claim to speak for itself.[89]

A hermeneutical method allows for a historically constituted understanding of a phenomena like disarmament and arms control due to the necessity of interpreting different texts and making meaning of them.[90] Its use and application within this thesis will be particularly important if aiming to answer the three guiding research questions. The complexity of globalisation, complex relationship of all levels of governance, and related proliferation and fragmentation of decentralised legal regimes means, as Teitel argues, that the meaning of legal norms "is significantly deterred by interpretive practices ex post their 'original' articulation in positive legal instruments."[91] Here, international law navigates between

> the Scylla of difference and the Charybdis of universalism. But since practice arises in real cases of individual rights, steering this path is not about defining a static ideal; rather, it concerns the continuing evolution of a norm that will help to guide and manage conflict.[92]

The potential for tension and demand for the reconciliation of multiple values makes the interpretation of legal texts a necessity if aiming to make meaning of them. What one needs is a "hermeneutics that is able to reconcile an approach that involves balancing with the intuition that there should also be a universalizable minimum."[93]

The hermeneutical method's historically constituted understanding of phenomena allows this thesis to use the official and written sources it relies on in order

[89] James Der Derian, "A Reinterpretation of Realism: Genealogy, Semiology, Dromology," in *Post-Realism: The Rhetorical Turn in International Relations*, eds. Francis A. Beer and Robert Hariman (East Lansing: Michigan State University Press, 1996), 278.
[90] Peregrine Schwartz-Shea and Dvora Yanow, *Interpretive Research Design, Concepts and Processes* (New York: Routledge, 2012), 41-42.
[91] Teitel, *Humanity's Law*, 169-170.
[92] Ibid, 170
[93] Ibid, 161.

to ground the jurisprudence of arms restrictions and examine cases in which the legal restrictions and taboos surrounding the trade and use of arms have been eroded. This methodology allows this thesis to access both the meaning of the restrictions encoded in arms control and disarmament treaties and the reasons for action driving states to disregard these legal restriction and taboos. The application of the hermeneutical method, therefore, allows this thesis to address the first two research questions through an analysis of official, legal, historical, and academic sources despite the different times in which they originate. Through this, it demonstrates how paying attention to these reasons for action provides more insight into the sociological and moral reasons for action by focusing on the reasons states give for their actions and the taboos surrounding arms control and disarmament treaties. The hermeneutical method also allows for the usage of realism—a theory outside of international law—to understand and account for the instances of failure of these taboos. This latter point is particularly important due to classical realism's nature as a theory of understanding rather than explanation, which allows it to access a social world woven from rules and meanings that define relationships among its inhabitants and give interactions their purpose.[94]

Gadamer's understanding of tradition also plays an essential role in making the classical realist examination of the international laws of disarmament and arms control possible. Reflections of the truth in the human sciences must be aware that their understanding and interpretation are not constructions based on principles, but the furthering of an event that goes further back. They cannot use concepts unquestioningly, and have to "take over whatever features of the original meaning of its

[94] Martin Hollis and Steve Smith, *Explaining and Understanding International Relations* (Oxford: Oxford University Press, 1992), 5-6.

concepts have come down to it."[95] Meanings must be addressed by tradition.[96] The great horizon of the past "influences us in everything we want, hope for, or fear in the future."[97] Understanding, therefore, is "a process of transmission in which past and present are constantly mediated."[98] It is a historically effected event, as the following extract shows:

> When our historical consciousness transposes itself into historical horizons, this does not entail passing into alien worlds unconnected in any way with our own; instead, they together constitute one great horizon that moves from within and that, beyond the frontiers of the present, embraces the historical depths of our self-consciousness.[99]

Furthermore:

> Hermeneutics bridges the distance between minds and reveals the foreignness of the other mind. But revealing what is unfamiliar does not mean merely reconstructing historically the 'world' in which the work had its original meaning and function. It also means apprehending what is said to us, which is always more than the declared and comprehended meaning.[100]

In order to carry out a classical realist examination of the international laws of disarmament and arms control, it is therefore necessary to understand the classical realist tradition, as understanding tradition requires a historical horizon.[101] The horizon of the present cannot be formed without the past—it requires a fusion of horizons:

> Every encounter with tradition that takes place within historical consciousness involves the experience of a tension between the text and the present. The

[95] Hans-Georg Gadamer, *Truth and Method*, xxiii.
[96] Ibid, 283.
[97] Hans-Georg Gadamer, "The Universality of the Hermeneutical Problem," in *Philosophical Hermeneutics*, trans. David E. Linge (Berkeley, Los Angeles, and London: University of California Press, 2008), 8-9.
[98] Hans-Georg Gadamer, *Truth and Method*, 291.
[99] Ibid, 303.
[100] Hans-Georg Gadamer, "Aesthetics and Hermeneutics," in *Philosophical Hermeneutics*, trans. and ed. David E. Linge (Berkeley, Los Angeles, and London: University of California Press, 2008), 100-101.
[101] On this point, Gadamer writes: "Understanding tradition undoubtedly requires a historical horizon, then. But it is not the case that we acquire this horizon by transposing ourselves into a historical situation. Rather, we must always have a horizon in order to be able to transpose ourselves into a situation." Hans-Georg Gadamer, *Truth and Method*, 303-304.

> hermeneutic task consists in not covering up this tension by attempting a naïve assimilation of the two but in consciously bringing it out.[102]

Situating the classical realist analysis of the international laws of disarmament and arms control within the classical realist tradition is a creative act that makes freedom of knowledge possible.[103] The interpreter's task is not simply to repeat what was or is being said, but to express it in the way that seems most appropriate considering the real situation of the dialogue.[104] Here, theory is a kind of political action that can lead us to see problems in international society with new eyes.[105] This fusion of horizons will be of particular importance in order to carry out the classical realist analysis of the international laws of arms control and disarmament. Though Carr, Morgenthau, and Schwarzenberger took this area of international humanitarian law into account and analysed it, their commentaries, in being bound to the periods of time where they were published, make their interpretation through the classical realist tradition a necessity. Thus, in following with Gadamer's and the hermeneutical method's understanding of tradition, this thesis will rely on and develop the classical realist tradition through the works of E.H. Carr, Hans J. Morgenthau, and Georg Schwarzenberger. The works of these theorists, which develop the classical realist tradition, will be used to answer the three research questions listed above through a fusion of horizons that will bring them together in the conclusion of this thesis.

[102] Ibid, 305.
[103] "*A person who reflects himself out of a living relationship to tradition destroys the true meaning of this tradition in exactly the same way*. In seeking to understand tradition historical consciousness must not rely on the critical method with which it approaches its sources, as if this preserved it from mixing in its own judgments and prejudices. It must, in fact, think within its own historicity. To be situated within a tradition does not limit the freedom of knowledge but makes it possible." Ibid, 354.
[104] Ibid, 307.
[105] Lang, *International Political Theory: An Introduction*, 200.

The research design and structure that this thesis will follow in order to answer the three research questions will be expanded upon below.

0.4 Architecture of the thesis

The research design of this thesis, guided by the three questions detailed above, is focused and divided into two parts. The first of these parts analyses the different historical disarmament and arms control treaties—particularly those focused on nuclear, chemical and biological, and conventional weapons—in order to determine the conditions under which weapons are prohibited by comparison to the taboos which exist in relation to their usage. It does this by focusing on the following three areas: First, the process through which things become taboo in legal and political terms; second, how this process is put in place legally, and third, how this occurs in legal, as opposed to political terms. This is complemented by a political analysis of the last research question; that is, a realist analysis of why legal restrictions and taboos surrounding the trade and use of arms are eroded due to political necessities. This second part is carried out using three key classical realist authors: E.H. Carr, Hans Morgenthau, and Georg Schwarzenberger. The main body of the thesis will, thus, be divided into five chapters, the conclusions of which will be synthetised into a final, concluding chapter.

Following the research questions presented above, chapter one examines the overall issue of whether arms control and disarmament principles apply in the same manner to different categories of weapons. As such, it pays particular attention to the differences in treatment given to certain weapons under current international law,

carefully examining the different taboos underlying each of these weapons. This is carried out following a thematic division, starting with what are widely regarded to be weapons of mass destruction—that is, nuclear, biological, and chemical weapons—and closing with an examination of chemical weapons. It covers the principal treaties which have developed in international law since the inception of modern international law in the late nineteenth century, up to current contemporary treaties, establishing the shared underlying ideology which is encoded in the legal principles that produce the moral opprobrium surrounding the usage of a particular weapons.

Chapter two builds on chapter one's analysis of the international treaties of disarmament and arms control. It examines the different ways in which state parties to these agreements have breached them in contemporary international law, following the fundamental changes brought about in 1945. As such, it first examines and establishes the different problems which arise concerning transparency and verification with regards to treaty violations. Following this, it examines cases of non-compliance, following the same fundamental division of weapons established in chapter one, paying particular attention to the underlying political interests which motivated them. This allows chapter two to put the taboo uncovered and brought to light by chapter one to the test, and to examine whether political and strategic necessities can give rise to deliberate breaches of international law.

Chapter three, which opens the theoretical analysis of the international laws of arms control and disarmament, is the first of three chapters providing a classical realist analysis of the overarching problems of international law, disarmament, and arms control. It focuses on and examines E.H. Carr's theory of international law as seen

through his oeuvre. This is done following the fundamental break in his thought that the start of the Second World War represented.[106] Following this, it examines Carr's thought on the question of disarmament and arms control. The choice to examine this aspect of Carr's thought separately plays a dual purpose, as it allows for both a further understanding of his theory of law and provides practical examples of the issues it uncovers in relation to it. The insights and warnings which it reveals offer us a theory that can explain why political, security, and military interests lead to violations of the legal restrictions and taboos of disarmament and arms control; revealing to us, in turn, what international law can achieve in the regulation of heavily political issues.

Chapter four examines Hans J. Morgenthau's largely unexplored legal thought following the same fundamental division and structure as that which is established in chapter three: First, by focusing on his pre-1939 and post-1939 works, and, following this, those which are focused on issues related to arms control and disarmament. Its argument develops in four stages. First, it examines Morgenthau's analysis of the nature of international law, the differences between domestic and international law, his theory of sanctions, and his concept of the political. Second, it examines his theory and critique of international law, the role played by justice and politics, and the profound effect that national interests and the balance of power have on it. Third, it examines his analysis of disarmament and arms control, paying special attention to his analysis of historical cases and nuclear weapons. Finally, this chapter brings the dominant themes present in his works together, offering a conclusion of why, for Morgenthau, legal restrictions and

[106] This division—which will be used in chapters three, four, and five—is primarily motivated by the common themes which can be found in the oeuvres of Carr, Morgenthau, and Schwarzenberger within these periods; the fundamental division the onset of the Second World War caused; and the transformative effect the Second World War had in international society.

taboos can be eroded due to political necessities and the path any potential solutions might take.

Chapter five, which closes the theoretical analysis of the international laws of arms control and disarmament, examines Georg Schwarzenberger's theory of international law. It does this by exploring his works thematically following the same fundamental division as is established in chapter three: first by examining his pre-1939 and post-1939 works; second by examining his analysis of the laws of war, and arms control and disarmament. This chapter brings the different ideas contained in Schwarzenberger's theory together. It showcases their relationship to the fundamental questions explored by this thesis, explores his suggested solutions for the problems facing international law, and offers direct answers to the question of why the legal restrictions and taboos surrounding certain weapons are eroded.

The conclusion of this thesis brings the different ideas and conclusions offered by these five preceding chapters together into a fusion of horizons. In synthesising the ideas and conclusions of the different chapters, it addresses directly the research questions presented within this introduction, providing and listing the different answers which the classical realist analysis of the international laws of arms control and disarmament offers. These conclusions will focus on the following nine points:

1. The legal restrictions and taboos surrounding arms restrictions have been eroded due to political necessities and interests,
2. Nuclear weapons are uniquely affected by power politics,

3. Arms control and disarmament treaties all originate within a necessary political background,
4. Disarmament and arms control treaties are defined by their function and role in international society,
5. International and national law are inherently different,
6. The problems related to the structure, strength, and reach of international treaties affects their role in international society,
7. International organisations are profoundly affected by power politics,
8. Power and ethics have prominent and competing effects on international law,
9. The role that national interests, sovereignty, and nationalism play on international law.

The conclusion successfully establishes the fundamental links which these theories have in relation to the problems brought to light in chapters one and two: the existence and erosion of the legal standards and taboos surrounding the laws of arms control, disarmament, and use. It is on the confluence of these two points that this conclusion hinges, synthesising the results in nine concluding reflections that bring the classical realist theory of Carr, Morgenthau, and Schwarzenberger together.

Chapter I. Treaties, Taboos, and Weapons Prohibitions: Norms and Legal Principles

1.1 Introduction

Throughout the twentieth century, the Covenant of the League of Nations and the Charter of the United Nations have provided the foundations for subsequent legal instruments designed to outlaw or control the use of certain instruments of war. These measures, previously referred to as the laws of war and currently deemed to be a part of international humanitarian law or international criminal law, apply in relation to weapons of mass destruction—nuclear, radiological, chemical, and biological—and conventional weapons.[1] This last category of weapons, despite being less sophisticated than weapons of mass destruction, remain lethal devices employed by states in their relations against each other and against non-state actors, both within and outside their borders.[2]

The aim of this area of international law has largely been, as noted in the introduction to this thesis, to reduce suffering in war by prohibiting or regulating the use of certain weapons and methods of warfare in order, fundamentally, to "protect combatants and non-combatants from unnecessary suffering."[3] The legal approaches to

[1] This thesis will refer to weapons of mass destruction—that is, nuclear, radiological, chemical, and biological weapons—separately throughout this chapter in order to analyse the treaties associated with them clearly and separately. This will also be the case in chapter two and in the conclusion of this thesis.
[2] Hensel, "Introduction", x.
[3] U.K. Ministry of Defence*, The Manual of The Law of Armed Conflict*, 3.

doing this are deeply rooted in history and involve efforts at concluding internationally binding agreements between states.[4] These international agreements, in turn, broadly suffering from weaknesses relating to the these rules of conduct not resisting "the pressure of military expedience generated in the course of hostilities."[5]

Arms control and disarmament have typically been seen as necessary in order to preserve international peace and security in the modern age, seeking to control or limit the numbers of weapons and the ways in which they can be used[6]. They are processes of a political and technical nature, both in substance and over time, with close ties to states and national security which render questions on verification and compliance at the heart of the negotiations of every major treaty.[7]

The exact distinction between the ideas of these two approaches—arms control and disarmament—has been difficult to differentiate in the past, with both terms used nearly interchangeably before the Second World War. Though originally arms control denoted the rules for limiting arms competition rather than revising it, the term eventually became tied to ideas relating to the limitation or reduction of certain categories of weapons; particularly through the prevention of certain military activities, the reduction of risks of accidental war, the constraints or prohibitions on the use of certain weapons, amongst others.[8]

[4] Andrew Michie, "The Provisional Application of Arms Control Treaties," *Journal of Conflict and Security Law* 10, no. 3 (2005): 345; Best, *War and Law since 1945*, vii; Stuart Casey-Maslen and Tobias Vestner, "Trends in Global Disarmament Treaties," *Journal of Conflict and Security Law* 25, no. 3 (2020): 451 and 470.
[5] Goldblat, *Agreements for Arms Control: A Critical Survey*, 89.
[6] D. Smith, "Introduction: International Security, Armaments, and Disarmament", 7.
[7] A key example of this is the role that deterrence in the development of this field during the Cold War, particularly in relation to nuclear weapons and the perceived threat and risk of using the weapons accumulated by both superpowers. Dalby, "Critical Geopolitics and the Control of Arms in the 21st Century", 40-56; Morgan, "The State of Deterrence in International Politics Today", 85-107; Adelman, "Arms Control with and without Agreements", 240-263; Marauhn, "Dispute Resolution, Compliance Control and Enforcement of International Arms Control Law" 243.
[8] Jozef Goldblat, *Arms Control, A Guide to Negotiations and Agreements* (Oslo: International Peace Research Institute, 1994), 3.

Disarmament, by contrast, encompasses measures for the elimination and destruction, prohibition and restriction, non-proliferation, regulation, reduction and limitation, and transparency of certain weapons.[9] The prominent English School IR theorist, Hedley Bull, defined the two terms as follows: arms control was understood as encompassing "restraint internationally exercised upon armaments policy, whether in respect of the level of armaments, their character, deployment or use",[10] while disarmament covered "the reduction or abolition of armaments … unilateral or multilateral; general or local; comprehensive or partial; controlled or uncontrolled."[11]

The prohibitions developed throughout history in relation to these two approaches have typically done so in relation to a particular moral opprobrium—a taboo—concerning their usage. According to Cassese, these different taboos have arisen in relation to the following three main grounds: a) that the weapons have been considered cruel or as causing unnecessary suffering; b) that they have been deemed treacherous, as is the case with poison and chemical weapons; c) and that they have been regarded as indiscriminate.[12] These three main grounds, visible in the motivations of nearly all disarmament and arms control treaties to some degree, give rise to the different taboos which exist in relation to particular weaponry.[13]

[9] U.N. Office for Disarmament Affairs, *Securing our Common Future, An Agenda for Disarmament* (New York: Office for Disarmament Affairs, 2018), 11; U.N. Centre for Disarmament, *Relationship between Disarmament and International Security: Report of the Secretary-General*, A/36/597 (New York: United Nations, 1982), 9.

[10] Hedley Bull, *The Control of the Arms Race: Disarmament and Arms Control in the Missile Age* (London: The Institute for Strategic Studies), ix.

[11] Ibid.

[12] Antonio Cassese, "Means of Warfare: The Traditional and the New Law," in *The New Humanitarian Law of Armed Conflict*, ed. Antonio Cassese (Napoli, Italy: Editoriale Scientifica, 1979), 166.

[13] Chemical warfare, for example, has faced a number of criticisms historically due to being regarded as being uncontrollable, producing unpredictable effects, producing inevitable death, producing excessive suffering, having the potential to spread to and devastate civilian populations, and being an unchivalrous means of conducting combat. This will be developed later on in this chapter. Robert L. Maynard, "Opinions of Chemical Warfare," in *Chemical Warfare Agents, Toxicology and Treatment*, 2nd ed., eds. Timothy C. Marrs, Robert L. Maynard, Frederick R. Sidell (Chichester: John Wiley & Sons, Ltd., 2007), 15-16.

This concept of a taboo—that is, the moral opprobrium surrounding the usage of a particular weapon—will represent the key idea through which I will examine different arms control and disarmament treaties.[14] The horror associated with the usage of certain weapons, such as chemical and biological weapons, gives us the ability to understand the prohibitions that have arisen in relation to them and the interests lying at the heart of arms control and disarmament treaties. The indiscriminate effects of chemical and biological weapons both invites disgust and sets these weapons apart from other equally indiscriminate weapons of mass destruction.[15] The images of chemical warfare, from the descriptions of First World War chlorine victims to the modern portrait of a menacing figure swathed in a protective cape, "are horrifying."[16] Similarly, biological weapons invite fears of acutely dangerous bacteria resistant to medical treatment spreading worldwide.[17] Taboos represent what one is not supposed to do, and exist as:

> [S]ocially constructed expectations that actors should not engage in, permit, and in some cases even acknowledge certain behaviours that have been deemed prohibitively unacceptable.[18]

Constructivist scholarship has developed the idea of taboos substantially. Tannenwald's analysis of its role and effect stands out as a prominent example of this.

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[14] Michelle Bentley develops the idea of a taboo in her analysis of chemical weapons, where she argues that within international politics, the notion of taboo manifests "in numerous issues and controversies including the legitimacy of intervention, the violation of state sovereignty, targeting of non-combatants, and … weapon prohibitions, where certain types of armament are considered so excessively offensive that their possession and use are intentionally and institutionally delegitimised." These weapons exceed the limits of acceptability to such a degree that makes their avoidance and proscription a requirement. Bentley, *Syria and the Chemical Weapons Taboo: Exploiting the Forbidden*, 1. Not all literature has supported the idea that taboos—which derive their strength from the psychological and emotional costs of violating these special rules—have successfully managed to inhibit the behaviour of states. For Thomas M. Dolan, constructivist taboo theorists, however, "have not taken account of psychological research that indicates that when deciders believe that taboo violation will save other values or ideas sacred to them, the choices before them will seem 'tragic' rather than taboo." Thomas M. Dolan, "Unthinkable and Tragic: The Psychology of Weapons Taboos in War," *International Organization* 67, no. 1 (2013): 38.

[15] Nicholas A. Sims, *The Diplomacy of Biological Disarmament: Vicissitudes of a Treaty in Force, 1975-85* (Hampshire and London: MacMillan Press, 1988), 5-6.

[16] Valerie Adams, *Chemical Warfare, Chemical Disarmament: Beyond Gethsemane* (Hampshire and London: Macmillan), 2.

[17] Ibid; International Committee of the Red Cross, *Biotechnology, Weapons and Humanity* (Geneva: International Committee of the Red Cross, 2003), 2-5.

[18] Bentley, *Syria and the Chemical Weapons Taboo: Exploiting the Forbidden*, 14.

The taboo here refers to a powerful de facto prohibition against the use of nuclear weapons. It is not the behaviour in itself, but the normative belief about it.[19] Taboos are a particular type of norm; a forceful normative prohibition that deals with the sociology of danger and is concerned with the protection of individuals and societies from behaviour that is defined or perceived as dangerous. It involves socially constructed notions of danger, as well as institutional mechanisms to localise it and regulate behaviour associated with it, and is generally associated with "such qualities as absoluteness, unthinkingness, and taken-for-grantedness."[20] Taboos transcend the idea of norms—which, as noted by Brunnée and Toope, should not be mistaken for legal norms in themselves—through their objective qualities and their intersubjective, phenomenological aspects; that is, the meanings they have for people.[21] Tannenwald's contrasting example of norms associated with the use of conventional weapons versus the taboo associated with nuclear weapons illustrates the difference between taboos and norms clearly:

> With conventional (non-taboo) norms, violations tend to be judged in terms of relative degrees of severity. Thus the use of one bomb, ten bombs, or 100 (conventional) bombs would represent an increasingly severe violation of a "regular" norm against their use. But in the case of a taboo, use of even one nuclear bomb moves one irrevocably to a new world, with all the unimaginable consequences that could follow. It opens a Pandora's box.[22]

That constructivist literature has highlighted how the identities and interests of different actors are ultimately shaped by interaction and communication is particularly relevant.[23] Price's analysis of chemical weapons reflects this idea. The extent and

[19] Nina Tannenwald, *The Nuclear Taboo: The United States and the Non-Use of Nuclear Weapons Since 1945* (Cambridge and New York: Cambridge University Press, 2007), 10.
[20] Ibid, 10-11.
[21] Brunnée and Toope, *Legitimacy and Legality in International Law*, 12-13; Tannenwald, *The Nuclear Taboo: The United States and the Non-Use of Nuclear Weapons Since 1945*, 11.
[22] Tannenwald, *The Nuclear Taboo: The United States and the Non-Use of Nuclear Weapons Since 1945*, 11-12.
[23] Brunnée and Toope, *Legitimacy and Legality in International Law*, 13-14.

strength of the poison taboo, he argues, "reflects the prevalent historical treatment of war as a political practice impregnated with social norms rather than devoid of them" and "underscores the social features of the institution of war and its emphasis on notions such as honor."[24] Taboos, then, are profoundly related to international law. They are background element that underscores and affects the legal dynamics surrounding arms control and disarmament treaties.

Throughout the following pages I will examine this overall issue—whether arms control and disarmament principles apply in the same manner to these different categories—paying particular attention to the differences in treatment given to certain weapons under current law, doing this through a careful examination of the different taboos underlying each of these different weapons. This will be carried out following a thematic division, starting first with an examination of what are widely regarded to be weapons of mass destruction; nuclear weapons—the most prominent in both international relations and international law literature—and chemical and biological weapons. Following this, I will examine conventional weapons, which were the first to be subjected to international treaties. This covers the principal treaties which have developed in international law since the inception of modern international law in the later nineteenth century, up to the different contemporary treaties. This examination will be carried out through the hermeneutical method introduced in the introduction of this thesis. The hermeneutical method's understanding of interpretation and tradition allows access and insight into the moral and ethical motivations underlying arms control and disarmament treaties that arose under different political and historical conditions.

[24] Richard Price, *The Chemical Weapons Taboo* (Ithaca and London. Cornell University Press, 1997), 27.

Having accomplished this, I establish the shared underlying ideology which is encoded in the legal principles that produce the moral opprobrium surrounding the usage of a particular weapon.[25] This ideology, which links law with morality and sees both as the means by which to assess practices of war, side-lining politics. Digging deeper into the ideas which framed these treaties allows us, through an analysis of the jurisprudential principles of arms control and disarmament treaties, to highlight and show that taboos come from a particular way of thinking about the relationship between power, morality, and law. This examination, through its successful completion in this chapter, allows for a comprehensive and detailed analysis of whether the international legal regime has been successful in maintaining a taboo over the use of biological, chemical, nuclear, and conventional weapons in chapter two of this thesis.

1.2 Nuclear Weapons

Nuclear arms control has been one of the most critical enterprises in American foreign policy since the 1960s and has involved both cooperation and competition with other powers, with the goal of nuclear disarmament floating uneasily through Cold War politics.[26] They have traditionally been singled out as particularly horrifying due to their

[25] It should be noted that, though not directly relevant to the objective of this thesis, there is a wide body of literature on the morality of war in itself, both in relation to international law and ethical debates. David Rodin and Henri Shue, *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* (Oxford and New York: Oxford University Press, 2008); Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 4th ed. (New York: Basic Books, 2006); Jeff McMahan, "The Ethics of Killing in War," *Ethics* 114 (July 2004): 693-733; Tamar Meisels, "In Defense of the Defenseless: The Morality of the Laws of War," *Political Studies* 60, no. 4 (2012): 919-935.

[26] Strobe Talbott, *Deadly Gambits. The Reagan Administration and the Stalemate in Nuclear Arms Control* (New York: Alfred A. Knopf, 1984), 4; David A. Koplow, "You're Gonna Need a Bigger Boat: Alternatives to the UN Security Council for Enforcing Nuclear Disarmament and Human Rights," Harvard Human Rights Journal 29 (2016): 158; Dalby, "Critical Geopolitics and the Control of Arms in the 21st Century", 42-44.

unusually destructive nature, which fundamentally altered the strategic calculus employed formerly with the exclusive use of conventional weapons.[27]

1.2.1 The Nuclear Taboo

The taboo associated with nuclear weapons has its origin in their destructive power and in concerns over their potential military use.[28] In particular, it finds its origin in their destructive power and the unique threat that these weapons posed to the survival of nations should hostilities to get out of hand, which forced a reconsideration of previous arms control priorities.[29] Cousins expressed this sentiment clearly in *In Place of Folly*, where he links the use of nuclear weapons to the potential "decimation of the human species" due to the lack of practical limits to their destructive power "except for the motivations of the men who make them."[30] Russel's *Has Man a Future?* mirrors this sentiment, with the author emphasising the danger nuclear weapons pose if used.[31]

Nuclear weapons are fundamentally different from conventional, chemical, and biological weapons due to the scale of their destructive power.[32] A single bomb has the potential to destroy "an entire city, kill millions and contaminate air, land and water for many kilometres around the original blast site" for thousands of years.[33] An assessment

[27] Mark Smith, "Pragmatic Micawberism? Norm Construction on Ballistic Missiles," *Contemporary Security Policy* 27, no. 3 (2006): 527; Daniel H. Joyner, *International Law and the Proliferation of Weapons of Mass Destruction* (Oxford: Oxford University Press, 2009), xiii-xiv.
[28] Michael J. Brenner, *Nuclear Power and Non-Proliferation, The Remaking of U.S. Policy* (Cambridge: Cambridge University Press), 1.
[29] Ibid, 1-2. See also: Harold K. Jacobson, "The Crisis in Arms Control," Michigan Law Review 82, no. 5-6 (1984): 1591.
[30] Norman Cousins, *In Place of Folly* (New York: Washington Square Press, 1962), 1 and 19.
[31] Bertrand Russell, *Has Man a Future?* (Middlesex, Great Britain: Penguin Books, 1961), 69 and 120.
[32] This difference plays a large role in Morgenthau's and Schwarzenberger's analyses of the role of nuclear weapons in international society. Their positions *vis-à-vis* nuclear weapons will be analysed in chapters four and five of this thesis.
[33] Melissa Gillis, *Disarmament, A Basic Guide*, 7th ed. (New York: United Nations, Office for Disarmament Affairs), 23.

of this devastating power can be found in the International Court of Justice's advisory opinion of 8 July 1996: "The destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilization and the entire ecosystem of the planet."[34] The account of Dr Marcel Junod, the first foreign doctor to reach Hiroshima and treat some of the victims, provides a similar view of the impact that these weapons had. Here, he describes that he witnessed "a sight unlike anything we had ever seen before. The centre of the city was a sort of white patch, flattened and smooth like the palm of a hand. Nothing remained…"[35] The cables sent by a western delegate of the International Committee of the Red Cross (ICRC) who managed to get to Hiroshima on the 2nd of September are similar in this respect:

> Situation horrifying. 80% of town razed. All hospitals destroyed or severely damaged … Many victims, apparently recovering, suddenly experience fatal relapse owing to degeneration of white corpuscles and other internal injuries. Deaths occurring now in great numbers. More than 100,000 injured still in provisional hospitals in neighbourhood … Urgently need large supplies bandages, cotton wool, ointment for burns, sulphonamides, blood plasma and transfusion kits…[36]

The continued development of these weapons since the first instance of their use heightens the horror associated with their destructive potential, particularly given how, from the perspective of the 21st Century, the damage caused in Hiroshima and Nagasaki was done by comparatively low-yield weapons. The horror associated with this destructive potential is compounded by the sheer numbers of stockpiled nuclear weapons. U.S. President Dwight D. Eisenhower clearly addressed this in his *Atoms for Peace* address to the UN General Assembly:

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[34] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinions and Orders, 1996 I.C.J. Rep. (July 8), ¶35.
[35] Caroline Moorehead, *Dunant's Dream: War, Switzerland and the History of the Red Cross* (New York City: Carrol & Graf Publishers, Inc., 1999), 490.
[36] Ibid, 489.

> Today, the United States stockpile of atomic weapons … exceeds by many times the total equivalent of the total of all bombs and all shells that came from every plane and every gun in every theatre of war in all the years of the Second World War. A single air group whether afloat or land based, can now deliver to any reachable target a destructive cargo exceeding in power all the bombs that fell on Britain in all the Second World War.[37]

The horror and destructive potential of nuclear weapons also seems to have played a key role in the shift in the Reagan Administration's position on nuclear weapons.[38] President Ronald Reagan's nuclear weapon policies during his first fifteen months of office "suggested if not a taste for war, at least a certain carelessness about the dangers of the nuclear age."[39] Despite this, he later came to reject the doctrine of Mutually Assured Destruction, believing that this policy and nuclear weapons were morally reprehensible, and challenged his supporters and advisors to go not where they wanted to go but where they ought to be—a nuclear free world.[40] His rejection and opposition of this policy, which also stemmed from practical reasons, also had an origin in the fact that "he abhorred the fact that nuclear weapons targeted innocent civilians", that "nuclear weapons were so destructive that victory was not possible", and that the peace they provided was disturbingly precarious.[41] This rejection gave rise to President Reagan's quest to move beyond Mutually Assured Destruction and eliminate nuclear weapons, which was also shared by General Secretary Mikhail Gorbachev.[42]

[37] Dwight D. Eisenhower, "Atoms for Peace Speech," International Atomic Energy Agency, accessed April 2, 2023, https://www.iaea.org/about/history/atoms-for-peace-speech.
[38] It should be noted that there have been different schools of thought about the evolution of President Ronald Reagan's attitude on nuclear weapons. Angela Santese, "Ronald Reagan, the Nuclear Weapons Freeze Campaign and the Nuclear scare of the 1980s," *The International History Review* 39, no. 3 (2017): 496-520.
[39] Michael Mandelbaum. "The Anti-Nuclear Weapons Movements," *PS* 17, no. 1 (Winter 1984): 26.
[40] Beth A. Fischer, "A Question of Morality: Ronald Reagan and Nuclear Weapons," in *Reagan and the World: Leadership and National Security, 1981—1989*, eds. Bradley Lynn Coleman and Kyle Longley (Lexington, Kentucky: University Press of Kentucky, 2017), 32.
[41] Ibid, 32-33.
[42] Ibid, 34-46; Paul Kengor, "A World of Fewer Nuclear Weapons: Ronald Reagan's Willingness to Negotiate," In *Reagan's Legacy in a World Transformed*, eds. Jeffrey L. Chidester and Paul Kengor, (Cambridge and London: Harvard University Press, 2015), 151-164.

These different examples firmly attest the existence of a nuclear weapons taboo. This nuclear taboo is linked to their destructive effects as well as their development, numbers, and potential military use.[43] The detonation of a nuclear weapon in a populated area is vastly destructive.[44] Ionizing radiation and radioactive fallout can cause radiation sickness until days or weeks after the explosion, with survivors of the explosion nevertheless facing "an increased risk of developing certain cancers, such as leukaemia and thyroid cancer."[45] Nuclear weapons can additionally cause significant climate disruption worldwide and famine resulting from the potential decline in agricultural production.[46]

The destructive potential of nuclear weapons is high enough so as to have given rise to debates on their legality under the International Criminal Court's Statute.[47] They have also been further seen, due to their nature, to go against existing international humanitarian law and customary international law principles.[48] They are, due to their

[43] Marianne Hanson, "Normalizing zero nuclear weapons: The humanitarian road to the Prohibition Treaty," *Contemporary Security Policy* 39, no. 3 (2018): 469; Berry et al, *Delegitimizing Nuclear Weapons: Examining the Validity of Nuclear Deterrence* (James Martin Center for Nonproliferation Studies, Monterey: Monterey Institute of International Studies, 2010), 1-2; Beatrice Fihn, "The Logic of Banning Nuclear Weapons," *Survival* 59, no. 1 (2017): 43-44; Aamandeep Gill, *Taking the Path of Degitimization to Nuclear Disarmament* (Stanford: Center for a new American Security, April 2009), 5; Turco et al, "Nuclear Winter: Global Consequences of Multiple Nuclear Explosions," *Science* 222, no. 4630 (1983): 1290; Rotblat, "Toward a Nuclear Weapon-free World as a Prelude to a War-Free World", 3; Jozef Goldblat, "Ban on Use: An Essential Condition for Nuclear Disarmament", in *Nuclear Disarmament: Obstacles to Banishing the Bomb*, ed. Jozef Goldblat (London and New York: I.B. Tauris), 37; Adil Sultan, *Universalizing Nuclear Nonproliferation Norms* (Switzerland: Palgrave Macmillan, 2019), 24; Amiard, *Volume 4: Disarmament and Decommissioning in the Nuclear Domain*, 1; Daley, *Apocalypse Never: Forging the Path to a Nuclear Weapon-Free World*, 205; DeGroot, "'Killing Is Easy': The Atomic Bomb and the Temptation of Terror", 91; Alexei V. Fenenko. "'Long Peace' and Nuclear Weapons," *Russia in Global Affairs* 17, no. 1 (2019): 75; Thomas Shea, *Verifying Nuclear Disarmament* (London and New York: Routledge, 2019), 105-106; Thakur, "Japan and the Nuclear Weapons Prohibition Treaty: The Wrong Side of History, Geography, Legality, Morality, and Humanity", 13.

[44] John Borrie, "Viewing nuclear weapons through a humanitarian lens: context and implications," in *Viewing Nuclear Weapons through a Humanitarian Lens*, eds. John Borrie and Tim Caughley (New York and Geneva: United Nations Institute for Disarmament Research, United Nations, 2013), 34.

[45] Lou Maresca, "The catastrophic humanitarian consequences of nuclear weapons: the key issues and perspective of the international committee of the red cross," in *Viewing Nuclear Weapons through a Humanitarian Lens*, eds. John Borrie and Tim Caughley (New York and Geneva: United Nations Institute for Disarmament Research, United Nations, 2013), 132-133.

[46] Ira Helfand, *Nuclear Famine: Two Billion People at Risk? Global Impacts of Limited Nuclear War on Agriculture, Food Supplies, and Human Nutrition*, 2nd ed. (Somerville, MA and Washington, DC: International Physicians for the Prevention of Nuclear War and Physicians for Social Responsibility, 2013), 2 and 20.

[47] Schwarzenberger's analysis of the legality of nuclear weapons, which is prominently linked to his theory at large, will be analysed in chapter five. Colangelo and Hayes, "An International Tribunal for the Use of Nuclear Weapons", 120; Maresca and Mitchell, "The human costs and legal consequences of nuclear weapons under international humanitarian law", 623-624 and 629; Anthony J. Colangelo, "The Duty to Disobey Illegal Nuclear Strike Orders," *Harvard National Security Journal* 9, no. 2 (2018): 88.

[48] The following rules derived from the UN Charter and the Geneva Conventions, in particular, require that the use of any weapon must be "proportional to the initial attack", "necessary for effective self-defense", "must not be directed at civilians and civilian objects", "must be used in a manner that makes it possible to discriminate between military targets and civilian non-targets", "must

indiscriminateness and long-lasting impact, "the most inhumane weapons ever conceived."[49] Their continued non-use since 1945 is a particularly important example of this.[50] For Tannenwald, nuclear weapons, which have come to be seen as "abhorrent and unacceptable weapons of mass destruction," have a particularly strong taboo associated with their use irrespective of their explosive yield.[51] This taboo, she argues, has helped to constrain resort to the use of nuclear weapons by reinforcing deterrence and inducing restraint even in cases where deterrence did not operate; giving rise, despite early expectations, to a decade-long tradition of non-use.[52]

The extent to which a nuclear taboo exists has, however, been contested by T.V. Paul. States have, he argues, treated the norm against nuclear use strategically: the nuclear doctrines of the U.S., Britain, France, and Russia call for an "expanded use of nuclear weapons against regional states acquiring weapons of mass destruction" and for allowing nuclear use in a preventive and pre-emptive mode.[53] These limitations point at nuclear non-use being a tradition rather than a strict taboo-like prohibition. Though it offers a "partial normative restraint on nuclear use" it is still not a "full-fledged taboo, as the military and strategic doctrines of nuclear states envision weapons use under certain circumstances."[54]

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not cause unnecessary or aggravated suffering to combatants", "must not affect states that are not parties to the conflict" and "must not cause severe, widespread or long-term damage to the environment." Nuclear weapons violate each of these rules, and derive their power precise from their large-scale, indiscriminate nature. Mitsuru Kurosawa, "Stigmatizing and Delegitimizing Nuclear Weapons", *Journal for Peace and Nuclear Disarmament* 1, no. 1 (2018): 41.

[49] Gareth Evans and Yoriko Kawaguchi, *Eliminating Nuclear Threats: A Practical Agenda for Global Policymakers* (Canberra and Tokyo: International Commission on Nuclear Non-proliferation and Disarmament, 2009), 3.

[50] Thakur, "Japan and the Nuclear Weapons Prohibition Treaty: The Wrong Side of History, Geography, Legality, Morality, and Humanity", 2; Maria Rost Rublee and Avner Cohen, "Nuclear norms in global governance: A progressive research agenda," *Contemporary Security Policy* 39, no. 3 (2018): 321-322.

[51] Tannenwald, "Stigmatizing the Bomb, Origins of the Nuclear Taboo", 5.

[52] Ibid, 6; Tannenwald, "How Strong Is the Nuclear Taboo Today?", 89.

[53] This, he argues, points at nuclear non-use being a tradition rather than a strict taboo-like prohibition. T.V. Paul, "Taboo or tradition? The non-use of nuclear weapons in world politics", *Review of International Studies* 36 (2010): 858-859.

[54] This has in turn, for the author, a significant impact on deterrence policies. T.V. Paul, *The Tradition of Non-Use of Nuclear Weapons* (Stanford, California: Stanford University Press: 2009), 201.

The existence of this taboo is therefore linked to a single, fundamental question, which has been articulated by Tannenwald as follows: "Why have nuclear weapons not been used in war since 1945?"[55] The development of this taboo and its persistence must be viewed as a significant accomplishment, with the main question to be analysed being whether it has been translated successfully into international disarmament and control treaties.[56] It is to this question that this section will turn now in order to examine the first of the three guiding questions introduced in the introduction of this thesis.

1.2.2 Nuclear Arms Control and Disarmament Treaties

There have been several markedly different periods in the history of international attempts to regulate and control these weapons. These different periods represent different strands of thought on the particular ways in which disarmament and arms control ought to occur in relation to these weapons, and have had a prominent impact in the treaties themselves. These different periods have been categorised by Schnenck and Youmans as follows:

(1) 1925–1958, concentrating comprehensive disarmament;

(2) 1959–1968, concentrating on attempts to implement partial nuclear arms control measures;

(3) 1969–1979, holding bilateral talks;

[55] Tannenwald, *The Nuclear Taboo: The United States and the Non-Use of Nuclear Weapons Since 1945*, 2.
[56] Ibid, 361-362.

(4) 1980–1991, involving reassessment and repositioning by the United States and the Union of Soviet Socialist Republics;

(5) 1991–2009, a period of uncertainty caused by the impact of the Soviet Union's dissolution on the Strategic Arms Reduction Talks (START) and corresponding treaties; and

(6) 2009–present, encompassing the most recent developments since the expiration of the START Treaty.[57]

An examination of the different arms control and disarmament treaties which arose in these different periods will be carried out in the following subsections. This chronological examination will lend further insight into the taboo associated with these weapons through how it was linked interplayed with the development of international arms control and disarmament treaties aiming to regulate or ban them.

1.2.2.1. Early treaties

The goal of eliminating nuclear arsenals was embraced in the first United Nations General Assembly resolution, which established a United Nations Atomic Energy

[57] This period, Schneck and Youmans argue, encompasses both the global collective agreements regarding disarmament and arms control which existed prior to 1945 and the nuclear era, and the arms control and disarmament proposals which followed the nuclear detonation in Hiroshima. These early nuclear arms control and disarmament proposals—of which the 1946 Baruch Plan, which will be examined below, is an example of—gradually developed as technological advancements continued, nuclear weapons changed, and the number of nuclear states grew. Three main strands can be observed within these periods: Different focused attempts to reduce existing built weaponry, which commenced with the Moscow-Washington negotiations that led to the Strategic Arms Limitation Treaty (SALT) and the later Strategic Arms Reduction Treaties (START I and II); dedicated to attempts to rein in defensive antinuclear systems, counting with the with the Anti-Ballistic Missile (ABM) Treaty as its centrepiece; and non-proliferation, with the Non-proliferation (NPT) arms control Treaty as its centrepiece. Lisa M. Schenck and Robert A. Youmans, "From Start to Finish: A Historical Review of Nuclear Arms Control Treaties and Starting Over with the New Start" *Cardozo Journal of International and Comparative Law* 20, no. 399 (2012): 401-404. See also: Jonathan Schell, "The Folly of Arms Control," *Foreign Affairs* 79, no. 5 (2000): 24.

Commission for the purpose of the elimination of all major weapons adaptable to mass destruction. This resolution details clearly how deeply it was motivated by the destructive nature of these weapons, and outlines how the Commission ought to make specific proposals in order to control atomic energy "to the extent necessary to ensure its use only for peaceful purposes."[58]

Despite the clear intentions and goals relating to nuclear arms control and disarmament, hopes were left unrealised with the onset of the nuclear arms race between the U.S. and the Soviet Union and the development of more powerful weapons.[59] The first proposed texts for comprehensive nuclear disarmament did not reach a clear conclusion.[60] Early proposals like the Baruch Plan "gave relatively little thought to the kind of world in which they could represent a practical and acceptable policy."[61] These proposals faced problems in relation to the risk that disarmament and arms control posed in face of a nation of "messianic ideas, implacable hostilities, and a deeply rooted belief that its ultimate survival depends on the destruction of all its rivals."[62] These problems, together with both Superpower's interest in deterrence in face of the lethality of nuclear weapons, made these initial proposals impractical and undesirable.[63]

By the mid-1950s both Superpowers had substantial military establishments that included nuclear weapons as integrated components, which shifted the focus of nuclear

[58] U.N. G.A. Res. 1(i), ¶5(b) (Jan. 24, 1946).
[59] Gillis, *Disarmament, A Basic Guide*, 31-32.
[60] This plan proposed that the United States, the only country possessing nuclear weapons then, relinquish its atomic arsenal and secrets to an independent authority which would inspect all nation parties willing to destroy existing bombs and stop their manufacture. Schenck and Youmans, "From Start to Finish: A Historical Review of Nuclear Arms Control Treaties and Starting Over with the New Start", 403-04; Gillis, *Disarmament, A Basic Guide*, 31.
[61] Richard J. Barnet, *Who Wants Disarmament?* (Boston: Beacon Press, 1960), 46.
[62] Ibid, 51.
[63] Walter C. Clemens, *The Superpowers and Arms Control, from Cold War to Interdependence* (Lexington, Massachusetts: Lexington Books, 1973), xxi-xxii.

arms control from general commitments to disarmament to strategic deterrence.[64] Multiple non-armament agreements were signed during the period between 1959 to 1968. The first of these was the Antarctic Treaty, which prohibited any measures of a military nature in Antarctic territory.[65] It was followed by the Limited Test Ban Treaty (LTBT),[66] the Latin American Nuclear-Free Zone Treaty,[67] the Outer Space Treaty,[68] and the Non-Proliferation Treaty (NPT).[69] All of these treaties represented a step away from the general disarmament that characterised the first proposed treaties, focusing instead on select commitments to arms control.

The LTBT, first seen as a success in restraining the nuclear arms race, became a prototype for other treaties limiting nuclear weapons.[70] This treaty banned explosions in the atmosphere, under water and in outer space, or in any other environment in which an explosion might cause radioactive debris "to be present outside the territorial limits of the States under whose jurisdiction or control such explosion is conducted."[71] Its reach was relatively limited. There were salient points of disagreement during negotiations about on-site inspections and control posts, the number of these, and their international or national ownership in relation to verification mechanisms. Furthermore, it also allowed the underground testing of nuclear weapons.[72] Notwithstanding this, the LTBT was regarded as a great achievement due to its attempt

[64] Jacobson, "The Crisis in Arms Control", 1591; Schenck and Youmans, "From Start to Finish: A Historical Review of Nuclear Arms Control Treaties and Starting Over with the New Start", 405.
[65] The Antarctic Treaty art. 1, Dec. 1, 1959, 402 U.N.T.S. 5778.
[66] Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, Aug. 5, 1963, 480 U.N.T.S. 6964.
[67] Treaty for the Prohibition of Nuclear Weapons in Latin America, Feb. 14, 1967, 634 U.N.T.S. 9068.
[68] This treaty prohibits the placing in orbit around earth of any objects carrying nuclear weapons or any other kinds of weapons of mass destruction. Treaty on principles governing the activities of States in the exploration and use of outer space, including the moon and other celestial bodies, Oct. 10, 1967, 610 U.N.T.S. 8843.
[69] Treaty on the Non-Proliferation of Nuclear Weapons, Mar. 5, 1970, 729 U.N.T.S. 10485.
[70] Gillis, *Disarmament, A Basic Guide*, 32; Jacobson, "The Crisis in Arms Control", 1594.
[71] Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, art. 1(b); David A. Koplow, "Eve of Destruction: Implementing Arms Control Treaty Obligations to Dismantle Weaponry," *Harvard National Security Journal* 8 (2017): 167.
[72] Phillip R. Trimble, "Beyond Verification: The Next Step in Arms Control," *Harvard Law Review* 102 (1989): 906.

to address the issue of the development of new nuclear weapons, where "the real arms race occurs" through the development of new technology.[73]

The NPT remains one of the most significant treaties addressing nuclear disarmament and arms control. Embraced by the vast majority of states, it entered into force in 1970. As such, it represented the first major effort to limit the proliferation of weapons of mass destruction, which was perceived to be one of the most important objectives of nuclear arms control.[74] It is still regarded as "the cornerstone of the modern nuclear non-proliferation regime"[75] and a "centrepiece of the crucial global effort to restrict the further spread of nuclear weapons."[76]

The NPT was the result of delicately balanced negotiations involving exchanges of commitments between nuclear-weapon states and non-nuclear-weapon states.[77] Integral parts of the treaty involve requirements not to transfer to any recipient nuclear weapons or other nuclear explosive devices, receive any such transfers, or provide special fissionable materials and materials designed for the processing of these materials.[78] Crucially, it also contains the only treaty-based, legally binding commitment for all states to accomplish nuclear disarmament through an agreed commitment for Parties to the Treaty to pursue negotiations in good faith on effective measures relating to nuclear disarmament.[79] Through this commitment, it implied a "prose of power

[73] John W. Spanier and Joseph L. Nogee, *The Politics of Disarmament: A Study in Soviet-American Gamesmanship* (New York: Frederick A. Praeger, 1962), 118.
[74] Schenck and Youmans, "From Start to Finish: A Historical Review of Nuclear Arms Control Treaties and Starting Over with the New Start", 408; Gerard C. Smith, "Nuclear Arms Control and Disarmament," *New York Law School Journal of International and Comparative Law* 4 (1983): 345-46.
[75] Joyner, *International Law and the Proliferation of Weapons of Mass Destruction*, xv.
[76] Koplow, "You're Gonna Need a Bigger Boat: Alternatives to the UN Security Council for Enforcing Nuclear Disarmament and Human Rights", 159.
[77] Laura Rockwood, "The Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and the IAEA Safeguard Agreements," in *Making Treaties Work: Human Rights, Environment and Arms Control*, ed. Geir Ulfstein (Cambridge: Cambridge University Press, 2007), 305.
[78] Treaty on the Non-Proliferation of Nuclear Weapons, arts. 1-3.
[79] Treaty on the Non-Proliferation of Nuclear Weapons, art. 6.

sharing, a collaborative effort involving both nuclear and non-nuclear states to address the fear of untrammelled proliferation of nuclear weapons."[80]

The NPT's adequacy, however, has remained controversial due to the failure of the permanent Security Council members to vindicate their obligations under this article.[81] Nye's comments on the NPT Conference and its underlying long-term security problems, that is, that "non-nuclear-weapons states will charge the superpowers with discrimination, hypocrisy, and failure to live up to their commitments to disarm" points to some of its long-term problems.[82] This idea has been reiterated in numerous NPT Review Conferences.[83] The 2015 NPT Review Conference failed to reach a consensus final document. Though in itself not unusual, the proposed final document failed to both gain support "amongst key advocates for much stronger language on nuclear disarmament" and a pair of nuclear-weapons states which "found it difficult to accept even the modest 'Action Plan Plus' text, which went beyond anything to which they had previously agreed."[84] Issues on transparency relating to the reporting of practical steps taken in leading to nuclear disarmament were also particularly controversial.[85] This was again the case in the delayed NPT's 2022 Tenth Review Conference, which also failed to adopt its final outcome document.[86]

[80] Marianne Hanson, "Power to the have-nots? The NPT and the limits of a treaty hijacked by a 'power-over' model," *Contemporary Security Policy* 43, no. 1 (2022): 84.
[81] This particular criticism of the NPT will be examined in chapter two in detail, as it represents a particularly important strand of criticism of this Treaty's effectiveness and overarching success.
[82] Joseph S. Nye Jr., "NPT: The Logic of Inequality" *Foreign Policy* 59 (1985): 123.
[83] Some such conferences being, for example the 2000 and 2015 Review Conferences. Gillis, *Disarmament, A Basic Guide*, 47-48.
[84] Potter suggests that "a coalition of non-nuclear-weapons states might have attempted to block what they regarded as unsatisfactory text dealing with disarmament" should a deal on the Middle East even been reached. William C. Potter, "The Unfulfilled Promise of the 2015 NPT Review Conference," *Survival* 58, no. 1 (2016): 155.
[85] Ibid, 162; Andrey Baklitskiy, "The 2015 NPT Review Conference And The Future Of The Nonproliferation Regime," Arms Control Today, Arms Control Association, July/August 2015, https://www.armscontrol.org/ACT/2015_0708/Features/The-2015-NPT-Review-Conference-and-the-Future-of-The-Nonproliferation-Regime.
[86] U.N. Press Release, NPT Review Conference, Non-Proliferation Treaty Review Conference Ends without Adopting Substantive Outcome Document Due to Opposition by One Member State, U.N. Press Release DC/3850 (Aug. 26, 2022); Arms Control Association Press Room, "NPT Review Outcome Highlights Deficit in Disarmament Diplomacy, Divisions Between Nuclear Rivals," Arms Control

1.2.2.2 The SALT agreements

The Strategic Arms Limitation Talks (SALT I), prompted by concern that an Anti-Ballistic Missile race between the U.S. and the U.S.S.R. could be strategically destabilizing, resulted in two finalized agreements: The Interim Agreement on Offensive Arms (Interim Agreement) and the Anti-Ballistic Missile (ABM) Treaty.[87] These treaties marked a change of interest in pre-1971 and post-1972 nuclear arms control from a focus on the character of the different weapons under use, to their numbers.[88]

The ABM Treaty focused on the limitation of strategic offensive and delivery weapons and banned the deployment of sea-based, air-based, space-based, or mobile land-based ABM systems for the defence of the territory of its country.[89] This prohibition, which rendered both the U.S. and U.S.S.R. vulnerable to a retaliatory nuclear strike, formed a part of the concept and practice of strategic nuclear deterrence through mutually assured destruction or counterforce.[90] It was focused on the idea that the ideal strategy would be to develop nuclear weapons in a way that would prevent and discouraged their use.[91] The Interim Agreement complimented this by limiting

Association, August 26, 2022, https://www.armscontrol.org/aca-press-releases/2022-08/npt-review-outcome-highlights-deficit-disarmament-diplomacy.

[87] Interim Agreement on certain measures with respect to the limitation of strategic offensive arms (with protocol), U.S.-U.S.S.R., May 26, 1972, 944 U.N.T.S. 13445; Treaty on the Limitation of Anti-Ballistic Missile Systems U.S.-U.S.S.R., May 26, 1972, 944 U.N.T.S. 13446.

[88] Thomas C. Schelling, "What Went Wrong with Arms Control," *Foreign Affairs* 64 (1985): 225.

[89] This treaty remained in force until U.S. withdrawal in 2001. Schenck and Youmans, "From Start to Finish: A Historical Review of Nuclear Arms Control Treaties and Starting Over with the New Start", 418-419.

[90] This treaty contained a number of restrictions on the size, type and location of ABM components, including the prohibition of the testing of these. Rein A. Mullerson, "The ABM Treaty: Changed Circumstances, Extraordinary Events, Supreme Interests and International Law," *International & Comparative Law Quarterly* 50, no. 3 (2001): 513-14; Jacobson, "The Crisis in Arms Control", 1592-1593.

[91] This idea was central in the development of the SALT agreements, greatly influencing the direction and strategies use in the negotiations. Matthew J. Ambrose, *The Control Agenda: A History of the Strategic Arms Limitation Talks* (Ithaca: Cornell University Press, 2018), 14-24.

certain strategic offensive weapons for a five year period and was intended to be succeeded by the unratified SALT II treaty of 1979.[92]

The political consensus on these two treaties developed surrounding two fundamental premises which led to their ratification and overall acceptance: First, that "missile defences that could protect against a large-scale attack would destabilise the strategic balance and raise the risk of war because they undermined each side's confidence in its nuclear deterrent"; and, second, that "the deployment of large-scale defences would trigger an offensive arms race as each side sought to prevent the other from making itself invulnerable to attack."[93]

The effect that both of these underlying political ideas had on the contents and effects of the treaties was considerable, particularly with their contribution to the establishment of a broadly-based rule of law for the control of nuclear weapons.[94] The ABM and Interim Agreement, however, were heavily criticised in the U.S. due to their omissions and launcher imbalance.[95] Both treaties fell short of expectations on important technological developments such as Multiple Independently-Targeted Re-entry Vehicles (MIRVs), cruise missiles, mobile land-based missiles, the miniaturization of nuclear weapons, and simpler methods of production. All of this weaponry remained untouched by treaties in the twelve years that followed.[96]

[92] These being submarine-launched ballistic missile launchers and ICBMs. The latter was subject to restrictive conversion clauses. Interim Agreement, arts.2-3. See also: Dakota S. Rudesill, "MIRVs Matter: Banning Hydra-Headed Missiles in a New Start II Treaty," *Stanford Journal of International Law* 54 (2018): 94-95.; U.N. Department for Disarmament Affairs, *The United Nations and Disarmament: 1945-1985* (New York: United Nations Publication, 1985), 10; Schelling, "What Went Wrong with Arms Control", 224.
[93] Mullerson, "The ABM Treaty: Changed Circumstances, Extraordinary Events, Supreme Interests and International Law", 519.
[94] G. Smith, "Nuclear Arms Control and Disarmament", 345; Schelling, "What Went Wrong with Arms Control", 224.
[95] Rudesill, "MIRVs Matter: Banning Hydra-Headed Missiles in a New Start II Treaty", 95.
[96] U.N. Centre for Disarmament Rep. of the Secretary-General, *Comprehensive Study on Nuclear Weapons*, at 3, U.N. Doc. A/35/392 (1981), 3.

The ABM and Interim Agreement were followed by the Threshold Test Ban Treaty (TTBT), which established a nuclear threshold by prohibiting tests having a yield exceeding 150 kilotons.[97] Though the TTBT did not enter into force until 1990, the U.S. and Soviet Union both announced their intention to separately observe the treaty in 1976.[98] The TTBT is firmly tied to the nuclear taboo and the dangers an unregulated nuclear arms race would present. The preamble of the TTBT showcases this origin clearly, declaring the intention of both the U.S. and Soviet Union to achieve "the cessation of the nuclear arms race and to take effective measures towards reductions in strategic arms, nuclear disarmament, and general and complete disarmament under strict and effective international control" at their earliest convenience.[99]

The SALT II negotiations which began in 1972 with the goal of replacing the Interim Agreement with a long-term comprehensive treaty on offensive weaponry never saw ratification after the Soviet invasion of Afghanistan in 1979.[100] The failure to ratify this treaty gave rise to a period in which arms control negotiations had little to no progress until the ratification of the Intermediate-Range Nuclear Forces (INF) Treaty[101] in 1987.[102] It also prompted an array of commentaries on the uncertain future of arms

[97] Treaty on the limitation of underground nuclear weapon tests (with protocol dated at Washington on 1 June 1990), July 3, 1974, 1714 U.N.T.S. 29637.
[98] U.S. Department of State, "Treaty Between The United States of America and The Union of Soviet Socialist Republics on the Limitation of Underground Nuclear Weapon Tests (and Protocol Thereto) (TTBT)," accessed April 14, 2023, https://2009-2017.state.gov/t/isn/5204.htm.
[99] TTBT, preamble.
[100] It took seven years until a final draft with nearly 100 agreed statements and common understandings was produced. The Agreement would have established a common ceiling on ICBM and SLBM launchers of 2400, and capped heavy bombers at 2250. Thomas Graham Jr. and Edward Ifft, "Legal Aspects of Bilateral Arms Control Treaties," *North Carolina Journal of International Law and Commercial Regulation* 16, no. 1 (1991): 3; Schenck and Youmans, "From Start to Finish: A Historical Review of Nuclear Arms Control Treaties and Starting Over with the New Start", 418-419; Koplow, "Eve of Destruction: Implementing Arms Control Treaty Obligations to Dismantle Weaponry", 205; Schelling, "What Went Wrong with Arms Control", 224.
[101] Treaty on the elimination of their intermediate-range and shorter-range missiles (with memorandum of understanding, protocol on procedures governing the elimination of the missile systems, protocol regarding inspections and annex thereto, site diagrams and photographs, exchange of notes and agreed minute dated 12 May 1988 and exchange of notes dated 28 and 29 May 1988), Dec. 8, 1987, 1657 U.N.T.S. 28521.
[102] This treaty is notable due to its provision for the complete elimination of an entire class of weapons. Ibid., art.5; U.N. Department for Disarmament Affairs Rep. of the Secretary-General, *Nuclear Weapons: A Comprehensive Study*, at 114-115, U.N. Doc. A/45/373 (1991); John Woodliffe, "Arms Control and Disarmament," *International & Comparative Law Quarterly* 37, no. 4 (1988): 988-96.

control due to differing conceptions of the "goals of the process that began in 1963 with the limited nuclear test ban treaty."[103] This crisis in arms control showed that the best strategic and technical reasons against deep reductions of weaponry often weighted against the best political reasons for them.[104] It therefore pointed at fundamental problems relating to the relationship between both superpowers, which strategic arms control could never be fully isolated from.[105]

1.2.2.3 Post-Cold War Treaties

The collapse of the Soviet Union in 1991 was greeted with optimism in the field of nuclear arms control and disarmament. It seemed to promise a sharp decline in nuclear danger which would open "possibilities in the arms control arena which seemed remote only a short time ago."[106] The opening for signature of the Strategic Arms Reduction Treaty (START) I, ratified in 1994, seemed to be an example of this.[107] Though delayed due to the dissolution of the Soviet Union, this treaty promised a sharp reduction in the number of nuclear warheads to about 7,000 on each side.[108] The START

[103] Joseph S. Nye Jr, "Restarting Arms Control," *Foreign Policy* 47 (1982): 98-99; Jacobson, "The Crisis in Arms Control", 1588.
[104] Joseph S. Nye Jr, "Farewell to Arms Control," *Foreign Affairs* 65 (1986): 11. Nye further concludes due to this that the *"early 1990s may prove a very difficult time for developing the consensus in defense and foreign policy that America needs to remain an effective great power during a turbulent period in world politics."* Nye, "Farewell to Arms Control", 20.
[105] Nye, "Restarting Arms Control", 113.
[106] Graham and Ifft, "Legal Aspects of Bilateral Arms Control Treaties", 1.
[107] Treaty between the United States of America and the Union of Soviet Socialist Republics on the Reduction and Limitation of Strategic Offensive Arms, U.S.-U.S.S.R., July 31, 1991, CD/1192.
[108] Amy F. Woolf, *Nuclear Arms Control: The Strategic Offensive Reductions Treaty*, Report no. RL31448 (Congressional Research Service, December 30, 2008) 1; Schenck and Youmans, "From Start to Finish: A Historical Review of Nuclear Arms Control Treaties and Starting Over with the New Start", 425.

II[109] agreement, which reduced strategic warheads to 3,000-3,500 on each side, was signed in 1993.[110]

Despite the failure of the negotiations of the START III, a number of developments in the field followed with the Strategic Offensive Reductions Treaty (SORT) in 2002 and the detailed and inspection-based New START in 2010.[111] The Comprehensive Test Ban Treaty[112] (CTBT), which intended to ban all nuclear-related test explosions and provide an efficient international monitoring system, was also opened for signature in September 1996, but remains unratified.[113] Despite this, the resolution in which the General Assembly declared its readiness to resume consideration of a comprehensive test-ban treaty shows the deep impact the nuclear taboo had in its creation. It reaffirmed that a treaty banning all nuclear-related test explosions was "one of the highest priority objectives of the international community in the field of disarmament and non-proliferation" and declared that:

> [T]he most effective way to achieve an end to nuclear testing is through the conclusion of a universal and internationally and effectively verifiable comprehensive nuclear-test-ban treaty that will attract the adherence of all States and will contribute to the prevention of the proliferation of nuclear weapons in all its aspects, to the process of nuclear disarmament and therefore to the enhancement of international peace and security.[114]

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[109] Treaty Between the United States of America and the Russian Federation on Further Reduction and Limitation of Strategic Offensive Arms, Russia-U.S., Jan. 3, 1993, CD/1994.

[110] Taken together, the U.S. and the Russian Federation had agreed with START I and II a reduction in nuclear arsenals by 80 per cent. Vladimir Petrosky, "Foreword", in *Future Legal Restraints on Arms Proliferation*, ed. Julie Dahlitz (New York: United Nations, 1997), 1.

[111] Treaty between the Russian Federation and the United States of America on Strategic Offensive Reductions, Russia-U.S., May 24, 2002, 2350 U.N.T.S. 42195; The Treaty between the United States of America and the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offensive Arms also known as the New START Treaty, Russia-U.S., April 8, 2020. See also: Woolf, *Nuclear Arms Control: The Strategic Offensive Reductions Treaty*, 1; Daniel H. Joyner, "Recent developments in international law regarding nuclear weapons," *International & Comparative Law Quarterly* 60, no. 1 (2011): 216.

[112] Comprehensive Nuclear Test-Ban Treaty, Sept. 35, 1996, 35 I.L.M. 1439.

[113] Alessandra Pietrobon, "Nuclear powers' disarmament obligation under Treaty on the Non-Proliferation of Nuclear Weapons and the Comprehensive Nuclear Test Ban Treaty: interactions between soft law and hard law," *Leiden Journal of International Law* 27, no. 1 (2014): 174; Gillis, *Disarmament, A Basic Guide*, 38.

[114] U.N. G.A. Res. 50/65 (Jan. 9, 1996).

The effect of the nuclear taboo can also be clearly seen in the CTBT's text. Its preamble stresses the need for continued systematic and progressive efforts to reduce "with the ultimate goal of eliminating those weapons, and of general and complete disarmament under strict and effective international control."[115] The treaty's preamble also highlights that the cessation of nuclear test explosions, by constraining the development and qualitative improvement of nuclear weapons, would constitute "an effective measure of nuclear disarmament and non-proliferation in all its aspects."[116]

The Treaty on the Prohibition of Nuclear Weapons[117] (TPNW)—the first multilateral legally binding instrument for nuclear disarmament to have been negotiated in twenty years also opened for signature in September 2017, and entered into force in October 2020.[118] The fundamental ways in which the nuclear taboo has given rise to this treaty can be clearly seen within its text, which remarks the following in its preface:

> Deeply concerned about the catastrophic humanitarian consequences that would result from any use of nuclear weapons, and recognizing the consequent need to completely eliminate such weapons, which remains the only way to guarantee that nuclear weapons are never used again under any circumstances,
>
> Acknowledging the ethical imperatives for nuclear disarmament and the urgency of achieving and maintaining a nuclear-weapon-free world, which is a global public good of the highest order, serving both national and collective security interests,

[115] CTBT, preamble.
[116] Ibid.
[117] Treaty on the Prohibition of Nuclear Weapons, July 7, 2017, 3380 U.N.T.S. CN.475.2017.TREATIES-XXVI-9.
[118] The Treaty on the Prohibition of Nuclear Weapons prohibits a range of nuclear weapon–related activities such as "undertaking to develop, test, produce, manufacture, acquire, possess or stockpile nuclear weapons or other nuclear explosive devices, as well as the use or threat of use of these weapons." Gillis, *Disarmament, A Basic Guide*, 37.

> Mindful of the unacceptable suffering of and harm caused to the victims of the use of nuclear weapons (hibakusha), as well as of those affected by the testing of nuclear weapons.[119]

The strength of the nuclear taboo is therefore evident through its underlying influence in this treaty and in these extracts. It provides a roadmap for complete nuclear disarmament—a historical legal achievement.[120] Despite this, it is also important to note that a number of key states are not parties to this treaty; amongst others, the United States, Russia, China, India, Pakistan, Israel, North Korea, the United Kingdom, France, and a number of other European countries have neither signed nor ratified the TPNW. A fact which, despite the magnitude of the achievement accomplished by the entry into force of this treaty, calls into question the strength and impact of the nuclear taboo.

This sense of optimism in the field these different treaties gave rise to has not lasted, however, with commentators pointing out a lack of progress in key areas and describing the current period of nuclear arms control as a moment of challenge.[121] The retaliatory nuclear tests conducted by India and Pakistan in 1998, have produced "the world's first nuclear confrontation entirely unrelated to the Cold War."[122] A majority of these treaties have also not yet entered into force or remain stalled, with the CTBT not

[119] TPNW, preface.
[120] Barry de Vries and Thilo Marauhn, "Not a love affair: The relationship between the Treaty on the Prohibition of Nuclear Weapons and the Nuclear Non-Proliferation Treaty," in *Disarmament Law: Reviving the Field*, eds. Treasa Dunworth and Anna Hood (London and New York: Routledge, 2021), 160-161; Bonnie Docherty, "Completing the package: the development and significance of positive obligations in humanitarian disarmament law," in *Disarmament Law: Reviving the Field*, eds. Treasa Dunworth and Anna Hood (London and New York: Routledge, 2021), 58; Alexander Kalyadine, "Nuclear disarmament negotiations require a powerful initiating momentum," in *Russia: Arms Control, Disarmament and International Security*, eds. Alexei Arbatov and Alexandre Kaliadine (Moscow: Institute of World Economy and International Relations, Russian Academy of Sciences, 2013), 27.
[121] Gillis, *Disarmament, A Basic Guide*, 6.
[122] Schenck and Youmans, "From Start to Finish: A Historical Review of Nuclear Arms Control Treaties and Starting Over with the New Start", 426.

yet in force due to the ratification certain states identified within its Annex 2 still being required.[123]

Furthermore, no positive progress has been made on ending fissile material, despite the existence of proposals relating to the control of the production of this material being offered since the mid 1940s. Despite multiple General Assembly resolutions—such as the unanimous 1993 resolution—calling for a multilateral and internationally effectively verifiable treaty prohibiting the production of fissile material for nuclear weapons due to their essential role in the manufacture of nuclear weapons or other nuclear explosive devices, no progress has been seen in this area.[124] In order for negotiations on a Fissile Material Cut-off Treaty (FMCT) to begin, key states such as Pakistan have to remove their oppositional vote—a fact that is affected by the country's concern over being locked into a "disadvantageous position relative to India's superior nuclear stockpile."[125]

Progress following the New START agreement has additionally stalled.[126] Proposals for a New START II to follow this treaty including proposals to ban MIRVs remained inconclusive despite their capability to destroy multiple adversary missiles and other targets, and the potentially dangerous effects these might have.[127] Recognized nuclear-weapon states have additionally made little progress on reducing the size of

[123] These being China, India, Israel, Pakistan, and the U.S. Pietrobon, "Nuclear powers' disarmament obligation under Treaty on the Non-Proliferation of Nuclear Weapons and the Comprehensive Nuclear Test Ban Treaty: interactions between soft law and hard law", 175.
[124] U.N. G.A. Res. 48/75L (Dec. 16, 1993); U.N. G.A. 65/66 (Jan. 12, 2011); U.N. Office for Disarmament Affairs Rep. of the Group of Governmental Experts to make recommendations on possible aspects that could contribute to but not negotiate a treaty banning the production of fissile material for nuclear weapons or other nuclear explosive devices, ¶1, U.N. Doc. A/70/81 (May 7, 2015).
[125] Daryl G. Kimball and Kingston Reif, "Fissile Material Cut-off Treaty (FMCT) at a Glance", Arms Control Association, last reviewed June, 2018, https://www.armscontrol.org/factsheets/fmct.
[126] Daryl G. Kimball and Kingston Reif, "NPT Conference Fails to Reach Consensus", Arms Control Association, June 2, 2015, https://www.armscontrol.org/act/2015-06/news/npt-conference-fails-reach-consensus.
[127] The issue of MIRVs, which has been present since the 1970s, is a point of critique of START I. Rudesill, "MIRVs Matter: Banning Hydra-Headed Missiles in a New Start II Treaty", 91-92.

their nuclear arsenals.[128] France announced no new reductions between 2013-16, and China and Russia have increased the number of deployed warheads since 2013.[129] Indeed, "in the space of barely ten years, the dream of disarmament now seems more distant than ever", with most nuclear-armed states devoting resources to upgrading their arsenals.[130] These events and treaties raise questions on the nature and strength of the nuclear taboo. Though its effectiveness concerning the use of nuclear weapons is clear, it does not seem to inspire the same revulsion regarding the possession of nuclear weapons.

Having established the emergence of the international legal regime of nuclear weapons and the nuclear taboo, the following section will now turn to the question of chemical and biological weapons.

1.3 Chemical and Biological Weapons

Chemical and biological weapons have long since borne a deep moral opprobrium rooted in their "perfidy and insidiousness" and their use as indiscriminate agents of "unnecessary suffering … said to contradict the universal and chivalrous principles of conduct in war."[131] They have been subject to a longstanding cross-cultural taboo which has made them stand seemingly in contrast to the purpose of international humanitarian law to "protect combatants and non-combatants from unnecessary

[128] Elisabeth Phillip and Kelsey Davenport, *Assessing Progress on Nuclear Nonproliferation and Disarmament: Updated Report Card, 2013-2016* (Arms Control Association, 2016), vii.
[129] Ibid.
[130] Nina Tannenwald, "The Vanishing Nuclear Taboo? How Disarmament Fell Apart," *Foreign Affairs* 97, no. 6 (2018): 16.
[131] Jean Pascal-Zanders, "International Norms Against Chemical and Biological Warfare: An Ambiguous Legacy," *Journal of Conflict and Security Law* 8, no. 2 (2003): 409.

suffering."[132] The taboo surrounding these weapons has arisen due to the wounding effects of these weapons on combatants and non-combatants.[133] In turning civilisation on its head, they negate all the benefits of medical and scientific progress whilst sharing with nuclear weapons the capacity to inflict mass casualties even in a single attack.[134]

Constraints on chemical and biological weapons are multifaceted and long-standing, with prohibitions relating to their use dating further back than the First World War and the idea of their unique immoral nature being deeply entrenched in the folklore of international society.[135] These prohibitions find their origin on the shock of the first large-scale gas attacks in warfare and its effective use in the First World War.[136] The usage of these weapons in early conflicts led a committee of the League of Nations Disarmament Conference to hold bacteriological warfare to be "so particularly odious that it revolts the conscience of humanity more than any other method of warfare."[137]

Though biological and chemical weapons have historically been dealt with under the overlapping idea of poisoned weapons, specialised conventions covering each

[132] U.K. Ministry of Defence, *The Manual of The Law of Armed Conflict*, 3; Daniel Feakes, "Global civil society and biological and chemical weapons," in *Global Civil Society Yearbook 2003*, ed. Mary Kaldor, Helmut Anheier, and Marlies Glasius (Oxford: Oxford University Press, 2003), 93. Guy R. Hasegawa's account of the development and attempted use of chemical weapons in the American Civil War illustrates the motivations underlying their development and the origin of the taboo which arose surrounding them. Guy R. Hasegawa, *Villanous Compounds: Chemical Weapons & The American Civil War* (Carbondale: Southern Illinois University Press, 2015).

[133] J. McClelland Mbe, "Conventional weapons: a cluster of developments," *International and Comparative Law Quarterly* 54, no. 3 (2005): 755-56.

[134] Robert Harris and Jeremy Paxman, *A Higher Form of Killing: The Secret History of Chemical and Biological Warfare* (London: Arrow Books, 2010), xii; Stockholm International Peace Research Institute, *Biological and Toxin Weapons: Research, Development and Use from the Middle Ages to 1945* (Oxford and New York: Oxford University Press, 1999), viii; Ramesh Thakur, "Introduction: Chemical Weapons and the challenge of weapons of mass destruction", in *The Chemical Weapons Convention: Implementation, challenges and opportunities*, ed. Ramesh Thakur and Ere Haru (Tokyo, New York, and Paris: United Nations University Press, 2006), 1; Maynard, "Opinions of Chemical Warfare", 1; Spiers, *Agents of War: A History of Chemical and Biological Weapons*, 11; R. Trapp, "Convergence of Chemistry and Biology, and Nanotechnology", in *Preventing Chemical Weapons: Arms Control and Disarmament as the Sciences Converge*, eds. Michael Crowley, Malcolm Dando, and Lijun Shang (Croydon: Royal Society of Chemistry, 2018), 193; K. Nixdorff, "Advances in the Targeted Delivery of Biochemical Agents", in *Preventing Chemical Weapons: Arms Control and Disarmament as the Sciences Converge*, eds. Michael Crowley, Malcolm Dando, and Lijun Shang (Croydon: Royal Society of Chemistry, 2018), 260.

[135] Pascal-Zanders, "International Norms Against Chemical and Biological Warfare: An Ambiguous Legacy", 391.

[136] Bull, *The Control of the Arms Race: Disarmament and Arms Control in the Missile Age*, 126-131.

[137] League of Nations Conference for the Reduction and Limitation of Armaments, Chemical and Biological Weapons Special Committee, *Report to the General Commission*, ¶11, League of Nations Doc. Conf.D.120. [Conf.D./A.C.B.16(I)] (May 31, 1932). See also: Louise Doswald-Beck and Peter Herby, "Humanitarian Law Perspectives," in *Future Legal Restraints on Arms Proliferation*, ed. Julie Dahlitz (New York: United Nations, 1997), 87.

category have developed in the past decades.[138] Biological weaponry has come to be understood as weapons consisting of "pathogenic microorganisms or toxins manufactured from living organisms which, when intentionally delivered, have the capacity to cause illness or death among human, animal or plant populations."[139] These weapons are measured in terms of virulence, infectiousness, stability, and ease of production and including the use of live organisms and that of their toxic products.[140]

Toxic chemicals, by contrast, have been defined in the Chemical Weapons Convention (CWC)[141] as "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals."[142] Four large overall types of chemical weapons are understood to exist: blood cases, blistering agents, choking agents, and nerve agents.[143] General differences between biological and chemical weapons include the fact that whereas chemical means relate to both tactical and strategic warfare, biological means are considered mainly in connection only to strategic warfare.[144] Biological and chemical weapons can also be distinguished by the fact that chemical agents of warfare may be employed because of their direct toxic effects on man, whilst biological agents of warfare may be intended to instead cause disease or death on man, plants, or animals.[145]

[138] James Revill, "'Muddling Through' in the Biological and Toxin Weapons Convention," *International Politics* 55 (2018): 387.
[139] Joyner, *International Law and the Proliferation of Weapons of Mass Destruction*, 79.
[140] Ibid; Bull, *The Control of the Arms Race: Disarmament and Arms Control in the Missile Age*, 126.
[141] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 1974 U.N.T.S. 45; 32 I.L.M. 800.
[142] The definition for what is characterised as a chemical weapon is given under article 1. Ibid, art.2(2).
[143] Joyner, *International Law and the Proliferation of Weapons of Mass Destruction*, 80; Joseph Cirinciose, Jon Wolfsthal, and Miriam Rajkumar, *Deadly Arsenals, Nuclear, Biological and Chemical Threats*, 2nd ed. (Washington: Carnegie Endowment, 2005), 57.
[144] Bull, *The Control of the Arms Race: Disarmament and Arms Control in the Missile Age*, 126.
[145] Stockholm International Peace Research Institute, *Armaments and Disarmament in the Nuclear Age: A Handbook* (Stockholm: Almqvist & Wiksell International, 1976), 109.

The international agreements proscribing these weapons are: the 1925 Geneva Protocol,[146] which prohibits the use of chemical or biological weapons in war; the Biological and Toxin Weapons Convention (BWC or 'Biological Weapons Convention'),[147] which prohibits the development, production and stockpiling of such weapons; and the CWC, which prohibits the development, production, stockpiling and use of such weapons.[148] Chemical warfare took a significantly longer time to result in a binding international treaty due to its spread amongst non-nuclear powers.[149] The international legal regime surrounding these treaties and its relation to the underlying chemical and biological weapons taboo will be examined in the following pages.

1.3.1 Early Chemical and Biological Treaties

The earliest international agreements covering biological and chemical weapons can be found in the Hague Conventions of 1899 and 1907, which provided some of the first multilaterally agreed prohibition of poison or poisoned weapons.[150] These Conventions represented some of the first comprehensive agreements on these weapons and were largely the product of 19th century attempts to regulate the conduct of war. Previous attempts such as the Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight[151] (hereinafter 'Declaration of St.

[146] Protocol for the prohibition of the use in war of asphyxiating, poisonous or other gases, and of bacteriological methods of warfare. June 17, 1925, 94 L.N.T.S. 2138.
[147] Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1974, 1015 U.N.T.S. 163; 11 I.L.M. 309.
[148] Graham S. Pearson, *The UNSCOM Saga: Chemical and Biological Weapons Non-Proliferation* (Hampshire: MacMillan Press, 1999), xvii.
[149] Best, *War and Law since 1945*, 309.
[150] Joyner, *International Law and the Proliferation of Weapons of Mass Destruction*, 88.
[151] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, Nov. 29 1868, 130 I.H.L. 6.

Petersburg') and the Manual published by the Institute of International Law in 1880 (hereinafter 'Oxford Manual')[152] deeply influenced this field by aiming to restrain the destructive force of war and endeavouring to establish the conduct of armed conflict.[153] The Declaration of St. Petersburg is particularly revealing in this respect, with its preamble stating that "the necessities of war ought to yield to the requirements of humanity."[154]

These conventions were ambitious and diverse. They produced a wide set of agreements concerning the use of weapons and represented the first salient international endeavour to prohibit or restrict the use of chemical and biological weapons.[155] Significantly, they prohibited the use of poison or poisoned weapons, projectiles for diffusion of asphyxiating or deleterious gases which caused unnecessary suffering, and further prohibited the discharge of projectiles and explosives from balloons and restricted the use of underwater contact mines.[156] The prohibition on the usage of asphyxiating gases within the 1899 Hague Convention stands out due to its consideration of this weapon as being cruel, indiscriminate, and causing unnecessary suffering.[157] The statements pronounced within the proceeding of this conference by the delegates of Russia and Austria-Hungary on these weapons stand out, as

[152] The Laws of War on Land, Sept. 9, 1880, 140 I.H.L. 8.
[153] These will be examined in the following section, which will examine conventional arms control and disarmament. U.K. Ministry of Defence*, The Manual of The Law of Armed Conflict*, 9.
[154] This declaration further states that "the necessities of war ought to yield to the requirements of humanity" and that "the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy." An object which is exceeded by the employment "of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable" Declaration of St. Petersburg, preamble.
[155] Koplow, "Eve of Destruction: Implementing Arms Control Treaty Obligations to Dismantle Weaponry", 183; Masahiko Asada, "A path to a comprehensive prohibition of the use of chemical weapons under international law: from The Hague to Damascus," *Journal of Conflict and Security Law* 21, no. 2 (2016): 155; Tryon, "The Regulation of War", 535-547.
[156] These were respectively prohibited in the *Declaration IV concerning Asphyxiating Gases (signed at The Hague, 29 July 1899)* and *Convention IV with Respect to the Laws and Customs of War on Land (signed at The Hague, 29 July 1907)*. Editorial Comment, "The Second Peace Conference of the Hague," *The American Journal of International Law* 1, no. 2 (1907): 431-32; Adam Roberts and Richard Guelff, *Documents on the Laws of War*, 3rd ed. (Oxford: Oxford University Press, 2000), 59; U.N. Department for Disarmament Affairs, *The United Nations and Disarmament: 1945-1985*, 132.
[157] Cassese, "Means of Warfare: The Traditional and the New Law", 170.

asphyxiating gases were deemed to be "barbarous in character" and "more cruel than death by bullets."[158]

These agreements did not survive the First World War, with all major belligerents adopting the use of these weapons. Germany, despite having been a signatory to the 1899 Hague Declaration concerning Asphyxiating Gases, argued that through a strict literal reading its method of employing these weapons had not been contrary to the usages of war.[159] This approach to the 1899 Hague Declaration's text stands out when considering the taboo surrounding these weapons and the long-held standard that the use of poison and weapons causing unnecessary suffering was contrary to the laws of war.[160]

The widespread usage of these weapons in the First World War gave rise to interwar arms control and disarmament treaties, with the international community deeming it necessary to take new steps in an attempt to prohibit or restrict their use.[161] The Geneva Protocol of 1925—the sole treaty on the usage of chemical and biological weapons until second half of the 20th Century—was hugely influenced by the usage that these weapons saw in this conflict.[162] The Geneva Protocol deemed chemical and biological to be so revolting and foul that they must meet with the condemnation of all

[158] International Peace Conference and James Brown Scott, *The Proceedings of the Hague Peace Conferences: translation of the original texts* (New York: Oxford University Press, 1920), 366.
[159] Best, *War and Law since 1945*, 49.
[160] This taboo was related to the use of poison in warfare. It also extended to other types of weapons which caused unnecessary suffering. Edward S. Creasy, *First Platform of International Law* (London: John Van Voorst, 1876), 441; William Edward Hall, *A Treatise on International Law*, 4th ed. (Oxford and London: Clarendon Press and Henry Frowde, 1895), 552; George B. Davies, *Outlines of International Law* (London: Harper & Brothers, 1888): 219-224.
[161] J.H.W. Verzijl, *International Law in Historical Perspective – Volume IX-A, The Laws of War* (Leyden: A.W. Sijthoff-Leyden, 1978), 331; Asada, "A path to a comprehensive prohibition of the use of chemical weapons under international law: from The Hague to Damascus", 156-7; Stephen C. Neff, *War and the Law of Nations, a General History* (Cambridge: Cambridge University Press, 2005), 279; Edward M. Spiers, "Gas disarmament in the 1920s: Hopes confounded," *Journal of Strategic Studies* 29, no. 2 (2006): 282.
[162] The long-lasting impact of the images of chemical warfare in the First World War has been amply noted in the literature. Adam's account is particularly compelling: "The images of chemical warfare are horrifying, from Wilfred Owen's description of First World War chlorine victims choking to death to the modem portrait of a menacing figure swathed in a protective cape, only his eyes visible behind a dull black respirator shaped like a crude distortion of the human face." Adams, *Chemical Warfare, Chemical Disarmament: Beyond Gethsemane*, 2.

civilised nations.[163] Despite this, this agreement was riddled with a network of reservations which turned it practically into a no first use agreement.[164]

The Washington Conference of 1922[165] marked an important move from attempts to limit certain uses of a new weapon to a blanket prohibition on any use, something that was not replicated with any other weapon at the time.[166] The language used in this conference reveals the existence of a taboo in relation to the usage of chemical and biological weapons, with article 5 stating that:

> The use in war of asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices, having been justly condemned by the general opinion of the civilized world and a prohibition of such use having been declared in treaties to which a majority of the civilized Powers are parties.[167]

These treaties and conventions firmly establish the long-standing taboo associated with the usage of chemical and biological weapons.[168] Opinions on these particular forms of warfare, both within treaties and in related literature, showcase a deep condemnation of their usage in war.[169] The novelty and destructive capacity of chemical weapons was not the single ethical issue facing these weapons; the additional suffering they produced in soldiers who were also disabled was also problematic.[170] Just war theorists were thus opposed the use of chemical weapons on the grounds that they

[163] Cassese, "Means of Warfare: The Traditional and the New Law", 170.
[164] U.K. Ministry of Defence*, The Manual of The Law of Armed Conflict*, 289.
[165] Treaty relating to the Use of Submarines and Noxious Gases in Warfare, Feb. 6, 1922, 270 I.H.L. 34 [hereinafter, 'Washington Conference']. This conference was a landmark event for many classical realist theorists, and plays a key role in their analysis of international law. It is prominently examined by E.H. Carr in particular, who provides an incisive diplomatic analysis of this conference. This will be developed in chapter three of this thesis.
[166] Price, *The Chemical Weapons Taboo*, 84.
[167] This article continues as follows: "The Signatory Powers, to the end that this prohibition shall be universally accepted as a part of international law binding alike the conscience and practice of nations, declare their assent to such prohibition, agree to be bound thereby as between themselves and invite all other civilized nations to adhere thereto." Washington Conference, art. 5.
[168] The use of gas in the First World War played a considerable role in the development of this taboo. Brown makes note of this in his analysis of chemical arms control and disarmament, noting that "By 1922, gas had become the *cause célèbre* of World War I memories." Frederic J. Brown, *Chemical Warfare: A Study in Restraints* (New Brunswick and London: Transaction Publishers, 2006), 96.
[169] Stockholm International Peace Research Institute, *Armaments and Disarmament in the Nuclear Age: A Handbook*, 108.
[170] Hasegawa, *Villanous Compounds: Chemical Weapons & The American Civil War*, 125.

violated the requirement for non-combatant immunity, as they killed and injured children, women, and elderly people indiscriminately.[171] Major S.J.M. Auld's account of the use of chemical weapons in 1915 at Ypres in the First World War is wholly focused on the suffering these weapons would have caused:

> The majority of those in the front line were killed—some, let us hope, immediately, but most of them slowly and horribly. It is not my intention to try and play upon feelings, but those of us who have seen men badly gassed can only think with horror of a battlefield covered with such cases, over which the Germans subsequently advanced.[172]

Field Marshall John French's account of the Ypres attack and the nature of chemical weapons is similarly noteworthy: "As a soldier I cannot help expressing the deepest regret and some surprise that an Army which hitherto has claimed to be the chief exponent of chivalry of war should have stooped to employ such devices against brave and gallant foes."[173] The suffering which chemical and biological weapons produced has also linked them to the standard of civilisation.[174] General John J. Pershing's account of the First World War illustrates this idea, whereby Germany's decision to disregard the Hague Conference of 1899 and use gas shells "the impression was that the Germans had now through every consideration of humanity to the

[171] Ulf Schmdt, *Secret Science: A Century of Poison Warfare and Human Experiments* (Oxford: Oxford University Press, 2015), 21-22. Coleman makes a similar argument with regards to the first use of chemical weapons in 1915 at Ypres, arguing that the "feelings of shock and outrage produced by this first gas attack were compounded by the fact that poison gas was specifically outlawed by international law." Kim Coleman, *A History of Chemical Warfare* (Hampshire and New York: Palgrave MacMillan, 2005), xv. Harris and Paxman further argue that: "To the British … gas was universally known as 'Frightfulness'. Even after years of war and atrocity which had seen the introduction of such terrifying new weapons as the tank, the Zeppelin and the U-boat, gas was still the most hated and feared of them all, with a complete demonology to itself." Harris and Paxman, *A Higher Form of Killing: The Secret History of Chemical and Biological Warfare*, 20.

[172] Major S.J.M. Auld, *Gas and Flame in Modern Warfare* (New York: George H. Doran Company, 1918), 12.

[173] Field Marshall John French, *The Despatches of Lord French* (London: Chapman and Hall, Ltd., 1917), 360.

[174] Price's analysis of the genealogy of the chemical weapons taboo points out the strong link it the use of these weapons had with the idea of war as an immoral institution: "part of the larger historical explanation for the origins of the CW taboo lies in the emergence of concentrated and organized attacks on the institution of warfare as immoral and uncivilized during this period." The idea of the standard of civilisation will be analysed in chapter five of this thesis, where Georg Schwarzenberger's analysis of this concept will be expanded upon. Schwarzenberger's conception of a standard of civilisation deepens the analysis of this chapter significantly. Richard Price, "A genealogy of the chemical weapons taboo," *International Organization* 49, no. 1 (1995): 95.

winds."[175] President Franklin D. Roosevelt's 1943 statement warning the Axis powers against using poison gas similarly stands out in this regard:

> I have been loath to believe that any Nation, even our present enemies, could or would be willing to loose upon mankind such terrible and inhumane weapons … Use of such weapons has been outlawed by the general opinion of civilized mankind. This country has not used them, and I hope that we never will be compelled to use them. I state categorically that we shall under no circumstances resort to the use of such weapons unless they are first used by our enemies.[176]

These extracts and passages establish the profound link which the taboo associated with the use of chemical and biological weapons has with these treaties. This idea will be explored further through the treatment which these weapons received under the conventions that emerged following the Second World War, which shed further light into the taboo associated with the usage these weapons.

1.3.2 The Biological and Chemical Conventions

The period following the Second World War saw the eventual accession of the BWC and the CWC. These two treaties abolished the weapons they covered equally for all members, with no special rights retained by the countries to hold stockpiles.[177] This represented the first time in which both of these types of weapons were categorised separately despite their historical ties to each other.[178] It also further represented the two main approaches followed by the United Nations in order to pursue disarmament, with the General Assembly acknowledging the need to concentrate on more far-

[175] John J. Pershing, *My Experiences in the World War* (New York: Frederick A. Stokes Company, 1931), 165.
[176] Franklin D. Roosevelt, "Statement Warning the Axis Against Using Poison Gas, June 08, 1943," The American Presidency Project, accessed December 26, 2022, https://www.presidency.ucsb.edu/documents/statement-warning-the-axis-against-using-poison-gas
[177] Koplow, "Eve of Destruction: Implementing Arms Control Treaty Obligations to Dismantle Weaponry", 177.
[178] U.K. Ministry of Defence*, The Manual of The Law of Armed Conflict*, 280.

reaching objectives.[179] Both conventions aimed to cover large groups rather than exclusively individual soldiers and were the subject of lengthy negotiations in recent years due to their use in combating guerrilla warfare in modern conflicts.[180]

1.3.2.1 The Biological Weapons Convention

The BWC was the first international agreement providing for a genuine measure of disarmament, entering into force after the U.S. unilaterally abandoned in 1969 its biological weapons.[181] This treaty is focused on the deliberate use of biological agents as weapons against humans due to their causing serious illness and death and the potential immense economic harm.[182] Advances in the life sciences and the globalization of biotechnology made these weapons "an area of growing concern."[183] President Nixon's statement on chemical and biological reaffirms the taboo associated with the usage of biological weapons and highlights its importance in relation to this treaty: "Biological weapons have massive, unpredictable and potentially uncontrollable consequences. They may produce global epidemics and impair the health of future generations."[184]

[179] U.N. Department for Disarmament Affairs, *The United Nations and Disarmament: 1945-1985,* 3.
[180] Such weapons have been also used in recent wars such as the Iran-Iraq War, the Gulf War, and numerous wars in Africa. Some of these cases of usage will be examined in the following chapter. U.N. Department for Disarmament Affairs, *The United Nations and Disarmament: 1945-1985,* 9.
[181] U.N. Department for Disarmament Affairs, *The United Nations and Disarmament: 1945-1985*, 9; Trimble, "Beyond Verification: The Next Step in Arms Control", 907.
[182] Smallpox remains a significant example of the devastating effect diseases can have: "Smallpox is one of the most dreaded diseases. Caused by the variola virus, it allegedly killed more people in history than any other infectious disease." Michael J. Selgelid, "Smallpox Revisited?", *American Journal of Bioethics* 3, no. 1 (2003): 5.
[183] Gillis, *Disarmament, A Basic Guide*, 57.
[184] Richard Nixon, "Statement on Chemical and Biological Defense Policies and Programs, November 25, 1969," in *Foreign Relations of the United States, 1969–1976, Volume E–2, Documents on Arms Control and Nonproliferation, 1969–1972* (Washington, DC: United States Government Printing Office), 461.

Fears of the horror biological weapons can give rise to are not new and are strongly tied to their deadliness and method of contagion. These fears, together with the biological weapons taboo, can be clearly seen in relation to certain diseases. Cole's account of Ebola is revealing in this respect:

> For Ebola, there is no cure, no treatment. Even the manner in which it spreads is unclear, by close contact with victims and their blood, bodily fluids or remains or just breathing the surrounding air … The horror is only magnified by the thought that individuals and nations would consider attacking others with such viruses.[185]

Mayor has also illustrated this in the latest edition of *Greek Fire, Poison Arrows, and Scorpion Bombs*:

> When plague struck Athens in 430 BC during the Peloponnesian War, for example, the Athenians' first impulse was to blame the Spartans. Fears of the deliberate transmission of plague arose in the Roman Empire, and in Europe during the Black Death. The havoc and mass deaths wrought by COVID-19 are sparking new, urgent concerns about bioweapons.[186]

These ideas are clearly present in the BWC. This Convention bans the development, production, stockpiling and acquisition of biological and toxic weapons. It requires the destruction of such weapons or delivery means, states the importance of banning "such dangerous weapons of mass destruction", and recognises the agreement's importance as a first step towards the achievement of a prohibition for the development of chemical weapons.[187] Its preface further emphasises the key role this convention plays in facilitating the "achievement of general and complete disarmament under strict and effective international control", notes the "importance and urgency of eliminating from the arsenals of States … such dangerous weapons of mass destruction",

[185] Leonard A. Cole, "The Specter of Biological Weapons," *Scientific American* 275, no. 6 (December 1996): 60.
[186] Adrienne Mayor, *Greek Fire, Poison Arrows, and Scorpion Bombs: Unconventional Warfare in the Ancient World* (Princeton and Oxford: Princeton University Press, 2022), ix.
[187] Biological Weapons Convention, Preamble.

and declares their use to be "repugnant to the conscience of mankind and that no efforts should be spared to minimise this risk."[188] In order to achieve this, states party to this Convention undertake to never, in any circumstances, develop, produce, stockpile, acquire, or retain:

> (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;
>
> (2) Weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.[189]

The Convention is deliberately comprehensive and requires the destruction of any existing biological weapons stockpiles within nine months of enactment.[190] Its unlimited duration was reaffirmed in the Eighth Review Conference of the states parties of 2017, with no state party exercising its right to withdraw from the Convention.[191] Further attempts to negotiate a protocol to the BWC that would address these deficiencies have failed.[192] It additionally has no implementing body and no means of monitoring or verifying compliance except by the lodging of a complaint with the Security Council.[193] Two facts which have led commentaries to deem this treaty as a political arrangement due to its lack of provisions or real economic incentives.[194] This

[188] Biological Weapons Convention, Preamble.
[189] Biological Weapons Convention, art. 1(1-2).
[190] Nicholas A. Sims, "A simple treaty, a complex fulfillment: A short history of the Biological Weapons Convention Review Conferences," *Bulletin of the Atomic Scientists* 67, no. 3 (2011): 9.
[191] U.N. Eighth Review Conference of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, *Final Document of the Eight Review Conference*, ¶78, U.N. Doc. BWC/CONF.VIII/4, (Jan. 11, 2017).
[192] Goldblat, *Agreements for Arms Control: A Critical Survey*, 248.
[193] Gillis, *Disarmament, A Basic Guide*, 59.
[194] Terence Taylor, "The Chemical Weapons Convention and prospects for implementation," *International & Comparative Law Quarterly* 42, no. 4 (1993): 918.

presupposes the biggest challenge and limitation of the convention, as "developing means and methods for verification in a time of rapidly changing science will require reopening longstanding political and technical differences."[195]

1.3.2.2 The Chemical Weapons Convention

The CWC opened for signature in January 1993 and entered into force in 1995 and prohibits the possession and production of chemical weapons, additionally requiring their destruction. It expands upon the 1925 Geneva Protocol, prescribing that state parties shall never, under any circumstances:

> (a) To develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone;
>
> (b) To use chemical weapons;
>
> (c) To engage in any military preparations to use chemical weapons;
>
> (d) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a state party under this Convention.[196]

The CWC was subject to long negotiations, with the question of chemical weapons—heavily linked to the suffering caused by these weapons—being under

[195] Revill, "'Muddling Through' in the Biological and Toxin Weapons Convention", 398.
[196] The usage of "never under any circumstances" was used deliberately to further ban the usage of chemical weapons by state parties against non-state parties. Chemical Weapons Convention, art.1(a-d).

consideration since 1971.[197] These discussions were subject to several complicated issues; amongst which was the question of the scope of the prohibition, whether its full implementation should be immediate or spread over a period of time, and to what activities and agents it would apply.[198] These complications made it seem "a miracle that this point finally has been reached, for the international community has been rather reticent about achieving quick result in this area."[199]

The taboo associated with these weapons can be clearly seen in the suffering they cause. Cole has made note of this in relation to the Tokyo subway sarin attacks of 1995, remarking about how the fact that "thousands did not die from the Tokyo attack was attributed to an impure mixture of the agent. A tiny drop of sarin, which was originally developed in Germany in the 1930s, can kill within minutes after skin contact of inhalation of its vapor."[200] Similarly, despite noting the effect incomplete historical records have in establishing the origin of this taboo, he has outlined that patterns of behaviour "suggest that in most societies throughout history, poisons were explicitly or implicitly deemed inappropriate weapons of war."[201] The taboo is, again, also clearly present in the preamble of this Convention through references to the suffering chemical weapons cause. It reaffirms the principles, objectives, and obligations of the 1925 Geneva Protocol, excludes the possibility of use of chemical weapons "for the sake of all

[197] For an analysis of, for example, the effects of chlorine gas see: P. Govier and J.M. Coulson, "Civilian exposure to chlorine gas: A systematic review," Toxicology Letters 293 (2018): 249–252.
[198] U.N. Department for Disarmament Affairs, *The United Nations and Disarmament: 1945-1985*, 110.
[199] Eric P.J. Myjer, "The organization for the prohibition of chemical weapons: moving closer towards an international arms control organization? A quantum leap in the institutional law of arms control," in *Issues of Arms Control Law and The Chemical Weapons Convention*, ed. Eric P.J. Myjer (The Hague: Martinus Mijhoff Publishers, 2001), 61.
[200] Cole, "The Specter of Biological Weapons", 60.
[201] Leonard A. Cole, "The Poison Weapons Taboo: Biology, Culture, and Policy," *Politics and the Life Sciences* 17, no. 2 (September 1998): 130.

mankind", and considers that "achievements in the field of chemistry should be used exclusively for the benefit of mankind."[202]

This Convention is set apart from the BWC by virtue of compliance mechanisms which it includes, which set up an overseeing international organisation—the Organization for the Prohibition of Chemical Weapons (OPCW)—and established requirements for states to demonstrate compliance.[203] A fact which further distinguishes it from the 1925 Geneva Protocols by disallowing any state party reservations.[204] These two facts stand out due to the nearly universal adherence achieved by this Convention, with 193 state party to it as of 2023.[205]

The significance of this achievement lies in the fact that it is the first multilaterally negotiated treaty providing for the ban of chemical weapons to such an extent. It covers many of the advancements in weapon technologies which emerged after the Second World War, using its verification measures to reduce the risk of proliferation among state parties.[206] Additionally, it addresses the problem of horizontal proliferation of WMD and filling the gap perceived in the 1925 Geneva Protocol, which until then was the latest treaty prohibiting the use of chemical weapons.[207] It remains, in this way, an

[202] Chemical Weapons Convention, Preamble.
[203] Taylor, "The Chemical Weapons Convention and prospects for implementation", 915; Lisa Tabassi, "The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction," in *Making Treaties Work. Human Rights, Environment, and Nuclear Arms Control*, ed. Geir Ulfstein (Cambridge: Cambridge University Press, 2007), 277; U.N. Office for Disarmament Affairs, *Securing our Common Future, An Agenda for Disarmament*, 27; Myjer, "The organization for the prohibition of chemical weapons: moving closer towards an international arms control organization? A quantum leap in the institutional law of arms control", 62; Jan Klabbers, "Strange bedfellows: The 'interim obligation' and the 1993 Chemical Weapons Convention," in *Issues of Arms Control Law and The Chemical Weapons Convention*, ed. Eric P.J. Myjer (The Hague: Martinus Mijhoff Publishers, 2001), 18.
[204] Reservations are not permitted to the main articles of the Convention. Taylor, "The Chemical Weapons Convention and prospects for implementation", 917.
[205] Organisation for the Prohibition of Chemical Weapons, "Member States", accessed 3 April 2023, https://www.opcw.org/about-us/member-states.
[206] Joyner, *International Law and the Proliferation of Weapons of Mass Destruction*, xv; Dieter Fleck, "Current Legal and Policy Issues," in *Future Legal Restraints on Arms Proliferation*, ed. Julie Dahlitz (New York: United Nations, 1997), 26.
[207] Joyner, *International Law and the Proliferation of Weapons of Mass Destruction*, xiii; Asada, "A path to a comprehensive prohibition of the use of chemical weapons under international law: from The Hague to Damascus", 154.

example of a true disarmament instrument, with all adhering state parties undertaking to eliminate this category of weapon by destroying all their existing stockpiles.[208]

Having established the international legal regime of chemical and biological weapons as well as its emergence, the following section will examine conventional weapons.

1.4 Conventional Weapons

Despite traditionally being one of the most underdeveloped areas of arms control and disarmament, treaties and international agreements on conventional weapons were amongst the first to arise.[209] The earliest of these treaties on conventional weapons date back to the late nineteenth century. Weapons such as landmines—first used in 1862 during the American Civil War by Confederate forces—were objected to by Union forces on the grounds that they were inhumane.[210] These early treaties gave rise to the identification of military necessity as a general principle to limit violence in the absence of any other legal rules.[211] The development of new means

[208] Tabassi, "The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction", 273.
[209] The genesis of contemporary disarmament can be traced to the later 19th century. Casey-Maslen and Vestner, *A Guide to International Disarmament Law*, 4.
[210] Steven A. Solomon, "The United Nations Convention on Certain Conventional Weapons of 1980: Its recent development and increasing significance," *Yearbook of International Humanitarian Law* 6 (2003): 350.
[211] Burrus M. Carnahan, "Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity," *The American Journal of International Law* 92, no. 2 (1998): 213; Inal, *Looting and Rape in Wartime: Law and Change in International Relations*, 33-34.

and methods of warfare was thus seen to go hand in hand with ethical thinking and complying with the law.[212]

Conventional weapons have been the primary tools of violence in almost every recent conflict, causing day-to-day human casualties in places with ongoing conflict and having strong ties to internal conflicts and activities.[213] Despite this, however, this area of arms control has not been perceived to be as high a priority during the twentieth century by comparison to nuclear, chemical, and biological weapons.[214] The reasons for this will be examined together with the development of arms control and disarmament treaties below.

1.4.1 Origins of Conventional Arms Control

1.4.1.1 Pre-WW1 Treaties

The first systematic code for the regulation of code and basis for all recent attempts to regulate it can be found in the Lieber Code issued in 1863 by President Abraham Lincoln.[215] Article 11 of the Lieber Code clearly shows the profound effect which the horrors of war had in its drafting, with its holding that the law of war "does

[212] For example, some categories of weapons, such as blinding laser weapons, were outlawed before their appearance in a battlefield. Vincent Bernard, "Editorial: Science Cannot be Placed Above its Consequences," *International Review of the Red Cross* 94, no. 886 (2012): 459.

[213] U.N. Department for Disarmament Affairs Rep. of the Panel of Governmental Experts on Small Arms, ¶¶15-19, U.N. Doc. A/52/298 (1997); U.N. G.A. Rep. of the Group of Governmental Experts on Small Arms, ¶¶13-16, U.N. Doc. A/54/258 (Aug. 19 1999); Mitsuro Donowaki, "Addressing Light Weapons and Small Arms Proliferation," in *Developing Arms Transparency: The Future of the United Nations Register*, Bradford Arms Register Studies No.7, ed. Malcolm Chalmers, Mitsuro Donowaki, and Owen Greene (University of Bratford, United Kingdom: University of Bratford and Centre for the Promotion of Disarmament and Non-Proliferation, 1997), 206; Lionel P. Fatton, "The impotence of conventional arms control: why do international regimes fail when they are most needed?" *Contemporary Security Policy* 37, no. 2 (2016): 200-222; Anna Stavrianakis, "Small Arms Control and the Reproduction of Imperial Relations," *Contemporary Security Policy* 32, no. 1 (2011): 196.

[214] Dalby, "Critical Geopolitics and the Control of Arms in the 21st Century", 45.

[215] Tryon, "The Regulation of War", 535.

not only disclaim all cruelty and bad faith concerning engagements concluded with the enemy during the war, but also the breaking of stipulations solemnly contracted by the belligerents in time of peace."[216] Article 14 of this treaty further showcases the profound effect this had, and remarks on the influence which the concept of military necessity should have in combat: "Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war."[217]

The Lieber Code was followed by the Declaration of St. Petersburg, which is regarded as the first significant international instrument prohibiting a specific weapon.[218] The Declaration of St. Petersburg was focused on the renunciation of certain types of explosives with a view to lessening the horrors of war.[219] The taboos associated with the use of certain conventional weapons can be seen clearly within it. The Declaration of St. Petersburg states directly that "the progress of civilization should have the effect of alleviating as much as possible the calamities of war", with the objects of war being exceeded "by the employment of arms which uselessly aggravate the suffering to disable the greatest possible number of men."[220]

[216] Instructions for the Government of Armies of the United States in the Field, art. 11, Apr. 24, 1863, 110 I.H.L. L.
[217] Ibid, Article 14.
[218] Solomon, "The United Nations Convention on Certain Conventional Weapons of 1980: Its recent development and increasing significance", 345.
[219] Tryon, "The Regulation of War", 536; Casey-Maslen and Vestner, *A Guide to International Disarmament Law*, 4.
[220] Declaration of St. Petersburg, preamble.

An improvement upon these ideas was made at the Brussels Conference of 1874. Its Final Protocol, which further developed the ideas contained within the Declaration of St. Petersburg on clear ethical grounds, stated that:

> It has been unanimously declared that the progress of civilization should have the effect of alleviating, as far as possible, the calamities of war; and that the only legitimate object which States should have in view during war is to weaken the enemy without inflicting upon him unnecessary suffering.[221]

The Oxford Manual reinforced and expanded both the 1868 Declaration of St. Petersburg and the ideas of the Brussels Conference of 1874. Its text clearly showcases the deep influence which unnecessary suffering had in its creation, and mirrors that of the other codes of this time period. Article 4 states, for instance, that the "laws of war "do not recognize in belligerents an unlimited liberty as to the means of injuring the enemy," and that belligerents are to "abstain especially from all needless severity, as well as from all perfidious, unjust, or tyrannical acts."[222] Similarly, Article 9 forbids:

> (a) To employ arms, projectiles, or materials of any kind calculated to cause superfluous suffering, or to aggravate wounds – notably projectiles of less weight than four hundred grams which are explosive or are charged with fulminating or inflammable substances;
>
> (b) To injure or kill an enemy who has surrendered at discretion or is disabled, and to declare in advance that quarter will not be given, even by those who do not ask it for themselves.[223]

The Hague Conferences of 1899 and 1907, convened through the personal initiative of Tsar Nicholas II of Russia for the primary purpose of limiting armaments, are a key example of pre-WW1 international arms control and of the ideas driving arms

[221] Project of an International Declaration concerning the Laws and Customs of War, Final Protocol, Aug. 27, 1874, 135 I.H.L. 7.
[222] Oxford Manual', art. 4.
[223] Ibid, art. 9(a-b).

control and the restriction of certain types of weapons.[224] Though little was achieved that could "ultimately restrict the behaviour of states", both Conferences saw some of the first restrictions on the use of specific weapons.[225] They seriously and successfully attempted to give definiteness and consistency to the laws of war on land via three separate Conventions and Declarations.[226] The Hague Conference of 1899 resulted on the following three annexed Conventions:

I. Convention for the peaceful adjustment of international differences.

II. Convention regarding the laws and customs of war on land.

III. Convention for the adaptation to maritime warfare of the principles of the Geneva Convention of 22 August 1864.[227]

Three additional Declarations were annexed to prohibit "the launching of projectiles and explosives from balloons or by other similar new methods", "the use of projectiles, the only object of which is the diffusion of asphyxiating or deleterious gases", and "the use of bullets which expand or flatten easily in the human body" (dum-dum bullets).[228] The Second Hague Peace Conference of 1907 reiterated these principles and expanded them, "evolving a very lofty conception of the common welfare of humanity."[229] However, the Conferences were unable to reach an agreement on arms

[224] Roberts and Guelff, *Documents on the Laws of War*, 59; Charles G. Fenwick, "Organization for Mutual Security the Condition Precedent to Disarmament," *The Annals of the American Academy of Political and Social Science* 126, *The United States in Relation to the European Situation* (1926): 154-157.
[225] Daniel Hucker, "British Peace Activism and 'New' Diplomacy: Revisiting the 1899 Hague Peace Conference," *Diplomacy and Statecraft* 26 (2015): 406. See also: Dick Richardson, "In Quest of Arms Control or Rattling an Olive Branch? Some Lessons of History," in *New Perspectives and Thinking on Disarmament and Arms Control,* European Consortium for Political Research, Amsterdam Joint Sessions, April 10-15 (1987), Goldblat, *Agreements for Arms Control: A Critical Survey*, 1.
[226] Editorial Comment, "The Second Peace Conference of the Hague", 431-32.
[227] Final Act of the International Peace Conference, July 29, 1899, 145 I.H.L. 9.
[228] Ibid.
[229] Final Act of the Second Peace Conference, Oct. 18, 1907, 185 I.H.L. 17.

limitations, with the agreements reached only applying to wars fought between the parties to the relevant agreement.[230]

These first prohibitions—the first to emerge from the custom principles in national laws and military manuals prevalent up to the mid-nineteenth century—coincided with the growing range and destructive power of weapons in the latter half of the century, which exponentially increased the lethality of warfare in and beyond the battlefield.[231] They were particularly influenced by advancements in military technology of the time, such as the development of the metallic cartridge in the 1870s, the invention of smokeless powder, and the development of fully automatic weapons in the 1880s and self-loading weapons in the 1890s.[232]

The military literature of the time, such as British military thought between 1900 and 1914, reflects this clearly. Bloch's writings crystallise some of the questions faced by the army before the First World War in relation to the use of improvements such as the magazine rifle, smokeless powder, and flat bullet trajectory bore, together with the use of trenches.[233] Other theorists such as Baden-Powell remarked on the impact that these weapons would have on daylight attacks across an open ground.[234] These writings are of interest when comparing them to the weapons on which international

[230] Roberts and Guelff, *Documents on the Laws of War*, 59; Editorial Comment, "The Second Peace Conference of the Hague", 431; Koplow, "Eve of Destruction: Implementing Arms Control Treaty Obligations to Dismantle Weaponry", 183.
[231] Michael Howard, "Constraints on Warfare," in *The Laws of War: Constraints on Warfare in the Western World*, eds. Michael Howard, George J. Andreopoulos, and Mark R. Shulman (New Haven and London: Yale University Press, 1994), 6; Adam Roberts, "Land Warfare: From Hague to Nuremberg," in *The Laws of War: Constraints on Warfare in the Western World*, eds. Michael Howard, George J. Andreopoulos, and Mark R. Shulman (New Haven and London: Yale University Press, 1994), 119.
[232] Simon Ball, "Britain and the Decline of the International Control of Small Arms in the Twentieth Century," *Journal of Contemporary History* 47, no. 4 (2012): 833.
[233] T.H.E. Travers, "Technology, Tactics, and Morale: Jean de Bloch, the Boer War, and British Military Theory, 1900-1914," *Journal of Modern History* 51, no. 2 (1979): 264-266.
[234] Ibid, 271. See also: Major B.F.S. Baden-Powell, *War in Practice: Some Tactical and Other Lessons of the Campaign in South Africa, 1899-1902* (London: Isbter & Company Ltd., 1903).

agreements quoted above were focused, particularly given their close ties to the taboo associated with the use of related of some of these newly developed weapons.

The limits which these first declarations introduced on the means with which a belligerent party in a battlefield could injure an enemy provide a clear view of what characterises a taboo, particularly in relation to the different weapons which—like the three additional Declarations of the Hague Conference of 1899—were perceived to inflict unnecessary suffering. The Oxford Manual's specific condemnation of perfidious, unjust, or tyrannical acts is particularly noteworthy in this regard, as it was mirrored and further developed by later arms control and disarmament treaties in the interwar period, and throughout and beyond the Cold War.

1.4.1.2 Interwar Treaties

Following the First World War, disarmament and arms control discussions revolved around the reduction of weapons and armed forces, the diminution of poison gas use, and bacteriological weapons.[235] This largely came as a result of the violence witnessed throughout the conflict and its unleashing of forces far beyond the wars of the previous century; proving the power of technology to wreak "death and destruction on a scale never seen before."[236] These ideas can be prominently seen in League of Nations' Conference for the Reduction and Limitation of Armaments, which link the idea

[235] Chemical and bacteriological weapons will be examined in the following section. Schenck and Youmans, "From Start to Finish: A Historical Review of Nuclear Arms Control Treaties and Starting Over with the New Start", 403.
[236] Neff, *War and the Law of Nations, a General History*, 279; Doswald-Beck and Herby, "Humanitarian Law Perspectives", 87.

of disarmament to that of the horrors of war.[237] The memorandum of the Polish Government to the Secretary-General of the League of Nations in 1931 makes this link clear: "The Governments of almost every country have accepted the principle of the condemnation of war as an instrument of national policy, and have since endeavoured to base their international actions on this principle."[238] Salvador de Madariaga's report and resolution, which the Assembly adopted on September 29th, 1931, also makes this link evident:

> Convinced that a renewal of the competition in armaments would necessarily lead to an international and social catastrophe;
>
> The Assembly,
>
> Addresses a solemn appeal to all those who are desirious that practical effect should be given to the principles of peace and justice upon which the Covenant is based … In view of the fact that an undertaking on the part of all States not to increase their armaments would help to create an atmosphere of confidence, to prevent competition in armaments and to prepare the ground for the success of the forthcoming confidence.[239]

Other commentaries of this period are similarly reflective of the prominent effect the violence witnessed throughout First World War had and focus on the destructive effects of the weapons that were used in this conflict. The machine-gun was particularly focused on due to the devastating effects it had in 'No Man's Land', with gun elevations being adjusted to cause the maximum number of fatal wounds possible.[240] These destructive effects gave rise to the notion that "At some later period in the history of

[237] Schwarzenberger explores the link between disarmament and considerations of humanity or civilisation in considerable depth, as will be shown in chapter five. It should be noted, however, that Carr, Morgenthau, and Schwarzenberger all ultimately dismiss the idea that it is armaments themselves that lead to international wars, as national interests and nationalism play a foundational effect on international society. The reasons for this will be touched on in chapters three, four, and five. They will also be summarised in the conclusion of this thesis.

[238] League of Nations, *Moral Disarmament, Memorandum from the Polish Government*, at 2, League of nations Doc. C.602.M.240.1931.IX [Conf.D.16] (Sept. 23, 1931).

[239] Madariaga delivered this report as the *rapporteur* of the Third Committee. League of Nations, *Armaments Truce, Continuation of replies from Governments to the Secretary-General's letter dated October 2nd, 1931 (C.L. 257)*, at 5, League of Nations Doc. C.919.M.484.1931.IX [Conf.D.35] (Dec. 21, 1931).

[240] Victor Lefebure, *Scientific Disarmament: A Treatment Based on the Facts of Armament* (London: Mundanus, 1931), 69.

the world, when mankind looks back with amazement, incredulity, and horror at the efforts which his ancestors made to devise means of self-destruction, his attention will be focused on the machine-gun."[241] This notion highlights the development of a taboo associated with certain types of conventional weapons. Lefebure's account highlights the origin and extent of this taboo:

> No soldier will ever forget his first sight of No Man's Land in front of a machine-gun emplacement. The cone of hundreds of British dead, a field of motionless khaki in front of the barbed wire besides the Lens road at the Battle of Loos, is a thing which I shall not forget.[242]

This period saw additional attention being given to the usage of submarines, with discussions involving proposals for their restriction due to their usage and effects.[243] Though the Washington Conference remained unratified, it included submarines in the prohibitions relating to the attack of merchant vessels, deeming states using them for this purpose as "liable to trial and punishment as if for an act of piracy."[244] The parallel with piracy as a taboo practice on this point is significant.[245] The stigma of piracy, which has provoked heated historical and political debate, has been frequently ascribed to the criminality of pirates.[246] The central premise of this stigma, best encapsulated in the expression *hostis humani generis* ('enemies of mankind'), asserted that pirates were the

[241] Lefebure, *Scientific Disarmament: A Treatment Based on the Facts of Armament*, 68.
[242] Ibid, 69.
[243] W.L. Rodgers, "Future International Laws of War," *The American Journal of International Law* 33, no. 3 (1939): 449; Fenwick, "Organization for Mutual Security the Condition Precedent to Disarmament", 154-157.
[244] Washington Conference, art. 5.
[245] Though the term piracy usually refers to a broad range of violent acts at sea, it is important to note that the meaning of the term in contemporary international law remains unsettled, particularly regarding specific types of historical and modern piracy. The problems concerning the definition of the term are compounded when analysing the forms which attacks on maritime commerce have historically taken—piracy, privateering, and reprisal—as though their division appears straightforward, it is difficult to apply in practice. Elizabeth Nyman, "Modern Piracy and International Law: Definitional Issues with the Law of the Sea," *Geography Compass* 5, no. 11 (2011): 864; Zou Keyuan, "New Developments in the International Law of Piracy," *Chinese Journal of International Law* 8, no. 2 (2009): 325; Clyde H. Crockett, "Toward a Revision of the International Law of Piracy," *DePaul Law Review* 26, no. 1 (Fall 1976): 81; Barry Hart Dubner, "Piracy in Contemporary National and International Law," *California Western International Law Journal* 21, no. 1 (1990): 139-140; John E. Noyes, "An Introduction to the International Law of Piracy," *California Western International Law Journal* 21, no. 1 (1990): 105; P.W. Birnie, "Piracy: Past, present, and future," *Marine Policy* 11, no. 3 (1987): 167.
[246] Simon Layton, "Discourses of Piracy in the Age of Revolutions," *Itinerario* XXXV, no. 2 (2011): 81; Sugata Bose, *A Hundred Horizons: The Indian Ocean in the Age of Global Empire* (United States of America: Harvard University Press, 2006), 43.

enemies of humankind rather than of state.[247] Through this, pirates were placed outside of humanity, in a realm reserved for wild animals, and therefore subject to universal jurisdiction by any state.[248] Furthermore, the legality or illegality of piracy, much like with arms control and disarmament, has been a historically evolving process.[249]

The advent of submarines is a particularly noteworthy issue within the period due to its effect on sea warfare. The submarine, a weapon which had the capability of attacking without being seen and which could hardly offer to rescue the crew and passengers of any ship it attacked, illustrates the reaction to the appearance of a new and highly effective weapon. Submarine warfare perceived to be "the most inhuman form of naval warfare", as if a "ship-of-war sank another, the crew of the sinking ship were very often rescued by the victor; the submarine can rescue none."[250] Ever since their inception, submarines were denounced "on numberless occasions as a cruel, cowardly, inhumane weapon."[251]

Professor Peter Rowe, an international lawyer of the time, addressed this aspect of submarines, arguing it "may well have asked at the time whether it really was a

[247] Douglas R. Burgess Jr., "Hostis Humani Generi: Piracy, Terrorism and a New International Law," *University of Miami International and Comparative Law Review* 13, no. 2 (2006): 315.

[248] Lawrence Azubuike, "International Law Regime against Piracy," *Annual Survey of International & Comparative Law* 15, no. 1 (Spring 2009): 44; Alejandro Colás, "Barbary Coast in the expansion of international society: Piracy, privateering, and corsairing as primary institutions," *Review of International Studies* 42, no. 5 (2016): 855; Michael Kempe, "'Even in the remotest corners of the world': globalized piracy and international law, 1500–1900," *Journal of Global History* 5 (2010): 356-357; Rytis Satkauskas, "Piracy at sea and the limits of international law," *Aegean Review of the Law of the Sea and Maritime Law* 1 (2011): 228.

[249] States only began to draw legal consequences from the international privateering system getting out of hand and once it came into increasing international discredit following the Napoleonic Wars. The impossibility of distinguishing effectively between lawful and unlawful private maritime violence led to an international abolition of private taking of booty at sea. Thus, "the early modern development of the legal treatment of piracy in interstate affairs reflects the inconsistency of modern international law, fluctuating between the two poles of its abuse by non-legal interests on the one hand and its independence as a normative authority on the other hand." Schwarzenberger's analysis of the standard of civilisation and of the historical aspects of international law reflects and takes into account these inconsistencies. This will be expanded upon in chapter five of this thesis. Kempe, "'Even in the remotest corners of the world': globalized piracy and international law, 1500–1900", 362-369 and 371; Nyman, "Modern Piracy and International Law: Definitional Issues with the Law of the Sea", 864.

[250] Alfred Hopkinson, Graham Bower, G. W. T. Omond, Lord Blanesburgh and Hugh H. L. Bellot, "Discussion on the Abolition of Submarines," *Transactions of the Grotius Society* 11, *Problems of Peace and War, Papers Read before the Society in the Year 1925* (1925): 67.

[251] Walton L. Robinson, "The Submarine in the Next War," *Scientific American* 157, no. 1 (July 1937): 22.

legitimate weapon."[252] The issue that this weapon represented remains particularly interesting due to the different stances taken by states in relation to them. Those with a large surface fleet, such as the United Kingdom, were keen to see it outlawed; whilst states with a smaller surface fleet opposed the attempt.[253] The British delegation at the 1930 London Naval Conference summarised its case for the abolition of submarines on the grounds that it served the best interests of all humanity, as submarines were primarily "an offensive vessel; that substantial advancement of disarmament and peace would result; that considerable financial savings would result; and that it would remove the undue risks of submarine personnel."[254] This position was not difficult to understand, as "it was Germany's U-boat campaign during the World War which nearly was successful in bringing Great Britain to submission."[255]

1.4.1.3 The Significance of these Treaties

The underlying significance of these early conventional weapons arms control treaties in relation to an examination of the emergence of international legal regimes of disarmament and arms control is considerable. This significance is particularly apparent due to how, despite the limitations of the treaties examined above, there existed a clear moral condemnation of new technologies of war that was clearly reflected in both literature of the time and in the treaties themselves. Legal texts of the time also

[252] Peter Rowe, *Defence: The Legal Implications. Military Law and the Laws of War* (London: Brassey's Defence Publishers, 1987), 127.
[253] Ibid, 127-128.
[254] Richard Dean Burns, "Regulating Submarine Warfare, 1921-41: A Case Study in Arms Control and Limited War," *Military Affairs* 35, no. 2 (April 1971): 58.
[255] Robinson, "The Submarine in the Next War", 22.

illustrate this, particularly in relation to the question of what international law ought to be.

F.E. Smith, the later Lord Birkenhead, opened his *International Law* by stating that international law is meant to be understood as the rules acknowledged by the "general body of civilised independent states to be binding upon them in their mutual relations."[256] Edward Creasy similarly outlined international law as the positive rules by which the conduct of states "is, or ought to be, determined."[257] Thomas Walker also grounded international law on a traditional notion of moral behaviour which he later tellingly contrasted with state behaviour and the idea that "the world's peace depends on these days of colossal armaments, of dynamite and torpedo, and every agent of destruction and devilry."[258]

These observations are not limited to a broad observation of international law and encompass the laws of war. A particular example of this can be seen in the works of William Winthrop, which make a clear distinction between contemporary developments in weaponry and the laws and usages of civilized warfare.[259] This argument stands out through how it defined illegitimate weaponry as that which "in disabling or causing death, inflicted a needless, unusual and unreasonable amount of torture or injury", clearly linking why the use of a weapon may be considered taboo.[260]

The pre-First World War and Interwar treaties examined above illustrate these ideas. They call to mind Thomas Walker's description of weapons such as the torpedo

[256] F.E. Smith, *International Law*, 1st ed., reprint, (London: Aldine House, J.M. Dent & Sons Ltd., 1906), 1.
[257] Creasy, *First Platform of International Law*, 1.
[258] Thomas Alfred Walker, *The Science of International Law* (London: C.J. Clay and Sons, 1893), 2-3.
[259] William Winthrop, *Military Law and Precedents*, 2nd rev. ed. (Washington: Government Printing Office, 1920), 778.
[260] Ibid, 784.

or the modern uses of dynamite as devilry. “Men learned at last,” Walker remarked, “to appreciate the teaching that necessity … sets bound and measure to the force to be applied.”[261] Furthermore, where acts of wanton violence against either person or property are concerned, “it behoves a commander to suppress and punish by every means in his power, including the infliction of death.”[262] It is the inhumanity of certain means of warfare that makes their usage taboo.

Henry Halleck provided a similar perspective on the what usage of weapons may be considered immoral or taboo, stating that “while the laws of war allow the use of new inventions of arms, or other means of destruction, against the life and property of an enemy, there is a limit to this rule beyond which we cannot go.”[263] Similarly, William Edward Hall condemned the use of weaponry which may cause unnecessary suffering, stating that “the use of wanton and gratuitous violence is not consistent with the character of a moral being”[264]. He further specified that prohibited usages of weapons “may be described as the rough result of a compromise between a dislike to cause needless suffering and a wish to use the most efficient engines in war”, amongst which poisoned weapons and guns loaded with nails or bits of iron of irregular shape were included.[265]

F.E. Smith further gave a clear examination of the different weapons not permissible according to the laws of war, made clear references to the Declaration of Brussels,[266] and held dum-dum and soft-nosed bullets to not be permissible in civilised

[261] Walker, *The Science of International Law*, 249.
[262] Ibid, 285.
[263] Halleck further continues on, stating that “It is necessity alone that justifies us in making war and in taking human life.” H.W. Halleck, *Elements of International Law and Laws of War* (J.B. Lippincott & Co., 1866), 179.
[264] Hall, *A Treatise on International Law*, 65-66.
[265] Ibid, 552.
[266] F.E. Smith, *International Law*, 104.

warfare due to the disproportionate suffering which they cause.[267] George Davies' examination of the destructive effects of the then-new military technology also stands out through its description of the effects which projectile weapons and torpedoes had on soldiers.[268]

This literature illustrates clear and consistent views of the illegitimate aspects of war, which are linked to weapons which cause unnecessary suffering. This perception of what is illegitimate in warfare together with the moral concerns relating to certain weapons, such as projectiles or submarines, influenced the different treaties examined above. The Oxford Manual's specific condemnation of perfidious acts stands out as an example of this.

It is noteworthy, however, that despite the plentifulness of commentaries over illegitimate weapons or uses of weapons, this taboo failed to fully surface within the different treaties of the time. The different proposals at the Brussels Conference of 1874 prompted opposition from delegates from Belgium and the Netherlands on the basis that it could create a tendency to weaken their national defence.[269] The Second Hague Peace Conference was also impacted by the struggle between states with competing interests, particularly between states "such as Germany, equipped with such strong standing armies and those … who claimed the right to mobilize their population in defence against an enemy invasion."[270] This problem made it difficult for the Second

[267] Ibid, 108.
[268] The author gives a clear analysis of various military developments, and, though optimistic by comparison to the literature that followed on these following the First World War, focuses particularly on the effects of projectile weapons and torpedoes. Davies, *Outlines of International Law*, 208-225.
[269] Percy Bordwell, *Law of War between Belligerents: A History and Commentary* (Chicago: Callaghan & Co., 1908; Littleton Colorado: Fred B. Rothman, 1994), 105. Citations refer to the Fred B. Rothman edition.
[270] J.H.W. Verzijl, *International Law in Historical Perspective – Volume I, General Subjects* (Leyden: A.W. Sijthoff-Leyden, 1968), 210-211.

Hague Peace Conference to reach a generally acceptable solution, particularly in relation to the conundrum that submarines in national navies posed.[271] The Convention on Automatic Submarine Contact Mines and Torpedoes (Convention VIII of 1907), furthermore, was not signed by China, Spain, Portugal, Russia and Sweden, with Germany and France making a reservation to Article 2.[272]

The failure of the League of Nations to bring forward a clear agreement to regulate the arms trade is a further example that points towards this, particularly given the importance of the 'merchants of death' literature following the First World War. Similar problems can be seen in the attempts of the Hague Conferences to regulate aerial warfare, as, despite an express prohibition on the bombardment of undefended cities, attacks of this nature were seen in the years leading up to and during the Second World.[273] This latter point highlights "the impotence of legal rules to control the actual conduct of States and governments in their … struggle for power."[274] This is also the case concerning the usage of submarines, which was never prohibited despite the perceived horror their usage brought.[275]

[271] Verzijl, *International Law in Historical Perspective – Volume IX-A, The Laws of War*, 297 and 315.
[272] Ibid, 297-298.
[273] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, art. 25, Oct. 18, 1907, 195 I.H.L. 19.
[274] Verzijl, *International Law in Historical Perspective – Volume IX-A, The Laws of War*, 328.
[275] E.H. Carr focused prominently on the political aspects of disarmament and arms control negotiations surrounding both submarines and other weapons in this period. Chapter three will focus and highlight these prominently, as they are particularly relevant to the three guiding questions of this thesis and its overarching discussion of the 'how' and 'why' of the laws of arms control and disarmament.

1.4.2 Conventional Weapons in Contemporary International Law

1.4.2.1 The Convention on Certain Conventional Weapons

The Convention on Certain Conventional Weapons (CCW)[276] was the first to cover conventional arms following 1945. It remains the only international legal framework dealing with a range of conventional weapons engaging all major military powers, as well as the only one covering the use of landmines to which the U.S., Russia, China, India, Pakistan, and South Korea are parties.[277] This Convention is not constituted, however, as a disarmament treaty, and has as its central focus the use of weaponry during armed conflict instead of issues related to the development, stockpiling, or testing of weaponry.[278] The weaponry covered by the CCW has expanded in recent years through reviews structured modularly as separate prohibitions and limitations to the Convention, with the aim of creating a solid legal framework to allow for different protocols to operate in a future-oriented manner.[279]

The adoption of the CCW in 1980 marked the completion of a significant phase in the evolution of arms control law. Its core purpose is centred on the goal of providing better legal protection for civilians against the effects of hostilities.[280] Its text is

[276] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (and Protocols) (As Amended on 21 December 2001), October 10, 1980, 1342 U.N.T.S. 137.
[277] Solomon, "The United Nations Convention on Certain Conventional Weapons of 1980: Its recent development and increasing significance", 346; Stephanie Carvin, "The 1980 Convention on Certain Conventional Weapons and the Politics of Legal Restraints on Weapons during the Cold War," *Journal of Cold War Studies* 19, no. 1 (2017): 38-39.
[278] Solomon, "The United Nations Convention on Certain Conventional Weapons of 1980: Its recent development and increasing significance", 349.
[279] U.N. Office for Disarmament Affairs, "Promoting the Universality of the Convention on Certain Conventional Weapons," *UNODA Occasional Papers*, no. 17 (October 2009): 7-10.
[280] Y. Sandoz, Y, "The United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Adopted 10 October 1980," in *The Banning of Anti-*

representative of this, indicating that methods or means of combat "having indiscriminate effects are prohibited because there is too great a risk of their harming the civilian population."[281] It currently has five protocols dealing with:

(1) The prohibition of the use of weapons the primary effect of which is to injure by fragments that cannot be detected by X-rays,

(2) the regulation of mines, booby-traps and similar devices,

(3) the prohibition of the use of air-delivered incendiary weapons against targets in populated areas,

(4) the prohibition of the use of laser weapons designed to cause permanent blindness, and

(5) explosive remnants of war.[282]

The CCW was based on two fundamental principles of international humanitarian law: that the right of the parties to an armed conflict is "not unlimited"[283] and that there is a prohibition over employing the use of "weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering."[284] The weaponry covered by the CCW, focused on due to its indiscriminate effects on combatants and civilians during and after conflicts, highlights these two

Personnel Landmines: The Legal Contribution of the International Committee of the Red Cross 1955–1999, ed. Louis Maresca and Stuart Maslen (Cambridge: Cambridge University Press, 2000), 103.

[281] Ibid.

[282] U.K. Ministry of Defence*, The Manual of The Law of Armed Conflict*, 17.

[283] In particular, "the principle of international law that the right of the parties to an armed conflict to choose methods or means of warfare is not unlimited, and on the principle that prohibits the employment in armed conflicts of weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary." CCW, preambular ¶3.

[284] Solomon, "The United Nations Convention on Certain Conventional Weapons of 1980: Its recent development and increasing significance", 348.

principles.[285] As such, the CCW sought to protect civilians "from the effects of weapons used in an armed conflict" and to "protect combatants from suffering in excess of that which is necessary to achieve a legitimate military objective."[286] The means with which to wage war, in other words, are limited by the excessive suffering which weapons may cause.

Landmines can be defined as mass-produced, victim-operated, explosive traps and munitions designed to explode from the presence, proximity, or contact of a person or a vehicle.[287] They often involved the manual emplacement of long duration anti-personnel mines, with the capability of killing or injuring civilians decades later and are "particularly liable to be indiscriminate."[288] They can hinder people's access to essential services and livelihoods, potentially killing and maiming indiscriminately.[289] These weapons were covered by the CCW following the momentum that built during the 1970s "toward a coordinated approach to landmines as an outgrowth of international efforts to clarify and strengthen international law."[290] The ability to detonate landmines through the presence, proximity or contact of a person; as well as their ability to incapacitate, injure or kill one or more persons regardless of their status as combatants

[285] David Kaye and Steven A. Solomon, "The Second Review Conference of the 1980 Convention on Certain Conventional Weapons," *The American Journal of International Law* 96, no. 4 (2002): 923.
[286] International Committee of the Red Cross, *Advisory Service on IHL: 1980 Convention on Certain Conventional Weapons (CCW)* (Geneva: International Committee of the Red Cross, 2021), 2.
[287] M. Croll, *The History of Landmines* (United Kingdom: Leo Cooper, 1998), ix; International Campaign to Ban Landmines, *Landmine Monitor 2015* (Monitoring and Research Committee, International Campaign to Ban Landmines—Cluster Munition Coalition, 2015), iii; Stuart Maslen, *Commentaries on Arms Control Treaties, Volume I: The Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on their Destruction*, 2nd ed. (Oxford: Oxford University Press, 2005), 1-2.
[288] Rowe, "Defence: The Legal Implications", 128. See also: International Campaign to Ban Landmines, *Landmine Monitor 2015*, 5; International Campaign to Ban Landmines, *Landmine Monitor 2016* (Monitoring and Research Committee, International Campaign to Ban Landmines—Cluster Munition Coalition, 2016), i.
[289] International Committee of the Red Cross, *Tackling Weapon Contamination: In Brief* (Geneva: International Committee of the Red Cross, 2017), 5; International Committee of the Red Cross, *Explosive Remnants of War: In Brief* (Geneva: International Committee of the Red Cross, 2014), 1-2.
[290] M. Patrick Cottrell, "Legitimacy and Institutional Replacement: The Convention on Certain Conventional Weapons and the Emergence of the Mine Ban Treaty," *International Organization* 63 (2009): 228.

or non-combatants made their usage in combat immoral, and influenced their inclusion in the CCW.[291]

The CCW, however, was a product of its military and political environment. Incendiary weapons were made relevant in the negotiation of the treaty due to the widespread circulation of images showing their effects.[292] The extensive focus on the usage of napalm and other conventional weapons used during the Vietnam War is noteworthy due to the fact that many of these weapons, such as flame-throwers, had actually been in use since the First World War.[293] Similarly, napalm had been used in war since its development during the Second World War.[294]

1.4.2.2 The Convention on Anti-Personnel Mines

Landmines, despite already being covered under the 1980 CCW, were subject to a further international agreement in 1997 under the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (hereinafter 'Mine Ban Treaty').[295] This convention was the product of an International Campaign to Ban Landmines and was mainly motivated by disappointment with the inability of the CCW "to deliver an effective remedy to the 'epidemic' of death

[291] Ibid, 227.
[292] Ibid; J. Ashley Roach, "Certain Conventional Weapons Convention: arms control or humanitarian law," *Military Law Review* 105 (1984): 3.
[293] Alexander Gillespie, *A History of the Laws of War: Volume 3 – The Customs and Laws of War with Regards to Arms Control* (Oxford and Portland, Oregon: Hart Publishing, 2011), 50.
[294] Solomon, "The United Nations Convention on Certain Conventional Weapons of 1980: Its recent development and increasing significance", 349.
[295] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Sep. 18, 1997, 2056 U.N.T.S. 241, 36 I.L.M. 1507.

and injury caused by anti-personnel mines."[296] The "horrendous effects of mines on the communities they were working with in Africa, Asia, the Middle East, and Latin America",[297] deeply affected this treaty, as the use of these weapons perceived to be beyond humanitarian concerns.[298]

These weapons, though initially unproblematic, thus came to be increasingly seen as a form of "'technology non grata'—weaponry deemed immoral, inhumane, and indiscriminate" during the Cold War and post-Cold War period.[299] The change in the perception of their use in war was caused by their impact on combatants and non-combatants. Anti-personnel mines were condemned in multiple General Assembly resolutions on grounds of their impact on civilians and combatants beyond the battlefield and "other severe consequences for years after emplacement."[300] Similarly, their use in Cambodia in 1995 was condemned by the General Assembly owing to their "devastating consequences and destabilizing effect" on Cambodian society.[301]

These changes in the perception of anti-personnel mines influenced the Mine Ban Treaty profoundly, and ultimately led to its establishment of a comprehensive prohibition of anti-personnel mines, including compliance monitoring and to a powerful

[296] Kathleen Lawand, "The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Ottawa Convention)," in *Making Treaties Work: Human Rights, Environment and Arms Control*, ed. Geir Ulfstein (Cambridge: Cambridge University Press, 2007), 326; Louis Maresca and Stuart Maslen, "Introduction," in *The Banning of Anti-Personnel Landmines: The Legal Contribution of the International Committee of the Red Cross 1955–1999* (Cambridge: Cambridge University Press, 2000), 3.

[297] International Campaign to Ban Landmines, *Landmine Monitor 2015*, iv.

[298] Y. Sandoz, "Turning Principles into Practice, The Challenge for International Conventions and Institutions," in *The Banning of Anti-Personnel Landmines: The Legal Contribution of the International Committee of the Red Cross 1955–1999* (Cambridge: Cambridge University Press, 2000), 105; Maslen, *Commentaries on Arms Control Treaties, Volume I: The Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on their Destruction*, 17-36; Cornelio Sommaruga, "Foreword by Cornelio Sommaruga, President, International Committee of the Red Cross," in *The Banning of Anti-Personnel Landmines: The Legal Contribution of the International Committee of the Red Cross 1955–1999* (Cambridge: Cambridge University Press, 2000), xxi-xxii.

[299] Neil Cooper, "Humanitarian Arms Control and Processes of Securization: Moving Weapons Along the Security Continuum," *Contemporary Security Policy* 32, no. 1 (2011): 145.

[300] U.N. G.A. Res. 51/45(S), at 33 (Jan. 10, 1997).

[301] U.N. G.A. Res. 49/199, ¶13 (Mar. 13, 1995).

taboo against this particular category of weapons.[302] Landmines are consistently perceived to pose an ongoing threat to lives and livelihoods around the world.[303] They spell "trepidation and worse" to foot-soldiers forced to traverse areas where they have been hidden or strewn," and spell "terror, death, and maiming to the rural populations of those places."[304] Children appear to suffer more than adults in this regard from this "discriminating indiscriminateness," as they are "congenitally prone to pick up unusual objects and play with them."[305] The ban has "meant the construction of a taboo that makes it almost unthinkable for states to use them."[306] The United States' choice to not deploy landmines since the first Gulf War despite its non-accession to the treaty and status as a major landmine producer represents a "startling example of non-use."[307] A fact which will stand out even further in chapter two's analysis of state compliance with the Mine Ban Treaty.

1.4.2.3 The Convention on Cluster Munitions

The prohibition on the use, development and production, and encouragement of use of cluster munitions in the Convention on Cluster Munitions[308] (CCM) finds its origin in the Mine Ban Treaty's negotiations. Largely a product of post-Cold War negotiations, the CCM represents one of the best examples "of the alternative

[302] Lawand, "The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Ottawa Convention)", 327; International Campaign to Ban Landmines, *Landmine Monitor 2016*, 34-40; Cooper, "Humanitarian Arms Control and Processes of Securization: Moving Weapons Along the Security Continuum", 145-146
[303] Tanisha M. Fazal and Margarita Konaev, "Homelands versus Minelands: Why Do Armed Groups Commit to the Laws of War?" *Journal of Global Security Studies* 4, no. 2 (2019): 151.
[304] Best, *War and Law Since 1945*, 300-301.
[305] Ibid.
[306] Garcia, *Disarmament Diplomacy and Human Security: Regimes, norms and moral progress in international relations*, 164.
[307] Ibid.
[308] Convention on Cluster Munitions, May 30, 2008, 2688 U.N.T.S. 47713.

humanitarian disarmament path, which places humanitarian considerations and the protection of civilians ahead of narrow, perceived national security interests."[309] It is a "deliberate break with the practice of most other treaties outlawing conventional or non-conventional weapons."[310] The CCM provides "a comprehensive framework to eradicate cluster munitions and thereby put an end to the suffering caused by these weapons."[311] Its prohibitions go beyond limitations of use within urban areas or the vicinity of civilians, and cover the majority of cluster munitions currently stockpiled by states, generating a powerful taboo against his particular category of weapon.[312]

Cluster munitions, defined in the CCM to mean conventional munitions "designed to disperse or release explosive submunitions", have a moral opprobrium dating back to the first arms control treaties.[313] This stigma is tied to the indiscriminate nature of cluster munitions, as well as their wide area of effect and their legacy on both civilians and military victims.[314] The suffering and casualties associated with these weapons are attributed to three main causes: the actual attacks with cluster munitions at the time of their use, the unexploded ordnance from cluster munitions when failing to function as intended, and the abandoned explosive ordnances.[315] The influence of the moral opprobrium associated with the use of cluster munitions on the CCM can be observed through its purpose and objective:

[309] Cluster Munition Coalition, *Cluster Munition Monitor 2015: Special Five-Year Report* (International Campaign to Ban Landmines—Cluster Munition Coalition, 2015), 6.
[310] Gro Nystuen and Casey-Maslen, *The Convention on Cluster Munitions, A Commentary* (Oxford: Oxford University Press, 2010), 41.
[311] Cluster Munition Coalition, *Cluster Munition Monitor 2015: Special Five-Year Report*, 5.
[312] Karen Hulme, "The 2008 Cluster Munitions Convention: stepping outside the CCW framework", *International & Comparative Law Quarterly* 58, no. 1 (2009): 221-223; Cooper, "Humanitarian Arms Control and Processes of Securization: Moving Weapons Along the Security Continuum", 145-146; Nystuen and Casey-Maslen, *The Convention on Cluster Munitions, A Commentary*, 11-35.
[313] Convention on Cluster Munitions, Article 2.
[314] Cluster Munition Coalition, *Cluster Munition Monitor 2018* (Monitoring and Researching Committee, ICBL-CMC Governance Board, 2018), iii.
[315] Nystuen and Casey-Maslen, *The Convention on Cluster Munitions, A Commentary*, 46.

> The Convention on Cluster Munitions seeks to prevent human suffering from cluster munitions, which are indiscriminate explosive weapons that impact a wide area and disperse multiple submunitions, many of which fail to detonate and pose a threat long after conflict ends.[316]

The taboo associated with these weapons is clear despite the lack of other international legal instruments restricting or banning their use.[317] Their effects have been seen as a humanitarian problem for decades due to the large numbers of such weapons that fail to detonate as intended, leaving a long-term and deadly legacy of contamination.[318] The distribution of explosive force and fragmentation over a wide area encompassed one of the technical characteristics of these munitions which was first identified as "problematic" due its effect on combatants and non-combatants alike.[319] The fragmentary nature of cluster munitions, which involves high velocity impacts and potentially toxic substances, calls into question whether military necessity is "great enough to outweigh the suffering caused by fragmentation weapons."[320] These weapons inflict large and deep wounds and penetrate the human body with tiny pieces of shrapnel that can lead to the loss of limbs, blindness, disfigurement, high mortality rates, and severe disabilities to their survivors.[321]

The strength of this taboo is particularly clear through how recent alleged users of these munitions have denied their usage, choosing to argue that "the weapon used

[316] Cluster Munition Coalition, *Cluster Munition Monitor 2022: 13th Annual Edition* (International Campaign to Ban Landmines—Cluster Munition Coalition: August 2022), 7.
[317] John Borrie, *Unacceptable Harm: A History of How the Treaty of Ban Cluster Munitions Was Won* (New York and Geneva: United Nations, 2009), xv-xvi.
[318] International Committee of the Red Cross, *Humanitarian, Military, Technical and Legal Challenges of Cluster Munitions: Expert Meeting* (Montreux, Switzerland: International Committee of the Red Cross, 2007), 3; International Committee of the Red Cross, *The Convention on Cluster Munitions: A Treaty to End Decades of Civilian Suffering* (Geneva: International Committee of the Red Cross, 2017), 3; International Committee of the Red Cross, *Cluster Munition Victims: What is Known and What is Needed?* (Geneva: International Committee of the Red Cross, 2010), 1.
[319] Nystuen and Casey-Maslen, *The Convention on Cluster Munitions, A Commentary*, 47.
[320] U.K. Ministry of Defence*, The Manual of The Law of Armed Conflict*, 248.
[321] Elvira Rosert, "Salience and the emergence of international norms: Napalm and cluster munitions in the inhumane weapons convention," *Review of International Studies* 45, no. 1 (2019): 84.

was not a cluster munition" instead.[322] When confronted by allegations of using cluster munitions in 2014, the Syrian military denied either possessing or using them, with the government typically choosing to neither respond nor comment.[323] Similarly, Sudan has repeatedly denied using cluster munitions in a May 2015 meeting with Cluster Munition Coalition representatives.[324] Suspected usage in Donetsk, in eastern Ukraine, in 2014 saw neither Russia nor Ukraine taking responsibility: Ukraine repeatedly denied the use of cluster munitions by its armed forces since October 2014, blaming their use on pro-Russian separatist forces, and Russia repeatedly drew attention to Ukraine's use of cluster munitions.[325] Russia, which has avoided admitting using cluster munitions in Ukraine and has sought to draw attention elsewhere, has also argued within the context of the 2022 Russian Invasion of Ukraine that cluster munitions are a lawful form of munitions and are only harmful if misused.[326] These denials of usage stand out due to the status of these aforementioned countries as states not party to the CCM.

Though there have been some recorded instances of cluster munition usage by both Russia and Ukraine—both non-state parties to this treaty—following the 2022 Russian invasion of Ukraine, the use of cluster munitions within this conflict has been strongly condemned internationally.[327] Furthermore, up to 2022 there has been "no evidence to suggest that cluster munitions, as defined by the convention, have been

[322] Recent users of these munitions since August 2010 include Libya, Sudan, Syria, Ukraine, and Yemen. Cluster Munition Coalition, *Cluster Munition Monitor 2015: Special Five-Year Report*, 5-6.
[323] Ibid, 13.
[324] Ibid, 15.
[325] Ibid, 14.
[326] Cluster Munition Coalition, *Cluster Munition Monitor 2023: 14th Annual Edition* (International Campaign to Ban Landmines—Cluster Munition Coalition: August 2023), 14.
[327] It should be noted that, though Russia and Ukraine have not denied using cluster munitions, they have also alleged and counter-alleged that Ukrainian and Russian forces were responsible for several possible cluster munition attacks. The use of cluster munitions in this conflict has been condemned by "40 states in national or joint statements at UN bodies such as the Human Rights Council, the Security Council, and the General Assembly," with cluster munition attacks being further condemned by "the EU, the NATO Secretary-General, the UN High Commissioner for Human Rights, UN Human Rights Special Rapporteurs and Experts, and the CMC." These allegations will be examined in detail in the following chapter. Cluster Munition Coalition, *Cluster Munition Monitor 2022: 13th Annual Edition*, 14-15.

transferred among the artillery, rocket systems, and other weapons that the Ukrainian government has received from third parties in 2022."[328] This lack of transfers of cluster munitions to Ukraine by state parties to the CCM reflects how three-quarters of NATO member states have banned this weapons and how:

> [O]ther states that have not banned cluster munitions are nonetheless quietly taking significant steps to align their policies and adapt their military practices to adhere with the convention's prohibitions, including on assisting with any banned activities.[329]

It should be noted, however, that cluster munitions have been used actively within this conflict following the 2022 Russian invasion of Ukraine.[330] Ukraine also notably asked to be supplied with cluster munitions for use in the ongoing conflict with Russia. President Joe Biden's announcement that the U.S. would supply cluster munitions with a failure rate exceeding 1% to Ukraine was welcomed by Ukraine's Minister of Defense, Oleksii Reznikov.[331] As of August 3, 2023, the leaders and officials of twenty-one countries have expressed concern over the U.S. decision to transfer cluster munitions to Ukraine.[332] This decision was criticised by UN officials and civil society organisations. It was also subject to a U.S. Congress vote, where 147 U.S. congressional representatives voted to prohibit the sale and transfer of cluster munitions and 276 representatives voted against it.[333] Russian President Vladimir Putin notably argued that though Russia had a stockpile of cluster bombs these had not been used yet, but would do so should they be used against Russia.[334]

[328] Cluster Munition Coalition, *Cluster Munition Monitor 2022: 13th Annual Edition*, 8.
[329] Ibid.
[330] Cluster Munition Coalition, *Cluster Munition Monitor 2023: 14th Annual Edition*, 1.
[331] Ibid, 21.
[332] These include. Australia, Austria, Belgium, Cambodia, Canada, Costa Rica, Denmark, France, Germany, Iraq, Ireland, Italy, Lao PDR, Netherlands, New Zealand, Nicaragua, Norway, Philippines, Spain, Switzerland, and UK. Ibid.
[333] Ibid, 21-22.
[334] Ibid, 14.

Despite the long-standing taboo associated with these inhumane munitions, however, the CCM remains the sole international instrument on cluster munitions. Despite resulting in high mortality rates and painful injuries, these munitions escaped a ban in the 1970s in the CCW, when a norm on napalm emerged.[335] Furthermore the states party to the CCW failed to create a new protocol on cluster munitions in 2011.[336] It should also be noted, however, that most of the states that have not joined the convention have never used cluster munitions, with only the U.S., Israel and Russia being known as major users and producers of cluster munitions.[337] That there have been reports or allegations of new cluster munitions use by any state party since the adoption of the CCM is also of additional importance.[338]

1.4.2.4 The Arms Trade Treaty

The control of the arms trade has a historical analogue in the control of nuclear weapons, as, despite the clear and long-standing will to control the arms trade, no such full treaty had been ratified internationally until recent years. Despite this, there has been a longstanding desire to implement an international treaty regulating the arms trade. This is evidenced by the interwar 'merchants of death' studies, which focused on the negative effects of the illicit arms trade, as well as on the dangers posed by small arms and weapons internationally.[339] The Treaty of St. Germain-en-Laye of 1919 sought

[335] Rosert, "Salience and the emergence of international norms: Napalm and cluster munitions in the inhumane weapons convention", 85.
[336] Cluster Munition Coalition, *Cluster Munition Monitor 2015: Special Five-Year Report*, 1.
[337] Cluster Munition Coalition, *Cluster Munition Monitor 2018*, 15.
[338] Cluster Munition Coalition, *Cluster Munition Monitor 2022: 13th Annual Edition*, 1.
[339] Ball, "Britain and the Decline of the International Control of Small Arms in the Twentieth Century", 813.

to similarly prevent the export of artillery of all kinds, apparatus for the discharge of all kinds of projectiles, explosive or gas-diffusing, flame-throwers, bombs, grenades, machines guns and rifled small-bore breech loading weapons of all kinds.[340] This treaty aimed to prevent as much as possible the uncontrolled dispersal of the large stocks of arms existing then in numerous countries and suffering they could cause.[341]

Interest in the control of the international arms trade, however, saw a decline of interest until the twenty-first century. Interest on this issue rekindled through the 2006 UN Review Conference on the Illicit Small Arms Trade.[342] Despite the fact that this conference ended without an agreement, it reviewed an ambitious 2001 Programme of Action to control the illicit trade in small arms.[343] The Arms Trade Treaty (ATT)[344]—a result of this long legacy of attempted regulation—is the first treaty of its kind. It has as its fundamental aim to "establish a global standard for the international trade in conventional arms" and, in doing so, provide a "new multilateral framework for transparency and accountability in that trade … that would also be a powerful new tool in efforts to prevent gross human rights abuses and violations of international humanitarian law."[345] The ATT, which aimed to regulate this in order "to sustain international peace and security and reduce human suffering", though these goals, finds itself linked to the longstanding taboo associated with the arms trade.[346]

[340] Treaty of Saint-Germain-en-Laye, art. 135, Sept. 10, 1919, U.K.T.S. 11.
[341] Ball, "Britain and the Decline of the International Control of Small Arms in the Twentieth Century", 822.
[342] Ibid, 835.
[343] U.N. Press Release, Review Conference on Illicit Small Arms Trade, United Nations Conference Aimed at Strengthening Global Effort against Illicit Small Arms Trade Ends without Agreement on Final Document, U.N. Press Release DC/3037 (July 10, 2006).
[344] Arms Trade Treaty, Apr. 2, 2013, 52 I.L.M. 988.
[345] Peter Woolcott, "Introduction," in *Weapons and International Law: The Arms Trade Treaty, Law Annotated 2015*, ed. Clare da Silva and Brian Wood (Brussels: Larcier, 2015), 13.
[346] Casey-Maslen et al., *The Arms Trade Treaty, A Commentary* (Oxford: Oxford University Press, 2016), 7.

The ATT focuses on the effect that the illicit trade in small arms and light weapons (hereinafter, 'SALW') have in sustaining conflicts, exacerbating armed violence, contributing to the displacement of civilians, undermining respect for international humanitarian law, and impeding the provision of humanitarian assistance to victims of armed conflicts.[347] It focuses particularly strongly on how the accumulation of SALW increases the incidence of internal conflicts and violence. In General Assembly Resolution 52/298 of the 27th of August 1997, the Secretary-General emphasised the role which SALW played in the hands of irregular troops in conflicts dealt with by the UN, stating that whilst not themselves causing the conflicts in which they are used, "the proliferation of small arms and light weapons affects the intensity and duration of violence and encourages militancy rather than peaceful resolution."[348]

The illicit production and trade of SALW have been similarly noted to be closely linked to the excessive and destabilising accumulation and transfer of such arms.[349] This idea was similarly reflected in the Third Review Conference on the Illicit Trade in SALW in All Its Aspects, which was specifically concerned with both the human suffering the illicit trade in SALW caused and the serious threat to "peace, reconciliation, safety, security, stability and sustainable development at the individual, local, national, regional and international levels" they represent.[350]

These concerns are mirrored within the ATT and the previous historical attempts at regulating the arms trade. This focus on the effects which the illicit flow of weapons

[347] U.N. Conference to Review Progress Made in the Implementation of the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, *Report of the third United Nations Conference to Review Progress Made in the Implementation of the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspect*, ¶4, U.N. Doc. A/CONF.192/2018/RC/3 (July 6, 2018).
[348] U.N. G.A. Res. 52/298, at 2 (Aug. 27, 1997).
[349] U.N. Rep. of the Group of Governmental Experts on Small Arms, ¶132, U.N. Doc A/54/258 (1999).
[350] U.N. Office for Disarmament Affairs, *Third Review Conference: Programme of Action*, Preamble, paragraph 2.

has in armed conflicts constitutes the main issue which the ATT and previous treaties have aimed to address. The preface of the ATT showcases this clearly, particularly through its recognition of the "security, social, economic and humanitarian consequences of the illicit and unregulated trade in conventional arms," as well as "the challenges faced by victims of armed conflict."[351] This represents the main issues which this treaty aims to address and the main factors which have influenced the development of a taboo in relation to the arms trade; as can be clearly seen through the various motives for historical and contemporary attempts to regulate this. That membership of the ATT is high among the top twenty arms exporters—thirteen of which are state parties to this treaty—further shows the impact of the taboo underlying the arms trade.[352]

Having established the emergence of international legal regimes on arms control and disarmament as well as the influence taboos, this chapter's conclusion will now establish the shared underlying ideology which is encoded in the legal principles that produce the moral opprobrium surrounding the usage of a particular weapon.

1.5 Conclusion

The arms control and disarmament treaties examined throughout this chapter clearly show that there is a shared underlying ideology encoded in the legal principles that give rise to the taboo surrounding the usage of the nuclear, biological, chemical,

[351] Arms Trade Treaty, Preface.
[352] Control Arms Secretariat, *ATT Monitor Report 2022* (New York: Control Arms Secretariat, 2022), 22.

and conventional weapons. This shared ideology finds its origin in the sheer inhumanity of certain means of warfare, identifies law with morality, and sees both as the means by which to assess the practices of war, side-lining politics. It states that the means which may be used by states are not unlimited even in warfare, and that following the rules is essential if aiming to prevent a drift towards inhumane violence.[353] This shared ideology can be clearly seen in the early arms control and disarmament literature examined within this chapter, particularly in the longstanding idea underpinning the ATT that escalations in the level of armaments are one of the principal causes of war.[354] As argued by Sir Edward Grey, British Foreign Secretary, in 1914:

> The moral is obvious: it is that great armaments lead inevitably to war … The enormous growth of armaments in Europe, the sense of insecurity and fear caused by them—it was these that made war inevitable.[355]

This can be further seen in the different ideas that gave rise to international arms control and disarmament treaties examined within this chapter. The sheer destructive potential of nuclear weapons is emphasised in the entirety of the literature surrounding these weapons. Furthermore, the case for prohibiting them in their entirety is grounded upon their inhumane and indiscriminate nature.[356] It is this nature that is the principal cause for the development of the powerful taboo surrounding their use, which has become part of a broader discourse of international law which defines what the minimum humanitarian standards of battlefields are.[357]

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[353] Francois Bugnion, "Customary International Humanitarian Law," *ISIL Year Book of International Humanitarian and Refugee Law 7* (2007): 1; Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (Geneva: International Committee of the Red Cross, 2001), 13; Fazal, *Wars of Law: Unintended Consequences in the Regulation of Armed Conflict*, 16.
[354] Carolyn J. Kitching, *Britain and the Problem of International Disarmament, 1919-34* (London and New York: Routledge, 1999), 9.
[355] Viscount Grey of Fallodon, K.G., *Twenty-Five Years, 1892-1916* (London: Hodder and Stoughton, 1928) 160-162.
[356] Fihn, "The Logic of Banning Nuclear Weapons", 43-50.
[357] Tannenwald, *The Nuclear Taboo: The United States and the Non-Use of Nuclear Weapons Since 1945*, 46.

Though nuclear weapons are, as noted above, unique in their scale and scope, there are important similarities to the taboos surrounding the use of biological and chemical weapons: They are all cases in which a significant, long-standing taboo has attached to a particular weapon.[358] For Tannenwald this appears "to explain the pattern of use and non-use", as it cannot seem to be explained away by the weapon's "lack of 'military utility'."[359] Biological and chemical weapons cause indiscriminate and unnecessary suffering.[360] The suffering they cause is specifically targeted towards civilians and soldiers alike rather than military objectives:

> By comparison with conventional ordnance, chemical weapons are capable of inflicting casualties over large areas, enveloping dispersed formations or small targets whose precise location is unknown. Unlike conventional weapons, including fuel-air explosives, which have significant area coverage, chemical weapons will not damage vital economic or military objectives such as bridges, ports, factories, railways and airfields. They may act as 'search weapons', penetrating shelters, buildings, trenches and other types of fortification.[361]

Though different in scope to conventional weapons, the taboos underlying conventional weapon arms control and disarmament treaties display are similarly focused on the suffering these weapons cause. The literature surrounding the use of gas in the First World War illustrates this. Though not unique, Saint-Exupéry's *Wind, Sand and Stars* provides a particularly stark example of this horror clearly:

> War carried on by gas and bombing is no longer war, it is a kind of bloody surgery. Each side settles down behind a concrete wall and finds nothing better to do than to send forth, night after night, squadrons of planes to bomb the guts of the

[358] This idea—that is, the way in which the destructiveness of nuclear weapons and the taboo associated with them has contributed to the seeming success of nuclear arms control and disarmament as opposed that of other categories of weapons—will be examined further in chapter four of this thesis, through Morgenthau's theory of international law.
[359] Tannenwald, *The Nuclear Taboo: The United States and the Non-Use of Nuclear Weapons Since 1945*, 375.
[360] Kusal Amarasinghe, "The shape of war in the 21st century: An analysis of the challenges posed by the contemporary armed conflicts with reference to international humanitarian law," *International Journal of Law* 7, no. 1 (2021): 4; Susan Martin, "Weapons of Mass Destruction: A Brief Overview," in *Ethics and Weapons of Mass Destruction: Religious and Secular Perspectives*, ed. Sohail H. Hashmi and Steven P. Lee (Cambridge: Cambridge University Press, 2004), 21-28.
[361] Spiers, *Agents of War: A History of Chemical and Biological Weapons*, 16-17.

other side, blow up its factories, paralyze its production, and abolish its trade. Such a war is won by him who rots last—but in the end both rot together.[362]

There is, therefore, a clear shared ideology encoded in arms control and disarmament treaties which identifies law with morality. In engaging fundamental issues of morality and conscience in the conduct of war, it raises questions about the treatment of human beings at a fundamental level—war making, in other words, "is permeated by norms and social structure."[363] The denials offered by states which are not party to the CCM offers a stark and prominent example of this, as does the fact that it was it was in reaction to the horrors of the First World War that statesmen came to show a "commendable determination" to place legal restrictions on future resorts to war.[364] The inhumane nature of certain weapons, in giving rise to a taboo, affects international law both for state parties and non-state parties alike.

A key problem, however, arises despite the clear existence of this shared ideology: the degree to which these arms control and disarmament principles apply in the same manner to different weapons.[365] Despite the clear underlying taboo associated with the weapons subject to the arms control and disarmament treaties covered within this chapter, the extent and strength of the treaties varies radically. The long-standing taboo associated with both biological and chemical weapons seems to be contradicted by the long length of time it took for both the BWC and the CWC to arise. This contradictory fact is mirrored by both the late creation of many of the arms control and

[362] Antoine de Saint-Exupéry, *Wind, Sand and Stars*, trans. Lewis Galantière (New York: Hancourt, Brace & World, Inc. [1939] 1967), 234-234.
[363] Finnemore, *National Interests in International Society*, 87.
[364] Neff, *War and the Law of Nations, a General History*, 285.
[365] The conclusions unveiled by the theories of Carr, Morgenthau, and Schwarzenberger address why this is the case directly. These conclusions—which offer direct answers to the contradictions that exist despite the shared ideology underlying arms control and disarmament treaties—address different problems and aspects of international law, arms control, and disarmament. These will be examined in chapters three, four, and five of this thesis.

disarmament treaties governing the use or non-use of conventional weapons, and the difficult process by which nuclear weapons treaties and agreements came to be ratified. The legitimacy of prioritising certain types of killing over others can also be called into question:

> Yet the idea that we can/should draw a distinction between different types of killing – where one is prioritised over the other as being more obscene – is elsewhere recognised as inappropriate, if not simply offensive.[366]

This is complicated by the problem which states which remain non-participants to international treaties represent. Despite the clear and longstanding taboo associated with landmines and cluster munitions, both the United States and Russia are not parties to the Mine Ban Treaty and the CCM. The CTBT, opened for signatures in September 1996, has not yet entered into force, and still requires the signatures of eight key states, including China, India, Pakistan, and the U.S. The FMCT remains similarly blocked. Furthermore, despite the recent entry into force of the TPNW, the United States, Russia, China, India, Pakistan, and much of Europe have neither signed nor ratified the treaty and are not parties to this treaty.[367]

This non-accession of certain states to international arms control and disarmament treaties seems to complicate the effects of this underlying ideology. Though it clearly links law with morality, seeing both as a means by which to assess practices of war and paying heed to the taboos associated with certain weapons, the extent of its reach and power remains unexamined. Thus, to allow for an analysis of the second research question guiding this thesis—that is, whether the international legal

[366] Bentley, *Syria and the Chemical Weapons Taboo: Exploiting the Forbidden*, 106.
[367] The non-accession of these countries to the TPNW, as noted within these chapter, further raises questions regarding the strength of the nuclear taboo concerning the possession of nuclear weapons as opposed to their use.

regime has been successful in maintaining a taboo over the use of biological, chemical, nuclear, and conventional weapons—I will examine the instances in which the legal restrictions set by the treaties examined within this chapter have been disregarded and broken. Once these instances have been established, I will carry out an analysis of the third guiding research question of this thesis—how instances of failure to observe the taboo can best be explained—can be undertaken. The classical realist literature of E.H. Carr, Hans J. Morgenthau, and Georg Schwarzenberger provides us with the tools to understand these breaches. These tools offer answers to the seemingly contradictory nature of these restrictions; they allow us to think through the implications of eroded taboos by political necessity and what they mean for the fabric and overriding logic of international society.

Chapter II. Violations of International Arms Control and Disarmament Treaties

2.1 Introduction

Having examined and established the international legal regime that has emerged in relation to arms control and disarmament as well as the shared underlying ideology encoded in these legal principles, this chapter will examine the different ways in which state parties to these agreements have chosen to breach it.

In order to achieve this, I will first establish the problems concerning transparency and verification that arise when examining this subject, and which are essential to keep in mind when considering the lack of evidence that can underpin many cases of non-compliance.[1] This problem still stands despite the number of cases of both overt and alleged noncompliance of international arms control and disarmament treaties that have arisen under contemporary international law and since the Second World War. The problem of transparency and verification is difficult to avoid and can be clearly seen in certain cases through the impossibility of identifying the parties that have used certain weapons. These issues can contribute to making the act of raising an allegation against another state a political act, a problem that is compounded by the

[1] For instance, several cases of nuclear proliferation are characterised by the fact that information relating to the exact purpose of nuclear material has remained unclear.

patterns of denial and counter-allegations which arise in almost all non-compliance cases.[2]

Once the problems concerning transparency and verification in this area of international law have been established, I will examine cases of non-compliance which have arisen to the treaties examined within the previous chapter. This will be done through a careful examination of the facts underpinning each case, international reactions to the allegations, and the political interests underlying interests motivating the violation of an international treaty by a state. The circumstances of the confirmed or alleged violations of international law and the different interests which gave rise to them will both be outlined. This analysis will be undertaken in the same order these treaties were examined in the previous chapter. It is important to note in relation to this that there is no unambiguous definition of what is meant by a violation of a treaty or agreement. This is particularly the case in relation to arms control and disarmament treaties, which lie particularly close to a country's political and security interests. The spectrum of what a violation of international law entails is as follows:

> A deliberate violation aimed at increasing a state's military capability in ways which the agreement was intended to preclude.
>
> An action inconsistent with the sense or spirit of the agreement and tending to undermine its viability even though it is not prohibited by the agreement.
>
> Unintended violations, occurring, for example, through negligence of higher officials responsible for ensuring compliance by their subordinate organizations.

[2] The non-compliance allegations traded between the U.S. and Soviet Union—such as was the case in relation to the ABM Treaty—are a good example of this. These will be examined within this chapter.

Actions not banned by an agreement but which complicate verification of the agreement.

Ambiguous activities resulting from differing interpretations of the provisions of the agreement.

Activities assessed as ambiguous due to inadequate information or misinterpretation of information which suggest a violation where in fact none exists.[3]

Violations of arms control and disarmament treaties, as shown by this spectrum, can come in many shapes and sizes, with the intentionality of the violation representing their prime and most distinguishing factor.[4] Due to their importance, I will examine cases where a conscious and intentional breach of international law has taken place following 1945; that is, in current international law and in relation to the treaties introduced in the previous chapter. This examination will be carried out through the hermeneutical method introduced in the introduction of this thesis. It is the application of the hermeneutical method that will allow access to and provide insights into the reasons for action behind these breaches of international arms control and disarmament treaties. By focusing on the justifications and motivations states give for their actions in these cases, this thesis will show how the shared ideology or taboo that was explored within this prior chapter—which underlies international arms control and disarmament treaties—has been deliberately broken in multiple instances by state parties to these very agreements.

The importance of these cases of non-compliance, both when proven and alleged, in relation to the overarching purpose of this thesis and the three questions

[3] Allan S. Krass, *Verification: How Much Is Enough?* (London and Philadelphia: Stockholm International Peace Research Institute, Taylor & Francis, 1985), 193.
[4] Ibid.

outlined in its introduction is clear. Cases of noncompliance of international arms control and disarmament treaties provide the foundations through which to examine the second research question guiding this thesis; that is, whether the international legal regime has been successful in maintaining a taboo over the use of biological, chemical, nuclear, and conventional weapons. Through this, they provide the fundamental foundation from which to conduct the classical realist analysis that will answer the third research question guiding this thesis. Classical realism provides us with the tools to understand these breaches and to think through the implications of eroded taboos by political necessity and what it means for the overriding logic of international society. It explains how and why instances of failure to observe the taboo come to take place, allowing us, through this, to understand this essential question of international law.

The significance and purpose of this chapter within the wider purpose of this thesis is therefore considerable, particularly given the interaction between taboos and the political and strategic interests of countries. It will showcase the political and strategic necessities that can give rise to deliberate breaches of international law; outlining the different interests which instances of noncompliance reveal about the international legal regime and taboo surrounding biological, chemical, nuclear, and conventional weapons.

2.2 Issues concerning treaty violations

In approaching a study of violations of international arms control and disarmament treaties, it is important to first outline the limitations to which allegations

are subject. These issues are inherent like this topic that shares a close link to the unreliability to which intelligence reports can be subject to. This is particularly the case concerning their potential political nature and the mistakes to which they may be subject to. Both of these— as will be examined in detail over the course of this chapter— can be found to different degrees in most of the cases which will be examined throughout this chapter.[5]

The significance that this problem presents cannot be overstated. Verification provides vital means for both deterring and discovering breaches of international treaties.[6] It provides the factual basis for determining what the reaction against said breaches should be, particularly since a lack of verification can prove detrimental to an international treaty if information concerning a violation or breach remains undiscovered.[7] Having established this, this section will turn to the specific problems associated with transparency and verification and, following this, to the political interests that can underlie and motivate allegations of noncompliance.

2.2.1 The unreliability of information

Incentives to gain weapons systems vary according to their cost, military utility, and international reaction to their possession. This variety makes single methods to

[5] Issues and problems related to verification can be linked to a lack of control of weapons proliferation and are part of a broader debate within the field. The BWC is a particularly good example of this. Thomas G. Weiss and Ramesh Thakur, *Global Governance and the UN: An Unfinished Journey* (Bloomington and Indianapolis: Indiana University Press, 2010), 125.

[6] Weapons of Mass Destruction Commission, *Weapons of Terror: Freeing the World of Nuclear, Biological, and Chemical Arms, final report* (Stockholm, Sweden: EO Grafiska, June 2006), 51-53.

[7] This was the case concerning the International Atomic Energy Agency's (IAEA) safeguard inspections in North Korea. Despite revealing that North Korean declarations regarding its holdings of plutonium were misleading, they did not lead to the discovery of similar efforts by Iraq and Libya to develop nuclear weapons. Ibid.

assure compliance or detect violations neither practical nor desirable, particularly due to how unilaterally detecting treaty violations can present considerable difficulties.[8] This was the case with both biological weapons and the BWC, where research or a natural occurrence could be mistaken for the use of a biological or toxic weapon and, conversely, a weapon for a natural occurrence.[9] The likelihood that there is a bias towards false accusations further complicates the problem of determining the credibility of allegations of biological warfare:

> An increase of the incidence of infectious disease is a natural consequence of the social disruption that accompanies military or civil conflict or the early encounters of peoples with different sets of endemic diseases, and under such circumstances political and social antagonisms are heightened. Natural outbreaks can thus be expected frequently to provoke suspicion and lead to accusations.[10]

Similar problems arise in relation to verifying the use of chemical weapons:

> The detection of CWA's can be difficult as they are frequently rapidly degraded and hence difficult to detect … Any system developed should be accurate with low false positive and negative alarms, especially in the context of a complex battlefield environment.[11]

Distinct, additional problems can arise in relation to the usage of uncommon weapons. Evidence for infringement in cases relating to the usage of biological weapons, for example, can be highly technical.[12] Similarly, establishing a violation of the Mine Ban Treaty by state parties requires reasonably clear identification of the mine's owner. The

[8] Marie Isabelle Chevrier, "Impediment to proliferation? Analysing the biological weapons convention," *Contemporary Security Policy* 16, no.2 (1995): 73.

[9] Biological weapons present an interesting scenario concerning verification: the production and storage of biological agents can take place in small facilities, and delivery systems can similarly be used with other weapons. Ibid, 91-92.

[10] This increases the probability that biological attacks have gone unrecorded either because they were never suspected or because the victims were not in a position to have their suspicions recorded. Stockholm International Peace Research Institute, *Biological and Toxin Weapons: Research, Development, and Use from the Middle Ages to 1945*, 9.

[11] This, as will be seen in this chapter, played a major role in verifying the allegations of chemical weapons usage in Syria. S. Chauhan et al., "Chemical warfare agents," *Environmental Toxicology and Pharmacology* 26 (2008): 122.

[12] J. P. Perry Robinson, "'The Soviet Union and the biological weapons convention' and a guide to sources on the Sverdlovsk incident," *Contemporary Security Policy* 3, no. 3 (1982): 45.

challenges which must be overcome in order to establish clear ownership over a stockpile of anti-personnel mines whilst states undertake deliberate efforts to conceal their holdings are considerable.[13] Furthermore, both chemical and biological weapons programs are inherently difficult for intelligence communities to assess due to how many of these programs have dual-use capacities; a problem which also affects nuclear weapon programs.[14]

A number of Armament Research Services reports concerning the usage of certain weapons in conflicts reveal the difficulties which identifying a clear origin for certain weapons can involve. The Iranian Falaq family of rockets had, for example, been observed in Syria in several configurations on both sides of the conflict by 2014.[15] Though Iranian manufacture was almost certain, sources in Syria suggested that copies of the Falaq-1 and Falaq-2 systems had been domestically produced.[16] Similarly, despite the recognition in 2014 of the likelihood that pro-Russian separatist groups in Ukraine received support from one or more external parties and the identification of material as primarily of U.S.S.R. or Russian Federation origin, levels of state complicity remain

[13] The tension between these two aspects of treaties, explored in more detail within chapter one, can lead to sanction credibility counterbalancing state participation in the treaty in itself, giving potential violators an incentive to remain outside of the treaty. Stephen Biddle, Julia Klare, Johnathan Wallis, and Ivan Oelrich, "Controlling anti-personnel landmines," *Contemporary Security Policy* 19, no. 3 (1998): 39-42.

[14] They have both legitimate commercial and military as well as terrorist purposes. This makes the detection of biological weapons programmes difficult, particularly if concealment and deception are at play. National Research Council, *Naval Forces' Defense Capabilities Against Chemical and Biological Warfare Threats* (Washington, D.C.: National Academies Press, 2004), 20-21; Tristan A. Volpe, "Dual-use distinguishability: How 3D-printing shapes the security dilemma for nuclear programs," *Journal of Strategic Studies* 42, no. 6 (2019): 814-816; John Forge, "A Note on the Definition of 'Dual Use'," *Scientific and Engineering Ethics* 16, no. 1 (2010): 116-118; Reid B.C. Pauly, "Deniability in the Nuclear Nonproliferation Regime: The Upside of the Dual-Use Dilemma," *International Studies Quarterly* 66, no. 1 (March 2022): 1-4.

[15] N.R. Jenzen-Jones, Yuri Lyamin, and Galen Wright, *ARES Research Report No.2. Iranian Falaq-1 and Falaq-2 Rockets in Syria* (Armament Research Services, May 2014), 7.

[16] Ibid, 11.

unclear.[17] No "direct evidence of Russian government complicity in the trafficking of arms into the area" remains.[18]

These examples, though brief, clearly indicate the overarching problems which must be overcome when gathering information concerning the usage of weapons covered in the treaties introduced in chapter one. I will develop this further below, highlighting additional issues that can be encountered relating to the problems that allegations can additionally present further on. Two salient issues concerning the unreliability of information will be explored and presented: transparency and verification. Once these two different sets of issues have been explored, this section will outline the political interests that can drive allegations of noncompliance.

2.2.1.1 Transparency

Transparency has an essential role in reducing distrust and building confidence in arms control agreements, establishing trust among parties, and pressurizing them into compliance.[19] It is in the interest of state parties to be transparent in their reporting to show their compliance with treaty obligations, which makes its imperfect history concerning treaty reporting of interest.[20] Issues concerning transparency, however, become prominent when attempting to establish intent and guilt in case of a violation. Carus outlines this problem as follows:

[17] Jonathan Ferguson and N.R. Jenzen-Jones, *ARES Research Report No.3. Raising Red Flags: An Examination of Arms and Munitions in the Ongoing Conflict in Ukraine* (Armament Research Services, November 2014), 18.
[18] Ibid, 87.
[19] Marauhn, "Dispute Resolution, Compliance Control and Enforcement of International Arms Control Law", 258.
[20] Control Arms Secretariat, "Case Study 2. Dealing in Double Standards: How Arms Sales to Saudi Arabia are Causing Human Suffering in Yemen," *ATT Monitor* (2016), 7.

> What other evidence is acceptable for establishing intent? Admissions of guilt are unlikely, as perpetrators are unlikely to confess their misdeeds and governments are likely to obfuscate their activities. Document destruction is one method to hide culpability, as demonstrated by the Germans after World War I, the Japanese at the end of World War II, the white Rhodesians after they abandoned their bid for an independent state, and the Bulgarians with documents related to the Georgi Markov assassination.[21]

The ATT's yearly monitor reports provide a stark example of this through state party compliance with its transparency requirements. The 2015 report stated that out of the 193 states assessed upon the inauguration of the Treaty, 159 of them (82 percent) publicly reported some information on their arms exports.[22] The 2016 report saw a similar problem, with only 47 out of the 63 state parties (75 percent) expected to submit their initial report on ATT implementation doing so.[23] This generates concerns about the lack of abiding by the rules of the Treaty's transfer regime despite "credible evidence of the use of arms and ammunition in contravention of international human rights and humanitarian law."[24]

The ATT's yearly monitor reports in themselves, however, do not in themselves imply full transparency. Issues of discrepancies in information, gaps, and inconsistencies are present in many, "if not all of the first batch of ATT Annual Reports."[25] The reasons for these discrepancies remain a cause of debate. Though they can indicate cases of diversion, fraud, or deliberate concealment of information, this is not always clear-cut. Discrepancies can arise in relation to states withholding of sensitive information, not reporting imports, asking for reports to be kept confidential, and differing levels of

[21] Problems are also compounded in relation to allegations made by victims: "Nor can allegations of BW by the supposed victims be accepted uncritically. There is a long modern history of false claims of BW. Misguided individuals who thought that they were reporting a credible claim advanced some allegations, while other claims were disseminated as deliberate misinformation." W. Seth Carus, "The History of Biological Weapons Use: What We Know and What We Don't," *Health Security* 13, no. 4 (2015): 221.
[22] Control Arms Secretariat, *ATT Monitor Report 2015* (New York: Control Arms Secretariat, 2015), 100.
[23] Control Arms Secretariat, *ATT Monitor Report 2016* (New York: Control Arms Secretariat, 2016), 14.
[24] Ibid, 14-15.
[25] Control Arms Secretariat, *ATT Monitor Report 2017* (New York: Control Arms Secretariat, 2017), 22.

aggregation of information.[26] This points to the difficulty which the information on treaty compliance via transparency measures can present.

2.2.1.2 Verification

Verification, like transparency, can be problematic when concerning highly technical information.[27] The detection of nuclear tests represents a significant example of the different verification-related problems that can arise in relation to highly technical information, and were highly debated throughout the 1970s and 1980s. Seismological means of verification constituted the principal component of the potential international control system for an underground test ban. Seismic networks, however, though providing a high degree of confidence that the comprehensive test ban had not been violated, retaining a certain level of uncertainty.[28]

This degree of uncertainly represents a significant problem, since seismological means of verification can only provide limited information—such as the location, time, and approximate size—of a nuclear explosion.[29] The precise yield of a nuclear explosion cannot be fully ascertained. Furthermore, seismological means of verification cannot distinguish between large chemical and small nuclear explosions. Similarly, the alleged Soviet violations of SALT II through its SS25 ICBMs were acknowledged in U.S. Senate

[26] The cases examined within this report are particularly interesting, with, for example, "Austria and the United Kingdom did not report any imports. Austria did not submit the import section of the reporting template and the United Kingdom left the section blank. However, other States Parties reported exports of over 20,000 items to Austria and 2,877 items to the United Kingdom." Control Arms Secretariat, *ATT Monitor Report 2018* (New York: Control Arms Secretariat, 2018), 88.
[27] This will be examined further in this chapter through different cases of non-compliance. The concerns this raises when gathering of information on allegations of noncompliance are substantial and need to be kept in mind in approaching this topic.
[28] Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 1982* (London: Taylor & Francis Ltd, 1982), 433.
[29] Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 1987* (Oxford: Oxford University Press, 1987), 48.

hearings as potentially inconclusive, with only rough estimates being provided on the missiles' payload carrying capacity.[30] This uncertainty led to a debate as to the level of accuracy which must be demanded from accusations regarding violations of international arms control and disarmament treaties.[31]

2.2.2. Political interests in allegations of noncompliance

The political interests which can underlie allegations of noncompliance are considerable. Though the particular effects of political and national interests on international law will be analysed in greater detail in the following three chapters, these still play a prominent role in allegations of noncompliance. The tension which can exist between specific allegations and their independence can be considerable, particularly due to the political motives that can drive their being put forwards.[32] The reciprocal charges made by the U.S. and U.S.S.R. during the Cold War represent a good example of this. From the end of the Second World War, the Soviet Union continuously made allegations of biological weapons usage against the United States. In a 1991 article, Leitenberg summarises a number of these allegations as follows:

1. On 10 July 1964, the Soviet news agency accused a US Military Commission in Colombia of using biological weapons against peasants.

[30] R. Jeffrey Smith, "A New Soviet Missile Angers the White House," *Science, New Series* 228, no. 4696 (April 12, 1985): 155-156; Mark B. Schneider, "Russian Violations of Its Arms Control Obligations," *Comparative Strategy* 31, no. 4 (2012): 344.
[31] Colin S. Gray, "Moscow Is Cheating," *Foreign Policy* 56 (Autumn 1984): 144.
[32] Guillemin in this article argues that the two allegations presented by the U.S. in relation to the 'yellow rain' and the Sverdlovsk incident are political in origin. Jeanne Guillemin, "The 1979 Anthrax Epidemic in the USSR: Applied Science and Political Controversy," *Proceedings of the American Philosophical Society* 146, no. 1 (March 2002): 32-33.

2. On 12 March 1968, Moscow Radio accused the United States of spreading plague and cholera in Vietnam.
3. On 13 September 1982 and 12 February 1983, the Soviet Army newspaper and Novosti Press Agency repeated the charges that the United States used biological weapons during the Korean War.
4. On 10 February 1983, *Pravda* accused the CIA of using biological weapons in Cuba.
5. On 8 February 1984, the Soviet Army newspaper carried an entire catalogue of charges of biological weapons use by the United States against humans, crops and domestic animals in Cuba:
    a. causing African swine fever in 1971, and again in 1980;
    b. causing sugar cane 'rust' in 1972;
    c. causing tobacco 'blue mould' in 1972;
    d. causing dengue fever in the spring of 1981; and
    e. causing haemorrhagic conjunctivitis in 1981.
6. On 2 December 1984, the Soviet Army newspaper alleged that the United States had used biological weapons in Indochina, caused dengue fever in Cuba, and was carrying on biological warfare 'experiments' in the city of Lahore, Pakistan.
7. Between 1985 and the summer of 1987, Soviet publications repeatedly carried the charge that the AIDS virus had 'come from' or been 'released by' laboratories in the United States.[33]

[33] Milton Leitenberg, "A return to Sverdlovsk: Allegations of Soviet activities related to biological weapons," *Contemporary Security Policy* 12, no. 2 (1991): 183-184.

These allegations are remarkable, Leitenberg argues, due to the lack of interest they received in relation to establishing the degree to which they were true. Whilst experts in the field assume their falsehood, from the "point of view of arms control, they should face examination by some international agency, and a determination made whether they are true."[34] The allegations still remain under-explored, with some publications only addressing their potential status as propaganda.[35] The allegations and investigations of the potential usage of chemical weapons in Syria from 2013 provide an additional, contemporary example of the effect of these political interests.[36]

Issues concerning the quality of the information gathered from an investigation can also give rise to further issues. The charges raised by several American administrations against the Soviet Union throughout the 1980s on the 'yellow rain' chemical and biological weapons controversy illustrate this particularly well.[37] The 'yellow rain' controversy concerned the allegation that the Soviet Union had supplied Vietnam with chemicals—mycotoxins called trichothecenes—for their use in Laos and Cambodia. The Soviet government rejected these allegations. The U.S. government, however, continued to cite the 'yellow rain' evidence throughout the 1980s as a

[34] Ibid, 185.

[35] The authors of this article offer an interesting analysis of the treatment which some of these allegations have received in the literature. Viktoriya V. Romanova and Yaroslav A. Shulatov, "The Echo of the Khabarovsk Trials: The USSR and the Allegation Campaign against the USA of Using Biological Warfare during the Korean War (1950–1953)," *History of Medicine* 5, no. 4 (2018): 262.

[36] The marked differences in the reception of these reports are also significant in relation to the differing interests of states concerning the desirability of direct military intervention. Yasmin Naqvi, "Crossing the Red Line: The Use of Chemical Weapons in Syria and What Should Happen Now," *International Review of the Red Cross* 99, no. 906 (2019): 962-963; Jean-Pascal Zanders, "After the chemical attacks in Syria – now what?", *EU Institute for Strategic Studies*, Issue Alert 30 (September 2013): 1-2; Jean-Pascal Zanders, "Chemical weapons use in Syria?" in *EU Institute for Security Studies Report 15: The Future of the CWC in the post-destruction phase*, ed. Jean-Pascal Zanders (March 2013): 1.

[37] The yellow rain allegations are particularly interesting due to how they arose at an approximately similar time to the first detection of the Soviet Sverdlovsk incident which, in contrast, proved to reveal the Soviet biological weapons program. The Sverdlovsk incident will be examined in greater detail further below in the chapter. Leitenberg, "A return to Sverdlovsk: Allegations of Soviet activities related to biological weapons", 161.

violation of international conventional and customary law, with Canadian reports supporting the US position, and the French and British governments confirming the Soviet use of chemical warfare.[38]

The evidence underlying these reports, however, did not hold up to scrutiny. Non-governmental inquiries illustrated the misperceptions that arose from the interviewing of refugees without regard for proper controls.[39] Ziegler's analysis of these allegations harshly concludes that "a dozen weak arguments do not add up to one strong one."[40] Other authors similarly noted the lack of consistency in the evidence, pointing out how medical evidence confirming claims of chemical warfare was elusive and the army medical specialists sent to Thailand in 1979 relied on verbal accounts as opposed to medical examinations.[41]

Having established the limitations to which allegations of noncompliance are subject, I will examine the different violations and allegations of violations that the treaties covered in the previous chapter have been subject to. This examination will be carried out with the same structure that was followed in the previous chapter.[42]

[38] This allegation was based on various types of evidence involving blood samples from purported victims of toxic agents in November 1981, January 1982, and February 1982 in Laos and during March 1983 in Kampuchea. Reports itemized positive findings for positive findings for T2 mycotoxins and its metabolite HT2. Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 1984* (London: Taylor & Francis Ltd, 1984), 332-334.
[39] Ibid, 335.
[40] David W. Ziegler, "Yellow rain: An analysis that went awry?" *International Journal of Intelligence and Counter Intelligence* 2, no. 1 (1988): 101.
[41] The fact that the spots of yellow rain and honeybee faeces proved to be indistinguishable from each other in general appearance was particularly damning. Julian Robinson, Jeanne Guillemin, and Matthew Meselson, "Yellow Rain: The Story Collapses," *Foreign Policy* 68 (Autumn 1987): 114; Peter Barss, "Epidemic Field Investigation as Applied to Allegations of Chemical, Biological, or Toxin Warfare," *Politics and the Life Sciences* 11, no. 1 (February 1992): 14.
[42] It is important to note that the limitations explored within this section are an important aspect of arms control and disarmament treaties. The problems these limitations reveal have echoes in Carr's, and Morgenthau's theories of international law; particularly through how nationalism and national interests can have profound effects in international law. The role played by nationalism and national interests in international law will be developed in chapters three, four, and five.

2.3 Nuclear Weapons

A number of issues concerning state non-compliance of international nuclear arms control and disarmament treaties have arisen throughout the years. These particularly involve the proliferation of nuclear weapons outside and within the NPT regime. Countries such as India, Pakistan, Israel, Iraq, North Korea, Iran, South Africa, and Libya have either attempted or succeeded to develop nuclear weapons. Other allegations have additionally arisen in the context of various U.S. and Soviet Union treaties, which recently led to the U.S.' withdrawal from the INF due to the perceived crisis in nuclear arms control.[43]

Throughout the following pages, I will examine several cases of alleged and proven non-compliance relating to the international treaties covered in the last chapter. This will be done following the date of ratification of the treaties, focusing in particular on the different political interests which prompted the different violations of treaties.

2.3.1 Non-Proliferation Treaty

Though there have been no clear official breaches of the NPT by a state party, there have been multiple cases of proliferation and attempted proliferation outside of the treaty by state parties who, upon discovery, abandoned the treaty which merits attention. Cases of nuclear proliferation by state parties—Iraq, North Korea, Iran, and Libya—will be explored below chronologically, noting particularly the underlying

[43] The previous chapter briefly examined this perceived crisis in arms control.

interests which led to the proliferation or attempted proliferation of nuclear weapons in these different countries. The potential violation of Article VI by nuclear weapon-holding states will be examined following this.

These different cases of non-compliance are of particular importance due to the status of the NPT within international nuclear arms control. The early near-universal membership of the treaty, with only non-members developing nuclear weapons, has seen issues of compliance grow following the cases of Iraq, North Korea, Iran, and Libya.[44] These cases of noncompliance have also given rise to serious doubts about the long-term survival of the treaty.[45] They have also given rise to concerns about the power imbalance created by the NPT which remain prominent in contemporary discussions about the NPT and the international nuclear non-proliferation, arms control, and disarmament regime.[46]

2.3.1.1 Iraq

Concerns related to Iraq's nuclear weapons programme arose, together with those of its development and use of chemical and biological weapons, following the Gulf War. Iraq's attempt to develop nuclear weapons following its ratification of the NPT in

[44] Camille Grand, "The Non-Proliferation Treaty in an era of proliferation crises," in *Chaillot Papers 120: Nuclear Weapon's After the 2010 NPT Review Conference*, eds. Ian Anthony, Camille Grand, Lukasz Kulesa, Christian Mölling, Mark Smith, and Jean-Pascal Zanders (EU Institute for Security Studies, April 2010), 16.
[45] Mario E. Carranza, "Can the NPT Survive? The Theory and Practice of US Nuclear Non-proliferation Policy after September 11," *Contemporary Security Policy* 27, no. 3 (2006): 489-491.
[46] Rebecca Johnson, "The Humanitarian Impacts of Nuclear Weapons: An Imperative for Achieving Disarmament," *Irish Studies in International Affairs* 25 (2014): 65-66.

1969 constituted a violation of it. This made Iraq a particularly relevant case to examine in the context of the later nuclear weapons proliferation attempts.

Observations about Iraq's nuclear weapons programme started in 1991, with UNSCOM being tasked with determining the extent of Iraq's weapons of mass destruction programme and disarming it.[47] Following Security Council Resolution 687, the first inspections of Iraqi facilities revealed evidence of the ability to manufacture all components for an EMIS separator as well as further evidence relating to a large EMIS process plant being built at Tuwaitha.[48] Further inspections revealed three clandestine uranium enrichment programmes and conclusive evidence of a nuclear weapons programme "aimed at an implosion-type nuclear weapon."[49] This, together with other findings, prompted the Security Council to condemn Iraq for the violation of its obligations under Resolution 687, demand the complete disclosure of its programmes of weapons of mass destruction, and halt nuclear activities of any kind.[50]

The size and scale of Iraq's attempts to develop nuclear weapons were revealed through the UNSCOM and IAEA safeguards inspections, which were carried out throughout the following years. These inspections showed that Iraq failed to inform the IAEA about attempts to experimentally separate a few grams of plutonium from fuel rods at a facility.[51] Questions remained unresolved in 2003 due Iraq's clear attempts to obfuscate, subvert, and evade United Nations Special Commission (UNSCOM)

[47] Weiss and Thakur, *Global Governance and the UN: An Unfinished Journey*, 120.
[48] U.N. S.C. Rep. 22788 (July 15, 1991); U.N. Centre for Disarmament Affairs, *The United Nations and Disarmament, Volume 16: 1991* (New York: United Nations, 1992), 43-44.
[49] U.N. Centre for Disarmament Affairs, *The United Nations and Disarmament, Volume 16: 1991*, 48.
[50] U.N. S.C. Res. 707 (Aug. 15, 1991), ¶¶ 3-4.
[51] Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 1992* (Oxford: Oxford University Press, 1992), 93-94; Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 1995* (Oxford: Oxford University Press, 1995), 659-660; U.N. Centre for Disarmament Affairs, *The United Nations and Disarmament, Volume 20: 1995* (New York: United Nations, 1996), 48.

investigations.[52] These questions were related to its nuclear weapons programme, with inspections initially aiming to discover an underground nuclear reactor which was later revealed to not exist.[53] There was no doubt, however, that Iraq was developing nuclear weapons using a secret programme code—Petrochemical Three—set up to both design nuclear weapons and produce fissile material for them.[54]

The case of Iraq is particularly relevant in relation to the enforcement of a Security Council Resolution which mandated the inspection of its development and possession of chemical, biological, and nuclear weapons. The enforcement of this resolution was, arguably, only possible due to Iraq's defeat in the Gulf War.[55] The relation of the country's nuclear weapons programme with Israel is also of further interest. Failure by the Security Council to halt Iraq's nuclear programme in 1981 led to Israel to unilaterally bomb the Osirak nuclear reactor, which prompted Saddam Hussein to drive his nuclear weapons acquisition programs underground on suspicion that Israeli aggression would not stop there.[56]

Saddam Hussein's instruction to his son-in-law to use Iraq's weapons of mass destruction only in case they were obliged to do so and there was a great necessity to put them into action is particularly relevant.[57] This political interests underlying this

[52] U.N. Department for Disarmament Affairs, *The United Nations and Disarmament, Volume 28: 2003* (New York: United Nations, 2004), 38-39; Weiss and Thakur, *Global Governance and the UN: An Unfinished Journey*, 120.
[53] Gudrun Harrer, *Dismantling the Iraqi Nuclear Programme: The inspections of the international atomic energy agency, 1991-1998* (London and New York: Routledge, 2014), 253.
[54] This shows how a country with a significant peaceful nuclear programme has "a cadre of trained nuclear scientists and engineers able to design and fabricate nuclear weapons." This highlights the problems which verifying peaceful nuclear energy programmes can presuppose. Frank Barnaby, *How Nuclear Weapons Spread: Nuclear-weapon proliferation in the 1990s* (London and New York: Routledge, 1993), 75-76.
[55] Harrer, *Dismantling the Iraqi Nuclear Programme: The inspections of the international atomic energy agency, 1991-1998*, 253.
[56] This case is also particularly relevant in relation to Israel's decision to acquire a nuclear-weapon force due to the belief that it would offset its inferiority in military manpower and quantity of conventional armaments by comparison to its enemies. Weiss and Thakur, *Global Governance and the UN: An Unfinished Journey*, 119-120; Kenneth R. Timmerman, *The Death Lobby, How the West Armed Iraq*, (Fourth Estate, London, 1992), 103; Barnaby, *How Nuclear Weapons Spread: Nuclear-weapon proliferation in the 1990s*, 69.
[57] Avner Golov, "Deterrence in the Gulf War," *The Nonproliferation Review* 20, no. 3 (2013): 460.

order are further shown through his additional order to deploy these "special weapons" so they "would be ready to use the moment a pertinent order is given, or in the event of a massive strike against Iraq."[58] This fact makes Iraq's ultimate decision to not use weapons of mass destruction in the Gulf War of particular interest, as it contrasts—as will be examined later in the chapter—with the country's chemical weapons usage against Iran.[59] The political interests underlying Iraq's decision to develop these weapons, however, are clear, and analysed in detail later on in this chapter after an examination of its biological and chemical weapons programmes.

2.3.1.2 North Korea

North Korea, which joined the NPT regime in 1985—a decade after South Korea—signed together with South Korea a Joint Declaration on the Denuclearisation of the Korean Peninsula in 1992, agreeing not to develop, test, or gain nuclear weapons and not to possess uranium enrichment facilities.[60] Concerns emerged during this same year that North Korea had produced more plutonium than it had declared. The case was reported as a breach of safeguard obligations to the Security Council following IAEA safeguards inspections, after which North Korea declared that it intended to withdraw from the NPT as a response.[61]

[58] Ibid.
[59] Ibid, 463.
[60] Weapons of Mass Destruction Commission, *Weapons of Terror: Freeing the World of Nuclear, Biological, and Chemical Arms, final report*, 67.
[61] Grand, "The Non-Proliferation Treaty in an era of proliferation crises", 17-18.

An Agreed Framework was drawn up in 1994 following negotiations between the U.S. and North Korea, under which North Korea declared that it would freeze its existing nuclear programme, accept inspections by the IAEA, re-join the NPT, implement the agreement on denuclearisation of the Korean peninsula, and dismantle its nuclear plants.[62] Concerns, however, re-emerged in 1998 following U.S. allegations that North Korea was building an underground nuclear weapon-related facility.[63] Allegations of North Korea's non-compliance with its safeguards agreement with the IAEA and the terms of the Agreed Framework resurfaced in 2002. These originated in unresolved discrepancies in North Korea's initial declaration and its continuing refusals to grant IAEA inspectors access to suspect sites.[64]

The allegations continued in 2003, with the nuclear programme showing no sign of abating and North Korea announcing that it had reprocessed stored 8000 spent nuclear fuel rods.[65] North Korea also announced in May 2003 that it had reduced the 1992 denuclearisation pledge with South Korea to a dead document due to the U.S.'s constant nuclear threats.[66] The crisis continued throughout the following years and through a series of talks between North Korea and the U.S., and has not yet ended.[67]

[62] Weapons of Mass Destruction Commission, *Weapons of Terror: Freeing the World of Nuclear, Biological, and Chemical Arms, final report*, 67.
[63] Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 2000* (Oxford: Oxford University Press, 2000), 474-475.
[64] Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 2003* (Oxford: Oxford University Press, 2003), 581-582.
[65] Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 2004* (Oxford: Oxford University Press, 2004), 612-613.
[66] Ibid.
[67] That South Korea was also subject to IAEA safeguard violations in 2004 following a failure to report uranium enrichment experiments is of further interest in relation to the North Korean case. Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 2005* (Oxford: Oxford University Press, 2005), 568-569; Stockholm International Peace Research Institute, SIPRI Yearbook of World Armaments and Disarmament, 2006 (Oxford: Oxford University Press, 2006), 630-631; Stockholm International Peace Research Institute, SIPRI Yearbook of World Armaments and Disarmament, 2008 (Oxford: Oxford University Press, 2008), 349-350; Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 2011* (Oxford: Oxford University Press, 2011), 387.

The withdrawal of North Korea from the NPT sets this country apart from other cases of nuclear proliferation, making its initial nuclear weapons programme—which took place whilst it was still a state party to the treaty—a plausible violation of this treaty.[68] The discovery of this programme, which initially lead to debates concerning the necessity of strengthening the safeguard system, pointed to the lack of an obvious distinction between a "good 'atoms for peace' and a bad 'atoms for war'."[69] The issues this case of non-compliance led to, particularly given the prolonged talks which followed the programme's initial discovery, raise significant doubts as to the state of the NPT and the non-proliferation system. That this took place within the treaty and without being sanctioned—a fact furthered by North Korea's arguable withdrawal from the treaty—led many states to "revisit the security benefits offered by the treaty" and "re-open debates about the benefits of nuclear abstention."[70]

North Korea's continued advocacy for the denuclearisation of the Korean Peninsula stands out as a seemingly incongruous element of this case.[71] At the historical summit between the U.S. and North Korea in June 2018, Kim Jong-Un and President Trump agreed to pursue the complete denuclearisation of the Korean Peninsula and build peace and security.[72] Prior to its first test in 2006, North Korea declared its commitment to international safeguards, pledging to never use nuclear weapons first and do its utmost to realise the denuclearisation of the peninsula.[73] This was also seen in the aftermath of the 2016-2017 nuclear provocations, when North Korea adopted a

[68] Knopf, "After diffusion: Challenges to enforcing nonproliferation and disarmament norms", 378-379.
[69] Carranza, "Can the NPT Survive? The Theory and Practice of US Nuclear Non-proliferation Policy after September 11", 504.
[70] Grand, "The Non-Proliferation Treaty in an era of proliferation crises", 17-18.
[71] Soon-Ok Shin, "Arm, to disarm: North Korea's Cold War anti-nuclearism," *The Pacific Review* 35 (2022): 2.
[72] Prior to the summit North Korea agreed to "suspend nuclear and long-range missile testing and destroyed several tunnels at its nuclear test site." Alicia Sanders-Zakre and Kelsey Davenport, "Assessing Progress on Nuclear Nonproliferation and Disarmament, Updated Report Card: 2016--2019," *Arms Control Association Report* (July 2019), 61.
[73] Shin, "Arm, to disarm: North Korea's Cold War anti-nuclearism", 2-3.

number of dismantling measures such as the destruction of nuclear test sites in Punggye-ri and the suspension of long-range missile and nuclear testing.[74]

These declarations seem to stand in sharp contrast with its pursuit of nuclear weapons at a time of escalating tensions with the U.S., and seem to contrast its threats of pre-emptive strikes of justice against Japan and South Korea.[75] It is clear, however, that North Korean advocacy for denuclearisation can be linked to the security interests which a nuclear-weapon-free-zone (NWFZ) in Northeast Asia could bring to North Korea. Such a NWFZ would ensure "a non-nuclear Japan and South Korea", "nuclear restraint from China, the United States and Russia", and "a legally binding negative security guarantee from the United States" in exchange for North Korean disarmament.[76] The North Korean violation of the NPT treaty is, then, fundamentally linked to its political interests and security concerns in relation to the U.S. and South Korea.

2.3.1.3 Iran

Evidence concerning undeclared nuclear facilities in Iran was first made public in 2002, following allegations concerning nuclear ambitions first made in 1995.[77] The Iranian case of attempted nuclear proliferation remains amongst the most relevant today due to its status as an original party to the NPT, particularly due to the prolonged

[74] Ibid.
[75] Ibid, 5; Norwegian People's Aid, *Nuclear Weapons Ban Monitor 2021* (Norwegian People's Aid, March 2022), 49.
[76] Shin, "Arm, to disarm: North Korea's Cold War anti-nuclearism", 26.
[77] Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 1986*, (Oxford: Oxford University Press, 1986), 659-660.

controversy which has raged regarding its nuclear ambitions and the multiple attempts to end its noncompliance with the NPT since 2002.[78]

Evidence concerning Iran's noncompliance with the NPT first arose due to concerns over Russia's cooperation with Iran in the field of nuclear energy. These concerns were increased after the publication of two satellite images purporting to show the construction of two secret nuclear fuel facilities south of Tehran.[79] Remaining unresolved in 2004, they intensified upon revelations by the IAEA that Iran had failed to declare for two decades important nuclear activities in contravention of its NPT-mandated safeguards agreement.[80]

Much like with North Korea, security factors are of significance concerning Iran's possible noncompliance with the NPT.[81] Despite Iran reaffirming that these plans involved the development of "a complete nuclear fuel cycle … as part of long-term energy policy to make up for the expected depletion of its fossil fuel reserves", concerns persisted in the following years.[82] They intensified when Iran refused to comply with U.N. Security Council Resolutions demanding that it suspend its enrichment

[78] Stockholm International Peace Research Institute, *SIPRI Yearbook 2015: Armaments, Disarmament and International Security*, (Oxford: Oxford University Press, 2015), 525.
[79] Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 2003*, 596; U.N. Department for Disarmament Affairs, *The United Nations and Disarmament, Volume 28: 2003,* 39-40.
[80] Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 2006*, 618-619; Robert J. Reardon, *Containing Iran: Strategies for Addressing the Iranian Nuclear Challenge* (Santa Monica, Arlington, Pittsburgh: RAND Corporation, 2012), 28-29.
[81] Weapons of Mass Destruction Commission, *Weapons of Terror: Freeing the World of Nuclear, Biological, and Chemical Arms, final report*, 66-67.
[82] Ibid.

programme.[83] This controversy was heightened further after a 2011 IAEA report provided details about Iran's past nuclear weapons-related activities.[84]

Debates concerning Iran's noncompliance with the NPT have argued that the development of nuclear capabilities for energy production could offer advantages by both allowing for increased exports of its natural resources and "the possible development of weapons technology for deterrence and/or power projection."[85] This latter point is of particular interest in relation to the internal debate between moderate and radical voices.[86] The unique structure of Iran's regime, which blends religious and democratic and formal and informal institutions, makes understanding its decision-making process particularly challenging.[87] Iran borders the politically vital Persian Gulf, the Middle East, the Caucasus, and Southwest Asia; strategically, it also further competes for control of the Strait of Hormuz in the Persian Gulf, a strategic chokepoint.[88]

The relation between concerns regarding Iran's noncompliance and its geographical situation—particularly considering Israel's development of nuclear weapons—is, therefore, of particular interest in relation to this case of noncompliance. Iran's underlying belief that its ballistic and unconventional weapons are essential for

[83] U.N. Office for Disarmament Affairs, *The United Nations and Disarmament Yearbook, Volume 32 (Part II): 2007* (New York: United Nations, 2008), 26-27; Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 2008*, 337; Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 2009* (Oxford: Oxford University Press, 2009), 387.

[84] Reardon, *Containing Iran: Strategies for Addressing the Iranian Nuclear Challenge*, 34; U.N. Office for Disarmament Affairs, *The United Nations and Disarmament Yearbook, Volume 35 (Part II): 2010* (New York: United Nations, 2011), 35-38; U.N. Office for Disarmament Affairs, *The United Nations and Disarmament Yearbook, Volume 36 (Part II): 2011* (New York: United Nations, 2012), 16-20; U.N. Office for Disarmament Affairs, *The United Nations and Disarmament Yearbook, Volume 37 (Part II): 2012* (New York: United Nations, 2013), 24-26; U.N. Office for Disarmament Affairs, *The United Nations and Disarmament Yearbook, Volume 41 (Part II): 2016* (New York: United Nations, 2017), 19-21.

[85] William Anthony Rivera, "Discursive Practices of Honor: Rethinking Iran's Nuclear Program," *Foreign Policy Analysis* 12 (2016): 395.

[86] Frances Flannery, Michael L. Deaton, and Timothy R. Walton, "Radical Apocalypticism and Iranian Nuclear Proliferation: A Systems Oriented Analysis," *International Journal of Intelligence and CounterIntelligence* 26, no. 4 (2013): 724.

[87] Rivera, "Discursive Practices of Honor: Rethinking Iran's Nuclear Program", 396.

[88] Ibid, 397.

its existence "irrespective of imminent dangers posed by those programs to the GCC, Israel, Iraq, and the West" is also, as will be seen in relation to its biological weapons programme, of further importance.[89]

Furthermore, it is noteworthy that soon after the first ratification and entry into force of the NPT, the Shah of Iran stated that Iran would have to acquire nuclear weapons should other countries in the region come to possess them.[90] This position remains relevant today. Iran and Saudi Arabia—both countries with latent nuclear breakout capabilities—have both stated a desire to acquire nuclear weapons should the other develop them.[91] These different facts show that Iran's decision to develop nuclear weapons despite its status as a state party to the NPT was fundamentally motivated by its national interests. In turn, the best guarantor of a non-nuclear Iran is a comprehensive approach where its security concerns, its economic and political interests, and its standing and status are respected.[92]

2.3.1.4 Libya

In December 2003, Libya, a state party to the NPT since 1975, informed the United Nations Security Council of its decision to eliminate all material, equipment, and programmes leading to the production of internationally proscribed weapons. This

[89] Dany Shoham, "Image vs. Reality of Iranian Chemical and Biological Weapons," *International Journal of Intelligence and CounterIntelligence* 18, no. 1 (2005): 95-96. The first order of business "in making biological weapons less desirable to Iran should be efforts to dilute their military utility (or at least Iranian perceptions of their military utility). Kirk C. Bansak, "Managing networks of risk: A tailored approach to Iran's biological warfare threat potential," *Bulletin of the Atomic Scientists* 67, no. 5 (2011): 71-72.
[90] Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 1976* (Stockholm: Almqvist & Wiksell, 1976), 389.
[91] Norwegian People's Aid, *Nuclear Weapons Ban Monitor 2021*, 32.
[92] Rivera, "Discursive Practices of Honor: Rethinking Iran's Nuclear Program", 411.

announcement included the development of uranium enrichment capabilities, an activity which should have been, but was not, reported under its NPT safeguards.[93] It arose after suspicions and concerns relating to Libya rose which, as will be explored later in this chapter in relation to its chemical weapons programme, led to Libya being regarded as a "perennial source of concern about the proliferation of non-conventional weapons and ballistic missile delivery systems."[94]

Libya's decision to renounce internationally proscribed weapons, amongst them its undeclared uranium conversion and enrichment programmes, marked a particularly prominent example of proliferation of weapons of mass destruction being quickly reversed following political decisions.[95] That Libya chose to pursue nuclear weapons in order to balance Israel and "exert leadership in the Arab world" is of particular significance in relation to this case of noncompliance.[96] This choice was also fundamentally linked to its decision to develop chemical weapons, which will be examined further on in this chapter.

Libya's announcement, which reportedly was made after nine months of secret diplomacy initiated by President Qadhafi, marked the first time the country admitted to possessing non-conventional weapons and the programmes to produce them.[97] It came as a "double shock to the international community", not only "was this a surprising move … few had realized how far Libya had progressed in acquiring resources for a

[93] U.N. Department for Disarmament Affairs, *The United Nations and Disarmament, Volume 28: 2003*, 40-41.
[94] Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 2004*, 617-618.
[95] U.N. Department for Disarmament Affairs, *The United Nations and Disarmament, Volume 29: 2004* (New York: United Nations, 2005), xi; Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 2005*, 639-640.
[96] Maria Rost Rublee, *Nonproliferation Norms, Why States Choose Nuclear Restraint* (Georgia: University of Georgia Press, 2009), 151.
[97] Ibid, 618.

nuclear weapons program."[98] The decision to reverse its pursuit of nuclear weapons was largely associated with the post-9/11 agenda, with analysts pointing to the "increasingly robust non-proliferation measures since 2001, the invasion of Iraq in 2003, and/or the trilateral negotiations between the United States, Libya, and the United Kingdom."[99] Libya's initial desire to possess nuclear weapons, however, was also held to be rooted in the regime's "regional ambitions and the revolutionary zeal that characterized its foreign policy during the late 1970s and early 1980s."[100]

2.3.1.5 Article VI

The final prominent alleged violation of the NPT relates to the failure by nuclear states to disarm as per Article VI's requirement to pursue disarmament negotiations in good faith.[101] These critiques are fundamentally linked to the debate surrounding the relationship of nuclear disarmament to non-proliferation.[102] "Where one stands on arms control linkage," is related to the assumptions about the "legal relationship of nonproliferation and disarmament under the NPT."[103] One formulation supported by a majority of the treaty's non-nuclear weapon states argues that the NPT's five nuclear weapon states are obliged under Article VI to not only pursue nuclear disarmament but also achieve it. An alternative legal view, however, holds that these two are unequal obligations, and that disarmament is best understood as a supporting element rather

[98] Målfrid Braut-Hegghammer, "Libya's Nuclear Turnaround: Perspectives from Tripoli," *Middle East Journal* 62, no. 1 (2008): 55.
[99] Ibid, 56.
[100] Ibid, 72.
[101] Blix, foreword to *Verifying Nuclear Disarmament*, xi.
[102] Adam M. Scheinman, "Crossing the Nonproliferation-Disarmament Divide," in *The Next Fifty Years of Nuclear Proliferation*, IISTP Occassional Papers, ed. Sharon Squassoni (Washington, DC: The George Washington University, February 2021), 83.
[103] Ibid, 85.

than the treaty's primary purpose.[104] That the NPT provides no guidance on how, when, with what verification or enforcement, and under what political conditions nuclear disarmament is to be achieved adds to this legal turbulence, giving rise to conflicting perspectives on what is or is not being achieved by state parties.[105] Article VI of the NPT states that:

> Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.[106]

Furthermore, according to the 1996 advisory opinion of the International Court of Justice, the legal importance of this obligation "goes beyond that of a mere obligation of conduct."[107] It involves "an obligation to achieve a precise result—nuclear disarmament in all its aspects—by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith."[108] Article VI of the NPT, then, must be fulfilled in good faith as per the requirement set in Article 2, paragraph 2 of the Charter of the UN.[109] Though the exact core meaning of this article is ambiguous, it represents an active and binding aspect of the NPT to which state parties must comply.[110]

The idea that this article has been violated by states with nuclear weapons that are parties to the NPT has been widely discussed in the literature.[111] A big failure of the

[104] Ibid, 85-86.
[105] Ibid, 86.
[106] Treaty on the Non-Proliferation of Nuclear Weapons, art. 6.
[107] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinions and Orders, 1996 I.C.J. Rep. (July 8), ¶99.
[108] Ibid.
[109] Ibid, ¶102.
[110] Koplow analyses this ambiguity in great detail. David A. Koplow, "Parsing Good Faith: Has the United States Violated Article VI of the Nuclear Non-Proliferation Treaty," *Wisconsin Law Review* 1993, no. 2 (1993): 383-384.
[111] It has also been discussed in relation to the state this treaty and in relation to the NPT's potentially conflictive relationship with the Treaty on the Prohibition of Nuclear Weapons. See for example: Orion Noda, "A wolf in sheep's clothing? The NPT and symbolic proliferation," *Contemporary Security Policy* 43, no. 1 (2022): 134-160; Carranza. "Can the NPT Survive? The Theory and Practice of

NPT has precisely been its inability to "achieve nuclear disarmament and there being no good prospect of achieving it."[112] It is the perception of non-nuclear weapon states that the "bargains undergirding the NPT are imbalanced" and that whilst non-proliferation has been continually strengthened, the pursuit of nuclear disarmament and the provision of peaceful nuclear technology have "at best, progressed slowly and fitfully."[113] Similarly, there is the complaint that the NPT may no longer the best way to achieve its grandest promise: "to get the recognized nuclear-armed powers—the United States, Russia, China, France, and the United Kingdom—to eliminate their nuclear arsenals."[114] An idea that is particularly salient due to how nuclear disarmament has stood for decades "as the primary litmus test of superpower sincerity and achievement in disarmament."[115]

Nuclear modernisation, the creation of new nuclear weapons, and overt nuclear threats have undermined these disarmament efforts by illustrating to non-nuclear-weapon states that these weapons "are militarily useful and symbolic of status and prestige."[116] This pursuit of nuclear disarmament has been further complicated by the "greater reliance on nuclear weapons likely to accompany emerging multipolarity" and

US Nuclear Non-proliferation Policy after September 11", 489-525; Joelien Pretorius and Tom Sauer, "Ditch the NPT," *Survival* 63, no. 4 (2021): 103-124; Edward M. Ifft and David A. Koplow, "Legal and political myths of the Treaty on the Prohibition of Nuclear Weapons," *Bulletin of the Atomic Scientists* 77, no. 3 (2021): 134-139; Melly Masni, "Norm Exemption in States' NPT Nuclear Disarmament Obligations," *Global: Jurnal Politik Internasional* 23, no. 1 (2021): 80-103; Jeffrey W. Knopf, "Not by NPT alone: The future of the global nuclear order," *Contemporary Security Policy* 43, no. 1 (2022): 186-212; Michal Smetana and Joseph O'Mahoney, "NPT as an antifragile system: How contestation improves the nonproliferation regime," *Contemporary Security Policy* 43, no. 1 (2022): 24-49; Matthew Harries, "Response: Keep the NPT," *Survival* 63, no. 4 (2021): 125-130; Radhika Desai, "The Long Shadow of Hiroshima: Capitalism and Nuclear Weapons," *International Critical Thought* 12, no. 3 (2022): 349-369; Paul Meyer, "'Permanence with Accountability': An Elusive Goal of the NPT," *Journal for Peace and Nuclear Disarmament* 3, no. 2 (2020): 215-223; Matthew Fuhrmann and Yonatan Lupu, "Do Arms Control Treaties Work? Assessing the Effectiveness of the Nuclear Nonproliferation Treaty," *International Studies Quarterly* 60, no. 3 (September 2016): 530-539; Thomas E. Doyle II, "The moral implications of the subversion of the Nonproliferation Treaty regime," *Ethics & Global Politics* 2, no. 2 (2009): 131-153.

[112] Nobuyasu Abe, "The NPT at Fifty: Successes and Failures," *Journal for Peace and Nuclear Disarmament* 3, no. 2 (2020): 5.

[113] Rebecca Davis Gibbons, "The Outlook for the Nuclear Nonproliferation Treaty," in *The Next Fifty Years of Nuclear Proliferation*, IISTP Occassional Papers, ed. Sharon Squassoni (Washington, DC: The George Washington University, February 2021), 38.

[114] Henry Sokolski, "Has the NPT's Future Run Out?" in *The Next Fifty Years of Nuclear Proliferation*, IISTP Occassional Papers, ed. Sharon Squassoni (Washington, DC: The George Washington University, February 2021), 46.

[115] Koplow, "Parsing Good Faith: Has the United States Violated Article VI of the Nuclear Non-Proliferation Treaty," 303.

[116] Gibbons, "The Outlook for the Nuclear Nonproliferation Treaty", 38.

the increasing tensions between the U.S., Russia, and China, which will make cooperation on expanding membership and "enforcing the regime's constituent agreements difficult."[117]

The continued renewal and expansion of nuclear arsenals represents a particularly prominent aspect of this alleged violation of Article VI. Almost every nuclear-weapon state has stepped up modernisation efforts in recent years, which has resulted in the development of new weapons systems, qualitative improvement of existing systems, and the development of new nuclear-capable platforms.[118] Though there have been reductions in U.S. and Russian nuclear arsenals since the Cold War, these two states still possess "over 90% of the remaining 14,000 global nuclear weapons."[119] The U.S.' "torpid refusal to budge on this crucial issue, and its insistence upon continuing nuclear weapons testing and development" have thus reflected, argues Koplow, an attitude "mired in the outmoded cold war context" and which threatens to disrupt important national and global security goals of the coming decades.[120] This unwillingness, particularly clear through the U.S.' unwillingness to pursue test ban agreements vigorously, raises concerns about its compliance with international law.[121]

The United Kingdom has also been accused of aiming to violate the NPT through its decision to increase its nuclear arsenal.[122] Similarly, Russia is clearly determined to maintain "all components of its nuclear triad: land-based intercontinental ballistic

[117] Rebecca Davis Gibbons and Stephen Herzog, "Durable institution under fire? The NPT confronts emerging multipolarity," *Contemporary Security Policy* 43, no. 1, 50-79 (2022): 70-71.
[118] For a detailed analysis of this, see: U.N. Office for Disarmament Affairs, *The United Nations Disarmament Yearbook, Volume 45 (Part II): 2020* (New York: United nations, 2021), 23-29.
[119] Gibbons and Herzog, "Durable institution under fire? The NPT confronts emerging multipolarity", 70.
[120] Koplow, "Parsing Good Faith: Has the United States Violated Article VI of the Nuclear Non-Proliferation Treaty," 303.
[121] Ibid.
[122] Stuart Casey-Maslen, "The United Kingdom plans to violate the NPT," *Nuclear Weapons Ban Monitor*, News, March 17, 2021, https://banmonitor.org/news/the-united-kingdom-plans-to-violate-the-npt.

missiles (ICBMs), submarine-launched ballistic missiles (SLBMs), and strategic bombers."[123] It has maintained and modernised a number of the components of its nuclear arsenal.[124] "Even if the political climate improves," writes Arbatov, "the arms control process would still be complicated by the proliferation of these technologies to third countries."[125] A fact which is further complicated by how the violations of the NPT explored earlier within this chapter have seemingly proven that any state willing to devote the necessary money, personnel and time to acquire nuclear weapons can succeed, and can always withdraw from the NPT if needed.[126] This has, on the whole, contributed to the apparent erosion of the NPT's legitimacy, complicating it further through the lack of clarity on what constitutes—or does not constitute—a violation of Article IV.[127]

2.3.2 Anti-Ballistic Missile Treaty

Starting in 1975, allegations concerning the Soviet Union's breach of the ABM Treaty were raised by the U.S; these included allegations concerning the potential breach of the Threshold Ban Treaty (TTBT) and SALT I, and involved the development of radars meant for use in an ABM system.[128] The allegations also concerned the

[123] Pavel Podvig, "Russia's Current Nuclear Modernization and Arms Control," *Journal for Peace and Nuclear Disarmament* 1, no. 2 (2018): 256-257.
[124] Ibid, 257-259.
[125] Alexei Arbatov, "An Unnoticed Crisis: The End of History for Nuclear Arms Control?" *Carnegie Endowment for International Peace* (Carnegie Moscow Center, 2015), 19-20.
[126] Pretorius and Sauer, "Ditch the NPT", 104.
[127] Joelien Pretorius and Tom Sauer, "When is it legitimate to abandon the NPT? Withdrawal as a political tool to move nuclear disarmament forward," *Contemporary Security Policy* 43, no. 1 (2022): 162. The problems Carr identifies in relation to international treaties illuminates why there is a lack of clarity about whether a violation of Article VI has taken place or not. This aspect of Carr's theory of international law will be developed in chapter three.
[128] Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 1975* (Stockholm: Almqvist & Wiksell, 1975), 483.

development of new ICBM silos in ABM mode, the increase in the number of heavy missiles above the permitted level, and the concealment of relevant activities from U.S. national technical means of verification.[129]

These allegations additionally involved the development of the Krasnoyarsk radar, which was alleged to represent a violation of the treaty.[130] The Krasnoyarsk radar, a large phased-array radar built-in central Siberia, was particularly held to be a violation due to the ABM Treaty's limitation of location and orientation of such radars.[131] This was because of the treaty's requirement that early warning radars intended to detect incoming missiles must be "emplaced on the periphery of the country and oriented outwards."[132] Discovered in 1983, this radar single face looked across 6,000 miles of Soviet territory towards the Northern Pacific.[133]

The Soviet Union held the U.S. allegation to be lies and countered them by citing U.S. violations of the treaty through the deployment of a large radar on Shemya Island. The Soviet Union thus alleged that the U.S. had used radar components tested for ABM purposes, developed mobile and space-based ABM systems, and tested Minuteman I missiles in order to give them the capability to counter missiles. It also claimed that the

[129] Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 1977* (Stockholm: Almqvist & Wiksell, 1977), 351-353.
[130] President Ronald Reagan, "Statement on Soviet and United States Compliance with Arms Control Agreements," Ronald Reagan Presidential Library & Museum, May 27, 1986, https://www.reaganlibrary.gov/research/speeches/52786e.
[131] Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 1984*, 645; Thomas K. Longstreth and John E. Pike, "U.S., Soviet programs threaten ABM Treaty" *Bulletin of the Atomic Scientists* 41, no. 4 (April 1985): 14; Sanford C. Reback, "Responding to Soviet noncompliance: How the United States should react to soviet violations of arms control agreements," *Contemporary Security Policy* 8, no. 2 (1987): 107.
[132] Andrew Mack, "Threats to the ABM Treaty," *Contemporary Security Policy* 9, no. 2 (1988): 101.
[133] Gary L. Guertner, "Three Images of Soviet Arms Control Compliance," *Political Science Quarterly* 103, no. 2 (Summer, 1988): 335-336.

U.S. was deploying new radars which ran counter to the ABM system for defence of the territory of the whole country in the Atlantic and Pacific coasts.[134]

These allegations are significant due to the prominent role which ABM systems were seen to play at the time, having been, as seen throughout the previous chapter, of particular military significance previous to and throughout the SALT treaty negotiations; particularly in relation to the potential role of ABM systems in battle-management.[135] The U.S.'s withdrawal from the ABM Treaty in 2002 is noteworthy in relation to the allegations of noncompliance of this case, particularly due to the U.S.' emphasis that Russia no longer was an adversary and that, therefore, "Cold War notions as mutual-assured destruction were no longer the defining characteristic of the strategic relationship between them."[136]

2.3.3 Threshold Test Ban Treaty

A number of allegations were made in 1976 holding that the Soviet Union had exceeded the threshold limit established by the TTBT. Suspicions concerning potential noncompliance arose in 1976, when the U.S. intelligence community was unable to classify several Soviet nuclear tests as having confidently fallen either above or below the 150-kiloton test limit established by the treaty.[137] Melvin Laird, Secretary of Defence, held this as incontrovertible proof that the Soviet Union had violated SALT I.[138]

[134] Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 1984*, 646-647; Jozef Goldblat, "Charges of Treaty Violations," *Bulletin of the Atomic Scientists* 40, no. 5 (May 1984): 34.
[135] Mack, "Threats to the ABM Treaty", 101; Gray, "Moscow is Cheating", 143.
[136] U.N. Department for Disarmament Affairs, *The United Nations and Disarmament, Volume 27: 2002* (New York: United Nations, 2003), 23.
[137] Robert J. Einhorn, "Treaty Compliance," *Foreign Policy* 45 (Winter, 1981-1982): 31.
[138] Schneider, "Russian Violations of Its Arms Control Obligations", 332.

No conclusive proof of infractions was provided, however, and the evidence was ambiguous and made reaching a definitive conclusion impossible.[139] The Soviet Union denied these allegations, and alleged repeated instances of U.S. nuclear explosions exceeding the TTBT's yield limit in response.[140]

President Reagan addressed these allegations in 1985 and included them in the report on Soviet Noncompliance with Arms Control Agreements.[141] The Soviet Union rejected them and did so again when President Reagan held the Soviet Union to be in non-compliance with the TTBT in 1987.[142] Further allegations were pressed by the Soviet Union against the U.S., holding that it had exceeded the limit set by this treaty. The SIPRI Yearbook for 1988, in examining these allegations, remarked that due to the difficulties involved in predicting the sizes of nuclear test explosions, the parties reached "an understanding that one or two slight unintended breaches per year would not be considered a violation."[143]

2.3.4 SALT II

A further set of allegations concerning non-compliance of the SALT II agreements was raised in 1984. Though this treaty never entered formally into force, its signatories were obligated under international law to not take action during the pre-ratification

[139] Goldblat, "Charges of Treaty Violations", 33-34; Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 1983* (London: Taylor & Francis Ltd, 1983), 97.
[140] Goldblat, "Charges of Treaty Violations", 35.
[141] U.S. Department of State, *Soviet Noncompliance with Arms Control Agreements, Special Report 136* (Washington, DC: December 1985), 2; Schneider, "Russian Violations of Its Arms Control Obligations", 344.
[142] Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 1984*, 651; Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 1988* (Oxford: Oxford University Press, 1988), 68.
[143] Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 1988*, 68.

period which would have defeated the object and purpose of the unratified agreement.[144] These allegations were centred around the testing of new types of ICBMs which contravened "the Carter administration's understanding of SALT II."[145] Though evidence was "somewhat ambiguous", the testing of these missiles was held to be a probable violation of the Soviet political commitment to observe SALT II, which limited each party to one new type of ICBM to constrain proliferation.[146] Allegations concerning this missile—the follow-on to the SS-16, which was prohibited by SALT II—continued until the demise of the START treaty in 2007.[147]

A further set of allegations was raised by the U.S. in relation to the deliberate encryption of missile test telemetry (radio signals sent from a missile to ground monitors) to, allegedly, impede verification. This practice was regarded to constitute a violation of the 1979 SALT II Treaty, under which the parties were not to deny telemetric information whenever such a denial was to impede verification.[148] Allegations of violations concerning encryption of this data continued into the START Treaty, with both the Bush and Obama administrations listing Russian provision of telemetry information as not following its international obligations.[149]

The Soviet Union characterised these allegations as lies and rejected them strongly, claiming that charges against the Soviet Union were aimed at diverting

[144] In 1981, after the U.S. had made clear its intention not to ratify the Treaty, the signatories assumed a political commitment to refrain from actions contrary to its provisions as opposed to a legal one. Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 1984*, 645.
[145] In particular, they were focused on the testing of the SS-25 ICBMs. Gray, "Moscow is Cheating", 143.
[146] Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 1984*, 645; R. Jeffrey Smith, "A New Soviet Missile Angers the White House", 155-156; Goldblat, "Charges of treaty violations", 33; Guertner, "Three Images of Soviet Arms Control Compliance", 334-335.
[147] Schneider, "Russian Violations of Its Arms Control Obligations", 333.
[148] Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 1984*, 645; Gloria Duffy, "Administration redefines Soviet 'violations'," *Bulletin of the Atomic Scientists* 42, no. 2 (February 1986): 13; Guertner, "Three Images of Soviet Arms Control Compliance", 332.
[149] Schneider, "Russian Violations of Its Arms Control Obligations", 343.

attention from "the USA's violations of arms control agreements."[150] Furthermore, it alleged that the U.S. was engaged in a strategic programme of unprecedented dimensions with the avowed aim of achieving military superiority. The Soviet Union thus held that, through the deployment of Pershing II ballistic missiles and long-range land-based cruise missiles capable of reaching targets on the territory of the Soviet Union, the U.S. had violated the provision of SALT II prohibiting circumvention of treaty provisions through any other state or states.[151] This allegation was subject to a response by the U.S. which pointed at statements following the signature of SALT II in which it held that this non-circumvention provision would not alter existing patterns of cooperation with allies or "preclude transfer of systems and weapons technology."[152]

In considering these contrasting sets of allegations it is important to consider the relative lack of information available, which restrained the ability to fully verify these allegations of non-compliance. As such, questions remained despite the enormity of the claims, with the Soviet Union insisting that the SS-25 ICBM conformed to treaty obligations despite the U.S.' claims.[153] The full significance of these alleged violations is considerable in the context of their context, with the Soviet SS-25 ICBM missile being held to "challenge seriously the essential balance which has deterred both conflict and coercion" by President Reagan in his 17 May 1986 Statement.[154] If so, these alleged violations reveal the extent to which inconvenient arms control provisions can be ignored when interfering with strategic nuclear agenda.[155]

[150] Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 1984*, 646.
[151] Ibid, 647.
[152] Ibid, 649.
[153] Reback, "Responding to Soviet noncompliance: How the United States should react to soviet violations of arms control agreements", 107.
[154] President Ronald Reagan, "Statement on Soviet and United States Compliance with Arms Control Agreements."
[155] Schneider, "Russian Violations of Its Arms Control Obligations", 332.

2.3.5 Intermediate-Range Nuclear Forces Treaty

The first charge of circumvention of the INF Treaty arose close to its initial entry into effect, when, in January 1989, Lieutenant-General Viktor Pavlov of the U.S.S.R. charged the U.S. with providing misleading information in the Memorandum of Understanding on Data. This allegation was concerned with two contracts to McDonnell-Douglas Astronautics and the Convair Division of General Dynamics for the conversion of Ground Launched Cruise Missiles (GLCMs) to Sea-Launched Cruise Missiles (SLCMs), which was not allowed under the INF Treaty.[156] This dispute, however, was revealed to be a mistake caused by the initial contract announcement "which should have stated that generic cruise missile parts originally intended for the use in the construction of GLCMs would be incorporated into SLCMs."[157]

These initial allegations were followed by a report to the U.S. Congress in December 1988 in which the Reagan Administration charged the U.S.S.R. with five minor violations of the INF Treaty, the most significant of which was related to the illegal movement and storage of missiles. Though little was made of these initiatives, by May 1989 the U.S. had become concerned after on-site inspections in the U.S.S.R. had uncovered an instance in which "pieces of an SS-23 launch vehicle were re-welded after being cut in half" and "a gap in factory markings for the SSC-X-4 and the removal of serial numbers from all SS-20s."[158] These suspicions led to the U.S. to make a charge

[156] Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 1990* (Oxford: Oxford University Press, 1990), 454-455.
[157] Ibid.
[158] Ibid.

concerning failure to dismantle SS-20 loading mechanisms on transport vehicles, which received no satisfactory response.[159]

Though these issues arose following the initial ratification and implementation of the INF Treaty, it has not been until recently that further issues concerning alleged non-compliance have arisen again.[160] It is to these allegations that I will turn now, particularly in relation to the interests underlying the actions allegedly undertaken by each country following this.

2.3.5.1 New allegations of non-compliance

Reports of noncompliance with the INF Treaty arose in July 2014, following months of press reports relating to concerns regarding the treaty.[161] The U.S. publicly alleged in its annual Department of State's unclassified report on arms control compliance that:

> [T]he Russian Federation violates its obligations under the INF Treaty not to possess, produce, or flight-test a ground-launched cruise missile with a range capability of 500 km to 5,500 km, or to possess or produce launchers of such missiles.[162]

The Russian Ministry of Foreign Affairs, in response, publicly asserted that the finding of the U.S. report was unsupported, and further claimed that problems related to the INF

[159] Ibid.
[160] These new set of allegations of noncompliance arose in 2014 and 2015, when Russia and the U.S. traded accusations regarding the violation of this treaty, and eventually led to the U.S and Russia's withdrawal from the treaty in August 2019.
[161] Stockholm International Peace Research Institute, *SIPRI Yearbook 2015: Armaments, Disarmament and International Security,* 541; Kristina Daugirdas and Julian Davis Mortenson, "United States Alleges Russia Continues to Violate INF Treaty," *American Journal of International Law* 111, no. 3 (2017): 787-789; Schneider, "Russian Violations of its Arms Control Obligations", 341-342; Alexander Lanoszka, "The INF Treaty: Pulling Out in Time," *Strategic Studies Quarterly* 13, no. 2 (Summer 2019): 48-53.
[162] U.S. Department of State, "Adherence to and Compliance with Arms Control, Nonproliferation, and Disarmament Agreements and Commitments," July 2014, 8, https://2009-2017.state.gov/documents/organization/230108.pdf.

Treaty were well known to both parties. It further alleged that the MK-41 launch systems that were going to be deployed in Poland and Romania as part of the European Phased Adaptive Approach missile defence would further violate the treaty if deployed in ground-launched mode.[163] Renewed concerns were raised once again by the U.S. in 2015 and mirrored by Russia as the ground-based MK-41 launch systems were brought into operation.[164] This was followed in 2017 by the U.S. revealing the Russian SSC-8 ground-launched cruise missile, which reportedly had entered service in February of that year, as being of concern and in violation of the spirit and intent of the INF Treaty.[165] Russia similarly alleged U.S. non-compliance with the Aegis Ashore Ballistic Missile Defence systems, ballistic target missiles, and armed unmanned aerial vehicles (UAVs).[166]

The deadlock over these allegations continued and reached their peak in 2018, when the U.S. declared that it had found Russia to be in "material breach of the Treaty" and would suspend its obligations as a remedy in 60 days unless "Russia returns to full and verifiable compliance."[167] Reaffirming its position, Russia held these accusations as groundless and asserted that the U.S. had not responded to requests for working-level consultations, further reiterating its allegations concerning U.S. non-compliance in

[163] U.N. Office for Disarmament Affairs, *The United Nations and Disarmament Yearbook, Volume 39 (Part II): 2014* (New York: United Nations, 2015), 25; Stockholm International Peace Research Institute, *SIPRI Yearbook 2015: Armaments, Disarmament and International Security,* 543; Ministry of Foreign Affairs of the Russian Federation, "Comment by the Russian Ministry of Foreign Affairs regarding the American accusations that Russia violates the INF Treaty," July 30, 2014, https://web.archive.org/web/20170119151207/http://www.mid.ru:80/en/foreign_policy/international_safety/disarmament/-/asset_publisher/rp0fiUBmANaH/content/id/676199.

[164] U.N. Office for Disarmament Affairs, *The United Nations and Disarmament Yearbook, Volume 41 (Part II): 2016*, 17.

[165] U.N. Office for Disarmament Affairs, *Disarmament Yearbook, Volume 42 (Part II): 2017*, 48.

[166] The U.S. refuted these allegations. U.S. State Department, Bureau of Arms Control, "Refuting Russian allegations of US noncompliance with the INF Treaty," December 8, 2017, http://web.archive.org/web/20201019111353/https://www.state.gov/refuting-russian-allegations-of-u-s-noncompliance-with-the-inf-treaty/.

[167] U.N. Office for Disarmament Affairs, *The United Nations and Disarmament Yearbook, Volume 43 (Part II): 2018* (New York: United Nations, 2019), 21.

eastern Europe.[168] These allegations ended in October 2018, when President Trump announced the U.S.'s withdrawal from the INF Treaty in response to the "long-running dispute over Russia's alleged non-compliance, and concerns about China's unconstrained stockpile of intermediate-range missiles."[169] Both countries withdrew from the INF Treaty in August 2019.

2.3.5.2 Underlying Interests and Reaction

Several reactions followed the development of these allegations of non-compliance and on the impact which withdrawal from the treaty signified in terms of larger non-proliferation concerns. The danger in which the collapse of this treaty presupposes is considerable, with multiple authors remarking on the crisis in arms control it would create.[170] The difficulty in evaluating the alleged violations of the treaty is notable, particularly due to the continual denial of both parties of the allegations made against them.[171] The lack of agreement on the baseline further complicates this, a fact which makes this crisis contrast with the Euromissile crisis of the early 1980s, where the number of missiles and other delivery vehicles on both sides was "reasonably clear to everyone."[172] Today NATO argues that Russia has "already deployed INF-range missiles and needs to respond to restore balance", whilst Russia argues that "it does not

[168] U.N. Office for Disarmament Affairs, *The United Nations and Disarmament Yearbook, Volume 43 (Part II): 2018*, 21-22
[169] Stockholm International Peace Research Institute, *SIPRI Yearbook 2019: Armaments, Disarmament and International Security*, (Oxford: Oxford University Press, 2019), 374.
[170] Ibid, 377; International Institute for Strategic Studies, "The demise of the INF Treaty," *Strategic Comments* 24, no. 9 (2018): 3.
[171] Stockholm International Peace Research Institute, *SIPRI Yearbook 2019: Armaments, Disarmament and International Security*, 376.
[172] Nikolai Sokov, "Avoiding a post-INF missile race," brief for *US-Russia Dialogue on Nuclear Issues: Does Arms Control Have a Future?*, CNS-CENESS meeting in Moscow (Middlebury Institute of International Studies at Monterey, James Martin Center for Nonproliferation Studies, November 7, 2019), 7.

have such missiles and may view a NATO response as an arms race requiring a response of its own."[173]

The impact of nuclear proliferation on this decision by both parties is of particular interest in relation to this alleged case of noncompliance. The collapse of the Soviet Union and the increased importance of other power centres—such as China and the EU globally, and India, Iran, Japan, Pakistan, Turkey, and others regionally—which, with few exceptions did not count nuclear arms control in their external interests and security concepts fundamentally altered the balance upon which the INF Treaty was established.[174] China's growing nuclear and conventional missile inventory, mostly composed of systems in the INF Treaty-prohibited range, was perceived as being of particular concern; particularly due to China's lack of interest in joining the INF Treaty.[175] It is noteworthy that both the U.S. and Russia expressed frustration that other countries such as China remained outside the purview of the current arms control regime.[176] The fact that nuclear cruise missiles were increasingly being regarded as destabilising by arms control experts, and other experts suspected and proposed new deployments in Asia due to China's introduction of new medium-range delivery systems is also significant.[177]

In contrast with the 1980s, the military balance today includes additional features. The role of nuclear weapons has also radically diminished, with nuclear

[173] Ibid.
[174] Alexei Arbatov, "Mad Momentum Redux? The Rise and Fall of Nuclear Arms Control," *Survival* 61, no. 3 (2019): 11-12.
[175] Stockholm International Peace Research Institute, *SIPRI Yearbook 2019: Armaments, Disarmament and International Security*, 376-377.
[176] William M. Moon, "Beyond Arms Control: Cooperative Nuclear Weapons Reductions—A New Paradigm to Roll Back Nuclear Weapons and Increase Security and Stability," *Journal for Peace and Nuclear Disarmament* 3, no. 1 (2020): 93; Honorable Andy Weber and Christine Parthemore, "Cruise Control: The Logical Next Step in Nuclear Arms Control?," *Journal for Peace and Nuclear Disarmament* 2, no. 2 (2019): 454-455.
[177] Götz Neuneck, "The Deep Crisis of Nuclear Arms Control and Disarmament: The State of Play and the Challenges," *Journal for Peace and Nuclear Disarmament* 2, no. 2 (2019): 436-437.

weapons being replaced with high-precision long-range conventional weapons that can be used in multiple conflicts.[178] Thus, although the nuclear balance has lost its centrality, these weapons still play the role of ultimate deterrence, a fact which makes Asia and China's more prominent international role a key strategic factor that neither the U.S. nor Russia can afford to ignore.[179] Fitzsimmons' proposed explanations for Russia's alleged non-compliance—that is, the gaining of conventional military advantages in Europe, sowing division in NATO, the gaining of military advantages in Asia, accommodating bureaucratic or technological momentum, and strategic deterrence—are of particular relevance in this regard.[180]

These different underlying interests make it clear that the limited scope of the INF Treaty, which only addressed land-based missiles and assumed all of them nuclear, became increasingly irrelevant.[181] Technological advancements, which have progressed with greater speed, thus made both parties "lament the complex and lengthy negotiations and intrusive verification methods required by treaties that cannot keep up the pace."[182] That both superpowers have decided on long-term modernisation programs in order to increase the quality and scope of operational nuclear capabilities is relevant when aiming to establish the political motivations and interests which underlie the collapse of the INF Treaty. A new arms race "is already manifesting itself in the budget planning and development steps of the nuclear forces of Russia and the

[178] Sokov, "Avoiding a post-INF missile race", 8.
[179] Ibid, 8-9.
[180] Michael Fitzsimmons, "Russian Strategy and the End of the INF Treaty," *Survival* 60, no. 6 (2018): 121-128.
[181] Sokov, "Avoiding a post-INF missile race", 12.
[182] Moon, "Beyond Arms Control: Cooperative Nuclear Weapons Reductions—A New Paradigm to Roll Back Nuclear Weapons and Increase Security and Stability", 93.

United States."[183] The danger which falling behind in scientific and technological terms would represent due to this changed situation cannot therefore be understated.[184]

2.3.6 New START

Widely reported allegations of Russian noncompliance with the inspection and verification terms of New Start arose in 2023 and were widely reported within the context of Russia's 2022 Invasion of Ukraine.[185] They surfaced in the annual U.S. Department of State report to congress on the implementation of the New START Treaty, which concluded that based on information available as of December 31, 2022:

> [T]he United States cannot certify the Russian Federation to be in compliance with the terms of the New START Treaty. In refusing to permit the United States to conduct inspection activities on Russian territory … Russia has failed to comply with its obligation to facilitate U.S. inspection activities, and denied the United States its right to conduct such inspection activities. The Russian Federation has also failed to comply with the obligation to convene a session of the Bilateral Consultative Commission (BCC) within the timeline set out by the Treaty.[186]

This finding arose in the aftermath of rising tensions between both countries following the 2022 Russian invasion of Ukraine. The U.S. denied Russia's claim that the temporary exemption of its facilities was justified due to incomplete work regarding Covid-19 inspection protocols and the unilateral advantages which the U.S. sanctions regime has

[183] Neuneck, "The Deep Crisis of Nuclear Arms Control and Disarmament: The State of Play and the Challenges", 439-440.
[184] The author refers in particular to the danger this would represent for Russia's sovereignty and ability to neutralise U.S. attempts to regain military superiority. Sergei Karaganov, "Where to go and with whom to go: Russia's foreign policy on the threshold of a new decade," *Russia in Global Affairs*, January 28, 2020, https://eng.globalaffairs.ru/articles/where-to-go-and-with-whom-to-go-russias-foreign-policy-on-the-threshold-of-a-new-decade/.
[185] Rose Gottemoeller, "Resuming New START inspections must be a critical goal of upcoming US-Russia talks," *Bulletin of the Atomic Scientists*, November 23, 2022, https://thebulletin.org/2022/11/resuming-new-start-inspections-must-be-a-critical-goal-of-upcoming-us-russia-talks; Connor Murray, "There is no alternative: US-Russian nuclear arms control must restart. Now," Bulletin of the Atomic Scientists, February 6, 2023, https://thebulletin.org/2023/02/there-is-no-alternative-us-russian-nuclear-arms-control-must-restart-now/; Shannon Bugos, "U.S. Cites Russian Noncompliance with New START Inspections," Arms Control Association, February 9, 2023, https://www.armscontrol.org/blog/2023-02/nuclear-disarmament-monitor.
[186] U.S. Department of State, "Report to Congress on Implementation of the New START Treaty, New START Treaty Annual Implementation Report," (January 31, 2023), 5.

created following the 2022 Russian invasion of Ukraine.[187] Russia's temporary exemption, it argued, is "not consistent with the provision's intended meaning and use."[188] Though this alleged violation has caused the U.S. to be "unable to make a determination that Russia remained in compliance throughout 2022 with its obligation to limit its deployed warheads on delivery vehicles" it is not a determination of noncompliance, with the U.S. assessing Russia remained beneath the Treaty limits.[189] Furthermore, it concluded that a resumption of U.S. inspection activities would bring Russia back into compliance.[190]

Russia rejected the allegations and held that detailed official explanations were communicated. Furthermore, in direct opposition to the U.S. report, it argued that:

> it was the US activities that violated the standard inspection procedures. Washington adopted anti-Russia restrictions, which prevented the Russian Federation from holding unobstructed inspections in the territory of the United States and thereby created obvious unilateral advantages for the American party.[191]

The suspension of inspection activities under the Treaty thus, instead of constituting a breach of its terms, are both envisaged in its provisions and have the goal of ensuring the stable operation of all of the Treaty's mechanisms.[192] Furthermore, Russia linked the U.S. allegations to a "total hybrid war against Russia", held that they are "unjustified, untimely and inappropriate until Washington reviews its hostile policy towards Russia

[187] Matt Korda and Hans Kristensen, "If Arms Control Collapses, US and Russian Strategic Nuclear Arsenals Could Double In Size," *Federation of American Scientists*, February 7, 2023, https://fas.org/blogs/security/2023/02/if-arms-control-collapses-us-and-russian-strategic-nuclear-arsenals-could-double-in-size/.
[188] U.S. Department of State, "Report to Congress on Implementation of the New START Treaty, New START Treaty Annual Implementation Report", 10-11.
[189] Ibid, 16.
[190] Ibid, 7.
[191] Ministry of Foreign Affairs of the Russian Federation, "Foreign Ministry statement regarding the Treaty on Measures for the Further Reduction and Limitation of Strategic Offensive Arms (New START)," Ministry of Foreign Affairs of the Russian Federation, February 8, 2023, https://www.mid.ru/en/press_service/spokesman/official_statement/1852877/.
[192] Ibid.

and abandons its line of building up threats to our national security", and reaffirmed its commitment to the Treaty.[193] Finally, Russian President Vladimir Putin announced that Russia would suspend its participation in New START on February 21 2023, and rather than withdraw would return to its implementation as soon as the nuclear arsenals of the United Kingdom and France had been taken into account.[194] U.S. Secretary of State Anthony J. Blinken said the suspension of Russia's participation in New START was "deeply unfortunate and irresponsible."[195] The President of the NATO Parliamentary Assembly similarly remarked that this suspension was "deeply disappointing and reckless."[196]

These allegations find their origin in Russia's 2022 Invasion of Ukraine, which has "affected Russia's approach to nuclear arms control."[197] The Russo-Ukrainian war has "salient, multifaceted nuclear undertones" and raises "important questions about the dynamics of nuclear deterrence, the future of nuclear nonproliferation, arms control and disarmament, and the international governance of nuclear energy."[198] The connection between these two events is made clear in the Russian Foreign Ministry's statement in connection with this suspension, which outlined that following the start of this conflict, Russia has found itself in a "radically new security environment resulting from Washington's extreme hostility and efforts to stir up confrontation, as well as its

[193] Ibid.
[194] Russian News Agency TASS, "Russia's New START suspension, special op and economic measures," *Russian News Agency TASS*, February 21, 2023, https://tass.com/politics/1579793; François Diaz-Maurin, "Russia suspends New START and is ready to resume nuclear testing," *Bulletin of the Atomic Scientists*, February 21, 2023, https://thebulletin.org/2023/02/russia-suspends-new-start-and-is-ready-to-resume-nuclear-testing/.
[195] Secretary of State Anthony J. Blinken, "Secretary Antony J. Blinken Remarks to the Press," U.S. Department of State, Remarks to the Press, February 21, 2023, https://www.state.gov/secretary-antony-j-blinken-remarks-to-the-press-7/.
[196] NATO Parliamentary Assembly, "NATO PA President on Russia's Suspension of New START," NATO Parliamentary Assembly, February 22, 2023, https://www.nato-pa.int/news/nato-pa-president-russias-suspension-new-start.
[197] Steven Pifer, "How the War in Ukraine hinders US-Russian nuclear arms control," *Bulletin of the Atomic Scientists*, January 17, 2023, https://thebulletin.org/2023/01/how-the-war-in-ukraine-hinders-us-russian-nuclear-arms-control/.
[198] Mariana Budjeryn, "Distressing a system in distress: global nuclear order and Russia's war against Ukraine," *Bulletin of the Atomic Scientists* 78, no. 6 (2022): 339.

overt commitment to promoting a malicious escalation of the conflict in and around Ukraine."[199] This new security environment, it argued, fundamentally affects the application of New START:

> There is every reason to argue that the United States policy aims to undermine Russia's national security, which directly contradicts the fundamental principles and understandings set forth in the New START's preamble and forming its foundation. It would not have been signed without stating these principles. This de facto amounts to a fundamental change of circumstances compared to those prevailing at the time of signing the New START Treaty.[200]

That the allegations that eventually led to Russia's withdrawal from New START arose after the Biden administration declassified documents revealing "that the pace of warhead dismantlement has slowed significantly in recent years" is significant.[201] This is also the case with Russian President Vladimir Putin's threats of nuclear use to defend Russia and its allies, which have since been denied.[202] These events heighten the importance of both the allegations and Russia's withdrawal from the treaty.

The allegations of noncompliance and Russia's withdrawal from the treaty hinder the negotiations over a follow-up Treaty, which would be necessary in order to continue the bilateral strategic arms control regime beyond the treaty's expiry in February 2026.[203] Both Russia and the U.S. could lose mutual predictability and trust, increasing

[199] Ministry of Foreign Affairs of the Russian Federation, "Foreign Ministry statement in connection with the Russian Federation suspending the Treaty on Measures for the Further Reduction and Limitation of Strategic Offensive Arms (New START)," Ministry of Foreign Affairs of the Russian Federation, February 21, 2023, https://mid.ru/en/foreign_policy/news/1855184/.
[200] Ibid.
[201] Hans M. Kristensen and Matt Korda, "United States nuclear weapons, 2023," *Bulletin of the Atomic Scientists* 79, no. 1 (2023): 28.
[202] Bugos, "U.S. Cites Russian Noncompliance with New START Inspections"; Budjeryn, "Distressing a system in distress: global nuclear order and Russia's war against Ukraine", 342; Charles B. Strozier and David M. Terman, "Putin's psychology and nuclear weapons: The fundamentalist mindset," *Bulletin of the Atomic Scientists* 78, no. 6 (2022): 310; François Diaz-Maurin, "The 2022 nuclear year in review: A global nuclear order in shambles," *Bulletin of the Atomic Scientists*, December 26, 2022, https://thebulletin.org/2022/12/the-2022-nuclear-year-in-review-a-global-nuclear-order-in-shambles/.
[203] Korda and Kristensen, "If Arms Control Collapses, US and Russian Strategic Nuclear Arsenals Could Double In Size"; Samuel Charap and Miranda Priebe, "Avoiding a Long War: U.S. Policy and the Trajectory of the Russia-Ukraine Conflict," *RAND Corporation* (January 2023): 11.

their overall military capabilities as a result.[204] Russia's withdrawal from New START is a step "from which nobody benefits" as one by one "the pillars of nuclear arms control between Russia and the USA have been pulled over the past two decades."[205] These events raise important questions about the state of the nuclear taboo, explored in chapter one of this thesis and highlight both the importance of its overarching guiding questions.[206]

2.4 Chemical Weapons

In contrast to the conventional weapons treaties explored in the first chapter, chemical weapon arms control and disarmament treaties have seen a nearly universal accession, with very few countries remaining outside of these treaty regimes.[207] Despite this, however, several cases involving alleged usage of chemical weapons have arisen throughout the years, with those involving Iraq in the 1990s and Syria more recently standing out. These cases of non-compliance stand out because of the universal

[204] Jessica Rogers, Matt Korda, and Hans M. Kristensen, "The long view: Strategic arms control after the New START Treaty," *Bulletin of the Atomic Scientists* 78, no. 6 (2022): 349-350.

[205] Stockholm International Peace Research Institute, "Statement by Dan Smith, SIPRI Director: Suspending the New START treaty benefits nobody," *Stockholm International Peace Research Institute*, February 22, 2023, https://www.sipri.org/media/press-release/2023/statement-dan-smith-sipri-director-suspending-new-start-treaty-benefits-nobody.

[206] Daryl G. Kimball, "The Nuclear taboo Remains Strong for Now," Arms Control Association, January/February 2023, https://www.armscontrol.org/act/2023-01/focus/nuclear-taboo-remains-strong-now; Daryl G. Kimball, "Strengthening the Nuclear Taboo in the Midst of Russia's War on Ukraine," University of Pennsylvannia Center for Ethics and the Rule of Law, March 2, 2023, https://www.penncerl.org/the-rule-of-law-post/strengthening-the-nuclear-taboo-in-the-midst-of-russias-war-on-ukraine/.

[207] It should be noted that the non-use of chemical weapons in the Second World War presupposes one of the pre-eminent puzzles of the chemical weapons literature. That is, the question of why chemical warfare "was not waged by the major belligerents in the major battlefields of World War II, a conflict in which few other restraints were observed and, indeed, in which most existing prohibitions were violated." Price, *The Chemical Weapons Taboo*, 4. Though this question lies beyond the scope of this thesis, the literature analysing this question has important links to the chemical weapons taboo, deterrence, the possibility of non-use due to non-acceptance by the military, and the perception that these weapons had more problems than advantages. Price, "A genealogy of the chemical weapons taboo", 74-75; John Ellis van Courtland Moon, "Chemical warfare: a forgotten lesson," *Bulletin of the Atomic Scientists* 45, no. 6 (1989): 40-41; Coleman, *A History of Chemical Warfare*, xxiii and 65-66; Harris and Paxman, *A Higher Form of Killing: The Secret History of Chemical and Biological Warfare*, 53-67 and 108-138; Brown, *Chemical Warfare: A Study in Restraints*, 189-289. The idea that biological and chemical weapons are so destructive so as to promote deterrence—which Hans J. Morgenthau, as shall be seen in chapter four of this thesis, examines in relation to nuclear weapons—has also arisen in relation to this case, and with chemical and biological weapons at large. John Ellis van Courtland Moon, "Chemical Weapons and Deterrence: The World War II Experience," *International Security* 8, no. 4 (1984): 35.

revulsion and taboo which exists and surrounds the usage of these weapons, established in chapter one. They raise questions as to the real success of chemical arms control and disarmament treaties, what failure means in relation to these treaties, and the challenges laying ahead of them.[208]

Throughout the following pages, I will examine known cases and allegations of the use of chemical weapons. I will do this first through an examination of the two most prominent cases which exist about these weapons—those of Iraq and Syria, which have received significant international attention.

2.4.1 Iraq's Chemical Weapons

First reports concerning the Iraq's use of chemical weapons emerged in 1984, after Iran requested the U.N. Secretary-General specialists in order to undertake a fact-finding visit to determine "whether chemical weapons had been used in Iran and, if so, their type and the extent of their use."[209] This request followed reported instances of chemical weapons being used by Iraq, wherein Iran alleged that it had used chemical weapons on more than 130 instances, killing or injuring at least 3500 people since the beginning of the Gulf War.[210] Due to the brittle state of Iran's international relations,

[208] Jean-Pascal Zanders, "The CWC ten years ahead: what is at stake?" in *Report 15: The Future of the CWC in the post-destruction phase*, ed. Jean-Pascal Zanders (EU Institute for Security Studies, March 2013), 11-12.
[209] U.N. Centre for Disarmament Affairs, *The United Nations and Disarmament, Volume 9: 1984* (New York: United Nations, 1985), 333-334.
[210] Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 1985* (London and Philadelphia: Taylor & Francis Ltd, 1985), 181-182.

these allegations had the sole effect of "impeding independent corroboration of the reports."[211]

What emerged after these initial investigations presuppose one of the biggest confirmed cases of a violation of the Geneva 1925 Protocol—signed by both Iran and Iraq. The specialists reached unanimous conclusions in their report, stating that chemical weapons in the form of aerial bombs had been used in addition to mustard gas and a nerve agent known as Tabun.[212] A year later Iran admitted it had the capacity to make and use chemical weapons as a last resort.[213] This led to an increase of use in chemical weapons by Iraq, which was subject to additional allegations of chemical weapons use against Kurds living within Iraq's borders.[214] It is noteworthy that Iran later admitted to developing a chemical warfare program during the latter stages of this war "as a deterrent against Iraq's use of chemical agents." Iran claimed this was terminated after the 1988 ceasefire, and it did not acknowledge possession of chemical weapons thereafter.[215]

2.4.1.1 The UNSCOM Investigation

Established in April 1991 in light of Iraq's invasion of Kuwait, UNSCOM was given powers and resources to reveal the extent of Iraqi efforts to acquire chemical, biological,

[211] Ibid. See also: Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 1986*, 162.
[212] U.N. Centre for Disarmament Affairs, *The United Nations and Disarmament, Volume 9: 1984*, 334.
[213] U.N. Centre for Disarmament Affairs, *The United Nations and Disarmament, Volume 10: 1985* (New York: United Nations, 1986), 332; Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 1987*, 305-306.
[214] Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 1988*, 509-510; Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 1989* (Oxford: Oxford University Press, 1989), 99-101.
[215] U.S. Department of State, "2003 Adherence to and Compliance with Arms Control and Nonproliferation Agreements and Commitments," accessed February 14, 2020, https://2009-2017.state.gov/documents/organization/22466.pdf, at 32.

and nuclear weapons.[216] Investigations started with Iraq acknowledging possessing 46,000 chemical munitions and 11,829 unfilled chemical munitions.[217] Problems followed when it refused an inspection team access to the Ministry of Agriculture to in 1993, after UNSCOM acquired information concerning archives related to proscribed activities.[218] This was accompanied by a refusal to accept the initiation and practical implementation of resolution 715 for compliance monitoring in February 1992, an incident which saw itself repeated multiple times in the early stages of the investigation from 1991 onwards.[219]

By the end of 1995, the Commission remained concerned over ongoing activities in Iraq in prohibited areas. Iraq acknowledged a much larger and advanced program for the production and storage of chemical warfare agent VX than previously admitted. It also further acknowledged its development of sarin-filled munitions and having carried out flight tests of long-range missiles with chemical warheads.[220] The UNSCOM investigation encountered further problems relating to the submission of both incorrect and incomplete reports on its chemical weapons programme and the concealment of previously undeclared locations and weapons.[221]

Further problems of access remained in 1996 and throughout much of the investigating period, with a visit conducted during 1997 confirming the weaponization

[216] U.N. S.C. Res. 687 (Apr. 3, 1991); Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 1992*, 147.
[217] Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 1992*, 515-516; U.N. Centre for Disarmament Affairs, *The United Nations and Disarmament, Volume 16: 1991*, 48-49.
[218] Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 1993* (Oxford: Oxford University Press, 1993), 692-693.
[219] Pearson, *The UNSCOM Saga: Chemical and Biological Weapons Non-Proliferation*, 14-16.
[220] U.N. Centre for Disarmament Affairs, *The United Nations and Disarmament, Volume 20: 1995*, 128-129.
[221] Pearson, *The UNSCOM Saga: Chemical and Biological Weapons Non-Proliferation*, 82-94.

of VX nerve gas.[222] Traces of other substances and decontaminated products—which according to Iraq should not have been present—were also found. Inspectors discovering live, 97 percent pure mustard gas agent in artillery shells, which refuted Iraq's claim that unaccounted chemical weapons would have deteriorated and become harmless.[223] Additionally, UNSCOM found Iraq to not have provided a credible account of quantities and types of special warheads produced, had evidence of the provision of incorrect information and found that not all chemical bombs had been declared.[224] The chemical weapons programme was reported to have additionally been reconstituted in 2002, with allegations concerning the rebuilding of several factories for the production of chemical and biological weapons west of Baghdad arising soon afterwards.[225]

2.4.1.2 Motivations and Significance

The production and use of chemical weapons on both sides of the Iraq-Iran war represents a particularly significant case of noncompliance, particularly given their strategic and political motivations. The production and use of chemical weapons in this war demonstrates the significant tactical and strategic political benefits that can come from their use. That Iran's development of these weapons followed Iraq's use of them use stands out as a key problem in relation to arms control and disarmament.[226] The

[222] U.N. Centre for Disarmament Affairs, *The United Nations and Disarmament, Volume 21: 1996* (New York: United Nations, 1997), 85; U.N. Department for Disarmament Affairs, *The United Nations and Disarmament Volume, 23: 1998* (New York: United Nations, 1999), 70-73.
[223] U.N. Department for Disarmament Affairs, *The United Nations and Disarmament Volume, 23: 1998*, 73.
[224] Pearson, *The UNSCOM Saga: Chemical and Biological Weapons Non-Proliferation*, 114.
[225] Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 2002* (Oxford: Oxford University Press, 2002), 705.
[226] Javed Ali, "Chemical weapons and the Iran-Iraq war: A case study in noncompliance," *The Nonproliferation Review* 8, no. 1 (2001): 43.

impact which the Iraqi political decision to use chemical weapons had on Iran was considerable, particularly given the later problems which arose in terms of enforcement, monitoring, and verification compliance.[227]

The war with Iran spurred an escalation in the effort to make chemical weapons. Iraq, which expected a rapid victory, saw its advances stalled in 1981 by successful Iranian counter-offensives. It was then that Iraq "decided to use chemical weapons as a force-equalizer."[228] The Iranian army's gas masks were of US origin, and replacement spare parts—such as fresh filters—were as such in short supply due to US sanctions. Furthermore, many Iranian troops had beards, which would inhibit the correct wearing of gas masks. Iraq thus viewed its enemy as "particularly vulnerable to chemical attack" and "unlikely to retaliate in kind."[229]

The decision to use chemical weapons was, therefore, both a measure of desperation and a means to persuade Iran to stop the war. To make up for the troops it lacked, Iraq required greater artillery capacity. Thus, Iraq used chemical weapons in areas of land which rendered artillery and air-delivered weapons useless and prevented the effective employment of armour. It "had no other choice but to use the chemical weapons"[230] and struggled to "make enough mustard agent to keep up with frontline demand from its forces."[231] Iran, however, lacked capacities and had limited production.[232]

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[227] Ibid, 43-44.
[228] Dan Kaszeta, *Toxic: A History of Nerve Agents, from Nazi Germany to Putin's Russia* (Oxford: Oxford University Press, 2021), 169.
[229] Ibid.
[230] Kevin M. Woods, Williamson Murray, and Thomas Holaday, "Saddam's War: An Iraqi Military Perspective of the Iran-Iraq War," *McNair Paper* 70 (Washington D.C.: Institute for National Strategic Studies, National Defense University, 2009), 56.
[231] Shane Harris and Matthew M. Aid, "Exclusive: CIA Files Prove America Helped Saddam as He Gassed Iran," *Foreign Policy*, August 26, 2013, https://foreignpolicy.com/2013/08/26/exclusive-cia-files-prove-america-helped-saddam-as-he-gassed-iran/.
[232] Woods, Murray, and Holaday, "Saddam's War: An Iraqi Military Perspective of the Iran-Iraq War", 58.

Although the decision to employ chemical agents against Iran likely came from Saddam himself, the rationale used by Iraq for its operational use of these weapons offers some interesting additional facts despite having been subject to conflicting presentations.[233] On the one hand, chemical weapons were "seen as a useful means to counter a numerically superior force", and, on the other, they were additionally presented as "a means of last resort for retaliation in the case of a nuclear attack on Baghdad."[234] The usage of chemical weapons, notes a 1983 CIA report, "contributed to Iraqi success in defending against massed infantry assaults."[235] This highlights together with Iran's own development of chemical weapons the difficulties involved in promoting compliance when chemical weapons are seen to have clear military utility, as well as the serious international support required in order to achieve it.[236] These facts are particularly prominent concerning Syria's usage of chemical weapons, which will be examined within the following pages.

2.4.2 Syria's Chemical Weapons

Subject to previous allegations concerning the development of chemical weapons—particularly mustard gas and nerve agents—and of chemical weapons missile capabilities, Syria saw itself involved in further allegations in 2013.[237] Its use of chemical

[233] Ali, "Chemical weapons and the Iran-Iraq war: A case study in noncompliance", 47; Pearson, *The UNSCOM Saga: Chemical and Biological Weapons Non-Proliferation*, 108.
[234] Pearson, *The UNSCOM Saga: Chemical and Biological Weapons Non-Proliferation*, 108.
[235] U.S. Central Intelligence Agency, *Iran's likely reaction to Iraqi use of chemical weapons*, Rep. CIA-RDP85M00363R000400690038 (November 4, 1983), 1.
[236] Ali, "Chemical weapons and the Iran-Iraq war: A case study in noncompliance", 55-56.
[237] Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 1993* (Oxford: Oxford University Press), 264; Zanders, "After the chemical attacks in Syria – now what?", 1-2; Zanders "Chemical weapons use in Syria?", 1-2.

weapons, considered to be "one of the most flagrant breaches of international law in recent history", is one of the most significant cases of chemical weapons use.[238] Though a large part of the events surrounding the use of these weapons remains uncertain, the facts surrounding the usage of these weapons remain of interest in light of examining confirmed and alleged non-compliance of international arms control treaties. As such, they are of particular significance in relation to the three guiding questions of this thesis.

2.4.2.1 Overview of the Events

Evidence on the use of chemical weapons in Syria first emerged against a backdrop of worsening armed conflict in 2013.[239] Widely criticised by the international community, it was subsequently subject to an investigation grounded on the authority of the General Assembly Resolution 42/37 C and the Security Council Resolution 620 (1988).[240] These resolutions followed a 2012 admission by the Syrian of government of possession of chemical weapons, wherein the Syrian Ministry of Foreign Affairs stated that all weapons were under secure storage and the direct supervision of the Syrian armed forces, and would "never be used unless Syria is exposed to external aggression."[241] A spokesman further clarified a day later that the statement was a response to false allegations on weapons of mass destruction.[242] This statement was

[238] Ash Stanley-Ryan, "Achieving Chemical Weapons Convention Compliance in the Aftermath of Khan Shaykhun," *New Zealand Journal of Public and International Law* 16, no. 1 (2018): 39-40.
[239] U.N. Office for Disarmament Affairs, *United Nations and Disarmament Yearbook, Volume 38 (Part II): 2013* (New York: United Nations, 2014), 80-81; Stockholm International Peace Research Institute, *SIPRI Yearbook 2014: Armaments, Disarmament and International Security* (Oxford: Oxford University Press, 2014), 389; Bentley, *Syria and the Chemical Weapons Taboo: Exploiting the Forbidden*, 59.
[240] U.N. Office for Disarmament Affairs, *United Nations and Disarmament Yearbook, Volume 38 (Part II): 2013*, 86.
[241] Stockholm International Peace Research Institute, *SIPRI Yearbook 2013: Armaments, Disarmament and International Security* (Oxford: Oxford University Press, 2013), 376.
[242] Ibid.

widely criticised, and was held to be a matter of great concern for the stability of the region by U.S. President Barack Obama and by the Secretary-General of NATO.[243]

The allegations of chemical weapons use that surfaced following the Ghouta chemical attack of 2013 were subject to conflicting reports almost immediately.[244] Some theories sought to deny that Sarin had been used at all, whilst others sought to deflect blame for its use onto one or more parties other than the Syrian state or claim that the scenes had been staged.[245] Syria—at the time a party only to the Geneva 1925 Protocol but not of the CWC—saw itself subject to allegations that either Syrian Government forces or rebel forces had used chemical weapons.[246] In an official statement at the time, Russia did not state whether it believed chemical weapons had been used and, if so, by who.[247] Russia also criticised the OPCW for seeking to involve itself in the Syrian matter when Syria, as a state not a party to the CWC, had no obligations under it.[248] This contrasted with the US position, which had declared the usage of these weapons a red line.[249]

Although the fact-finding mission concluded that there was clear and convincing evidence that chemical weapons had been used at Ghouta, the evidence collected on

[243] U.S. White House, "Remarks by the President to the White House Press Corps," Press Briefing transcript, 20 Aug. 2012, https://obamawhitehouse.archives.gov/the-press-office/2012/08/20/remarks-president-white-house-press-corps; North Atlantic Treaty Organization, "Doorstep statement by the NATO Secretary General at the start of the Foreign Affairs Minister meeting," 4 December 2012, https://www.nato.int/cps/en/natolive/opinions_92785.htm.
[244] Stockholm International Peace Research Institute, *SIPRI Yearbook 2014: Armaments, Disarmament and International Security*, 391.
[245] Kaszeta, *Toxic: A History of Nerve Agents, from Nazi Germany to Putin's Russia*, 219.
[246] Ibid.
[247] Ibid, 395.
[248] Organisation for the Prohibition of Chemical Weapons [OPCW], Executive Council, *Russian Federation: Statement by the Delegation of the Russian Federation at the Seventy-Third Session of the Executive Council Under Agenda Item 3*, at 2, OPCW Doc. EC-73/NAT.17 (July 13, 2013).
[249] U.S. White House, "Remarks by the President to the White House Press Corps"; Naqvi, "Crossing the Red Line: The Use of Chemical Weapons in Syria and What Should Happen Now", 962; Gabrielle Gould, "Red Lines: Filling the Gaps in International Law Enforcement," *Georgetown Journal of International Law* 46, no. 2 (2015): 522; Michelle Almary, "The Necessity for a Permanent Disincentive: Examining the Use of Chemical Weapons with a Focus on Syria's Civil War," *Southwestern Journal of International Law* 24, no. 2 (2018): 313.

other sites which were subject to a chemical weapons attack could not be fully corroborated.[250] Upon accession to the OPCW, Syria provided site diagrams for chemical weapon storage facilities and declared the possession of sulphur mustard agent, sarin precursors, and VX precursors—notably not including the two weapon types examined by international inspectors in Ghouta.[251] Furthermore, President al-Assad, in an interview for a US television channel, stated that he had not authorised the use of chemical weapons.[252]

Allegations concerning the usage of chemical weapons resurfaced in 2015 despite the achievements recorded by the OPCW concerning the nearly-fully completed elimination of declared chemical weapon stockpiles.[253] These allegations continued throughout 2016 under much of the same conditions.[254] These allegations—the majority of which implied that the Syrian Government forces had used chemical weapons in contested areas to instil fear—remained, however, contested.[255] International efforts to determine responsibility for the use of chemical weapons were also subject to disagreement at the political level.[256]

Following these allegations, the European Union reiterated its concern about the insufficient information the Syrian Government provided, and the inconsistencies between its initial and subsequent declarations to the OPCW's Technical Secretariat.[257]

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[250] Stockholm International Peace Research Institute, *SIPRI Yearbook 2014: Armaments, Disarmament and International Security*, 400.
[251] Ibid; Organisation for the Prohibition of Chemical Weapons [OPCW], Executive Council, *Progress in the Elimination of the Syrian Chemical Weapons Programme*, OPCW Doc. EC-M-34/DG.1 (Oct. 25, 2013).
[252] Ibid. For a transcript see: The Syrian Observer, "Transcript of Cashar Al-Assad's interview with CBS," September 10, 2013, https://syrianobserver.com/EN/interviews/34692/president_assads_interview_with_american_cbs_news.html.
[253] U.N. Office for Disarmament Affairs, *The United Nations and Disarmament Yearbook, Volume 40 (Part II): 2015* (New York: United Nations, 2016), 57.
[254] U.N. Office for Disarmament Affairs, *The United Nations and Disarmament Yearbook, Volume 41 (Part II): 2016*, 46.
[255] Stockholm International Peace Research Institute, *SIPRI Yearbook 2016: Armaments, Disarmament and International Security* (Oxford: Oxford University Press, 2016), 728-729.
[256] Ibid, 729.
[257] Ibid, 730-731.

The U.S. attributed responsibility to the Syrian Government based on findings from the OPCW, with the United Kingdom supporting the referral of the situation to the International Criminal Court. China and Russia opposed this referral, with Russia stating that a careful reading of the OPCW's 2014 investigation did not offer conclusive grounds on which to warrant attributing responsibility for chemical weapon attacks to the Syrian Government.[258]

The evidence that surfaced following new allegations of chemical weapons use in 2017 was similarly difficult to validate with certainty.[259] This was again the case concerning new allegations of use in 2018 when, despite the OPCW fact-finding mission's identification of the chemical weapons used, both the U.N. Security Council and the OPCW Executive Council remained deadlocked on the question of Syrian Government responsibility.[260]

Bellingcat, however, has conclusively tied a number of the chemicals used in these attacks to the Syrian government.[261] This was also achieved by the German intelligence service through the interception of incriminating phone calls.[262] The primary user of chlorine and only user of sarin thus was the Syrian government, who used both

[258] Ibid; U.N. Press Release, Security Council, Adopting Resolution 2209 (2015), Security Council Condemns Use of Chlorine Gas as Weapon in Syria; U.N. Press Release SC/11810 (Mar. 6, 2015).
[259] U.N. Office for Disarmament Affairs, *The United Nations and Disarmament Yearbook, Volume 42 (Part II): 2017* (New York: United Nations, 2018), xi-xii; Stockholm International Peace Research Institute, *SIPRI Yearbook 2017: Armaments, Disarmament and International Security* (Oxford: Oxford University Press), 513.
[260] U.N. Office for Disarmament Affairs, *The United Nations and Disarmament Yearbook, Volume 42 (Part II): 2017*, xi-xii; Stockholm International Peace Research Institute, *SIPRI Yearbook 2018: Armaments, Disarmament and International Security* (Oxford: Oxford University Press, 2018) 53-54, 349. See also: Organisation for the Prohibition of Chemical Weapons [OPCW], Technical Secretariat, *Rep. of the OPCW Fact-Finding Mission in Syria Regarding an Alleged Incident in Saraqib, Syrian Arab Republic on 4 February 2018*, OPCW Doc. S/1626/2018 (May 15, 2018); Organisation for the Prohibition of Chemical Weapons [OPCW], Technical Secretariat, *Rep. of the OPCW fact-Finding Mission in Syria Regarding Alleged Incidents in Ltamenah, the Syrian Arab Republic 24 and 25 March 2017*, OPCW Doc. S/1636/2018 (June 13, 2018); Organisation for the Prohibition of Chemical Weapons [OPCW], Technical Secretariat, *Rep. of the OPCW Fact-Finding Mission in Syria Regarding the Incidents in Al-Hamadaniyah on 30 October 2016 and in Karm Al-Tarrab on 13 November 2016*, OPCW Doc. S/1642/2018 (July 2, 2018).
[261] Cheryl Rofer, "'A Naïve Set of Assumptions' - An Expert's View on Ted Postol Hexamine Theories," *Bellingcat*, August 6, 2018, https://www.bellingcat.com/news/mena/2018/08/06/naive-set-assumptions-experts-view-ted-postol-hexamine-theories/
[262] Kaszeta, *Toxic: A History of Nerve Agents, from Nazi Germany to Putin's Russia*, 221.

agents repeatedly over the course of the conflict, with the only other positively identified user of chemical weapons being the Islamic State.[263] Any 'false flag' attack would have been "extremely complex to plan and execute" and would have had to rely on "the murder of multiple people" or the discovery of an "unprecedented number of people who had died from 'dust inhalation'."[264] Furthermore, attempts by Russia to defend Syria against allegations of sarin use have, ironically, "led to a number of significant developments in the investigation into the nature of Syria's Sarin bombs" which have helped corroborate Syria's usage of chemical weapons.[265]

2.4.2.2 Significance of the events

The examination of the events conducted above makes their significance clear, particularly in relation to the taboo associated with the use of chemical weapons—established in the previous chapter—and the political deadlock in which the investigations have been immersed in since 2013.

Before the start of this conflict, Syria was one of the few states that did not join the CWC.[266] The Syrian state "had long had a chemical warfare programme" since the 1970s, as, like other Arab states in the region, the regime "felt that chemical and

[263] Bellingcat Investigation Team, "The OPCW Douma Leaks Part 1: We Need To Talk About 'Alex'," *Bellingcat*, January 15, 2020, https://www.bellingcat.com/news/mena/2020/01/15/the-opcw-douma-leaks-part-1-we-need-to-talk-about-alex/; Kaszeta, *Toxic: A History of Nerve Agents, from Nazi Germany to Putin's Russia*, 222-228.

[264] Bellingcat Investigation Team, "The OPCW Douma Leaks Part 3: We Need To Talk About A 'False Flag' Attack," *Bellingcat*, January 23, 2020, https://www.bellingcat.com/news/mena/2020/01/23/the-opcw-douma-leaks-part-3-we-need-to-talk-about-a-false-flag-attack/.

[265] This concerns in particular the matching of the bomb debris of the March 30 2017 attack in Al-Lataminah to the M4000 diagram published by Russia. Eliot Higgins, "The Open Source Hunt for Syria's Favourite Sarin Bomb," *Bellingcat*, April 21, 2020, https://www.bellingcat.com/news/2020/04/21/the-open-source-hunt-for-syrias-favourite-sarin-bomb/; Bellingcat Investigation Team, "Did Russia Accidentally Provide the Best Evidence of the Syrian Government's Involvement in Sarin Attacks?" *Bellingcat*, November 13, 2017, https://www.bellingcat.com/news/mena/2017/11/13/russia-accidentally-provide-best-evidence-syrian-governments-involvement-sarin-attacks/.

[266] R. Trapp, "Elimination of the Chemical Weapons Stockpile of Syria," *Journal of Conflict and Security Law* 19, no. 1 (2014): 8.

biological weapons were needed as a counterbalance to Israel's suspected nuclear bomb."[267] Egypt has similarly and consistently argued it will not join the CWC until Israel has signed and ratified all other weapons of mass destruction treaties.[268] Israel's official reason for its reluctance to ratify the convention, however, "is the existence of a chemical-weapons threat in the region, coupled with the unstable political and security environment."[269] This makes, on the whole, the denials of usage of sarin before Syria's official accession to the CWC of particular interest, given the government's July 2012's threat to use chemical weapons to defend its regime.[270]

The differing responses to the usage of chemical weapons following Syria's accession to this convention are of similar interest, particularly given their nature as a violation of the treaty regime and Syria's later failure to declare the remainder of its chemical weapons stockpile to the OPCW.[271] Though Russia and Syria have agreed with the conclusions of the OPCW report on a diplomatic level, in public Russia has launched a "widespread and concerted effort to undermine both the OPCW and the conclusions of its report on Douma."[272]

Furthermore, despite the repeated expert confirmation of the Syrian government's usage of these weapons, Syria and its allies have "conducted one of the

[267] Kaszeta, *Toxic: A History of Nerve Agents, from Nazi Germany to Putin's Russia*, 212; M. Zuhair Diab, "Syria's chemical and biological weapons: Assessing capabilities and motivations," *The Nonproliferation Review* 5, no. 1 (1997): 104-111.
[268] Nomi Bar-Yaacov, "Achieving Universality of the Chemical Weapons Convention in the Middle East," *Global Politics and Strategy* 57, no. 6 (2015): 169.
[269] Ibid, 165.
[270] Kaszeta, *Toxic: A History of Nerve Agents, from Nazi Germany to Putin's Russia*, 215; R. Trapp, "The Use of Chemical Weapons in Syria: Implications and Consequences," in *One Hundred Years of Chemical Warfare: Research, Deployment, Consequences*, eds. Bretislav Friedrich, Dieter Hoffmann, Jürgen Renn, Florian Schmaltz, and Martin Wolf (Cham: Springer, 2017), 364.
[271] Masahiko Asada, "The OPCW's Arrangements for Missed Destruction Deadlines Under the Chemical Weapons Convention: An Informal Noncompliance Procedure," *The American Journal of International Law* 108, no. 3 (July 2014): 451; Julia Masterson, "Syrian Chemicals Stockpile Declaration Still Incomplete," *Arms Control Today*, April 2021, https://www.armscontrol.org/act/2021-04/news/syrian-chemicals-stockpile-declaration-still-incomplete; Julia Masterson, "Syria Fails to Meet OPCW Deadline," *Arms Control Today*, November 2020, https://www.armscontrol.org/act/2020-11/news/syria-fails-meet-opcw-deadline.
[272] Bellingcat Investigation Team, "Unpublished OPCW Douma Correspondence Casts Further Doubt on Claims of 'Doctored' Report," Bellingcat, October 26, 2020, https://www.bellingcat.com/news/mena/2020/10/26/unpublished-opcw-douma-correspondence-raises-doubts-about-transparency-of-opcw-leaks-promoters/.

most comprehensive disinformation campaigns to date" with conflicting media stories and narratives.[273] This campaign has been "an almost unmitigated success", as it has hindered accountability by "providing an excuse for governments and the public to continue to look away from the Syrian government's and its accomplices' repeated violations of international law."[274] It has "minimized public outcry and excused political inaction", becoming so effective that "others have replicated it to prevent accountability for other bad actions."[275] This stands in contrast with Syria's suspension of rights and privileges under the CWC in an effort to hold the country accountable for repeatedly violating this treaty.[276]

The logic behind Syria's usage of chemical weapons is an essential element of the events that needs to be examined.[277] "One question that comes up repeatedly in discourse on the Syrian war," writes Kaszeta, "is 'Why would Assad bother with chemical weapons?'"[278] There is a clear military and political logic to the use of chemical weapons in Syria: agents like chlorine and sarin are more effective at targeting underground bunkers and tunnels than unguided munitions. They are part of a "broader campaign to make areas outside of Assad's control uninhabitable."[279] Chemical weapons, through being heavier than air, can "flush out people from shelter, thus making them more vulnerable to attack by cheap conventional munitions."[280] Thus, they compensate for

[273] M. Stewart, "Defending Weapons Inspections from the Effects of Disinformation," *American Journal of International Law Unbound* 115 (2021), 107.
[274] Ibid, 108.
[275] Ibid.
[276] Leanne Quinn and Julia Masterson, "States Censure Syria for Chemical Weapons Violations," *Arms Control Today*, May 2021, https://www.armscontrol.org/act/2021-05/news/states-censure-syria-chemical-weapons-violations.
[277] Syria's use of chemical weapons has been examined in relation to the idea of insincere norm-holders. Syrian President Bashar al-Assad's public, rhetorical support for the CW taboo "belies his private opposition to the taboo demonstrated by his regime's actions." Christopher W. Blair, Jonathan A. Chu, and Joshua A. Schwartz, "The Two Faces of Opposition to Chemical Weapons: Sincere Versus Insincere Norm-Holders," *Journal of Conflict Resolution* 66, no. 4-5 (2022): 680.
[278] Kaszeta, *Toxic: A History of Nerve Agents, from Nazi Germany to Putin's Russia*, 229.
[279] Ibid, 230.
[280] Ibid, 229.

the Syrian army's older, less sophisticated weapons, and can ensure heavy casualties with a small amount of effort.[281] Chemical weapons are, furthermore, cheap and easy to procure in significant quantities, with Syria's industrialized infrastructure making it easy for chlorine to be stored, handled, and weaponised without specialist knowledge or equipment.[282]

On the whole, then, this case of CWC non-compliance is of particular interest due to the political and military utility of chemical weapons and the political nature of the denials of use by Syria and Russia. The repeated violations by the Syrian government of the CWC also stand out when compared to the taboo associated with their use, as does the disinformation campaign surrounding Syria's alleged use. Despite the legal framework requiring accountability under international law for any employment of chemical weapons, the Syrian government has "continued to use chemical weapons against its own people."[283] This fact, coupled with Russia's use of the veto power on the U.N. Security Council to undermine efforts to investigate chemical weapons since 2013, shows both the political interests underlying this violation of the CWC and the limited effect of the taboo in the face of them.[284]

Assad's public and rhetorical support for the chemical weapons taboo belied his private opposition to the taboo, as demonstrated by Syria's actions.[285] Blair, Chu, and Schwartz have described this contradiction as insincere norm-holding, motivated by the

[281] Luke O'Brien and Aaron Stein, "The Military Logic Behind Assad's Use of Chemical Weapons," *War on the Rocks*, June 15, 2018, https://warontherocks.com/2018/06/the-military-logic-behind-assads-use-of-chemical-weapons/.
[282] Tobias Schneider and Theresa Lütkefend, "Nowhere to Hide: The Logic of Chemical Weapons Use in Syria," *Global Public Policy Institute* (February 2019), 12-13, https://www.gppi.net/2019/02/17/the-logic-of-chemical-weapons-use-in-syria.
[283] Stewart, "Defending Weapons Inspections from the Effects of Disinformation", 106-107.
[284] For the debate on whether Syria's violations of the CWC have had an impact on the taboo or global norm against chemical weapons see: Bentley, *Syria and the Chemical Weapons Taboo: Exploiting the Forbidden*, 152-154.
[285] Blair, Chu, and Schwartz "The Two Faces of Opposition to Chemical Weapons: Sincere Versus Insincere Norm-Holders", 4.

strong social desirability costs associated with publicly opposing a norm and taboo as well-established as that of chemical weapons.[286] For Bentley, however, this case is an example of the political aspects of taboos, whereby despite its importance in shaping foreign policy discourse, its influence is more complex and less absolute than its reputation would otherwise make out.[287]

Having examined this, we will examine the final major case of CWC noncompliance which, through its political significance, will develop many of the aforementioned issues which have been displayed thus far in this chapter.

2.4.3 Russia and Navalny

On the 20th of August 2020, Russian opposition activist Alexei Navalny collapsed into a coma during a flight from the Siberian city of Tomsk to Moscow, resulting in an emergency landing and his hospitalisation. Two days later, Navalny was evacuated to the Charité hospital at Berlin, where he was diagnosed with severe poisoning with a cholinesterase inhibitor.[288] Following a request for aid by Germany, the OPCW confirmed that the cholinesterase inhibitor found in Navalny's blood and urine samples had similar structural characteristics as the toxic chemicals belonging to schedules

[286] Ibid, 8-9.

[287] Thus, she argues, "adherence to the taboo cannot be seen as inevitable – at least not in the extreme terms within which it has been conventionally portrayed." Bentley, *Syria and the Chemical Weapons Taboo: Exploiting the Forbidden*, 56-57. Furthermore, "while the taboo now plays a significant role in understanding US policy on Syria, discussion of it in this context has overlooked a key aspect of its application: that the taboo has been used strategically." Michelle Bentley, "Strategic taboos: chemical weapons and US foreign policy," *International Affairs* 90, no. 5 (2014): 1034.

[288] Bellingcat Investigation Team, "FSB Team of Chemical Weapon Experts Implicated in Alexey Navalny Novichok Poisoning," *Bellingcat*, December 14, 2020, https://www.bellingcat.com/news/uk-and-europe/2020/12/14/fsb-team-of-chemical-weapon-experts-implicated-in-alexey-navalny-novichok-poisoning/; Bellingcat Investigation Team, "'If it Hadn't Been for the Prompt Work of the Medics': FSB Officer Inadvertently Confesses Murder Plot to Navalny," *Bellingcat*, December 21, 2020, https://www.bellingcat.com/news/uk-and-europe/2020/12/21/if-it-hadnt-been-for-the-prompt-work-of-the-medics-fsb-officer-inadvertently-confesses-murder-plot-to-navalny/.

1.A.14 and 1.A.15 in the Annex on Chemicals to the Convention.[289] Frequently referred to as 'nerve agents', this category of chemical includes among other things "some military chemical warfare agents, some drugs, and numerous pesticides."[290] Though it resembled known Novichok variants, it was not included in the list of banned nerve agents that was updated after the Skripal poisoning in 2018, implying that "the agent used on Navalny was of a more recent, previously unknown type."[291]

The U.S. and European governments blamed the Russian government, and in particular the Federal Security Service (FSB) for Navalny's near-fatal poisoning. By contrast, Russia repeatedly denied the accusations, holding instead that "the opposition figure had no traces of nerve agents in his body while in Russia" and that it must have happened "after he left Russian territory."[292] Kremlin spokesperson Dmitry Peskov stated on October 7 that Russia was not developing chemical weapons and that it was in full compliance with its treaty obligations. However, French and German officials maintained their suspicions of Moscow's involvement in Navalny's poisoning despite this, countering that no credible explanation for the incident had been provided for Russia so far.[293] It is noteworthy that a District Court in Moscow converted Navalny's suspended sentence into a sentence of two years and eight months in prison a month his return to Russia in January 2021.[294]

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[289] Organisation for the Prohibition of Chemical Weapons [OPCW], Technical Secretariat, *Correspondence from Germany to the OPCW Requesting Technical Assistance in the Case of Mr Alexei Navalny, and Associated Documents*, OPCW Doc. S/1979/2021 (Aug. 3, 2021); Organisation for the Prohibition of Chemical Weapons [OPCW], Technical Secretariat, *Summary of the Report on Activities Carried Out in Support of a Request for Technical Assistance by Germany (Technical Assistance Visit—TAV/01/20)*, OPCW Rep. S/1906/2020 (Oct. 6, 2020).

[290] Dan Kaszeta, "A Guide to Cholinesterase Inhibitors in Wake of Suspected Alexei Navalny Poisoning," *Bellingcat*, August 28, 2020, https://www.bellingcat.com/resources/2020/08/28/cholinesterase-inhibitors-alexei-navalny/.

[291] Bellingcat Investigation Team, "FSB Team of Chemical Weapon Experts Implicated in Alexey Navalny Novichok Poisoning."

[292] Ibid.

[293] Julia Masterson, "Novichok Used in Russia, OPCW Finds," *Arms Control Today*, November 2020. https://www.armscontrol.org/act/2020-11/news/novichok-used-russia-opcw-finds.

[294] The European Court of Human Rights, commenting on several cases which Navalny brought before it, found violations by Russian authorities of Navalny's freedom of expression, right to liberty and security, right to a fair trial, the prohibition on punishment

A joint investigation between Bellingcat and The Insider, in cooperation with Der Spiegel and CNN, later discovered voluminous telecom and travel data that implicated Russia's FSB in the events. The poisoning appeared to have happened "after years of surveillance" which began in 2017, "shortly after Navalny first announced his intention to run for president of Russia."[295] A comprehensive analysis of phone metadata and travel data of twelve FSB operatives linked to the Criminalistics Institute, reports Bellingcat, "paints a picture of a specialized chemical weapons facility, run within this institute, that has a similar profile to that of the KGB-run laboratory described by the aforementioned Soviet-era ex-KGB officers."[296] Furthermore, the information further pointed at this chemical weapons program being supervised by Col. Stanislav Makshakov, who previously worked at the State Organic Synthesis institute in the closed military town of Shikhany-1. Until the official termination of Russia's chemical weapons program, this military institute "provided research and development for new forms of chemical weapons, including nerve agents of the Novichok type as part of a total of 21 highly poisonous substances."[297]

The usage of Novichok to poison Navalny stands out as a particularly prominent element of this violation of the CWC due to its inclusion to the treaty's most tightly controlled agents following the 2018 poisoning of former Russian spy Sergei Skripal in the United Kingdom.[298] The campaign to amend the treaty's annex on chemical weapons

without law, and the prohibition on inhuman and degrading treatment and punishment. M. Plachta, "International human rights enforcement," *International Enforcement Law Reporter* 38, no. 2 (2022): 54-55.

[295] Bellingcat Investigation Team, "FSB Team of Chemical Weapon Experts Implicated in Alexey Navalny Novichok Poisoning."

[296] Ibid.

[297] Ibid.

[298] Julia Masterson, "OPCW to Investigate Navalny Poisoning," *Arms Control Today*, October 2020, https://www.armscontrol.org/act/2020-10/news/opcw-investigate-navalny-poisoning; Marie Isabelle Chevrier, "Compliance mechanisms and their implementation: the contrast between the Biological and Chemical Weapons Conventions," *The Nonproliferation Review* 27, no. 4-6 (2020): 483.

that followed these events meant that countries in possession of the nerve agent were to be subjected to the treaty's most stringent verification and declaration requirements.[299] The continuation of Russia's Novichok development program beyond its official closure date in 2010 further represents a significant violation of the CWC.[300] This fact is of significant interest due to the fact that Russia disguised its development capability behind a network of state-run institutes.[301]

The conflicting narratives on the events and official responses on Navalny's poisoning represent, much like Syria's usage of chemical weapons, a significant aspect of this case.[302] In face of the allegations and the OPCW analysis of Navalny's samples, Russia held that it had no ongoing chemical weapons program and it had destroyed all of its prior arsenals, further alluding that U.K. agencies had used their own stash of Novichok to poison the Skripal's in a false-flag operation.[303] The political interests which underpin these official responses cannot be ignored, particularly considering Navalny's importance as an opposition leader. Navalny's poisoning threatens the CWC and highlights the erosion of the global norm against chemical weapons use, particularly due to the lack of accountability for these incidents and Russia's continued denials.[304] The fact that Russian compliance and support for the CWC remains crucial for its effective

[299] Julia Masterson, "OPCW to Investigate Navalny Poisoning."
[300] Bellingcat Investigation Team, "Russia's Clandestine Chemical Weapons Programme and the GRU's Unit 29155," *Bellingcat*, October 23, 2020, https://www.bellingcat.com/news/uk-and-europe/2020/10/23/russias-clandestine-chemical-weapons-programme-and-the-grus-unit-21955/.
[301] Bellingcat Investigation Team, "FSB Team of Chemical Weapon Experts Implicated in Alexey Navalny Novichok Poisoning."
[302] A number of differing explanations for the events have been further provided by Russia. In particular that: "(i) tests conducted in Russia found no traces of any poisonous substance in Mr. Navalny", "(ii) Mr. Navalny could have poisoned himself and had simulated illness in the past", "(iii) other countries were using Mr. Navalny's illness to make false accusations against Russia", "(iv) other countries … were involved in the poisoning of Mr. Navalny, or falsifying laboratory analysis results", "(v) The failure of Germany … to provide information was preventing the Russian authorities from investigating the incident." Ibid.
[303] Bellingcat Investigation Team, "Russia's Clandestine Chemical Weapons Programme and the GRU's Unit 29155."
[304] Julia Masterson, "U.S. Urges CW Norms for Global Partnership," *Arms Control Today*, January/February 2021, https://www.armscontrol.org/act/2021-01/news/us-urges-cw-norms-global-partnership; Tuan H. Nguyen, "Countering the future chemical weapons threat: Shift focus from disarmament to preventing reemergence," *Science* 376, no. 6591 (22 April 2022): 355-356.

implementation and several states have made clear they were not willing to let demands for accountability go unanswered complicates this state of affairs.[305]

Russia's use of the nerve agent Novichok against Navalny thus remains, together with Syria's use of chemical weapons following its accession to the CWC, one of the singularly most important violations of this treaty. Its use against Navalny is "evidence of the existence of a Russian offensive chemical weapons programme", undermines international norms, and encourages others to pursue these weapons.[306] This is particularly the case concerning the exchange of allegations and counter-allegations concerning the events, particularly in relation to Russia's claim that the OPCW's Technical Secretariat aims to politicise as much as possible the conditions under which technical assistance can be provided and of treating its request differently than those made previously by Malaysia, the United Kingdom, and Germany.[307] This continued embrace of chemical weapons, writes Kenneth Ward, "is not an isolated affront, but

[305] Oliver Meier and Alexander Kelle, "The Navalny Poisoning: Moscow Evades Accountability and Mocks the Chemical Weapons Convention," *Bulletin of the Atomic Scientists*, February 1, 2022, https://thebulletin.org/2021/10/the-navalny-poisoning-moscow-evades-accountability-and-mocks-the-chemical-weapons-convention/. Some instances of demands for accountability include: Organisation for the Prohibition of Chemical Weapons [OPCW], Executive Council, *United Kingdom of Great Britain and Northern Ireland: Request for Circulation of a Document at the Ninety-Eight Session of the Executive Council*, OPCW Doc. EC-98/NAT.11 (Oct. 18, 2021); Organisation for the Prohibition of Chemical Weapons [OPCW], Executive Council, *France: Statement by H.E. Ambassador Luis Vassy Permanent Representative of the French Republic to the OPCW at the Ninety-Eight Session of the Executive Council*, OPCW Doc. EC-98/NAT.36 (Oct. 5, 2021); Organisation for the Prohibition of Chemical Weapons [OPCW], Executive Council, *United States of America: Statement by H.E. Ambassador Joseph Manso Permanent Representative of the United States of America to the OPCW at the Ninety-Eight Session of the Executive Council*, OPCW Doc. EC-98/NAT.15 (Oct. 5, 2021); Organisation for the Prohibition of Chemical Weapons [OPCW], Executive Council, *United States of America: Statement by the H.E. Ambassador Joseph Manso Permanent Representative of the United States of America to the OPCW at the Ninety-Ninth Session of the Executive Council*, OPCW Doc. EC-99/NAT.12 (Mar. 8, 2022); Organisation for the Prohibition of Chemical Weapons [OPCW], Executive Council, *Germany: Statement by the H.E. Ambassador Thomas Schieb Permanent Representative of the Federal Republic of Germany to the OPCW at the 101st Session of the Executive Counci*l, OPCW Doc. EC-101/NAT.15 (Oct. 4, 2022); Organisation for the Prohibition of Chemical Weapons [OPCW], Executive Council, *United States of America: Statement by H.E. Ambassador Joseph Manso Permanent Representative of the United States of America to the OPCW at the 101st Session of the Executive Council*, OPCW Doc. EC-101/NAT.8 (Oct. 4, 2022).

[306] Peter Brookes, "Five Agenda Items for the Next U.S.–Russia Strategic Stability Dialogue," *The Heritage Foundation Issue Brief* 5218 (September 23, 2021): 4.

[307] Plachta, "International human rights enforcement", 55.

rather part of a much larger challenge to the West."[308] Politically motivated, it challenges the CWC.[309]

2.4.4 Other Allegations of Non-Compliance

A number of other cases and allegations of non-compliance have emerged previous to and since the entry into force of the CWC. Throughout the following pages I will examine these additional cases of non-compliance, setting out the different events they involved and the politics surrounding them. It is important to note that allegations which surfaced previously to the ratification and entry into effect of the CWC concern primarily the Geneva 1925 Protocol.

2.4.4.1 Libya

Libya was alleged to have cleaned up the ruins of an alleged chemical weapon production facility at Rabta and of building a second plant south of Tripoli. Though there was disagreement about whether this second plant existed, Qadhafi stated that Libya was prepared to consider outside inspection of alleged nuclear and chemical weapon sites.[310]

[308] Kenneth D. Ward, "Syria, Russia, and the Global Chemical Weapons Crisis," *Arms Control Today*, September 2021, https://www.armscontrol.org/act/2021-09/features/syria-russia-global-chemical-weapons-crisis.
[309] This violation of the CWC highlights issues concerning the enforcement of international law which are explored prominently in Morgenthau's works. These will be developed and expanded upon in chapter four.
[310] Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 1993*, 265.

These allegations continued in 1994, involving additional alleged chemical weapon plants related to attempted acquisitions of a chemical weapons arsenal, with Libya being accused of producing at least 100 tons of chemical weapon agents, particularly mustard gas and sarin.[311] European and US intelligence reports claimed that Libya had opened a plant fully capable of producing mustard gas had opened near Rabta in September 1995. Libya denied these allegations, stating that it was destined for the production of pharmaceuticals and it was sabotaged by "German, Israeli and US intelligence services."[312]

These continued through 1997 until December 2003, when Libya announced a public commitment to disclose and dismantle all weapons of mass destruction in their possession, allowed international inspectors to enter to verify this destruction, and became a part of the CWC. It is noteworthy that secret negotiations involving this began from March 2003 onwards, which resulted in the visits to Libya in October and December of British and US officials, during which interviews with Libyan scientists were conducted. These resulted in the confirmation of sulphur mustard and air-delivered bombs.[313]

This renunciation to the use of chemical weapons is particularly interesting, as the chemicals which were declared, despite not being listed in the Chemical Weapon Convention's annex on chemicals, had been meant for use as part of its chemical

[311] Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament*, 1994 (Oxford: Oxford University Press, 1994), 327.
[312] Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 1996* (Oxford: Oxford University Press, 1996), 664.
[313] Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 1997* (Oxford: Oxford University Press, 1997), 463; Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 2004*, 676-677.

weapons programme.[314] A fact which demonstrates the difficulties which exist in determining the intentions of a state in assessing its compliance with treaty commitments.[315]

2.4.4.2 South Africa

Following preliminary investigations in 1996 and 1997, the Truth and Reconciliation Commission (TRC) started an in-depth investigation into South Africa's chemical and biological weapons programme in February 1998.[316] This chemical and biological weapons programme was claimed to be defensive and destined to "acquire the necessary expertise to be able to react to external chemical or biological warfare threats" and to have a "retaliatory capability available."[317] Additionally, seeing the sharing of information despite the sanctions against the apartheid regime at the time, with countries such as Germany, Israel, Taiwan, and the US being found to have done so.[318]

South Africa did not declare this chemical weapons programme to the OPCW following the entry into force of the CWC. The main reason for the secrecy of the program, allegedly, was to prevent the African National Congress (ANC) from acquiring

[314] Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 2005*, 645.
[315] Ibid, 648.
[316] Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 1999* (Oxford: Oxford University Press, 1999), 583-584.
[317] Ibid, 584-585.
[318] Ibid.

data about the powerful crowd-control agent following the 1994 elections.[319] These followed the revelation of South Africa's nuclear program during the early 1990s.

2.5 Biological Weapons

Biological weapons have been held, as examined within the previous chapter, with a nearly unparalleled revulsion since the conception of modern international arms control and disarmament. Subject to some of the earliest attempts at disarmament and arms control, biological and toxic weapons were, until recently, considered a success story. Examples of success include the 1969-1970 Nixon administration's unilateral renouncement on the grounds of their liabilities outweighing their advantages, with his Joint Chiefs of Staff advising that they were militarily unreliable.[320] Biological weapons provide a case in which, instead of negotiating a treaty and then implementing its provisions, an entire class of weapons was renounced by a major possessor without previous international agreement.[321]

It is noteworthy that a number of allegations concerning the development and use of biological weapons have been raised throughout the years despite the nearly unparalleled revulsion associated with the usage of these weapons. The cases involving the Soviet Union and Iraq stand out due to the extent of the biological weapons

[319] Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 2001* (Oxford: Oxford University Press, 2001), 536-537.
[320] Jonathan B. Tucker, "Lessons of Iraq's biological warfare programme," *Contemporary Security Policy* 14, no. 3 (1993): 230; Amy E. Smithson, "Biological weapons: Can fear overwhelm inaction?" *The Washington Quarterly* 28, no. 1 (2004): 167.
[321] Milton Leitenberg, "Biological weapons arms control," *Contemporary Security Policy* 17, no. 1 (1996): 1; Matthew Meselson, Martin M. Kaplan, and Mark A. Mokulsky, "Verification of Biological and Toxin Weapons Disarmament," *Science & Global Security* 2, (1991): 235-252.

programs which were confirmed, with the former representing a major breach of the BWC. Both cases, along with allegations concerning the use and development of these weapons by other countries, point at the BWC's allowance of research on dangerous pathogens for medical and defensive purposes as a problem.[322] This raises additional questions as to the difficulty which can exist in both verification and non-compliance monitoring. That the Soviet biological weapons program did not cease despite the U.S. renouncement of these weapons is of particular interest in this regard.[323] This program only came to be fully revealed following the defection of two high-placed insiders, with Russian President Boris Yeltsin admitting that the Soviet Union had developed biological weapons despite its adherence to the BWC.[324]

Throughout the following pages I will examine known cases of non-compliance relating to the BWC and the Geneva 1925 Protocol: that is, the Soviet biological weapons program and Iraq's development of these weapons previous to the Gulf War. The examination of these two cases will be followed by that of additional allegations concerning the use of these weapons, which will be accompanied by an examination as to the motivations that led to the use and development of these weapons when possible and available. It should be noted, however, that due to the nature of biological warfare and research no comprehensive and authoritative history of biological warfare has been released, and that current literature is also replete with misinformation and gaps.[325]

[322] Smithson, "Biological weapons: Can fear overwhelm inaction?", 168.
[323] Matthew Meselson, "The Problem of Biological Weapons," *Bulletin of the American Academy of Arts and Sciences* 52, no. 5 (1999): 54; Weiss and Thakur, *Global Governance and the UN: An Unfinished Journey*, 125.
[324] Tucker, "Lessons of Iraq's biological warfare programme", 230-231.
[325] Carus provides a detailed and comprehensive analysis of the issues plaguing prior literature on this topic. Some of the problems facing this area of research—in addition to those noted in the section 2.2 of this chapter—are as follows: "Unfortunately, existing surveys of past BW are replete with misinformation and gaps, including this author's own work. Events that almost certainly never happened are widely reported as fact, while events that certainly did happen are poorly described. As a result, it is as important to dispose of false allegations that have made their way into the literature as it is to identify and characterize actual uses of biological weapons." Carus, "The History of Biological Weapons Use: What We Know and What We Don't," 219.

2.5.1 The Soviet Biological Weapons Program

The events that led to the discovery of the soviet biological weapons programme, undoubtedly one of the biggest confirmed violations of an international arms control treaty, will be detailed and explored below.[326] This program, which started less than a year after the Soviet Union's signature of the BWC, was a massive clandestine cheating effort that concealed a vast network of biological weapons "research, development, testing, and production facilities" under the direction of an organisation known as Biopreparat.[327]

The discovery of this biological weapons program stands out due to the Soviet Union's early accession to the BWC. An example of this can be seen in the statements by the United States and the United Kingdom at the Disarmament Conference after this Convention came into force, where they stated they had destroyed their stockpile of biological weapons.[328] The Soviet Union mirrored this announcement despite the existence of its biological weapons program, and stated that:

> In accordance with the legislation and practice of the Soviet Union, compliance with the provisions of the Convention on the Prohibition of Bacteriological (Biological) and Toxin Weapons, which was ratified by decree of the Presidium of the Supreme Soviet of the USSR dated 11 February 1975, is guaranteed by the appropriate State institutions of the USSR. At present, the Soviet Union does not

[326] Information which led to concerns within the U.S. government about a violation by the Soviet government of the BWC began to emerge in 1980. This information followed an anthrax epidemic that broke out in 1979 in the Ural Mountains city of Sverdlovsk. The U.S. government pressed for consultations between experts of the two countries due to the perceived inconsistencies of the Soviet explanation for this epidemic, which, upon their denial, led to a stalemating of the situation. Einhorn, "Treaty Compliance", 32.
[327] Jack M. Beard, "The Shortcomings of Indeterminacy in Arms Control Regimes: The Case of the Biological Weapons Convention," *The American Journal of International* Law 101, no. 2 (April 2007): 282.
[328] U.N. Conference of the Committee on Disarmament, *Final Record of the Six Hundred and Fifty-Fifth Meeting*, at 24, U.N. Doc. CCD/PV.655 (Mar. 4, 1975); U.N. Conference of the Committee on Disarmament, *Final Record of the Six Hundred and Fifty-Ninth Meeting*, at 13, U.N. Doc. CCD/PV.659 (Mar. 18, 1975); Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 1976*, 398-399.

possess any bacteriological (biological) agents and toxins, weapons, equipment or means of delivery, as referred to in article 1 of the Convention.[329]

Considered one of the "best-guarded secrets in the old Soviet Union", it was only in the 1990s when the extent of the Soviet violation of the BWC came to light, with several allegations following its discovery.[330] This fact was preceded by many U.S. allegations on the potential existence of this program and counter-allegations on the existence of a similar program within the U.S. by the Soviet Union.[331] This led, in turn, to an increase in the demands of clear transparency and verification measures to be included in this weapons convention.[332] The discoveries that followed the revelation of this biological weapons program are significant, particularly concerning the scale of the breach of the BWC it presupposed. This biological weapons programme is revealing in relation to the weakness of the compliance provisions of the BWC, particularly considering the damage it perpetrated to them.[333]

Throughout the following pages I will examine first the Sverdlovsk incident which led to the first suspicions as to the existence of this program and the program in itself. This will be followed by an exposition and analysis of the different interests which led to the development of this weapons programme at a government level.

[329] U.N. Conference of the Committee on Disarmament, *Final Record of the Six Hundred and Sixty-Sixth Meeting*, at 13, U.N. Doc. CCD/PV.666 (June 24, 1975); Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 1976*, 399.
[330] Leitenberg, "Biological weapons arms control", 4.
[331] Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 1985*, 178-179; Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 1986*, 160 and 269; Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 1987*, 410-411.
[332] Beard, "The Shortcomings of Indeterminacy in Arms Control Regimes: The Case of the Biological Weapons Convention", 284-285.
[333] It should be noted that concerns regarding the Russian biological weapon continued following the dissolution of the Soviet Union. Leitenberg, "A return to Sverdlovsk: Allegations of Soviet activities related to biological weapons", 181; Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 1999*, 582-583; Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 2000*, 528-529.

2.5.1.1 The Sverdlovsk Incident

The anthrax epidemic that occurred in the city of Sverdlovsk in 1979, indicated to the U.S. government by both open and classified sources, represented the first incident that initiated suspicions about an ongoing Soviet biological weapons program in violation of the BWC.[334] This outbreak concerned an outbreak of anthrax that occurred among the population of Sverdlovsk, which, according to different accounts, resulted in the deaths of between 64 to 300 people who lived and worked in the area surrounding the 19th Military Compound.[335] A first confrontation on the event occurred in March 1980, when the U.S. confronted the Soviet Union on suspicions on violating the 1972 BWC. This followed reports following the existence of this military base near the city and doubts on whether it was testing "anthrax vaccines with lethal aerosols" or whether it was instead engaged in "the illegal development of biological weapons."[336]

The Soviet response to this allegation was clear, and held that the outbreak had been caused by animal feed that had been infected with anthrax spores.[337] This official explanation was expanded in September 1986, when the Soviet Union presented an expanded account of these events. This expanded account held that, according to an official of the Soviet Ministry of Health, the infection was attributed to remains of anthrax-infected cattle being reduced to bone meal from a slaughterhouse in March 1979, with cases occurring between the 4th of April and the 18th of May.[338] Additionally, it stated that in response "topsoil had been scraped away where infected animals had

[334] Raymond A. Zilinskas, "Biological Warfare in the Third World," *Politics and the Life Sciences* 14, no. 2 (August, 1995): 63; Leitenberg, "A return to Sverdlovsk: Allegations of Soviet activities related to biological weapons", 161.
[335] Leitenberg, "A return to Sverdlovsk: Allegations of Soviet activities related to biological weapons", 163.
[336] Guillemin, "The 1979 Anthrax Epidemic in the USSR: Applied Science and Political Controversy", 18.
[337] Ibid, 19; Elisa D. Harris, "Sverdlovsk and Yellow Rain: Two Cases of Soviet Noncompliance?" *International Security* 11, no. 4 (Spring, 1987): 46.
[338] Leitenberg, "A return to Sverdlovsk: Allegations of Soviet activities related to biological weapons", 164.

been found … been buried, and, following that, decontamination was carried out by special teams using liquid disinfectant."[339]

The report U.S. authorities issued in response disagreed with the new explanation issued by the Soviet Union. The report held that the accidental release of anthrax had occurred within the Microbiology and Virology Institute in Sverdlovsk City following the explosion of a pressurized system containing dry anthrax spores, which went on to expand through a radius of at least 2.3 miles. This event was followed by partially effective mass immunizations, largely ineffective disinfection, and decontamination procedures. The new U.S. report also held that the spraying of decontaminating solutions from aircraft was not consistent with public health control measures for dealing with anthrax acquired through bad meat, and that the reported spraying and disinfection around the military facility were attempts to decontaminate surfaces affected by an infectious aerosol.[340]

U.S. authorities still held in 1991 that the outbreak had occurred due to an accidental release of anthrax spores from an illegal biological weapons facility.[341] A later investigation of the events in 1992 and 1993 later confirmed this, reinforcing U.S. suspicions as to the nature of the outbreak.[342] It revealed half of the allegations made by the U.S. as correct, with the epidemic being caused by an airborne escape of organisms from the military laboratory. This further showed that "previous Soviet government explanations given to the BWC Review Conference in 1986 and at the US

[339] Ibid, 164-165.
[340] Ibid, 167; Defense Intelligence Agency, *Soviet Biological Warfare Threat*, DST-1610F-057-86 (Washington D.C., 1986), 4-6.
[341] Leitenberg, "A return to Sverdlovsk: Allegations of Soviet activities related to biological weapons", 167.
[342] The study conducted by Leitenberg and Zilinskas on this topic is outstanding, and points clearly at the expansion of the disease and its origin. Milton Leitenberg and Raymond A. Zilinskas, *The Soviet Biological Weapons Program, A History* (Cambridge, Massachusetts and London: Harvard University Press, 2012), 423-445.

National Academy of Sciences presentation in 1988 were a consciously contrived fraud."[343] This consciously contrived fraud holds Sverdlovsk as a template of what not to do when verifying a treaty.[344]

2.5.1.2 Biopreparat: Soviet Development of Biological Weapons

Details regarding the full extent of the Soviet biological weapons programme only emerged following the defection of two high-placed insiders: Vladimir Pasechnik—a key research director of what turned out to be a clandestine Soviet biological weapons facility—and Kanatian Alibekov, who revealed that the Soviet military had developed virulent strains of smallpox virus as a biological weapon and mass-produced it.[345] Throughout the 1970s and 1980s, the Soviet military successfully developed an offensive biological weapons capability that gave it overwhelming superiority with regard to these weapons of mass destruction over the US and other Western countries.[346]

The revelations that followed on the scale and depth of this program, particularly from Pasechnik, were impressive. Seeing an early start following the First World War in 1925, it continued through to the Second World War.[347] The biological weapons programme continued beyond this date, with the modern biological weapons program

[343] Leitenberg, "A return to Sverdlovsk: Allegations of Soviet activities related to biological weapons", 178.
[344] Michael D. Gordin, "The Anthrax Solution: The Sverdlovsk Incident and the Resolution of a Biological Weapons Controversy," *Journal of the History of Biology* 30, no. 3 (Autumn, 1997): 476.
[345] Jonathan B. Tucker, "Preventing the Misuse of Biology: Lessons from the Oversight of Smallpox Virus Research," *International Security* 31, no. 2 (Fall, 2006): 129-130; David C. Kelly, "The Trilateral Agreement: Lessons for biological weapons verification," in *Verification Yearbook 2002*, ed. Trevor Findlay and Oliver Meier (London: Verification Research, Training and Information Centre, 2002), 93-94; Jeanne Guillemin, *Biological Weapons. From the Invention of State-Sponsored Programs to Contemporary Bioterrorism* (New York: Columbia University Press, 2005), 144-145; Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 1994*, 717-718.
[346] Anthony Rimmington, "Invisible weapons of mass destruction: The Soviet Union's BW programme and its implications for contemporary arms control," *The Journal of Slavic Military Studies* 13, no. 3 (2000): 1.
[347] Leitenberg and Zilinskas, *The Soviet Biological Weapons Program, A History*, 18-44.

coming to a start in 1971, upon the issuing a decree by the Central Committee of the Communist Party and the U.S.S.R. Council of Ministers. This presupposed the establishment of the All-Union Science Production Association, 'Biopreparat'.[348] This continued during the initial negotiations of the BWC, its signing, and its entry into force.

A number of biological weapons were developed, with all agents being designed to be dispersed as aerosols.[349] The two major weapon types the Soviet biological weapons programme developed were bomblets and spray devices. Several pathogens were developed, with the variola virus—that is, smallpox—and anthrax standing out.[350] The variola virus which was developed stands out, as its weaponization started before 1971 and continued beyond the point when the World Health Organisation declared the world free of naturally occurring smallpox. With many governments stopping vaccination programmes for their populations at the time and the development of a likelihood of suffering a 30% or higher mortality should the disease reappear, the Soviet Union "was the sole possessor of stocks of this particularly lethal biological weapons agent."[351] A 1993 interview with Pasechnik, most likely with aerosolised *Y. Pestis* in mind stands out:

> If you take, for example, a city with a population, say of 100,000 people, then I would say that it is very possible that in a short time, say a week time, the preparations will be prepared to apply to the whole city, with an effect that about half of its population will be killed.
>
> If there may be subversive activity in the city much less quantity would be required for that. Because it may be produced very easily and then applied in

[348] Ibid, 71-72.
[349] Ibid, 284.
[350] Ibid, 298-305; Selgelid, "Smallpox Revisited?", 6.
[351] Leitenberg and Zilinskas, *The Soviet Biological Weapons Program, A History*, 305.

such a way that it would be very difficult to discover who applied it. Users would deny it. That has been discussed in Biopreparat.[352]

The lethality of these biological weapons was considerable. The fact that the U.S. stopped vaccinations against smallpox in 1972 would have made an attack of these proportions against a population particularly deadly; more so if a vaccine was not immediately available.[353] Furthermore, a program codenamed *'Ekology'*, which aimed to develop biological weapons against animals and plants, was also developed by the Ministry of Agriculture.[354] This program targeted agricultural crops and livestock with agents that could lead to potential economic losses of immense proportions.[355]

The Soviet biological weapons program came to last a total of 65 years. Dating from 1928 or earlier to at least September 1992, it was the longest program in the 20th century. The U.S. program had a 27-year duration by comparison (from 1942 through to 1969), with British/Canadian programs lasting 21 years (1929-1960), the Japanese biological weapons program lasting 13 years (1932-1945), and the Iraqi program about 16 years (1975-1991).[356] It was "the largest such program by many times", with the Soviet Ministry of Defence possessing more experience in "researching, developing, testing, and stockpiling biological weapons" than any other national biological weapons program.[357] The fact that Soviet Concerns about U.S. biological weapons capabilities

[352] Ibid.
[353] Ibid, 307.
[354] Raymond A. Zilinskas, "The Anti-Plague System and the Soviet Biological Warfare Program," *Critical Reviews in Microbiology* 32, no. 1 (2006): 47.
[355] Anthony Rimmington, *The Soviet Union's Agricultural Biowarfare Programme: Ploughshares to Swords* (Birmingham, UK: Palgrave Macmillan, 2021), 3.
[356] Leitenberg and Zilinskas, *The Soviet Biological Weapons Program, A History*, 698.
[357] Ibid. See also: Kathleen M. Vogel, "The Soviet Biological Weapons Program: A History," *The Nonproliferation Review* 19, no. 3 (2012): 473; Selgelid, "Smallpox Revisited?", 6; W. Seth Carus, "A century of biological-weapons programs (1915–2015): reviewing the evidence," *The Nonproliferation Review* 24, no. 1-2 (2017): 144.

persisted well into the late 1980s and far beyond the U.S.' destruction of its anti-crop stockpile stands out further in relation to this violation of the BWC.[358]

Russia's 1992 admission that the Soviet Union had been in gross, generic violation of the treaty represents the only instance in which one of the superpowers has admitted to having been in total violation of a post-WW2 arms control treaty.[359] Russia's current official position, however, denies that an offensive biological weapons program ever took place and holds the Sverdlovsk anthrax outbreak as a natural event. This denial, argue Leitenberg and Zilinskas, represents an additional violation of both the letter and the spirit of the BWC.[360]

2.5.1.3 Interests behind the biological weapons program

The original biological weapons programme, much like its later iteration, was launched in 1928—the same year the Soviet Union agreed to the Geneva protocol.[361] Its launch was prompted by the devastation witnessed during the First World War and the Russian Civil War. This decision was strengthened upon the reception of intelligence reports in the 1930s showing that Germany was undertaking a biological weapons program.[362] Though these intelligence reports later proved to be false, it stimulated Soviet decision-makers to establish and operate a biological weapons program to

[358] Rimmington, *The Soviet Union's Agricultural Biowarfare Programme: Ploughshares to Swords*, 27.
[359] Milton Leitenberg, "Biological Weapons, International Sanctions and Proliferation," *Asian Perspective* 21, no. 3 (Winter 1997): 8-9.
[360] Leitenberg and Zilinskas, *The Soviet Biological Weapons Program, A History*, 711-712.
[361] Rimmington, "Invisible weapons of mass destruction: The Soviet Union's BW programme and its implications for contemporary arms control", 4.
[362] Leitenberg and Zilinskas, *The Soviet Biological Weapons Program, A History*, 44.

defend "Soviet military forces from perceived Western biological threat" and to "reply in kind should biological weapons be used against them."[363]

There was genuine alarm concerning the "deteriorating international position and the country's lack of military and economic preparation to defend itself."[364] The Soviet leadership feared that the capitalist and fascist nations were developing biological weapon capabilities.[365] It was only once the feasibility of the external threat was accepted that the build-up of organisations, facilities, and programmes commenced.[366] Marshal Kliment Voroshilov's—People's Commissar for Defence on the Soviet Union—1938 admission of the Soviet government's achievements in this field illustrates and reveals these underlying interests:

> Ten years ago or more the Soviet Union signed a convention abolishing the use of poison gas and bacteriological warfare. To that we still adhere, but if our enemies use such methods against us, I will tell you that we are prepared—fully prepared—to use them also and to use them against aggressors on their own soil.[367]

This idea saw itself substantiated in the arguments which were offered in the modern inception Soviet biological weapons program, particularly through the belief that when the U.S. government had lied in its 1969 announcement of the termination of the biological weapons program arose.[368] Military hawks in the Soviet leadership "believed that elements of the US military biological effort continued to be maintained

[363] Ibid.
[364] Rimmington, "Invisible weapons of mass destruction: The Soviet Union's BW programme and its implications for contemporary arms control", 3.
[365] The Japanese biological weapons programme prior to and during the Second World War presents an interesting parallel to the Soviet case despite Japan's non-accession to the 1925 Geneva Protocol. Japan's military hierarchy, in calculating that "the Bolsheviks greatly outnumbered the Japanese, concluded that BW would be an important weapon as a counterweight in such a future conflict." Furthermore, the Japanese "believed that the Soviets were already engaged in extensive BW research." Sheldon H. Harris, *Factories of Death: Japanese biological warfare 1932—45 and the American cover-up* (London and New York: Routledge, 2002), 22-23.
[366] Stockholm International Peace Research Institute, *Biological and Toxin Weapons: Research, Development, and Use from the Middle Ages to 1945*, 260.
[367] Stockholm International Peace Research Institute, *The Problem of Chemical and Biological Warfare, Volume I The Rise of CB Weapons* (Stockholm: Almqvist & Wiksell, 1971), 287.
[368] Leitenberg and Zilinskas, *The Soviet Biological Weapons Program, A History*, 407.

in secret."[369] The comments made by Arkady Schevchenko—a diplomat and personal advisor to Foreign Minister Gromyko defected to the U.S. in 1978—are revealing on this point. Regarding the Soviet Union's decision to accede and ratify the BWC, Schevchenko states that:

> The military's reaction was to say go ahead and sign the convention; without international controls, who would know anyway? They refused to consider eliminating their stockpiles and insisted upon further development of these weapons. The Politburo approved this approach. The toothless convention regarding biological weapons was signed in 1972, but there are no international controls over the Soviet programme, which continues apace.[370]

The Soviet Union's decision to the increase resources for its agricultural biowarfare programme and expansion of its network of facilities may have thus been "in response to the revelations in the media concerning the scale of historical activities in this area in the US."[371] This would parallel the much larger anti-personnel biological weapons programme. A range of circumstantial evidence, however, suggests that this program may have also been partially directed towards China. The date of its launch coincides with the beginnings of the Sino-Soviet split and the sharp deterioration of relations between China and the Soviet Union. At this time there was considerable Soviet concern about "China's massive conventional forces", with the Politburo fearing that they might "make a large-scale incursion into Soviet territory."[372]

An interesting difference in conceptions as to the value of biological weapons between the U.S. and the Soviet Union is implicit throughout this, with Soviet military planners viewing these weapons as having a central military role. The potential

[369] Anthony Rimmington, *The Soviet Union's Invisible Weapons of Mass Destruction: Biopreparat's Covert Biological Warfare Programme* (Birmingham: Palgrave MacMillan, 2021), 225-226.
[370] A.N. Shevchenko, *Breaking with Moscow* (New York: Alfred A. Knopf, 1985), 173-174.
[371] Rimmington, *The Soviet Union's Agricultural Biowarfare Programme: Ploughshares to Swords*, 79.
[372] Ibid, 202-203.

calculation being that "with judicious selection of the agents and timing of their delivery, the urban populations of Western Europe might be sufficiently weakened to allow an occupying army to accomplish an otherwise impossible task."[373] The 1993 interview with Pasechnik quoted earlier on the potential use and effect of aerosolised *Y. Pestis* further reinforces this idea.[374] That Russia's yearly BWC confidence-building measures submissions since 1992 have not documented satisfactorily whether this program was fully destroyed or converted to peaceful purposes is similarly noteworthy, particularly considering Russian insinuations that "that there is foreign development of chemical and biological weapons that are not controlled by international treaties."[375]

It is, therefore, clear that the Soviet Union's biological weapon programme—one of the clearest and biggest confirmed violations of an international arms control treaty—was developed for political interests. Stalin's biological weapons programme, initially a response to the biological sabotage programmes pursued by Germany in the First World War, can shed much light on how states might initiate and progress clandestine biological weapons programmes.[376] The apparent ease with which the Soviet Union was able to circumvent its international treaty obligations has similarly profound implications in regard to the operation of the BWC and its effectiveness in face of the perceived utility of biological weapons.[377] This is particularly the case due to the Soviet Union's cynical decision to violate the BWC's Article 1 from the start and the scale of the

[373] John D. Steinbruner, "Biological Weapons: A Plague upon All Houses," *Foreign Policy* 109 (Winter 1997-1998): 89-90.
[374] Leitenberg and Zilinskas, *The Soviet Biological Weapons Program, A History*, 305.
[375] Roger Roffey and Anna-Karin Tunemalm, "Biological Weapons Allegations: A Russian Propaganda Tool to Negatively Implicate the United States," *The Journal of Slavic Military Studies* 30, no. 4 (2017): 540-541.
[376] Anthony Rimmington, *Stalin's Secret Weapon: The Origins of Soviet Biological Warfare* (Oxford and New York: Oxford University Press, 2018), 2.
[377] Rimmington, "Invisible weapons of mass destruction: The Soviet Union's BW programme and its implications for contemporary arms control", 1-2.

programme.[378] A fact which has profound implications for the seemingly unyielding and solid taboo examined in the previous chapter of this thesis.

Having examined this, we will examine Iraq's biological weapons programme. This final case, of particular relevance due to its international significance at the time and association with this country's chemical weapons programme, will shed further light as to the motivations and reasons which prompt and underlie violations of the BWC.

2.5.2 Iraq's Biological Weapons Program

The Gulf War and 1991 resolutions introduced and explored in the previous section above revealed the existence of a biological weapons program in Iraq.[379] This biological weapons program had long-term developmental activities, and took place over a 20-year period.[380] Though tremendous gaps remain as to the nature of the program in itself—particularly in relation to the development, production, and filling of weapons—the discovery of this program raised additional questions about the difficulties that arise when verifying compliance and detecting noncompliance.[381]

Iraq, despite signing the BWC in 1972 did not ratify it until 1991, and was suspected of developing biological weapons since 1989.[382] Early reports on the program

[378] Ibid, 22; Rimmington, *The Soviet Union's Invisible Weapons of Mass Destruction: Biopreparat's Covert Biological Warfare Programme*, 1-2; Vogel, "The Soviet Biological Weapons Program: A History", 473.
[379] Pearson, *The UNSCOM Saga: Chemical and Biological Weapons Non-Proliferation*, 126-159.
[380] Philip D. O'Neill Jr., *Verification in an age of insecurity, the future of arms control compliance* (New York: Oxford University Press, 2010), 52; Raymond A. Zilinskas, "Biological Warfare and the Third World," *Politics and the Life Sciences* 9, no. 1 (August 1990): 64.
[381] Raymond A. Zilinskas, "UNSCOM and the UNSCOM Experience in Iraq," *Politics and the Life Sciences* 14, no. 2 (August 1995): 231-232; Richard A. Falk, "Assessing the Challenges of Biological Weaponry in the Late 1990s," *Politics and the Life Sciences* 18, no. 1 (March 1999): 113
[382] It is important to note that there is no evidence of a clear violation of this Convention, as it permits prophylactic research. Leitenberg, "Biological weapons arms control", 18-19.

revealed large-scale production of these biological agents since 1989 at four separate facilities near Baghdad, with delivery means ranging from aerial bombs and artillery rockets to surface-to-surface missiles.[383] UNSCOM revealed in 1994 that Iraq had persistently lied in its submissions to UNSCOM. It additionally discovered that Iraq had procured "39 tons of bacteriological growth media in 1988 alone, and additional quantities in 1989, as well as high technology fermenters and spray drying and weapons filling machinery."[384]

Though Iraq ultimately did not use biological weapons during the Gulf War, the development of these despite being a signatory state to the BWC represents and raises many of the same problems which its development of chemical weapons and which the Soviet biological weapons program raises.[385] It is interesting in this regard that Iraq began to import biological weapon agents and production equipment from foreign suppliers by 1985.[386] Once again, this points to the problems which exist to verification and in the detection of non-compliance. It also points to the underlying interests which led to the development and use of these weapons, particularly given how their level risk and utility was subject to both underestimation and overestimation by countries.[387]

[383] Ibid, 19.
[384] Ibid, 21.
[385] Tucker, "Lessons of Iraq's biological warfare programme", 229-230.
[386] Ibid, 238.
[387] Gregory Koblentz, "Pathogens as Weapons: The International Security Implications of Biological Warfare," *International Security* 28, no. 3 (Winter, 2003-2004): 116.

2.5.3 Other Allegations of Non-Compliance

Other states have also been suspected of developing or using biological weapons. A number of these states—like Syria, Iran, Libya, China, North Korea, and Taiwan—have been identified in the past.[388] A 1995 U.S. compliance report identifies a number of these countries, and holds Syria and Egypt—both signatories of the BWC—Libya, and India either as suspected or potential developers of biological warfare agents.[389] South Africa was also revealed to have developed biological weapons in February 1995, after it disclosed that it had initiated a biological weapons program in 1985. This program was maintained for several years, and reportedly produced toxins for the "assassination of opponents of apartheid."[390] Additionally, it was able to produce and use biological weapons, with their defensive or offensive use remained debated.[391]

Libya's December 2003 renunciation of weapons of mass destruction—explored within the previous sections—involved, additionally, its renunciation of biological weapons in December 2003. The country's renunciation of these weapons also involved an agreement to allow international inspectors to verify its commitments.[392] This renunciation took place after a 1993 Russian Foreign Intelligence Service report concluded that Libya was conducting preliminary research work in biological weapons.[393] Despite these suspicions, no concrete evidence of a biological weapons

[388] Elisa D. Harris, "Towards a comprehensive strategy for halting chemical and biological weapons proliferation," *Contemporary Security Policy* 12, no. 2 (1991): 129.
[389] Leitenberg, "Biological weapons arms control", 37-39.
[390] Ibid, 33. See also: Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 1996*, 686-687.
[391] Leitenberg, "Biological weapons arms control", 33-34.
[392] Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 2005*, 629-647.
[393] Furthermore, the report also noted that Libya had shown a marked interest in the work carried out with biological weapon agents in other countries. The report also noted that Libyan officials had indicated to other Arab countries that Libya was prepared to finance joint biological programmes, including those of an applied military nature on condition such work was to be conducted in Libya. Ibid, 642.

programme was initially uncovered, as lack of access to internal policy documentation made it impossible to determine whether such a programme was defensive or offensive.[394]

2.5.3.1 Iran

In 1994, a U.S. compliance report identified Iran as having produced biological warfare agents, with statements by Iranian officials suggesting that it had weaponized a negligible quantity of them.[395] The U.S. 1995 compliance report was more expansive and stated that the Iranian biological weapons programme had been "embedded with Iran's extensive biotechnology and pharmaceutical industries to obscure its activities."[396]

As explored within the section covering Iraq's chemical weapons programme, the national interests believed to have led to Iran's biological weapons program are fundamentally linked to Iraq's usage of chemical weapons in the Iraq-Iran war. Iraq's usage of chemical weapons made Iran desire to expand its security guarantees under the BWC and the CWC due to the lack of international response.[397] These weapons had a tremendous psychological effect on the Iranian soldiers.[398] Lieutenant General Ra-ad al-Hamdani's comments on this are particularly revealing, and shed further light into the motivations of both Iran and Iraq's concerning biological and chemical weapons:

> The attack almost entirely exterminated the Iranian division. This was the first true mass use of chemicals, where the air forcefully exterminated the 84th

[394] Ibid, 643.
[395] U.S. Arms Control and Disarmament Agency, "Adherence to and Compliance with Arms Control Agreements," June 23, 1994, 12.
[396] U.S. Arms Control and Disarmament Agency, "Adherence to and Compliance with Arms Control Agreements" May 30, 1995, 16.
[397] Stockholm International Peace Research Institute, *SIPRI Yearbook of World Armaments and Disarmament, 2001*, 533.
[398] Golov, "Deterrence in the Gulf War", 463.

> Division… This had a tremendous psychological effect on the rest of the Iranian division.[399]

This idea has been explored widely in the literature, particularly in relation to its potential links to Iran's noncompliance with the NPT. Bansak argues this in relation to the dangerous reaction the mothering of Iran's nuclear ambitions may prompt, enhancing the appeal of pursuing other types of unconventional weapon systems.[400] This idea is strongly related to how a powerful motivation for the creation of biological weapons is the "belief in the military utility of this class of weaponry" and their perception as "particularly inexpensive weapons of mass destruction… useful for conducting clandestine warfare."[401] President Hashemi Rafsanjani's 1988 characterisation of these weapons is particularly revealing in this regard, and outlines the weakness of international law in face of political and national interests:

> Chemical and biological weapons are poor man's atomic bombs and can easily be produced. We should at least consider them for our defense. Although the use of such weapons is inhuman, the war taught us that international laws are only scraps of paper.[402]

Shoham theorises that four categories appear to underlie Iran's efforts in the development of these weapons: Defence and deterring capacities, offensive and retaliatory capacities, independence, and self-reliance in the military sphere, and superiority and prestige.[403] This outlines the motivations that underlie the development

[399] Woods, Murray, and Holaday, "Saddam's War: An Iraqi Military Perspective of the Iran-Iraq War," 57.
[400] Bansak, "Managing networks of risk: A tailored approach to Iran's biological warfare threat potential", 66.
[401] Ibid, 71.
[402] Anthony Cordesman, *Iran's Military Forces in Transition: Conventional Threats and Weapons of Mass Destruction* (Westport, CT: Praeger Press, 1999), 234.
[403] Shoham, "Image vs. Reality of Iranian Chemical and Biological Weapons", 94.

of biological weapons, which rests in deterrence and the security dilemma, and is linked to the objectives which their acquisition can accomplish.[404]

2.6 Conventional Weapons

Out of the categories of weapons covered in chapter one, conventional weapons that present the best track record of compliance with treaty provisions. Instances of non-compliance have, however, taken place, particularly in relation to the Mine Ban Treaty. The CCM, which shows a positive history of compliance since its entry into force, has seen continuous usage of these weapons by non-state parties despite widespread criticism and calls to accede to the Convention.

In this section, I will explore and develop the cases of non-compliance which have taken place since the entry into force of these treaties, detailing the related facts for each. I shall do this following the same order found within the exploration of international treaties on conventional weapons in the last chapter, starting with the Mine Ban Treaty, following with the CCM, and ending with the ATT. Details regarding state motivations and responses will be provided where available.

[404] Bansak, "Managing networks of risk: A tailored approach to Iran's biological warfare threat potential", 71-72; Carus, "A century of biological-weapons programs (1915–2015): reviewing the evidence", 146.

2.6.1 Anti-personnel Mines

The usage of anti-personnel mines since the ratification of the Mine Ban Treaty has shown a positive if mixed, record. The majority of allegations of use of anti-personnel mines by state parties took place within the first years of the treaty in Africa; and in later years in Cambodia, Turkey, Yemen, and Sudan and South Sudan. No state parties have been alleged to use these weapons since 2016, and the use of these weapons remains a rare phenomenon.[405] The Landmine Monitor Report holds the overall trend as positive and argues that compliance and implementation by states parties has been excellent. It also states that the treaty's core obligations have been largely respected, and ambiguities been dealt with satisfactorily.[406] For instance, the 2022 Landmine Monitor reported that there was no evidence to indicate that any of the 164 state parties had violated its core obligations, and further remarked that this treaty:

> [H]as succeeded in establishing a robust and inclusive international framework to eliminate these weapons. Although challenges remain, the treaty's States Parties and its supporters are charting a clear course for achieving its ultimate objective of putting an end to the suffering and casualties caused by antipersonnel mines.[407]

Despite this seemingly overall positive trend, however, it is clear that there remain a number of problems concerning certain provisions of the treaty.[408] Issues concerning the submission of annual reports—which mirror the issues experimented by

[405] International Campaign to Ban Landmines, *Landmine Monitor 2016*, 1-2. See also: International Campaign to Ban Landmines, *Landmine Monitor 2017* (International Campaign to Ban Landmines–Cluster Munition Coalition, December 2017), 4; International Campaign to Ban Landmines, *Landmine Monitor 2018* (International Campaign to Ban Landmines–Cluster Munition Coalition, November 2018), 1-2; International Campaign to Ban Landmines, *Landmine Monitor 2019* (International Campaign to Ban Landmines–Cluster Munition Coalition, November 2019), 7-8.
[406] International Campaign to Ban Landmines, *Landmine Monitor 2013* (Landmine and Cluster Munition Monitor, November 2013) 1; International Campaign to Ban Landmines, *Landmine Monitor 2017*, 4.
[407] International Campaign to Ban Landmines, *Landmine Monitor 2022* (ICBL-CMC: November 2022), 7.
[408] This particularly concerns the retention of anti-personnel mines by state parties. International Campaign to Ban Landmines, *Landmine Monitor 2017*, 4.

the ATT on the submission of reports—additionally remain unsolved.[409] Furthermore, the Russo-Ukrainian conflict also currently presents the "greatest challenge to the emerging norm against these weapons", and has resulted in the unprecedented situation in which "a country that is not party to the Mine Ban Treaty is using the weapon on the territory of a State Party."[410]

Throughout the following subsection I explore and outline the major cases of non-observance of the treaty perpetrated by state parties.[411] Minor, initial cases of noncompliance with the Mine Ban Treaty will be explored briefly in the first appendix of this thesis.

2.6.1.1 Turkey

Unresolved allegations concerning the use of anti-personnel mines in south-eastern Turkey, near the border with Iraq, by the Turkish Armed Forces surfaced in May

[409] "Only 48% of States Parties have submitted annual reports for calendar year 2016, a slight increase from the previous year (45%). A total of 83 States Parties have not submitted a report for calendar year 2016. Only one State Party has not submitted an initial report: Tuvalu (due 28 August 2012)." Ibid.

[410] International Campaign to Ban Landmines, *Landmine Monitor 2022*, 7. Though these allegations are of interest—particularly in relation to the usage of anti-personnel mines in the territory of a state party and the Russian allegations that Ukraine, a state party, has used them in combat—it should be noted that since "there is no independent confirmation of the allegations, a final assessment and attribution of use of PFM-type mines in Ukraine is not possible at this time." International Campaign to Ban Landmines, *Landmine Monitor 2022*, 10-12.

[411] Though not directly relevant to the purpose of this chapter, a number of non-state parties to the Mine Ban Treaty have been alleged to use anti-personnel mines since the treaty's entry into force. In 2001 Russia, Uzbekistan, Kyrgyzstan, Nepal, and FR Yugoslavia were accused of using anti-personnel mines. Myanmar, a non-state party, was accused by Bangladesh and Thailand of laying mines illegally across their borders, with allegations continuing to arise yearly until 2019. Further use of antipersonnel mines by Russia in Chechnya was confirmed in 2006 and alleged from 2001 onwards. Non-state parties India and Pakistan laid a large number of antipersonnel mines along their border in December 2001 in appeared to be one of the biggest mine-laying operations in recent years. Further use of antipersonnel mines by Russia in Chechnya was additionally alleged from 2001 onwards and confirmed in 2006. International Campaign to Ban Landmines, *Landmine Monitor, Executive Summary 2001* (Landmine Monitor, August 2001), 9; International Campaign to Ban Landmines, *Landmine Monitor, Executive Summary 2002* (United States of America: Human Rights Watch, August 2002), 70; International Campaign to Ban Landmines, *Landmine Monitor Report 2009, Special Ten-Year Review of the Mine Ban Treaty* (Canada: Mines Action Canada, October 2009), 1; International Campaign to Ban Landmines, *Landmine Monitor Report 2010* (Canada: Mines Action Canada, October 2010), 1; International Campaign to Ban Landmines, *Landmine Monitor Report 2012* (Canada: Landmine and Cluster Munition Monitor, November 2012), 8.

2009.[412] These concerned media accounts for the deaths of nine Turkish soldiers and the injury of eight by an antipersonnel mine near Çukurca. Though the Turkish Army initially held that the Kurdistan Workers Party had planted an anti-personnel mine, media reported that this anti-personnel mine had been laid by Turkish forces not long before its detonation.[413]

Turkey informed states parties to the Mine Ban Treaty in May 2013 that a detailed investigation had been undertaken.[414] On December 2013, Turkey stated that a member of its military had been sentenced to over six years of imprisonment following a thorough investigation, further claiming that the verdict and sentence were unrelated to Turkey's obligations under the Mine Ban Treaty because of no mention of the illegal use of anti-personnel mines.[415] On the following April 2014 Turkey remarked on the differences between confirmed use and allegations of use, stating that they remained committed to being as transparent as possible.[416]

2.6.1.2 Yemen

Anti-personnel mines were alleged to be used by government forces in Yemen—a state party to the treaty—in 2012.[417] Though the forces that used the mines at the compound could not conclusively be determined, new information emerged in 2013

[412] Particularly in Sirnak province in April 2009 and in Hakkari province in May 2009. International Campaign to Ban Landmines, *Landmine Monitor Report 2012*, 5.
[413] Ibid.
[414] International Campaign to Ban Landmines, *Landmine Monitor 2013*, 6-7.
[415] International Campaign to Ban Landmines, *Landmine Monitor 2014* (International Campaign to Ban Landmines–Cluster Munition Coalition, December 2014), 14-15.
[416] Ibid, 15.
[417] These came to public attention after antipersonnel mines were discovered inside a building compound of the Ministry of Industry and Trade in Sana'a. International Campaign to Ban Landmines, *Landmine Monitor Report 2012*, 4.

concerning their use north of Yemen's capital.[418] Yemen's permanent representative to the UN in Geneva responded to the allegations, stating that the relevant government bodies and Yemen Mission in Geneva had been contacted and agreeing that "an official investigation will be conducted on the use of AP [antipersonnel] mines in the area."[419]

The situation was not resolved throughout the following year. In November, the prime minister's office admitted to a violation of the Mine Ban Treaty in 2011 and declared that Yemen had lost control of the ground and was committed to being serious and transparent on the issue.[420] It also further stated that the Military Prosecutor's Office had begun an investigation to identify those responsible for the mine use. No further details were provided about its progress or any other elements it had committed to reporting on, such as possible the origin of the mines, at the Thirteenth Meeting of the States Parties.[421]

2.6.2 The Arms Trade Treaty

When examining the compliance of states party to the ATT, it is essential take its recent entry into effect into account. Though this treaty represents a considerable achievement in its field, it is the most recent conventional weapons-related treaty to come into effect, and has considerably fewer reports by comparison to the other treaties which have been explored in this chapter. Despite this, the reports which have

[418] International Campaign to Ban Landmines, *Landmine Monitor 2013*, 4.
[419] Ibid, 4.
[420] Ibid, 12-13.
[421] Ibid.

arisen in relation to compliance with this treaty are of interest in relation to the overarching purpose of this thesis. These will be examined below.

2.6.2.1 Reports to the Arms Trade Treaty

Reports by state parties to the ATT have an imperfect track record. Out of the 89 state parties required by Article 13.3 of the ATT to submit their reports in 2018, only 36 did so in time, with a further four doing so shortly after the deadline—bringing the total to 45 percent compliance.[422] In 2019 reports saw a similar issue, with 45 state parties out of the 92 required by this article doing so on time (a 49 percent compliance rate).[423] In 2020, out of the total of 97 state parties required to submit annual reports under this article, only 35 did so (a 36 per cent compliance rate).[424] In 2021, 46 out of the 105 state parties required to submit annual reports did so (a 44 per cent compliance rate).[425] Though this represents a notable increase over on-time reporting rates than in previous years, it nevertheless underscored "the persistent challenge with low compliance rates in ATT reporting overall."[426] Finally, in 2022, 44 out of the 111 state parties required to submit a report did so (a 40 per cent compliance rate)—one of the lowest ever recorded.[427]

In addition to this, there has been an additional decline in the total number of reports since the entry into effect of this treaty. The year-on-year increase in the number

[422] Control Arms Secretariat, *ATT Monitor Report 2018*, 13.
[423] Control Arms Secretariat, *ATT Monitor Report 2019* (Control Arms Secretariat; New York, 2019), 14.
[424] Control Arms Secretariat, *ATT Monitor Report 2020* (Control Arms Secretariat; New York, 2020), 12.
[425] Control Arms Secretariat, *ATT Monitor Report 2021* (Control Arms Secretariat; New York, 2021), 13.
[426] Ibid.
[427] Control Arms Secretariat, *ATT Monitor Report 2022*, 13.

of state parties obliged to submit reports "has not been matched by a comparable increase in the number of annual reports submitted."[428] The percentage of state parties submitting annual reports declined from 82 per cent of 2015 reports to 64 per cent of 2019 reports—a trend that has continued in successive years.[429] The number of state parties that are non-compliant with their initial reporting requirement has remained constant, with 24 states not having submitted their reports to the ATT Secretariat.[430] Less than half of state parties to this treaty have fulfilled all of their ATT annual reporting requirements in any given year. This fact, when combined with the increasing rates of confidential reporting, have reduced the percentage of reports that "contribute positively to the transparency aims and objectives of the treaty."[431]

Additional issues have been encountered in relation to the reports that have been submitted. In 2017, an analysis of 435 separate transactions of SALW reported by an exporting state party in its 2016 annual report found that "a large majority of reported exports could not be matched in the report of the specified importing State Party."[432] This issue went further, with, in 78 percent of cases analysed, a reporting export having "no corresponding import of a similar weapon type" and in only 6 percent of cases there being "an exact 'mirror' between reports."[433] In some instances, the discrepancies were significant. For instance, Slovenia entering 'nil' for its imports of all categories of SALW whilst other parties reported the following: 1) "204 'SALW' and one light weapon from Austria", 2) "US$26,767 (€14,600) of small arms from Belgium", 3) an

[428] Control Arms Secretariat, *ATT Monitor Report 2020*, 39.
[429] Control Arms Secretariat, *ATT Monitor Report 2021*, 39; Control Arms Secretariat, *ATT Monitor Report 2022*, 13.
[430] Control Arms Secretariat, *ATT Monitor Report 2021*, 196.
[431] Ibid, 33.
[432] Control Arms Secretariat, *ATT Monitor Report 2017*, 47.
[433] Ibid.

undefined quantity of "revolvers and self-loading pistols from Bosnia and Herzegovina", 4) "ten revolvers and self-loading pistols, 68 rifles and carbines, and one assault rifle from Czech Republic", 5) "seven rifles and carbines from Finland", 6) "12 revolvers and self-loading pistols, and ten rifles and carbines from Serbia", 7) "US$3,631 (SEK32,119) of small arms from Sweden", 8) "two revolvers and self-loading pistols, and one rifle and carbine from Switzerland," and 9) "one sporting rifle and three assault rifles from United Kingdom."[434]

This was not the only example provided within the 2017 ATT Monitor Report, with similar discrepancies existing in Sweden's own annual report.[435] This issue was also observed in the following years. "As in all previous reporting years," notes the 2020 ATT Annual Report, the United Kingdom "did not provide information on imports of major conventional weapons or SALW, nor did they submit a 'nil' report," despite other state parties reporting exports.[436] This was also further the case in Austria's, Norway's, Spain's, Sweden's, and Finland's reports.[437]

Further instances of reporting non-compliance include instances of lack of updated information, which could hinder efforts towards "comprehensive treaty implementation and undermine the value of transparency in national control systems."[438] This tension between compulsory reporting and the current system has led to concerns relating to both its potential inhibiting of public transparency and the risk

[434] Ibid, 48.
[435] Smaller discrepancies were found in other 'nil' reporters: Latvia, Luxembourg, Samoa, and Uruguay. Ibid.
[436] It should be noted, however, that some States Parties also experienced issues in meeting reporting obligations due to issues relating to limited internal communication and coordination and the time which identifying experts to compete sections of the initial reports could require. Control Arms Secretariat, *ATT Monitor Report 2020*, 41.
[437] Ibid, 42-46.
[438] Control Arms Secretariat, *ATT Monitor Report 2018*, 98.

of undermining the "growing trend of public reporting on the arms trade through voluntary or national mechanisms."[439]

This decline in reporting rates is significant. Failure by state parties to submit initial reports and annual reports represents an undeniable, if minor, violation of the ATT as per articles 13(1) and 13(3) of this treaty:

> 13(1): Each State Party shall, within the first year after entry into force of this Treaty for that State Party … provide an initial report to the Secretariat of measures undertaken in order to implement this Treaty, including national laws, national control lists and other regulations and administrative measures;[440]
>
> 13(3): Each State Party shall submit annually to the Secretariat by 31 May a report for the preceding calendar year concerning authorized or actual exports and imports of conventional arms covered under Article 2(1).[441]

Not all the discrepancies seen in the reports, however, may be due to noncompliance. Discrepancies may be caused to fraud—that is, in to avoid paying tariffs—or due to some state parties deliberately censoring their reports to conceal sensitive information without stating that they have done so.[442] Other explanations potentially include issues relating to mismatches between physical movement and transfer of title or control, as there could be different conceptions of what constitutes an import and an export; different definitions of small arms; and withheld sensitive information, as allowed by the treaty itself.[443] It is also likely that a number of state parties are not fulfilling these reporting obligations because they lack the capacity and resources to do so. This, in addition to a lack of political will and prioritisation of

[439] Control Arms Secretariat, *ATT Monitor Report 2016*, 14.
[440] Arms Trade Treaty, art. 13(1).
[441] Ibid, art. 13(3).
[442] Control Arms Secretariat, *ATT Monitor Report 2017*, 48.
[443] Ibid, 49-50.

reporting obligations, may be the cause of the low reporting rates and decreasing commitments to transparency among state parties.[444]

2.6.2.2 Non-compliance with the ATT

Arms transfers to Saudi Arabia by ATT state parties and signatories represents the sole case of non-compliance which has been be observed.[445] Transfer data made available in 2014 by the Stockholm International Peace and Research Institute (SIPRI) has shown that major conventional weapons were transferred to Saudi Arabia before the ATT entered into force by Canada, France, Germany, the Netherlands, South Africa, Spain, Sweden, Switzerland, Turkey, the U.K., and the U.S.[446] The U.S., a signatory of the treaty, remained its largest supplier of weapons.[447] Problematic arms transfers to the Saudi-led coalition, writes the 2021 annual ATT Monitor Report, "are ongoing", and Saudi Arabia has been the world's largest importer since 1014, and was among the top five in previous years.[448]

The potential issue of non-compliance relating to this relates to the serious humanitarian crisis which continued to escalate since the start of the conflict in March

[444] Control Arms Secretariat, *ATT Monitor Report 2021*, 70.
[445] Though not considered to be a violation of the ATT at the present point in time, it should be noted that the Russo-Ukrainian conflict presents significant challenges for ATT state parties. Whilst Ukraine "has the right to self-defence under Article 51 of the UN Charter and there is no evidence that the weapons being supplied to it are being used to commit serious violations of international law," most of the weapon being transferred "have been the subject of little oversight." A lack of oversight of weapons transfers increases the risk of weapons—both SALW and sophisticated technologies—being diverted to criminal groups or extremist organisations. This risk stands out in relation to the duties imposed by the ATT on state parties, which must "conduct substantial due diligence in the application of Article 11.2, which obliges them to assess the risk of diversion, and to encourage them, together with importing States Parties, to consider the establishment of diversion risk-mitigation measures, including confidence-building measures and joint programmes." Control Arms Secretariat, *ATT Monitor Report 2022*, 16.
[446] Control Arms Secretariat, "Case Study 2. Dealing in Double Standards. How Arms Sales to Saudi Arabia are Causing Human Suffering in Yemen", 2-3; Control Arms Secretariat, *ATT Monitor Report 2016*, 14-15.
[447] Ibid, 3.
[448] Control Arms Secretariat, *ATT Monitor Report 2021*, 16-17.

2015. Transfers of weapons and ammunition by state parties and signatories to Saudi Arabia and its coalition partners could play an acutely destabilising role in Yemen, a fact which could represent a "violation of the Treaty."[449] Of the air raids that have been documented since the start of the Saudi-led coalition's campaign in 2015, 32 per cent have hit military targets, 29 percent non-military sites, and 29 per cent unknown sites. Attacks have caused up to 100,000 casualties, including 10,000—12,000 civilians, and it has been made clear that all parties to the conflict continue to commit acts of gender-based violence.[450]

This issue presents important questions for state parties to the ATT in their efforts to "implement the ATT in accordance with its object and purpose of reducing human suffering."[451] Article 7(4) of the ATT requires exporting state parties to take into account "the risk of conventional arms covered under Article 2(1) or of items covered under Article 3 or Article 4 being used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children."[452] The conflict in Yemen, writes the 2021 annual report, therefore shows how state parties that continue to export weapons to members of the Saudi-led coalition "are not fulfilling their obligations in this regard."[453]

Efforts to implement provisions of the ATT in accordance with its purpose and object of reducing human suffering in this conflict have had mixed results. The number of state parties that exported weapons to Saudi Arabia between 2015 and 2019 fell from

[449] Control Arms Secretariat, *ATT Monitor Report 2017*, 14.
[450] Control Arms Secretariat, *ATT Monitor Report 2021*, 16-17.
[451] Control Arms Secretariat, *ATT Monitor Report 2018*, 14.
[452] Arms Trade Treaty, art. 7(4).
[453] Control Arms Secretariat, *ATT Monitor Report 2021*, 16-17.

13 to 7. However, some state parties, such as France and the United Kingdom, have continued to supply weapons to Saudi Arabia despite continued evidence that all parties in the conflict have committed serious violations of international humanitarian law and International Human Rights Law.[454] State parties and signatories to the ATT that carry out these exports, writes the report, "have yet to live up to the object and purpose of the Treaty to reduce human suffering."[455] They thus seem to only "be paying lip service" to the norms of this treaty, carrying out behaviour that confirms the suspicions raised "by non-state parties such as India and Pakistan that the ATT is imposing a double standard."[456]

2.7 Conclusion

It is clear, having examined cases of non-compliance with the arms control and disarmament treaties, that ideas relating to deterrence, security, and the utility of weapons underlie their development and potential use despite international law. It can be difficult to identify a single set of factors unique to the problem of non-compliance, particularly due to the great number of individual charges and counter charges.[457] However, despite this, the cases explored within this chapter provide a clear insight into the different motivations underlying violations of the arms control and disarmament treaties examined within the first chapter of this thesis.

[454] Ibid, 17-18.
[455] Ibid, 18.
[456] Simone Wisotzki, *Violating the Arms Trade Treaty: Arms Exports to Saudi Arabia and the Humanitarian Crisis in Yemen* (Frankfurt: Peace Research Institute, 2018), 3-4.
[457] Allan S. Krass, *Verification: How Much Is Enough?*, 192.

The violations of arms control and disarmament treaties—both alleged and confirmed—examined within this chapter provide a clear insight into the different interests that prompted countries to go against both their international obligations and the taboo and shared ideology brought to light within the previous chapter. Through this, these instances of noncompliance show that the international legal regime surrounding arms control and disarmament weapons has not been successful in maintaining a taboo over the use of biological, chemical, nuclear, and conventional weapons.

It is important to note in this regard, however, that much like the taboo underlying each type of weapon is different, so are the different violations of international law. Conventional weapons disarmament and arms control treaties offer a better record than chemical, biological, and nuclear weapons arms control and disarmament treaties. This difference is particularly notable in relation to the CCM, where:

> Since joining the Convention on Cluster Munitions, no State Party is known to have transferred cluster munitions other than for the purposes of stockpile destruction or to retain them for research and training in the detection and clearance of cluster munition remnants, as permitted by the convention.[458]

The seemingly higher compliance rates of state parties to conventional weapon disarmament and arms control treaties are, then, a marked success. Though these treaties are comparatively more recent than others examined in chapter one—a factor that could play a role in the lack of major breaches and violations—the longstanding

[458] Cluster Munition Coalition, *Cluster Munition Monitor 2022: 13th Annual Edition*, 18-19.

taboo associated with the usage of certain conventional weapons should also be taken into account.

The violations by state parties of the CWC and BWC represent a markedly different counterpoint to the seeming success of conventional weapon disarmament and arms control treaties, particularly in relation to the strength of the taboo associated with their use. The motivations which prompted the early pre-WWII and Cold War Soviet biological weapons programme—featuring concerns on German and U.S. development and potential usage of these weapons together with their destructive power at their heart—showcases how military and political interests can give rise to a violation of this taboo.[459] A similar fact occurs when considering the effect that the usage of chemical weapons in the Iraq and Iran war had, particularly to the motivations prompting Iraq to develop and use chemical weapons and the effect that this later had on Iran. The cases of non-compliance with the NPT and reciprocal allegations of noncompliance between the U.S., and the Soviet Union and Russia further support this idea; particularly considering their wider strategic concerns. A fact which has also been seen in recent years through Syria's own usage of chemical weapons and Russia's use of chemical weapons despite its status as a state party of the CWC.

President Hashemi Rafsanjani's 1988 characterisation of international law, and chemical and biological weapons comes to mind in this regard; Schevchenko's and Pasechnik's exploration of the Soviet biological weapons programme also reinforce this

[459] The conclusion offered by Geissler and van Courtland Moon, support this idea: "three factors fuelled the BTW programmes of the major belligerents: first, a perceived threat; second, recognition of national vulnerability to biological attack and a belief that biological and toxin warfare is feasible and therefore may confer certain military advantages on any nation that is prepared to use it; and third, an internal momentum once the political decision had been taken which encouraged and supported national biological and toxin warfare programmes." Stockholm International Peace Research Institute, *Biological and Toxin Weapons: Research, Development and Use from the Middle Ages to 1945*, 260.

idea. Shoham's exploration of Iran's motivations in the development of biological weapons—defence and deterring capacities, offensive and retaliatory capacities, independence and self-reliance in the military sphere, and superiority and prestige—in this sense seems pertinent.[460] This is also the case in relation to Russia's use of the Novichok agent against Navalny, which stands out due to his position and importance.[461] These cases therefore make the following fact profoundly clear: Despite the existence of the taboo and the shared ideology underlying international arms control and disarmament treaties, this taboo has been broken by state parties for political, military, and security interests.[462]

These different violations of arms control and disarmament treaties show how political, security, and military interests fundamentally underpin and lead to violations of these very treaties despite the taboos associated with the weaponry they control.[463] They exceed the problems of enforcement and verification typically associated with international law, raising questions about the main factors motivating compliance outside of the taboo associated with different weapons.

[460] Shoham, "Image vs. Reality of Iranian Chemical and Biological Weapons", 94.

[461] For Price, the cases of chemical weapons usage between 2013 and 2018 "open up another line of erosion of the poison and CW taboos that requires stern responses if the targeted attacks are to be stemmed." Richard Price, "Weapons of Mass Destruction, Norms, and International Order: The Chemical Weapons Taboo in Syria," *New Perspectives* 26, no. 1 (2018): 43.

[462] The implied failure of treaties in face of these violations has been noted in the literature. Sims argues this in relation to the BWC: "how far has the conclusion of a biological disarmament treaty with its subsequent consolidation into an international regime achieved its purpose of minimising the likelihood of biological warfare occurring?" Despite the seeming early success of this treaty, the scene has, since then, "darkened and it is doubtful whether an answer can be given with any degree of assurance; for, as allegations have proliferated, so BW has crept in again from the outermost margins of credibility, to become ever more nearly 'thinkable', and at the same time the 1972 Convention has come to be criticised for diminishing rather than enhancing international security." Sims, *The Diplomacy of Biological Disarmament: Vicissitudes of a Treaty in Force, 1975-85*, 255. This perceived failure is of particular importance in face of the continuous development of biological weapons. Paul H. DeForest, "The Matrix of Biological Disarmament: Strategy, Law, and Technology," *Politics and the Life Sciences* 9, no. 1 (1990): 22.

[463] This idea has been developed in the literature surrounding taboos and international law, particularly in relation to Tannenwald's analysis of the nuclear taboo and other similar studies. For Dolan, for example, "evidence suggests that when pitted against another taboo or fundamental value, taboos may lose their stigma." State leaders may thus choose "to tragically violate taboos even as they embrace them as morally desirable. Their usage of these forbidden methods of war is not an indication of a failure to internalize the norm … nor is it an effort to revise a norm or challenge its usage. Rather … tragic taboo violation is a response to a difficult moral dilemma." Dolan, "Unthinkable and Tragic: The Psychology of Weapons Taboos in War", 46-47.

This seeming contradiction—that is, the tension between the taboo underlying international laws of arms control and disarmament and decisions by state parties to these very agreements to use these weapons—will be examined through the lens of classical realist authors throughout the following three chapters. Realism remains at the heart of theoretical and political disputes in world politics, "constituting a continuing reference point against which competing positions consistently define themselves."[464] The insights offered by classical realist scholarship can provide us with the answers that allow us to understand these breaches and to think through the implications of eroded taboos by political necessity and what it means for the overriding logic of international society. Through these insights, it explains how instances of failure to observe the taboo surrounding the use of certain biological, chemical, nuclear, and conventional come to take place; allowing us to understand the nature of these violations of international law and, through it, its strength.

[464] Williams, *The Realist Tradition and the Limits of International Relations*, 1.

Chapter III. E.H. Carr's Theory of International Law*

3.1 Introduction

Despite not being legal theorist, E.H. Carr's oeuvre remains central to the theorisation of the function and limits of international law within international society. Though the value of Carr's thought in relation to international law may at first seem to be of little note, this is not the case.[1] The new wave of literature exploring Carr's further works has offered invaluable insights into previously unaddressed aspects of his thought.[2] Cecelia Lynch and William E. Scheuerman represent two of the most prominent authors tackling Carr's thought on international law. Scheuerman argues that classical realists "not only engaged extensively with proponents of radical global reform, but many of them advocated major alterations to the existing state system."[3] For Lynch, however, Carr failed to understand the "historical move toward institutionalising

* Parts of this chapter have been published as a journal article. See: Carmen Chas, "E.H. Carr's Theory of Law: Exploring the Elements and Problems of International Law," *Global Studies Quarterly* 3, no. 3 (July 2023): ksad041.

[1] A number of critiques have addressed various elements of Carr's theory of law. See, for example: Ken Booth, "Security in Anarchy: Utopian Realism in Theory and Practice," *International Affairs*, 67, no. 3 (1991): 527-45; Paul Hirst, "The Eighty Years' Crisis, 1919-1999—Power," *Review of International Studies* 24, no. 5 (1998): 133–48; Hedley Bull, "The Twenty Years' Crisis Thirty Years On," *International Journal* 24, no. 4 (1968-1969): 625-638.

[2] A number of noteworthy publications have explored further dimensions of Carr's work. Some examples include: John J. Mearsheimer, "E.H. Carr vs. Idealism: The Battle Rages On," *International Relations* 19, no. 2 (2005): 139-52; Parent and Baron, "Elder Abuse: How the Moderns Mistreat Classical Realism", 193-213; Howe, "The Utopian Realism of E. H. Carr", 277-97; Cox, "E.H. Carr and the Crisis of Twentieth-Century Liberalism: Reflections and Lessons", 523–33; Jonathan Haslam, *The Vices of Integrity: E.H. Carr, 1892-1982* (London and New York: Verso, 2000), xi.; Haro L. Karkour "Debating Global Justice with Carr: The Crisis of Laissez Faire and the Legitimacy Problem in the Twenty-First Century," *Journal of International Political Theory* 17, no. 1 (February 2021): 81–98.

[3] William E. Scheuerman, "The (Classical) Realist Vision of Global Reform," *International Theory* 2, no. 2 (July 2010): 249.

international legal norms that restrain states' rights to engage in war and promote universalism and equality of status."[4]

Carr's relevance in this debate goes beyond that of mere historical importance and can clearly be seen in his wider oeuvre.[5] The issues which Carr explores retain their importance today, not just in relation to explaining the limits of international law, but also in relation to explaining the breaches of arms control and disarmament treaties outlined in the second chapter of this thesis. Carr's works, through their diplomatic and historical focus on international society, reveal what international law can achieve in regulating heavily political issues. They reveal the fundamental problems, questions, and issues surrounding international law; unearthing the factors inherent in international society which limit international law. This provides us, through this revelation, with clear answers as to how and why the legal restrictions and taboos surrounding arms control and disarmament might be eroded due to political necessities.

E.H. Carr was born in a north London suburb in 1892 to a Victorian middle-class family.[6] After studying Classics at Trinity College, he began to work at the British Foreign Office in 1916, where he was witness to the collapse of Tsarist Russia and the Russian Revolution.[7] Before resigning from the Foreign Office in 1936, he was chosen to be a part of the British Delegation to the Paris Peace Conference, was posted to Riga as a diplomat, and regularly attended League of Nations annual sessions.[8] He was elected

[4] Cecelia Lynch, "E.H. Carr, International Relations Theory, and the Societal Origins of International Legal Norms," *Millennium* 23, no. 3 (1994): 628.
[5] The lack of engagement with these wider works has been noted by a number of authors. See, for example: Wilson, "Radicalism for a Conservative Purpose: The Peculiar Realism of E. H. Carr", 123-36; Seán Molloy, *The Hidden History of Realism: A Genealogy of Power Politics* (New York and Hampshire: Palgrave Macmillan, 2006); K. Smith, "The Realism That Did Not Speak Its Name: E. H. Carr's Diplomatic Histories of the Twenty Years' Crisis", 475–93.
[6] Haslam, *The Vices of Integrity: E.H. Carr, 1892-1982*, 1-2.
[7] Ibid, 9-20.
[8] Ibid, 24-52

Woodrow Wilson Chair of International Politics at the University of Aberystwyth—then the first academic position of its kind in the United Kingdom—in 1936. Carr began to work at The Times, first as a writer of editorials and later as an assistant editor, from 1940 to 1946.[9] His political positions and seeming advocation of a pro-Soviet foreign policy rendered his search for a new academic appointment after the Second World War and forced resignation from the Chair of International Politics at Aberystwyth difficult.[10] His studies and publications during this period began to gradually move away from the study of international relations and became increasingly focused on Soviet history and history at large.[11] It was only in 1952 that he returned to Trinity College—first as a Tutor in Politics and, three years later, as a Fellow of the College—where he remained until passing away in November 1982.[12]

The choice to start the analysis of the research questions outlined in the introduction of this thesis with E.H. Carr is significant. E.H. Carr's prominence in both the foundation of both international relations and realist theory justifies the choice to open the analysis of the laws of disarmament and arms control with an analysis of his theory and works.[13] His approach to international relations, which understands "history and power as a problem that has to be taken seriously" considers questions which remain relevant today.[14] Furthermore, Carr's professional background and formation offers a valuable alternative to Hans Morgenthau and Georg Schwarzenberger's more juridical

[9] Ibid, 56-117.
[10] Ibid, 133.
[11] E.H. Carr, "An Autobiography," in *E.H. Carr: A Critical Appraisal*, ed. Michael Cox (Hampshire and New York: Palgrave, 2000), xxi.
[12] Haslam, *The Vices of Integrity: E.H. Carr, 1892-1982*, 166-175 and 299.
[13] Carr was additionally "the main responsible–along with Hans Morgenthau, but before him–for the secularization of Niebuhrian realism." Guilherme Marques Pedro, *Reinhold Niebuhr and International Relations Theory: Realism beyond Thomas Hobbes* (London and New York: Routledge, 2018), 122-123.
[14] Michael Cox, "Introduction by Michael Cox", in *The Twenty Years' Crisis, 1919–1939, reissued with a new preface from Michael Cox.* (London: Palgrave Macmillan, 2006), lxiii.

backgrounds, with his thought providing valuable insights into the role and impact of nationalism on international law. Thus, Carr's relevance in the overarching examination of the limits of international law is undeniable.

In order to bring Carr's complex and provocative thought on international law to light and answer the question of what international law can achieve in regulating heavily political issues, I provide an examination of the entirety of his works. This task is essential to bring forth this misunderstood aspect of Carr's thought. This will be done following the fundamental break in his thought that the start of the second world war represented.[15] Following this, I examine Carr's thought on the question of disarmament and arms control. This examination will be carried out through the hermeneutical method introduced in the introduction of this thesis due to its historically constituted understanding of interpretation and tradition, which makes a classical realist examination of the international laws of disarmament and arms control possible.[16]

The choice to examine this aspect of Carr's thought separately plays a dual purpose, as it allows for a further understanding of his theory of law and provides practical examples of many of the issues which he uncovers in relation to it. Carr's theory of law explains the different ways in which politics impinge on international law, as well as the problems faced by international legal regimes. The insights and warnings which it

[15] The outbreak of the second world war, as Haslam has shown, "exposed the bankruptcy of Carr's line on appeasement … But whereas August 1914 left intact his hopes for a return to prewar prosperity, the new conflict left him in a void." Haslam, *The Vices of Integrity: E.H. Carr, 1892-1982*, 81.

[16] In order to follow the hermeneutical method's historically constituted understanding of interpretation and tradition, the theoretical chapters of this thesis will open with an examination E.H. Carr due to how he was the first to articulate realism in the English-speaking world. This realist analysis will continue with Hans J. Morgenthau due to how he articulated this tradition as an international lawyer who began to think about international relations after reading Carr. Finally, it will finish with Georg Schwarzenberger due to his independent development of realism and his common origins with Morgenthau. Having done this, as outlined in the introduction, the conclusions and ideas of these three theorists will be brought together in the conclusion through a fusion of horizons, expanding the classical realist tradition and giving an answer to the three research questions guiding this thesis. It is in this way that I will fulfil the hermeneutical angle of this thesis.

reveals thus offer us a theory that can explain why political, security, and military interests lead to violations of the legal restrictions and taboos of disarmament and arms control; revealing to us, in turn, what international law can achieve in the regulation of heavily political issues.

3.2 Carr's Theory of Law

Carr's theory of law can be clearly seen across his published works. Originally developed during the interwar years, this work conveyed "a sense of intellectual urgency—a vital need to think rigorously and systematically about fundamentals."[17] It was a work "strongly impregnated with Marxist ways of thinking, applied to international affairs", in the words of Carr, whose "harsh 'realism'" eventually became something he "began to be a bit ashamed of."[18] His later works would focus on the nature of history and the relation of the past to the present.[19] The unique nature of Carr's classical realism in this regard should be emphasised, as it is of particular importance to the overarching purpose of this chapter and this thesis as a whole:

> E. H. Carr was sensitive to the dialectical relation of politics to morality; but he sought to reconcile morality with politics in a way that was distinct from a Kantian Republicanism. Rather than avoid the political decision by subordinating political power to morality through law—a largely depoliticising strategy Carr identifies with liberal internationalism—Carr refused to moralise politics.[20]

[17] Peter Wilson, "Introduction: The Twenty Years' Crisis and the Category of 'Idealism' in International Relations," in *Thinkers of the Twenty Years' Crisis, Inter-War Idealism Reassessed*, ed. David Long and Peter Wilson (New York: Oxford University Press, 2003), 1.
[18] Carr, "An Autobiography", xix.
[19] Ibid, xxi.
[20] Corey Ranford-Robinson, "Cosmopolitanism and Liberal Universalism in International Relations Theory: Moralising Politics or Politicising Ethics?" *Millenium: Journal of International Studies* 42, no. 1 (2013): 249.

Carr's classical realism defies easy classification and exceeds paradigmatic assumptions. His work was informed by a "consistent and compelling philosophy, one deferential to the basic insights of realism but unwilling to submit to the more dire implications of the doctrine."[21] He possessed a nuanced understanding of change that grasped the interplay of both power and morality, wherein "power was the dominant force, the dialectic between power and morality, and the need for some accommodation to be found between the two, is a useful theoretical device."[22] Rather than displaying adherence to the position that might makes right, Carr opposes such a stance and instead supports the idea that a moral position is a requirement of political theory.[23]

Carr's depth of thought with regard to international law is, then, both striking and firmly entrenched in his works.[24] The unity of Carr's theory and thought should be further emphasised.[25] The utility and purpose of an analysis of Carr's theory of law in relation to the fundamental questions examined in this thesis is, then, clear, and best articulated by Scheuerman:

> [B]y failing to engage constructively with sophisticated advocates of global reform, contemporary Realists betray one of the most impressive contributions

[21] Howe, "The Utopian Realism of E. H. Carr", 277.
[22] Daniel Kenealy and Konstantinos Kostagiannis, "Realist Visions of European Union: E.H. Carr and Integration," *Millenium: Journal of International Studies* 41, no. 2 (2013): 223-224.
[23] Molloy, "Pragmatism, Realism and the Ethics of Crisis and Transformation in International Relations", 460.
[24] This thought remains, despite the growth of international law, firmly relevant today. Dunne, Cox, and Booth articulate this idea in their introduction to *The Eighty Years' Crisis* special edition of the *Review of International Studies*: "Many of the arguments and dilemmas in Carr's The Twenty Years' Crisis are relevant to the theory and practice of international politics today. One obvious parallel is that Carr wrote the book against the backdrop of a transition in the organisation and conduct of world politics. In his view, the crisis at the end of the 1930s was brought about by a collapse in the whole edifice of liberal-idealist thinking which had permeated theory and practice in the inter-war period. Sixty years on, another sense of crisis pervades the discipline. The Cold War is over yet there is no consensus on what has replaced it." Tim Dunne, Michael Cox, and Ken Booth, "Introduction: The Eighty Years' Crisis," *Review of International Studies* 25, no. 5 (1998): v.
[25] Molloy touches on this aspect of E.H. Carr, arguing that his theory of international relations revolves around the idea of progressive change as an inevitable feature of the international environment: "Carr declared that this synthesis of moral aspiration and power politics would only be verified if it stood the test of experience. In the early years of the war, as his prescription for peaceful change by accommodating Hitler seemed a failure, Carr attempted once more to re-analyse the nature of his international crisis and to offer a solution once again incorporating the dyad of power and morality—it is important to note that it is the policy prescription rather than the mode of analysis that changes in Carr's treatment of international relations." Seán Molloy, "Dialectics and Transformation: Exploring The International Theory of E. H. Carr," International Journal of Politics, Culture, and Society 17, no. 2 (Winter 2003): 286.

> of their own rich and in many respects untapped tradition. By ignoring mid-century Realism's ideas about global reform, non-Realists unfairly eliminate a voice from a conversation, whose oftentimes powerful insights deserve a fair hearing.[26]

Furthermore:

> Global reform today seems at a standstill … Yet the momentarily frozen character of some present-day global institutions perhaps provides a useful opportunity to re-think many of the increasingly tired clichés that dominate thinking about global-level change.[27]

Due to the breadth of Carr's work, I will examine his theory of law following the fundamental division the onset of the Second World War caused. This will first be done through Carr's pre-1939 works and, following this, through his post-1939 works. This choice is primarily motivated due to the common themes which can be found in his oeuvre in both of these periods, the fundamental division the onset of the Second World War caused, and the transformative effect the Second World War had in international society. Carr's historical works—of particular interest in understanding the interplay of foreign policy and international law—are focused upon in the following section due to their incisive commentary on the dynamics of disarmament and breaches of international law.

A substantial part of Carr's theory of law can be observed within his pre-1939 works. Within these works, he provides insights into the nature of international law, and the way in which national interests and problems with international treaties fundamentally impact it. These ideas are, in turn, further developed in his post-1939

[26] Scheuerman, "The (Classical) Realist Vision of Global Reform", 249.
[27] Scheuerman, *The Realist Case for Global Reform*, ix.

works, where Carr explores the problems relating to the enforcement of and the role which national interest and the *status quo* play in international law.

Throughout these texts, Carr develops a profound critique of the role which nations and nationalism plays in international society and how this affects the very structure of international law. He explores the question of how a transformation of international society can entail a transformation of international law. Carr's theory of law is, therefore, essential if aiming to understand both what international law can achieve in regulating heavily political issues and the questions posed and presented in the introduction of this thesis. This division will also be further followed in the following two chapters, as the oeuvre of both Morgenthau and Schwarzenberger was notably affected by the collapse of international society in 1939.

3.2.1 Pre-1939 Works

3.2.1.1. The Nature of International Law

The relationship between international law and politics is a fundamental element Carr's work. "Politics and law," says Carr, "are indissolubly intertwined; for the relations of man to man in society which are the subject-matter of the one are the subject-matter of the other. Law, like politics, is a meeting place for ethics and power."[28] The same is

[28] E.H. Carr, *The Twenty Years' Crisis, 1919–1939, reissued with a new preface from Michael Cox* (London: Palgrave Macmillan, 2016), 165.

true of international law, which can have no existence except in so far as there is an international community which recognises it as binding:

> International law is a function of the political community of nations. Its defects are due, not to any technical shortcomings, but to the embryonic character of the community in which it functions. Just as international morality is weaker than national morality, so international law is necessarily weaker and poorer in content than the municipal law of a highly organized modern state.[29]
>
> The relationship between law and politics profoundly affects international law.[30]

A key aspect of this stems from the differences between international law and national law, which Carr identifies as follows:

> 1) International law recognizes no court competent to give on any issue of law or fact decisions recognized as binding by the community as a whole.
>
> 2) International law has no agents competent to enforce observance of the law. In certain cases, it does indeed recognize the right of an aggrieved party, where a breach of the law has occurred, to take reprisals against the offender. But this is the recognition of a right of self-help, not the enforcement of a penalty by an agent of the law.
>
> 3) Of the two main sources of law–custom and legislation–international law knows only the former, resembling in this respect the law of all primitive communities.[31]

The impact of these differences is significant. Exhortations to establish a rule of law, maintain international law and order, and defend international law assume that in doing and attempting to do so "we shall transfer our differences from the turbulent political atmosphere of self-interest to the purer, serener air of impartial justice."[32] International

[29] Ibid.

[30] Carr's thought in relation to international law was, as Jones notes, deeply unique. He was not a textbook realist, particularly in relation to his political program and his ideological preferences. Charles Jones, "E.H. Carr: Ambivalent Realist," in *Post-Realism: The Rhetorical Turn in International Relations*, eds. Francis A. Beer and Robert Hariman (East Lansing: Michigan State University Press, 1996), 97-98.

[31] Schwarzenberger's analysis of international law develops the idea of international law and international society as primitive communities further. This will be explored further in chapter five of this thesis. Carr, *The Twenty Years' Crisis, 1919–1939, reissued with a new preface from Michael Cox*, 159-160.

[32] Ibid, 159.

treaties, whatever their scope and content, lack an essential quality of law: they are not "automatically and unconditionally applicable to all members of the community whether they assent to it or not."[33] The Hague Conventions of 1907—examined within the first chapter of this thesis—are an example of this, as they were not binding on states not a party to them.[34]

These differences do not deprive international law of its legal character, as "the relation of law to politics will be found to be the same in the international as in the national sphere."[35] They give rise, however, to an important question: "Why is international law, and with it the rule that treaties must be kept, binding, and should they be regarded as binding at all?"[36] International law is unable to answer this question alone. The answer must be sought in the relationship between law and politics and in the fact that international law requires a society within which it is operative.[37] Law, Carr argues, "cannot be self-contained; for the obligation to obey it must always rest on something outside itself. It is neither self-creating nor self-applying."[38] The fact the obligation to obey the law must always rest on something outside itself links it to a capital shortcoming of the international community: the "failure to secure general acceptance of the postulate that the good of the whole takes precedence over the good of the part."[39]

[33] Ibid, 160.
[34] Carr explores this in his further publications. In a pseudonymous article published under the pseudonym 'John Hallett', Carr argues that this system broke down "not because its machinery failed to work, but because at the moment of supreme crisis, two of the Powers refused to allow it to set in motion." John Hallett [E.H. Carr], "The Concert of Europe," *Fortnightly Review* 129 (December 1930), 852.
[35] Carr, *The Twenty Years' Crisis, 1919–1939, reissued with a new preface from Michael Cox*, 160.
[36] It is interesting to note that Carr associates these two positions in legal theory with legal positivism and natural law, equating utopian thought to natural law and realist thought to legal positivism. Ibid, 161.
[37] Ibid, 164.
[38] Ibid, 165.
[39] Ibid, 147.

Carr links this to his critique of the doctrine of harmony of interests and the endemic discrimination members of the international community suffer due to their differences.[40] Carr's conception of power in international politics—which he divides into military power, economic power, and power over opinion—is an essential element of this.[41] Political judgements modify the facts on which they are passed, making political thought itself a form of political action.[42] The relationship between political thought and political action carries with it questions of coercion which Carr sees as answerable only through both utopia and reality.[43] "The utopian who dreams that it is possible to eliminate self-assertion from politics and to base a political system on morality alone", he argues, "is just as wide of the mark as the realist who believes that altruism is an illusion and that all political action is based on self-seeking."[44] In other words, the problem at the heart of international law is precisely the perceived dichotomy between these two extremes and attempts to choose either one or the other.[45]

[40] Ibid, 148.
[41] Of these three, warfare is a particularly prominent factor in international politics due to how every act of state, in its power aspect, "is directed to war, not as a desirable weapon, but as a weapon which it may require in the last resort to use." This has important implications for the overall analysis of arms control and disarmament jurisprudence, particularly in light of the heavy role which weaponry plays in this first category. Ibid, 102.
[42] Carr surmises this with the following quote: "In the process of analysing the facts, Marx altered them. To attempt to distinguish between Marx the scientist and Marx the propagandist is idle hair-splitting." Ibid, 5-6.
[43] Carr's thought on this point was prominently influenced by Mannheim. Molloy, "Dialectics and Transformation: Exploring the International Theory of E.H. Carr", 293 and 300; Gismondi, *Ethics, Liberalism and Realism in International Relations*, 138-141.
[44] Carr, *The Twenty Years' Crisis, 1919–1939, reissued with a new preface from Michael Cox*, 92.
[45] Carr's realism, for Mearsheimer, is manifest in his discussion of international law, where he makes it clear that rather than a branch of ethics it is a vehicle of power. Mearsheimer, "E.H. Carr vs. Idealism: The Battle Rages On", 140.

3.2.1.2 National Interests

The impact which national interests have in the creation and treatment of international law feature prominently in Carr's theory of law.[46] Though Koskenniemi has addressed this aspect of the realist critique of international law, arguing that the camouflage legal arguments give to political and economic power "is their very point", Carr's analysis of national interests play in international law reveals deeper facets of this concept and its impact.[47]

Carr identifies national interests as a foundational aspect driving international relations and international law within the interwar period.[48] A key aspect Carr explores relating to national interests is the idea of state security. France's quest for security was the most "important and persistent single factor in European affairs in the years following 1919."[49] This quest for security determined its position on a number of issues of international law throughout the period.[50] It became, Carr argues, a French interest to support Poland, Czechoslovakia, and Yugoslavia against rival powers and "even to save her friends from the inconvenience of a too rigorous interpretation of their obligations towards their minorities."[51]

[46] "In his seminal realist tract, *The Twenty Years' Crisis*," Mearsheimer writes, "Carr criticizes liberalism and length and argues that states are motivated principally by power considerations." John J. Mearsheimer, *The Tragedy of Greater Power Politics* (New York and London: W.W. Norton & Company, 2014), 18.
[47] Koskenniemi, *The Politics of International Law*, 99.
[48] The Treaty of Versailles is one of the clearest examples Carr explores in relation to the influence of national interests on international law. It affected almost every important political event of an international character in this period. The difference between principle and practice in the Treaty of Versailles gave an easy handle to those who wished to argue that it "was a tainted document and that the Allies had violated the conditions on which the armistice was concluded." E.H. Carr, *International Relations Between the Two World Wars, 1919-1939* (Hong Kong: Macmillan, 1990), 3-4 and 5-6.
[49] The reasons Carr identifies for this are interesting in relation to the wider study of arms control and disarmament carried out within this thesis, particularly in relation to the impact which the rise of Germany had. Ibid, 25.
[50] Particularly in relation to France's support of the terms of the Treaty of Versailles and alliances with Poland, Czechoslovakia, and Yugoslavia.
[51] Carr, *International Relations Between the Two World Wars, 1919-1939*, 42-43.

Britain's reluctance to see any one power dominate the continent of Europe contrasted with France's interest to support these countries. The destruction of the German fleet gave the British Empire a sense of perfect security. Furthermore, "Time-honoured British conceptions of fair play and chivalry to a beaten foe came into conflict with the legally precise French mind."[52] These national interests and conception of its own security fundamentally affected Britain's interpretation of the Treaty of Versailles and its position on disarmament.[53] These contrasting views of the aims and duties imposed by the Treaty of Versailles fundamentally affected disarmament negotiations in the period:

> The reply of France to every British proposal for disarmament was a counter-claim for increased security. From 1922 onwards, France began to seek this additional security in special agreements designed to strengthen and make more precise the coercive articles of the Covenant.[54]

The impact which these differing national interests had—both in relation to disarmament and the workings of the League of Nations—was significant. The negotiations which preceded the Geneva Protocol are, for Carr, a particularly prominent example of this. France now had clients in Eastern and Central Europe whose safety had become part of its own: It required a general guarantee of additional security for both itself and its allies. Discussions in Geneva about disarmament gave an excellent opportunity for demanding this guarantee, whereby if it were obtained "French policy

[52] Ibid, 50.
[53] Ibid.
[54] Carr develops this point extensively, particularly in relation to the discrepancy between the two aims of the League: "In Britain, where the pacific functions of the League were held in honour, there was widespread enthusiasm for disarmament, though successive British Governments argued that Britain herself had already disarmed to the limit prescribed by the covenant. In France, where the League was prized mainly as a bulkwark of the *status quo*, there was little inclination to abandon the preponderance of armaments which was required to make that function effective. The deadlock, based on the discrepancy between the two aims of the League, was never resolved." E.H. Carr, *Britain: A Study of Foreign Policy from the Versailles Treaty to the Outbreak of War* (London: Longmans, 1939), 105.

would have secured a notable success. If it were not obtained, France and her allies would admit no obligation to disarm."[55]

The Locarno Treaties and the general quest for disarmament show the prominent role which national interests played in creation and treatment of international law. Every time that the British or German Delegations reminded the League or its organs of the importance of Disarmament, "the French, Polish, and Little Entente Delegations harped no less emphatically on the need for security as a prior condition of disarmament."[56] In a pseudonymous article, Carr remarks that despite France's sincere belief in the League of Nations, "her view of the League is not quite the same as that prevalent elsewhere."[57] France's perception of the League of Nations thus impacted its collective security policies.[58] Carr also explores this in relation to the impact of national interests had in a country's foreign policy, particularly in relation to Italy's challenges to the international status quo.[59]

The analysis which Carr conducts of the impact of national interests in international law during the interwar period is incisive.[60] It is telling that, in relation to disarmament, the "lowest point consistent with national safety" agreed upon by the League was left to the discretion of individual governments despite the awkward

[55] Carr, *International Relations Between the Two World Wars*, *1919-1939*, 88.
[56] Ibid, 113.
[57] John Hallett [E.H. Carr], "What France Thinks," *Fortnightly Review* 128 (July 1930): 83.
[58] John Hallett [E.H. Carr], "Nationalism the World's Bane," *Fortnightly Review* 133 (June 1933): 697-698; E.H. Carr, "Abyssinian Documents," *The Times Literary Supplement* 1833 (March 20, 1937): 201; E.H. Carr, "Reviewed Work(s): Survey of International Affairs 1935 by Arnold J. Toynbee and V. M. Boulter," *International Affairs* 16, no. 2 (March-April 1937): 282.
[59] Carr examines these aspects of Italy's national interests and foreign policy in the following articles: George Martelli and E.H. Carr, "Italy's Ambitions," *The Listener* 20, no. 512 (November 1938): 956; E.H. Carr, "The League of Peace and Freedom: An Episode in the Quest for Collective Security," *International Affairs* 14, no. 6 (November-December 1935): 837; R.W. Seton-Watson and E.H. Carr, "Nations Bordering the Adriatic," The Listener 20, no. 515 (November 24, 1938): 1122; Herbert Richmond and E.H. Carr, "Strategy in the Mediterranean," *The Listener* 20, no. 518 (December 15, 1938): 1290; E.H. Carr, "Political Scene in the Mediterranean," *The Listener* 20, no. 520 (December 29, 1938): 1412.
[60] Despite their different professional backgrounds, there are some striking similarities between Carr's and Schwarzenberger's analyses of national interests and international law. Schwarzenberger's thought on this point will be examined in chapter five.

example set by the disarmament that had been imposed on Germany following the First World War.[61] Despite widespread enthusiasm "successive British governments argued that Britain herself had already disarmed to the limit prescribed by the Covenant"; in France, however, "where the League was prized mainly as a bulwark of the *status quo*, there was little inclination to abandon the preponderance of armaments."[62] This discrepancy between the need for security and disarmament resulted in the deadlock of disarmament discussions within the period.[63]

Carr's conclusion on Locarno reveals his thoughts on the role which national interests play in the development of international law: "Britain was ready to use military force in order to maintain a frontier which she regarded as vital to her own defence", but not "in order to maintain other frontiers."[64] A fact fundamentally linked to his ideas on the discrimination inherent to international society and ironic when considering the "professed British fidelity to the Covenant as a whole."[65] Politically, the "alleged community of interest in the maintenance of peace", is capitalised by a dominant nation or group of nations, becoming "a special vested interest of predominant Powers."[66] National interests defined the shape and form which international law and treaties took. These national interests, in turn, affected the ways in the obligations imposed by these

[61] The interplay of different national interests within the Disarmament Conference, particularly in relation to the British, French, German, and Russian positions is of great interests, and will be carried out in greater detail within the following section. Carr, *Britain: A Study of Foreign Policy from the Versailles Treaty to the Outbreak of War*, 104.
[62] Ibid, 105.
[63] Carr also explores the proposal put forward in 1929 by the British Delegation to incorporate the Kellogg-Briand Pact into the Covenant of the League of Nations. This would have made the sanctions of Article 16 apply not only to wars prohibited by the existing Covenant, but to all wars prohibited by the Pact of Paris. The proposal, which was originally supported by the French Delegation, encountered strong opposition from the Scandinavian countries and Japan upon being discussed in the Assembly of 1930. As there was serious doubt about the ratification of amendments, the decision was taken to postpone the question to the Assembly in 1931, which saw the amendments talked out. Carr, *International Relations Between the Two World Wars*, *1919-1939*, 121-122.
[64] Ibid, 107-108.
[65] Ibid, 108.
[66] "To-day, when no single Power is strong enough to dominate the world, and supremacy is vested in a group of nations, slogans like 'collective security' and 'resistance to aggression' serve the same purpose of proclaiming an identity of interest between the dominant group and the world as a whole in the maintenance of peace." Carr, *The Twenty Years' Crisis, 1919–1939, reissued with a new preface from Michael Cox*, 76.

treaties were interpreted, pointing to the failures to observe the taboo underlying the use of certain explored in chapter two of this thesis.

3.2.1.3 The Problems of Treaties

Carr identifies a number of problems which impact the role played by treaties in international law. The first fundamental problem relates to the underlying politics which lead to their creation:

> Every system of law presupposes an initial political decision, whether explicit or implied, whether achieved by voting or by bargaining or by force, as to the authority entitled to make and unmake law. Behind all law there is this necessary political background. The ultimate authority of law derives from politics.[67]

Every treaty, in other words, sees its origin within a necessary political background. This feature is linked to the nature of international law, which makes treaties—independent of their scope and contents—lack an essential quality of law through their lack of automatic and unconditional applicability.[68] The lack of automatic and unconditional applicability of treaties is further affected by the fallacy involved in presupposing that the interests of every state are the same.[69] "It is the natural assumption of a prosperous and privileged class" with a dominant voice in the community, to be "naturally prone to identify its interest with their own."[70] This makes the supremacy of the privileged

[67] Carr, *The Twenty Years' Crisis, 1919–1939, reissued with a new preface from Michael Cox*, 166.
[68] A fact which gains importance in relation to the different arms control and disarmament treaties examined within chapter one, in which, in a majority of cases, faced a number of complications throughout their history in relation to attempts to bind certain states. The crisis currently faced by the NPT and the motives which allegedly have led to the collapse of the INF Treaty recently—examined in chapter two—are particularly relevant examples of this. Ibid, 160.
[69] Ibid, 56.
[70] Ibid, 75.

overwhelming enough so as to make its interests those of the community, as its well-being carries with it that of the other members of the community.[71]

Principles, then, merely reflect different national policies framed to meet different conditions.[72] The utopian, upon preaching the doctrine of harmony of interests, "is innocently and unconsciously … clothing his own interest in the guise of a universal interest for the purpose of imposing it on the rest of the world."[73] Just as in 1917, upon deciding on a policy of war with Germany, Wilson "proceeded to clothe that policy in the appropriate garment of righteousness", so did Briand "fearful of attempts made in the name of justice to disturb a peace settlement favourable to France" have no more difficulty "in finding the moral phraseology which fitted his policy" in 1928.[74] International treaties, then, are unconscious reflections of a particular interpretation of national interest at a particular time. The differing interests of states surrounding the nuclear arms control and disarmament treaties explored in chapter one of this thesis illustrates this aspect of Carr's theory, as does the lack of clarity on the alleged violation of Article VI of the NPT explored in chapter two.

The fact that treaties are unconscious reflections of particular interpretations of national interests at a particular time fundamentally affects the role they can play in international society. Satisfied nations "generally assume that to maintain the *status quo* is the best way to maintain peace."[75] By contrast, countries which are struggling to force their way into the dominant group will "naturally tend to invoke nationalism

[71] Carr argues that in so far as "the alleged natural harmony of interests has any reality, it is created by the overwhelming power of the privileged group, and is an excellent illustration of the Machiavellian maxim that morality is the product of power." Ibid.
[72] Ibid, 80.
[73] Ibid, 71.
[74] Ibid, 69-71.
[75] Carr, *Britain: A Study of Foreign Policy from the Versailles Treaty to the Outbreak of War*, 98-99.

against the internationalism of the controlling Powers."[76] These national interests, Carr argues, make the legal validity of treaties "a weapon used by the ruling nations to maintain their supremacy over weaker nations on whom the treaties have been imposed."[77] The political origins of treaties, in being impossible to avoid, are a fundamental problem in their nature.[78]

The second problem which Carr identifies in relation to international treaties is that of their static nature, which makes their consistent application through time impossible. Carr articulates the fundamental aspects of this second problem as follows:

> Words are often misleading in politics because their meanings change … When, therefore, we say that Britain stands for democracy, we are thinking of general principles and a general method of approach to political issues rather than of a specific institution working in accordance with specific rules.[79]

Any social order implies a large measure of standardisation and therefore of abstraction. There cannot be a different rule for every member of the community.[80] The standardisation implied by social orders is a problem when dealing with matters that have to be applied to states which vary considerably in size, power, and in political, economic, and cultural development.[81] Once it came to be believed that "the unruly flow of international politics could be canalized into a set of logically impregnable abstract formulae" the end of the League as an effective political instrument was in

[76] Carr, *The Twenty Years' Crisis, 1919–1939, reissued with a new preface from Michael Cox*, 79.
[77] Ibid, 174.
[78] Carr explores this idea in relation to the development of attempts to have any persons in Germany accused of having committed acts in violation of the laws and customs of war. Here, Carr concludes that had Allied Governments been willing to bring to trial any national accused of similar offenses by the German Government, "the whole procedure might have been a valuable innovation and an earnest of the desire of mankind to make international law an effective reality." Carr, *International Relations Between the Two World Wars, 1919-1939*, 45-48.
[79] Carr, *Britain: A Study of Foreign Policy from the Versailles Treaty to the Outbreak of War*, 3.
[80] Carr, *The Twenty Years' Crisis, 1919–1939, reissued with a new preface from Michael Cox*, 29.
[81] Ibid, 30.

sight.[82] Linguistic contortions encouraged the failure to distinguish between the world of abstract reason and the world of political reality.

The dilemma of international law is, then, that of ecclesiastical dogma. "Elastic interpretation adapted to diverse needs increases the number of the faithful", whilst rigid interpretation, "though theoretically desirable, provokes secessions from the church."[83] The consistent application of a treaty throughout a period of time is, then, a considerable challenge; especially in areas of particular national interest. The U.S.', and the Soviet Union and Russia's mirrored allegations of noncompliance with nuclear arms control and disarmament treaties explored in chapter two—of a markedly technical character—highlights the problems the static nature of treaties prominently.

Compliance is the third great problem of international treaties. Carr explores this through his critique of *pacta sunt servanda* in the interwar period, which he links to the issues the nonfulfillment of treaty obligations creates. Writers during the interwar period, he writes, attempted to treat this rule "not merely as a fundamental rule of international law, but as the cornerstone of international society."[84] This attempt to treat *pacta sunt servanda* as the cornerstone of international society gave rise to a set of prominent issues in relation to the selective fulfilment of treaty obligations.

Instances of noncompliance in the interwar period saw the states concerned defending themselves either "denying that any breach of treaty obligations has

[82] Ibid, 31.
[83] Ibid, 171. The analysis offered by Carr of the Allied policy on Stresemann illustrates the damage which this idea caused: "The external misfortunes which destroyed the liberalism of Stresemann began at Versailles. The hunters, having overpowered their quarry, tried to keep it 'in a small enclosure where it will be dangerous and bound to run amok'." E.H. Carr, "The Tragedy of German Liberalism," The Times Literary Supplement 1939 (April 1, 1939): 182.
[84] Carr, *The Twenty Years' Crisis, 1919–1939, reissued with a new preface from Michael Cox*, 168-169.

occurred, or by alleging that the treaty had in the first instance been violated by the other party."[85] This made it difficult to discover from the words used whether the alleged justification was based on legal or on moral grounds. The French Chamber of Deputies' refusal to carry out the French War debt agreement with the United States did so on the grounds that determining circumstances had changed since the conclusion of the agreement.[86] Similarly, the British default on the Anglo-American debt agreement was justified on the grounds of economic necessity, holding on moral rather than legal grounds that the burden imposed by the agreement was unreasonable and inequitable.[87] This was again the case in Germany's repudiation of the Versailles Treaty's military clauses in March 1935, wherein the action was justified on the "alleged failure of the other parties to the treaty to implement their own obligations to disarm."[88]

Problems of compliance were exacerbated by the elastic and inconsistent manner in which *pacta sunt servanda* was applied in practice. Despite repudiating their war debt agreements, French and British governments vehemently insisted that "the disarmament clauses of the Versailles Treaty were legally binding on Germany, and could be revised only with the consent of the interested powers."[89] The flagrant violations of the Kellogg-Briand Pact committed by Japan and Italy after its signature—"the one thinly disguised as a police operation, the other, still more thinly, as a defensive war"—aggravated the inconsistent and elastic application of *pacta sunt servanda* further.[90]

[85] Ibid, 171.
[86] Ibid.
[87] Ibid, 172.
[88] Ibid.
[89] Ibid, 174.
[90] Carr, *International Relations Between the Two World Wars, 1919-1939*, 119-120.

Problems of non-compliance and the impossibility of imposing sanctions against the parties in breach fundamentally damaged the peace settlement itself.[91] They show, together with the other two fundamental problems explored in the previous pages, how the element of power is inherent in every political treaty. These ideas have important implications for the conclusions outlined in chapters one and two of this thesis, particularly in relation to the erosion of the taboos underlying disarmament and arms control treaties and non-compliance.[92] The contents of treaties reflect the relative strength of the contracting parties. Whilst strong parties will insist on the sanctity of treaties conducted by them, weaker states will renounce them as soon as the power position alters, and they are able to reject or modify the obligation.[93] Respect for law and treaties can only be maintained in so far as the law recognises an effective political machinery through which it can itself be modified or superseded.[94]

3.2.2 Post-1939 Works

3.2.2.1 Nationalism

Throughout Carr's works, nation and state—whether in relation to the apparatus of government or the field in which it works—refer to a unit of political power that plays an important role in his conception of international law.[95] "Sovereign states", Carr

[91] Ibid, 215.
[92] Though this section argued for the relevance of Carr's analysis of international treaties, it should be noted that Lynch argues against this being the case, arguing that Carr simplifies the character and goals of peace activism *vis-à-vis* international legal standards and that his overarching critique of law and social forces is time-bound. This, Lynch argues, causes Carr to fail to understand the importance or persistence of peace movement agency and the historical move towards the institutionalisation of international legal norms. This section and this chapter as a whole argues for the opposite view. Lynch, "E.H. Carr, International Relations Theory, and the Societal Origins of International Legal Norms", 594-595 and 628.
[93] Carr, *The Twenty Years' Crisis, 1919–1939, reissued with a new preface from Michael Cox*, 174-175.
[94] Ibid, 176.
[95] E.H. Carr, *Conditions of Peace* (London: Macmillan, 1942), 39.

writes, “are legal conventions between which no kind of equality exists or can be reasonably assumed.”[96] They are not only quantitatively unequal, but also and qualitatively incomparable.[97] This makes the application of rights such as self-determination in international law practically inconsistent, as fixed standards of number and size for independent units vary from one place and period of history to another.[98]

The inconsistency with which principles such as self-determination are applied exemplifies the prominent way in which nationalism and the inequality of states affect international law. Inequality of power impacts the ability of a country to retain a foreign policy of its own and be a Great Power.[99] The growth of military disparity between strong and weak Powers after the First World War impacted the ability of countries to retain foreign policies of their own.[100] “International law, framed for days when munitions and military stores were the only contraband and neutrals traded freely with belligerents” was severely affected by the “change in spirit extended from the methods of war to its purposes.”[101] War amongst socialised nations became an instrument for securing economic advantages from the victor and inflicting economic disabilities on the defeated, whereby wars were fought to a finish and the loser had no rights.[102]

The deterioration of international relations in the interwar period, rather than being caused by “an unhappy incident or to the malevolence of a few men or a few nations”, for Carr, finds its origin in the modern idea of nations.[103] Nationalism overrides

[96] E.H. Carr, “The Moral Foundations for World Order,” in *Foundations for World Order* (Denver: Social Science Foundation, University of Denver, 1948), 72.
[97] Ibid, 72-73.
[98] Carr, *Conditions of Peace*, 48.
[99] E.H. Carr, “Foreign Policy Begins at Home,” *The Listener* 36, no. 929 (31 October 1946): 585.
[100] Carr, *Conditions of Peace*, 53; E.H. Carr, *Nationalism and After, with a new introduction from Michael Cox* (London: Palgrave Macmillan, 2021), 35.
[101] Carr, *Nationalism and After, with a new introduction from Michael Cox*, 26.
[102] Ibid.
[103] Ibid, 26-27.

the passion for agreement and tenacity shown by Geneva delegates when signing "protocols and resolutions in order to maintain at least the forms of agreement even where the substance was lacking."[104] Nationalism thus makes modern nations, in virtue of their nature and function, less capable than any other groups in modern times of reaching agreement with one another.[105] One of the reasons for this relates to the loss of life, risk of defeat in war, and serious economic losses which the observance of international law can incur:

> [W]hatever view we take of it, it would be folly to neglect the overwhelming evidence that modern national governments cannot and will not observe international treaties or rules of international law when these become burdensome or dangerous to the welfare or security of their own nations.[106]

Furthermore:

> In peace, as in war, the international law of the age of sovereigns is incompatible with the socialized nation. The failure to create an international community of nations on the basis of international treaties and international law marks the final bankruptcy of nationalism in the west.[107]

The effect of nationalism on international law is therefore, for Carr, considerable. Nationalism and its negative effect on international law is thus a prominent aspect of his thought that transcends the reputation his writings have acquired.[108] His critique of nationalism and commentary on the transitory and historically evolving character of nation-states is enormously significant in relation to the erosion to the taboo explored in chapter two of this thesis.[109] Linklater outlines an additional striking aspect of Carr's

[104] Ibid, 27.
[105] Ibid.
[106] Ibid, 29.
[107] Ibid.
[108] Carr's writings contain "a striking analysis of the changing nature of the modern state and the possibility of new forms of political association." Linklater, "The Transformation of Political Community: E. H. Carr, Critical Theory and International Relations", 321.
[109] "Unsurprisingly," Cox argues, "Carr's argument about the transitory and historically evolving character of the nation-state has generated quite a debate, even amongst more sympathetic scholars. Certainly, his call for radical change in the international system was, and is, not one which has recommended itself to everybody, including, most obviously, a number of more conventional IR realists who appear to have taken from Carr that which they deem to be useful—most obviously his emphasis on the permanent

analysis of nationalism: "What is striking about Carr's analysis is his unusual recognition that the boundaries of moral and political community are not fixed and unalterable: these boundaries can expand just as they can contract."[110] Carr's analysis, therefore, is "relevant to the statist-cosmopolitan debate on global justice," as it highlights the "political vacuum in which this debate operates in the absence of a framework of rights and obligations under laissez faire."[111] Cox's introduction to *Nationalism and After* also emphasises the contemporary relevance of Carr's analysis and critique of nationalism in this regard:

> Long ago Carr warned that we should beware the siren calls of nationalism or thinking we could find answers to the challenges facing humanity through the nation-state. We might be well advised in taking his advice seriously today.[112]

The relevance of Carr's critique of nationalism to the questions outlined in the introduction of this thesis and brought to light in its first and second chapters should therefore, in light of the preceding pages, be clear. It is the "lack of equality between states, or the presence of a higher authority," Molloy argues, "that makes international law an inadequate basis for achieving international morality."[113] Any international order built on the contingent obligations assumed by national governments is, for Carr, "an affair of lath and plaster and will crumble into dust as soon as pressure is placed upon it."[114] Weakened by nationalism, international law becomes almost irrelevant except

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struggle for power in a world of competitive nation-states—while ignoring almost entirely his argument that the world was for ever in flux and thus would not remain the same in perpetuity." Michael Cox, "Introduction," in *Nationalism and After, with a new introduction from Michael Cox* (London: Palgrave MacMillan, 2021), xviii-xix.

[110] Linklater, "The Transformation of Political Community: E. H. Carr, Critical Theory and International Relations", 338.

[111] Karkour, "Debating global justice with Carr: The crisis of laissez faire and the legitimacy problem in the twenty-first century", 82. Kenealy and Kostagiannis also emphasise the relevance of Carr's critique of nationalism in relation to the European Union: "It offers a way of getting to grips with the fundamental tensions and power-political dynamics that have shaped the history of the EU that is superior to both neorealism and existing integration theories that operate at the level of IR." Kenealy and Kostagiannis, "Realist Visions of European Union: E.H. Carr and Integration", 222-223.

[112] Cox, "Introduction", liv.

[113] Seán Molloy, "Spinoza, Carr, and the ethics of *The Twenty Years' Crisis*," *Review of International Studies* 39, no. 2 (2013): 264.

[114] Carr, *Nationalism and After, with a new introduction from Michael Cox*, 29.

when it can be invoked to discredit an opponent.[115] Nationalism, then, represents one of the fundamental elements and problems faced by international law and, as shown by the second chapter of this thesis, international disarmament and arms control.[116]

3.2.2.2 Uncertainty in Treaties

Carr explores the uncertainty concerning the enforcement of international treaties extensively throughout his post-1939 works. This uncertainty is related to Carr's critique of treaties as static: "every fresh extension of the battlefield alters in some degree the perspectives through which they are viewed and the policies designed to meet them."[117] Laws grow out of the conditions they are required to meet. In consequence, they can rarely be devised in advance to meet emergencies whose character is still unknown.[118] There is, therefore, for Carr:

> [A] kind of naïve arrogance in the assumption that the problem of the government of mankind, which has defied human wit and human experience for centuries, can be solved out of hand by some neat paper construction of a few simple-minded enthusiasts.[119]

Positive law, in having grown out of the conditions it was required to meet, is thus unable to account for and meet emergencies whose character is unknown. The idea that a single treaty or legal formula can single-handedly offer a solution to the problems nationalism creates is a "dangerous, if popular, illusion", particularly when thinking that

[115] Ibid.
[116] The unreliability of information and political interests which can affect allegations of arms control and disarmament treaty noncompliance, outlined in chapter two, offers a clear view of how nationalism fundamentally affect arms control and disarmament treaties.
[117] Carr, *Conditions of Peace*, vii.
[118] Ibid, 153.
[119] Ibid, 164.

it can be done "to everyone's satisfaction and without impinging on anyone's interests."[120]

Carr explores the ways in which evolving political contexts can render legal treaties obsolete through the League of Nations' multiple attempts to abolish and annihilate war. The machinery of the League, he argues, sometimes provided "discreet 'formulae' to plaster over real cracks, thereby concealing both the seriousness and the character of the issues at stake."[121] Disarmament was an excellent illustration of this, whereby "Repeated pious resolutions at Geneva about the desirability of disarmament … encouraged the world to forget that one, and only one, real question mattered in this field: the rearmament of Germany."[122]

The nuclear arms control and disarmament treaty violations explored in chapter two of this thesis provide a further example of the uncertainty Carr that exists in treaties. The alleged violation of the NPT due to the failure of nuclear states to disarm as per Article VI's requirement to pursue disarmament negotiations in good faith illustrates Carr's exploration of the uncertainty that underlies the enforcement of international treaties. The startling difference between the nuclear taboo enshrined in the text of the treaties explored in chapter one—such as the CTBT, FMCT, and TPNW—and the non-accession of particular States, which complicates the shared ideology explored and established within the chapter, further exemplify Carr's arguments on this point. Laws grow out of the conditions they are required to meet. International treaties and single legal formulae cannot change the fact that foreign policy will not cease to exist for those

[120] Ibid, 166.
[121] E.H. Carr, "The League of Nations," in *From Napoleon to Stalin and Other Essays*, ed. E.H. Carr (Hampshire and London: MacMillan Press Ltd., 1986), 22.
[122] Ibid.

who possess power, as the only normal thing about politics and economics is that they are always moving on.[123]

3.2.2.3 The historical bias of the law

Carr's theory of history offers a clear view into additional facets of his theory of law; particularly in relation to the conditions under which laws are created. Carr's theory of law, which is brightly aware of the historical biases which ultimately affect it, thus finds itself linked to his theory of history. For Babik, the importance Carr's theory of history has in his thought is considerable, as it offers "powerful additional evidence that his realism expressed a decidedly critical mindset … and keen awareness of the inherently limited and historically relative nature of human knowledge."[124]

In showcasing this critical mindset, Carr's theory of history and, through it, his critique and analysis of international law highlights the artificiality of Carr's standard disciplinary representation, making him emerge as a "historian combining a decidedly anti-positivist conception of knowledge with a dynamic idea of open-ended emancipatory progress."[125] Carr's historico-cultural method, "in which the clash of ideologies plays the most important role in animating international politics", offers a clear view into additional facets of his theory of law.[126] In it, in clear contrast to the practice of traditional historians, he studies history through the historian and the

[123] Carr, *Conditions of Peace*, 166; E.H. Carr and Collin Brooks, "Taking Stock," *The Listener* 24, no. 613 (October 10, 1940): 509.
[124] Babik, "Realism as Critical Theory: The International Thought of E.H. Carr", 499.
[125] Ibid, 504.
[126] Molloy, "Dialectics and Transformation: Exploring the International Theory of E.H. Carr", 289.

broader context "within which (s)he carries out research and within which historical facts are accumulated."[127]

It is here where Carr's theory of history comes to fundamentally affect his theory of law, particularly through his critique of static views of history and the idea of historical biases. In arguing against a static view of history, Carr holds that any such view of history purporting to be recorded from a fixed point by a stationary observer is fallacious.[128] History is a constantly moving process where the historian moves along within it.[129] The creators of systems are not exempt from this rule: their systems reflect the biases of the ones who constructed them.[130] History without bias is a utopian ideal which, so long as national passions persist, means that national bias will be one of the occupational diseases of the historian.[131]

Laws are fundamentally affected by this historical bias: they reflect the conditions of the time during which they were made and require the observance of their history to be understood.[132] The historical bias, which affects the shape laws take, thus fundamentally impacts the law's pretension to establish rules on abstract principles.

[127] John M. Hobson and George Lawson, "What is History in International Relations?" *Millenium: Journal of International Studies* 37, no. 2 (2008): 428.
[128] E.H. Carr, *The New Society* (London: Macmillan, 1951), 13.
[129] E.H. Carr, *What is History?* 2nd ed. (London: Macmillan, 1961; Harmonsworth: Penguin Books, 1990), 133.
[130] Carr, *The New Society*, 11-12.
[131] E.H. Carr, "History without Bias," *The Times Literary Supplement* 3070 (December 30, 1960): 845; E.H. Carr, "Society and the Individual," *The Listener* 65, no. 1674 (April 27, 1961): 733; E.H. Carr, "Diplomatic Exchanges," *The Times Literary Supplement* 2735 (July 2, 1954): 425; E.H. Carr, "The Historian and his Facts," *The Listener* 65, no. 1673 (April 20, 1961): 691.Carr also explores this idea in relation to the historical conditions which give rise to revolutions, stating that however universal their pretensions and their significance, revolutions "are made in a specific material environment and by men reared in a specific national tradition." E.H. Carr, "The Bolshevik Revolution in Perspective—I," *The Listener* 53, no. 1364 (April 21, 1955): 697.
[132] Carr argues this within the opening pages of *The New Society*: "I shall assert here and now that it was, so far as anything ever has a starting point in history, the starting point of something, and that in order to understand the problems of the 'new society' in which we live today we shall have to go back at least as far as the French, the American and the Industrial revolutions." Carr, *The New Society*, 1.

Nowhere is this more visible than in international law, as Carr notes in relation to the historical growth and development of human rights:

> A more fruitful practical approach may perhaps be found by asking how far the conception of human rights propounded at the end of the eighteenth century is still valid to-day, and how far, and for what reasons, it needs to be corrected or supplemented.[133]

Human rights, though in principle recognised for humanity as a whole, can only be discussed in the framework of the particular society to which an individual belongs.[134] The liberal principles which gave rise to the peace settlement of 1919 are, for Carr, another key example of how historical bias affects international law. He surmises these principles in the following way: "they believed that rational man was master of his fate, and that no insoluble problems or insuperable barriers would arise to bar the triumphant march of mankind towards a fuller and better life", leading to a belief that "in this world the prospect of war held no place."[135] These liberal principles fundamentally came to affect how the peace settlement appeared on paper, binding it to the conditions of the time during which it were made.

The implications which the historical bias of the law have are, then, clear. The historically bound nature of international law shapes the form which treaties taken, fundamentally affecting them. Neither security nor peace can properly be made the object of policy. "International peace," he writes, "cannot be achieved by the signing of pacts or covenants 'outlawing' war any more than revolutions are prevented by making them illegal … The only stability attainable in human affairs is the stability of the

[133] E.H. Carr, "Rights and Obligations," *The Times Literary Supplement* 2493 (11 November 1949): 725.
[134] Ibid, 726.
[135] E.H. Carr, "Change and Illusion," *The Times Literary Supplement* 2700 (October, 30 1953): 687. See also: E.H. Carr, "The Groundwork of History." The Times Literary Supplement 2431 (September 4, 1948): 495.

spinning-top or the bicycle."[136] It is only when the victors of a war can create the conditions for an orderly and progressive development of human society that peace and security can follow.[137] Carr's theory of history throws light on the shared underlying ideology explored in chapter one. It explains why these arms control and disarmament principles cannot be applied equally to different weapons. In being historically bound, the shared underlying ideology encoded in these principles can only be discussed within a particular framework which limits the particular shape treaties take.

3.2.2.4 Status Quo and National Interests

Carr explores the way in which national interests and the *status quo* impact international law extensively throughout his post-1939 works.[138] International affairs presupposes, he argues, a "clash of interest between conservative Powers satisfied with the *status quo* and revolutionary Powers seeking to overthrow it."[139] This idea—that is, the clash between *status quo* and revolutionary powers—fundamentally affects his analysis of international law in the interwar period. It was the "backward-looking view of the satisfied Powers" that made security be taken to be "best assured by putting back the clock, or at any rate by seeing that it did not move any further."[140] This backward-looking view of security influenced the attitudes of countries to new weaponry, which, in the case of the British and American General Staffs at the 1919 Peace Conference

[136] Carr, *Conditions of Peace*, xxiii.
[137] Ibid.
[138] Carr does not, however, glorify power in this exploration. David Jason Karp, "The Utopia and Reality of Sovereignty: Social Reality, Normative IR and 'Organized Hypocrisy'," *Review of International Studies* 34, no. 2 (2008): 333.
[139] Carr, *Conditions of Peace*, xv.
[140] Ibid, xi.

included the aims to "abolish the submarine and to deprive Germany of military aviation."[141]

International law is fundamentally affected by the clash of interests between conservative Powers satisfied with the *status quo* and revolutionary Powers seeking to overthrow it. Every attempt to strengthen the Covenant of the League of Nations meant another bulwark to uphold the *status quo*, with the Geneva Protocol being nothing more than the political counterpart of the Maginot Line.[142] Movements supporting international change coming from dissatisfied Powers were inevitably confronted by the vested interests of the *status quo*.[143] This contributed to the ineffectiveness and sterility of the 1919 peace settlement, which failed due to the inability of its creators to "understand the contemporary revolution."[144]

National interests therefore play an unequivocal and unavoidable role in international law, with power playing a central role in foreign policy: "No machine will work without fuel; and power is the fuel which makes the political machine work. However lofty your purposes, it is no use considering what you are going to do at the Antipodes if your ship of state has not fuel on board to take you beyond Gibraltar."[145] International law is thus bound and limited by the diverging national interests of *status quo* and revolutionary powers.[146] The victory of a revolutionary power does not affect

[141] The different interests which underpinned the British and American government's desire to abolish the submarine have been explored extensively in the first chapter of this thesis together with those of the countries that opposed them. Ibid.
[142] Ibid, xv.
[143] Ibid, xvi. This idea relates very strongly to the role which, for Carr, wars play in international society: "Great wars are, then, commonly part of a revolutionary process whose fundamental causes may be quite different from the immediate causes of the war." Ibid, 5.
[144] Ibid, 7.
[145] E.H. Carr, "The Case for a Planned Foreign Policy," *The Listener* 36, no. 926 (October 10, 1946): 463.
[146] National interests are also affected by geography. Carr argues that certain foundations of British foreign policy have been fixed and unchangeable over long periods of time. Britain's geographical location, "too close to Europe not to be a part of it" yet also affected by the detachment and unique position conferred by the Straits of Dover, fundamentally affect its national interests. The impact of the geographical location on a country is not unlimited, however: "many of the conditions which govern British foreign policy in the past have changed, and changed very radically" owing to the fact that "we live in a changing world." Ibid, 462.

this aspect of international law, nor do morality nor ideological aspirations: "the victory of a revolutionary movement, by transforming it into the government of a state," places the practical obligation on it of conducting "relations of some kind, whether friendly or hostile, with other states."[147] Countries are therefore limited in what they can aim to do in terms of international law and, as explored in the previous pages, in relation to treaties due to their static and fixed nature.[148]

3.3 The Question of Disarmament

Having examined the different elements constituting Carr's theory of law, the following sections focus on his analysis and treatment of the question of disarmament and arms control. Carr's analysis of the question of disarmament and arms control, especially in his historical works on Germany and the history of the Soviet Union, allows us to examine not just the question of how much sanctity these treaties possessed, but also the matter of the politics underlying their negotiation and creation. It brings to light the principles he considers foundationally affect international law—particularly in relation to national interests and their effect on foreign policy—together with the relationship between disarmament and security. Through these, Carr examines and explains why states choose to breach their treaty obligations in relation to disarmament

[147] Carr, "The Bolshevik Revolution in Perspective—I," 697.
[148] It is important to note in this regard that Carr "thought that utopian ideas were dangerous not because they are irrelevant, but because they are powerful. They can help make the world a better place, but they can also precipitate World Wars." Karp, "The Utopia and Reality of Sovereignty: Social Reality, Normative IR and 'Organized Hypocrisy'", 334.

and arms control; explaining, in turn, how instances of failure to observe the taboo underlying the treaties examined in chapters one and two can best be explained.

The history and development of the question of disarmament plays a central role in Carr's analysis of the interwar period, particularly through the ways it was impacted by national interests and ideas of security. Ideas on disarmament within the League of Nations were split into two main camps: "those who thought that disarmament would bring about an increase of security", and "those who thought that increased security must precede disarmament."[149] Additional differences existed in relation to the form which disarmament should take; particularly in relation to whether disarmament should focus on the qualitative or quantitative limitation of weapons.[150]

The effect which these different strands of thought had on disarmament was considerable. They impacted the interpretation which states made of their disarmament commitments, representing through this the difference between the abstract principles underlying disarmament projects and their practical application. Carr differentiates between these abstract principles of disarmament and their practical application through the opposition of intellectuals and experts:

> For the intellectual, the general principle was simple and straightforward; the alleged difficulties of applying it were due to obstruction by the 'experts'. For the expert, the general principle was meaningless and utopian; whether armaments could be reduced, and if so which, was a 'practical' question to be decided in each case 'on its merits'.[151]

[149] Carr, *International Relations Between the Two World Wars*, *1919-1939*, 113.
[150] These manifested over the course of the Disarmament Conference, during which the British Foreign Secretary, Sir John Simon, suggested the qualitative limitation of armaments: the limitation of armaments not by numbers but by the complete abolition of certain forms of armaments. This proposal was particularly focused on the abolition of forms of armament "lending themselves to offensive rather than defensive warfare." Ibid, 184-185.
[151] Carr, *The Twenty Years' Crisis, 1919–1939, reissued with a new preface from Michael Cox*, 17-18.

These different strands of thought and conceptions of disarmament and arms control in international law retain their relevance today. The effects national interests had on the treatment of disarmament, particularly through the negotiation of treaties, were considerable. Howe outlines the importance of Carr's historical commentaries on past events clearly: "Carr's commentary on past events and his speculation about the future," he argues, "drive home an important point: progress in human affairs often is painfully slow and comes only through the wilful assertion of dissident viewpoints."[152] Furthermore:

> Through his forays into philosophy, history and politics, Carr highlights an underlying logic and progression in the cooperation and conflict of the past. Moreover, for those disturbed by the atomism that continues to rent international society, he provides strategies for the present and optimism for the future.[153]

Parent and Baron have also argued this in relation to Carr's historical thought:

> [G]ood history is theory; path dependence is theoretical; weaving compelling explanations of broad patterns, foreign policy, and particular actions requires sound theory at more than one level of analysis. Although historical theory is not always as transparent as many would like, it is theory regardless.[154]

The importance of Carr's analysis of disarmament and arms control in the interwar period is, therefore, of considerable relevance to the three guiding questions outlined in the introduction of this thesis. The reasons for this mirror Cox's argument for Carr's contemporary relevance: "The more we read Carr today and the ways in which he uncovered the limits of liberalism in his day, the more we discover how much he has to say about our own, increasingly disturbed, world."[155] Carr's analysis of disarmament and

[152] Howe, "The Utopian Realism of E. H. Carr", 297.
[153] Ibid.
[154] Parent and Baron, "Elder Abuse: How the Moderns Mistreat Classical Realism", 202.
[155] Cox, "E.H. Carr and the Crisis of Twentieth-Century Liberalism: Reflections and Lessons", 533.

arms control addresses issues of compliance directly and applies his theoretical theory directly, providing a direct answer to how instances of failure to observe the taboo be best explained.

It is because of this that I will examine Carr's treatment of disarmament and arms control in the interwar period throughout the following pages, paying particular attention to his analysis and interpretation of the diplomatic history of the interwar period.[156] For this reason, I will first examine his treatment of general aspects of disarmament, in which he touches on the multiple conflicting ideas present at its inception and the political interests underlying them. This is followed by an analysis of German and Soviet postures in relation to disarmament.

3.3.1 General Aspects of Disarmament

3.3.1.1 Interwar Naval Limitations

The subject of naval limitations was treated extensively throughout this period; particularly through the Washington and London Naval Conferences, which were impacted considerably by the differing national interests of their participants. The Washington Naval Conference, Carr argues, proceeded from the start "on the tacit assumption that Great Britain and the United States were henceforth equal partners in world supremacy."[157] No political partnership between states "is ever equal except in

[156] This is something which is of particular interest due to what Carr's historical analysis on the history of disarmament on this period reveals of his theory of law.
[157] Carr, *Conditions of Peace*, 170-171.

name", however, and the inequality between these states became obvious through the question of the numbers to which navies should be limited to and whether submarines should be banned.[158]

The treatment to which the submarine was held in this conference is of particular interest in relation to the taboo which originated around its use—examined within chapter one of this thesis. The Washington Conference provided the Anglo-Saxon powers, whose naval predominance had been threatened by the submarine, with ample opportunity to denounce the immorality of this weapon.[159] "Civilization demands," wrote the naval adviser to the American Delegation at the Peace Conference, "that naval warfare be placed on a higher plane" by the abolition of the submarine.[160] The immorality and perceived taboo of this weapon, however, was ineffective in light of its being regarded "as a convenient weapon by the weaker French, Italian and Japanese navies", which meant this demand of civilization not being complied with.[161] Furthermore, British interests demanded the retention of a high number of cruiser owing to the need to police her possessions.[162]

Many similar issues were observed in the lead-up to the London Naval Conference, which found its origin in the aim to limit the classes of ships that had not been subject to limitations by the Washington Naval Treaty.[163] France declined the first invitation in 1927, holding that she was prepared "in the last resort to make naval concessions in return for counter-concessions on matters more vital to her" and Italy

[158] Ibid.
[159] Carr, *The Twenty Years' Crisis, 1919–1939, reissued with a new preface from Michael Cox*, 70.
[160] Ibid.
[161] Ibid.
[162] Carr, *Britain: A Study of Foreign Policy from the Versailles Treaty to the Outbreak of War*, 104.
[163] Carr, *International Relations Between the Two World Wars, 1919-1939*, 179.

followed suit.[164] Several different interests underlined the proposals of the three major powers which attended this Conference. Britain "wished to economise by an all-round reduction in the size of ships" but claimed a free hand or high limitation "in respect of small cruisers."[165] The American Government, however, "saw no reason to reduce the size of ships of any category" and suspected "a desire on the part of the British Government to escape from the principle of equality accepted at Washington."[166] The Japanese delegation, finally, "occupied an intermediate position", and gave "the impression of willingness to accept whatever the two protagonists might agree on."[167]

This was the case again in the 1930 London Naval Conference, by which time the conditions had changed. Though Britain "had reduced her requirements in cruisers from seventy to fifty" it was France who now instead insisted on the necessity of maintaining a large amount of cruisers for her colonial possessions.[168] As a result, France rejected "the Anglo-American proposal for the extension of non-capital ships of the Washington ratios" and the "Italian claim to parity with France."[169] Japan also expressed dissatisfaction with the Washington treaties for the first time, and putting forwards "a tentative claim to parity with Great Britain and the United States in all categories."[170]

[164] Ibid.
[165] Ibid 180.
[166] Ibid.
[167] Ibid.
[168] Ibid, 181-182.
[169] Ibid.
[170] Ibid.

3.3.1.2 The Disarmament Conference

Carr's examination of the disarmament conference further emphasises the deep impact which the underlying problems of international law had on disarmament. The different propositions of the shape disarmament should take, impacted by differing national interests, came to affect the entire conference.

The conflict between the French quest for security—examined earlier within Carr's theory of law—and the national interests of other countries can be seen through the fate of an early French Delegation memorandum. This document, circulated to the Conference, proposed the creation of a League of Nations police force. Suggesting that powers possessing "capital ships, large submarines or heavy artillery were to hold them at the disposal of the League force, which was also to have a monopoly of bombing aeroplanes."[171] Though supported by several minor European Powers, this proposal was "distasteful to Great Britain and the United States", who "opposed the idea of a supernational military force" and by Germany, who "regarded the plan as yet another manoeuvre to shelve the real issue of disarmament."[172]

A similar case can be seen in the proposal made by Sir John Simon, which suggested qualitative limitations to heavy guns, tanks, submarines, bombing aircraft, and gas—the usage of which was viewed negatively—and received widespread support.[173] Problems arose with the conflicting classification of these weapons as either defensive or offensive in different countries. The French Delegation, for example,

[171] Ibid, 184.
[172] Ibid.
[173] Ibid, 185.

considering only tanks of over seventy tons, "a hitherto non-existent phenomenon", whilst the British Delegation suggested a limit of twenty-five tons.[174] The German Delegation, by contrast, held that "all armaments prohibited by the Versailles Treaty were offensive, all others defensive" and argued that Germany would only participate in the Conference if there was a "clear and definite recognition of equality of rights between nations."[175]

3.3.1.3 Implications

The implications of the differences between these conceptions of disarmament, as well as the diverging underlying national interests revealed during the Disarmament and Naval Conferences, are significant. Despite the clear reference to ideas relating to the taboos surrounding the usage of certain weapons, the lack of agreement on what should be done to ban them is telling. National interests concerning the perceived military use of submarines influenced the positions which states took in the Washington and London Naval Conferences deeply. Britain's proposal to abolish "the submarine, the large tank, gas and bombing from the air" at the Disarmament Conference similarly shows the impact of national interests on disarmament and arms control.[176]

Carr explores the way in which these national interests impacted disarmament in the period through his analysis of the question of armament exports to Spain during

[174] Ibid.
[175] Carr further references an American proposal which, based on the principle of an all-round reduction of one-third in existing armed forces and armaments. This proposal was "politely, but coldly, received by Great Britain, who saw in it a sinister design to reduce the number of British cruisers" Ibid, 185-186.
[176] Carr, *Conditions of Peace*, xi.

the Spanish Civil War. The declaration of non-intervention—approved by the French, British, and Soviet governments in August 1936—was formally acceded to, amongst other nations, by Italy, Germany, and Portugal.[177] Though followed by a British, French, and Soviet arms embargo, it was tainted with hypocrisy from the outset. Two of the signatories had no intention of observing it, and Soviet acceptance was preconditioned by its lack of the capacity "to send military supplies to Spain on any scale matching that of Germany and Italy."[178] "Though it can hardly have been supposed in Moscow that Germany or Italy would be induced by a diplomatic agreement to suspend the supply of arms to Franco", a potential violation of the agreement would have made it "easier to discredit them in the eyes of the Western world."[179] Thus, Soviet acceptance could be used to justify Soviet shipments as "a measure of retaliation."[180]

These examples, for Carr, clearly show the preeminent position which national interests had in questions of disarmament in the interwar period. Molloy articulates this aspect of Carr's thought:

> The ultimate failure of the League is traced to the incommensurability of its political philosophy and its regional bias … Despite the rhetoric of the period, the unsuccessful end of the Disarmament Conference demonstrated that Realism had intruded into the logic of the legal structures that had been posited as its successor, in a reversal of the Clausewitzian dictum, politics had become war by other means.[181]

Carr's analysis of disarmament in this period offers a stark commentary on the different political interests which act as the foundation of arms control and disarmament treaties. This is particularly the case with his analysis of the Washington and London Naval

[177] E.H. Carr, *The Comintern and the Spanish Civil War*, ed. Tamara Deutscher (London and Basingstoke: MacMillan, 1984), 16-17.
[178] Ibid, 17-18.
[179] Ibid.
[180] Ibid.
[181] Molloy, *The Hidden History of Realism: A Genealogy of Power Politics*, 28.

Conferences It provides a direct commentary on the shared underlying ideology encoded in legal principles and the cases of noncompliance examined in chapters one and two. National interests and nationalism played major roles in the negotiation of the Washington and London Naval Conferences despite the seeming inhumanity of submarines.

Carr links the problems attempts to regulate naval warfare met with those he argues fundamentally affect international law and offers answers as to why the taboo over the use of biological, chemical, nuclear, and conventional weapons failed at all. His analysis also offers a commentary on why cases like that of the alleged noncompliance with the NPT's Article VI come to arise at all, why the rights of nuclear and non-nuclear states seem so disparate, and why there has been a limited accession to the TPNW by states like the U.S. and Russia despite the strength of the nuclear taboo. Carr's analysis, therefore, highlights how laws can be bound to the environment in which they originate, pointing how the interests of states influence and give shape to it. The conflicting German and Soviet positions on disarmament and rearmament—as we will see in the following section—also further demonstrate this.

3.3.2 Germany's disarmament and rearmament

The case of German disarmament and rearmament presupposes one of the most distinctive cases of this period. Furthermore, it also represents a particularly relevant example to many aspects of Carr's theory of law. Carr's analysis German disarmament and rearmament, together with—as will be seen in the following section—that of

German and Soviet foreign policy illustrate the expansive depths of Carr's thought.[182] Smith articulates this idea in relation to the recovery of Carr's analysis of British and German-Soviet relations. These, he argues, point to:

> Carr's more overt imbibing of the realist tradition in these texts suggests that the revisionists have overlooked a more hard-nosed realism – a realism that did not appear as naked as say in The Twenty Years' Crisis for example. Where does that leave our understanding of Carr?[183]

Carr's analysis of these aspects of interwar diplomacy broadens our understanding his contribution to International Relations.[184] It is "the relationship between allies that creates the international system in Carr's conception of IR."[185] Carr's analysis of German disarmament and disarmament, together with his historical commentaries at large, show the problem-solving aspects of his theory of law.[186]

3.3.2.1 The Treaty of Rapallo

The conditions identified by Carr as leading to Germany's rearmament are particularly relevant to his theory of law. The restoration of Poland to a position of

[182] The idea of the existence of different E.H. Carrs has been remarked in the literature and is firmly tied to the lack of exploration of Carr's historical works in international relations. Wilson articulates this clearly in his analysis of E.H. Carr's realism: "Until recently it was not unreasonable for the enquiring undergraduate to think there was not one but two E.H. Carrs, perhaps even three. First, there was Carr the Realist", "Second, there was the Soviet Carr", "The especially alert and enquiring undergraduate may, however, have placed these two Carrs alongside a third one, of whose existence they may have, for a year or two, forgotten … Carr the philosopher of history." Wilson, "Radicalism for a Conservative Purpose: The Peculiar Realism of E. H. Carr", 123-124. Haslam also gives voice to this idea with regard to Carr's philosophy of history, Soviet history, and nineteenth-century Russia works. Haslam, *The Vices of Integrity: E.H. Carr, 1892-1982*, xi.

[183] Keith Smith, "A reassessment of E.H. Carr and the realist tradition: Britain, German–Soviet Relations and neoclassical realism," *International Politics* 54 (2017): 100.

[184] For Smith, the utility of doing this—particularly for neoclassical realism—is as follows: "A more fruitful starting point for thinking about Carr and neoclassical realism rests in Britain and German–Soviet Relations. At the very least, the more in-depth understanding of the pushes and pulls on a country's foreign policy developed in these texts would serve as a useful tool for those seeking to carve out a distinctly European variant of realist foreign policy analysis." Ibid.

[185] Molloy, *The Hidden History of Realism: A Genealogy of Power Politics*, 27.

[186] Cox articulates a similar argument on the nature of Carr's thought and how it remains relevant today: "Carr was, and I would insist remained, as much a 'problem-solving' scholar as he ever was a 'critical' one. I then ask whether or not Carr's critique of liberal order conceived of in one epoch has anything to say to us today, in a quite different era. Here I make the case—though not in great detail—that he is perhaps more relevant today than he has been for many a long year." Cox, "E.H. Carr and the Crisis of Twentieth-Century Liberalism: Reflections and Lessons", 525.

predominance in eastern Europe and an outpost of the western allies deeply affected Germany's foreign policy.[187] It led, together with the impositions of the Treaty of Versailles and the perceived permanence of the Soviet regime in Russia, to the negotiations of the Treaty of Rapallo's negotiations.[188] These negotiations flowed in three distinct channels—military, economic, and political—the former of which was conducted in profound secrecy.[189] The German Government deliberately concealed the measurements of rearmament which presupposed a "flagrant contravention of the Versailles treaty."[190]

Carr emphasises the significance of Rapallo. This treaty—a turning point for both Germany and the Soviet Union—enhanced the status of both parties.[191] It represented the beginning of German-Soviet Military collaboration in direct contravention to the Treaty of Versailles, which both countries denied "with equal emphasis."[192] It allowed the German Government to manoeuvre "freely between east and west, playing off the two rivals against one another" and disclaim "any firm or irrevocable commitment to either."[193]

The significance of this overt breach of international law in light of the analysis conducted throughout the previous pages cannot be understated. The overt denials of the military and political aspects of the treaty and the secrecy with which the negotiations were conducted provide a direct link to Carr's theory of international law.

[187] E.H. Carr, *German-Soviet Relations Between the Two World Wars, 1919-1939* (London: Geoffrey Cumberlege, Oxford University Press, 1952), 34.
[188] Ibid, 48-49.
[189] Ibid.
[190] Ibid, 55-56.
[191] The signature of this treaty, more important than the formal contents found within it, provided for a resumption of full diplomatic and consular relations. Germany waived all claims against Soviet Russia on account of nationalised German enterprises on the condition that the government of the RSFSR did meet the analogous claims of other states. Ibid, 64.
[192] Ibid, 66.
[193] Ibid.

This is particularly clear with regard to the role played by the status quo, as represented by the Versailles Treaty during this period.

3.3.2.1 Military and Naval Collaboration

Carr explores the degree and depth of Soviet and German military collaboration within two separate notes in his *History of the Soviet Union*, wherein he explores the different elements of its military and naval aspects.[194] It is here where he notes that due to the secrecy of the agreement, records on the German side were systematically destroyed and that, as such, "information about it is intermittent and imperfect."[195] Despite this, Carr remarks that collaboration in aeronautical matters is both the best documented and the most important.[196] Military collaboration between the two countries involved the manufacture of shells for the Reichswehr in Soviet factories and tanks at Kazan, with preparations of chemical warfare additionally being observed.[197] The latter of these was subject to a direct denial in a speech by Trotsky on the 19 May, 1924 after rumours reached Polish authorities.[198]

German naval authorities "did not share the enthusiasm of their military colleagues for links with the Soviet armed forces."[199] The German Marineleitung

[194] It is further covered, in relation to the Soviet Union's own position on this issue, in a number of additional places, such as: E.H. Carr, *A History of Soviet Russia: The Bolshevik Revolution, 1917-1923; Volume Three* (New York and London: W.W. Norton & Company, 1985), 361-362.
[195] E.H. Carr, *A History of Soviet Russia: Socialism in One Country, 1924-1926; Volume Three—Part II* (Hampshire and London: MacMillan, 1964; Reprint, 1988), 1010.
[196] Carr, *A History of Soviet Russia: Socialism in One Country, 1924-1926; Volume Three—Part II*, 1010.
[197] Ibid, 1013.
[198] Ibid.
[199] Carr argues that this difference was not unnatural due to the interest in a western orientation by the naval officers of both countries. E.H. Carr, *A History of Soviet Russia: Foundations of a Planned Economy, 1926-1929; Volume Three—Part II* (London and Basingstoke: Macmillan, 1976), 629.

declined a proposal to participate in 1924 "in the creation of the training establishment for German aviation at Lipetsk."[200] Though it replied to a Soviet questionnaire on submarine operations—of particular interest to this country—by enclosing naval manuals, it was agreed that "there could be no question of having submarines built by Germans in the Soviet Union."[201] Soviet submarines could only be "built on German plans, and technical advisers lent, provided these remained in German, not in Russian, pay."[202]

The differences between the military and naval collaboration of these two countries—both in breach of international law—is of profound interest. Naval collaboration was pronounced to be "uncertain and unreliable" owing to the hope of securing a "relaxation of the Versailles restrictions" through negotiations.[203] A fact which, Carr finds, would have been made considerably more difficult because collaboration with the Soviet navy "could not be concealed."[204] By comparison, the military collaboration between these two countries lasted until the advent of Hitler in 1933.

Though Germany and the Soviet Union retained "political as well as personal reservations" and were "conscious from time to time of the possible alternative of rapprochement with the west", the "practical advantages of military collaboration" were never forgotten.[205] Throughout the 1920s, this gave to both the Reichswehr and the Red Army "a sufficient justification of the policy" to which "much else had, if

[200] Ibid.
[201] Ibid, 629-630.
[202] Ibid, 630.
[203] Ibid.
[204] Ibid.
[205] Carr, *A History of Soviet Russia: Socialism in One Country, 1924-1926; Volume Three—Part II*, 1016-1017.

necessary, to be sacrificed."[206] National interests, in other words, justified the breach of international law; with foreign policy playing an additional key role in defining Germany's specific actions. It is clear, then, that national interests and Germany's own dissatisfaction with the *status quo* led to a breach of international law. The origin of this breach presents important conclusions for why the cases of noncompliance examined in chapter two came arose despite the strength of the taboo over the use of biological, chemical, nuclear, and conventional weapons.

The implications of this point on both Germany's and the Soviet Union's foreign policy—both of which further strengthen Carr's analysis and critique of international law—will be examined below.

3.3.3 Soviet and German foreign policy

3.3.3.1 Germany

Carr considers Rapallo the "most conspicuous landmark in European diplomacy between Versailles and Locarno."[207] This Treaty points at the nature of German foreign policy throughout this period; in particular, to how German foreign policy "in its present phase could only hold a careful balance between east and west and draw the maximum advantage from both orientations."[208] Carr viewed this as fundamental in understanding the importance of Locarno for the international attitudes of both countries, as it affected

[206] Ibid.
[207] Carr, *German-Soviet Relations Between the Two World Wars, 1919-1939*, 67.
[208] Ibid, 80.

their positions on disarmament. Unofficial talks on the possibility of Germany joining the League produced "anxious enquiries from the Soviet Embassy in Berlin."[209] This policy represented a part of Stresemann's foreign policy, which rather than value a western connexion to the League and Locarno "for any sentimental or ideological reason," only did so "for the advantages which they brought to his country."[210]

Carr links this to the German-Soviet collaboration on military, political, and economic affairs. Stresemann's position exemplifies this as, however little "he, in common with most German industrialists, appreciated the theory or practice of the Bolsheviks", it did not alter the nature of German-Soviet collaboration.[211] Both positions led to a "careful economy of truth" about the disarmament clauses of the Treaty of Versailles.[212] This foreign policy, Carr argues, represented the craftiness "of a weak and unarmed country set between two far more powerful neighbours, standing in need of both, and compelled to manoeuvre between them."[213] The choice between east and west, only being able to be made "when backed by military force."[214]

Although Locarno represents a turning point in this relationship, the position of the Soviet Union and Germany on the League and disarmament showcase the deep impact of German national interests and foreign policy. In 1929, the Soviet delegation at the preparatory commission at Geneva "not only supported all German pleas for disarmament, but far outbid them", which gave "great satisfaction to the otherwise isolated German delegations."[215] The foreign policy of both countries thus shows how

[209] These took place in August 1924, during the London conference on the Daws plan. Ibid, 82-83.
[210] Ibid, 88-89.
[211] Ibid.
[212] Ibid.
[213] Ibid, 89.
[214] Ibid.
[215] Ibid, 100-101.

"the two outcasts still felt themselves outcasts" and how Rapallo survived as "a marriage of convenience … kept up partly out of habit and partly because its advantages to both sides."[216] A position which lasted "in spite of quarrels and infidelities" until 1932, with Soviet and German delegates generally voting on the same side at the disarmament conference.[217]

3.3.3.2 The Soviet Union

Carr's analysis of interwar Soviet foreign policy reveals the deep influence which national interests had on disarmament commitments. Smith emphasises the importance of Carr's analysis of Soviet foreign policy, arguing that it details "the manner in which Soviet strategy … became increasingly concerned with security and national interest over the promotion of revolution" and the manner in which "the revolutionary aims of the Soviet Union, and by extension the Comintern, were by necessity diluted."[218] Carr's analysis of Soviet foreign policy thus has much to tell us about Carr's political thought specifically and towards international relations more broadly and, in turn, towards his theory of law.[219]

The position of the Soviet Union upon the start of the period, moved in 1917 by the belief that "a quick revolution in the rest of Europe was a condition of their own

[216] Ibid.
[217] Ibid, 103.
[218] K. Smith, "The realism that did not speak its name: E. H. Carr's diplomatic histories of the twenty years' crisis", 484-485.
[219] Smith outlines here again the importance of Carr's historical commentaries: "Although historical, and generally seen as relatively minor, they may have much to tell us about Carr's political thought specifically and his thought towards IR more broadly. If it is true that we can only gain a deeper understanding of Carr's thought as a whole by engaging with is *oeuvre* in its entirety, then the neglect of his historical work is an oversight in need of correction." Ibid, 478.

survival" determined its position throughout the following years.[220] As "European or world revolution was the acknowledged condition of the building of socialism in Russia and of the very survival of the regime", the fundamental aim of foreign policy was, therefore, "to promote and further it."[221] The Soviet Government, "threatened by the enemy on all sides", was thus deprived of "any power of initiative in foreign policy"—a fact which led to its rupture in relations with the outside world.[222]

The Soviet Union's stance changed in 1920, when it found itself "almost involuntarily in the posture of defending, not the interest of world revolution, but national interests which any government of Russia would be obliged to defend."[223] This change in foreign policy led directly to the negotiations of the Treaty of Rapallo. These negotiations found their origin in Germany's unique place in Soviet foreign policy; particularly as Soviet leadership came to divide the world in two broad categories: "the hostile capitalist Powers of the west and the potentially friendly peoples of the east, themselves also victims of the Western Powers."[224] Germany fitted into neither category, though the defeat of 1918 had "brought her into the category of victims of western imperialism."[225]

The road to Rapallo, "a clandestine path carefully shaded on both sides from any form of publicity" emerged into the open in April 1922.[226] It converged to form "a single coherent foreign policy in which rapprochement with Germany predominated over

[220] E.H. Carr, "World Revolution and Soviet Foreign Policy," *The Listener* 41, no. 1045 (February 3, 1949): 171.
[221] Carr, *A History of Soviet Russia: The Bolshevik Revolution, 1917-1923; Volume Three*, 18.
[222] Ibid, 148.
[223] This arose "automatically out of the continued existence of Soviet Russia in a world of capitalist states." Ibid, 157.
[224] Ibid, 305.
[225] Carr adds to this fact how, "in the Russian economy Germany had always been the outstanding capitalist Power and main supplier of industrial goods." Ibid.
[226] Ibid, 361.

rapprochement with the western Powers."[227] Motivated by a "common fear of western powers, the makers of the Versailles system, and a common hostility to the Poles, now profiteers at the expense both of Russia and Germany", it lied at the heart of both Germany and the Soviet Union's national interests.[228] The knowledge of these two countries of their weaknesses *vis-à-vis* western powers made the partnership seem equally necessary to both.[229] The signing of this treaty gave "Soviet Russia for the first time an assured status as a European Power" and a partnership with another Great Power which also "regarded the treaty as a way of escape from isolation and contempt."[230]

Carr's analysis of the years that followed further reveals the different interests which influenced its position on questions of disarmament and arms control. The Soviet distaste for the French occupation of the Ruhr in 1923 is a clear example of this. Regardless of the occupation's origin in the reparations covered by the Treaty of Versailles, it "weakened Soviet Russia's only important ally", "reduced that ally to the verge of collapse", and brought to a standstill "a branch of German industry which was a large supplier, or potential supplier, of Soviet requirements."[231]

The threat changed after the fall of the Poincaré government and the end of France's intransigent attitude towards Germany, following the Treaty of Locarno.[232] Germany's accession to the League of Nations and rapprochement with Western powers raised fundamental security issues for the Soviet Union, as it would mark a division

[227] Ibid.
[228] E.H. Carr, "Munich to Moscow I," *Soviet Studies* 1, no. 2 (June 1949): 4.
[229] Ibid, 5.
[230] Carr, *A History of Soviet Russia: The Bolshevik Revolution, 1917-1923; Volume Three*, 18.
[231] E.H. Carr, *A History of Soviet Russia: The Interregnum, 1923*-1924 (Bombay, Calcutta, Madras: Macmillan and Co. Ltd., 1954), 154.
[232] E.H. Carr, *A History of Soviet Russia: Socialism in One Country, 1924-1926; Volume Three—Part I* (Hong Kong: Macmillan, 1978), 35.

"between the Rapallo partners, unless both joined the League simultaneously" and could theoretically involve the taking of action against it.[233] During the negotiations of Locarno, Chicherin—the Commissar for Foreign Affairs—remarked to the Soviet ambassador that "Russia needs Germany to rebuild her military power, and Germany needs Russia as an arsenal."[234] Cooperation between both countries was, at its heart, tied to their national interests.

In contrast to its early intransigence towards the League of Nations, it is interesting to note that the Soviet Union took, during this period, a markedly different approach towards disarmament. "As a weak country," Carr notes, "Soviet Russia had the same interest as Germany in promoting the disarmament of the stronger Powers."[235] In the year of Locarno, when "fear of hostile military action against the Soviet Union had become something more than a conventional bugbear", the question of disarmament became "the way to conjure this fear, either by persuading the western powers to disarm or by discrediting them for their failure to do so."[236]

Soviet and German interests were, thus, one and the same.[237] Soviet foreign policy was "pacific and defensive," combining peaceful intentions with "vigorous assertions of the need for national defense."[238] The Soviet Union's appearance in Geneva at the session for the Preparatory Commission for Disarmament gains a new significance when considering this, as Litvinov "stole the limelight by putting forward a

[233] Ibid, 65.
[234] Carr analyses in great detail the Soviet position and its reactions during this period in this work. Ibid, 259.
[235] Ibid, 450.
[236] Ibid, 458.
[237] Ibid.
[238] E.H. Carr, *A History of Soviet Russia: Foundations of a Planned Economy, 1926-1929; Volume Three—I* (London and Basingstoke: Macmillan, 1976), 17.

proposal for the total abolition of all military, naval and air armaments."[239] Upon the next session in March 1928, Litvinov proposed a draft "for total disarmament by stages."[240] When this proposal was shelved too, he substituted it for an alternative draft for a limitation of armaments which "though less Utopian than its two predecessors, went far beyond anything contemplated by the western Powers."[241] The radical contents of these proposals by comparison to others under consideration at the time, as well as the motivations underlying them, thus reveal their security and national interest-oriented origin.[242]

Carr's analysis of general aspects of disarmament, Germany's disarmament and rearmament, and German and Soviet foreign policy clearly show his thought on disarmament and arms control. Disarmament and arms control cannot be separated from larger issues of international law and are fundamentally tied to both the diverging national interests of states and the problems of international law. Carr's commentary on Soviet foreign policy is also significant in relation to the Soviet Union's and Russia's violation of the BWC and CWC despite the chemical and biological weapons taboo, and further points at the particular ways in which national interests, nationalism, and the problems and uncertainty of treaties affect arms control and disarmament. The significance of this in light of the chapter as a whole will be analysed below.

[239] E.H. Carr, *The Russian Revolution, From Lenin to Stalin* (New York: The Free Press, 1979), 174.
[240] Ibid.
[241] This proposal was greeted with sympathy by Germany and Turkey, at the time a new member of the commission. Ibid. The Soviet Union's participation in the Disarmament conference and in the League is also analysed in some further detail in: E.H. Carr, *Twilight of the Comintern, 1930-1935* (New York: Patheon Books, 1982), 53-54; E.H. Carr, "American-Soviet Relations," *The Times Literary Supplement* 2722 (April 2, 1954): 210.
[242] This fact can be seen as well in the leadup to the form which German-Soviet relations took between 1939, the avoidance of a war on two fronts was the compelling thought for both German and Soviet negotiators. E.H. Carr, "Munich to Moscow II," *Soviet Studies* 1, n. 2 (October, 1949): 98-99.

3.4 Conclusion

What, then, does Carr's theory of law and treatment of the topic of disarmament reveal about the overarching questions surrounding international law on disarmament and arms control in the present day?[243] The key conclusion to which his works give rise is that international law is fundamentally affected by power, national interests, and nationalism. In other words, the ways in which national interests fundamentally affect international law and disarmament can be seen throughout Carr's analyses of disarmament during the interwar period, German foreign policy, and Soviet foreign policy.

Carr's analysis of the League of Nations' Covenant also shows international law's inability to overpower national interests. "Not a country in the world," he argues, "has allowed its attitude to be influenced in the minutest degree by its membership of the League or by its obligations under the Covenant."[244] The coercive provisions of the Covenant will therefore work "only if human beings are as ready to risk their lives in the defence of any other country as they are in the defence of their own."[245]

[243] This is not the first work to argue that the core arguments Carr lays out in his works remain relevant today. Mearsheimer articulates this contemporary relevance as follows: "Most importantly, we live in a world where there are thousands of nuclear weapons and where the number of states with nuclear arsenals seems sure to grow in the years ahead. Nuclear war is not likely, but one would be foolish to argue that it cannot happen." Mearsheimer, "E.H. Carr vs. Idealism: The Battle Rages On", 148. Scheuerman offers a different argument for the relevance of classical realism in relation to global political order debates: "For those who have yet to give up on the dream of a just global political order, a proper engagement with classical Realism—and its intellectual history—remains indispensable." Scheuerman, "The (Classical) Realist Vision of Global Reform", 278. Cox, again, offers a different perspective of the contemporary relevance of Carr: "A spectre is certainly haunting the world; however, that spectre is no longer communism, as Marx believed it was back in 1848, but rather a rising tide of nationalism and the search for national solutions in a world that still remains highly interdependent. The stakes therefore could not be higher." Cox, "Introduction", liv.

[244] Carr, *Britain: A Study of Foreign Policy from the Versailles Treaty to the Outbreak of War*, 123.

[245] Ibid, 122-123.

Carr's conclusion in this respect is clear. International law can only be fully followed if "those who have the power have also the will in the last resort" to "take and enforce with vigour and impartiality the decisions which they think right."[246] Power is a prerequisite of this rather than a purely intellectual solution: Even Hitler, Carr argues, "tried to find a moral justification for what he was doing" and, in breaking treaties, he "frequently offered to conclude new treaties with the implication that he would consider himself morally bound to keep them."[247] The forces of selfish interest and power are never absent from international law. Thus:

> The picture of a president in the White House or a prime minister in No. 10 Downing Street hitching his wagon to the star of the loftiest morality and ignoring the balance of power between political forces in the country belongs to the world of pure fantasy.[248]

The influence of power in international law finds its origin in international politics' lack of an effective community to develop common loyalties and a common stock of ideas. The undisguised intrusion of power is thus "far more frequent, and the appeal to morality less likely to be listened to."[249] Rather than represent the wickedness of states, the influence of power in international law is a matter of fact which makes every working concept of morality turn out to be tainted by power. This fundamentally affects international law and international treaties:

> The institution which purports to make authoritative moral pronouncements exists in time and space and cannot free itself from them. Its pronouncements are inevitably coloured by the conditions in which it exists, by its interests and by its ambitions.[250]

[246] Carr, *Conditions of Peace*, 275.
[247] Carr, "The Moral Foundations for World Order", 57.
[248] Ibid, 63.
[249] Ibid, 66.
[250] Ibid.

Carr's analysis of disarmament expresses this idea—that is, the influence of national interests and nationalism on international law. No historical judgements are absolute, and any historical interpretation "depends in part on the values held by the historian, which will in turn reflect the values held by the age and society in which he lives."[251] Even in judging moral opprobrium, in other words, it is impossible to be objective.

The politics underpinning law are, then, an essential matter to confront if aiming to make international law effective. This conclusion is visible in a number of his works; particularly in relation to Carr's thought on the League of Nations' workings, where he argues that the League of Nations "made fashionable a set of elaborate formulas which ingeniously concealed from the unwary the real motives of the negotiators."[252] Politics therefore fundamentally affect what international law can do and achieve; particularly in relation to international treaties, which are subject to national interests:

> The difficulty lies not in the lack of machinery for international legislation, but in the absence of an international political order sufficiently well integrated to make possible the establishment of a legislative authority whose decrees will be recognized as binding on states without their specific assent.[253]

The dualism of politics, therefore, keeps considerations of morality entangled with those of powers, creating "the morality convenient to itself."[254] National interests and power thus play a prominent role in international law. Carr's analysis of the *status quo* further develops the role which power and national interests play in international law. "What

[251] Carr, *The New Society*, 101.
[252] E.H. Carr, *The Soviet Impact on the Western World* (London: Macmillan, 1946), 80.
[253] Carr, *The Twenty Years' Crisis, 1919–1939, reissued with a new preface from Michael Cox*, 193-194.
[254] Ibid, 216.

was commonly called the 'return to power politics' in 1931 was, in fact," he argues, "the termination of the monopoly of power enjoyed by *status quo* Powers."[255]

Power affects the application of abstract principles and laws. This is something which Carr explores in his further work, particularly in relation to the ideal of self-determination. In a book review published in the *Times Literary Supplement*, Carr discusses the application of this principle by Hungary, pointing out the elasticity of the demand for self-determination and the author's seeming lack of "awareness of the close connexion between the social and national problem in most of the transferred territories."[256] This is the case as well in a 1935 discussion on the possible future interactions between Britain and Italy in the Mediterranean.[257] Some of the other forces which Carr finds determine national interest and foreign policy relate to geography, "including not only the location and general shape of the country but also the character and distribution of its natural resources" and the other being the beliefs and assumptions "consciously or unconsciously held by those who decide the nation's foreign policy."[258]

The ways in which power affects the application of abstract principles and laws are fundamental to understand if aiming to overcome the problems confronting international law; particularly in relation to the role which states play in international law. This idea is critical if aiming to understand how the instances of failure to observe

[255] Ibid, 98.
[256] E.H. Carr, "Champion of Hungary," *The Times Literary Supplement* 1962 (September 9, 1939): 522.
[257] Carr, "The League of Peace and Freedom: An Episode in the Quest for Collective Security", 837. A similar discussion on role of power in government can be found in: E.H. Carr, "Keeping an Eye on the World," *The Times Literary Supplement* 2366 (June 7, 1947): 276.
[258] E.H. Carr, "The Pattern of Soviet Foreign Policy," *The Listener* 39, no. 988 (January 1 1948): 3. The role of geography is further explored in a number of other publications, such as: E.H. Carr, "Rivalry in Iran," *The Times Literary Supplement* 2532 (August 11, 1950): 504; E.H. Carr, "The Puzzle of Anglo-German Relations," *The Listener* 48, no. 1218 (July 1952): 12; E.H. Carr, "German-Soviet Relations," *The Times Literary Supplement* 2717 (February 26, 1954): 131.

the taboo explored in chapter two can be best explained. The discrimination present in international society amongst nations, owing to their inequality and their different national interests, "accepted as a normal and legitimate principle of policy", represents the essence of foreign policy.[259] This makes "a sham" out of the thesis that,

> fifty formally sovereign states, differing vastly in population, in resources and in the degree of effective independence which they enjoy, can be treated as equal for the purpose of building up a world order.[260]

This limits what is possible for international law to achieve in a world filled with nation states—a problem which needs to be confronted if aiming to prevent instances of failure to observe the taboo that underlies disarmament and arms control treaties. The equality of opportunity demanded by social justice, rather than being independent of nations, can only be realised in world that rejects the principle of discrimination on the grounds of nationality.[261] The best hope for achieving this lies, Carr argues, in a "balanced structure of international or multi-national groupings" for both the "maintenance of security and for the planned development of the economies" of geographical areas and groups of nations.[262]

It is important to note that the solutions that Carr's thought offers to the different problems underlying and facing international law is ultimately optimistic.[263]

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[259] Carr, "The Moral Foundations for World Order", 60.
[260] Ibid, 62.
[261] Carr, *Nationalism and After, with a new introduction from Michael Cox*, 57-58.
[262] Ibid, 61-62.
[263] Carr, Howe argues, "is one of the few realists—assuming the cap still fits—who senses significant changes afoot in the international system." Howe, "The Utopian Realism of E. H. Carr", 289. Scheuerman's analysis of what he describes as *progressive realism* also offers a similar perspective on the fundamental nature of Carr's theory: "Cosmopolitans and many other critics of Realism have made things too easy for themselves by embracing a simplistic and occasionally caricatured interpretation of Realism. They regularly ignore versions of Realist international theory … which rest on more sophisticated and politically appealing ideas than those pretty much universally ascribed to it." Scheuerman, *The Realist Case for Global Reform*, 4. Booth has also commented on this utopian aspect of Carr: "This side of Carr is normally ignored by realists. It was inconvenient that one of realism's chief gurus had some decidedly utopian leanings." Booth, "Security in Anarchy: Utopian Realism in Theory and Practice", 531. Elshtain also remarks on this aspect of Carr's thought: "Carr's realistic critique invites us to ask whether or not realists can be the architects of a utopia of their own; if so, this surely undercuts their claims to the mantle of 'realism'." Jean Bethke Elshtain, "On Never Reaching the Coast of Utopia," *International Relations* 22, no. 2 (2008): 155.

This optimism is evident throughout his works and is remarked upon when considering the role which power plays in international society. "Human beings," Carr writes, "obstinately refuse to accept as final the view that might is right, even when might masquerades as an intelligent appreciation of national interest."[264] No society can live and function "under the constant obsession of its own impending dissolution."[265] Indeed, "the hypothesis of survival must be accepted," and "faith in the possibility of survival must exist" in order for society to live and work for it.[266] Whilst we "may be utopian if we expect to attain our goal" we shall "indubitably fail if we have no goal ahead by which to set our course, or if we shrink from the difficulties and hardships that are encountered along the way."[267]

Carr's juxtaposition of power and morality makes his proffered solution clear: "It is as fatal in politics to ignore power as it is to ignore morality."[268] Whilst the ideal cannot be institutionalised, nor the institution idealised, compromises remain possible.[269] The recurring patterns and shortcomings Carr identifies, much like of those of realism at large, are "constraints, not unbreakable barriers."[270] These shortcomings do not deprive international law of the condition of law—particularly due to the fact that the relation of law to politics can be found "to be the same in the international as in the national

[264] E.H. Carr, "American Foreign Policy," *The Times Literary Supplement* 2610 (February 8, 1952): 102.
[265] Carr, *The New Society*, 100.
[266] Ibid.
[267] Ibid, 111-112.
[268] Carr, *The Twenty Years' Crisis, 1919–1939, reissued with a new preface from Michael Cox*, 92. Molloy examines this idea: "Peaceful change is an exercise in negotiating the difference between power and morality, steering a middle course between the naive idealism of Utopianism and the morally untrammelled exercise of power." Molloy, "Pragmatism, Realism and the Ethics of Crisis and Transformation in International Relations", 468.
[269] Carr, *The Twenty Years' Crisis, 1919–1939, reissued with a new preface from Michael Cox*, 94-95. Guzzini argues that Carr failed in his quest to mix realism and idealism, with his scepticism being neither "able to define his exact mix of realism and idealism, nor to positively propose a coherent policy." This chapter, as seen in the analysis contained in the preceding pages, takes the opposite view. Stefano Guzzini, *Realism in International Relations and International Political Economy: The Continuing Story of a Death Foretold* (London and New York: Routledge, 2003), 30.
[270] Jack Donelly, *Realism and International Relations* (Cambridge: Cambridge University Press, 2004), 193.

sphere."[271] Respect for international treaties can be maintained "only in so far as the law recognizes effective political machinery through which it can itself be modified and superseded."[272] The solution to the problems underlying international law therefore exists only in a "clear recognition of that play of political forces which is antecedent to all law."[273] These political forces, which explain the instances of failure to observe the taboos underlying the arms control and disarmament treaties, must be accounted for if aiming to strengthen the treaties examined in chapter one of this thesis.

Having brought Carr's complex and provocative thought on international law to light and answered the question of what international law can achieve in regulating heavily political issues, we will continue to analyse the contradiction uncovered in the first two chapters of this thesis: That is, the tension between the taboo underlying international laws of arms control and disarmament and decisions by state parties to these very agreements to use these weapons. The analysis of this contradiction will be carried out through Hans J. Morgenthau's theory of law.[274] Though also a classical realist and often compared to E.H. Carr, Hans J. Morgenthau, through his legal and juridical background, provides us with a different set of answers and insights than those brought to light within this chapter. His thought and works reveal further facets of international law and its limits, as well as the different ways in which politics and national interests come to affect it.

[271] Carr, *The Twenty Years' Crisis, 1919–1939, reissued with a new preface from Michael Cox*, 160.
[272] Ibid, 176.
[273] Ibid.
[274] There are fundamental differences between Morgenthau's and Carr's theories, thought, and the solutions their analyses offer. Molloy outlines a number of these in his examination of tragic and pragmatic realism: "Ultimately, the advantage of rediscovering Realist ethics, both tragic and pragmatic, lies in recognizing that they address ethics in very different, but complementary ways. Morgenthau's concerns play out on a level distinct from the plateau on which Carr operated. Morgenthau's focus on understanding the human being as a political and ethical agent, led to a deeper and more philosophically compelling analysis than that of Carr, but this approach is not designed to deal with the intricacies of a political system in a state of flux." Molloy, "Pragmatism, Realism and the Ethics of Crisis and Transformation in International Relations", 486.

Chapter IV. International Law, Arms Control, and Disarmament in Hans J. Morgenthau's Theory of Law*

4.1 Introduction

A number of publications have sought to re-examine Hans J. Morgenthau's legacy, reintroducing a number of elements that have been ignored or misinterpreted by conventional interpretations of his works.[1] When read carefully and in context, his theory emerges "as a sophisticated, self-conscious, and highly political interrogation of the relationship between power and politics."[2] Morgenthau's works have a surprisingly nuanced understanding of the relationship between ethics and politics, as well as the status of truth and the legitimacy of universal values.[3] Within them, the often-assumed close identity between realism as a set of scientific truths and those who happened to wield power is "is at best too simple, and at worst seriously misleading."[4] He committed

* It should be noted that parts of this chapter have been published as a journal article. Carmen Chas, "Hans J. Morgenthau's Critique of Legal Positivism: Politics, Justice, and Ethics in International Law," *Jus Cogens* 5, no. 1 (2023): 59—84.

[1] Richard Ned Lebow, *The Tragic Vision of Politics: Ethics, Interests and Orders* (Cambridge and New York: Cambridge University Press, 2003), 216; Molloy, *The Hidden History of Realism: A Genealogy of Power Politics*, 1; Molloy, "Realism and reflexivity: Morgenthau, academic freedom and dissent", 338; Williams, *The Realist Tradition and the Limits of International Relations*, 8; Michael C. Williams, "Morgenthau Now: Neoconservatism, national greatness, and realism," in *Realism Reconsidered: The Legacy of Hans Morgenthau in International Relations*, ed. Michael C. Williams (Oxford and New York: Oxford University Press, 2007), 217 and 234-235.

[2] Williams, "Why Ideas Matter in International Relations: Hans Morgenthau, Classical Realism, and the Moral Construction of Power Politics", 634.

[3] Lang, "Morgenthau, agency, and Aristotle", 18; Nicholas Rengger, "Realism, tragedy, and the anti-Pelagian imagination in international political thought," in *Realism Reconsidered: The Legacy of Hans Morgenthau in International Relations*, ed. Michael C. Williams (Oxford and New York: Oxford University Press, 2007), 118-122; Molloy, *The Hidden History of Realism: A Genealogy of Power Politics*, 31-32; Felix Rösch, "Morgenthau in Europe: Searching for the Political," in *Hans J. Morgenthau and the American Experience*, ed. Cornelia Navari (Switzerland: Palgrave MacMillan, 2018), 15; Mihaela Neacsu, *Hans J. Morgenthau's Theory of International Relations, Disenchantment and Re-Enchantment* (London and New York: Palgrave MacMillan, 2009), 1-2; Seán Molloy, "Morgenthau and the Ethics of Realism," in *Routledge Handbook of Ethics and International Relations*, eds. Brent J. Steele and Eric A. Heinze (Oxon and New York: Routledge, 2018), 182; Ty Solomon, "Human Nature and the Limits of the Self: Hans Morgenthau on Love and Power," International Studies Review 14, no. 2 (June 2012): 203-204.

[4] Michael Cox, "Hans J Morgenthau, realism, and the rise and fall of the Cold War," in *Realism Reconsidered: The Legacy of Hans Morgenthau in International Relations*, ed. Michael C. Williams (Oxford and New York: Oxford University Press, 2007), 168-169.

himself "neither to the view that politics is a mechanical or predictable matter nor to the position that science must abstain from taking a moral stand"; further worrying that the Hobbesian state of nature "closed our eyes to the myriad ways in which ethics, mores, and law regulated state action even absent world government."[5]

Hans J. Morgenthau was born to a middle-class, Jewish family in Coburg, Germany in 1904.[6] Though he began to study philosophy at the University of Frankfurt in 1923 he was disappointed by the experience, left both philosophy and Frankfurt, and went to the University of Munich to study law.[7] He worked as a clerk at the chambers of Hugo Sinzheimer, a well-known labour lawyer, in 1928, who brought him into contact with members of the Frankfurt School.[8] Morgenthau passed his doctorate at the University of Frankfurt in 1929 and began to pursue a habilitation with the aim of becoming a law professor in Germany.[9] Rising antisemitism hampered his academic ambitions, however, and, as a result, he left Germany in 1932 for the Graduate Institute of International Studies of Geneva in order to complete his habilitation.[10] Despite facing similar difficulties at Geneva, Morgenthau completed his habilitation in 1934 thanks to the intervention of Hans Kelsen.[11] He received an offer to teach at the Instituto de Estudios Internacionales y Económicos at Madrid, where he began to work in 1935, through the Emergency Committee in Aid of Displaced Foreign Scholars.[12] The start of

[5] Vibeke Schou Tjalve, *Realist Strategies of Republican Peace: Niebuhr, Morgenthau, and the Politics of Patriotic Dissent* (New York and Hampshire: Palgrave MacMillan, 2008), 131; Scheuerman, *The Realist Case for Global Reform*, 16.
[6] Jose Antonio García Sáez, *Kelsen versus Morgenthau: paz, política y derecho internacional* (Madrid: Centro de Estudios Políticos y Constitucionales, 2016), 55.
[7] Hans J. Morgenthau, "Fragment of an Intellectual Autobiography: 1904—1932," in *Truth and Tragedy: A Tribute to Hans J. Morgenthau*, ed. Kenneth Thompson and Robert J. Myers (Washington D.C., New Republic Book Company Inc., 1977), 4
[8] García Sáez, *Kelsen versus Morgenthau: paz, política y derecho internacional*, 58-59; Hartmut Behr and Felix Rösch, "Introduction," in *The Concept of the Political*, ed. Hartmut Behr and Felix Rösch, trans. Maeva Vidal (New York: Palgrave MacmIllan, 2012), 6-7.
Hartmut Behr and Felix Rösch. "Introduction." In The Concept of the Political, edited by Hartmut Behr and Felix Rösch. Translated by Maeva Vidal. New York: Palgrave Macmillan, 2012
[9] Rösch, "Morgenthau in Europe: Searching for the Political", 1.
[10] Ibid, 2-3; García Sáez, *Kelsen versus Morgenthau: paz, política y derecho internacional*, 61-62.
[11] García Sáez, *Kelsen versus Morgenthau: paz, política y derecho internacional*, 62-63 and 70-71.
[12] Ibid, 72.

the Spanish Civil War, however, forced him to emigrate again before finally arriving in United States in 1937.[13] It was only in 1943, after working in a series of precarious positions, that Morgenthau began to work at the University of Chicago, where he would become a prominent figure in the study of international relations.[14]

Though Morgenthau's legal thought is by no means a wholly unknown aspect of his work, it has remained—with the exception of Oliver Jütersonke and Martti Koskennniemi's outstanding works—comparatively unexplored.[15] Before becoming known as an American international relations scholar, Morgenthau was a European jurist concerned with the theoretical problems which the international law of the first half of the twentieth century presented.[16] Trained as a lawyer, he wrote his works within the discipline of international law, only rarely referring to contributions from other disciplines.[17] He engaged extensively with Lauterpacht and Kelsen, offering a detailed and in-depth critique of their theories of international law.[18] This engagement changed upon Morgenthau's introduction in the U.S. to political science as a discipline.[19] This enormous change—not just of language, but also cultural—affected the academic

[13] Rösch, "Morgenthau in Europe: Searching for the Political", 2-3.
[14] García Sáez, *Kelsen versus Morgenthau: paz, política y derecho internacional*, 77-79
[15] Oliver Jütersonke, *Morgenthau, Law and Realism* (Cambridge and New York: Cambridge University Press, 2010); Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument, Reissue with a new Epilogue* (New York: Cambridge University Press, 2006), 198-201; Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2004), 437-460.
[16] Jose Antonio García Sáez, "El giro del Derecho Internacional a las Relaciones Internacionales en Hans J. Morgenthau: Una transición mediada por la Historia," Relaciones Internacionales 37 (2018): 32; Jose Antonio García Sáez, "La correspondencia entre Kelsen y Morgenthau: un diálogo en las fronteras del derecho internacional," *Revista Telemática de Filosofía del Derecho* 25 (2022): 88-89; Christoph Frei, "Politics Among Nations: A Book for America," in *Hans J. Morgenthau and the American Experience*, ed. Cornelia Navari (Switzerland: Palgrave MacMillan, 2018), 57.
[17] Amstrup, "The 'Early' Morgenthau. A Comment on the Intellectual Origins of Realism", 170; Anthony F. Lang Jr., "Introduction," in *Political Theory and International Affairs: Hans J. Morgenthau on Aristotle's The Politics*, ed. Anthony F. Lang Jr. (Westport and London: Praeger, 2004), 2.
[18] Oliver Jütersonke, "The image of law in *Politics Among Nations*," in *Realism Reconsidered: The Legacy of Hans Morgenthau in International Relations*, ed. Michael C. Williams (Oxford and New York: Oxford University Press, 2007), 94; Jochen von Bernstorff, "Peace and Global Justice through Prosecuting the Crime of Aggression? Kelsen and Morgenthau on the Nuremberg Trials and the International Judicial Function," in *Hans Kelsen in America - Selective Affinities and the Mysteries of Academic Influence*, ed. D.A. Jeremy Telman (Switzerland: Springer, 2016), 85-86.
[19] Alfons Söllner, "From Public Law to Political Science? The Emigration of German Scholars after 1933 and Their Influence on the Transformation of a Discipline," in *Forced Migration and Scientific Change: Emigré German-Speaking Scientists and Scholars after 1933*, ed. Mitchell G. Ash and Alfons Söllner (Cambridge: Cambridge University Press, 1996), 247-248; Ashley J. Tellis, "Reconstructing Political Realism the Long March to Scientific Theory," *Security Studies* 5, no. 2 (1995): 39.

structure in which Morgenthau found himself, ultimately resulting in his legal thought being fully absorbed by politics.[20]

The fact Morgenthau's works became a classic in the theory of international relations must not make us forget the fact that he originally worked in the discipline of law.[21] There are further depths to his thought than those that have been conventionally accepted; particularly in relation to the roles he assigns to morality and law.[22] It is because of this that, having established E.H. Carr's nuanced and multifaceted thought on the question of the limits of international law, I will continue the examination of the research questions outlined in the introduction of this thesis with Hans J. Morgenthau's works.

The choice to continue the analysis of how instances of failure to observe the taboo underlying disarmament and arms control treaties with Morgenthau is significant. Morgenthau's professional background, more linked to legal studies than Carr's more diplomatic career, make his theory show a more juridical and legal focus. The concepts he outlines in his oeuvre, particularly in regard to law, retain a strong importance in relation to the fundamental problems faced by international law. They remain, despite the date of their publication, of essence if we aim to understand ways in which legal

[20] García Sáez, *Kelsen versus Morgenthau: paz, política y derecho internacional*, 74; José Antonio García Sáez, "A propósito del paso de Hans J. Morgenthau por España: Positivismo mal entendido y teoría realista del derecho internacional," *Anuario de filosofía del derecho internacional* XXX (2014): 237.
[21] Antonio Truyol y Serra, "Presentación", in *Escritos sobre política internacional*, Hans J. Morgenthau, trans. Esther Barbé (Spain: Tecnos, 1990), x; Oliver Jütersonke, "Hans J. Morgenthau on the Limits of Justiciability in International Law," *Journal of the History of International Law* 8 (2006): 182.
[22] Through his legal background, he brought his sophisticated understanding of the relationship between law and politics with him to the U.S. Oliver Jütersonke, *Morgenthau, Law and Realism*, 4-5; William E. Scheuerman, *Hans Morgenthau: Realism and Beyond* (Cambridge and Malden: Polity, 2009), 4.

restrictions and taboos are eroded due to political necessities. The argument offered by Morgenthau himself in the prologue of *Truth and Power* can, in this sense, be mirrored:

> Thus the substance of the issues we faced in the 1960's has not changed since these essays were written. Those issues are, by and large, as far from a solution now as they were then. What has, however, changed—and in good measure because of the lack of solution—is the mood, the moral, intellectual, and political attitudes, with which many of us approach those issues today.[23]

In order to bring forth Morgenthau's complex and provocative thought on international law to light, I will provide an examination of his theory of law following the same fundamental division as was used in the previous chapter. The choice to follow this structure is primarily motivated due to the common themes which can be found in his oeuvre in both of these periods, the fundamental division the onset of the Second World War caused, and the transformative effect the Second World War had in international society. The analysis of Morgenthau's theory of law will be done thematically, following the same divide contained within the previous chapter. First by focusing on his pre-1939 and post-1939 works, and, following this, those which are focused on issues related on arms control and disarmament. The argument will develop in four stages. First, it will examine Morgenthau's analysis of the nature of international law, the differences between domestic and international law, his theory of sanctions, and his concept of the political. Second, it will examine his theory and critique of international law, the role played by justice and politics, and the profound effect that national interests and the balance of power have on it. Third, it will examine his analysis of disarmament and arms control, paying special attention to his analysis of historical cases and nuclear weapons. Finally, it will bring the dominant themes present in his

[23] Hans J. Morgenthau, "Prologue," in *Truth and Power: Essays of a Decade, 1960—70* (New York and London: Praeger Publishers, 1970), 4-5.

works together, offering a conclusion of why, for Morgenthau, legal restrictions and taboos can be eroded due to political necessities and the path any potential solutions might take. In bringing these themes together, this chapter's conclusion will explain why the legal restrictions and taboos examined in chapter one are—as seen in chapter two—eroded due to political necessities.

4.2 Morgenthau's pre-1939 works

4.2.1 The nature of the law

Morgenthau opens *La Réalité des Normes* with a discussion on the nature of norms and laws.[24] "A norm", he writes, is a "prescription of the will: it designates, between various possible actions, the one that must be chosen."[25] When decided upon and prescribed by a legislator it imposes a particular way of behaviour on its subjects, affecting their will.[26] Norms, therefore, are "demands that the human mind makes on the human will to modify empirical reality, and according to which it evaluates that reality."[27]

The validity of a norm is one of the preconditions of its effectiveness: Whilst a law's effectiveness cannot be conceived without validity, validity can exist outside of all

[24] Morgenthau's *La réalité des normes* was his Habilitation. It was published in 1934, after he submitted it to the prestigious Paris editorial Félix Alcan in order to force his evaluating committee to evaluate his Habilitation again. Félix Alcan agreed to publish it without major difficulties. That his second evaluation committee—which took place after the publication of this book—was presided by Hans Kelsen is noteworthy, as it brought together the two theorists for the first time. García Sáez, *Kelsen versus Morgenthau: paz, política y derecho internacional*, 64.

[25] All quotes from Morgenthau's French-language works in this chapter, unless otherwise indicated, have been translated by the author. Hans J. Morgenthau, *La réalité des normes, en particulier des normes du droit international*. *Fondements d'une théorie des normes* (Paris: Librairie Félix Alcan, 1934), 22-23.

[26] Ibid, 22-23.

[27] Ibid, 23.

effectiveness.[28] Validity represents the normative existence of a norm, whilst its objective effectiveness is the result of its normative function.[29] Two phenomena make it possible to characterise validity: Duty and conscience.[30] Conscience is a specific sanction within the domain of morality.[31] To say that a moral norm is valid is to hold that "a given normative disposition obtains, by means of moral conscience … the abstract faculty of determining the will of these individuals and by that of realizing the effective order which it prescribes."[32]

Norms of law, morals, or customs are, therefore, for Morgenthau, inseparably linked to human communities.[33] They are real things given to observation, and which lend themselves, rather than to metaphysical creations, to exact descriptions and empirical verification.[34] Morgenthau contrasts this position with that of legal positivism, which recognizes legal norms as valid only when they are laid down by valid legislative bodies.[35] Legal positivism's erroneous view of the nature of the law brings forth several errors which affect the interpretation and application of laws:

1. Legal positivism combats, like all kinds of positivism, Metaphysics which aspire to enter the domain of science.[36]

2. Traditional juridical positivism not only refuses to admit the existence ... of a specific type of Law, but it also refuses to take into consideration a branch of Law whose existence is obvious: we speak of juridical norms foreign to the State.[37]

[28] Ibid, 32.
[29] Ibid, 33.
[30] Ibid, 52.
[31] Ibid, 53.
[32] Ibid.
[33] Ibid, 38-39.
[34] Hans J. Morgenthau, "Positivisme mal compris et théorie réaliste du droit international," in *Collección de Estudios historicos, jurídicos, pedagógicos y literarios, ofrecidas a D. Rafael Altamira y Crevea* (Madrid: Bernejo, 1936), 1.
[35] Ibid, 1-2. I examine Morgenthau's critique of legal positivism and its relation to his understanding of morality and ethics in international law in the following article, which expands on this beyond the limits of this thesis substantially: Chas, "Hans J. Morgenthau's Critique of Legal Positivism: Politics, Justice, and Ethics in International Law", 59-84.
[36] Ibid, 3.
[37] Ibid, 4.

3. The positivism of the dominant doctrine is well founded in rigorously separating the Law as an object of science from other neighbouring fields such as Morality, Politics, etc.[38]

In committing the first error, positivism excludes the empirical possibilities which reality could logically contain; discounting, denying, and not taking into consideration the existence of norms foreign to the state.[39] By separating the law as an object of study from neighbouring fields, such as politics and morality, it moves away from reality.[40] Through this, legal positivism forgets the "purely hypothetical character of the separation of the legal sphere from the other normative domains" and neglects a part of reality that would have otherwise concerned it.[41] Legal positivism is therefore unfaithful to both its principles and methods: it is unable to understand legal orders in an objective, theoretical, and systematic way.[42] This proves, for Morgenthau, that the validity of legal norms does not have to be based on another legal standard and that the last norm of a system of legal norms cannot be normatively determined.[43]

Morgenthau's critique of legal positivism fundamentally affects the entirety of his legal thought and theory at large.[44] He rejects the proposition that "the problems of

[38] Ibid, 5.
[39] Ibid, 3.
[40] This is, for Morgenthau due to how the law, which participates in the destiny of ethics, carries the features of morality even when seemingly separated from it. Ibid, 6.
[41] Ibid, 6-7.
[42] Ibid, 10.
[43] Morgenthau, *La réalité des normes*, 81.
[44] The influence of Kelsen on Morgenthau has been substantially explored in the literature, if slightly less than that of Schmitt, and has led to conflicting conclusions on the similarities between the theories of both authors. García Sáez explores it widely across his works and argues Kelsen's theory of law presupposes the starting point for Morgenthau's own. Truyol y Serra similarly argues that the starting point for Morgenthau's concept of international law can be found in Kelsen's and Scelle's theories. Bernstorff emphasises the close link between Kelsen's and Morgenthau's careers, but argues both authors started from opposing conceptual premises. Jütersonke argues that Morgenthau's equation of 'reality' with 'validity'—the key to his legal thought—is in line with Kelsen's work, but that both theorists part ways on the context-dependent reality of the enforcement of sanctions. Jütersonke has also traced in depth the ways in which Kelsen and Morgenthau's migration to the U.S. impacted their theory and works. Amstrup notes how Morgenthau, in his early works, was not in any fundamental way in disagreement with Kelsen's ideas, but disagreed on the hierarchical ordering of legal norms. Rösch emphasises Morgenthau's disagreement with legal positivists like Kelsen and the possibility of a pure theory of law. Rösch and Grima have also explored the different aspects of Morgenthau's and Kelsen's critiques of populism. Schuett has also outlined it prominently. García Sáez, "A propósito del paso de Hans J. Morgenthau por España: Positivismo mal entendido y teoría realista del derecho internacional", 220; García Sáez, *Kelsen versus Morgenthau: paz, política y derecho internacional*; Truyol y Serra, "Presentación", xiii; Bernstorff, "Peace and Global Justice through Prosecuting the Crime of Aggression? Kelsen and Morgenthau on the Nuremberg Trials and the International Judicial Function", 85-86; Jütersonke, "The image of law in *Politics Among Nations*", 105; Jütersonke, *Morgenthau, Law and Realism*, 144-146; Oliver Jütersonke, "Echoes of a

international politics amount to little more than scientific problems."[45] García Sáez supports this idea and argues that Morgenthau's critique of legal positivism both underpins his analysis of international law and sets him apart from Kelsen despite the latter's influence on his legal thought.[46] For Jütersonke, the continuity of Morgenthau's thought theoretically is startling. Many of the convictions he developed whilst engaged in the field of international law "even long after anyone identified the name 'Morgenthau' with anything other than 'power politics'."[47] It would therefore be misleading to:

> [I]nterpret Morgenthau by establishing a break in his oeuvre, and hence assuming there to have been a 'European' Morgenthau engaged in legal theory and then an 'American' Morgenthau disillusioned with liberal internationalism and preaching the virtues of power politics.[48]

This theoretical foundation pushes Morgenthau's analysis of international law further than Carr's more diplomatic own. In setting itself apart from legal positivism, it rejects the idea that international law can stand without being affected by politics and national interests. In the same manner, the treaties examined in chapter one cannot exist independently from their political context and are innately affected by it. Morgenthau's analysis of international law, which is fundamentally affected by this theoretical foundation, will be examined throughout the following pages.

Forgotten Past: Mid-Century Realism and the Legacy of International Law," *Ethics & International Affairs* 26, no. 3 (2012): 376-377; Oliver Jütersonke, "Kelsen and Morgenthau in America: Betwixt Legal Philosophy and International Politics," *Austrian Journal of Political Science* 51, no. 3 (2022): 79; Amstrup, "The 'Early' Morgenthau. A Comment on the Intellectual Origins of Realism", 170-171; Rösch, "Morgenthau in Europe: Searching for the Political", 4; Felix Rösch and John Grima, "Practising International Thought as a Critique of Populism: Realist Accounts for a Democratic Political," *Austrian Journal of Political Science* 51, no. 3 (2022): 84-90; Robert Schuett, *Hans Kelsen's Political Realism* (Edinburgh: Edinburgh University Press, 2021), 13-14.

[45] William Bain, "Deconfusing Morgenthau: Moral Inquiry and Classical Realism Reconsidered," *Review of International Studies* 26, no. 3 (July 2000): 451.

[46] García Sáez, "A propósito del paso de Hans J. Morgenthau por España: Positivismo mal entendido y teoría realista del derecho internacional", 221.

[47] Jütersonke, "Hans J. Morgenthau on the Limits of Justiciability in International Law", 183-184.

[48] Jütersonke, "The image of law in *Politics Among Nations*", 110.

4.2.2 Domestic law vs international law

The reach and nature of domestic and international law are markedly different. Morgenthau exemplifies the difference between them through the four questions which the internal legal order of a state must be able to answer in order to be effective: 1) "Who has the legal power over a given object, say over a desk?" 2) "How can the legal power over this desk change hands?" 3) "How will a dispute on the legal power over this desk be settled?" 4) "Finally, in what way will the person who holds legal power over this desk be protected in the exercise of it?"[49] A legal order which does not provide an answer to the first of these questions would be unable to have a material basis to solve the remaining three.[50] A failure to give an answer to the second question would lead to a fatal conflict "with the living forces which call for modifications in the domains of powers."[51] If the legal does not give an answer to the third question, its constitutive elements would remain "in the state of theoretical principles without ever being able to be realized in practice," so that "it will no longer be possible to ensure its sanction."[52] If, finally, a legal order failed to answer the fourth question, "its material decisions, and itself with them, would risk remaining ineffective."[53] It is only by answering all four questions that a legal system can do what falls under the responsibility of any legal order: "justice and peace."[54]

[49] Hans J. Morgenthau, *La Notion du Politique et la Théorie des differends internationaux* (Paris: Librairie du Recueil Sirey, 1933), 7.
[50] Ibid, 7.
[51] Ibid, 7-8.
[52] Ibid.
[53] Ibid.
[54] Ibid.

A domestic legal order can answer all four questions completely.[55] International law, however, only gives a satisfactory answer to the first question.[56] The legal order of the state, from the point of view of international law, has a different position from that of any non-state legal order.[57] International legal norms are developed in accordance with the objective requirements of the international social reality.[58] They impose their power on states which "to regulate their respective relations in a normative manner" have no other choice but to either form "the norms of international law according to these requirements or to renounce any normative regulation of their relations."[59] International law cannot generate through its own forces a state legal order, as it cannot otherwise prevent the spontaneous generation of the legal order of a state.[60] It neither says that it is "necessary to engender, on such and such territory, the legal order of a State" nor that it is "necessary to destroy the legal order that a state engenders on such an such territory."[61]

International law, therefore, fulfils a dual function with regards to the legal orders of states. On the one hand, it establishes the conditions "under which a new state legal order can be engendered," and, on the other, it delimits "the domains of validity of norms-sanctions as well as the material norms of the different state orders by protecting them against any encroachment."[62] These two functions are typical in any legal order: the creation of subjects of law and the delimitation of their spheres of

[55] Morgenthau, *La réalité des normes*, 144-145.
[56] Morgenthau, *La Notion du Politique et la Théorie des differends internationaux*, 8.
[57] Morgenthau, *La réalité des normes*, 129.
[58] Ibid, 139-140.
[59] Ibid.
[60] Ibid, 179.
[61] Ibid, 179-180.
[62] Ibid, 181-182.

competence.[63] To say that international law is a law governing states is, then, to say that it "normatively determines the relations between groups of men subject to the domain of personal validity of various legal orders."[64] Jütersonke emphasises the following in relation to Morgenthau's conception of international law:

> Morgenthau's legal realism moreover assumed that international law, just as every legal order, was an autonomous system of norms culminating in a basic norm that was of necessity in the realm of morals or mores.[65]

If we consider the norms of international law from the point of view of their normative structure, the problem that we have to solve—that is, the reality of the norms of international law—can then be reduced to the following two questions: who are "bearers of this reality," and "what is the particular nature of the element of validity of norms of international law."[66] The normative provision of *pacta sunt servanda* cannot serve as the fundamental law of international law, as it "requires that all the norms of a legal system, not just a part of them, can derive their validity from this norm."[67] Were *pacta sunt servanda* to be the fundamental norm of international law, it should be formulated in the following way:

> The head of the international community must be the guarantor of the international legal order, the bearer of its validity. We therefore need to know who is the guarantor of this entire legal order, that is to say the supreme guarantor, and what are the guarantees by which the validity of this fundamental norm is ensured.[68]

[63] Ibid.
[64] Ibid, 214-215.
[65] Jütersonke, *Morgenthau, Law and Realism*, 117.
[66] The first of these two questions involve two additional distinct problems: 1) What is the nature of the element of validity on which the entire legal order depends, and 2) what is the nature of the element of validity of the norms of international law. Morgenthau, *La réalité des normes*, 216.
[67] Ibid, 216-217.
[68] Ibid, 217.

The international legal order is, however, decentralised by nature. No single man or group or men are the bearers of its validity.[69] The validity of international law thus rests "not on the fundamental norm of international law, but on the fundamental norm of state law."[70] Amstrup supports this reading of Morgenthau's early works, and links it to his critique of the international order. Morgenthau, he argues,

> points out that it is not possible to 'find' or 'invent' some nice international order, acceptable to all states. Such an international order would presuppose a harmonizing of all interests influencing international relations—and this is simply '*un rêve irréalisable'*. The states will necessarily disagree on the essential question: which particular international order should prevail and therefore be protected?[71]

Morgenthau's analysis of international law transcends Reus-Smit's analysis of realist thought, for which international law is, he argues, "epiphenomenal: it rests on power but when confronted with the actions of determined states it is weak and ineffectual."[72] The validity of international law, in light of this section's analysis, represents the dualism of international law. The bearer of the validity of the norms of international law are the individuals who belong to the states which form the international community.[73] The differences between the validity and fundamental norms of domestic legal orders and international law fundamentally alter the shape which their norms and laws take. The inability of international law to generate through its own forces a state legal order affects its effectiveness, binding it together with its decentralised nature to international social reality. The reach of international law, then,

[69] Ibid, 217-218.
[70] Ibid, 218.
[71] Amstrup, "The 'Early' Morgenthau. A Comment on the Intellectual Origins of Realism", 165-166.
[72] Christian Reus-Smit, "The Politics of International Law," in *The Politics of International Law*, ed. Christian Reus-Smit (Cambridge: Cambridge University Press, 2004), 16.
[73] For them to become the bearers of legal validity, "the nature and the modalities of this validity must be normatively determined." Morgenthau, *La réalité des normes*, 219-220.

is notably different from that of domestic law; a fact which affects the strength and role of the arms control and disarmament treaties explored in chapter one.

Having established this, the following section will now turn to the Morgenthau's analysis of the enforcement of laws and of sanctions.

4.2.3 Legal sanctions

Sanctions provide norms with "the element of validity, of reality": they establish the sanction as an intrinsic element of the norm without which it cannot be guaranteed.[74] The nature of a norm, in so much as it is a prescription of the will, can be realised solely through a sanction. If the sanction fulfils the function of constituting the norm as a real phenomenon by giving it validity, the sanction cannot be "something unreal, a pure idea like the normative provision as such."[75] The ideal type of sanctioning system therefore faces three key requirements: 1) "guaranteed validity", 2) "guaranteed effectiveness", and 3) "the most restricted application of the least violent empirical sanctions."[76]

Sanctions have three main elements: the holder of the sanction, the one to whom it is addressed, and the measure which is the sanction.[77] Though Morgenthau classifies these into diplomatic, legal, and economic sanctions, he argues that only one

[74] Hans J. Morgenthau, "Théorie des sanctions internationals [Part I]," *Revue de droit international et de législation compare* 16, no. 3 (1935): 479.
[75] Ibid, 479-480. This allows us to logically deduce the definition of a sanction: it is the "the measure of coercion that intervened in the event of the violation of a norm." Ibid, 482-483.
[76] Ibid, 498.
[77] Ibid, 483.

distinction enriches our knowledge of the structure of sanctions. [78] That is, the distinction between "sanctions of a peaceful nature," such as public opinion and moral sanctions, and "sanctions which are carried out by physical force," such as *vendetta*, capital punishment, and war.[79] International legal sanctions are different from their domestic counterparts, and require us, Morgenthau argues, to distinguish between three different types of international law:

i. General international law, "which is valid for all members of the international community without exception, unless specific prescriptions with divergent content intervene,"
ii. The international law of the League of Nations "which is valid only for the members of the League of Nations, but which tends to apply to the international community as such," and
iii. "Particular international law," which is, as a general rule, "of a contractual nature and applies only to the contracting States."[80]

Distinguishing between these three different types of international law is of particular importance, as international society is characterised by a series of partial communities, each formed by a system of legal norms. The structure of international society therefore affects and defines international legal sanctions.[81] As international society is nothing other than "the sum of the partial communities called 'states,'" the sanctions specific to international law either result from state sanctions or are at the

[78] Ibid, 488-489.
[79] Ibid, 489-490.
[80] Hans J. Morgenthau, "Théorie des sanctions internationals [Part II]," *Revue de droit international et de législation compare* 16, no. 4 (1935): 809.
[81] Ibid, 809-810.

"service of norms whose content has been formed according to the aims of particular states."[82] Thus, sanctions have no chance of overriding the impulses or interests which serve the purposes of states. Rather:

> The moral conscience of statesmen, as well as that of individuals as such, is determined as a general rule, as far as international questions are concerned, according to national norms which, as such, aim for a national purpose and not an international one.[83]

The power of these national purposes over the structure of international legal sanctions is considerable, particularly as international law does not have a way with which to enforce sanctions of a coercive nature. It inhibits the effect which public opinion may have on the violation of an international norm—an idea which stands at the heart of the different taboos brought to light in the first chapter of this thesis. Morgenthau's concept of the national purpose here, Lang argues, differs from the traditional realist emphasis on security. Though a state may not act in a way that conforms to individual norms of morality, it will,

> pursue a set of normative goals in its foreign policy. The national purpose provides a tool by which to understand these goals as linked to the community's history and values. States seek to convince others that their ways of life are normatively positive.[84]

Morgenthau's examination of the question of what public opinion can achieve as a sanction deepen his critique of international legal sanctions as a whole. If the public opinion of not just a single state, but of the community of states were unanimously against the violation of a norm "how effective would it be? It would generally be nil… the violating state and individuals need not worry about it, and history teaches us that

[82] Ibid.
[83] Ibid, 811.
[84] Anthony F. Lang Jr., *Agency and Ethics: The Politics of Military Intervention* (New York: State University of New York Press, 2002), 22.

they never worry about it, as to the wrongful action itself. "[85] The disruptor state would not have the slightest regard for public opinion as a sanction, unless he sought to influence it "in accordance with its own policy" and it did not "exploit it to find justifications for its illicit actions."[86] Public opinion is, then, nothing but "an artificial product of the divergent political aspirations of different states."[87] Its weakness to the divergent national interests of states reduces the strength of sanctions of a peaceful nature, rendering their application difficult. It is important to note, however, that for Morgenthau, paradoxically, "an international normative order sanctioned by physical force is in no way different from that of international anarchy," as "it is war here and there."[88]

Morgenthau's analysis of the elements of international sanctions reveals important conclusions about their effect in international law, their reach, and their relation to power and politics. Koskenniemi's description of the difference between the positions of sceptic and rule-approach lawyers—which he equates to Morgenthau and Kelsen—should be noted in relation to Morgenthau's investigation of international sanctions:

> For the latter, sanction is a matter of the existence of a rule providing for sanctions. For the sceptic, this is a matter of observable fact. What is important is not whether such rule exists or not but what is the likelihood that actual sanction will follow. And this is a likelihood that varies due to differences of political context.[89]

[85] Morgenthau, "Théorie des sanctions internationals [Part II]", 813-814.
[86] Ibid, 814.
[87] Ibid, 814-815.
[88] This has additional consequences in relation to the usage of war as an international sanction: "It therefore seems preferable, even if it is impossible to prevent war as a violation of law, to at least renounce war as a legal instrument." Ibid, 818.
[89] Koskenniemi develops this idea further. The sceptic's argument here is, he argues, curious due to how it both maintains and denies the distinction between law and politics. Law is "a division of power politics. The distinctions between law and society, legal and political disputes and legal and sociological methods vanish. What is binding is determined by what is politically effective." Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument, Reissue with a new Epilogue*, 198-199.

Morgenthau's analysis of international sanctions is therefore related to his overarching examination of the possibility of settling international conflicts by legal means. Morgenthau's investigation into this aspect of international law, Amstrup argues, is clearly implied in his works:

> Morgenthau's aim in his thesis was to investigate the possibility of settling international conflicts by legal means. This problem clearly implies some sort of relation between 'political' and 'legal' international orders … There is a fundamental contradiction between the ever-changing power relations between states on the one hand and the immobile system of international law on the other hand.[90]

Due to its structure, general international law can only recognise the authorisation of the application of physical force as an international sanction.[91] International law, however, can only allow such an intervention on the condition that the state in question fails its international obligations in a flagrant manner, particularly with respect to the application of indirect international sanctions.[92] This conclusion, is, however, for Morgenthau, "of a theoretical rather than practical scope," as, in practice, the state against which a physical sanction is directed "will defend, if it is able, the sovereignty endangered by the intervention."[93] Any attempt to enforce such an international sanction would lead to "an armed conflict between the two States in question, unless the superiority of the coercive means of the executing State render all resistance at first sight useless", with such a risk only being taken if serious interests were at stake.[94]

[90] Amstrup, "The 'Early' Morgenthau. A Comment on the Intellectual Origins of Realism", 168.
[91] Morgenthau, "Théorie des sanctions internationals [Part II]", 818-819. By delimiting "the domains of action of the various systems of sanctions by the granting … a kind of monopoly in principle within their respective domains," international law has drawn "the only way in which it is possible for it to sanction its own normative provisions." Morgenthau, "Théorie des sanctions internationals [Part II]", 822.
[92] Ibid, 823-824.
[93] Ibid, 824.
[94] Ibid.

The question of enforcement in Morgenthau's theory of sanctions explains the contested nature of many of the allegations of noncompliance examined in chapter two. The usage of Novichok to poison Navalny and of chemical weapons in Syria stand out in this regard. Though both events constitute clear violations of the CWC and of the taboo associated with chemical weapons as established in chapter one, the political deadlock that followed are of singular importance. International law can only recognise the authorisation of the application of physical force as an international sanction, and, in practice, the state against which a physical sanction is directed will defend its sovereignty if it is able.

Having examined this we will turn to the role which politics plays in international law, and the way in which these two seemingly separate concepts are fundamentally related.

4.2.4 The concept of the political

Though in the original and etymological sense the concept of the political originally refers to when it enters the sphere of public life, for Morgenthau this is not the case in international society. Here political questions are "questions likely to have an influence on the relations of a State with other States, on the situation of a State within the international community."[95] As any action by the state outside of itself

[95] Morgenthau, *La Notion du Politique et la Théorie des differends internationaux*, 24.

ultimately affects its relations with other states, from the point of view of the goal they pursue, all external actions of the state are thus always political.[96]

Morgenthau contrasts this position with the idea that the difference between political and other international questions lies in the fact that political questions have no legal character, and that, therefore, "the notion of a political question would thus be equivalent to that of a question of pure interest."[97] An empirical examination of the facts, he writes, makes it clear that the differentiation of the concept of the political and the legal character of disputes cannot be substantiated, as historical experience "abounds with cases where questions of law unquestionably took on a political character."[98] Law and international law were not "antithetical to but parallelly coexistent with politics."[99]

Morgenthau's insistence that the concept of the political and the legal character of disputes cannot be differentiated represents a profound aspect of his thought on the problems facing international law. Positive international law did not have the necessary tools to fully grasp the concept of the political, and, consequently, had to resort to "defining the concept of the political in opposition to the notion of legal questions or questions susceptible to a juridical solution."[100] Koskenniemi has supported this interpretation of Morgenthau's thought.[101] Morgenthau's 1930s works, for Amstrup,

[96] Ibid.
[97] Ibid.
[98] The question of whether the territorial integrity of China was violated in 1931 by Japan is therefore, despite its legal character, of "great political importance." The affirmation of the legal character of a dispute does not necessarily imply that it is not political, as the "politics and law do not form an antithetical couple." Ibid, 25-26.
[99] Martti Koskenniemi, "Carl Schmitt, Hans Morgenthau, and the Image of Law in International Relations," in *The Role of Law in International Politics: Essays in International Relations and International Law*, ed. Michael Byers (Oxford: Oxford University Press, 2001), 22.
[100] Jütersonke, "Hans J. Morgenthau on the Limits of Justiciability in International Law", 196-197.
[101] "Morgenthau", Koskenniemi argues, "attacks classical discourse in the following way: Classicists defined 'law' too narrowly as rules emerging by agreement between States." Furthermore, he argues, for Morgenthau, "Politics is focal and law secondary. Even where the latter exists, its content cannot be ascertained independently from political analyses." Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument, Reissue with a new Epilogue*, 197-198.

point the singularly important problem that international conventions can only be understood within the political and historical circumstances of their creation.[102] Williams has additionally argued the following in relation to Morgenthau's concept of the politics:

> [W]hat marks Morgenthau's realism off from classical realism …. Is his insistence that a system of checks and balances, and of autonomous spheres, must continue to recognize the centrality of politics, and that balancing as a social strategy will only be effective if it is understood as a principled strategy, not a mechanistic process.[103]

The importance of these historical and political circumstances in the interpretation of international conventions and treaties represents an important point of confluence between Carr and Morgenthau.[104] Politics is a unique realm in which certain problems remain perennial.[105] The political character of legal questions, for Morgenthau, depends on circumstances of place and time, and does not follow from a principle.[106] The affirmation of the legal character of a dispute does not, therefore,

[102] Amstrup expresses this idea in the following way: "Morgenthau points to a very important problem. An international convention cannot be literally interpreted, but must be seen in relation to the political circumstances, not just at the time of its conclusion, but also and in particular at the moment of interpretation." Amstrup, "The 'Early' Morgenthau. A Comment on the Intellectual Origins of Realism", 172.

[103] Williams, "Why Ideas Matter in International Relations: Hans Morgenthau, Classical Realism, and the Moral Construction of Power Politics", 651-652.

[104] It should be noted in relation to this that there is a substantial body of literature on the Schmitt's influence or lack of influence on various aspects of Morgenthau's thought. Morgenthau's relationship with this theorist—who he deemed the 'most evil man alive' after meeting him in his apartment and claimed had stolen some of his ideas—stands at the centre of this. Jütersonke questions the influence of Schmitt on Morgenthau, and instead puts more importance on Morgenthau's interactions with Lauterpacht and Kelsen. He also argues that this literature has occluded other scholars Morgenthau conversed with and prevented the development of a more nuanced picture of his thought. For Scheuerman, Morgenthau's own failures stemmed in part from his Schmittian intellectual baggage. Williams has also argued that Schmitt's critique of liberalism and realpolitik was a key element of the context in which Morgenthau's political realism emerged. Koskenniemi also sees a prominent Schmittian side in Morgenthau's thought, and argues they were both led from a critique of formalism into a decisionism that no longer provided space for legal constraints beyond physical possibility and the conscience of statesmen. The author of this thesis, as the analysis of this chapter has and will show, leans towards Jütersonke's interpretation of Schmitt's influence on Morgenthau. Felix Rösch, "Realism, the War in the Ukraine, and the Limits of Diplomacy," *Analyse & Kritik* 44, no. 2 (2022): 207-208; Jütersonke, "The image of law in *Politics Among Nations*", 94; Jütersonke, *Morgenthau, Law and Realism*, 66-67; Jütersonke, "Echoes of a Forgotten Past: Mid-Century Realism and the Legacy of International Law", 384; William E. Scheuerman, "Carl Schmitt and Hans Morgenthau: Realism and beyond," in *Realism Reconsidered: The Legacy of Hans Morgenthau in International Relations*, ed. Michael C. Williams (Oxford and New York: Oxford University Press, 2007), 86; William E. Scheuerman, "Realism and the Left: the case of Hans J. Morgenthau," *Review of International Studies* 34, no. 1 (January 2008): 30; Williams, *The Realist Tradition and the Limits of International Relations*, 93-94 and 104-105; Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960*, 463-464; Koskenniemi, "Carl Schmitt, Hans Morgenthau, and the Image of Law in International Relations", 19.

[105] Lang, "Introduction", 3-4.

[106] Morgenthau, *La Notion du Politique et la Théorie des differends internationaux*, 30.

necessarily imply that it is not political. All that can be said is that in certain circumstances, certain questions regularly acquire a political character, which they would not have in other circumstances.[107] Politics and law, in other words, do not form an antithetical couple.[108]

Morgenthau illustrates the relationship of politics and law through the debates which took place during the second Hague Conference. Certain questions which a certain state considered, from the point of view of its interests as devoid of political character appeared to other states as having "a political character, or at least as likely to have one."[109] Thus, Morgenthau argues, we must conclude that it is impossible to distinguish between political and non-political questions, as the concept of the political "is not necessarily inherent in certain determined objects, just as it is not necessarily absent from other determined objects."[110] It does not have a fixed contents that can be defined once and for all. Rather, it is a "quality, a tonality, which can be specific to any object, which attaches preferentially to some of them, but which does not necessarily attach to any."[111]

Morgenthau's nuanced illustration of the concept of the political plays, as Williams shows in his own analysis of Morgenthau, an important role in his thought:

> Morgenthau's refusal to accept an exclusive delineation of the political allows him to examine the ways in which political reality is structured according to the interpenetration of different social spheres, while still maintaining that politics has a distinctive core that must not be reduced to other spheres.[112]

[107] Ibid, 30.
[108] Ibid, 26.
[109] Ibid, 31.
[110] Ibid, 32.
[111] Ibid.
[112] Williams, *The Realist Tradition and the Limits of International Relations*, 125.

Scheuerman's analysis of Morgenthau also illustrates the importance of Morgenthau's concept of the political:

> Morgenthau accused positivists like Kelsen of mapping out a distorted picture of legal reality, in which law was artificially separated, on the one hand, from ethics and mores, and, on the other hand, from the factual realities of social power.[113]

The scope of the political for international law, then, does not consist only in that the political "serves international law as a social support," but that it is, as such, an "intrinsic element of international law itself."[114] International legal norms ultimately refer to this political element, showcasing the problematic relationship between international law and the political in all its special aspects.[115] The concept of the political thus applies to events that go far beyond the domain of the state.[116] Politics, in the specific sense, therefore consist of "the particular degree of intensity of the relationship that the will to power of the State creates between its objects and the State."[117] This fundamentally affects international law in all its facets, linking it irrevocably with politics.

[113] Scheuerman, *Hans Morgenthau: Realism and Beyond*, 27.
[114] Morgenthau, "Positivisme mal compris et théorie réaliste du droit international," 19-20.
[115] Morgenthau analyses this in relation to the role which neutrality plays in international relations and international law. See for instance: Hans J. Morgenthau, "Assistance to Publication," *The American Journal of International Law* 32, no. 3 (July 1938): 560; Hans J. Morgenthau, "The Problem of Neutrality," *University of Kansas City Law Review* 7, no. 2 (1938-1939): 109-128; Hans J. Morgenthau, "International Affairs: The Resurrection of Neutrality in Europe," *The American Political Science Review* 33, no. 3 (June 1939): 473-486.
[116] Morgenthau, *La Notion du Politique et la Théorie des differends internationaux*, 42.
[117] Ibid, 63-64.

4.3 Morgenthau's post-1939 works

4.3.1 Domestic law vs international law

Domestic and international politics are "two different manifestations of the same phenomenon: the struggle for power", and only differ due to the different moral, political, and social conditions prevailing in each.[118] In contrast with domestic society, international society is "unable to define authoritatively the interests of its members to be defended and to defend them."[119] The inability to authoritatively defend or be defended by its members fundamentally impacts international law.[120] The public overrates the functions which international law can fulfil either by "conceiving of it primarily as a substitute for international politics" or seeing in it "the utopia of well-meaning humanitarians or the ideology of clever politicians."[121]

Neither of these perceptions of international law reflects reality. The domestic legal system operates from within a social context, from which it receives its validity. "Take that context away," Morgenthau argues, "and the legal rules remain a dead letter."[122] The same is true in relation to international law, where:

> The provisions of treaties from which international lawyers quote mean very little in so far as the actuality of international law is concerned, that is with

[118] Hans J. Morgenthau, *Politics Among Nations, the Struggle for Power and Peace*, 5th ed. rev. (New York: Alfred A. Knopf, 1978), 42.
[119] Hans J. Morgenthau, "The Decline and Fall of American Foreign Policy," in *Politics in the Twentieth Century, Volume II: The Impasse of American Foreign Policy*, ed. Hans J. Morgenthau (Chicago: The University of Chicago Press, 1962), 30-31.
[120] The teacher of international law, Morgenthau writes, is "confronted with a number of problems which do not face the teacher of any other branch of the law." Hans J. Morgenthau, "Reviewed Work(s): International Law. Volume 1, International Law as Applied by International Courts and Tribunals by Georg Schwarzenberger," *The Review of Politics* 8, no. 1 (January 1946): 141.
[121] Ibid.
[122] Hans J. Morgenthau, "Principles of International Politics: A lecture delivered at the Naval War College on 21 September 1955," *Naval War College Review* 8, no. 6 (February 1956): 6.

> respect to the effect which the rules of international law have upon the actual behavior of States.[123]

Areas such as the convergence of legal rules and social functions in international law are therefore always precarious, as "they exist only by virtue of a permanently precarious consensus among the interested nations."[124] The more socially important branches of international law are normally "characterized by a thorough discrepancy between the literal meaning of their rules and their social environment."[125] They are the result of an attempt to gloss over existing dissension through agreement on a "meaningless verbal formula which preserves the status quo."[126] International law and verbal formulas are not, however, meaningless:

> [D]uring the four hundred years of its existence international law has in most instances been scrupulously observed. When one of its rules was violated, it was, however, not always enforced and, when action to enforced it was actually taken, it was not always effective.[127]

Lebow supports this aspect of Morgenthau's thought, and links it to Kant and Kelsen.[128] García Sáez also emphasises this aspect of his thought.[129] Scheuerman links it to Morgenthau's early legal works, which have also been explored in the first part of this

[123] For Morgenthau, this is clear upon looking at the rules of war. Oppenheimer and Lauterpacht's rules of maritime warfare, "which are allegedly valid rules of international rule," do not necessarily bear a resemblance to the "practices engaged in by all maritime nations in the two World Wars." This is due to the relationship between "the very existence and effectiveness of international law" and the "balance of power as the basic principle of international politics." Ibid, 7-8.
[124] Hans J. Morgenthau, "Political Limitations of the United Nations," in *Law and Politics in the Contemporary World: Essays on Hans Kelsen's Pure Theory and Related Problems in International Law*, ed. George A. Lipsky (Berkeley: University of California Press, 1953), 143-144.
[125] Ibid.
[126] Ibid.
[127] Morgenthau, *Politics Among Nations, the Struggle for Power and Peace*, 281.
[128] Lebow argues this in the following way: "Following Kant and Hans Kelsen, Morgenthau treated law as a system of norms (nomos), and argued that international society had evolved to encompass a wide range of norms that states for the most part obeyed." Lebow, *The Tragic Vision of Politics: Ethics, Interests and Orders*, 239.
[129] García Sáez has analysed Morgenthau's critique of legal positivism, particularly through its reliance on the neokantian distinction between *Sein* and *Sollen*, which gives rise to a deficient way of understanding of the legal and the real. García Sáez, "La correspondencia entre Kelsen y Morgenthau: un diálogo en las fronteras del derecho internacional", 95.

chapter.[130] Morgenthau's sympathetic account of international law, he argues, is significant and worth noting; particularly in light of his critique of positivism:

> Still writing in 1940 as a reform-minded lawyer, albeit one who clearly believed that the admirable quest to minimize international violence by legal means could best be advanced by breaking with legal orthodoxy, Morgenthau offered a surprisingly sympathetic account of many of its features. His main target was legal positivism and by no means international law or reform in toto.[131]

A naïve faith in natural science led too many of its admirers "to advance simplistic answers to deeply rooted political and social dilemmas for which we can only hope to find unavoidably fragile and provisional resolutions."[132] Jütersonke has also remarked on this aspect of Morgenthau's thought:

> Politics Among Nations is not a book on political theory. It is a work on the practical limitations to the use of law in the international realm, written at a time when peaceful change seemed an increasingly futile endeavour, and the bipolar stalemate that was to become the Cold War an ominous reality.[133]

Morgenthau's main criticism of international law was directed "primarily at the fact that it was not able to integrate the contributions of the 'behaviorist revolution'."[134] To deny that international law exists as a system of binding legal rules, for Morgenthau, therefore "flies in the face of all the evidence."[135] International law, however, remains a primitive type of law due to its decentralised nature, as its rules are "binding only upon

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[130] "In light of the mature Morgenthau's relative skepticism about the transformative power of international law," Scheuerman writes, "his early demands for a reformed international legal order inevitably seem surprising. Nonetheless, it would be mistaken to dismiss them as nothing more than a sin of youth, a momentary lapse of good judgment, immediately jettisoned for purportedly sounder and more familiar ideas associated with orthodox variants of Realism." Scheuerman, *Hans Morgenthau: Realism and Beyond*, 23.

[131] Ibid, 26-27.

[132] William E. Scheuerman, "Was Morgenthau a Realist? Revisiting Scientific Man Vs. Power Politics," *Constellations* 14, no. 7 (2007): 506-507.

[133] Jütersonke, "Hans J. Morgenthau on the Limits of Justiciability in International Law", 206.

[134] Olivier Zajec, "Legal Realism and International Realism in the United States during the Interwar Period: Neglected Reformist Convergences between Political Science and Law," *Revue française de science politique (English Edition)* 65, no. 5-6 (2015): 67-68.

[135] Despite the "doubtful efficacy" and sometimes "even of doubtful validity" of legal instruments such as the Briand-Kellogg Pact, the Covenant of the League of Nations, and the Charter of the United Nations, these are, "not typical of the traditional rules of international law." Traditional rules of international law, writes Morgenthau, concern "the limits of territorial jurisdiction, the rights of vessels in foreign waters, and the status of diplomatic representatives." Morgenthau, *Politics Among Nations, the Struggle for Power and Peace*, 281.

those states which have consented to them."[136] In Morgenthau's view, Bernstorff argues, it is the uncertainties about so fundamental a question as the legality of collective acts of violence that demonstrates the weakness of international law as a legal order.[137] Koskenniemi has also emphasised the importance of these uncertainties in Morgenthau's thought:

> Morgenthau's thesis revolved around the apparent paradox that though there were no objective reasons for why the legal process could not be used for the resolution of any kinds of international conflicts, in practice only a very small number were submitted to it.[138]

The decentralised nature of international law, for Morgenthau, affects the judicial and executive functions of international law. Only a small number of international legal rules—such as the rules of interpretation, the rules providing sanctions, and the rules delimiting the jurisdiction of individual states—do not owe their existence to the consent of the members of the international community.[139] These, however, are either the logical precondition for the existence of any legal system or of a multiple state system. They do not affect the sovereignty of individual states and make it possible as a legal concept in the first place.[140]

The decentralised nature of international law is the inevitable result of the structure of international society, which lacks the ability to impose laws by the group that holds the monopoly of organised force.[141] If rules are not supported by the interests

[136] Many of the rules that are binding by virtue of the consent given are, additionally, "so vague and ambiguous and so qualified by conditions and reservations" to allow "individual states a very great degree of freedom of action." Hans J. Morgenthau, "The Problem of Sovereignty Reconsidered," *Columbia Law Review* 48, no. 3 (April 1948): 343.
[137] Bernstorff, "Peace and Global Justice through Prosecuting the Crime of Aggression? Kelsen and Morgenthau on the Nuremberg Trials and the International Judicial Function", 97.
[138] Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960*, 440.
[139] Morgenthau, "The Problem of Sovereignty Reconsidered", 343-344.
[140] Ibid.
[141] "Where there is neither community of interest nor balance of power, there is no international law." Morgenthau, *Politics Among Nations, the Struggle for Power and Peace*, 281-282.

of those to which they are addressed or by the power of a central authority which can enforce the law if it is violated, it remains powerless.[142] Thus, as long as nations deal with and oppose each other on the basis of equality "without having a sovereign superior to them which can give, apply, and enforce the law," international law is bound to remain a primitive type of law and in a precarious state.[143]

This leads us to the main way in which international law is created—treaties—which will be analysed within the following subsection.

4.3.2 International treaties

Only two forces can create law in the international sphere: necessity and mutual consent.[144] These two forces, however, are fundamentally affected by the decentralised character of the legislative function of international law. First, that, "many matters bearing upon international relations … are not regulated by international law" due to the divergent interests involved.[145] Second, that in those matters "with regard to which agreement was possible, insecurity and confusion frequently reign," as, one needs to determine which treaties remain in force.[146]

[142] This fundamentally affects international law and what it can achieve. The different reach of international law by comparison to that of domestic law affects the differing strength and role of the arms control and disarmament treaties explored in chapter one. Hans J. Morgenthau, "International Law and International Politics: An Uneasy Partnership," *American Society of International Law Proceedings* 68 (1974): 333.
[143] Ibid.
[144] Morgenthau, *Politics Among Nations, the Struggle for Power and Peace*, 283.
[145] Ibid, 283-284.
[146] This lack of precision, which originates in the "confusing multitude of unilateral claims", permeates "most branches of the law of nations, by virtue of the decentralized character of the legislative function." Ibid, 283-285.

Aside from the small number of rules which are binding on states regardless of their consent, the main bulk of international legal rules owe their existence to the mutual consent of the individual subjects of international law; that is to say—to states.[147] This origin fundamentally affects international law, as governments are "anxious to shake off the restraining influence that international law might have upon their foreign policies."[148] International law, then, is principally used for the promotion of national interests and to evade legal obligations that might be harmful through the advancement of "unsupported legal claims and by misinterpreting the meaning of generally recognized rules of international law."[149]

The need to substitute the unanimous consent of all subjects of international law for genuine international legislation gives rise to an additional problem: that of "ascertaining the meaning of the provisions of international treaties, of the rights they confer, of the obligations they impose."[150] International legal documents, Morgenthau argues, are vague and ambiguous regularly out of necessity, as states would otherwise not be able to find a common basis on which different national interests could meet in harmony.[151] Thus, in the international field, "it is the subjects of the law themselves that not only legislate for themselves but are also the supreme authority for interpreting and giving concrete meaning to their own legislative enactments.[152]

The impact that the need for consent has on the international law is substantial. States interpret and apply the provisions of international law "in light of their particular

[147] An example of these, as examined in previous pages, are the international legal rules defining the limits of national sovereignty. Ibid, 283-284.
[148] Ibid, 284-285.
[149] Ibid.
[150] Ibid, 285.
[151] Ibid, 285-286.
[152] Ibid, 286.

and divergent conceptions of the national interest", marshalling them to the support of their particular international policies.[153] Reliance on states and national interests therefore weakens international law. It is noteworthy, Morgenthau argues, that international law is incapable of "giving a precise answer to so fundamental a question as to whether it forbids collective acts of violence for certain purposes."[154]

The decentralised character of international law and the role played by states within it represents a key weakness of international law. When in 1939 the Soviet Union attacked Finland, Morgenthau argues, it confronted France and Great Britain with two issues, one legal and another political: Did this action "violate the Covenant of the League of Nations" and, if so, "what countermeasures should France and Great Britain take?"[155] Though the legal question could be answered in the affirmative, the political question depended on three separate factors: First, "upon the manner in which the Russian action affected the interests of France and Great Britain"; second, "upon the existing distribution of power between France and Great Britain … and the Soviet Union and other potentially hostile nations"; finally, upon the "influence that the countermeasures were likely to have upon the interests of France and Great Britain and the future distribution of power."[156] Lebow has similarly argued that:

> One of the tragedies of the post-World War I era, Morgenthau maintained, was that Wilsonians read the limited success of law in restricting violence as evidence that international agreements could outlaw war and resolve, or at least regulate, the kinds of conflicts that had led to war in the past.[157]

[153] Morgenthau illustrates this idea through the Briand-Kellogg Pact of 1928. Has this agreement, he asks, "been from the beginning a rule of international law binding upon all signatories, or is it merely a statement of moral principle without effect?" Morgenthau's analysis is, on this point, directly comparable to Carr's own despite their different professional backgrounds. Ibid, 286-287.
[154] A further question arises in relation to this if international legal rules are consistently breached and this breach is accepted by other subjects of international law: whether the legal rule still exists as a binding legal rule at all. Ibid, 287-288.
[155] Morgenthau, "The Decline and Fall of American Foreign Policy", 31.
[156] Ibid.
[157] Lebow, *The Tragic Vision of Politics: Ethics, Interests and Orders*, 242.

There can therefore be "no more primitive and no weaker system of law enforcement" than international law, for it delivers "the enforcement of the law to the vicissitudes of the distribution of power between the violator of the law and the victim of the violation."[158] It makes it easy for the "strong to both violate the law and to enforce it, and consequently puts the rights of the weak in jeopardy."[159] A small nation must, therefore, look for the protection of its rights to the assistance of powerful friends. This subjects the enforcement of international law and international treaties to national interests:

> [W]hether or not an attempt will be made to enforce international law and whether or not the attempt will be successful do not depend primarily upon legal considerations and the disinterested operation of law-enforcing mechanisms. Both attempt and success depend upon political considerations and the actual distribution of power in a particular case.[160]

This—that is, the primacy of national interests—represents an essential problem which international treaties cannot avoid by themselves.[161] Namely, the failure to account for the non-legal forces which affect international law:

> This legalistic, positivist approach to the problems of international law and organization leads, of necessity, to an optimistic approach to the problems of international politics; for, since it takes the stipulations of rights and duties contained in international legal documents at their face value, it cannot fail to attribute maximum efficiency to them, and, conversely, to minimize the importance of autonomous political factors.[162]

[158] Morgenthau, *Politics Among Nations, the Struggle for Power and Peace*, 298.
[159] Ibid.
[160] Ibid.
[161] Lang has remarked on the important role national interests play in Morgenthau's overarching thought, arguing that when combined with his concept of the national purpose they "provide an important vantage point from which to think about U.S. foreign policy." Lang, "Introduction", 4.
[162] Hans J. Morgenthau, "Preface," in *Peace, Security and The United Nations*, ed. Hans J. Morgenthau (Chicago and Illinois: University of Chicago Press, 1946), 6.

In proposing to deal exclusively with legal matters, legal positivism delimits the subject-matter of its research.[163] Thus, the failure of the post-World War One science of international law, rather than being due to "personal or accidental circumstances" grows out of the "very assumptions and methods which have led juridic positivism to defeat in the domestic field."[164] Failing to account for the national interests that affect international law can only result in the failure to resolve the very problems to which they give rise. The longstanding taboos associated with the usage of certain weapons explored in chapter one are not enough: National interests must be taken into account if aiming to strengthen arms control and disarmament treaties.

4.3.3 International organisations

The problem of international organisation is, Morgenthau argues, "not different from the problem of organization in general."[165] The relationship between the substantive goal of a group of people and the institutional forms through which they endeavour to materialise it is identical on all social levels. It is only on the international level that "it has almost become a dogma that organization is not so much a means to an end as an end in itself."[166] For Morgenthau, the assumption that membership and support of an international organisation provides an alternative to the traditional methods and objectives of international politics is erroneous. Instead, it provides "a new

[163] Hans J. Morgenthau, "Positivism, Functionalism, and International Law," *The American Journal of International Law* 34, no. 2 (April 1940): 261.
[164] Ibid, 264-265.
[165] Hans J. Morgenthau, "International Organization and Foreign Policy," in *Politics in the Twentieth Century, Volume II: The Impasse of American Foreign Policy*, ed. Hans J. Morgenthau (Chicago: The University of Chicago Press, 1962), 107.
[166] Ibid.

medium for the traditional methods of international politics."[167] International organisations thus find themselves limited by the lack of an understanding of the limits of the law. It is "the utopian hope which made the internationalist look at the United Nations as a new and radical departure in international relations," he writes, when in reality its Charter was "deeply imbedded in the spirit of the times."[168]

The legalistic approach to international organisations, though possible in municipal law, is significantly less so in international law due to the powerful effect that national interests have over it.[169] Lebow has expressed the problem national interests represent for international organisations in the following way:

> In many societies, norms, institutions and laws direct the struggle for power into ritualized and socially acceptable channels that prevent its otherwise violent and destructive consequences. In the international sphere, the struggle for power cannot so readily be tamed.[170]

Morgenthau clearly argues that the struggle for power cannot be easily tamed in international society and fundamentally affects international organisations. The Charter of the United Nations, he argues, "may mean different things according to the political intentions of the nations supporting it" and "according to the political developments which will occur in the future."[171] Thus, not only has the United Nations not replaced power politics; its organisational forms and procedures have been put at the service of power politics.[172] It is an instrument through which "its members try to protect and

[167] The League of Nations and United Nations both stand as examples of this. What brough the regime of 1919 to an end was not the "refusal of the United States to join the League of Nations," but the "policies pursued by the great powers" both inside and outside the organisation. Ibid, 108-109.
[168] Hans J. Morgenthau, "The Yardstick of the National Interest," in *Politics in the Twentieth Century, Volume II: The Impasse of American Foreign Policy*, ed. Hans J. Morgenthau (Chicago: The University of Chicago Press, 1962), 121.
[169] Morgenthau, "Political Limitations of the United Nations", 143.
[170] Lebow, *The Tragic Vision of Politics: Ethics, Interests and Orders*, 225.
[171] Morgenthau, "Preface", 6-7.
[172] Morgenthau, "Political Limitations of the United Nations", 150; Hans J. Morgenthau, "The New United Nations and the Revision of the Charter," *The Review of Politics* 16, no. 1 (January 1954): 7.

promote their respective national interests."[173] Attempts to explain national policies in terms of United Nations' policies amount either to "ideological rationalizations and justifications of national policies in terms of supranational ones" at best, and attempts to cloak the "absence of any positive national policy whatsoever" at worst.[174]

García Sáez has supported the idea that Morgenthau's analysis of international organisations such as the International Criminal Court would remain identical today:

> Indeed, it is impossible not to notice how the power relations between states are reflected in the results that the Court's operation has given until now: only the leaders of weak (specifically African) states have been prosecuted, whilst the leaders of the great powers can afford to ignore these courts, and even openly boycott them.[175]

Whatever functions the United Nations is able to fulfil in relation to the preservation of peace do not depend on the legal provisions of the Charter or its institutions, but on "the political policies pursued by the great powers through the medium of the traditional methods of diplomacy."[176] As long as it survives as a legal entity, however impotent at present in political matters, it "carries within its legal framework political potentialities for good which may or may not be realised in the future, but which it would be unwise to discount off-hand."[177]

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[173] Morgenthau, "The Yardstick of the National Interest", 77.
[174] Morgenthau, "Political Limitations of the United Nations", 151.
[175] García Sáez also compares Morgenthau's critique of international organisations to that of Danilo Zolo. "En efecto, es imposible no reparar en cómo las relaciones de poder entre los estados se plasman en los resultados que hasta ahora ha dado el funcionamiento de la Corte: solo mandatarios de estados débiles (concretamente africanos) han sido enjuiciados, mientras que los mandatarios de las grandes potencias pueden permitirse ignorar dichos tribunales, e incluso boicotearlos abiertamente." García Sáez, "El giro del Derecho Internacional a las Relaciones Internacionales en Hans J. Morgenthau: Una transición mediada por la Historia", 54.
[176] Morgenthau, "Political Limitations of the United Nations", 152.
[177] Hans J. Morgenthau, "The Revision of the Charter," in *Politics in the Twentieth Century, Volume II: The Impasse of American Foreign Policy*, ed. Hans J. Morgenthau (Chicago: The University of Chicago Press, 1962), 135.

Having established these different underlying aspects of international organisations and, through them, of international law, we will analyse the way in which politics, justice, and ethics fundamentally affect its workings.

4.3.4 Politics, justice, and ethics

The idea that the history of political thought is the history of the moral evaluation of political power lies at the heart of Morgenthau's critique of international law.[178] "When we speak of politics," he writes, "we have in mind a universal force inherent in human nature and necessarily seeking power over other men."[179] Although this force manifests itself in different periods of history in different ways, it finds its specific expression in the competition for and exercise of the supreme power of the state, where the will to power "interposes itself between the will to live and the means to that end."[180] It deflects action from the course "human reason has outlined for it," orienting it towards the achievement of its own end: "the accumulation, preservation, and demonstration of power."[181]

International politics is subject to these same forces. Regardless of the ultimate aims of international politics and how they may be defined—whether in terms of a religious, philosophic, economic, or social idea—power is always its immediate aim.[182]

[178] Hans J. Morgenthau, "The Evil of Politics and the Ethics of Evil," *Ethics* 56, no. 1 (October 1945): 1.
[179] Hans J. Morgenthau, *Science: Servant or Master?* (New York: The New American Library, 1972), 31.
[180] Ibid, 31-32.
[181] Morgenthau develops this idea through the following example: "Modern war and many types of historic war seek either to settle the competition for power by eliminating the competitor (the Carthaginian peace) or to kill as many of the enemy as possible in order to make the hostile government conductive to the other side's demands. Political assassination and civil war have throughout most of recorded history been widely used in order to settle the competition for supreme power." Ibid.
[182] Morgenthau, *Politics Among Nations, the Struggle for Power and Peace*, 29.

The essence of international politics is identical to its domestic counterpart, as both are "a struggle for power, modified only by the different conditions under which this struggle takes place in the domestic and in the international spheres."[183]

International politics, however, is not solely dominated by power. The complexity of Morgenthau's thought on power has been widely explored in the literature.[184] Cox has challenged the one-sided reading of Morgenthau's work that identifies realism as a set of scientific truths with those who happen to wield power and has read his views as providing a theoretical rationalization for American power.[185] Tjalve describes Morgenthau's formulation of the democratic challenge as "a balance between escaping the dangers of an end to politics on the one hand, and the hazards of rendering politics an absolute end in itself on the other."[186] Williams also reaffirms the complexity of Morgenthau's thought with regards to power and politics:

> [T]o see Morgenthau's realism simply as a crude reduction of politics to pure power is mistaken. In fact, when read carefully and in context, his realist theory emerges as a sophisticated and self-conscious, and highly political interrogation of the relationship between power and politics.[187]

Neacsu also questions the traditional reading of Morgenthau's thought, arguing that he was criticised for what he used to condemn: "the neglect of moral considerations in the interpretation of events in the international political arena."[188] Molloy emphasises the

[183] Ibid, 37.
[184] Zambernardi has, for example, argued for the contemporary relevance of Morgenthau's critique of US foreign policy on the grounds that the "flaws that conducted Washington into the 'Vietnam quagmire' are not historically bounded" and still seem to affect some foreign policy circles. Lorenzo Zambernardi, "The impotence of power: Morgenthau's critique of American intervention in Vietnam", *Review of International Studies* 37, no. 3 (2010): 1355-1356.
[185] Cox, "Hans J Morgenthau, realism, and the rise and fall of the Cold War", 168-169.
[186] Tjalve, *Realist Strategies of Republican Peace: Niebuhr, Morgenthau, and the Politics of Patriotic Dissent*, 97.
[187] Morgenthau's thinking, Williams writes "is driven by a concern that recognizing the centrality of power in politics risked yielding (and legitimizing) a situation in which the capacity to wield any form of power—particularly physical violence—is the ultimate arbiter of authority and legitimacy." Williams, "Why Ideas Matter in International Relations: Hans Morgenthau, Classical Realism, and the Moral Construction of Power Politics", 634.
[188] Neacsu, *Hans J. Morgenthau's Theory of International Relations, Disenchantment and Re-Enchantment*, 16.

importance of Morgenthau's ethical theory in dispelling his misrepresentation as an amoral theorist of international relations:

> Morgenthau's distinctive approach to ethics emerged from his attempts to analyse why the liberal order which was to replace the old system of the balance of power after World War One terminated in the inexorable erosion of its legal, moral, and political foundations.[189]

Lang reasserts the depth of Morgenthau's ethical thought further and explores the Aristotelian conception of agency in Morgenthau's thought:

> This Aristotelian conception of agency allows Morgenthau to retain the principle that persons and states pursue their interests, but in pursuing those interests they might well be acting in accordance with normative standards. The virtue of prudence, which Morgenthau locates in the practice of diplomacy, provides the tool by which interests and principles can be brought into alignment.[190]

The juxtaposition of power politics and moral politics, which is "fundamentally mistaken," derives "from the assumption that the principles of morality have the same substantive quality as, say, the principles of politics, economics or law."[191] It is the dialectic of ethics and politics that prevents the latter from escaping the former's "judgment and normative direction."[192] Thus, by depriving the political act of ethical significance altogether, the modern age reveals "its inability to understand and solve the problem of political ethics with its own intellectual means."[193] Neither politics nor ethics can be ignored:

> Neither science nor ethics nor politics can resolve the conflict between politics and ethics into harmony. We have no choice between power and the common good. To act successfully, that is, according to the rules of the political art, is

[189] Molloy, "Morgenthau and the Ethics of Realism", 182.
[190] Lang, "Morgenthau, agency, and Aristotle", 19.
[191] Hans J. Morgenthau, "The Moral Dilemma of Political Action," in *Politics in the Twentieth Century, Volume I: The Decline of Democratic Politics*, ed. Hans J. Morgenthau (Chicago: The University of Chicago Press, 1962), 325. This idea is developed in a number of Morgenthau's further works, such as: Hans J. Morgenthau, "Realism in International Politics" *Naval War College Review* 10, no. 5 (January 1958): 1-2; Hans J. Morgenthau, "Review, Reviewed Work(s): Towards an Abiding Peace by R. M. MacIver," *Journal of Political Economy* 52, no. 1 (March 1944): 91-92.
[192] Morgenthau, "The Evil of Politics and the Ethics of Evil", 5.
[193] Ibid, 6.

> political wisdom. To know with despair that the political act is inevitably evil, and to act nevertheless, is moral courage.[194]

The idea of justice, which is "a quality of interpersonal and, ultimately, social relations," is affected by this dichotomy.[195] Justice requires that men "give to others, and receive from others, what is their due."[196] Where, however, "do we find the standards by which we can measure the adequacy of what a man receives and gives?"[197] We take for granted, Morgenthau argues, that the standards of judgement and action produced by the "peculiarities of our perspective can serve as universal laws for all mankind."[198] Thus, a great power "imbued with the conviction that its particular conception of justice reflects the order of the universe" will be tempted to make "that order prevail in the rest of the world."[199]

Justice, then, is "a screen for parochial interests and dependent on power for its realisation," which, when consistently applied, can result "in injustices … at least as great as those its application attempted to remedy."[200] While the aspiration for justice aims at using power for its ends, it "eggs on the lust that seeks power for power's sake."[201] In the dialectic between justice and power, power gets the better of justice, for "the work of justice is never done and always dubious; the work of power, however ephemeral it may be, is clearly seen and simply enjoyed."[202] Thus, for Morgenthau, the quest for justice can neither be satisfied nor eradicated. It cannot be satisfied "because we are

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[194] Hans J. Morgenthau, *Scientific Man vs Power Politics* (London: Latimer House Limited, 1947), 173.
[195] Hans J. Morgenthau, "Justice and Power," *Social Research* 41, no. 1 (Spring 1974): 166.
[196] Hans J. Morgenthau, "On Trying to be Just," in *Truth and Power: Essays of a Decade, 1960—70* (New York and London: Praeger Publishers, 1970), 63.
[197] It is here where power affects this concept, as all of us, Morgenthau writes, "look at the world and judge it from the vantage point of our interests." Ibid, 63-64.
[198] Ibid, 64.
[199] Morgenthau, "Justice and Power", 172-173.
[200] Morgenthau uses the application of the principle of national self-determination in the interwar period within Central and Eastern Europe as a particular example of this. Ibid, 173.
[201] Morgenthau, "On Trying to be Just", 67.
[202] Ibid, 67.

ignorant of the order of the universe which is invoked to supply justice to a concrete case," with this invocation justifying and rationalising "parochial interests which can only maintain themselves supported by power."[203] Lang has emphasised this aspect of Morgenthau's thought. The role played by morality in international politics was not always a positive, as, "rather than acting as a constraint on power and political action, the moral discourse most prevalent in international politics actually serves to justify power politics."[204]

The dialectic between justice and power lies at the heart of Morgenthau's theory and critique of international law. Morgenthau was concerned "not with demonstrating and exercising power for its own sake, but with exercising power in a way which improves the moral and material condition of humanity."[205] In defending or opposing the existing order, "even those who oppose it invoke its particular justice on their own behalf."[206] Power, therefore, must be taken into account when considering the influence of ethics and justice on international law.[207] By covering political reality with an ideological veil, theoretical thought cuts itself off from access to that reality, losing its creative impulse.[208]

The belief in the redeeming power of the law, which reforms the conditions of man through its mere existence, demands that politics "be 'reformed' and

[203] Morgenthau, "Justice and Power", 174.
[204] Caution about moral discourse in the international realm is, Lang argues, a "a seriously neglected aspect of the classical realist scholarship." Rather than dismiss it outright, Morgenthau recognises that morality was always a part of politics and argues that "statesmen continually abuse that moral discourse and, in so doing, create situations of irreconcilable differences." Lang, *Agency and Ethics: The Politics of Military Intervention*, 190-192.
[205] Bain, "Deconfusing Morgenthau: Moral Inquiry and Classical Realism Reconsidered", 463-464.
[206] Morgenthau, "Justice and Power", 174-175.
[207] Morgenthau's analysis on this point adds nuance to that of taboos over the usage of biological, chemical, nuclear, and conventional weapons explored in chapter one. Schwarzenberger's analysis of ethics in international law, though similar to Morgenthau's own, develops these ideas in a considerably more legalistic way. This will be explored in the following chapter.
[208] Morgenthau, *Science: Servant or Master?*, 10; Hans J. Morgenthau, "Thought and Action in Politics," Social Research 38, no. 4 (Winter 1971): 611-618.

'rationalized'."[209] This dominating belief has brought forth the idea that "reason would reign supreme through the medium of the political scientist, the economist, the sociologist, the psychologist, etc." and attempts to exorcise "social evils by the indefatigable repetition of magic formulas."[210] Morgenthau's multifaceted conception of politics plays, as Williams argues, an important role here:

> Morgenthau's conception of 'politics' is not, therefore, just an analytic device: it is a moral and political project. Long-standing claims that his Realism eschews morality, reduces freedom to determinacy, ignores domestic politics, and denies the possibility of progress are badly mistaken.[211]

Zambernardi has also remarked on this aspect of Morgenthau's thought, arguing that his line of reasoning was,

> not intended as an attempt to establish a genuine theory of foreign policy but rather a philosophical frame of reference for a political system in which ethics, unknowable to humans, is to stay in a constant state of evolution.[212]

Mistaken interpretations of the relationship between justice and politics fundamentally affect international law. By mistaking the dialectic between justice and power, we mistake, in turn, the nature of international society itself, confusing the domestic and international experience.[213] The rule of law has "come to be regarded as a kind of miraculous panacea which, wherever applied, would heal, by virtue of its intrinsic reasonableness and justice, the ills of the body politic."[214] The problems of war and

[209] Morgenthau, *Scientific Man vs Power Politics*, 31-32.
[210] Ibid, 34 and 40.
[211] Williams, *The Realist Tradition and the Limits of International Relations*, 124.
[212] Lorenzo Zambernardi, "The limits of power: Knowledge, ethics, and foreign policy in Hans J. Morgenthau's international theory," *International Relations* 36, no. 1 (2022): 18.
[213] This is particularly revealing in relation to the analyses of both chapters one and two of this thesis. The problem at hand is, for Morgenthau, bigger than the quest for perfect treaty compliance. The instances of failure to observe the taboo explored in chapters one and two transcend the terms of the treaties themselves, and involve justice, power, and ethics.
[214] Morgenthau, *Scientific Man vs Power Politics*, 100.

peace, however, "in contradistinction to the problem of an air-cooled engine, is not closer to solution today than it was when it first presented itself to the human mind."[215]

Having established this, I will analyse the role played by power in a country's foreign policy through national interests.

4.3.5 National interests, imperialism, and the 'status quo'

International law and international morality are, for Morgenthau, fundamentally related to national interests.[216] Morality clothes politics in order to make it appear that this quest for power, "far from violating morality, were actually its consummation."[217] This ideological function is morality's "main function for international politics."[218] The relatively constant relationship between power and national interests is the "basic datum for the purposes of both theoretical analysis and political practice."[219] The period of history when national interests could be said to be subordinated and limited has been replaced by one in which individual nations have become "the highest moral unity on earth," and have further been tempted to equate their "own moral values with morality

[215] Ibid, 183-184.
[216] "In the phenomenon of uniting nationalism," Guzzini writes, Morgenthau offers "not only a conceptual bridge between the individual and the political elite, between human nature and the level of the state, but also a possible explanation for the phenomenon of total war in the twentieth century." Guzzini, *Realism in International Relations and International Political Economy: The continuing story of a death foretold*, 27.
[217] Hans J. Morgenthau, "The Intellectual and Moral Dilemma of Politics," in *Politics in the Twentieth Century, Volume I: The Decline of Democratic Politics*, ed. Hans J. Morgenthau (Chicago: The University of Chicago Press, 1962), 13.
[218] Hans J. Morgenthau, "The Commitments of a Theory of International Politics," in *Politics in the Twentieth Century, Volume I: The Decline of Democratic Politics*, ed. Hans J. Morgenthau (Chicago: The University of Chicago Press, 1962), 60. Foreign policies can sacrifice the national interest where its consistent pursuit "would necessitate the violation of an ethical principle," such as with "the prohibition of mass killing in times of peace", with nations refraining from "the infliction of death and suffering" under certain conditions." Morgenthau, "The Twilight of International Morality," *Ethics* 58, no. 2 (January 1948): 82.
[219] Morgenthau, "The Commitments of a Theory of International Politics", 58-59.

as such."[220] Lang has commented on Morgenthau's ambiguous views on morality as seen in his Aristotle seminars:

> On the one hand, he refuses to accept the students' largely relativistic accounts on the political realm, pointing out that our daily discourse is imbued with moral principles. At the same time, he does argue for a larger form of moral relativism, one based on a historical time frame and national context.[221]

The tension and ambiguity of morality in Morgenthau's thought informs the role norms can play in international affairs.[222] The importance of national interests in international law stems from the "nature of the interests to be protected, the political environment within which they operate, and the rational necessities which limit the choice of ends and means."[223] They can only be usurped by supranational interests derived from religious bodies and international organisations.[224] All civilised political regimes, Morgenthau writes, must "justify themselves in philosophic and moral terms in order to be able to govern at all," as no government can govern "by brute force alone."[225] An actor on the political scene "cannot help 'playing an act' by concealing the true nature of his political actions behind the mask of a political ideology."[226] Legal and ethical principles may be the goal of a foreign policy, an ideology, or both at the same time.[227] Professions of peaceful intentions therefore perform two important political functions:

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[220] Ibid, 60.
[221] Lang, "Introduction", 8.
[222] Lang notes the role this plays in Morgenthau's analysis of foreign policy at length. "American leaders," he writes, "insist on using normative language to define their policies, often putting debates in terms of 'good and evil' rather than national interest … Simultaneously, critics of American foreign policy draw on moral principles to argue that the conduct of certain wars and economic policies violate basic norms of peace and justice." In pointing this out, however, Morgenthau does not seek to deny that ethics and morality have no role to play in the conduct of foreign policy. Rather, he aims to "find a balance between these normative questions. Ibid, 9-10.
[223] Hans J. Morgenthau, "The Problem of the National Interest," in *Politics in the Twentieth Century, Volume I: The Decline of Democratic Politics*, ed. Hans J. Morgenthau (Chicago: The University of Chicago Press, 1962), 91.
[224] Ibid, 97.
[225] Hans J. Morgenthau, *A New Foreign Policy for the United States* (New York and London: Frederick A. Praeger, 1969), 32-33
[226] Morgenthau, *Politics Among Nations, the Struggle for Power and Peace*, 93.
[227] Ibid, 93-94. The development of disarmament in international law is a particular example of this. Due to the general fear of a third world war fought with weapons of mass destruction, no government can "expect to gain support for its foreign policies from its own and other peoples if it cannot convince them of its peaceful intentions." Ibid, 101-102.

they "conceal the actual policies pursued behind a veil of professed peaceful purposes" and also attract "support of men of good will everywhere."[228]

These political functions fundamentally affect the objectives national policies states may pursue in international society. Morgenthau identifies three of these: It can either aim at maintaining the power it has, seek to augment the power it has at the expense of other nations, or try to demonstrate the power it has.[229] Three types of foreign policies correspond to these three objectives—that of the status quo, imperialism, and prestige.[230] These three concepts affect international law by defining the direction which a nation may take.[231] The conservative view of the purposes of politics "endows the *status quo* with a special dignity and seeks to maintain and improve it."[232] By contrast, when a nation is engaged in war with another nation, it is very likely that the one which anticipates victory will "pursue a policy that seeks a permanent change of the power relations with the defeated enemy."[233]

International law fulfils an ideological function for policies of the status quo.[234] "Any legal order," writes Morgenthau, tends to primarily be "a static social force" that defines "a certain distribution of power and offers standards and processes to ascertain

[228] Ibid, 101-102. Whenever governments declare general and complete disarmament as their policy, Morgenthau argues, they are in actuality making an ideological appeal that serves the purpose of "making the foreign policies actually pursued more acceptable to the other nations than they might otherwise be." Ibid, 93-94.
[229] Morgenthau, "Principles of International Politics", 2.
[230] The policy of status quo tries to preserve the power a nation has, the policy of imperialism tries to overthrow the distribution of power as it exists, and the policy of prestige tries to demonstrate the power a nation has. Ibid, 2.
[231] This fundamentally affects international peace treaties, which aim to "formulate in legal terms the shift in power which victory and defeat in the preceding war have brought about," and to ensure the stability of the new "distribution of power by means of legal stipulations." Morgenthau, *Politics Among Nations, the Struggle for Power and Peace*, 44.
[232] Hans J. Morgenthau, *The Purpose of American Politics* (New York: Alfred A. Knopf, 1960), 296-297.
[233] Thus, a war that was started by the victor as a defensive war for the maintenance of the pre-war status quo will transform itself with the approaching victory into an imperialistic war. The intended status of subordination, however, may "easily engender in the vanquished a desire to … overthrow the status quo" and to change the hierarchy of power. In other words, the policy of imperialism pursued by the victor may engender, in turn, a policy of imperialism on the part of the vanquished. Morgenthau illustrates this through the example of German imperialism between 1935 and 1945. Morgenthau, *Politics Among Nations, the Struggle for Power and Peace*, 57-58.
[234] Peace and international law are, Morgenthau writes, "eminently qualified to serve as ideologies for a policy of the status quo," as imperialistic policies "must always take the possibility of war into account." Ibid, 96.

and maintain it in concrete circumstances."[235] The static aspects of international law are particularly prominent, as it lacks the highly developed systems of legislation, judicial decisions, and law enforcement of domestic law. This lack of development makes any attempt to invoke it an indication of the "ideological disguise of a policy of the status quo."[236]

The aspiration for power on the part of several nations, with each trying to maintain or overthrow the status quo, "leads of necessity to a configuration that is called the balance of power and to policies that aim at preserving it."[237] Little has argued that Morgenthau's approach to the balance of power is more pluralistic than is generally recognised, further noting that:

> Morgenthau's theory presupposes that because of the problems of measuring power there is a mechanistic or power political dynamic that pushes great powers in a hegemonic direction, but he also acknowledges that because of what constructivists call inter-subjective beliefs, the structural dynamics associated with power politics can be ameliorated.[238]

Williams has similarly argued for the nuanced aspects of the balance of power and national interests, stating that:

> Yet despite the almost iconic status that 'interest defined as power' has assumed in presentations of Realist theory, a close examination of Morgenthau's discussion quickly reveals that power and interest are actually remarkably flexible and indeterminate concepts.[239]

[235] Ibid, 96-97.
[236] Morgenthau illustrates this through the League of Nations, which, in being established "for the purpose of maintaining a particular status quo" made support of that organisation tantamount "to support of that particular status quo." Ibid.
[237] Ibid, 173.
[238] Richard Little, "The balance of power in *Politics Among Nations*," in *Realism Reconsidered: The Legacy of Hans Morgenthau in International Relations*, ed. Michael C. Williams (Oxford and New York: Oxford University Press, 2007), 158.
[239] Williams, *The Realist Tradition and the Limits of International Relations*, 107.

The international balance of power is, for Morgenthau, an "essential stabilizing factor in a society of sovereign nations."[240] It is the "inevitable result of the very conditions which exist—and must exist—on the international scene" due to the existence of multiple autonomous units which seek to counteract the power of others, making it inherently unstable, unreliable, and unreal.[241] International law is inevitably affected by it, as it cannot, out of its own force, compel international relations and politics to conform to its commands.[242]

Neither disarmament nor arms control alone are a solution to the problem the balance of power presents.[243] Rather, "the armaments race is a mere symptom of the actual problem, which does not lie in the possession of weapons but in the existence of unsolved political problems."[244] The unsolved political problems of necessity "intrude into the disarmament negotiations" and make them "simply a reflection of the different attitudes and interests of the nations undertaking them."[245] Each side "inevitably regards the negotiations as a particular phase of the over-all struggle for power and tries to gain an advantage in that struggle by putting forward certain proposals relating to disarmament."[246] International law and, through it, disarmament and arms control, are

[240] The advent of nuclear weapons, however, for Morgenthau, have rendered the balance of power conceptually obsolete, and fundamentally altered it. This will be explored in the following section in relation to how the irrationality of nuclear warfare affects the foreign policies of states. Morgenthau, *Politics Among Nations, the Struggle for Power and Peace*, 173-174.
[241] Morgenthau, "Principles of International Politics", 3.
[242] Ibid, 6.
[243] Morgenthau summarises this belief through the following equation: "Wars are fought with weapons; diminish he quantity of weapons and you thereby diminish the likelihood of war; do away with all weapons and you will have eliminated the likelihood of war, and you will have solved the most urgent problem of international politics." Morgenthau, "Realism in International Politics", 8-9.
[244] Ibid, 9.
[245] Ibid, 9-10.
[246] Ibid, 10. See also: Hans J. Morgenthau, "Changes and Chances in American-Soviet Relations," *Foreign Affairs* 49, no. 3 (April 1971): 430.

therefore subject to the uncertainty of power calculations inherent in the nature of national power itself.[247]

4.4 Disarmament and arms control

4.4.1 Concepts and definitions

Arms control, writes Morgenthau, is "a mere regulation of the arms race. It is an understanding between two or more nations engaged in an arms race to pursue that race within certain agreed-upon limits."[248] One of the classic examples of this "is the agreement between the United States and the Soviet Union concerning the arms race in offensive nuclear missiles," wherein the technological limits upon which missiles are built is agreed upon.[249] Arms control, "has a great deal of value within itself because it gives a certain security to the nations concerned," as what formerly "would have been the result of guesswork … is now put on paper and rationalised and formalised in legal terms."[250] It is not, however, disarmament, which involves "the actual reduction or abolition of certain or all types of arms."[251] The fundamental goals of disarmament and arms control are, then, different. One aims to reduce or eliminate certain types of

[247] As stated in the previous chapter, this unreliability of information and the political interests which affect allegations of noncompliance with arms control and disarmament treaties—explored in chapter two—have echoes on this aspect of Morgenthau's thought. Morgenthau, *Politics Among Nations, the Struggle for Power and Peace*, 212.
[248] Hans J. Morgenthau, "Some Political Aspects of Disarmament," in *The Dynamics of the Arms Race*, eds. David Carlton and Carlo Schaerf (London: Croom Helm, 1975), 57.
[249] Ibid.
[250] Ibid.
[251] The SALT agreement, argues Morgenthau, wherein there was an agreement to forego for all practical purposes the development of anti-ballistic missile systems and to dismantle partially existing ones is an example of this. Ibid, 57-58.

weapons, whilst the other is concerned only with the regulation of the arms race for the purpose of creating military stability.[252] They are radically different processes.

Conventional and nuclear disarmament and arms control present similar differences.[253] The history of conventional disarmament has, Morgenthau argues, "by and large been a history of failure."[254] These failures are intimately related to the very structure of international politics, as arms races are a mere manifestation of political conflict.[255] By contrast, it is in the field of nuclear disarmament and arms control that we have a real chance to achieve genuine results due to the different relationship between the political struggle and nuclear armaments.[256] In the conventional field "the number of, actual and potential targets, by far exceeds the number of available weapons."[257] This is not the case with nuclear weapons, where there is an optimum beyond which is irrational to go. Once you are "capable of destroying your potential enemy ten times over with nuclear weapons," it is "absurd to increase that capability to the point where you are able to destroy him twelve or fifteen times over."[258]

The difference between conventional and nuclear disarmament and arms control is, therefore, the result of the enormous, unprecedented, and virtually unimaginable destructiveness of nuclear weapons.[259] When we deal with nuclear weapons "we are dealing not with something quantitatively different but with something so qualitatively different that it requires new modes of thought and action

[252] Morgenthau, *Politics Among Nations, the Struggle for Power and Peace*, 393.
[253] Morgenthau, "Some Political Aspects of Disarmament", 58.
[254] Ibid.
[255] Ibid.
[256] When we look at this field, we have a radically different situation than that of conventional armaments, which are fundamentally "the result of the discrepancy between available targets and available weapons." Ibid, 59-60
[257] Thus, one "cannot have enough machine guns or enough pieces of artillery." Ibid.
[258] Ibid, 60.
[259] Ibid.

appropriate to the novelty of nuclear weapons."[260] Confusing conventional and nuclear forms of disarmament and arms control is therefore theoretically untenable and practically dangerous.[261] The difference between conventional and nuclear weapons in this respect has important implications in relation to the unequal development of international arms control and disarmament treaties despite the taboos associated with the usage of certain weapons examined in chapter one. It is also particularly relevant in relation to the late creation of conventional arms control and disarmament treaties despite the strength and age of the taboo, and provides an incisive commentary on why it is that accession to treaties like the CCM and the Mine Ban Treaty remains unequal.

The impact and significance of this will be analysed throughout the following subsections, following an analysis of the prominence and importance of the politics underpinning all arms control and disarmament agreements and negotiations.

4.4.2 The political background of arms control and disarmament

War, Morgenthau argues, has traditionally been regarded as a "kind of interruption of the normalcy of peace, which has no organic relation with the peace that preceded it or with the peace that will follow it."[262] This belief is fundamentally related to the idea that disarmament constitutes the key to the problem of international peace; an idea which—as is the case with the purpose of the ATT—is linked to the analysis offered in the first chapter of this thesis through its connection to the taboo over the

[260] Ibid.
[261] Ibid, 60-61.
[262] Hans J. Morgenthau, "The nature and use of power and its influence upon state goals and strategies: A lecture delivered at the Naval War College on 25 September 1963," *Naval War College Review* 16, no. 6 (February 1964): 20-21.

use of biological, chemical, nuclear, and conventional weapons.[263] Neither of these beliefs are accurate. Peace and war, instead, are "organically connected, as foreign policy and military strategy are."[264]

Arms races, then, are a symptom of the actual problem, which does not lie in the possession of weapons but in the existence of unsolved political problems.[265] Men, in other words, do not fight because they have arms, but have arms because they deem it necessary to be prepared to fight.[266] The difficulties of bringing the nuclear armaments race under control therefore result from "the existence of unsettled political issues, which one or the other side might want to settle through the threat or use of nuclear force" rather than from the weapons themselves.[267] Disarmament, when divorced from the settlement of the political conflicts which have caused the need for disarmament in the first place, is futile, and only affects the technology through which hostilities are conducted.[268] Its failure is "foreordained by the concentration of the negotiators upon the symptoms of the disease—the technicalities of the armaments race—rather than on its cause—the unresolved political conflict."[269]

The political background underlying arms races is therefore essential to take into account if aiming to make disarmament and arms control agreements succeed,

[263] Morgenthau, "Realism in International Politics", 8-9.
[264] Morgenthau, "The nature and use of power and its influence upon state goals and strategies", 20-21.
[265] Morgenthau, "Realism in International Politics", 9.
[266] Hans J. Morgenthau, "The H-Bomb and After," in *Politics in the Twentieth Century, Volume III: The Restoration of American Politics*, ed. Hans J. Morgenthau (Chicago: The University of Chicago Press, 1962), 121.
[267] Hans J. Morgenthau, "Emergent Problems of United States Foreign Policy," in The Relevance of International Law: Essays in Honor of Leo Gross, eds. Karl W. Deutsch and Stanley Hoffmann (Cambridge, Massachusetts: Schenkman Publishing, 1968), 47-48.
[268] Reducing them, in the case of an effective prohibition of atomic bombs, to the level at which it operated in the field of high explosives on the morning of July 16, 1945, with the addendum of the impossibility of outlawing the technological skill to produce atomic bombs. Whether this would be a gain for humanity, argues Morgenthau, in view of the "potentialities of guided missiles and bacteriological warfare" is an open question, as the incidence of war would be left "exactly where it was before." Morgenthau, "The H-Bomb and After", 121.
[269] Hans J. Morgenthau, "Should We Negotiate Now?," in *Politics in the Twentieth Century, Volume II: The Impasse of American Foreign Policy*, ed. Hans J. Morgenthau (Chicago: The University of Chicago Press, 1962), 179.

particularly as disarmament has proved viable "when it either followed a political settlement or was negotiated as an integral part of one."[270] Disarmament cannot be the first step towards pacification, as it is the result "of political settlement, never its precondition."[271] Whilst a disarmament agreement could have a "great and beneficial psychological effect" by itself, said agreement would still be subject to the unsolved political problems which would "intrude into the disarmament negotiations," making them "a reflection of the different attitudes an interests of the nations undertaking them."[272] Each nation would regard the negotiations as a particular phase of the overall struggle for power—particularly as the actions of states are not determined by moral principles and legal commitments, but by considerations of interest and power.[273]

For Morgenthau, this represents the fundamental question at the heart of the problems of the Western Alliance. The members of the Western Alliance "have only one obvious interest in common: protection from Communist aggression and subversion."[274] This national interest, however, is not a policy: it is an objective which requires common policies for its realisation.[275] The alliance, which was predicated "upon the nuclear monopoly of the United States," was fundamentally affected by it.[276] Whilst in the pre-nuclear age it could be expected of a nation to support an ally at risk of war even though its vital interests were not affected, this is no longer the case in the nuclear age. A nation

[270] Ibid.
[271] Morgenthau, "The H-Bomb and After", 126-127.
[272] Morgenthau, "Realism in International Politics", 9-10.
[273] Ibid, 10; Hans J. Morgenthau, "The Middle East," in *Truth and Power: Essays of a Decade, 1960—70* (New York and London: Praeger Publishers, 1970), 382.
[274] Hans J. Morgenthau, "The Crisis of the Western Alliance," in *The Crossroad Papers: A Look into the American Future*, ed. Hans J. Morgenthau (New York: W. W. Norton, 1965), 153.
[275] Ibid.
[276] Morgenthau, *A New Foreign Policy for the United States*, 4.

whose vital interests are not at risk can no longer be expected to come to the aid of an ally if, by doing so, it risks its very existence.[277]

The question of the reliability of alliances is thus brought to the forefront and, through it, that of nuclear arms control and disarmament.[278] Nuclear proliferation "expresses the desire of the major European nations to decide for themselves the issue of life and death."[279] It is futile and dangerous to oppose this policy dogmatically, however much one may deplore it. Instead, it is necessary "to create the political conditions likely to minimize the risk of proliferation" and, in the end, to "deprive the members of the Western Alliance of any motive for proliferation."[280] The threat of atomic destruction can be met "only on the level from which it arises, that is, the political level."[281]

The concentration of efforts on the illusion of disarmament becomes "a mere evasion of the issue of life and death" and, as such, "the pastime of political children at the rim of the abyss, a wasted effort on the eve of universal disaster."[282] It raises the danger of getting absorbed in the technicalities of disarmament without realising the outstanding political issues beneath them.[283] The following quote reveals Morgenthau's thought on this point:

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[277] "De Gaulle," writes Morgenthau, brought this crisis into the open through two courses of action, "the development of a national nuclear capability and the pursuit of national policies regardless of the interests of France's allies." Ibid, 4-5.

[278] The policies of containment undertaken by the U.S. represent, for Morgenthau, another key example of the link between nuclear arms control and disarmament and the interests of countries. Hans J. Morgenthau, "The Containment Policy and the Rationale of the Alliance System," in *American Diplomacy in a New Era*, ed. Stephen D. Keretsz (Notre Dame, Indiana: University of Notre Dame Press, 1961), 63-77.

[279] Morgenthau, *A New Foreign Policy for the United States*, 185.

[280] Ibid.

[281] If the United States and the Soviet Union can settle these conflicts peacefully, by safeguarding vital interests and compromising on secondary issues, "the technological progress of mankind will, by that very fact, have lost its threat." Morgenthau, "The H-Bomb and After", 127.

[282] Ibid.

[283] Ibid, 147.

> When it comes to war, that is to say, to victory or defeat or survival or destruction, all nations will use all the weapons which they deem to be serving their interests, with or without agreements. They will refrain from using certain weapons which might become self-defeating or useless, such as was poison gas in the Second World War, or they may use other weapons only in a limited way.[284]

Necessity can supersede the law, particularly in relation to warfare. "Even in a disarmed world," Morgenthau argues, "conflicts among nations will continue to occur."[285] Nations have no choice between the balance of power and other kinds of rational policies: they have a choice between a balance of power policy and nothing at all.[286] As the principal means by which nations endeavour to maintain or re-establish the balance of power are armaments, the balance of power needs to be addressed if aiming to establish lasting disarmament and arms control.[287]

The fact that armaments and armaments races are a manifestation of the struggle for power on the international scene affects all of the technical arguments, proposals, counterproposals, and disagreements with regard to disarmament.[288] Nations arm "either because they want to defend themselves against other nations or because they want to attack them."[289] The political interests that lie behind the technological development of weapons and arms races are an essential aspect of disarmament and arms control agreements which, if not tackled, will ensure their failure.

[284] Ibid, 151-152.
[285] Hans J. Morgenthau, "The Impartiality of the International Police," *Revista Española de Derecho Internacional* 21, no. 2 (Abril-Junio 1968): 278.
[286] Morgenthau, "Organization of a Power System: Unilateralism and the Balance of Power," *Naval War College Review* 20, no. 7 (February 1968): 4.
[287] Morgenthau, *Politics Among Nations, the Struggle for Power and Peace*, 187.
[288] Ibid, 398-399.
[289] Ibid.

Having established this, we will examine Morgenthau's analysis of the history of disarmament and arms control, which presents some salient differences with Carr's.

4.4.3 Historical cases

Only two attempts at conventional disarmament since the Napoleonic wars, Morgenthau argues, have seen permanent and temporary success: disarmament between Great Britain and the United States concerning the disarmament of the American-Canadian frontier and the Washington Treaty on the limitation of naval armaments of 1922. The key characteristic of these treaties is the fact that "they followed a political settlement among the contracting powers."[290] The 1922 Washington Treaty was the result of a "complex settlement of naval competition between the United States and Great Britain."[291] Its terms performed "the function of the legal ratification of the changes in military technology," which are frequently the "motivating force of arms control agreements and even disarmament agreements."[292] Neither Great Britain nor the United States were willing to spend "enormous amounts for floating monuments to their national pride," which, "had no military significance except to provide enormous targets for naval artillery and submarine torpedoes."[293] Thus, they "gave them up and concluded a disarmament agreement to that effect, thereby lifting from them the burden of extremely expensive and essentially useless military expenditure."[294]

[290] Morgenthau, "Some Political Aspects of Disarmament", 58.
[291] Ibid, 58-59.
[292] In this case, the First World War had already shown dreadnoughts to be obsolescent. Ibid, 59.
[293] Ibid.
[294] Ibid.

This idea—that is, that successful disarmament and arms control treaties are linked to the political interests of the state parties involved in an agreement—is characteristic of Morgenthau's thought.[295] "No nation or combination of nations," he writes, "however strong and devoted to international law, can afford to oppose by means of collective security all aggression at all times."[296] Conventional disarmament and arms control is inherently linked to this. Disarmament "has been realized only under extraordinary conditions," and, even when seemingly realised, it has meant an "increase in armaments rather than reduction."[297] Men have arms because they deem it necessary to fight; take away their arms and "they will either fight with their bare fists or get themselves new arms with which to fight."[298] In other words, a reduction or prohibition of armaments will have no influence upon the incidence of war, and a taboo is only effective insomuch as a weapon is not deemed necessary.[299]

The attempts of Great Britain to have the World Disarmament Conference outlaw "aggressive, in contrast to defensive, weapons," illustrates, Morgenthau argues, the "impossibility of solving the problem by way of qualitative disarmament."[300] Great Britain assumed that "the ability to wage aggressive war was the result of the possession of aggressive weapons," with the conclusion following that without them, no aggressive war would occur.[301] Great Britain's proposals amounted to an attempt to make the

[295] It also presents some important similarities with Carr's and, as shall be seen in the following chapter, Schwarzenberger's analyses of arms control and disarmament.
[296] Morgenthau, *Politics Among Nations, the Struggle for Power and Peace*, 419.
[297] Ibid, 410.
[298] Ibid.
[299] Ibid, 411.
[300] Ibid.
[301] This conclusion falls with the assumption, as "weapons are not aggressive or defensive by nature, but are made so by the purpose they serve." Ibid.

status quo secure from attack by outlawing the weapons most likely to be used to overthrow it.[302]

"The ratio among the armaments of different nations," Morgenthau argues, "is the most important problem an attempt at disarmament must solve."[303] It gives, however, rise to the question of the standards according to which different types and quantities of armaments are to be allocated to different nations.[304] At the World Disarmament Conference, Germany "demanded equality of armaments with France," whilst France "agreed to that ratio as an abstract principle, provided the problem of security could be solved to its satisfaction."[305] Equality in armaments could only mean "equality in the defensive position of each country against foreign attack" rather than a purely mathematical equality.[306]

It was incumbent upon the World Disarmament Conference to then evaluate the risks of foreign attack against each country, the means of defence other than armaments, and the need for armaments in view of the other factors.[307] This "threefold task confronted the Conference with three difficulties that proved to be insuperable."[308] To reach agreement among the nations concerned as to who must defend himself against whom is "obviously made impossible by the very nature of the controversy."[309] The nation that has aggressive tendencies against others, or fears them, "is compelled by considerations of self-interest to keep the estimate of its own defensive needs as high

[302] This fact is highlighted by how battleships were considered to be defensive weapons and submarines offensive weapons. Ibid, 412.
[303] Ibid, 405.
[304] Ibid.
[305] Ibid.
[306] Ibid.
[307] Ibid, 405-406.
[308] Ibid.
[309] Ibid, 406.

as possible," and to reduce "those of its rivals to the lowest possible point."[310] In other words, the standards they apply "are determined by their political aims and not by anything remotely resembling objective criteria."[311]

Disarmament has no chance for success without a political settlement. Whilst indispensable in the general settlement of international conflicts, it cannot be the first step. Competition for armaments "reflects, and is an instrument of, competition for power," and so long as nations advance "contradictory claims in the contest for power, they are forced by the very logic of the power contest to advance contradictory claims for armaments."[312] In other words, instead of attacking the technical problems of the arms race and searching to bring them into control, we ought to deal with the political problems which makes them arise in the first place.[313] Neither the legal formulas contained in arms control and disarmament treaties nor the taboo associated with the usage of certain weapons—examined in chapter one—can achieve success alone: a political settlement is required too. This fact will be examined in detail after an analysis of nuclear arms control and disarmament.

4.4.4 Nuclear arms control and disarmament

Morgenthau's analysis of nuclear disarmament and arms control treaties is fundamentally affected by the differences that exist between nuclear and conventional weapons. Nuclear weapons are neither weapons in the conventional semantic sense nor

[310] Ibid.
[311] Ibid.
[312] Ibid, 413.
[313] Morgenthau, "Some Political Aspects of Disarmament", 61-62.

rational means to rational ends.[314] They are instruments of indiscriminate destruction.[315] The threat of nuclear war, rather than a rational instrument of national policy, is an instrument of suicide and genocide, whereby war becomes a senseless and irrational enterprise.[316] Nuclear weapons destroy the meaning of immortality by making both society and history impossible.[317] Their destructiveness renders nuclear force unusable as an instrument of foreign policy due to the irrationality of threatening the other side with destruction whilst also making it irrational to destroy them.[318]

The irrationality of nuclear weapons stands in sharp contrast with the use of conventional forces as an instrument of foreign policy, whereby "by inflicting limited damage with commensurate risks to oneself, one can indeed use it as a suitable instrument for changing the other side's will."[319] The contrast between nuclear and conventional weapons gives rise to a dual paradox. High-yield nuclear weapons are unusable for rational military purposes. Whilst they can be used to deter a war, they cannot be used to fight one in a rational manner.[320] Morgenthau's analysis, in this sense, matches Jervis' account of realism. Despite differing on whether nuclear weapons made the world more or less safe, realists "agreed that they brought important changes in

[314] Ibid, 80.
[315] Ibid, 63-64.
[316] Hans J. Morgenthau, "The Fallacy of Thinking Conventionally about Nuclear Weapons", in *Arms Control and Disarmament*, eds. Paolo Foradori, Giampiero Giacomello, Alessandro Pascolini (Cham: Palgrave Macmillan, 2018),85; Hans J. Morgenthau, "The Art of Diplomatic Negotiation," in *The State of Social Sciences*, ed. Leonard D. White (Chicago and London: University of Chicago Press, Chicago, 1956), 411.
[317] Hans J. Morgenthau, "Death in the Nuclear Age," in *Politics in the Twentieth Century, Volume III: The Restoration of American Politics*, ed. Hans J. Morgenthau (Chicago: The University of Chicago Press, 1962), 22; Morgenthau, "The nature and use of power and its influence upon state goals and strategies", 22-27; Hans J. Morgenthau, "The Pathology of American Power," *International Security* 1, no. 3 (Winter, 1977): 7.
[318] Morgenthau, *Politics Among Nations, the Struggle for Power and Peace*, 32.
[319] Ibid.
[320] A nation armed with nothing but high-yield nuclear weapons "could draw very little political power from its military posture; for it would have no military means by which to impose its will upon another nation" aside from "threatening it with total destruction." Ibid, 128.

state policies, bargaining tactics, alliance relationships, and opportunities to change the status quo."[321]

Two consequences follow from the unlimited destructiveness of nuclear weapons: "the irrationality of nuclear war" and the "continuous exposure of at least the major nations to the threat of immediate destruction."[322] Nuclear warfare, "and, as a potentiality, bacteriological warfare," have brought in this respect "a revolution similar to, yet far exceeding in magnitude, the one that the machine gun achieved a few decades earlier."[323] Effective nuclear defence has a radically different meaning from that of effective conventional defence.[324]

Nuclear disarmament and arms control are fundamentally affected by the irrationality of nuclear warfare.[325] Their particular nature and destructiveness are thus an essential fact to be considered when analysing nuclear arms control and disarmament agreements; particularly given the measure of success which, for Morgenthau, these agreements have had.[326] The seeming success of nuclear arms control and disarmament agreements has not been accidental. Whilst conventional weapons provide us "with a military economy of scarcity," nuclear weapons have created "a military economy of abundance, where destructiveness of available weapons far exceeds the number of possible targets."[327]

[321] Robert Jervis, "Realism in the Study of World Politics," *International Organization* 52, no. 4 (August 1998): 984.
[322] Morgenthau, *Science: Servant or Master*, 137.
[323] Morgenthau, *Politics Among Nations, the Struggle for Power and Peace*, 377. See also: Hans J. Morgenthau, "Modern Science and Political Power," *Columbia Law Review* 64, no. 8 (December 1964): 1391-1394.
[324] Morgenthau, *A New Foreign Policy for the United States*, 229-230.
[325] Hans J. Morgenthau, "The Four Paradoxes of Nuclear Strategy," *The American Political Science Review* 58, no. 1 (March 1964): 30
[326] Morgenthau, *Politics Among Nations, the Struggle for Power and Peace*, 414.
[327] Ibid.

The policy of atomic war, if pursued by both sides, thus has the "salutary effect of making unlikely an atomic war which might be launched deliberately by one or the other side."[328] The very destructive nature of nuclear weapons, in other words, contributes to the success of nuclear arms control and disarmament agreements whilst also heightening the danger of nuclear proliferation.[329] Morgenthau develops this idea further through the following example:

> Imagine for a moment that perhaps ten years hence twenty nations have nuclear weapons, however primitive and however devoid of sophisticated delivery systems, and the United States has tense relations with three of them, and a nuclear explosion occurs in its territory. Against whom is it going to retaliate?[330]

Nuclear equilibrium cannot be taken for granted. Deterrence is a subjective psychological relationship between two superpowers that operates on the condition that prospective atomic aggressors are clearly identified beforehand.[331] Thus, both the United States and the Soviet Union have a common interest in the stabilisation of the nuclear arms race through regulation.[332] Molloy has outlined the important significance

[328] Hans J. Morgenthau, "The Political and Military Strategy of the United States," *Bulletin of the Atomic Scientists* 10, no. 10 (October 1954): 325. Morgenthau remarks, however, that such a balance of power is "by its very nature unstable and precarious," with the threat of miscalculation, to which all balance of power situations are exposed, being magnified by the technology of nuclear war. Hans J. Morgenthau, "Another Legacy of Hiroshima: The Partially Scientific Mind," *Bulletin of the Atomic Scientists* 18 (June 1962): 35.

[329] This fact is obvious in considering Morgenthau's analysis of the impact which the Soviet Union's acquisition of nuclear power had: "One of the logical alternatives to the cold war is no longer practical today: overwhelming power on the side of the United States Overwhelming power is no longer at the disposition of the United States and will not be at its disposition in the foreseeable future." Hans J. Morgenthau, "Power Politics," in *The Atomic Era: Can It Bring Peace and Abundance?*, ed. Freda Kirchwey (New York: Medill McBride, 1950), 37.

[330] Hans J. Morgenthau, "From Great Powers to Superpowers," in *The Aberystwyth Papers, International Politics 1919-1969*, ed. Brian Porter (London: Oxford University Press, 1972), 135.

[331] Ibid, 137; Hans J. Morgenthau, "Detente: Reality and Illusion," in *Detente in Historical Perspective*, eds. George Schwab and Henry Friedlander (New York: Cyrco Press, 1972), 71-79; Hans J. Morgenthau, "Nationalism," in *Politics in the Twentieth Century, Volume I: The Decline of Democratic Politics*, ed. Hans J. Morgenthau (Chicago: The University of Chicago Press, 1962), 189-190.

[332] The United States and the Soviet Union, Morgenthau argues, could do this in three different ways. First, by limiting "the production of nuclear weapons and delivery vehicles by unilateral action, based upon their own judgement of what is enough in terms of deterrence and actual nuclear war." Second, by controlling "their armaments by tacit agreement, one side's action or omission being predicated upon the other side's example, and vice versa." Third, by controlling "their armaments by formal agreement," such as with the 1963 Partial Test Ban Treaty. Morgenthau, *Politics Among Nations, the Struggle for Power and Peace*, 415.

the irrationality and destructive potential of nuclear weapons has on Morgenthau's later works:

> This lag between theory and technological and political experience of reality was a recurrent theme in Morgenthau's later works … By this stage Morgenthau was convinced that one of the prerequisites of the survival of Man was being conscious of the fact that our modes of thought and action belong to an age that has been left behind by technological development.[333]

Craig has also emphasised the political revolution the advent of nuclear weapons and power presupposed internationally:

> By making two essential forms of political violence senseless, the thermonuclear revolution had transformed the meaning of international politics. There was to be no raising the possibility of limited nuclear war in this article: for Morgenthau, nuclear war now simply meant total destruction.[334]

The instability of nuclear equilibrium thus links disarmament to the question of security and national interests. It is the nuclear state's national interests, rather than the taboo associated with nuclear weapons alone, that makes reaching arms control agreements desirable. The problem of nuclear equilibrium is, then, for Morgenthau, one of the single most important factors of nuclear arms control and disarmament.[335] Devoid of a rational use as weapons, it enhances the desirability of controlling these weapons as opposed to prohibiting them completely.

The impossibility of a successful ban on nuclear weapons goes further than this. Even if atomic disarmament were possible, it would "not mean peace but only the elimination of certain types of weapons," and, most importantly, it could only succeed

[333] Molloy, *The Hidden History of Realism: A Genealogy of Power Politics*, 96.
[334] Campbell Craig, "Hans Morgenthau and the world state revised," in *Realism Reconsidered: The Legacy of Hans Morgenthau in International Relations*, ed. Michael C. Williams (Oxford and New York: Oxford University Press, 2007), 208.
[335] For a further discussion of this, see: Hans J. Morgenthau, "Has Atomic War Really Become Impossible?" *Bulletin of the Atomic Scientists* 12, no. 1 (January 1956): 7-9; Hans J. Morgenthau, "An Atomic Philosophy," *Saturday Review* (February 18, 1961): 18-19; Hans J. Morgenthau, "Decisionmaking the Nuclear Age," *Bulletin of the Atomic Scientists* 18, no. 10 (December 1962): 7-8; Morgenthau, "Changes and Chances in American-Soviet Relations", 430-433.

"as the by-product of a political settlement not as a substitute for it."[336] It is this, together with the effects of proliferation, that makes nuclear arms control and disarmament difficult to achieve. The nuclear taboo explored in chapter one, in other words, no matter its strength, is not able to prevent cases of noncompliance from arising or give an answer to the problem of nuclear weapons alone. The conflict between the United States and the Soviet Union over atomic disarmament is a reflection of "the underlying struggle for power."[337] It is a "new production of the play which was staged at the World Disarmament Conference in the early thirties," wherein the issue "in the language of disarmament, was again security vs. equality."[338]

"The public discussion of the H-bomb," writes Morgenthau, has, however, centred around "its technological feasibility and advisability, its moral justification, its politico-military neutralization by way of disarmament."[339] The moral problem is different in magnitude, but not in kind, from the dilemmas with which all the modern instruments of mass destruction have confronted the conscience of the Western world.[340] It is insoluble on the technological level, as short of a universal moratorium on scientific progress there is no way of stopping scientific development from achieving with greater opportunities for either betterment or destruction.[341] Nor is it possible to resolve it through morality alone, as states can "no more afford to be without all the weapons which modern technology puts at its disposal than could the medieval knight

[336] Morgenthau, "The H-Bomb and After", 120-121.
[337] Ibid, 123-124.
[338] Ibid.
[339] Ibid, 119.
[340] Ibid, 119-120.
[341] Ibid.

afford to be without a sword."[342] The ineluctable ascendancy of technology over morality in times of war gives rise to the cry for international control of atomic energy.[343]

Morgenthau's analysis on this point mirrors Carr's own.[344] On the level of disarmament the dilemma of nuclear weapons resolves itself into a controversy between two theoretical conceptions: "security first, equality later vs. equality first, security later."[345] By contrast, on the level of the struggle for power, the struggle is posed through the following antagonistic policies, "defense of the status quo vs. overthrow of the status quo."[346] The conflict between the status quo and attempts to overthrow the status quo, unavoidable due to the nature of international society, means that so long as "the struggle for power between the United States and the Soviet Union rages unabated and unsettled," so will the impasse with regard to disarmament.[347]

Power politics, then, fundamentally underpin efforts at nuclear disarmament and arms control, and need to be addressed if aiming to make said efforts a success. Morgenthau's conclusion on the importance of this is particularly relevant in relation to both the seeming lack of strength of the nuclear taboo explored in chapter one and the cases of nuclear treaty noncompliance explored in chapter two.[348] We must face the paradox that the chance to avoid all-out atomic war resides in the "willingness and ability to fight it," with mastery of this dilemma residing in the preservation of the

[342] Ibid.
[343] Ibid, 120.
[344] The unity of Morgenthau's thought on nuclear disarmament and arms control and his theory of international relations is contested by Craig, who argues that Morgenthau's attempts to provide a realist framework for the U.S. Cold War project and answer the problems posed by thermonuclear war altered his philosophical understanding of politics. Campbell Craig, *Glimmer of a New Leviathan: Total War in the Realism of Niebuhr, Morgenthau, and Waltz* (New York: Columbia University Press, 2003), 93-94.
[345] Morgenthau, "The H-Bomb and After", 125.
[346] Ibid.
[347] Ibid.
[348] The lack of accession of countries like the U.S., Russia, and China to the TPNW and the CTBT's lack of ratification stand as prominent examples of this former point, with power politics and national interests affecting nuclear disarmament and arms control despite the strength of the nuclear taboo.

"political and military conditions which do not call for such a war."[349] Nuclear arms control and disarmament is only possible if the underlying political conflicts which have given rise to the arms race in the first place have been mitigated or eliminated.[350] The threat of atomic destruction can "be met only on the level from which it arises, that is, the political level," with disarmament contributing only to "the general pacification."[351] A fact which is particularly important in light of the enormous destruction which the unrestricted proliferation of nuclear weapons could bring forth.[352]

Having established this, we will now address the conclusions which Morgenthau's theory of law and writings on disarmament and arms control offer us with respect to the overarching questions examined by this thesis.

4.5 Conclusion

The conclusions which Morgenthau's theory of law offer are, though similar to Carr's in terms of the role played by national interests, of a fundamentally different nature.[353] They centre on the following two interrelated ideas: the nature and role of international law, which is inherently different from domestic law, and the effect that politics and national interests have on international law. Both of these fundamentally

[349] Morgenthau, "Has Atomic War Really Become Impossible?" 140-141.
[350] Morgenthau, "The Fallacy of Thinking Conventionally about Nuclear Weapons", 88.
[351] Morgenthau, "The H-Bomb and After", 79.
[352] "For with proliferation now having started in earnest," Morgenthau writes, "there is no doubt in my mind, and I think in the minds of most experts, that a nuclear arms race not limited to two superpowers having responsible governments mortally afraid of each other, but spreading over the whole globe, is bound, sooner or later, to lead to an unspeakable catastrophe." Morgenthau, "The Fallacy of Thinking Conventionally about Nuclear Weapons", 89.
[353] The differences between Carr and Morgenthau's treatment of morality and power are substantial, and explain Morgenthau's attack of Carr: "Far from being an aspect of power as in the works of Carr, for Morgenthau, morality is the dualistic counterpart, the means of salvation, from the lust for power." Molloy, *The Hidden History of Realism: A Genealogy of Power Politics*, 93.

affect the ways in which international arms control and disarmament treaties function in international society and are created. They explain why the legal restrictions and taboos surrounding certain weapons are eroded due to political necessities; offering a set of answers that, whilst different from Carr's own, allow us to explain the violations examined in chapter two of this thesis.

These ideas will be examined below, first in relation to Morgenthau's analysis of the inherently different nature of international law and second in relation to the way politics come to affect it. Both of these aspects of his theory are important to consider when seeking to explain why it is that the instances of failure to observe the taboo—established in chapters one and two of this thesis—take place.

4.5.1 The nature and role of international law

Morgenthau's works showcase a consistent focus on both the nature of the law and its relation to the political reality of international society. This focus is palpable throughout his texts. Morgenthau's exploration of politics, Lang argues, "meant taking on essentially contested concepts, grappling with them, and seeing how they applied to events that are taking place in the world around us."[354] The interdisciplinary nature of Morgenthau's works makes them fundamentally relevant to the overarching questions examined by this thesis. Morgenthau's uneasy realism and critical approach heightens their relevance.[355] A single, key question underpins the different themes examined

[354] Lang, "Introduction", 2.
[355] Scheuerman describes this uneasy realism as follows: "Morgenthau was always an uneasy Realist, unsatisfied with conventional interpretations of the tradition and its intellectual forerunners and at times unsure whether his work should even be described as a contribution towards it." Scheuerman, *Hans Morgenthau: Realism and Beyond*, 6.

within this chapter; that is, the question of the relationship between the domain of politics—which is that of real facts—and the domain of the international legal order.[356] Morgenthau's answer in this regard, as made clear throughout the previous pages, is conclusive, and reminiscent of Carr's conclusion on the static nature of the international legal treaties:

> For, by virtue of the very essence of law, every legal order possesses a certain static tendency; the principles of order, rationality, predictability, which are immanent in the nature of law and which all proceed from the principle of legal certainty, in fact require, above all, the delimitation and preservation of the spheres of power given in reality and in a pre-existing way, which the legal order is called upon to govern.[357]

The static tendencies which exist within every legal order fundamentally affect how it functions. Legal orders cannot survive in the long run if it pushes these principles to their final consequences, as the tendency to modify the domains of power stems "in the same way as the tendency to preserve existing domains of power, from sociological necessities."[358] Neither can legal orders ever fully accommodate the political tendency towards increasing power in its field. Between the static and dynamic tendencies, with each trying to mark the internal structure of the law, "there is an insoluble antinomy, which leads, as a rule, to a kind of more or less lasting modus vivendi and where the static element predominates."[359]

International law is fundamentally unable to resolve this conflict, as there does not exist any organised and monopolised physical force capable of sanctioning the validity of international law.[360] Thus, whilst international law "creates norms capable of

[356] Morgenthau, *La Notion du Politique et la Théorie des differends internationaux*, 65.
[357] Ibid, 66-67.
[358] Ibid, 67.
[359] Ibid, 69.
[360] Ibid, 70.

fixing a given state of law," these "only exist in international law in quite a rudimentary way."[361] In depending on the goodwill of the interested states, international law "is distinctly static in nature", a fact that negatively impacts its sanctioning systems.[362] The problems faced by arms control and disarmament—that is, the erosion of legal restrictions and taboos due to political necessities—are unsolvable through the current means available to diplomacy. Furthermore, the impossibility of objectively examining and comparing the needs of various states with regard to armaments fundamentally affects arms control and disarmament, particularly in relation to the security and equality dilemma.[363] The truth about international politics for Morgenthau is then, as Molloy shows, intrinsically bound to power, which "permeates the social and political fabrics of human existence."[364]

The problems facing international law are compounded by how the universal domain of the content of general international law does not correspond to an equally universal domain of sanctions, rendering them subject to national interests. Stronger states, generally, have a very good chance of achieving "the order desired by those norms of international law which concern its legal sphere," with the opposite being true in the case of weaker states.[365] It is on this balance of power that international law depends. International organisations only gave "new forms of technical organization and attempted to justify it with a new ideology of international solidarity and peaceful

[361] Ibid.
[362] Ibid.
[363] Ibid, 76.
[364] Molloy, *The Hidden History of Realism: A Genealogy of Power Politics*, 75.
[365] This fact is fundamentally linked to that of the operation of sanctions in the sphere of international law, where "each defends his legal position against each other, and reprisals are the standard measures which serve as a sanction." Morgenthau, "Théorie des sanctions internationals [Part II]", 824-825.

cooperation."[366] They cannot affect international society's structure, which is determined by the existence of a plurality of states.

Several solutions can ensure the effectiveness of international law. First, an international morality should be formed, "for there can be no stable legal order without a moral foundation, a truth which the classical internationalists from Vittoria and Suarez to Grotius and Wolf were not unaware of."[367] On the other hand, the stability of the legal order "is ensured only on the condition that the proportionality of the sanctions is achieved in a definitive manner," and that, therefore, the sanctions which are available to the legal order "are sufficient to defend it against any foreseeable attack."[368] The conviction of the most socially influential members of the community of the legitimacy of the international legal order should be the second ideal support of the international community.[369] These two facts need to be addressed if aiming to avert the erosion of the legal restrictions and taboos examined in the first chapter of this thesis.

Having examined this, we will now turn to the second key conclusion which Morgenthau's theory of law brings to light—that of the effect of politics on international law.

[366] Ibid, 830-831.
[367] Ibid, 833-834.
[368] Ibid, 834.
[369] Ibid.

4.5.2 The effect of politics on international law

Six important consequences can be drawn from the recognition of the functional relationship between social forces and international law.

First, a theory of international law has to start with the recognition of the intimate relationship between social forces and international law. Whilst in the domestic field "legal rules can be imposed by the group which holds the monopoly of organized physical force," the international sphere is characterised by an absence of such a group.[370] As such, international law owes its existence to "identical or complementary interests of states," backed by power as a last resort, or, these interests do not exist, "to a mere balance of power which prevents a state from breaking these rules of international law."[371] Where there is neither a community of interests nor a balance of power, there cannot be any international law.[372] Morgenthau's analysis of power, however, as Jütersonke shows, goes beyond crude renditions of power politics and addresses issues of morality and ethics.[373] Scheuerman illustrates the complexity of his thought on this point:

> Morgenthau never envisioned the balance of power as a political cure-all. This is partly why he joined other Progressive Realists in considering the possibility of deep institutional changes able to compensate for its intrinsic limitations.[374]

Morgenthau's interdisciplinary and multifaceted analysis of international law is, I argue, of great relevance to the questions which the first and second chapters of this thesis present on the erosion of the taboo surrounding disarmament and arms control

[370] Morgenthau, "Positivism, Functionalism, and International Law", 275.
[371] Ibid.
[372] Ibid, 275.
[373] Jütersonke, *Morgenthau, Law and Realism*, viii-ix.
[374] Scheuerman, *The Realist Case for Global Reform*, 33.

treaties. Koskenniemi has emphasised the importance of the interdisciplinary nature of Morgenthau's proposed solutions for international law. Lawyers should no longer remain blind to the sociological context of economic interests, social tensions, and aspirations of power: Instead, they should develop a better understanding of the relationship between law and ethics.[375] Rösch makes a similar argument which this chapter has, on the whole, also followed and shared.[376] Frei has also noted on this far-reaching aspect of Morgenthau's thought, which he argues was intended to be an interdisciplinary type of political theory geared towards the understanding of the forces that mould international politics.[377]

Second, it is important to note that a rule of international law, "as positivism was prone to believe, receive its validity from its enactment into a legal instrument, as, for instance, an international treaty."[378] Morgenthau thought shows, as Neacsu demonstrates, a crucial continuity on this front—particularly in relation to the role of morality in politics.[379] A rule, whether legal, moral, or conventional, is valid when "its violation is likely to be followed by an unfavorable reaction, that is, a sanction against its violator."[380] If this is not the case, then, it follows that it is not a valid rule but a mere idea, wish, or suggestion. Thus, an alleged rule of international law against the violation of which no state reacts and is likely to react is proved by the "absence of probable reaction, not to be a valid rule of international law."[381]

[375] Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960*, 459.
[376] "I am not claiming," Rösch writes, "that a Morgenthauian realism necessarily has or even should have the potential to transcend these interdisciplinary and trans-disciplinary boundaries, but it can help the discipline to rethink its current institutionalization and its ambitions." Felix Rösch, *Power, Knowledge, and Dissent in Morgenthau's Worldview* (New York: Palgrave MacMillan, 2015), 10.
[377] Frei, "Politics Among Nations: A Book for America", 69.
[378] Morgenthau, "Positivism, Functionalism, and International Law", 276.
[379] Neacsu, *Hans J. Morgenthau's Theory of International Relations, Disenchantment and Re-Enchantment*, 176.
[380] Morgenthau, "Positivism, Functionalism, and International Law", 276.
[381] Ibid.

Thus, for Morgenthau, there only exist two different types of international law: one founded upon permanent and stable interests, and another founded upon the temporary and fluctuating interests of states.[382] This differentiation leads to far-reaching conclusions as to the science of international law. Though traditional international law treats both of these alike, applying to them the concepts and methods developed in municipal civil law, in doing so it "cannot but draw a completely distorted picture of those rules which belong in the category of political international law."[383] This gives the appearance of legal validity to rules which are exposed to change and are more or less uncertain. International law is, therefore, affected by the fluctuating interests of states and Morgenthau's interpretation of the balance of power.[384]

Fourth, Morgenthau argues, it is clear that the validity of any legal system reposes "upon a fundamental norm which itself cannot be of a legal nature, but belongs of necessity to the domain of ethics and mores."[385] Fifth, it follows from this that no branch of the traditional "science of international law is more in need of reform than the doctrine of interpretation," as it has overlooked completely the relationship between social forces and the rules of international law.[386] Finally, he writes, in order to fulfil its task, a functional theory of international law has to take steps beyond those taken by positivism.

[382] Ibid, 278.
[383] Ibid, 279.
[384] Morgenthau's approach to the balance of power, Little argues, is more pluralistic than has been generally recognised. It conflates, he writes, two distinct dynamic processes: "One associates the balance of power with the unintended outcome of great powers engaged in a mechanistic drive for hegemony. The other dynamic is associated with a complex set of social, ideational, and material factors that ameliorate the effects of the first dynamic by helping the great powers to maintain an equilibrium that promotes their collective security and common interests." Little, "The balance of power in *Politics Among Nations*", 137.
[385] Morgenthau, "Positivism, Functionalism, and International Law", 280.
[386] Ibid, 281-282.

The importance of these six points in relation to the question of how instances of failure to observe the taboo be best explained cannot be understated. The lack of recognition of the political interests that underpin arms control and disarmament treaties twists our perception of their foundations and real role in international society, weakening their reach and impact.[387] Morgenthau highlights this idea in the following extract:

> The science of international law, completely absorbed by practical problems as to what the rules of international law should be, is paying almost no attention to the psychological and sociological laws governing the actions of men in the international sphere, nor to the possible legal rules growing out of such actions.[388]

The relationship between international law and international society is a fundamental factor that needs to be addressed if aiming to prevent the erosion of the legal restrictions and taboos surrounding disarmament and arms control. "Grandiose legalistic schemes purporting to solve the ills of the world," in other words, "have replaced the less spectacular, painstaking search for the actual laws and the facts underlying them."[389] It is only through focusing on the social forces lurking beneath international law that we can prepare the ground for satisfying the greater ethical and political desire to improve international relations by means of the law.[390] In other words: "What else have you got to put in place of the balance of power? You have nothing as long as you have a multiplicity of autonomous nations competing with each other for

[387] The transformative aspects of Morgenthau's thought, as Lebow shows and argues, plays an important role in this; particularly in relation to international security and in contrast to the static views of international law exposed in this chapter. "For classical realists like Morgenthau," he writes, "transformation is a broader concept and one they associate with shifts in identities, discourses, and conceptions of security. Morgenthau conceives of political systems in terms of their principles of order, and is interested in the ways in which these principles help shape the identities of actors and the framing of their interests." Richard Ned Lebow, "Texts, paradigms, and political change," in *Realism Reconsidered: The Legacy of Hans Morgenthau in International Relations*, ed. Michael C. Williams (Oxford and New York: Oxford University Press, 2007), 252.
[388] Morgenthau, "Positivism, Functionalism, and International Law", 282-283.
[389] Ibid.
[390] Ibid, 284.

power."[391] Furthermore, no attempt to "solve the problem of international peace by limiting the national aspirations for power has succeeded, and none would have succeeded under the conditions of the modern state system.[392]

In other words, it is only through the consideration of the political and social forces which affect international law that a functional system of international law can truly be established.[393] The problem of world community is, then, a moral and political rather than an intellectual and aesthetic one. So long as men continue to judge and act in accordance with national rather than supranational standards and loyalties, "the world community remains a postulate that still awaits its realization."[394] In this regard, Morgenthau's thought, despite its considerably legalistic rather than diplomatic focus, mirrors much of Carr's own despite differing from his clear historical focus and from Schwarzenberger's purely legal one. It is to the theory of law of this latter theorist that we will now turn.

[391] Morgenthau, "Realism in International Politics", 6.
[392] Morgenthau, *Politics Among Nations, the Struggle for Power and Peace*, 491.
[393] This leads to a seemingly obvious yet deceptive answer: an international state, wherein what is needed is not to limit the exercise of national sovereignty through international obligations and institutions, but to transfer it to a world authority. The existence of such a state, however, is impossible due to the role played by nationalism in international society. Ibid, 491-492.
[394] Ibid, 513.

Chapter V. Georg Schwarzenberger: The Reality and Power of International Law

5.1 Introduction

Georg Schwarzenberger's works stand out from those of other classical realists through their focus on the nature of international law, its problems, and its relation to power politics and international society. Throughout these works he depicts international law as something that can rise above power politics under the right conditions and is both alive and real. He was widely regarded as a preeminent member of the realist school and his works were compared to those of Carr, Morgenthau, and Schuman.[1] The incisiveness, range, depth, and encyclopaedic propensities of his conclusions appear as common features in the great majority of the published reviews of his works.[2] Despite this prominence, however, Schwarzenberger has been all but forgotten by current IR literature, and his importance as a theorist has been vastly underestimated.[3]

[1] Norman Bentwich, "Reviewed Work(s): Power Politics by Georg Schwarzenberger," *The Modern Law Review* 5, no. 3-4 (1942): 271-272; David Mitrany, "Reviewed Work(s): Power Politics: A Study of International Society by Georg Schwarzenberger," *International Affairs* 28, no. 1 (1952): 71-72.

[2] E.H. Carr, "International Society," *The Times Literary Supplement* 2592 (October 5, 1951): 623; Ieuan G. John, "Reviewed Work(s): Power Politics. A Study of International Society by Georg Schwarzenberger," *The Modern Law Review* 15, no. 4 (1952): 531; Hans J. Morgenthau, "Reviewed Work(s): Power Politics by Georg Schwarzenberger," *The American Journal of International Law* 36, no. 2 (1942): 352; Frederick L. Schuman, "Reviewed Work(s): Power Politics: A Study of International Society by Georg Schwarzenberger," *The Annals of the American Academy of Political and Social Science* 280 (1952): 161-162.

[3] The nature of his theory and arguments—which both defended and undertook an unflinching investigation of the weaknesses of international law—are largely responsible for how he was made oddball amongst both international jurists and postwar political scientists. Robert Cryer, "International Law and the Illusion of Novelty: Georg Schwarzenberger and British International Law," in *British Influences on International Law, 1915—2015*, ed. Robert McCorquodale and Jean-Pierre Gauci (Leiden and Boston: Brill Nijhoff, 2016), 482; Scheuerman, *The Realist Case for Global Reform*, 84.

Georg Schwarzenberger was born to a local Jewish bourgeoisie family in Heilbronn, Germany in 1908.[4] He completed his legal studies at the University of Heidelberg, where he studied under Gustav Radbruch, and further attended the Universities of Frankfurt, Berlin, and Tübingen.[5] After his First State Examination in Tübingen, he worked on a doctoral thesis on the League Mandate for Palestine, and was supervised by Carlo Schmid.[6] Schwarzenberger was undertaking the preparatory service for the Second State Examination when Hitler was appointed Chancellor. Fearing riots against Jews and political opponents, he left Germany for Switzerland in March 1933 on election day, and narrowly avoided being arrested. He returned to Heilbronn after the first wave of arrests, only to be dismissed from the preparatory service for the Second State Examination in the summer of that year after colleagues mobilised members of the National Socialist Party against him.[7]

Schwarzenberger, whose hopes for a legal or academic career in Germany had just been destroyed, decided to abandon Germany and travel to Great Britain in 1934.[8] Though he hoped to start working immediately as a lecturer in international law and continue his academic career, he was forced to obtain a new professional qualification due to his lack of an academic reputation and contacts.[9] After struggling for a number of years, he started his doctoral studies at the London School of Economics under H.A. Smith, began to work at the New Commonwealth Society, travelled on its behalf to

[4] Stephanie Steinle, "Georg Schwarzenberger (1908—1991)," in *Jurists Uprooted: German-Speaking Émigré Lawyers in Twentieth-Century Britain*, ed. Jack Beatson and Reinhard Zimmermann (Oxford: Oxford University Press, 2004), 664. For additional complete, if brief, biographies of Schwarzenberger's life, see: Stephanie Steinle, "*'Plus ça change, plus c'est la même chose'*: Georg Schwarzenberger's *Power Politics*," *Journal of the History of International Law* 5 (2003): 387-390; L.C. Green, "Georg Schwarzenberger (1908—1991)," *American Journal of International Law* 86, no. 2 (1992): 341-342.
[5] It was at this time that Schwarzenberger became deeply involved in political activity on behalf of the Social Democratic Party.
[6] Steinle, "Georg Schwarzenberger (1908—1991)", 664.
[7] Ibid, 665.
[8] Ibid, 665-667.
[9] Ibid, 667-668.

sessions of the League of Nations, and became involved in editing the *New Commonwealth Quarterly*. In 1938, he was deprived of German nationality after devoting an issue of the *New Commonwealth Quarterly* to the Munich Agreement and sending a copy of his editorial to the German Embassy, only to be further notified that the University of Tübingen had revoked his PhD.[10]

Schwarzenberger was appointed as a part-time lecturer at the University College London in 1938, where he began to publish a number of works on international law together with George W. Keeton, and naturalised in 1946. He became distanced from mainstream British international lawyers—including Hersch Lauterpacht—due to his views on what he called the 'international society' and became an outsider in the British academic community due to his theory of international law, his difficult and polarizing personality, and his delight in provoking and attacking intellectual opponents.[11] These had a prominent effect on his career.[12] Despite being appointed Reader in International Law at the University of London in 1946, he was unable to be appointed to a chair due to opposition from Lauterpacht and Gerald Fitzmaurice. It was only in 1962—two years after Lauterpacht's death—that he was appointed to a chair at the University College London.[13] Schwarzenberger rejected an offer of membership of the *Institute de Droit International* in 1968, retired from his chair in 1975, and passed away in 1991.[14]

[10] Ibid, 669-670.
[11] Ibid, 671-672; Cryer, "International Law and the Illusion of Novelty: Georg Schwarzenberger and British International Law", 459.
[12] Schwarzenberger's approach to international law—which examines the role international law could play in a power-dominated environment—sets him apart from international lawyers. A concept of international relations like this "was not welcome among international legal scholars." In Germany the "sociological and interdisciplinary approach was not shared. The critics' main reproach was that a sociological method in international law led to a *nihilism doctrinaire* and a capitulation of law to power." In England, Lauterpacht and his circle also disagreed with Schwarzenberger's method. Steinle, "Georg Schwarzenberger (1908—1991)", 677. Schwarzenberger's almost exclusive focus on international law as a field, however, also sets him apart from other realists. Unlike many realists, he was both a strong advocate of international law and an unabashed supporter of it. His investigation of the weaknesses of international law and unflinching defense of it rendered him an outsider in both circles. Cryer, "International Law and the Illusion of Novelty: Georg Schwarzenberger and British International Law", 466-470.
[13] Steinle, "Georg Schwarzenberger (1908—1991)", 673.
[14] Ibid, 674-675.

Schwarzenberger was, like Morgenthau, an émigré trained in the legal science of Weimar Germany. His analysis of international law was based upon the fundamental sociological distinction between society and community made by the German sociologist Ferdinand Tönnies.[15] A student of Radbruch, he adopted his "neo-Kantian distinction between the 'ought' and the 'is'," as well as an appreciation for the effect of social forces on the compass and meaning of the law.[16] He presented the social background of international law in terms of the irreducible hostility between states, expressed in the various forms of power politics that international law could facilitate and symbolise, but not limit.[17] For Martti Koskenniemi, Schwarzenberger is therefore the main representative of the rule-approach doctrine of international law, which dictates that it is normatively strong but restricted in scope.[18]

Schwarzenberger was amongst the first to explore and develop the standard of civilisation in international society, drawing deep links between it and the development of international law.[19] He examined international economic law extensively, drawing connections between its development, structure, and the political realities of international society.[20] He traced the historicity of international law and explored its

[15] Bart Landheer, *On the Sociology of International Law and International Society* (The Hague: Martinus Nijhoff, 1966), 40-42; Nicolas Guilhot and Cadenza Academic Translations, "The French Connection," *Revue française de science politique (English Edition)* 67, no. 1 (2017): vi.

[16] Cornelia Navari*, The International Society Tradition: From Hugo Grotius to Hedley Bull* (Cham, Switzerland: Palgrave MacMillan, 2011), 137-138.

[17] Martti Koskenniemi, "The Fate of Public International Law: Between Technique and Politics," *The Modern Law Review* 70, no. 1 (January 2007): 20-21.

[18] By contrast, Morgenthau expounds for Koskenniemi the sceptical doctrine of international law, holding it both normatively weak and materially restricted. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument, Reissue with a new Epilogue*, 184-195.

[19] Brett Bowden, "In the Name of Progress and Peace: The 'Standard of Civilization' and the Universalizing Project," *Alternatives* 21, no. 1 (January 2004): 51; Brett Bowden, "Civilization: 'It Means Just What I Choose It to Mean'," *Society* 54 (2017): 130-131; Sarah da Mota, *NATO, Civilisation and Individuals: The Unconscious Dimension of International Security* (Cham, Switzerland: Palgrave MacMillan, 2018), 70-71; David P. Fidler, "The Return of the Standard of Civilization," Chicago Journal of International Law 2, no. 1 (Spring 2001): 144-145.

[20] This facet of Schwarzenberger's works has been somewhat more explored than the rest of his theory. See for example: Steve Charnovitz, "What is International Economic Law," *Journal of International Economic Law* 14, no. 1 (March 2011): 15; Steve Charnovitz, "The Field of International Economic Law," *Journal of International Economic Law* 17, no. 3 (September 2014): 612 and 618; Donald McRae, "International Economic Law and Public International Law: The Past and the Future," *Journal of International*

laws of war.[21] Schwarzenberger proposed an inductive approach to international law that was meant "as a corrective for the fallacies of logical deduction" in both their naturalist and positivist guise.[22] He bitterly engaged with Hersch Lauterpacht due to personal reasons and on the jurisprudence of the law, with Schwarzenberger disagreeing with Lauterpacht's naturalism.[23] An advocate of 'legal realism', he tried to combine legal research with a critical outlook on the influence of law on politics.[24] As stated by Schwarzenberger himself in the preface to the 2nd edition of *Power Politics*: "My constant object has been to prevent this picture of international society as a whole becoming blurred by undue concern with detail."[25]

Throughout his works, Schwarzenberger paints a detailed picture of international law that retains immense relevance in the field of international relations. His works offer an unflinching account of the weaknesses of international law that transcends the narrow account of classical realism that has come to dominate IR discussions today.[26] The methodology he employs—which leads him to examine the historical, ethical, and sociological origins of international law—allows him to account for the contradiction

Economic Law 17, no. 3 (September 2014): 628; Tanjina Sharmin, *Application of Most-Favoured-Nation Clauses by Investor-State Arbitral Tribunals: Implications for the Developing Countries* (Singapore: Springer Nature, 2020), 29.

[21] These aspects of Schwarzenberger's thought have been noted in other works, such as: Daisuke Akimoto, *Japan's Nuclear Identity and Its Implications for Nuclear Abolition* (Singapore: Palgrave MacMillan, 2020), 29; James Robert Huntley, *Pax Democratica: A Strategy for the 21st Century* (Hampshire: Palgrave, 2001), 33; Jean-Pierre Colin, "Individuals and Humanitarian Law: the Geneva Paradox," in *Individualism and World Politics*, ed. Michel Girard (Great Britain: MacMillan, 1999), 214; Peter J. Spiro and Linda Bosniak, "An Emerging International Law of Citizenship?," *Proceedings of the Annual Meeting (American Society of International Law)* 101 (2007): 89; Christopher Stephen, "International Criminal Law: Weilding the Sword of Universal Criminal Justice?," *International and Comparative Law Quarterly* 61, no. 1 (January 2012): 56; Jonathan Waterlow and Jacques Schuhmacher, *War Crimes Trials and Investigations: A Multi-Disciplinary Introduction* (Cham, Switzerland: Palgrave MacMillan), 113.

[22] Justin Desautels-Stein, "The Future of International Law: Global Government," *Journal of International Economic Law* 18, no. 2 (June 2015): 484.

[23] Cryer, "Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study", 246-247; Cryer, "International Law and the Illusion of Novelty: Georg Schwarzenberger and British International Law", 462-464. Cryer recounts that anecdotally: "the personal level of their disagreement was begun by Schwarzenberger's rude rebuff of Lauterpacht's offer of assistance when they first met in one of the University of London's libraries." Cryer, "International Law and the Illusion of Novelty: Georg Schwarzenberger and British International Law", 462.

[24] Andreas Paulus, "Realism and International Law: Two Optics in Need of Each Other," *Proceedings of the Annual Meeting (American Society of International Law)* 96 (2002): 270.

[25] Georg Schwarzenberger, *Power Politics: A Study of International Society*, 2nd ed. (London: Stevens & Sons Limited, 1951), xvi.

[26] Cryer, "International Law and the Illusion of Novelty: Georg Schwarzenberger and British International Law," 470-471 and 482.

that exists between the taboos underlying arms control and disarmament treaties and the cases of noncompliance that have taken place despite them. Schwarzenberger tackles this contradiction directly, offering a picture of international society and international law throughout his works that is surprisingly akin to Carr's and Morgenthau's own.

The choice to finish this section of the thesis with an examination of Schwarzenberger's oeuvre is not accidental. Schwarzenberger's works challenge our conception of classical realism. International law, which for Schwarzenberger was "generally a product of politics", could not be deduced from higher natural law or the law of reason.[27] He argued for the urgency of laying down generally valid legal standards in order to articulate the gap between present-day reality and the minimum requirements of civilized world community.[28] Schwarzenberger's theory allows us to bridge the gap between Carr and Morgenthau by examining international law through a sociological lens. Its conclusions answer the question of why the legal restrictions and taboos surrounding certain weapons—examined in the first two chapters of this thesis—are eroded.

The chapter opens with an examination of Schwarzenberger's pre-1939 works.[29] Within this section the development of international law, role of morality in

[27] Steinle, "'*Plus ça change, plus c'est la même chose*': Georg Schwarzenberger's *Power Politics*," 390.
[28] William E. Scheuerman, "Reconstructing Realism on Rights," in *Philosophical Dimensions of Human Rights: Some Contemporary Views*, ed. Claudio Corradetti (London and New York: Springer, 2012), 50; William E. Scheuerman, "Realism and the Kantian Tradition: A Revisionist Account," *International Relations* 26, no. 4 (2012): 460-461; Scheuerman, *The Realist Case for Global Reform*, 152-153.
[29] The choice to examine Schwarzenberger's theory of law following the fundamental division 1939 represents is primarily motivated, much like in chapters three and four, by the common themes which can be found in Schwarzenberger's oeuvre in both of these periods, the fundamental division the onset of the Second World War caused, and the transformative effect the Second World War had in international society.

international law, and problems facing international organisations are analysed.[30] The second section examines his post-1939 works through his analysis of the differences of international law and municipal law, its historical and sociological perspectives, the impact of ethics on it, the three types of law (power, co-ordination, and reciprocity), the impact of sovereignty and nationalism, and international institutions. The third section will examine Schwarzenberger's analysis of war and peace in international society, the functions of the laws of war, the contradictory nature of the standards of civilisation and the necessities of war, and the problems posed by nuclear weapons. The conclusion of the chapter brings the different ideas contained within Schwarzenberger's theory together, showcasing both their relationship to the fundamental questions explored by this thesis and exploring his suggested solutions for the problems facing international law.

5.2 Pre-1939 works

5.2.1 Force and morality in international law

The laws which regulate a community only formalise "customary behavior, which would be observed even without its existence."[31] They define the relations members regard as substantially sound and adequate, making it vital "to recognize this correlation between a community or a society and the different functions of their respective legal

[30] The three editions of Schwarzenberger's *Power Politics* will be examined within this chapter due to their notable differences, with occasional use of the first and second editions of this book being made where relevant in order to complement the text of the third edition. This choice is of particular importance, as though Schwarzenberger's analysis is remarkably consistent in its conclusions, the cases he analyses are not always the same.

[31] Georg Schwarzenberger, "The Rule of Law and the Disintegration of the International Society," *American Journal of International Law* 33, no. 1 (January 1939): 61.

systems."[32] It is upon these ideas that Schwarzenberger opens his analysis of international law, which focuses on the following questions:

> Has the function of international law in the past and in the present been primarily to witness agreements on issues indifferent from the standpoint of a proper community, to stabilize power positions, or to give expression to common conceptions of value?[33]

Only an examination of the social forces that underlie international law can give an answer to these questions and allow for a deeper understanding of it. Schwarzenberger's theory addresses the questions examined by this thesis precisely through this examination. It is his examination of the social forces underlying international law that allows him to account for both the emergence of the taboo surrounding the use of biological, chemical, nuclear, and conventional weapons and the instances of failure to observe it.[34] Modern international law "would not have been conceivable in the *unum corpus Christianum* of the Middle Ages, when there was no need to distinguish between national and international law."[35] International law—the product "of the experience gained in international affairs in the last three centuries of European history"—is fundamentally affected by its origin.[36] The pyramidal structure of the medieval community was replaced by the principle of the Christian natural law of nations, which gave it its universalistic spirit. This structure allowed international law, through its application between states, to be replaced by the international law of civilised nations.[37]

[32] Ibid, 61-62.
[33] Ibid.
[34] Ibid, 62.
[35] Ibid, 62.
[36] Georg Schwarzenberger and George W. Keeton, *Making International Law Work*, 2nd ed. (London: Steven & Sons Limited, 1946), 1.
[37] Schwarzenberger, "The Rule of Law and the Disintegration of the International Society, 63-64.

The origin of international law gives rise, for Schwarzenberger, to the following question: Does "international law fulfil the functions of a society law, and what is its relation to other regulating principles in the interstate sphere?"[38] In a society where the interests of members conflict, the main concern of each entity "must necessarily be directed towards self-preservation."[39] The only realistic alternative to universality for countries that are not in a position of geographical or political security is provided by the balance of power.

The balance of power allows, on the plane of power politics, for the preservation of peace "by continuous efforts at balancing in order to avert the ever-present danger of the preponderance of one or other group."[40] Thus, it is rash "to conclude that this principle is incompatible with the existence of international law," as it was the international law of peace that registered and stabilised "the equilibrium achieved by force in the fundamental peace treaties between 1648 and 1815."[41] So long as major issues do not arise, international law can contribute to the regularisation of relations between Powers on a basis of mutuality and reciprocity. The binding force of international law, then, "does not depend essentially on the availability of external force in case of violation," but can rely on "the penalizations inherent in its social machinery."[42] International law, in other words, is a real, if separate, dimension of international society.

[38] Ibid, 66. The process of the elimination of spiritual values from international law was carried to its logical conclusion by doctrine of legal positivism. The law, which was formerly a truth to be sought after, became "the equivalent of the will of those who give or refuse their consent." This showed that international law came to express less and less "the common standards of value which permeated the interstate system in its opening stages." Ibid, 65-66.
[39] Ibid, 66-67.
[40] Ibid.
[41] Schwarzenberger, "The Rule of Law and the Disintegration of the International Society", 67-68.
[42] Ibid.

The investigation into the social background of international law leads Schwarzenberger to conclude that force is the supreme law of international society.[43] This does not mean, however, that it has achieved exclusiveness. It can be "conditioned without there being any further inter-relationship between the two," or be completely or partially "subservient to the rule of force."[44] The fundamental conceptions of international law can best be understood if we assume that they maintain and support the rule of force. The absence of a superior authority means that "the consent of the sovereign States is necessary for any change in the *status quo*."[45]

The impact the rule of force has on international law cannot be overstated. "Such a system can only run smoothly," Schwarzenberger writes, "if the inter-State system is so static that no changes of major importance are necessary, or if sovereign States are reasonable enough to make sure that unavoidable changes are effected by agreement."[46] Legal bonds decrease the "non-committal character of such liaisons," giving them "the appearance of stability."[47] The dignity which legal forms invest in *de facto* situations resulting directly from force "is especially valued by States when the time comes to secure the spoils of victory and conquest."[48] International law provides quasi-legal excuses for political measures which are otherwise incompatible with the sovereignty and equality of states.

The shortcomings of international law are, thus, a direct result its subordination to the rule of force.[49] Though not necessarily permanent, inherent or unavoidable, "they

[43] Schwarzenberger and Keeton, *Making International Law Work*, 31.
[44] Ibid.
[45] Ibid, 32.
[46] Ibid.
[47] Ibid, 35.
[48] Ibid, 35-36.
[49] Ibid, 38.

cannot be eradicated until the existing relationship between law and power politics is reversed."[50] Thus, in the spheres in which international law is subservient to power politics, "the threat of force plays an important part, but once force has been actually brought to bear, there remains no further effective threat."[51]

The question thus arises as to whether international law can claim to fulfil the functions of a legal system at all.[52] Research into the sociological background of municipal law, Schwarzenberger argues, reveals that "though it compares favourably with international law, it is itself not entirely free from similar defects."[53] It is here that international morality comes to play a role in international law, with its principal problem being expressed as follows:

> [I]n the relationship between the 'stars' of the international society, do there exist any rules identical to, or comparable with, those moral norms which apply to the relations between individuals?[54]

A lawyer's approach to this problem would differ in accordance with his views on the relationship between natural and international law. "Even if there were conclusive evidence in the practice of States of the reception of morality into law," a positivist would "shrink from accepting morality as a *sine qua non* of international law."[55] By contrast, a naturalist would either "pin his faith to the superiority of natural over positive law, or else equate them."[56] Schwarzenberger analyses the question sociologically,

[50] The nature of truth in the relationship between law and force is of considerable interest: "the validity of truth cannot depend on the attitude of the entity which is supposed to be bound and restricted thus the doctrines of natural law, though never to any appreciable extent observed in State practice, were naturally replaced by positivist doctrines according to which States are subject to international law only by their own express or implied consent." Ibid.
[51] Ibid, 42-43.
[52] "There are no objections," Schwarzenberger writes, "to regarding as a legal system that part of international law which lies outside the range of power politics." Ibid, 46.
[53] These, however, "are nowhere as brutally obvious as in the international society and in totalitarian States." Ibid, 47-48.
[54] Ibid, 49.
[55] Ibid, 50.
[56] Ibid.

paying attention to the language used in international society.[57] Judging from state practice "it would appear that diplomatic correspondence, preambles of international treaties and the public utterances of statesmen were imbued with ethical conceptions and maxims."[58] These ethical maxims are present in the pronouncements of totalitarian states, which seems to confirm the impression that the power of international morality is a reality; a fact which further points at the taboo brought to light in the first chapter of this thesis.[59]

Ascertaining the reality of this presents considerable difficulties: Only an assessment of the impact that the rule of force has on moral values can provide a realistic inquiry on this question.[60] "In a system of power politics," Schwarzenberger writes, "appeals to moral standards by statesmen would not occur so regularly if they did not serve some useful purpose."[61] It follows, then, that the main function of morality in the international society "does not consist in the control of one's own behaviour," but in "the use of morality as a powerful weapon against potential and actual adversaries."[62]

For Schwarzenberger, there are positive aspects to this state of affairs. Interests can become secondary to the ideas which they have called to their assistance. Thus, in exceptional cases, "the influence of international morality exceeds even that of

[57] "We do not identify our task with any of those so far described; for we are not so much concerned with systems of morality and judgments on the role which morality *ought* to take in the inter-State system as with the moral rules which are actually, or else professed to be, applied." Ibid, 50-51.
[58] Ibid, 53.
[59] It would be incorrect, he writes, "to assume that the totalitarian States did not profess adherence to the standards of international morality." Schwarzenberger develops this argument by reference to several examples. Amongst these is a Japanese Note to the American Secretary of State of 1924, in which a protest was registered against a clause of the United States Immigration Act of 1924 on the grounds that "international discriminations in any form and on any subject" are "opposed to the principles of justice and fairness upon which the friendly intercourse must, in its final analysis, depend." Ibid, 56-57.
[60] There is hardly anything more difficult "than the classification of the behaviour of States according to one of the available standards of moral appraisement or condemnation." Ibid, 59. It is important, if attempting to do this, that we bear in mind that the "inter-State system is ultimately governed by motive powers such as self-interest and self-preservation" as well as the supremacy of the rule of force. Ibid, 61.
[61] Ibid, 62-63.
[62] Ibid.

international law," as the latter, in being a set of highly technical rules, does not have a "direct access to the imagination of the public which broad issues, such as good faith and justice, can claim."[63] The reality of the influence of morality is demonstrated through the way in which international law was developed:

> When international law served to bridge the disintegration of the medieval Commonwealth and the anarchy which seemed to threaten the European State system, the first stone was provided by international morality in the form of international law.[64]

Though less treasured as a guide for one's own conduct, international morality "formed a weapon which diplomats were prone to use for the purpose of strengthening shaky legal positions."[65] Schwarzenberger's theory is reminiscent of Carr's—examined in chapter three of this thesis—on this point. International morality in state practice is used "as an ideology cloaking in deference to public opinion, policies of national self-interest and self-preservation."[66] Despite this, the connection between international morality and law "has never been entirely disrupted."[67] Thus, though the question of international morality can be complicated by the sliding scale of moral values among states, "forces of passion and other irrational motives should not be underestimated."[68] The powerful impact of morality in international society stands despite the pre-eminence of the rule of force.

Having examined this, we will turn to the particular problems presented by this transposition of loyalties to the international society.

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[63] Ibid, 64.
[64] Ibid, 64-65.
[65] Ibid, 65-66.
[66] Ibid, 66.
[67] Ibid.
[68] Ibid, 67-68.

5.2.2 The question of universality

Endeavours to create international communities are made when the following three conditions prevail: First, the respective communities "must be in touch with one another"; second, conditions "must be sufficiently complicated to make common organization advisable for the settlement of their difficulties"; and third, "the interest in the maintenance of this inter-relationship must be strong enough to stimulate the desire for a closer connection between the communities concerned" in spite of "obstacles and contrary interests."[69] These conditions do not solve the problem of the non-participant. Non-participants may be "strong enough to resist the application of force," and of sufficient importance "to prevent the achievement of the common aim by non-co-operation."[70] An international community may thus conceive universality in the following ways:

1. We can look at the *structure* of the organization of the collective system as a *whole*. It may be either *imperial* or *co-operative*.[71]

2. Looking at the *constitutional structure* of the *individual communities* of which the universal organization is composed, the collective system may aim either at *homogeneous* or *heterogeneous universality*.[72]

[69] Georg Schwarzenberger, *The League of Nations and World Order: A Treatise on the Principle of Universality in the Theory and Practice of the League of Nations* (Constable & Co LTD, London, 1936), 1.
[70] This fact is heightened by the "national, cultural and racial" characteristics of countries, which reduce the value of idealistic arguments, making "only common interests remain as a bond of union." Ibid, 1-2.
[71] An imperial idea of universality was realized or "thought to be realizable, as one world empire based on *coercion from above*." This universality, however, may also be based on free will, with all members cooperating "in achieving the common aim as equal constituents of a world organization." Ibid, 4.
[72] If this collective system comprises "*communities of a certain constitutional structure* only it aims at *homogeneous universality*." By contrast, if it does not apply such standards, "it aims at *heterogeneous universality*." Ibid.

3. Looked at from the point of view of the *purpose* which it is intended to serve, a universal organization may aim at *absolute or relative universality*.[73]

The differences which these present in relation to how international organisations work is considerable. The obvious method to achieve universality for any power "seems to be to absorb all other communities" which would not "allow for independent nations living side by side on a basis of equality."[74] By contrast, the opposite situation implies "a corresponding lack of national consciousness," as well as of the desire "for self-determination among the subjected communities."[75] As the "awakened nationalism of the modern era" has made this impossible, universality instead has to be reached through the voluntary co-operation of states.[76]

Nationalism defined early proposals for international organisations, making them practically unworkable through their optimistic rationalism.[77] The problem it brings forth is complicated by the question of whether an international organisation ought to be homogeneous or heterogeneous. These qualifications raise the question of whether it is possible to both "make the proposal of an international league acceptable to all civilized States" and make all states "fulfil the further conditions which are deemed indispensable" to join such a league.[78] Furthermore, the problem of homogeneity can only be reconciled with that of cooperative universality if it is "possible to realize a

[73] If it is deemed necessary that all communities, regardless of size, must be included, the collective system will aim at absolute universality. By contrast, it will be based on the principle of relative universality if it is content with the membership or co-operation key states which might endanger the attainment of its common aim. Ibid, 4-5.
[74] Ibid, 6-7.
[75] Ibid, 7.
[76] Ibid, 9.
[77] Ibid, 15-16.
[78] Ibid, 17-18.

homogeneity of some kind in all States whose co-operation is deemed to be indispensable for the achievement of world peace."[79]

These, for Schwarzenberger, affected the functioning, early structure, and development of the League of Nations.[80] The Peace Conference intended to create a League of Nations based on a principle of universality restricted only by moderate qualifications of constitutional homogeneity. The "establishment of a universal peace organization, if it is to become a reality," involves more than "matters of legal formality."[81] An *anima societatis* must be created.[82]

If we want to trace whether the principle of universality was embodied in the Covenant of the League of Nations we must ask whether it provided for: (1) the "inclusion of all important States of the international community"; (2) their "active co-operation as long as they remain outside the League"; or (3) the "collective system to enforce its will upon non-members whose co-operation is indispensable for the achievement of its aims."[83] The answers to these are linked to questions of power politics, state interests, the status quo, and isolation; they cannot be ignored by any international organisation aspiring to universality. They are linked to the key feature which makes international organisation schemes unworkable: That some variant of nationalistic policies is found in all "well-intentioned proposals which aimed consciously

[79] Ibid.
[80] Much of Schwarzenberger's analysis of the workings of the League is affected by this idea, particularly in relation to the particular interests of states and the perception which the imposition which certain treaties had on the League's neutrality as a whole. For example: "If one bears in mind that the war was only just over, and that its atmosphere still persisted, it is not astonishing that the principle which was adopted as a general rule was not quite upheld when it had to be applied to problems of practical policy and to concrete decisions as to whether this or that State should be admitted." Ibid, 35.
[81] Ibid, 44.
[82] The Peace Conference, however, only succeeded in introducing the new principle "at the price of not applying it to the products of pre-war imperialism." Ibid, 46.
[83] Ibid, 95.

or unconsciously at stabilizing a specific international *status quo* in the interest of individual Powers."[84]

So long as a state or group of states is not sufficiently powerful to compel the rest of the world to conform to a peace system of that kind, international organisation schemes will always break down on the point of nationalism.[85] It is idle to hope for success so long as states are not ready to "make equal sacrifices in the interest of international solidarity, and of world peace," and "not prepared to give up their own special selfish interests."[86] The treaties examined in chapter one and the breaches explored in chapter two are both profoundly affected by the question of universality. As wars "to-day are no longer exclusively the affair of individual nations, or even of individual continents," with each entailing the possible danger of becoming a worldwide conflict, an "effective system for the maintenance of peace must be universal or it remains an impotent shadow."[87] In striving for universality, the states and organisations pushing for the continued growth of arms control and disarmament treaties must account for the difficulties they may encounter.

We will examine the relation which the balance of power bears with this idea in the following subsection.

[84] Georg Schwarzenberger, *William Ladd: An Examination of an American Proposal for an International Equity Tribunal*, 2nd ed. (London: Constable & Co LTD, 1936), 25-26.
[85] Ibid, 26-27.
[86] Ibid.
[87] Ibid, 29.

5.2.3 The balance of power

"The best ideas," writes Schwarzenberger, "remain mere dreams so long as there are no powerful groups of interests bound up with them, intent on their realization."[88] It is through this that the balance of power comes to impact international organisations, making it a fundamental factor of any universal peace. Though an international organisation "may be confined to certain States for just so long as the danger of war is limited to a certain area," it must "extend over a whole continent or the whole world" to be effective when "the danger of war is not limited to any one quarter."[89]

In pre-war Europe, the political system of alliances and counter-alliances which brought the balance of power as a means of preserving peace was an overriding force. Within its limits, international law could fulfil the functions of a society law which was founded on mutuality and reciprocity "only in subordination to the requirements of this system."[90] The disintegrating forces played by the incompatibility between the two main objects of the Peace Treaties—that is, hegemony over the former Central Powers on the one hand, and an organised community based on the comprehensive rule of law on the other—further the shape of international law the war.[91] They transformed the system established by the collective system of Geneva into a "non-coercive League" and a "transitional period of scarcely checked anarchy."[92]

The facet which, for Schwarzenberger, merits particular attention in the interwar period is that of the hostile attitude of the League towards Germany. Taken for reasons

[88] Ibid, 33.
[89] Schwarzenberger, *The League of Nations and World Order*, 3-4.
[90] Ibid, 75.
[91] Ibid.
[92] Ibid.

of power policy, it caused Germany to "inaugurate a policy of counter-alliances, compensating her not only from the point of view of her political interests, but also from that of violated honour."[93] The changed attitude of western states mitigated anti-Western feelings considerably in Germany and the Soviet Union.[94] The experience of the growing co-operation with the League, first in the humanitarian sphere, and later in questions of disarmament and economic relations taught, however, the Soviet Union "that it was fantastic to regard the League as the screen behind which imperialistic alliances against them were formed."[95] Though these considerations made it advisable for the Soviet Union to develop their relations with both the League, Schwarzenberger writes, "closer relations became imperative after Japan and Germany revealed their intention of resigning from the League."[96]

Most of the delegates who expressed their hope that the League would achieve absolute or relative universality represented "either small States or non-European States."[97] To smaller states universality meant "protection against exclusive understandings among the Great Powers," whilst for non-European states it was "a guarantee against the League deteriorating into a Continental alliance merely restricted to Europe, and possibly directed against the other continents."[98] Thus, it would be "contrary to experience" to assume that the international law can take "more than a secondary place as long as it is subject to the requirement of such a political system."[99]

[93] Ibid, 77-78.
[94] This stands out in Stresemann's confidential notes. Provided that Germany obtained a permanent seat in the Council, it was noted that membership of the League would give Germany an opportunity of enjoying the advantages and rights of membership. Germany's admission to the League, however, would have been possible from the outset if the Peace Conferences had only applied the measure of homogeneous universality laid down in Article I of the Covenant. Ibid, 78-80.
[95] Ibid, 84.
[96] Ibid.
[97] Ibid, 120-121.
[98] Ibid.
[99] Schwarzenberger, "The Rule of Law and the Disintegration of the International Society", 75.

The conclusion and implications of these different examples are clear. The collective interests to which "those sacrifices must be made without which a universal collective system cannot be established," must either be "so strong that the States will freely renounce their respective national interests" or have identical national and supranational interests.[100] The decisions of states to subordinate other interests to those of a collective system, in turn, then, "depend on whether the maintenance of peace is sufficiently valuable for the national communities."[101] The creation and effectiveness of international organisations, and through them international law, thus remain fundamentally bound to national interests.[102]

5.3 Post-1939 works

5.3.1 Municipal vs international law

The differences between municipal and international law play a prominent role in Schwarzenberger's theory of law.[103] Schwarzenberger addresses two key questions on the nature of international law throughout his post-1939 works: "Is international law

[100] Schwarzenberger, *The League of Nations and World Order*, 176-177.
[101] Ibid.
[102] The similarities of Schwarzenberger's and Carr's analyses of national interests and international law are, despite their differences, striking—particularly through how these national interests impacted the workings of the League of Nations. Carr's historical and diplomatic analysis on this point was examined in chapter three.
[103] Schwarzenberger's categorization of municipal and international law has been noted in a variety of legal studies. Schwarzenberger, Motataianu argues, denies the existence of imperative norms in international law and reaffirms the strict opposition between the customary and conventional laws in international law. Stefan Motataianu, "Jus Cogens in the Doctrinal Preoccupations after the Second World War," *Annals of the Constantin Brancusi University of Targu Jiu Juridical Sciences Series* 2017, no. 3 (2017): 68. Spiro and Bosniak reference Schwarzenberger's commentary of the question of nationality in international law in their analysis of the same question. Spiro and Bosniak, "An Emerging International Law of Citizenship?", 89. Cryer remarks on the similarities and differences between Schwarzenberger and Lauterpacht's positions on the utility of evidence provided to international tribunals in relation to international customary law: "One of these was that the decisions of international tribunals were useful evidence of what customary law was, but—and this is a large caveat—this depended on the quality of the decision." Cryer, "Of Custom, Treaties, Scholars and the Gavel: The Influence of International Criminal Tribunals on the ICRC Customary Law Study", 246.

law or is it merely positive morality?" and how can "a system claim legal character if it lacks all or some of the customary attributes of municipal law: legislative organs, courts and sanctions?"[104] Questions of this type uncritically take it for granted that there is only one type of law, and lead either to unrealistic assertions of the identical character of municipal and international law or resigned admissions of differences which deprive international law of its legal character.[105]

International law is the "body of legal rules which apply between sovereign States."[106] Its principles "may be abstractions within a narrow compass from relevant rules of international law."[107] Their significance, therefore, varies according to the level of international or supranational integration on which they are invoked.[108] The basic rules of primary international law rules "fit readily into a comprehensive system consisting of seven fundamental principles: sovereignty, recognition, consent, good faith, self-defence, international responsibility and freedom of the seas."[109] Both are shaped by the impact of the three states of international law: "the state of peace, the intermediacy between peace and war (*status mixtus*), and the state of war."[110]

International law, then, much like municipal law, has an underlying order.[111] In order not to be purely nominal, it must satisfy a single condition: "there must be a state

[104] Georg Schwarzenberger, *The Frontiers of International Law* (London: Stevens & Sons Limited, 1962), 20.
[105] Ibid.
[106] Georg Schwarzenberger, *A Manual of International Law*, 5th ed. (London: Stevens & Sons Limited, 1967), 3.
[107] Schwarzenberger, *The Inductive Approach to International Law*, 85.
[108] "For instance," Schwarzenberger writes, "on the levels of unorganised and partly organised international society, the assertion of subjective responsibility as a general principle of law is likely to be countered by the invocation of the objective responsibility as a counter-principle. Similarly, every legal maxim invoked as evidence of a general principle tends to be neutralised by a counter-maxim, and both are frequently no higher authority than Chinese proverbs invented by Western wits." Georg Schwarzenberger, *The Dynamics of International Law* (Milton: Professional Books Limited, 1976), 7-8.
[109] Rather, these "are not contained in any one primary rule," and "may be products of the interaction between two or more primary rules … governing different fundamental principles of international law." Schwarzenberger, *The Inductive Approach to International Law*, 95.
[110] Ibid, 96.
[111] Georg Schwarzenberger, *World Economic Order? A Basic Problem of International Economic Law* (Manchester: Manchester University Press, 1970), 1.

of relative absence of physical disorder; that is, the prevalence of a state of peace."[112] This single condition circumscribes international law to the limits set by power politics, making it the background against which that international legal rules have been developed.[113] This aspect of Schwarzenberger's thought has been widely noted in the literature. For Schwarzenberger, Steinle argues, "international law is generally a product of politics," as international legal rules cannot "be deduced from higher natural law or law of reason."[114] Law, Koskenniemi notes, exists away from centres of power politics, and even when it does so insistence on its binding force is hopelessly inadequate.[115] Landheer summarises the fundamental difference between municipal and international law in the following way:

> International law, according to Schwarzenberger, does not condition, but is conditioned by the rule of force. International law expresses power relationships instead of regulating them. Consequently, it expresses the volition of dominant states and changes in accordance with the power structure of world society.[116]

The differences between self-help in international law and municipal law, as noted by Scheuerman, further illustrate why this is the case:

> There appeals to self-help were legally circumscribed so as to make sure that it remained an exceptional state of affairs, whereas in international affairs a lacuna of basic legal safeguards meant that self-help served as little more than a cover for the 'rule of force', i.e. political constellations typically favoring those with more de facto power.[117]

These three ideas are clearly present in Schwarzenberger's analysis of municipal and international law. "In the municipal sphere," Schwarzenberger writes, "legislation

[112] Georg Schwarzenberger, "Las naciones unidas y el derecho internacional: el criterio determinante," *Foro Internacional* 11, no.2 (1970): 353-354.
[113] Georg Schwarzenberger, *International Law and Totalitarian Lawlessness* (London: Jonathan Cape, 1943), 9.
[114] Steinle, "'*Plus ça change, plus c'est la même chose*': Georg Schwarzenberger's Power Politics", 390.
[115] Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument, Reissue with a new Epilogue*, 195.
[116] Landheer, *On the Sociology of International Law and International Society*, 40-41.
[117] Scheuerman, "Realism and the Kantian Tradition: A Revisionist Account", 461.

has become the antidote to violent changes and revolution, and it is therefore only natural that reformers investigate … similar possibilities in the realm of inter-State affairs."[118] The fundamental differences between international and municipal law in terms of overruling dissent, prevent this from being a reality.[119] Whereas the *jus cogens* and *jus dispositivum* present clear differences in municipal constitutional legal systems, this is not the case in international law. International customary law "has no rules of *jus cogens*, and the general principles of law recognised by civilised nations are products of a merely subsidiary law-creating process."[120]

In municipal law "law-making in disguise by judicial organs is less open to objection than on the international level."[121] By contrast, international society is "deeply divided", and the existence and scope of individual rules and principles is "less securely established and, as yet, the submission of disputes to international judicial institutions is the exception rather than the rule."[122] International customary law lacks rules which "by consent, individual subjects of international law may not modify" and must rely on the "majority of the subjects of international law acting in a spirit of reasonableness."[123] International law, therefore, cannot grow "in the way of municipal law because of the need for obtaining the consent of all concerned to any change in the law."[124] This gives enormous importance to treaties—the chief vehicle of the development of international

[118] Schwarzenberger specifically quotes Hersch Lauterpacht as an example of this view. Georg Schwarzenberger, *Power Politics: An introduction to the study of international relations and post-war planning*, 1st ed. (London: Jonathan Cape, 1941), 393-394.
[119] Ibid, 401.
[120] Schwarzenberger, *Power Politics*, 2nd ed., 117.
[121] Schwarzenberger, *The Inductive Approach to International Law*, 74.
[122] Ibid, 74-75.
[123] Schwarzenberger, *A Manual of International Law*, 29-30.
[124] Schwarzenberger, *The Frontiers of International Law*, 36.

law—as a rule is only considered customary law if it has been accepted by most, if not all, subjects of international law.[125]

In developed communities, municipal law rests securely on the organised power of the state. The government, in insisting on the monopoly of the use of legitimate force, "puts its overwhelming strength behind the law and, if it acts wisely, forestalls revolution by timely adaptation of the law to changing circumstances."[126] International law, by contrast, "is not only dependent for change on the consent of every State concerned" but also lacks a "central authority capable of imposing its will on recalcitrant members of the international aristocracy."[127]

Dependence on the consent of states makes international law strongly hierarchical. "Every one of the groups concerned," Schwarzenberger argues, "has interests of its own in defending or improving its relative position."[128] Rather than individual or sectional groups and desires, it is sovereign states and the oligarchy of world Powers that decide on the character of international affairs. Thus, all radical plans for international peace "are based on a usually unstated major premise: the transformation of international society into an international community."[129] Navari emphasises the importance of the society and community distinction in Schwarzenberger's theory: "His conception of "power politics" came from a sociological distinction between 'society' and 'community'. Schwarzenberger insisted that

[125] Ibid, 37.
[126] Ibid, 38.
[127] Ibid.
[128] Georg Schwarzenberger, *Power Politics: A Study of World Society*, 3rd ed. (London: Stevens & Sons Limited, 1964), 140.
[129] This transformation is more complicated than the idea of consent to international law implies: "Even if one State were prepared to take this step, it would still be faced with the dead weight of all the others. Even if all small States and middle Powers could be persuaded to follow suit, there would still be the world Powers. Even if all the world Powers but one were prepared to start a new chapter in international relations, they could merely establish an international community among themselves." Ibid, 141.

international society, while real was not a true international community." [130] For Guilhot, the society and community distinction transcend Schwarzenberger's works and has importance for realism at large. The link to sociology in these, he argues:

> is one of the markers of the creation of realism and was far from being uniquely French, since it can also be found in the work of Kenneth W. Thompson, Hans Morgenthau, and John Herz, as well as Raymond Aron.[131]

International law is therefore fundamentally affected by its reliance on the consent of states. Its reach is limited until such a condition can be fulfilled; a fact which impacts the effectiveness of disarmament and arms control laws.[132]

Having examined this idea, we will examine Schwarzenberger's analysis of the two perspectives of international law.

5.3.2 The historical and sociological perspectives of international law

International law has undergone fundamental changes in character throughout its development from an inter-European legal system to one with worldwide universality.[133] The historical premises of the medieval international law were of "brutal simplicity," wherein the absence of an agreed state of truce or peace "war was the basic state of international relations even between independent Christian communities."[134]

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[130] Navari, *The International Society Tradition: From Hugo Grotius to Hedley Bull*, 138.
[131] The importance of this distinction, as seen in chapter three of this thesis, can also be observed in Carr's own theory of law. Guilhot and Cadenza Academic Translations, "The French Connection", vi.
[132] This—that is, the powerful effects which the consent of states has on international law—represents an important similarity between Carr's and Schwarzenberger's theories of law. Scheuerman remarks on the importance of this aspect of international law, particularly by relation to the lack of equality of its members: "Even when international law appears to treat all parties equally, de facto power inequalities means that it favors those possessing superior power resources. Legal generality, in short, presupposes a modicum of de facto power equality." Scheuerman, "Reconstructing Realism on Rights", 52.
[133] Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals, Volume I: International Courts and Tribunals*, 3rd ed. (London: Stevens & Sons Limited, 1957), 79; Schwarzenberger, *Power Politics*, 3rd ed., 31.
[134] Schwarzenebrger, *The Frontiers of International Law*, 47.

Little was taken for granted, and contracting parties tried to safeguard themselves through the use of multiple sanctions "which might be incorporated side by side into treaties" yet ultimately rested on "the word and good faith of the princes concerned."[135]

The rise of international law required "the symbiosis of independent states."[136] Political and economic interests combined in shaping early international law, with the legal foundations for the growth of treaty and customary international law being laid down first.[137] This origin makes international law reflect "the major forces which have come to shape contemporary world society."[138] International law mirrors its historical foundations. A historical analysis of international law reaffirms the idea that in an "international society as distinct from a community, the models of international law adopted by State practice are repetitive rather than continuous in their legal validity."[139] It is this historical analysis that leads Schwarzenberger to present the following five hypotheses:

1) The efforts made over more than eight centuries to reverse the historical premises of international law have been attained primarily by means of treaty.

2) The parties to such treaties have come to take for granted certain moral assumptions without which the legal validity of any of these treaties would have been inconceivable.

3) International customary law … amounts to little more than a residue of treaty clauses of past ages which are generally taken for granted as embodying self-understood legal obligations.

4) The growth of international law mirrors so accurately every essential change in its social environment that, prima facie, the rules of

[135] These, Schwarzenberger writes, could consist in the "exchange of hostages, in the pledging of towns, castles and territories, in mortgaging the movable and immovable properties of kings or their subjects, or in the appointment of powerful nobles of the contracting parties or of foreign princes as guardians and guarantors of such treaties." Ibid, 50-51.
[136] Georg Schwarzenberger, "International Law in Early English Practice," *British Year Book of International Law* 25 (1948): 52.
[137] Ibid, 55.
[138] Schwarzenberger, *The Frontiers of International Law*, 59.
[139] Schwarzenberger, *The Dynamics of International Law*, 54.

international law appear to reflect, rather than condition, the structure of international society at any particular time.

5) On the level of universal international law, the historical premises of international law are as valid as ever. Arguments to the contrary … hardly affect, however, the place of law in the vital overall relations between the two major power blocks.[140]

The implication of these underpins the entirety of Schwarzenberger's conception of international law. They are of "dramatic and traumatic simplicity: non-peace as the normal state of affairs, rightlessness of foreigners and anarchy on the high seas", confirming the "working hypothesis of international law as, predominantly, a law of power and reciprocity in such systems of power politics."[141]

The key to understanding the functions fulfilled by international law lies in the structure of its social background.[142] Law and justice, regardless of what their essence may be, "are social agencies and fulfil social functions."[143] Two questions define the social background of international law: "what is the nature of the social substratum of international law," and "what are the dominant motive powers determining the actions of groups in the international sphere?"[144] These two questions are fundamentally affected by the fact that law and society are correlative terms: where "there is Law, there is Society."[145] Koskenniemi remarks on the importance of the distinction between 'society' and 'community' in Schwarzenberger's analysis of international law:

> Georg Schwarzenberger, among others, used the distinction between 'community' and 'society' to canvass the 'social background of international law' in terms of an irreducible hostility between States, expressed in the various

[140] Schwarzenberger, *The Frontiers of International Law*, 64.
[141] Georg Schwarzenberger, "Civitas Maxima?" in *The Yearbook of World Affairs*, eds. George W. Keeton and Georg Schwarzenberger (London: Stevens & Sons, 1975), 344.
[142] Georg Schwarzenberger, "International law and society," in *The Yearbook of World Affairs*, eds. George W. Keeton and Georg Schwarzenberger (London: Stevens & Sons, 1947), 159.
[143] Georg Schwarzenberger, "The Three Types of Law," *Ethics* 53, no.2 (1943): 89.
[144] Schwarzenberger, "International law and society", 160.
[145] Schwarzenberger, *Power Politics*, 3rd ed., 31.

> forms of 'power politics' which international law could only facilitate and symbolise but not limit.[146]

Three features therefore characterise the structure of international law on the level of unorganised international society: its universality, its exclusiveness (who is subject to it), and its individualistic character (how its subjects are bound by its rules).[147] These are linked to the different functions which law may serve any social environment, wherein it "may be an instrument of power, a regulator of reciprocal interests or a means of co-ordinating common efforts."[148] International law tends to present the characteristics of an extreme type of society law, that is to say, "it is preponderantly, but not necessarily exclusively, a law of power."[149] Depending on the degree of integration between states, it may change into a hybrid between society and community law "a law of reciprocity," or a fully-fledged community law "a law for the co-ordination of joint efforts on the basis of voluntary co-operation."[150]

Power is the test which "determines the place of sovereign States in the hierarchy of the international society."[151] It makes the primary object of every member of the international aristocracy that of self-preservation, a fact which conditions the foreign policies of states and makes the balance of power system span across the globe.[152] Each group considers itself not merely as a means to a common end, but as an end in itself, limiting law and morality to "relatively subordinate positions."[153] The

[146] Koskenniemi, "The Fate of Public International Law: Between Technique and Politics", 20-21.
[147] Schwarzenberger, *A Manual of International Law*, 8-9.
[148] Whilst this first function, Schwarzenberger argues, is likely to be predominant in extreme societies, the third one tends to prevail in corresponding community relations. Ibid, 10.
[149] Ibid, 12.
[150] Ibid.
[151] Ibid, 23.
[152] Diplomacy and armaments are, Schwarzenberger writes, the "traditional weapons of the sovereign State." Corresponding importance, however, must be given public opinion, as "States have found it necessary to seek closer contact with this elusive phenomenon," a fact which makes propaganda a "junior branch of the foreign service." Ibid, 23-24.
[153] Ibid, 24.

primacy of power in international law gives us insights into the motives behind the motives behind the instances of failure to observe the treaties and the taboo explored in the first and second chapters of this thesis:

> In a society in which power is the overriding consideration, the primary function of law is to assist in maintaining the supremacy of force and the hierarchies established on the basis of power and to give such an overriding system the respectability and sanctity of law. International law serves these purposes in a variety of ways.[154]

International law is fundamentally affected by the national interests of the states which form the international society. The effect of national interests in international society is not, however, unlimited. The "very States which, since time immemorial, have been immersed in the vortex of power politics," Schwarzenberger writes, "themselves attest to the reality of international law."[155] The independence of states "is one of the corner-stones of international law."[156] Thus, it follows that "the participation of a State in an international congress or conference depends on its own free will," and, further, that "in the absence of agreement to the contrary, unanimity is required for any decision."[157] Though inhibited by national interests and power politics, international law, for Schwarzenberger, has a powerful impact on the states which form the international society. The key way in which this is the case—ethics, an idea which was also touched on by Morgenthau—will be explored throughout the following subsection.

[154] Ibid, 25.
[155] Ibid, 24.
[156] Ibid, 25.
[157] Ibid.

5.3.3 Ethics in international law

International morality, more so than international law itself, "suffers from being applied not so much as a code to regulate one's own conduct but as a handy weapon against others."[158] The use of international morality as an ideology of power politics throughout history is thus, as seen in the mirrored allegations of treaty violations explored in the second chapter of this thesis, "so blatant as to make the observer wonder who is likely to be impressed by such clumsy masquerades."[159] A single, key question can therefore be asked: What, if any, is the role played by ethics and morality in international law?[160]

The roles played by ethics and morality, for Schwarzenberger, are clear. International ethics is primarily conditioned by international society, rather than the reverse.[161] The standard of civilisation, in order to be relevant, has to be "be *universalised* so as to cover the chief civilisations that, throughout the ages, have emerged from pristine savagery."[162] It has to also be "*relativised* so as to make manifest the savage and barbarian elements in all civilised groups," as well as dynamised "so as to emphasise the room there always is for further improvement."[163]

[158] Schwarzenberger, *Power Politics*, 2nd ed., 253-254.
[159] Ibid.
[160] The that international morality plays in Schwarzenberger's conception of international law—particularly through principles such as consent and good faith—has been noted by Motataianu. "These higher reasons that promote the common interest of the whole international society, can be found even in the so restrictive concept of international imperative rules expressed by Georg Schwarzenberger. He believes that many principles are so fundamental in the structure of international law—consent, good faith etc.—that their abolition would expose the legal system to the international destruction." Stefan Motataianu, "Impact of Mandatory Rules in the International Legal Order," *Annals of the Constantin Brancusi University of Targu Jiu Juridical Sciences Series* 2016, no. 4 (2016): 95.
[161] Georg Schwarzenberger, "Beirut 1982," in *The Yearbook of World Affairs*, eds. George W. Keeton and Georg Schwarzenberger (London: Stevens & Sons, 1984), 301-302.
[162] The idea of the standard of civilisation will be expanded upon in section 5.4.3 of this chapter. Ibid.
[163] Ibid.

The speeches of statesmen, diplomatic notes and preambles to international treaties, Schwarzenberger writes, "abound in protestations of faith in the canons of international morality."[164] Notions of good faith, justice, equity, peace, humanity, civilisation, friendship, freedom, the equality of states, natural rights, and the honour of states frequently appear as themes.[165] This regard for international morality is not limited to diplomatic documents, as totalitarian states also seemingly profess their regard for it. On his return from Munich on September 30, 1938, Mussolini shouted from the Palazzo Venezia: "At Munich we worked for peace based on justice. Is not this the ideal of the Italian people?"[166] Similarly, at the Paris Peace Conference of 1946, Molotov echoed Stalin in contrasting the two opposite methods of existence in international life: that of "violence and domination, for which all means of pressure are good" and that of "democratic co-operation based on recognition of the principle of equality and the legitimate interests of all States, big and small."[167]

The primary task of international morality in state practice is to therefore reinforce state policy. "If States are in search of territorial expansion," Schwarzenebrger writes, "they do not normally justify their demands on grounds of the economic or strategic assets they desire to acquire. They refer to the need for 'natural' frontiers or a 'natural' right of access to the sea."[168] Similarly, allies united against a third power do so "in the interest of peace and security, if not mankind at large."[169] Though statesmen

[164] Schwarzenberger, *Power Politics*, 3rd ed., 215.
[165] The accusations brought against the former German Emperor—"based on the allegation of a 'supreme offence against international morality and the sanctity of treaties'"—represent, for Schwarzenberger, a particularly prominent example of this. Ibid, 216-217.
[166] Ibid, 217.
[167] Ibid, 218.
[168] Ibid, 219.
[169] The balance of power system established in the Peace Treaties of Utrecht, Schwarzenberger writes, was described by the victors as "*justum potentiae equilibrium."* Ibid, 219-220.

must take for granted a minimum of international morality, governments "are not slow in perceiving the real intentions of their counterparts who disguise political objects in terms of international morality."[170] In other words, the seeming existence of a universally agreed upon standard of civilisation or of morality—or, for example, of a taboo surrounding the use of particular weapons—does not equate to its being a legal reality; particularly in the areas where international morality comes to be in conflict with state interests.

The standard of civilisation's lack of power has important implications for the strength and role that the taboo observed in chapter one of this thesis can play when constraining the actions of states, and offers an explanation for the violations explored in chapter two which neither Carr nor Morgenthau fully develop. It is only when international morality is not overridden by state interests that it can fulfil a clear function. Powers, often under the pressure of public opinion, "act in accordance with the categorical imperative formulated long since Isocrates: 'Treat weaker States in the same way as you would like stronger States to treat you.'"[171] Thus, even in times of war, "notions of chivalry and humanity have led to the mitigation of practices which, according to the laws of war at the time prevailing, were lawful."[172] It is therefore incorrect to assume that international morality is redundant. International morality enables states to apply higher standards in their relations with one another, crystallising them into legal rules when applied over prolonged periods of time.[173] International morality offers higher standards of an optional character that states can accept as legally

[170] Ibid, 220.
[171] Ibid, 221-222.
[172] Examples include abstention from selling prisoners of war into slavery, from plundering a town taken by assault, from confiscating the private property of enemy subjects or treating an enemy fishing vessel as good and lawful prize. Ibid, 222.
[173] Ibid, 224.

binding, and thus serves as the nursery of international law.[174] There remains, however, a gulf between aspiration and achievement in contemporary civilisation.[175]

Having established this, we will examine the particular ways in which international law works through Schwarzenberger's analysis of the laws of power, co-ordination, and reciprocity, which fundamentally reveal the inner workings of the laws of arms control, disarmament, and use introduced in the first chapter of this thesis.

5.3.4 The laws of power, co-ordination, and reciprocity

The relationship between legal systems and their social environment makes, for Schwarzenberger, an examination of the role played by power unavoidable.[176] In a society where power is the overriding consideration, the primary function of law is "to assist in maintaining the supremacy of force and hierarchies" and to give them "the respectability and sanctity law confers."[177] Power here is both a subjective and a relative phenomenon that means that, so long as states insist on being judges in their own causes, so must the borderline between power and law remain fluid.[178] This ties

[174] Ibid.
[175] It suffices to recall that "since the area bombings in the Second World War and the man-produced mushroom-clouds over Hiroshima and Nagasaki, over one hundred and forty wars have taken place, a cosmic armament race towards further overkill-capacity that makes reciprocity meaningless is rapidly accelerating, and scenarios for a 'winnable' Third World War are proliferating." Schwarzenberger, "Beirut 1982", 301-302.
[176] Kritsiotis comments briefly on this aspect of Schwarzenberger's analysis of international law, labelling him an arch-positivist and emphasising the role of power on international law following the Cold War. Dino Kritsiotis, "The Power of International Law as Language," *California Western Law Review* 34, no. 2 (1998): 399. Desautels-Stein, however, argues that Schwarzenberger's inductive approach to international law was meant "as a corrective for the fallacies of logical deduction, in either its naturalist or positivist guise." Desautels-Stein, "The Future of International Law: Global Government", 484.
[177] Schwarzenberger, *Power Politics*, 3rd ed., 199.
[178] Schwarzenberger, *Power Politics*, 3rd ed., 14-15.

international law indissolubly with the law of power, which affects it at a fundamental level and prevents it from being fully autonomous.

The outstanding characteristic of the law of power is that it serves sectional interests rather than the group at large.[179] Its emphasis, in other words, "is on order rather than law."[180] The functions fulfilled by the division between law and order in this law of power "strengthen the illusion of the autonomy of the law of power from its sustaining social order," disguising its true character as an "ideological prop of domination and exploitation."[181] In the law of power, then, "the dominant position of one party tends to encourage legal interpretation in favour of the stronger side."[182] It best serves its purpose if its character and function are "disguised behind a façade of technicalities and quasi-ethical doctrines."[183] Thus, until international society is transformed into an international community, "groups inside international society tend to do what they can rather than what they ought."[184]

The predominance of the law of power goes down to the very root of international customary law and to the conception of State sovereignty, making any change in the *status quo* depend on the consent of the States concerned. In other words, by building international law "on the foundation of national sovereignty" states ensure that "in the international sphere, the rule of law remains subject to the overriding rule

[179] Georg Schwarzenberger, *International Law and Order* (London: Stevens & Sons, 1971), 12.
[180] Ibid.
[181] Ibid, 13.
[182] Georg Schwarzenberger, "Myths and Realities of Treaty Interpretation: Articles 27-29 of the Vienna Draft Convention on the Law of Treaties," *Virginia Journal of International Law* 9, no. 1 (December 1968): 16-17.
[183] Schwarzenberger, "The Three Types of Law", 91-92.
[184] Schwarzenberger, *Power Politics*, 3rd ed., 13. This idea is developed in a number of Schwarzenberger's works: "It is for each subject of international law to decide for itself whether and, if so, in which form, it desires to grant equal treatment to other States and their subjects or give privileged treatment to some and discriminate against others." Georg Schwarzenberger, "Equality and discrimination in international economic law (I)," in *The Yearbook of World Affairs*, eds. George W. Keeton and Georg Schwarzenberger (London: Stevens & Sons, 1971), 163.

of force."[185] In the absence of international organisations entitled to impose on states authoritative interpretations of their rights and duties, states can choose to "employ international law as a quasi-legal garb to disguise designs that may well run counter to their international obligations."[186] If a state chooses to break an international engagement, "international law offers convenient excuses of a quasi-legal character such as the principles of self-preservation or self-defence or the *clausula rebus sic stantibus*."[187] Schwarzenberger's conclusion here is similar to Carr's, for whom this is also an important issue. International law can become a direct instrument of power politics.

"Is international law, then," asks Schwarzenberger, "merely a pious fraud, at which the augurs smile?"[188] Schwarzenberger's answer to this question is more multifaceted than what the preceding analysis seems suggest.[189] Every answer in the affirmative would be "as unrealistic and unscientific as is the attitude of those who choose to ignore the ideological functions fulfilled by international law."[190] International law, rather than just being a law of power, is therefore also a law of reciprocity with traces of the law of co-ordination.[191]

The transformation of international customary law from a law of power into a law of reciprocity or coordination requires "consensual superstructures of a bilateral or

[185] Schwarzenberger, "International law and society", 166-167.
[186] Schwarzenberger, *A Manual of International Law*, 13.
[187] Schwarzenberger, "International law and society", 165.
[188] Ibid, 170.
[189] It should be noted that Schwarzenberger's answer is different from Morgenthau's. Scheuerman remarks on this difference in the following way: "Schwarzenberger's Power Politics (1941) defended the idea of a federal global state as a long-term goal, while Morgenthau's famous Politics Among Nations concluded with a series of considerations on how traditional diplomacy might be salvaged, partly in order to buy time—, in a world threatened by nuclear warfare—so that necessary forms of post-national statehood could someday get built." Scheuerman, "Realism and the Kantian Tradition: A Revisionist Account", 460.
[190] Schwarzenberger, "International law and society", 170.
[191] Ibid.

multilateral character."[192] The laws of reciprocity and co-ordination attain effectiveness in different ways from the law of power. They change the functions fulfilled in the law of power by the dichotomy of law and order.[193] "In spheres remote to power politics," Schwarzenberger writes, international law "shows traces of community law."[194] Rather than seek to exploit disparities in power positions, the law of co-ordination "serves as a means of co-ordinating individual efforts for the better achievement of common purposes."[195] In such a congenial atmosphere, judicial organs can be able to "make powerful contributions of their own to the furtherance of community aspirations," achieving this object through the "interpretation of relevant undertakings in a spirit becoming the law of *co-ordination*."[196] Schwarzenberger's law of co-ordination has important implications for the arms control and disarmament treaties examined in chapter one, as it explains and gives voice to the shared taboos which underlie each of these treaties despite their involving a multitude of states.

The law of power "partakes of the characteristics of the law of co-ordination, and the law of co-ordination borrows from its opposite type."[197] The members of a community may value their membership and approval of their conduct by other members to such an extent that "the mere possibility of disapproval by and exclusion from the community acts as a deterrent and guide for the actual behaviour of its members."[198] The law of co-ordination therefore assists in the maintenance and continuous integration of the community. Its function is the "co-ordination of efforts,"

[192] Schwarzenberger, *International Law and Order*, 18.
[193] Ibid, 14.
[194] Schwarzenberger, *Power Politics*, 3rd ed., 207.
[195] Schwarzenberger, *A Manual of International Law*, 6-7.
[196] Schwarzenberger, "Myths and Realities of Treaty Interpretation", 16.
[197] Schwarzenberger, "The Three Types of Law", 93.
[198] Ibid, 92.

a fact which makes it and the law of power "form the two antipodes which legal genius has created."[199] Whilst the one embodies "strong ideological elements," the other "largely remains an unfulfilled aspiration and, to that extent, utopian."[200]

The law of reciprocity constitutes "a compromise between the Laws of Power and of Co-ordination" and between the "extremes of brutal domination and saintly self-negation."[201] It provides a meeting ground and an intermediate stage between the laws of power and of co-ordination.[202] It can be used intentionally by a community for the regulation of affairs which, from the point of view of the group, are considered peripheral and in order to regulate brute power and force.[203]

International law, on the levels of partially or fully organised international society, is "primarily a law of reciprocity."[204] This fact stands even in the thick of power politics, where there remains scope for the law of reciprocity.[205] The laws of war and neutrality owe their existence to considerations of this kind, which "impose restraints on belligerent and neutral States alike."[206] It is the mutual interest of the parties "in the performance of consensual engagements" that tends to "instil in these relations the requisite doses of reasonableness, good faith and common sense."[207] The equilibrium of power makes it possible for power to be ignored.[208] It is in matters such as diplomatic

[199] Ibid, 92-93.
[200] Ibid.
[201] Schwarzenberger, *The Frontiers of International Law*, 16.
[202] Georg Schwarzenberger, "International law and society", 159-160.
[203] "Even in a world society engulfed in a system of power politics," Schwarzenberger argues, "States find it to their benefit, on a basis of reciprocity, to limit the crude play of power and force." Schwarzenberger, *A Manual of International Law*, 6-7.
[204] Ibid.
[205] This statement, however, does not apply in its full extent to conflicts such as the Napoleonic Wars, or the First and Second World Wars, where "the weaker side has a tendency to ignore the limitations imposed by international customary and treaty law and to seek short-range advantages by breaches of the laws of war and neutrality." Schwarzenberger, *The Frontiers of International Law*, 32.
[206] Schwarzenberger, *A Manual of International Law*, 6-7.
[207] Schwarzenberger, "Myths and Realities of Treaty Interpretation", 16.
[208] This, Schwarzenberger argues, "implies that man is not predominantly altruistic but is prepared to act on the basis of the principle *do ut des*, to consider the application of this principle to his own affairs as just and fair, and to come to an understanding with his fellow-men on the standards by which the *quid pro quo* is to be determined." Schwarzenberger, "The Three Types of Law", 93.

immunity, extradition, commerce, communications, and transport that the rules of international law develop freely and beneficially on a footing of reciprocity.[209] A legal order based on reciprocity "can safely rely on the penalties inherent in its social machinery: the unwillingness of participants to jeopardise the enjoyment of the benefits derived from participation in the legal regime in question."[210]

International law is, then, a curious mixture of the three types of law we have examined within this section. As the rule of law in international society is conditioned by the arbitrament of force, international law is primarily a law of power. However, there are situations—particularly those where the threat of force is not available or are peripheral to systems of power politics—where there is wide scope for the laws of reciprocity and co-ordination.[211] The three laws of power, reciprocity, and co-ordination are "of general applicability in the realm of legal theory."[212] This reveals where the difficulties which have been typically associated with the laws of arms control, disarmament, and use arise from; particularly in relation to the conclusions brought to light by the second chapter of this thesis.[213]

Having examined this, we will examine the impact and effect which nationalism and sovereignty—fundamental aspects of Schwarzenberger's theory of international relations—have on international law.

[209] The fact that these activities are peripheral or irrelevant from the point of view of power politics, Schwarzenberger argues, is not an accident.
[210] Schwarzenberger, *Power Politics*, 3rd ed., 211.
[211] Schwarzenberger, "The Three Types of Law", 96-97.
[212] Ibid.
[213] The three laws of power, reciprocity, and co-ordination identified by Schwarzenberger impact significantly his analysis of international law. "If international law is interpreted as a law of power, reciprocity and coordination," Landheer writes, "it can be classified accordingly as an ideology, reality and utopia." In order to reduce tensions, therefore, "there are many international activities which must be seen as compensation-mechanisms rather than as being functional." Landheer, *On the Sociology of International Law and International Society*, 41-42.

5.3.5 Sovereignty and Nationalism

The concept of sovereignty stands at the heart of international law. "The stratification of the world society in hierarchies of world Powers, middle Powers and small States," Schwarzenberger writes, "indicates that *political* sovereignty still means, if not necessarily omnipotence, at least *pre-eminence* and *leadership*."[214] Coordination between political and legal sovereignty can only be attained by consent or acquiescence.[215] "Any new rule which is added to the body of international law," Schwarzenberger argues, "changes the previously existing equilibrium between the rules governing the principle of sovereignty and the other principles of international law in favour of the latter."[216] In other words, each subject of international law "acquires additional rights under compulsory or optional rules of international law to command any of the other subjects in the same nexus to behave in accordance with the rule invoked."[217]

Schwarzenberger analyses the importance of sovereignty and nationalism in international law in a more legalistic way than both Carr and Morgenthau, which allows him to solidly ground international law on these concepts. The fact that international

[214] Schwarzenberger, *A Manual of International Law*, 64.
[215] The principle of legal sovereignty is an abstraction from a number of relevant rules, which Schwarzenberger lists as follows: 1) "Without its consent, a subject of international law is bound by applicable rules of universal or general international customary law and general principles of law recognised by civilised nations"; 2) "Additional international obligations may be imposed on any subject of international law only with its consent"; 3) "Unless the territorial jurisdiction of a State is excluded or limited by rules of international law, its exercise is exclusively the concern of the State in question"; 4) "Subjects of international law may claim potential jurisdiction over persons or things outside the territorial jurisdiction"; 5) "Unless authorised by permissive rules to the contrary, intervention by subjects of international law in one another's sphere of exclusive domestic jurisdiction constitutes a breach of international law." Ibid, 65.
[216] Negative sovereignty, moreover, does not vanish. Potential or actual jurisdiction is transferred to the potential or actual beneficiaries of these rules, transforming it into positive sovereignty. Ibid, 66-67.
[217] Ibid.

law in unorganised international society lacks any rules corresponding to those of *jus cogens*, he argues, lies at the heart of this. Each subject of international law is "free to limit as it sees fit the exercise of its own sovereignty in favour of another sovereign State or an international institution."[218] The main difference between the operation of sovereignty on the levels of unorganised and organised societies is that "in collective systems, the presumption in favor of sovereignty no longer applies."[219]

The implications of an *unorganised* or *partly organised* international society can hardly be overrated. In the absence of consent or acquiescence, states are under no legal obligation to submit disputes with other sovereign states to procedures for the pacific settlement of international disputes, or to agree to changes to the existing international status quo. The legal standards maintained by individual states must be judged "by their willingness to abide by international law in cases in which such an attitude appears to involve a sacrifice of national self-interest."[220] This fundamentally affects the laws of disarmament and arms control, both in their creation—that is, in how the moral taboo associated with the use of a particular weapon is transformed into a legal standard—and in the application of existing treaties.

The principle of sovereignty makes world organisation a precarious international quasi-order.[221] World organisation may hope to either "function in situations in which the super-Powers achieve consensus among themselves", or to "work in circumstances

[218] It is only possible to imagine a world state coming into existence only by having sovereign states renounce to their spheres of exclusive jurisdiction either in favour of one of them or of a supranational institution. In both of these cases, however, "the negative sovereignty enjoyed by its former bearers will have been transformed into positive sovereignty, wielded by a world State or supreme world authority." Ibid, 67.
[219] Georg Schwarzenberger, "International Jus Cogens," *Texas Law Review* 43, no. 4 (March 1965): 471.
[220] Georg Schwarzenberger, "The Inductive Approach to International Law," *Harvard Law Review* 60, no. 4 (April 1947): 559.
[221] Georg Schwarzenberger, "Neo-barbarism and international law," in *The Yearbook of World Affairs*, eds. George W. Keeton and Georg Schwarzenberger (New York and Washington: Frederick A. Praeger, 1968), 191.

in which, on a basis of parity, the world Powers are willing to impose self-denying ordinances on themselves."[222] Such a system ultimately rests on "the equipoise between power centres of those more equal than the rest."[223] The principle of consent reigns supreme: "States are sovereign and, for this reason, equal in the eyes of international law."[224] Beyond the minimum of obligations imposed by international customary law and general principles of law recognised by civilised nations, "every subject of international law may decide for itself whether to accept any further restriction of its sovereignty."[225]

International law is innately affected by state sovereignty.[226] The subordinate functions fulfilled by law in unorganised international society reveal the "antimony between the dynamic character of international society and the static character of international law", wherein the appeal to power and force are an ever-present alternative to law.[227] The implications of this are inescapable: "The more rigid a legal system is in a dynamic environment, the more likely it is that changes considered vital by powerful parties will be brought about by extra-legal means."[228]

The function of the principle of sovereignty is to maintain intact the supremacy of the rule of force over the rule of law in international society. Concepts such as sovereignty and sovereign equality, therefore, are merely ideological symptoms of a reality which they symbolise or disguise. "They strengthen", Schwarzenberger argues,

[222] Ibid, 191-192.
[223] Ibid, 192. Fear is, then, the overriding motive in contemporary world society: Linked with questionable views of national interest, it produces the society attitudes which generate the traditional forms of power politics with or without disguise. Georg Schwarzenberger, "From bipolarity to multipolarity?" in *The Yearbook of World Affairs*, eds. George W. Keeton and Georg Schwarzenberger (New York and Washington: Frederick A. Praeger, 1967), 180-181.
[224] Schwarzenberger, *Power Politics*, 3rd ed., 92.
[225] Ibid.
[226] Ibid.
[227] Ibid, 93.
[228] Ibid, 93-94.

"the illusion that all that is needed to remedy the situation is to deal radically with the legal superstructure to which they belong."[229]

The significance of Schwarzenberger's analysis of the influence of sovereignty and nationalism on international law cannot be overstated.[230] Nothing could be easier "than to present a superficially plausible picture of interdependence, rather than independence, as the fundamental principle of post-1945 international law."[231] There is, however, a different side to this "chocolate-box picture" of international law, where cases where states assert their sovereignty are evidence of the reassertion of "political sovereignty in its most primitive form: the supremacy of politics irrespective of, and if necessary against, the law."[232]

Having established Schwarzenberger's as seen through his pre-1939 and post-1939 works, we will now turn to the various facets which Schwarzenberger identifies, examines, and analyses in relation to disarmament and arms control. These represent a particularly important aspect of Schwarzenberger's thought due to the level of analysis he undertook of this aspect of international law in his works and have important implications for this thesis as a whole.

[229] Ibid, 97.

[230] Schwarzenberger's conception of sovereignty, as shown in this section, shows more nuance than Reus-Smit's articulation of sovereignty in realist thought, wherein he argues that in practice or principle, sovereignty, for realists, is a purely empirical characteristic of the state that "is taken to mean the absolute authority of the state within its borders and the absence of any higher authority outside those borders." Christian Reus-Smit, *The Moral Purpose of the State: Culture, Social Identity, and Institutional Rationality in International Relations* (Princeton, New Jersey: Princeton University Press, 1999), 157-158.

[231] "The assumption of jurisdiction by the United Nations regarding apartheid, the United Nations Emergency Force (UNEF)" amongst others, could, Schwarzenberger writes, "readily be woven into a heartening nursery tale." Schwarzenberger, *The Inductive Approach to International Law*, 176.

[232] The conflict between the shared ideology established in chapter one and the violations of arms control and disarmament treaties examined in chapter two provide profound examples of Schwarzenberger's conception of sovereignty and nationalism at work. Ibid.

5.4 The Laws of War

5.4.1 De jure belli et pacis

"The social relevance of any normative system," Schwarzenberger argues, "increases or diminishes in relation to its efficacy in fulfilling its own functions."[233] It is the degree to which a legal system is able to "sustain its correlated *de facto* order and fulfil peace-conserving and peace-restoring functions" that is the ultimate test of "its claim to be more than a set of ethical postulates."[234] The nature of peace and war in international law is of essence if aiming to understand how instances of failure to observe the taboo over biological, chemical, nuclear, and conventional weapons can be explained, as it determines how arms control and disarmament treaties are developed.

In historical sequence, war "tends to be viewed as an interval between two periods of peace."[235] The juxtaposition of peace and war is, however, "an oversimplification."[236] The contradictions innate to any system of power politics reduce all periods of peace to an inter-war period. Peace, in this negative sense, means "little more than the absence of war."[237] If peacemakers wish to re-establish this state of affairs their task is limited, and consists only in preparing the ground for the "next inter-war period in a manner which will provide … the greatest possible stability for the new *status quo*."[238]

[233] Schwarzenberger, *International Law and Order*, 161.
[234] Ibid.
[235] Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals, Volume II: The Law of Armed Conflict* (London: Stevens & Sons Limited, 1968), 723.
[236] Ibid.
[237] Schwarzenberger, *Power Politics*, 3rd ed., 249. Schwarzenberger examines this in more detail in: Georg Schwarzenberger, "An American Challenge to International Anarchy," *Transactions of the Grotius Society* 23 (1937): 156-158.
[238] Schwarzenberger, *Power Politics*, 3rd ed., 249.

The traditional system of international law is "based on the distinction between the law of peace and the law of war."[239] Thus, the traditionalist approach to the problem of peace and war can be discussed under the following three headings: the doctrine of the normalcy of peace; the doctrine of the alternative character of peace and war; and the doctrine of war as a status and objective phenomenon.[240] To see war and peace in their proper perspective, it is necessary to analyse these "against the background of the reality of power politics."[241]

The doctrine of the normalcy of peace is merely "a survival of naturalist thought" which is "incompatible with the real functions of war in international society."[242] Similarly, the doctrine of the alternative character of peace and war "minimises or ignores the reality of State practice which has created rules pertaining to neither a state of peace nor a state of war," that is, of a *status mixtus*.[243] Finally, the doctrine of war as a status and objective phenomenon "breaks down over the reality of the *status mixtus*" and betrays "an over-estimation of the differences between political and economic power as compared with military power."[244]

In systems of power politics and power politics as disguise (that is, in systems ruled by both open power politics and disguised power politics), war "is not an unhappy incident or an incalculable catastrophe," but the "culminating point in a rising scale of pressure."[245] War is, then, the last resort of power politics when diplomacy fails to

[239] Schwarzenberger, *The Frontiers of International Law*, 234.
[240] Ibid, 240.
[241] Ibid, 245-246.
[242] Ibid, 251.
[243] Ibid.
[244] Ibid.
[245] Ibid, 241.

achieve its objects by the threat of force or through less drastic forms of pressure.[246] Peace is "something artificial," as well as a state of affairs that lasts "as long as the forces and interests that have been strong enough to establish it remain sufficiently powerful to maintain it."[247]

The common object which has "again and again brought States together in the international sphere is", Schwarzenberger writes, "the ideal of preserving peace."[248] The absence of a generally recognised authority to prevent and punish violations of international law means that "each individual State of the international community has the right to see that the rules of international law are kept and to intervene if they are broken."[249] The question of the preservation of peace is, through this, inexorably linked to that of the balance of power. The act of signing and ratifying an international treaty is not enough to guarantee respect for the contents of the treaty, particularly in relation to warfare. The "negative act of renouncing wars of aggression," in the 1928 Kellogg-Briand Pact was not, by itself "enough to secure the maintenance of world peace," as League members were not prepared "to accept the idea of a comprehensive system of settling international disputes by pacific means."[250]

Schwarzenberger develops this idea—that is, the inability of treaties alone to guarantee respect for its contents—through his analysis of interwar international law. "Such names as Manchuria, Abyssinia and Spain," he argues, "have become eloquent testimonials of the thesis that aggression *does* pay, at least in the short run, and that

[246] Thus, "the doctrine of the normalcy of peace is founded on a complete misinterpretation of the function of war in international society." Ibid.
[247] Georg Schwarzenberger, "Peace and war in an international society (I)," *UNESCO International Social Science Bulletin* 1, no.3-4 (1949): 63.
[248] Schwarzenberger, *The League of Nations and World Order*, 2-3.
[249] Ibid, 113.
[250] Ibid, 131-132.

international agreements, solemnly concluded, are treated as mere scraps of paper if the likely advantages of their violation outweigh the risks involved."[251] The weakness of treaties is of particular importance if aiming to understand the use of weapons of mass destruction—both nuclear, chemical, and biological—and the way in which their different associated treaties have been violated by state parties, as shown in chapter two of this thesis. The treaties examined in chapter one, no matter the strength of the taboo associated with the use of certain weapons, are unable to account for the advantages the violation of its clauses may entail in war. This weakness can be amply seen in the various cases of noncompliance that were examined in chapter two.

Having examined Schwarzenberger's conception of the dichotomy of war and peace in international law, we will analyse how it affects the laws of war and its functions.

5.4.2 The function of the laws of war

"To understand the law of peace in international systems of power politics or power politics in disguise," Schwarzenberger argues, "it is necessary to understand the laws of war."[252] Pre-1914 international law fulfilled, as an extreme society law, three chief functions: "It served the rule of force," and limited itself "to matters which were irrelevant from the point of view of power politics" or concerned "relations between entities which were in a state of equilibrium and, therefore, of relative equality."[253] The

[251] Schwarzenberger, "An American Challenge to International Anarchy", 147.
[252] Schwarzenberger, *International Law as Applied by International Courts and Tribunals, Volume II: The Law of Armed Conflict*, 1.
[253] Schwarzenberger, *International Law and Order*, 167-168.

rules on the legality of resort to force in classic international law were so liberal "as to open the door wide to international anarchy."[254] Compared with the importance of treaties of truce and peace, *jus in bello*—that is, the actual rules of warfare—was of minor significance, and its development due to a number of formative factors.[255] By contrast, post-1919 and post-1945 international law is more sophisticated. It is a typical "two-level law, geared to international systems of power politics in disguise", fundamentally defining it.[256]

Only a functional analysis of the rules of war can help us understand the nexus between the rule of law and the rule of force in a state of war.[257] The purpose of the laws of war is to determine "the permissible forms, areas and objects of exercise of physical pressure by belligerents against one another."[258] The function of the rules of warfare, in turn, is "to impose some limits, however ineffective, to a complete reversion to anarchy by the establishment of minimum standards on the conduct of war."[259] As the object of war is to "impose the will of a belligerent State on the enemy by force," the laws of war "present a paradox that calls for explanation."[260] This makes the following fact rest at the heart of the laws of war:

> It is no service to international law—and, in any case, constantly refuted by the realities of warfare—to pretend that the rules of warfare seriously restrain the supremacy of force in time of war.[261]

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[254] Schwarzenberger, *A Manual of International Law*, 182.
[255] The importance of some (such as religious motivations and notions of chivalry), for Schwarzenberger, has been unduly magnified. Other more down-to-earth motivations, however, "were 'trade union' concerns of mercenaries and professional soldiers, requirements of army and naval discipline and the ambitions of governments to further their prestige by creating images of their countries as civilized communities." Georg Schwarzenberger, "From the Laws of War to the Law of Armed Conflict," *Journal of Public Law* 17, no. 1 (1968): 63.
[256] Schwarzenberger, *International Law and Order*, 167-168.
[257] Schwarzenberger, *International Law as Applied by International Courts and Tribunals, Volume II: The Law of Armed Conflict*, 9.
[258] Schwarzenberger, *A Manual of International Law*, 196.
[259] Schwarzenberger, *International Law as Applied by International Courts and Tribunals, Volume II: The Law of Armed Conflict*, 10.
[260] Schwarzenberger, *A Manual of International Law*, 196.
[261] Four types of rules of warfare emerge when viewed through the idea of its functions. The first type "can serve its purpose without coming into conflict with the necessities of war." It is in situations like these that the rules of warfare are most effective, "for they

The rule of force reigns supreme. The function of this admonitory type of rule, rather than being to safeguard the minimum standard of civilisation is to cover up the inability or unwillingness to achieve this object.[262] Only the second and third types of rules of warfare—those putting the requirements of civilisation before the necessities of war—can create this paradox.[263] It is only when these two requirements clash that states make "at most, marginal concessions to the standard of civilisation."[264] The principle of reciprocity assures that self-denial of any weapon or opportunity also means its denial to the enemy. Moreover, this is further compounded by the fact that serious breaches of any of the rules of warfare by one side "give the other a right of reprisal and, in fact, a hardly limited freedom of action."[265]

Self-limitation and the relative insignificance of the rules of warfare explain the paradoxical coexistence of law and force in states of war: "*De minimis non curat Mars*."[266] Treaties of disarmament and arms control, in other words, regardless of the standard of civilisation they display within them, are not above power politics. This latter point—that is, the standard of civilisation—will be, due to its fundamental importance in understanding the ideas unveiled by the first chapter of this thesis, examined throughout the following pages.

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can operate on the line of least resistance form the authorities of belligerents." The second type "sets limitations to warfare in cases in which considerations of civilisation demand priority over military interests", and is illustrated by the prohibition of the use of poison and poisoned weapons. The third type "attains a true compromise between the requirements of civilisation and the necessities of war." Finally, the fourth type "is merely a formal compromise between the standard of civilisation and the necessities of war." Schwarzenberger, *International Law as Applied by International Courts and Tribunals, Volume II: The Law of Armed Conflict*, 10-11.

[262] Ibid, 11-12.

[263] Ibid, 12.

[264] Ibid, 12-13.

[265] Ibid, 13.

[266] Ibid.

5.4.3 The standard of civilisation

5.4.3.1 The idea of humanity

Schwarzenberger's analysis of the standard of civilisation is one of the most prominent aspects of his theory of law. First developed by Schwarzenberger, the notion of the standard of civilisation, Mota writes, operated as a "legal mechanism aimed at establishing whether non-European states could ascend to the status of 'civilised' in order to be recognised by international law."[267] For Bowden, it was the "oft-overlooked implications of the value-laden conception of civilization that led to what Georg Schwarzenberger called the 'standard of civilization in international law'."[268] The interaction between the standard of civilisation and the expansion of the Westphalian system are linked in Schwarzenberger's analysis of international law:

> The interaction was informed by the norms, rules, and institutions of Western civilization; but, as Schwarzenberger observed, the expansion of Western civilization and the Westphalian system produced … a pragmatic, limited strategy designed to bring non-Western countries into profitable contact with the West.[269]

The rules of warfare, both as examined throughout the previous pages and in the first chapter of this thesis, are fundamentally affected by the tug of war between the standards of civilisation and the necessities of war. The clash between these two ideas is one of the most distinctive and fundamental aspects of Schwarzenberger's theory of law, and enormously relevant to the three guiding questions of this thesis.[270] They are

[267] Mota, *NATO, Civilisation and Individuals: The Unconscious Dimension of International Security*, 70.
[268] Bowden, "Civilization: 'It Means Just What I Choose It to Mean'", 130-131. The standards of civilisation, he argues, were a major component of the legal distinction between civilised and uncivilised peoples. Bowden, "In the Name of Progress and Peace: The 'Standard of Civilization" and the Universalizing Project", 51.
[269] Fidler, "The Return of the Standard of Civilization", 145.
[270] The importance of this notion, as we have seen in the previous chapter of this thesis, is also emphasised by Morgenthau, particularly through the role which morality and ethics comes to play in international law. The links between these ideas and the taboo examine in chapter one of this thesis are of note.

the formative agencies of the laws of war, whose real test comes when they conflict with the necessities of war.[271] That is, the "tactical and strategic requirements of war," which serve to attain the overriding object of war, "the imposition of the will of the victor on the defeated."[272]

The laws of disarmament, arms control, and use are the product of three formative factors: "compulsion, humanity and chivalry."[273] In principle, belligerents are entitled to apply against each other all means of compulsion, including force of any kind, in order to achieve the strategic object of warfare. The dictates of humanity, however, "prohibit any use of unnecessary violence," and the canons of chivalry "demand a certain amount of fairness in offence and defence, and some degree of mutual respect between opposing forces."[274] Savagery, "the state of a group before it attains *civilisation*", is "a minimum of relations on a footing of free and spontaneous co-operation, rather than compulsion, for commonly accepted purposes."[275] Both of these concepts, humanity and savagery, can be observed in the treaties examined in chapter one. They play a prominent role both in the creation of treaties through the shared ideology encoded within them, which gives rise to the taboo surrounding the usage of certain weapons.[276]

The differences between the idea of humanity and savagery represents a fundamental tenet of the standard of civilisation. Civilisation is a dynamic phenomenon

[271] Schwarzenberger, *A Manual of International Law*, 197.
[272] Georg Schwarzenberger, "Functions and Foundations of the Laws of War," *Archiv für Rechtsund Sozialphilosophie* 44, no.3 (1958): 352.
[273] Georg Schwarzenberger, "The law of armed conflict: a civilised interlude?" in *The Yearbook of World Affairs*, eds. George W. Keeton and Georg Schwarzenberger (London: Stevens & Sons, 1974), 293.
[274] Ibid.
[275] Schwarzenberger, *The Dynamics of International Law*, 78.
[276] Early conventional, chemical, and biological weapons treaties and international agreements offer a particularly stark example of the influence the concepts of humanity and savagery have played in this area of international law. This is also the case in relation to nuclear weapons, with their destructiveness playing a major role in the desire to prevent their proliferation and outlaw their use.

which no group in history has either fully attained or rejected. It is fundamentally linked to the laws of war, which are, for Schwarzenberger, the "only legal restraints on the most ruthless exercise of wartime sovereignty."[277] The necessities of war are "but a negative in positive guise," and a "facet of State sovereignty."[278] While the laws of humanity are "*pars pro toto* for the standard of civilisation", the "necessities of war stand for wartime sovereignty."[279]

The lack of restraints on sovereignty in the relations between belligerent states explains why the international legal regime surrounding disarmament and arms control, if aiming to be more than a "pious fraud", must "be protected by exceptionally strong sanctions."[280] The standard of civilisation and the necessities of war are "rationalisations of conflicting social forces in international society."[281] They assume complementary functions on a legal level. The former, "positive and regulative," is contrasted by the latter, which is "limiting or purely negative."[282]

The contents of the laws of war are therefore "controlled by the standards of civilisation, and their scope is determined by the necessities of war."[283] The impact of the standard of civilisation in the rules of land warfare, Schwarzenberger argues, "has led to a differentiation between lawful and unlawful objects of warfare *ratione loci*,

[277] Schwarzenberger, *A Manual of International Law*, 199.
[278] Schwarzenberger, *International Law as Applied by International Courts and Tribunals, Volume II: The Law of Armed Conflict*, 13-14.
[279] Thus, in the relations between belligerent states, sovereignty is no longer "limited by the ensemble of the rules governing the other six fundamental principles of international law, but solely by the rules of warfare." Ibid.
[280] Schwarzenberger, *A Manual of International Law*, 199.
[281] Schwarzenberger, *International Law as Applied by International Courts and Tribunals, Volume II: The Law of Armed Conflict*, 13.
[282] Ibid.
[283] Viewed from this angle, the true nature of the necessities war emerges. They are synonymous with freedom from legal restraints, and thus the "more the standard of civilisation advances, the more the necessities of war recede, and vice versa." Ibid.

instrumenti vel personae."[284] The use of particular devices or means of destruction can be incompatible with the standard of civilisation due to the:

> incongruity between means and ends which shocks public conscience, such as expanding bullets; excessive inhumanity, such as the use of poison or poisoned weapons, or the treacherous character of some stratagems, such as the improper use of flags of truce or enemy uniforms.[285]

Sea warfare, by contrast, "auxiliary to land warfare," is as much "directed against enemy civilians and their property as against the navy of the enemy."[286] Thus, a "belligerent man-of-war is entitled, if necessary, to destroy enemy merchant vessels" if passengers and crew "can be taken on board the man-of-war or have a reasonable chance of saving themselves."[287] Thus, though unable to override power politics, the standard of civilisation fundamentally affects all of the laws of war.[288]

5.4.3.2 Loss of civilisation

The background threat of the application of physical force is always present in systems of power politics. "Armed forces," Schwarzenberger writes, "are instruments of power politics."[289] It is the purpose of the armed forces of sovereign states to "secure agreement in circumstances in which, otherwise, parties to diplomatic negotiations would prefer to disagree," and to achieve this end "by the actual application of force" in the case of resistance.[290] Armed forces, which are fundamentally linked to the

[284] Schwarzenberger, *A Manual of International Law*, 200-201.
[285] Ibid, 201.
[286] Ibid, 204.
[287] Ibid, 204-205.
[288] Schwarzenberger's analysis of the standard of civilisation thus fleshes out and develops the shared ideology underlying arms control and disarmament treaties established in chapter one of this thesis.
[289] Schwarzenberger, *Power Politics*, 3rd ed., 158.
[290] Ibid.

sovereignty of states, affect the interplay between the standards of civilisation and the necessities of war, which are merely "a pattern of tactics in the international field."[291]

There are no legal compulsions that can force states to join co-operative efforts such as international institutions.[292] In a world in which not all signatories to a pact can be "relied upon to honour at all times their obligations," it is advisable "to make preparations in advance against any breach by parties of their collective obligations."[293] Thus, the illusion which gave rise to the belief in the interwar period that disarmament was the most direct shortcut to peace is fundamentally flawed.[294] The breaches of international law explored in the second chapter of this thesis bring this idea to light. The interplay of state interests and the taboo associated with the use of certain weapons—that is, the standard of civilisation Schwarzenberger examines—can conflict, and may result in the latter being disregarded to the benefit of the former.

Until the First World War, Schwarzenberger argues, it was possible "to imagine that the overall trend in the evolution of the rules of warfare was characterised by a slow, but steady advance of the standard of civilisation."[295] It has become painfully apparent since then that "in spite of some headway made in limited fields, far more powerful forces work in the opposite direction."[296] If the war crimes "found proven at Nuremberg are analysed in the light of their necessity in terms of total warfare," it

[291] Schwarzenberger, "Peace and war in an international society (I)", 66-67.
[292] Georg Schwarzenberger, "Peace and war in international society (II)," *UNESCO International Social Science Bulletin* 1, no.1 (Spring 1950): 26-27.
[293] Georg Schwarzenberger, "Peace and war in international society (III)," *UNESCO International Social Science Bulletin* 2, no.3 (Autumn 1950): 340.
[294] Even if states agreed on the abolition of all forms of modern armaments and used only spears and arrows, their "*potentiel de guerre* would vary according to the number and quantity of these weapons, and according to the number of spear-bearers and bowmen whom they could put into the field." Ibid.
[295] Georg Schwarzenberger, "The Law of Air Warfare and the Trend towards Total War," *University of Malaya Law Review* 1, no. 1 (July 1959): 120.
[296] Ibid.

emerges that only a small proportion of these "is attributable to 'overmastering dictates' of total warfare in the actual conduct of hostilities."[297]

The Hague draft rules on aerial warfare of 1923, for Schwarzenberger, were "the most significant of a number of fruitless efforts" during the interwar period.[298] Though aiming at a compromise between the necessities of war and the requirements of the standard of civilisation, the Commission realised that "so long as war was still likely to occur, belligerent States would not be content to visualise the necessities of war in terms of a bygone phase of warfare."[299] States "did not equate impossibility with humanity," but rather attempted to "forestall indiscriminate aerial bombardment of non-combatants."[300] The standards of civilisation must therefore "fight a losing battle against the necessities of war on the level of rules of warfare" if aiming to be effective.[301]

Schwarzenberger's analysis on this point gives rise to a question even in the event that states accept restrictions on weapons because of their inhumanity. "What," asks Schwarzenberger, "happens if a control body has found that a serious breach of a convention on the regulation of armament has occurred?"[302] By then a state may have "stolen a march on its potential enemies," which may be "unable to catch up with their more unscrupulous rival."[303] Governments "able to adapt more quickly than others to changing requirements" or in "possession of a temporary monopoly of super-weapons" may reap a marginal profit from their enterprise.[304] Thus, for Schwarzenberger, in any

[297] Instead, most of these relate "to the breach of legal obligations for the protection of prisoners of war and the populations of occupied territories." Ibid, 129.
[298] Ibid, 131.
[299] Ibid.
[300] Ibid.
[301] Ibid, 136.
[302] Schwarzenberger, *Power Politics*, 3rd ed., 407.
[303] Ibid.
[304] Ibid, 158-159.

type of war, initially observed rules tend to "vanish in a crescendo of increasingly ruthless reprisals and counter-reprisals."[305]

If aiming to maintain the standards of civilisation and the effectiveness of the laws of war, international society must provide "sufficient guarantees against the probability of war," or any "far-reaching regulation of armaments on a consensual basis remains a chimera."[306] Political, technological, and military factors all appear to work in one and the same direction: "to make the powerful more powerful still and to widen the gap between the super-Leviathans and the Leviathans of yesterday."[307] War is "politics continued by other means," and peace, in turn, war "conducted with different techniques."[308] The taboos and legal restrictions underlying the use of certain weapons cannot exist outside of power politics or national interests, and are subject to being broken when confronted by the necessities of war should there be no political guarantees underlying them.

International law, like any other branch of law, is "an instrument of social control."[309] It is not, and can never be, a self-executing system that operates in a social vacuum. "Whether it serves civilising processes or trends in the opposite direction," Schwarzenberger writes, "depends on its subjects in the double meaning of the term."[310] In a hierarchical world society held together by a precarious quasi-order, world Powers are, in the abstract, the only effective international policemen. If aiming to strengthen the laws of war, what we need is "a readjustment of priorities of self-interest, especially

[305] Schwarzenberger, "The law of armed conflict: a civilised interlude?", 304.
[306] Schwarzenberger, *Power Politics*, 3rd ed., 407.
[307] Georg Schwarzenberger, "Hegemonial Intervention," in *The Yearbook of World Affairs*, eds. George W. Keeton and Georg Schwarzenberger (London: Stevens & Sons Limited, 1959), 253-254.
[308] Schwarzenberger, "Peace and war in an international society (I)", 62.
[309] Schwarzenberger, "The law of armed conflict: a civilised interlude?", 307.
[310] Ibid.

among the super-Powers," else "little hope exists for the survival of the present world civilisation or international law as a civilising instrument."[311] Disarmament and arms control treaties and agreements cannot achieve this alone: the social environment in which they operate also needs to be taken into account, as they originate from and cannot operate independently from it.

Having established this, we will analyse Schwarzenberger's analysis of the nature and role of nuclear weapons, including their legality, and what this, in turn, reveals about the laws of war and about disarmament and arms control.

5.4.4 Nuclear weapons

Nuclear weapons, due to their destructive power, play a fundamentally different role than conventional weapons.[312] Their destructive power has impacted drastically the relationship between peace and war.[313] Threats of nuclear war have thus ceased to be rational power politics tactics, ceasing war's effective use as an alternative to negotiation as the complementary pattern of international tactics.[314] "So long as the nuclear balance between the world Powers remains roughly intact," Schwarzenberger argues, and the price of nuclear warfare "is likely to be the co-extermination of these

[311] Ibid.
[312] "In push-button warfare," Schwarzenberger writes, "the time left for last-minute negotiation on the 'hot line' and the rectification of mistakes in the identity and intentions of the potential enemy" is inherently short. Schwarzenberger, *Power Politics*, 3rd ed., 196.
[313] "In the age of atomic warfare," Schwarzenberger writes, "a premium is put on preventative war, and the origin of atomic bombs which have been deposited in enemy capitals beforehand, or are contained in directed missiles, may be hard to determine." Georg Schwarzenberger, "Judgment of Nuremberg," *Tulane Law Review* 21, no. 3 (1946-1947): 360.
[314] Schwarzenberger, "Hegemonial Intervention", 245.

Powers, open war between the world Powers has ceased to be a rational tactic of foreign policy."[315]

The Test Ban Treaty of 1963 and the Antarctic Treaty of 1961, for Schwarzenberger, are particularly important examples of nuclear arms control.[316] Despite the seeming success of the Antarctic Treaty it is arguable, he writes, that the agreement was possible only "for three good reasons: lack of population, of resources and of strategic importance."[317] By contrast, the 1963 LTBT, which is in principle of unlimited duration, is subject to "three months' notice whenever one of the parties, 'in exercising its national sovereignty,' decides that extraordinary events … have jeopardised its supreme interest."[318] The LTBT provides "striking evidence of the extreme hesitation of the Parties to limit irrevocably the unfettered exercise of their sovereignty in politically sensitive matters."[319] Furthermore, it "stops short of prohibiting nuclear tests underground" likely on account of the desire by both the United States and Soviet Union to "improve their 'smaller' nuclear weapons."[320]

Schwarzenberger's analysis of nuclear arms control and disarmament negotiations is fundamentally linked to the law of reciprocity: "On any level, be it that of power, interest or duty," the principle of reciprocity "can be applied in a positive or

[315] Georg Schwarzenberger, "Beyond Power Politics?" in *The Yearbook of World Affairs*, eds. George W. Keeton and Georg Schwarzenberger (London: Stevens & Sons Limited, 1965), 231. This makes it easier for middle powers and small states to behave as if they were independent centres of power, which "may well be the starting point for the transformation of our world system of power politics in disguise into a world community in which the supremacy of law and reason was no longer a far-off dream." Schwarzenberger, "Beyond Power Politics?", 233-234.

[316] The Antarctic Treaty of 1961 is based on the following five principles: the "military non-exploitation of Antarctica"; the "prohibition of nuclear explosions"; the "disposal in this area of radioactive waste material"; the "international co-operation there in scientific investigation, including the exchange of information, scientific personnel and observations"; and, finally, the "inspection of treaty compliance by aerial observation and ground observers designated by each of the original Parties to the Treaty and other Parties, conducting there substantial scientific research." Georg Schwarzenberger, "An inter-camp agenda," *The Yearbook of World Affairs*, eds. George W. Keeton and Georg Schwarzenberger (London: Stevens & Sons Limited, 1964), 9.

[317] Ibid, 10.

[318] Ibid.

[319] Georg Schwarzenberger, *The Misery and Grandeur of International Law* (London: Stevens & Sons Ltd., 1964), 10.

[320] Ibid, 10-11.

negative direction."[321] To operate positively, it requires a common fund of confidence between the participants in such a nexus. Thus, though difficult to obtain, an agreement "by which the Parties to the limited Test-Ban Agreement of 1963 undertook to supply neither nuclear weapons nor information on them to other countries" or induce them "to become parties to the Agreement, would be a valuable complement to the 1963 Agreement."[322]

On the level of the law-creating processes of the rules of warfare, it appears "impossible to discover any automatic limitation of the freedom of the subjects of international law to possess, test or use nuclear weapons."[323] Considerations of humanity, requirements of civilisation, and other formative factors, "are no substitute for prohibitive rules of international law and, by themselves, do not constitute evidence of rules prohibiting the use of nuclear weapons."[324] Furthermore, the legality of the use of nuclear weapons by way of reprisals "must be accepted within the limits within which reprisals are admitted in international law," but cannot be "justified or excused on any other ground."[325] It is impossible, therefore, to avoid the fact that in principle "every sovereign State is free to manufacture or possess nuclear weapons."[326] Thus, it stands that, in the absence of "treaty obligations which impose international obligations on States regarding any particular territory," any state is free to "use its own territory for any purpose it likes, including the testing of nuclear weapons."[327]

[321] Schwarzenberger, "An inter-camp agenda", 12.
[322] Ibid, 13-14.
[323] Georg Schwarzenberger, *The Legality of Nuclear Weapons* (London: Stevens & Sons, 1958), 11.
[324] Ibid, 47.
[325] Ibid, 48.
[326] For Schwarzenberger, a particular comparison can be drawn to the Geneva Poison Gas Protocol of 1925, as even state parties to this Protocol, he writes, "keep considerable stores of these prohibited weapons and have even prepared for the eventuality of bacteriological warfare." Ibid, 49-50.
[327] It is only if such tests cause injury to life, health or property of subjects of other sovereign states that general rules of international law apply. Ibid, 51-52.

The mere question of the legality or illegality of nuclear weapons cannot give an answer to their destructive power.[328] Cryer reaffirms this aspect of Schwarzenberger's thought. Schwarzenberger, he argues, warned against the dangerous illusion that his own findings on the legality or illegality of nuclear weapons could influence one way or another decisions to use them.[329] Roberts reaffirms this aspect of Schwarzenberger's analysis of nuclear weapons, writing that he:

> [R]eached conclusions which came to terms more with the by then widespread possession of nuclear weapons. He said that considerations of humanity are no substitute for prohibitive rules of international law and, by themselves, do not constitute evidence of rules prohibiting the use of nuclear weapons.[330]

The legality of illegality of nuclear weapons, for Schwarzenberger, means "little more than confirming in a still further field the parting of the ways of international law and the standard of civilisation," and the other amounts to the "same thing, for … the use of nuclear weapons by way of reprisals remains legal."[331] The duty of the international lawyer is, therefore, "to warn against the dangerous illusion that his findings on the legality or illegality of nuclear weapons are likely to influence one way or the other the decision on the use of these devices of mechanised barbarism."[332] He must be willing to consider, without fear or favour, any changes in the structure of existing world society,

[328] Other aspects of Schwarzenberger's analysis of nuclear weapons have been touched on by the literature, particularly in relation to the question of deterrence. For Akimono, Schwarzenberger, despite contending that the use of nuclear weapons against civilians could infringe on the 1948 Genocide Convention and 1949 Geneva Conventions, "recognized the legality of the manufacture and possession of nuclear weapons for deterrence policy as well as use of the weapons under certain conditions for reprisals." Akimono, *Japan's Nuclear Identity and Its Implications for Nuclear Abolition*, 29.
[329] Cryer, "International Law and the Illusion of Novelty: Georg Schwarzenberger and British International Law", 468.
[330] Adam Roberts, "The Relevance of Laws of War in the Nuclear Age," in *Nuclear Weapons, The Peace Movement and the Law*, eds. John Dewar, Abdul Paliwala, Sol Picciotto and Matthias Ruete (Hampshire and London: MacMillan, 1986), 38.
[331] Schwarzenberger, *The Legality of Nuclear Weapons*, 57-58.
[332] Schwarzenberger's argument on this point has echoes in Morgenthau's analysis of the nature of the law, critique of legal positivism, theory of sanctions, concept of the political, and analysis of ethics, power, and justice. These different aspects of Morgenthau's thought are detailed in chapter four. Ibid, 58.

however radical, which "may be required to break the vicious circle of our system of world power politics in disguise."[333]

From this point of view, even a treaty outlawing the use of "the whole 'family' of nuclear weapons would be grotesquely incongruous" to this challenge.[334] In keeping with the principle of state sovereignty, "world powers would continue to prepare themselves for the contingency that the other side would break its solemnly pledged word" making everything remain "exactly where it was before."[335] Legal restraints which, on the ground of reprisals, may always be thrown at will, are hardly of a calibre commensurate to our problem. "What is needed is," Schwarzenberger argues, "a world public order which any of the parochial States can flout only at its own risk. Anything less may be all that is attainable, but falls sadly below the world safety minimum."[336]

5.5 Conclusion

International law, for Schwarzenberger, offers a picture that is intimately related to those presented by Carr and Morgenthau.[337] The nature of this picture is made evident by the aspects of international law and the laws of war brought to light in this chapter, and of extreme importance to the fundamental questions explored by this thesis due to their incisive commentary on the erosion of the taboo exposed in chapter

[333] Ibid, 58-59.
[334] Ibid.
[335] Ibid, 59.
[336] Ibid, 61.
[337] The similarities between Schwarzenberger's and Morgenthau's backgrounds have been noted in the literature. "It is no coincidence," Strange writes, "that in Europe most of the early pre-1939 professors of international relations were nearly all trained in continental university faculties of law, as international lawyers - Georg Schwarzenberger, William Rappard, Hans Morgenthau, Frederick Schuman, for example." Susan Strange, "Corporate Managers in World Politics," in *Individualism and World Politics*, ed. Michel Girard (Great Britain: MacMillan, 1999), 159.

two of this thesis. Cryer's commentary on the contemporary relevance of Schwarzenberger touches on why this is also the case in relation to the questions examined in this thesis: "Much of his contemporary relevance can be based on the fact that he never tired of reminding international lawyers of the possibility of ideology in international legal argument."[338]

It would be, Schwarzenberger argues, "a dangerous illusion to judge contemporary international law by achievements," as these attainments "are remote from the overriding objective of the collective system of the United Nations: the maintenance of international peace of and security."[339] These ideologies attest to the absence of a true world order sustaining international law.[340] So long as *jus cogens* and the rules of international public policy in international law are lacking, "the assertion of the will of world society as the basis of obligation in international law must remain a mockery, however unintended."[341]

This fatal weakness, however, is not the end of the story, as international law "has survived astonishingly well the host of ingenious horoscopes cast regarding its future by magi in many lands."[342] International law, whilst flawed in its current state, is

[338] Cryer, "International Law and the Illusion of Novelty: Georg Schwarzenberger and British International Law", 476. Cryer also argues the following in relation to Schwarzenberger's contemporary relevance: "On a more general level, a study of Schwarzenberger's work can lead us to a reflection on more general aspects of international legal scholarship. In the past decade or so there has been a tendency to relegate scholarship prior to the early 1990s to history, on the understanding that the world fundamentally changed with the assertion of the 'New World Order'. International lawyers should not forget cold-war scholarship. There is a clearer thread back to it than many realise, or want to think." Cryer, "International Law and the Illusion of Novelty: Georg Schwarzenberger and British International Law", 482.

[339] Schwarzenberger, *The Misery and Grandeur of International Law*, 4.

[340] For Cryer, Schwarzenberger's sceptical outlook led directly to the understudy of his works. "The idea that an international lawyer might express doubts renders the view of him as something of a cuckoo in the nest of international law. Schwarzenberger was an outsider in international legal circles in part for precisely this reason." Cryer, "International Law and the Illusion of Novelty: Georg Schwarzenberger and British International Law", 470. Scheuerman agrees with this: "His critical views about existing international law and organizations always made him something of an oddball among international jurists committed to their promotion, while his enthusiasm for global reform was increasingly out of sync with postwar political scientists not only to a growing degree hostile to the traditional study of law, but also to reformist ideas like those he embraced." Scheuerman, *The Realist Case for Global Reform*, 84.

[341] Schwarzenberger, *The Misery and Grandeur of International Law*, 21-22.

[342] Schwarzenberger, *The Frontiers of International Law*, 297.

neither at one extreme nor the other. No legal system "is or can be absolutely effective."[343] We are therefore forced to ask the following question: "Why was the credibility of international law in the century between the Vienna Congress and the First World War so much higher than that of international law after the First and Second World Wars?"[344]

The price of the high credibility of pre-1914 international law "was its unvarnished subordination to overriding requirements of power politics."[345] The demands made of contemporary international law, however, are more exacting. Attempts to expel the devil of sovereignty from international law have "permitted Beelzebub to return in the shape of a practically unlimited sovereignty of the world Powers."[346] Is it therefore, Schwarzenberger asks, astonishing that post-1945 international law claims a low credibility? The key difference between both of these systems is "merely that between two variants of society law," with the one "applied in systems of open power politics and the other in systems of power politics in disguise."[347]

The credibility of international law can only be raised through the application of the three concrete tests: (1) The degree of integration of the environment of treaties, (2) the homogeneity of the contracting parties, and (3) the minimal ethical common denominator.[348] The more proposals for the codification and development of

[343] Georg Schwarzenberger, "The Credibility of International Law," in *The Yearbook of World Affairs*, eds. George W. Keeton and Georg Schwarzenberger (London: Stevens &. Sons, 1983), 295.
[344] Ibid.
[345] Ibid, 297.
[346] Ibid.
[347] Ibid, 299.
[348] That is: (1) "Can any particular draft be squared with an existing international environment, or does its realisation presuppose a far-reaching change in the structure of this environment?", (2) "Does the realisation of the draft depend on far-reaching homogeneity of the participants, for instance, in constitutional or cultural spheres?", (3) "What is the minimal ethical common denominator between the contemplated contracting parties that is required to assure relatively smooth operation of the treaty?" Ibid, 301.

international law correspond to these criteria "the higher is their credibility", whilst, conversely, the more readily they fit "into an existing social environment" the less they can ameliorate "the shortcomings of an existing *status quo*."[349]

The lack of credibility of international law and its problems, however, are not the only problems facing international law. "Anybody concerned about what he may consider to be an unduly 'critical' attitude" towards efforts made "on the legal level by the proverbial men of good will," he writes, "may wish to recall that the phenomenon of political law is hardly a novelty."[350] The necessity of ameliorating the evils of war is more needed than ever—a fact keenly displayed by the destructive power of nuclear weapons.[351] If international law is not to remain helpless and impotent in such an emergency, "its defences and remedies must be congenial to the magnitude of the challenge."[352]

The obstacle facing international law, rather than power politics, is the principle of sovereignty. "The main body of opponents," is "furnished by adherents of State sovereignty and all it stands for."[353] The arguments of said opponents vary between assertions that international law "should remain a law *between* States," to a "panic horror of the 'super-State'."[354] Others, meanwhile, fear that this scheme would merely be "one of the many and futile efforts at humanizing warfare."[355] So long as international

[349] Ibid.
[350] Georg Schwarzenberger, "Détente and International Law," in *The Yearbook of World Affairs*, eds. George W. Keeton and Georg Schwarzenberger (London: Stevens & Sons, 1981), 267.
[351] "Unless the proliferation of nuclear weapons is stopped in time," warns Schwarzenberger, "bipolarised world society is likely to relapse again into a pluralist world society." If China and Western Europe were to acquire nuclear weapons and creditable nuclear delivery systems, Schwarzenberger writes, they "can be expected to insist on being treated as world Powers, that is to say, as Powers to be consulted on any major issue anywhere." This would make the tasks of the United Nations, he argues, even more exacting than they are at the present. Schwarzenberger, "An inter-camp agenda", 1-2.
[352] Schwarzenberger, *International Law and Totalitarian Lawlessness*, 7.
[353] Ibid, 77.
[354] Ibid, 77-78.
[355] Ibid, 78.

relations are fundamentally governed by power politics, a relationship between "sovereign States of unequal strength easily degenerates from one on a community footing to one in a society nexus."[356]

Schwarzenberger's conclusions are, therefore, linked to Carr's and Morgenthau's through both the influence nationalism and sovereignty have over international law and the idea that international society is not a true community.[357] State sovereignty, nationalism, and state interests fundamentally affect international law, defining the social environment in which it operates and what it can achieve. No legal order can be stronger than the political order which conditions it.[358] The arms control and disarmament treaties examined in chapter one are, therefore, subject to their social environment, and cannot transcend conflicting state interests and political order which conditions them. Furthermore, however well devised an international organisation may be, it will only work in practice if collective interests exist, if these are recognised by all concerned, and if said recognition brings about the birth of a collective will.[359]

The shared underlying ideology encoded in the legal principles that give rise to the taboo surrounding the usage of certain weapons, no matter its strength, is also affected by the social environment of international law. The breaches of the taboo and the international legal regime surrounding arms control and disarmament are then explained by the power national interests retain over ideas of humanity. In the absence

[356] Schwarzenberger, "Hegemonial Intervention", 250.
[357] It is therefore necessary, if aiming to solve the problems faced by international law, to keep in mind the following factors which have affected it. First, that "sovereign States have become more interdependent, but some more than others." Second, that even if the leaders of world Powers imposed "considerable restraint on themselves" and contented themselves with the indefinite continuation of the nuclear stalemate, they could not "afford to tolerate any substantial change to their own disadvantage in the underlying balance of thermo-nuclear terror." Finally, in addition to this, that "competition between the world camps for the non-aligned countries has both a negative and positive impact on international law." Schwarzenberger, *The Misery and Grandeur of International Law*, 24-25.
[358] Schwarzenberger, *World Economic Order?*, 68.
[359] Schwarzenberger, *The League of Nations and World Order*, 176.

of common loyalty, "fear, and perhaps to a lesser degree, shame, seem to be the only driving forces on which a universal peace system can rely."[360] It seems improbable that the problem of world peace "can ever be solved by such methods," and, in the long run, they will only have a chance of success "if they take into account the interdependence of the conditions of world peace."[361]

"Our time," Schwarzenberger writes, "has lost its belief in the necessarily convincing effect of argument and reason."[362] The liberal myth of progress "does not prevent man from retrograde action, leading towards a mechanized barbarianism infinitely worse than anything to be found in primitive society or the 'dark' ages."[363] The only alternative to this "road of debasement, cynicism and nihilism" is, then, "the return to the springs from which our civilization flows."[364] The taboos underlying the use of certain weapons are, then, despite their limited reach, of fundamental importance if aiming to strengthen the laws of war. Though of limited effect, they play an unquestionable role in the formation and development of international law, as Schwarzenberger's accounts for in his examination of international law and the role ethics and morality within it.

Neither "plausible pessimistic interpretations of current international relations" nor "naïve optimism" are suitable means through which to do this.[365] Any design for world peace must "so far subordinate and limit power politics that the international

[360] Ibid, 178.
[361] Ibid, 180.
[362] Schwarzenberger, *Power Politics*, 1st ed., 432-433.
[363] Ibid.
[364] This particularly refers to the origins of international law in medieval international law and in natural law, rather than in its later positivist state. Ibid, 433.
[365] Schwarzenberger, *Power Politics*, 2nd ed., 715.

order can prevail."[366] The essence of its success "lies in aiming not at the maximum, but at the minimum of change that is required for the purpose."[367] In other words, it is essential to address and minimise the problems posed by the principle of sovereignty in international society.[368] Such a legal system would eliminate all the loopholes of power politics in disguise and provide for the establishment international organs required for the legal skeleton of a true international community.[369] To ignore the phenomenon of war would be to adopt an ostrich policy, as peace must necessarily be defined by reference to war in systems of power politics.[370]

It is essential to note that Schwarzenberger's writings and conclusions are, much like Carr's, fundamentally optimistic. Schwarzenberger, Scheuerman argues, never shied away from elaborating on the prospective institutional attributes of a global federal order, and "*contra* the more cautious Niebuhr … believed that major steps could immediately be taken towards creating a new global order."[371] Cryer argues that the common view of Schwarzenberger as a simplistic realist is impossible to square with his own writings:

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[366] Ibid, 737-738.

[367] A number of additional, more controversial particulars are set out by Schwarzenberger, including: 1) "The members of the international community must be safeguarded effectively against interference with any rights which are guaranteed to them, or left with them, by the community." 2) "For its own purposes, the international community requires adequate governmental and executive powers." 3) "Provision for the judicial settlement of international disputes between members of the international community is not enough … international legislative or quasi-legislative organs with discretionary power are indispensable." 4) "The members of the international community must hand over … and refrain from producing, any armaments the retention of which might seriously hamper the international community in prevailing over any individual member." 5) "The degree of control of the international community over its members … must depend on one test only: the minimum of functions and interference which is compatible with the proper working of the community system." 6) "Without some measure of direct control over the citizens of the member States, the international community cannot create loyalties strong enough to counterbalance existing national or other sectional loyalties." 7) "As distinct from a society, a community can be based only on the principle of consent." Ibid, 738.

[368] The same general conditions and particular conditions as those introduced in the 2nd edition are maintained, with Schwarzenberger further noting that at the time of this edition's writing, the limited 1963 Test Ban Treaty offers "some tangible additional evidence of the possibility of the world Powers coming to grips with the greatest obstacle to the transformation of the Cold War into a state of peace *within* the prevailing world balance of power system: their mutual distrust of each other." Schwarzenberger, *Power Politics*, 3rd ed., 532-533.

[369] Schwarzenberger, *Power Politics*, 2nd ed., 759-760.

[370] Schwarzenberger, *Power Politics*, 3rd ed., 519.

[371] Scheuerman, *The Realist Case for Global Reform*, 85.

> This all too easily also flows into an idea that Schwarzenberger was a rather old fashioned, misanthropic lawyer who was not interested in helping humanity and therefore someone whose views are suspect. Although his almost obsessive concentration on the limitations and failures of international law is troubling, nothing could really be further from the truth than the view that Schwarzenberger was simply a cynic.[372]

International law can rise above the problems posed by state sovereignty and brought about, in turn, by power politics. In other words, for most purposes our contemporary world is already a society, and, in the most elementary sense, an "indivisible world community: it is a community for life and death."[373] Both 'idealism' and 'realism' are fallacies.[374] Thus, though it not easy to aim high, it "appears more worthwhile," and what is needed is a "world public order which any of the parochial States can flout only at its own risk."[375] To argue that the ideas in the general conditions outlined above are perfectionist and unattainable would merely be to say that "power politics in, or without, disguise is to remain for ever the lot of mankind."[376]

[372] Cryer, "International Law and the Illusion of Novelty: Georg Schwarzenberger and British International Law", 470.
[373] Schwarzenberger, *Power Politics*, 3rd ed. 553.
[374] Schwarzenberger, *International Law as Applied by International Courts and Tribunals, Volume II: The Law of Armed Conflict*, 3.
[375] Schwarzenberger, *International Law and Order*, 218.
[376] Schwarzenberger, *Power Politics*, 3rd ed., 533.

Conclusion

The positions of E.H. Carr, Hans J. Morgenthau, and Georg Schwarzenberger have been presented separately over the course of this thesis, with particular attention being paid to the different facets of international law, arms control, and disarmament they explore in their works. The choice to undertake this thesis following this structure was not motivated by the goal of establishing the theories of these authors on an individual basis. Its purpose, which is fundamentally connected to the first two chapters of this thesis, was instead to establish and bring to light the themes explored by these three theorists in order to triangulate them and identify the common themes in their analyses of international law. In following the hermeneutical method's understanding of tradition, this triangulation will take the shape of a fusion of horizons that will encompass the entirety of this conclusion.[1]

The usage and application of the theories of Carr, Morgenthau, and Schwarzenberger to the questions faced by the international arms control and disarmament regime are, as noted in the introduction of this thesis, one of the main aspects in which this thesis has produced original knowledge. The theories of these classical realist theorists provide a critical way of understanding 'how' and 'why' international legal treaties concerning arms control and disarmament are violated by states. Their insights, which are not limited to the standard account that states seek

[1] As stated in the introduction to this thesis, the hermeneutical method's understanding of tradition highlights the fact that reflections of the truth in the human sciences are not constructions based on principles. They are a historically effected event that must be addressed by tradition.

their own interests, take into account the nature of international law and the role played by both ethics and morality within it. Through this, the conclusions which these three theorists unveil provide a direct answer to the contradiction exposed in chapters one and two and reveal why breaches of international disarmament and arms control treaties occur despite the taboos that underlie them. The role national interests, sovereignty, and nationalism play in arms control and disarmament treaties are a salient aspect of these conclusions. Classical realism thus allows us to think through the implications of eroded taboos by political necessity and what this means for the fabric and the overriding logic of international society.

This thesis has also produced original knowledge through how its examination of the thought of Carr, Morgenthau, and Schwarzenberger's works has challenged the prevailing caricature and understanding of classical realism as a theory that can only account for power and disregards international law. This limited understanding of realism as an international relations tradition stands out notably in prior legal theory scholarship. Realism here is seen to argue that international law plays "virtually no role in international affairs, especially in the area of the use of force."[2] It regards the resort to military force as useful, does not consider protracted armed conflict as a failure, and has a narrow view of human nature that accounts only for the pursuit of power.[3] In seeing only state interests and interstate power relations, it sees "law in narrow, state-centric terms" that prevents it from accounting for its development.[4] Realism here is therefore taken to exclusively argue that "the law of the jungle is simple: The strongest

[2] O'Connell, "New International Legal Process", 336.
[3] O'Connell, *The Art of Law in the International Community*, 14-15; Teitel, Transitional Justice, 3-4.
[4] Teitel, Transitional Justice, 168.

win" and that "the strongest animals would never allow themselves to be captured and caged."[5] The analysis undertaken in chapters three, four, and five of this thesis shows that this could not be further from the case. Realism provides a nuanced and insightful analysis of international law that accounts for its role in international society, details its effects, and focuses on both its strengths and weaknesses. Though the standard account that states seek their own interests plays a role in this analysis, it is not the only factor which can be found in Carr's, Morgenthau's, and Schwarzenberger's theories of international law. By establishing this aspect of classical realist theory, this thesis makes an unexpected and original contribution to the way in which realism can speak to international law.

This thesis has also made an original contribution to the realist tradition of international relations by bringing Schwarzenberger into dialogue with Carr and Morgenthau. In doing this, it has advanced our understanding of how realism—and more particularly classical realism—addresses the practice and function of international law. Schwarzenberger's analysis of the role of morality in international law, different aspects of legal theory, universality, and the standard of civilisation are particularly prominent examples of this; as are Carr's analysis of the problems underlying international treaties and the historical bias of the law, and Morgenthau's analysis of legal theory and morality in international law. The originality of this thesis is also strengthened through the usage of Schwarzenberger's works—which have rarely been used in international relations literature—and Morgenthau's French works, which were actively used over the course of the thesis. Its originality has also been augmented by

[5] Brunnée and Toope, *Legitimacy and Legality in International Law*, 3-4.

examining the theories and works of Carr, Morgenthau, and Schwarzenberger as opposed to those of theorists whose works and thought have been explored more substantially, such as Hedley Bull's.[6] By exploring these theories, this thesis has demonstrated an original use of international relations theorists who have traditionally been taken to not engage with arms control and disarmament or with international legal treaties.

Undertaking a thematic analysis of the theories of international law of these three classical realist theorists has therefore, as per the three research questions outlined in the introduction of this thesis, successfully achieved the following two objectives. First, it has brought to light and deepened our knowledge of the positions which Carr, Morgenthau, and Schwarzenberger held on international law. Second, it has successfully established the fundamental links which these theories have in relation to the problems brought to light in the first and second chapters of this thesis: namely, the existence and erosion of the legal standards and taboos surrounding the laws of arms control, disarmament, and use.

It is on the confluence of these two points—examined within the conclusions of each chapter—that this conclusion will hinge, synthesising the results in the following nine concluding reflections. These nine reflections will answer the three research questions outlined in the introduction through the different aspects of international law, arms control, and disarmaments which have been unveiled in each of the five chapters. These nine reflections are, in line with what is noted in the conclusions to chapters three,

[6] Hedley Bull's thought and works have been, as was noted in the introduction of this thesis, been explored substantially in relation to arms control, disarmament, and international law. A number of relevant examples of this scholarship are listed in footnotes 83 and 84 of the introduction.

four, and five, fundamentally constructive in nature. Rather than deem international efforts to strengthen disarmament and arms control hopeless, they provide and propose a road forwards. This idea is in line with Carr's, Morgenthau's, and Schwarzenberger's theories of international law and analyses arms control and disarmament. Though the realist critique diagnoses and points to a number of weaknesses present in international law and in international arms control and disarmament treaties, it does not—as can be seen in the conclusions of chapters three, four, and five— argue for hopelessness or futility. It actively recognises that the demands made of contemporary international law—which, as Schwarzenberger notes, are more exacting than those that were made of pre-1914 international law—makes efforts to change and improve the international order of imperative importance. Classical realism neither supports nor entertains the capitulation of international law and international efforts at arms control and disarmament to pure power politics. On the contrary: its analysis of arms control and disarmament provides a path forwards that supports and argues for efforts at global reform.

6.1 The legal restrictions and taboos surrounding arms restrictions have been eroded due to political necessities and interests

The combined study undertaken in first and second chapters of this thesis has confirmed both the existence and erosion of the legal restrictions and taboos

surrounding the laws of arms control and disarmament. The shared ideology which links law with morality and sees both as the means by which to assess practices of war underlies all of the arms control and disarmament treaties examined within chapter one. It finds its origin in the inhumanity which certain means of warfare bring when used in war. It identifies law with morality and sees both as the means by which to assess the practices of war, side-lining politics. What this taboo implies is therefore clear: the means which may be used by states in warfare are not unlimited, and following the law is essential if aiming to prevent the rise of inhumane violence.[7] This idea—that is, that the means which may be used by states in warfare are not unlimited—can be seen throughout all of the conventional, biological, chemical, and nuclear weapons treaties examined within the first chapter.

Nuclear weapons have been singled out as particularly horrifying owing to their unusually destructive nature; a fact which fundamentally altered the strategic calculus which was employed prior to their creation.[8] They pose a unique threat to the survival of nations should hostilities get out of hands, and have the potential to decimate the human species.[9] The International Court of Justice's advisory opinion of 8 July 1996, quoted in chapter one, is particularly revealing.[10] The shared and mirrored language in all of the examined nuclear arms control and disarmament treaties—with the NPT, LTBT, START I and II, SORT, New START, and the TPNW—also highlights the enormous effect

[7] Bugnion, "Customary International Humanitarian Law", 1; Kalshoven and Zegveld, *Constraints on the Waging of War*, 13; Fazal, *Wars of Law: Unintended Consequences in the Regulation of Armed Conflict*, 16.
[8] Talbott, *Deadly Gambits*, 4; M. Smith, "Pragmatic Micawberism? Norm Construction on Ballistic Missiles", 527; Joyner, *International Law and the Proliferation of Weapons of Mass Destruction*, xiii-xiv.
[9] Brenner, *Nuclear Power and Non-Proliferation, The Remaking of U.S. Policy*, 1-2.
[10] "The destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilization and the entire ecosystem of the planet." Legality of the Threat or Use of Nuclear Weapons, Advisory Opinions and Orders, 1996 I.C.J. Rep. (July 8), ¶35.

which the inherently destructive nature of nuclear weapons has had on the treaties examined in chapter one.[11]

The taboo associated with chemical and biological weapons is similarly clear. Chemical and biological weapons have borne a deep moral opprobrium rooted in their perfidy and insidiousness and their use as indiscriminate agents of "unnecessary suffering … said to contradict the universal and chivalrous principles of conduct in war."[12] They have been subject to a longstanding cross-cultural taboo due to their seemingly standing in contrast with the purpose of international humanitarian law to protect combatants and non-combatants from unnecessary suffering.[13] The language used in the treaties prohibiting the development and use of biological and chemical weapons, as is the case with that of the Declaration of St. Petersburg's preamble, the 1922 Washington Conference, and the concerns that led to the creation of the BWC and the CWC, further show the major role which this taboo has had on the development of treaties.

Despite their status as a traditionally underdeveloped area of international law, the legal restrictions and treaties surrounding conventional weapons also clearly display the power and effect of the taboo underlying the use of certain weapons. The analysis conducted in chapter one demonstrates the importance of this taboo since the creation of the earliest conventional weapons disarmament and arms control treaties, such as the Oxford Manual and the Final Protocol of the 1874 Brussels Conference.

[11] This is also the case in relation to the repeated attempts to have the CTBT enter into force and commence negotiations on a FMCT, which have consistently pointed the destructive nature of nuclear weapons out.
[12] Pascal-Zanders, "International Norms Against Chemical and Biological Warfare: An Ambiguous Legacy," 409.
[13] U.K. Ministry of Defence*, The Manual of The Law of Armed Conflict*, 3; Feakes, "Global civil society and biological and chemical weapons", 93.

The significance of the taboo underlying the use of certain conventional weapons cannot be overstated. The association of certain inhumane weapons with devilry—as is the case with torpedoes in Thomas Walker's 1893 *Science of International Law*—points clearly at the taboos underlying disarmament and arms control treaties. Particularly in relation to weapons which inflict needless, unreasonable, and unusual amount of torture or injury when disabling or causing death.[14] That the same language has been maintained in modern arms control and disarmament treaties is noteworthy.

It is clear, therefore, in light of this analysis, that there is a shared underlying ideology encoded in the legal principles that give rise to the taboo surrounding the usage of the nuclear, biological, chemical, and conventional weapons. This shared underlying ideology can be seen in the literature and treaties examined within chapter one. It is clear, however, that despite the underlying taboo associated with the use of certain weapons, that legal restrictions do not apply to the same degree. The extent and strength of the treaties varies radically, with non-participant states complicating their reach further. Nuclear arms control and disarmament treaties provide a particularly stark example of the disparity between taboo and international treaties; a fact which stands out due to the strength of the taboo surrounding nuclear weapons.

An additional problem arises in relation to the cases of treaty violations which have been examined in chapter two. That is: participant states have violated the treaties they were party to despite the taboo underlying the use of certain conventional weapons, biological, chemical, and nuclear weapons. Despite the difficulties associated with investigating cases of non-compliance—detailed in chapter two—these violations

[14] Winthrop, *Military Law and Precedents*, 784.

of arms control and disarmament treaties offer insights into the real strength and reach of these legal restrictions and taboos. They establish and show how political, security, and military interests fundamentally affect and lead to violations of arms control and disarmament treaties despite the taboos underpinning them. These interests exceed problems related to the enforcement and verification of treaties, a fact which raises questions about the way in which arms control and disarmament treaties come to be created and the different factors that motivate compliance.

The national interests which prompted the early pre-WWII and Cold War Soviet biological weapons programme—that is, concerns about Germany's and the U.S.' potential development and usage of biological weapons—shows the different ways in which political, security, and military erode the legal restrictions and taboos surrounding the trade and use of arms. The violations of the CWC examined in chapter two provide a further example of the ways national interests erode legal restrictions and taboos—particularly those related to Syria and Navalny—as do the mirrored allegations of noncompliance in nuclear arms control and disarmament treaties. President Hashemi Rafsanjani's 1988 characterisation of international law is also a salient example of the political, security, and military interests that erode the legal restrictions surrounding arms control and disarmament.[15]

The analysis conducted within these two chapters is, thus, as outlined at in their respective conclusions, fundamentally multifaceted. Political, security, and military interests fundamentally underpin and lead to violations of arms control and disarmament treaties. Despite the clear existence of taboos surrounding the use of

[15] Cordesman, *Iran's Military Forces in Transition*, 234.

certain weapons, these interests erode the legal restrictions and taboo underpinning these very treaties. This seemingly contradictory set of facts raises salient questions about the 'how' and 'why' of arms control, which the classical realist theories of Carr, Morgenthau, and Schwarzenberger can—as shown in the previous chapters—help us answer, particularly in relation to the nature of international law and its relation to national interests. It is on these answers that the following eight conclusions hinge and rely on.

6.2 Nuclear weapons are uniquely affected by power politics

Nuclear weapons, due to their destructive power, play a fundamentally different role than conventional weapons: They are neither weapons in the conventional semantic sense nor rational means to rational ends. The very destructive nature of nuclear weapons, firmly tied to the nuclear taboo outlined in chapter one of this thesis, fundamentally defines them. Van Courtland Moon's analysis of nuclear weapons illustrates why this is the case:

> Paradoxically, although nuclear weapons may promote deterrence and maintain general peace in a bilaterally armed world, they are so ferociously destructive and so obviously indiscriminate as to be useless as weapons of war. Nuclear weapons, like toxics, are indecisive weapons.[16]

Nuclear weapons have drastically altered the relationship between peace and war, ceasing war's effective use as an alternative to negotiation as the complementary pattern of international tactics due to the price of nuclear warfare.[17] The threat of

[16] Courtland Moon, "Chemical Weapons and Deterrence: The World War II Experience", 35.
[17] Schwarzenberger, "Beyond Power Politics?", 231.

nuclear war is thus an instrument of suicide and genocide, whereby war becomes a senseless and irrational enterprise and which has fundamentally altered the relations amongst governments themselves.[18] Effective nuclear defence has a radically different meaning from that of effective conventional defence.[19] These differences have fundamentally affected nuclear disarmament and arms control; a fact that stands out given the moderate success which it has seemed to enjoy.

The relative success of nuclear arms control and disarmament is not accidental. Nuclear weapons have created a military economy of abundance, where destructiveness of available weapons far exceeds the number of possible targets. The very destructive nature of nuclear weapons has contributed to both the creation of arms control and disarmament agreements as well as heightened the danger of nuclear proliferation.[20] In enhancing the desirability of controlling these weapons, it has made a successful ban on nuclear weapons unlikely, whereby, even if it were possible, it would "not mean peace but only the elimination of certain types of weapons," and could only succeed "as the by-product of a political settlement not as a substitute for it."[21] It is this fact—that is, the underlying struggle for power—that makes nuclear arms control and disarmament difficult to achieve.

The question of the legality or illegality of nuclear weapons cannot, thus, give an answer to their destructive power, as one means "little more than confirming in a still further field the parting of the ways of international law and the standard of civilisation," and the other amounts to the "same thing, for … the use of nuclear weapons by way of

[18] Morgenthau, "The Fallacy of Thinking Conventionally about Nuclear Weapons", 85.
[19] Morgenthau, *A New Foreign Policy for the United States*, 229-230.
[20] Morgenthau, "Power Politics", 37.
[21] Morgenthau, "The H-Bomb and After", 120-121.

reprisals remains legal."[22] The question of the legality or illegality of nuclear weapons alone, therefore, cannot put an end to the danger which these weapons present. In keeping with the principle of state sovereignty, world powers would continue to prepare themselves for the contingency that the other side will break its solemnly pledged word.

Legal restraints which may be thrown at will cannot offer a permanent road to nuclear disarmament. Power politics fundamentally underpin nuclear disarmament and arms control efforts, and need to be addressed if aiming to make said efforts succeed. Nuclear arms control and disarmament is only possible if the underlying political conflicts which have given rise to the arms race in the first place have been mitigated or eliminated.[23] What is needed, rather, is a world public order which any of the parochial states can flout only at its own risk. Anything less, whilst immediately attainable, will fall below the world safety minimum.[24]

6.3 Arms control and disarmament treaties all originate within a necessary political background

The political background from which arms control and disarmament treaties originate is a fundamental aspect of their nature and reach and needs to be confronted if aiming to make these treaties a success. Arms races, in turn, are a symptom of the actual problem, which does not lie in the possession of weapons but in the existence of

[22] Schwarzenberger, *The Legality of Nuclear Weapons*, 57-58.
[23] Morgenthau, "The Fallacy of Thinking Conventionally about Nuclear Weapons", 88.
[24] Schwarzenberger, *The Legality of Nuclear Weapons*, 61.

unsolved political problems.[25] Disarmament, then, when divorced from the settlement of the political conflicts which have caused the need for disarmament in the first place, is futile, and only affects the technology through which hostilities are conducted. Its failure is foreordained by the concentration of the negotiators upon the symptoms of the disease rather than on its cause: the unresolved political conflict.[26]

Whilst a disarmament agreement could have an enormously beneficial psychological effect by itself, said agreement would remain subject to unsolved political problems which would intrude into the disarmament negotiations, making them a reflection of the different attitudes and interests of the nations undertaking them. They would each regard the negotiations as a particular phase of the overall struggle for power, which, in turn, gives rise to the danger of becoming so absorbed with the technicalities of arms control and disarmament that the underlying political issues are ignored.[27] Necessity, particularly in relation to warfare, can supersede the law, and nations arm "either because they want to defend themselves against other nations or because they want to attack them."[28] The political interests which lie behind the technological development of weapons and arms races are, therefore, an essential aspect of disarmament and arms control agreements which, if not tackled, will be sure to lead them to failure.

These ideas are notable aspects of both Carr's and Morgenthau's analyses of arms control and disarmament. For Morgenthau, they are particularly related to the

[25] Morgenthau, "Realism in International Politics", 9.
[26] Morgenthau, "The H-Bomb and After", 121; Morgenthau, "Should We Negotiate Now?", 179.
[27] Hans J. Morgenthau, "Disarmament," in *Politics in the Twentieth Century, Volume III: The Restoration of American Politics* (Chicago: Chicago University Press, 1962), 147.
[28] Morgenthau, *Politics Among Nations, the Struggle for Power and Peace*, 398-399.

moderate success that nuclear arms control has enjoyed and the relative failure conventional weapons arms control has seen. The terms of the 1922 Washington Treaty—a complex settlement of naval competition between the United States and Great Britain—performed the function of legally ratifying the changes in military technology.[29] As neither Great Britain nor the United States were willing to spend "enormous amounts for floating monuments to their national pride," with no military significance except to provide enormous targets for naval artillery and submarine torpedoes, they concluded a disarmament agreement to that effect.[30]

Carr's analysis of arms control and disarmament in the interwar period, wherein the political interests pursued by different states fundamentally affected both the outcome of disarmament negotiations and their application, further demonstrates the influence of national interests on the development of taboos. National interests affected the seemingly different taboos associated with certain weapons, with the Anglo-Saxon powers, whose naval predominance was threatened by the submarine, forcefully denouncing the immorality of this weapon.[31] The case of German rearmament following the Treaty of Rapallo further showcases the deep effect which these underlying national interests have on disarmament and arms control, particularly through the turning point this violation of the Treaty of Versailles system represented for both Germany and the Soviet Union.[32]

The conclusion which the analyses of these two theorists offers is clear: disarmament has no chance for success without a political settlement. Whilst

[29] Morgenthau, "Some Political Aspects of Disarmament", 59.
[30] Ibid.
[31] Carr, *The Twenty Years' Crisis, 1919–1939, reissued with a new preface from Michael Cox*, 70.
[32] Carr, *German-Soviet Relations Between the Two World Wars, 1919-1939*, 66.

indispensable in the general settlement of international conflicts, it cannot be the first step. Competition for armaments reflects an instrument of, above all, competition for power. So long as nations advance contradictory claims in the contest for power, they are forced to advance contradictory claims for armaments. Legal formulas and the taboo associated with the weapons examined in chapter one alone will not achieve success: the conflicting national interests giving rise to armament races need to be tackled before their technical problems.

6.4 Disarmament and arms control treaties are defined by their function and role in international society

Disarmament and arms control are fundamentally affected by both the standards of civilisation and the necessities of war. The standards of civilisation, despite acting as the formative agencies of disarmament and arms control, are put to test by the tactical and strategic requirements of war, which serve to attain the overriding object of war—the imposition of the will of the victor on the defeated.[33] Both affect disarmament and arms control, which are the product of three formative factors: compulsion, humanity, and chivalry.

The impact of the standard of civilisation on disarmament and arms control is significant. It has led to a "differentiation between lawful and unlawful objects of warfare *ratione loci*, *instrumenti vel personae*."[34] The use of particular devices or means

[33] Schwarzenberger, *A Manual of International Law*, 197.
[34] Ibid, 200-201.

of destruction—particularly those with an incongruity between means and ends, excessive inhumanity, or the treacherous character of their stratagems—can be incompatible with the standard of civilisation. These ideas underpin the entirety of disarmament and arms control, showing, as examined in chapter five, the prominent role which the taboo brought to light in chapter one can come to play in the creation and maintenance of international arms control and disarmament treaties.[35]

The effect of the standard of civilisation is, however, not unlimited. It is the function of the rules of warfare "to impose some limits, however ineffective, to a complete reversion to anarchy by the establishment of minimum standards on the conduct of war."[36] As the object of war is to impose the will of a belligerent state on the enemy by force, however, disarmament and arms control treaties imposing restraints on belligerents present a paradox that calls for explanation. Indeed:

> It is no service to international law—and, in any case, constantly refuted by the realities of warfare—to pretend that the rules of warfare seriously restrain the supremacy of force in time of war.[37]

The rule of force is, in other words, supreme. Self-limitation and the relative insignificance of the rules of warfare explain the paradoxical coexistence of law and force in states of war: "*De minimis non curat Mars*."[38] Treaties of disarmament and arms control, in other words, regardless of the standard of civilisation they display within them, are not above power politics. In a world in which not all signatories to a pact can be relied upon to honour it at all times, it is advisable to "to make preparations in

[35] The standard of civilisation also represents one of the most distinctive and unique aspects of Schwarzenberger's theory, and contrasts sharply with the realism's caricature as a theory devoid of ethics.
[36] Schwarzenberger, *International Law as Applied by International Courts and Tribunals, Volume II: The Law of Armed Conflict*, 10.
[37] Ibid.
[38] Ibid, 13.

advance against any breach by parties of their collective obligations."[39] The standard of civilisation must therefore fight a losing battle against the necessities of war on the level of rules of warfare. Schwarzenberger illustrates this with the following example: "What," he asks, "happens if a control body has found that a serious breach of a convention on the regulation of armament has occurred?"[40] By then a state may have "stolen a march on its potential enemies," which may be "unable to catch up with their more unscrupulous rival."[41]

International society, if aiming to maintain the standards of civilisation and the effectiveness of disarmament and arms control treaties, must therefore provide sufficient guarantees against both the probability of war, else any far-reaching regulation of armaments on a consensual basis remains an impossibility. The taboos and legal restrictions underlying the use of certain weapons cannot exist outside of power politics or national interests, and are subject to being broken when confronted by the necessities of war should there be no political guarantees underlying them. International law, which like other branches of law is an instrument of social control, cannot be a self-executing system operating in a vacuum.[42] Thus, if aiming to strengthen disarmament and arms control, we need to readjust the priorities of self-interest amongst superpowers. International treaties cannot achieve this alone: the social environment in which treaties operate needs to be taken into account. This is of key importance in order to understand the cases of noncompliance explored in chapter two, and which seemingly contradict the taboo established in chapter one.

[39] Schwarzenberger, "Peace and war in international society (III)", 340.
[40] Schwarzenberger, *Power Politics*, 3rd ed., 407.
[41] Ibid.
[42] Schwarzenberger, "The law of armed conflict: a civilised interlude?", 307.

6.5 International and national law are inherently different

The fundamental differences separating international law from national or municipal law are one of the key facts which determine what it can do. For Carr, the differences between international and national law relate to the fact that politics and law are indissolubly intertwined, and that law, "like politics, is a meeting place for ethics and power."[43] International law is, due to its limited relevance insofar as the international community recognises it as binding, a function of the political community of nations and therefore "necessarily weaker and poorer in content than the national law of a highly organised modern state."[44] It is more primitive than its domestic counterpart, a fact which makes of treaties a mere mirage, as they lack an essential quality of law: they are not automatically and unconditionally applicable to all members of the community.[45]

Though these differences do not deprive international law of its legal character, they impact all of its functions due to how the obligation to follow international law always rests outside of itself. The conditions under which international law comes to be created also affect its role in international society. For Carr, law is not exempt from the biases brought about by a static view of history, and instead reflects the conditions of the time during which it was made.[46] Thus, it was precisely the burst of idealism generated in English-speaking countries after the First World War and the powerful

[43] Carr, *The Twenty Years' Crisis, 1919–1939, reissued with a new preface from Michael Cox*, 165.
[44] Ibid.
[45] Ibid, 160.
[46] Carr, *The New Society*, 11-13.

"demand for something which would ensure that this monstrosity should never appear again" that gave the League of Nations its shape, rather than its foundational treaties alone.[47] The historical conditions in which laws are created affect its pretension to establish rules based on purely abstract principles. Neither security nor peace can be made the object of policy nor achieved through the signing of pacts and covenants alone.[48]

Morgenthau's theory of international law, despite its numerous points of divergence with Carr's, also argues international and domestic law are fundamentally different. The reach of international law and national law are fundamentally different, with international law only being able to answer one out of the four key questions which all legal orders face.[49] In failing to answer these questions, international law is unable to meet all of the requirements which domestic legal orders face. International law is thus developed in accordance with the objective requirements of the international social reality. It cannot generate a state legal order through its own forces and depends on states to enforce itself due to its own decentralised nature.[50] The functions and processes of international law are thus fundamentally affected, making its validity rest on the fundamental norm of state law rather than on that of international law.[51]

The fact that international society is unable to authoritatively define the interests of its members to be defended and to defend them fundamentally affects the workings

[47] Carr, "The League of Nations," 20.
[48] Carr, *Conditions of Peace*, xxii-xxiii.
[49] Namely, and as quoted in chapter four: i. "Who has the legal power over a given object, say over a desk?" ii. "How can the legal power over this desk change hands?" iii. "How will a dispute on the legal power over this desk be settled?" iv. "Finally, in what way will the person who holds legal power over this desk be protected in the exercise of it?" Morgenthau, *La Notion du Politique et la Théorie des differends internationaux*, 7.
[50] Morgenthau, *La réalité des normes*, 179.
[51] Ibid, 218.

of international law, and confronts it with problems which no other branch of law faces.[52] The lack of a social context akin to that of national law makes the provisions of treaties mean very little by themselves, as they exist only by virtue of the consensus of interested nations.[53] International law is a decentralised order where rules are binding only upon the states which have consented to them. Though this decentralised nature does not deprive international law of its legal character, it defines it as a primitive type of law that is unable to be as effective as national legal systems. This idea is fundamentally linked to Morgenthau's critique of legal positivism, which separates the law as an area of study from neighbouring fields of politics and morality, which fundamentally affect it.[54]

These same ideas are present in Schwarzenberger's analysis of international law, particularly with regards to the question of whether a system can claim legal character whilst lacking some or all the customary attributes of municipal law. Though international law lacks many of these attributes, it has a clear underlying order. The significance of its principles varies depending on the level of international or supranational integration on which they are invoked.[55] International law's lack of *jus cogens* fundamentally affects it, circumscribing it to the to the limits set by power politics and making it the background against which all international legal norms have been developed.[56] The lack of *jus cogens* makes international law strongly hierarchical, a fact which subjects it to the different interests of different states.

[52] Morgenthau, "The Decline and Fall of American Foreign Policy", 30-31; Morgenthau, "Reviewed Work(s): International Law. Volume 1, International Law as Applied by International Courts and Tribunals by Georg Schwarzenberger", 141.
[53] Morgenthau, "Principles of International Politics", 7.
[54] Morgenthau, "Positivisme mal compris et théorie réaliste du droit international", 3.
[55] Schwarzenberger, *The Dynamics of International Law*, 7-8.
[56] Schwarzenberger, *International Law and Totalitarian Lawlessness*, 9; Schwarzenberger, *Power Politics*, 2nd ed., 117.

The historical and sociological environment in which international law has developed fundamentally determine what it can do. The historical environment which led to the development of international law makes it predominantly a law of power and reciprocity, where non-peace is the normal state of affairs.[57] The correlative nature of law and society is one of the driving factors which makes this the case, wherein international law can act either as an instrument of power, a regulator of reciprocal interests, or a means of co-ordinating common efforts.[58] These origins fundamentally affect international law, giving us insights as to why the legal restrictions on the use or development of certain weapons take the shape that they do:

> In a society in which power is the overriding consideration, the primary function of law is to assist in maintaining the supremacy of force and the hierarchies established on the basis of power and to give such an overriding system the respectability and sanctity of law.[59]

It is clear, then, that the historical and sociological environment in which international law has developed and exists fundamentally affects it. This idea, though developed in full only by Schwarzenberger, complements Morgenthau's and Carr's analyses of international and national law. National and international law are, due to their development and the environment in which they exist, fundamentally different. International law's decentralised nature thus fundamentally affects it, subjecting it to national interests and power considerations in ways in which national law is not. Its lack of *jus cogens* affects its processes and functions, as well as the way in which treaties come to be formed, applied, and enforced. The absence of a superior authority means that the consent of sovereign states is necessary for any change in the *status quo*, and

[57] Schwarzenberger, "Civitas Maxima?", 344.
[58] Schwarzenberger, *A Manual of International Law*, 10.
[59] Ibid, 25.

so long as there is no sovereign superior to them international order, peace, and law are bound to be in a precarious state.[60] The treaties analysed in chapter one are therefore fundamentally affected by international law's lack of *jus cogens*, which determines their strength in ways which go beyond the taboo that underlies and gives rise to them. International law, in lacking *jus cogens*, is strongly dependent on the consent of states. This limits its reach, effectiveness and impact; not just in relation to itself, but also to the arms control and disarmament treaties examined in chapter one.

6.6 The problems related to the structure, strength, and reach of international treaties affects their role in international society

A sixth conclusion which the analysis conducted in this thesis gives rise to is that of the fundamental problems which underlie international treaties, and how these affect their structure, strength, and reach. These problems feature prominently in Carr's works, particularly in relation to the problems impacting the politics underlying the creation of treaties, the static nature of treaties, and issues of compliance. For Carr, every system of law, whether explicit, implied, achieved by voting, or by bargaining presupposes an initial political decision. This initial political decision fundamentally affects treaties, making them unconscious reflections of a particular interpretation of national interests at a particular time. The legal validity of a treaty is, then, "a weapon

[60] Morgenthau, "International Law and International Politics: An Unease Partnership", 333.

used by the ruling nations to maintain their supremacy over weaker nations on whom the treaties have been imposed."[61]

The problems which the political origin of treaties give rise to are further affected by their static nature, which makes their consistent application through time impossible. Social orders require a large level of standardisation and, therefore, of abstraction: There cannot be different rules for every member of the community. The static nature of treaties inhibits their reach and effect, particularly in relation to matters that have to be applied to states which vary considerably in size, power, and in political, economic, and cultural development.[62] The dilemma of international law is, therefore, that of ecclesiastical dogma, wherein elastic interpretation adapted to diverse needs "increases the number of faithful" and rigid interpretation, "though theoretical desirable, provokes secessions from the church."[63]

The static nature of treaties makes their consistent application through time a considerable challenge, particularly in areas of international law close to the national interests of states. It also has a significant impact on problems related to compliance, particularly in relation to the principle of *pacta sunt servanda*, which presents fundamental problems in relation to the nonfulfillment of treaty obligations. Where nonfulfillment is concerned—as shown by analysis conducted on disarmament and arms control treaty violation cases in chapter two—it is often difficult to gauge whether the alleged justification for the breach is based on legal or on moral grounds.[64] These two

[61] Carr, *The Twenty Years' Crisis, 1919–1939, reissued with a new preface from Michael Cox*, 174.
[62] Ibid, 30.
[63] Ibid, 171.
[64] The elastic and inconsistent manner in which *pacta sunt servanda* is applied to the practice of states exacerbates this problem, as Carr's analysis of interwar diplomacy and the role that uncertainty plays in treaties demonstrates.

problems are fundamentally linked: Law grows out of the conditions which it is required to meet, and it is rarely able to be devised in advance to meet emergencies whose character is still unknown. International treaties and single legal formulae, regardless of their contents, cannot change the fact that foreign policy will not cease to exist for those that have power.

Morgenthau's analysis of international law, though different and more juridical in focus, mirrors many of Carr's conclusions. In the international legal sphere, it is necessity and common consent that create law. International treaties can only create international law on those states which are a party to them. This subjects treaties to the divergent interests of the states involved. It weakens their potential strength through the fact that governments are "anxious to shake off the restraining influence that international law might have upon their foreign policies."[65] Making international treaties an instrument which states use for the promotion of their national interests and to evade legal obligations that might be harmful to them. In other words, in the international field it is the subjects of the law themselves that "not only legislate for themselves but are also the supreme authority for interpreting and giving concrete meaning to their own legislative enactments."[66]

The impact necessity and common consent have on international law is substantial. It weakens its enforcement mechanisms by delivering them to the vicissitudes of the distribution of power between the violator of the law and the victim of the violation. Attempts to enforce international law and their success depend not on

[65] Morgenthau, *Politics Among Nations, the Struggle for Power and Peace*, 284-285.
[66] Ibid, 286.

legal considerations, but on the distribution of power in a particular case. International legal sanctions are affected by this. Sanctions specific to international law, due to its decentralised nature, either result from state sanctions or are service of norms whose content has been formed according to the aims of particular states.[67] They cannot override the impulses or interests which serve the purposes of States and are fundamentally affected by them; particularly in relation to those of a coercive nature.

Carr's and Morgenthau's analysis of the different problems which international treaties are subject to is thus fundamentally linked through its focus despite their different professional backgrounds. The fundamental ways in which the decentralised nature of international law affects treaties, their enforcement, and sanctions exposes problems which legal formulae cannot address alone. The political origin of treaties subjects them to effect of differing national interests, making them static reflections of the dominant interests of a particular period of time. These underlying problems are firmly tied to those exposed by the seeming contradiction which chapters one and two of this thesis expose—that is, that despite the emergence of these taboos, multiple instances of their breach are recorded—and must be understood if aiming to strengthen arms control and disarmament treaties.

[67] Morgenthau, "Théorie des sanctions internationals [Part II]", 809-810.

6.7 International organisations are profoundly affected by power politics

The seventh conclusion that we can derive from the analysis conducted in this thesis is that of the problems which fundamentally confront all international organisations and treaty systems. The idea that international organisations can offer an alternative to national policies, where nations can pursue policies determined by standards of wisdom and justice rather than those of interests and power, has no foundation in fact. International organisations do not and cannot exist apart from the great nations whose interests and power determine international society.[68] Rather, they provide a new medium for traditional methods of international politics and remain subject to and affected by power and national interests.

The four basic decisions which the founders of any international institution are faced with fundamentally affect their scope and nature.[69] The purely optional character of all types of international institutions enables subjects of international law to act according to their own interests. This optional character makes international institutions another system of power politics in disguise; a fundamental flaw that stands despite the fact that their ends or purposes may be legally relevant even when not amounting to a legal rule.[70]

[68] Morgenthau, "The Decline and Fall of American Foreign Policy", 34.
[69] Schwarzenberger, *Power Politics*, 3rd ed., 334.
[70] Georg Schwarzenberger, "Scope and Limits of International Legislation," *Nordisk Tidsskrift for International Ret* 22 (1952): 8; Georg Schwarzenberger, "The Purposes of the United Nations: International Judicial Practice," *Israel Yearbook on Human Rights* 4 (1974): 13.

International organisations thus find themselves limited by a lack of an understanding of the limits of the law, particularly through the flawed role which international outlooks can practically play in international society due to its decentralised nature and national interests. Not only has the United Nations not replaced power politics, but its organisational forms and procedures have instead been put at their service, wherein its charter may mean different things according to the political intentions of the nations supporting it. Whatever functions the United Nations is able to fulfil in relation to the preservation of peace, rather than depending on the legal provisions of the Charter or its institutions, depend upon the political policies pursued by the great powers through the medium of the traditional methods of diplomacy.[71]

International organisations and systems to which different states may be parties to are fundamentally—though not fatally, as Schwarzenberger's analysis of international law shows—affected by these flaws. Though tangentially related to the treaties examined in chapter one, these flaws fundamentally affect the way in which these treaties come to exist and are applied. The universality in the abstract of an international organisation is meaningless. So long as a state or group of states is not sufficiently powerful to compel the rest of the world to conform to a peace system, such a scheme will always break on this point.[72] This fact is particularly relevant by relation to the disarmament and arms control treaties examined in chapters one and two. Due to how contemporary warfare holds the inherent danger of spreading globally, an effective

[71] Morgenthau, "Political Limitations of the United Nations", 150; Morgenthau, "Preface", 6-7.
[72] Schwarzenberger, *William Ladd*, 26-27.

system for the maintenance of peace must be universal if it desires to not be an impotent shadow.

6.8 Power and ethics have prominent and competing effects on international law

An eighth conclusion which the analysis conducted in this thesis gives rise to is that of the prominent and competing effects which ethics and power both play in international law. For Morgenthau, international politics, like all politics, is a struggle for power. Regardless of its ultimate aims and how they may be defined, power is always the immediate aim. Thus, the essence of international politics is identical to that of its domestic counterpart: both are a struggle for power, modified only by the differing conditions in which they take place. International politics are not merely the social support of international law, but an intrinsic element of it.

International law—through its relationship with both ethics and justice, and the political element in all legal norms—is fundamentally affected by the curious dialectic of ethics and politics, which prevents the latter from escaping the former's judgment and normative direction.[73] Where, however, do we find the universal standard with which to measure the adequacy of what a man receives and gives? It is here that power affects ethics and justice, as we all "look at the world and judge it from the vantage point of our interests."[74] The standards of judgement and action produced by the peculiarities of our

[73] Morgenthau, "The Evil of Politics and the Ethics of Evil", 5.
[74] Morgenthau, "On Trying to be Just", 64.

own perspective are taken for granted. A great power imbued with the conviction that its particular conception of justice reflects the order of the universe will be tempted to make said order prevail in the rest of the world. This makes of justice a screen for the parochial interests of states. This is also the case in relation to professions of regard and in favour of the taboos examined in chapter one, which are similarly affected by the peculiarities of our own perspective and cannot transcend it.

Power, therefore, gets the better of justice due to the fact that the work of justice is never done and is always dubious, whilst the work of power, however ephemeral, is clearly seen and simply enjoyed. The quest for justice can never be satisfied nor eradicated: it cannot be satisfied "because we are ignorant of the order of the universe which is invoked to supply justice to a concrete case."[75] This idea lies at the heart of international law, as rival invocations of justice will be made by states seeking to defend or oppose an international order. The dialectic between power and ethics fundamentally affects international law. It underlies the very foundations and workings of international law—such as that of international organisations and treaties—rendering the legal positivist desire to exorcise "social evils by the indefatigable repetition of magic formulas" impossible.[76] Power, thus, despite the role played by ethics and justice, is the fundamental problem confronting international law.

Schwarzenberger's analysis of international law, which also focuses on these ideas, develops them further; particularly in relation to the role international morality can practically play despite its link to the parochial interests of states. International

[75] Morgenthau, "Justice and Power", 174.
[76] Morgenthau, *Science: Servant or Master?*, 40.

morality, more so than international law, suffers from being applied not so much as a code to regulate one's own conduct but as a handy weapon against others.[77] The correlative nature of law and society fundamentally affects this. International ethics, much like international law, is primarily conditioned by international society rather than the reverse.[78]

The primary task of international morality is to reinforce state policy. It is used to cover and justify the national interests which a state may pursue. Though statesmen must take for granted a minimum of international of international morality, governments "are not slow in perceiving the real intentions of their counterparts who disguise political objects in terms of international morality."[79] In other words, the seeming existence of a universally agreed upon standard of civilisation or of morality—or of the taboo established in chapter one—does not equate to its being a legal reality. Particularly in the areas where international morality comes to be in conflict with state interests. Considerations of international morality, however, can fulfil a clear function when not overridden by state interests. Disarmament and arms control treaties, in which notions of chivalry and humanity have led to the mitigations of practices which were lawful at the time, clearly display the powerful effect that international morality can have.[80] In offering higher standards of an optional character that states can accept as legally binding, it becomes the nursing ground of international law.

[77] Schwarzenberger, *Power Politics*, 2nd ed., 253-254.
[78] This fact stands out in the speeches of statesmen, diplomatic notes, and preambles to international treaties—as has been established in chapter one—in which notions of good faith, justice, equity, peace, humanity, civilisation, friendship, freedom, the equality of states, natural rights, and the honour of states appear as frequent themes.
[79] Schwarzenberger, *Power Politics*, 3rd ed., 220.
[80] Ibid, 222.

The synthesis which the dialectic of ethics and politics offers us is, therefore, a multifaceted one, and one which is prominently analysed in Schwarzenberger's analysis and examination of the laws of power, co-ordination, and reciprocity. The key to understanding the functions fulfilled by any legal system, as established in chapter five, lie in the structure of its social environment. An examination of the role played by power is therefore unavoidable. The outstanding characteristic of the law of power is that it serves sectional interests rather than the group at large.[81] The dominant position of one party tends to encourage legal interpretation in favour of the stronger side.[82] The predominance of the law of power, therefore, goes down to the root of international customary law and to the conception of state sovereignty, and makes of international law a direct instrument of power politics.

The prominent role played by the law of power, however, does not mean that international law is a "pious fraud."[83] International law is also, through the influence of ethics, a law of reciprocity with traces of the law of co-ordination. International law, on the levels of partially or fully organised international society, is primarily a law of reciprocity. This fact stands even in the thick of power politics, where there always remains scope for the law of reciprocity. It is the mutual interest of the parties "in the performance of consensual engagements" that tends to "instil in these relations the requisite doses of reasonableness, good faith and common sense."[84]

International law is, then, a curious mixture of these three types of law. Though primarily a law of power, there are situations—particularly those where the threat of

[81] Schwarzenberger, *International Law and Order*, 12.
[82] Schwarzenberger, "Myths and Realities of Treaty Interpretation", 16-17.
[83] Schwarzenberger, "International law and society", 170.
[84] Schwarzenberger, "Myths and Realities of Treaty Interpretation", 16.

force is not available, or which are peripheral to systems of power politics—where there is wide scope for the laws of reciprocity and co-ordination. This mixed nature reveals where the difficulties which have been typically associated with the laws of arms control, disarmament, and use arise from; particularly in relation to the conclusions brought to light by chapter two. The question is not whether it is the taboos or the political interests leading to breaches of international treaties of disarmament and arms control that dominate international law—both complement and affect one another.

6.9 The role of national interests, sovereignty, and nationalism

The ninth and final conclusion of the analysis conducted in chapters three, four, and five relates to the key and essential role which national interests and all its derivative effects play on international law. It is national interests, more so than power and ethics, that ultimately comes to affect international law. Chapter three's analysis of Carr's theory of law hinges on the effect of national interests on international law.[85] It is telling that, in relation to disarmament, the lowest point consistent with national safety agreed upon by the League of Nations was left to the appreciation of individual governments. Successive British governments argued that Britain herself had already disarmed to the limit prescribed by the Covenant despite widespread enthusiasm, with

[85] This is the case, for example, in Carr's analysis of the interwar quest for disarmament, where the reply of France to ever British proposal for disarmament was a counterclaim for increased security. Carr, *Britain: A Study of Foreign Policy from the Versailles Treaty to the Outbreak of War*, 105.

France—where the League was prized as the bulwark of the *status quo*—showing little inclination to abandon the preponderance of armaments.[86]

Morality is necessarily subjected to national interests. It envelops politics, making it seem that the quest for power, "far from violating morality, (was) actually its consummation."[87] This ideological feature is morality's main function for international politics. National interests, then, are a fundamental aspect of international society that originate from its decentralised nature. They stem from the nature of the interests to be protected, the political environment in which they operate, and the rational necessities which limit the choice of ends and means; and can only be usurped by supranational interests. Whether policies justify themselves on morality or not does not change this: legal and ethical principles may be the goal of a foreign policy, an ideology, or both at the same time.[88]

The role played by national interests in international society, the *status quo*, and the balance of power, then, fundamentally affect international law. Collective interests must either be so strong so as to make states freely renounce their respective national interests or have identical national and supranational interests. The decisions of states to subordinate their interests to those of a collective system depend on whether the maintenance of peace is sufficiently valuable for the national communities.[89] Legal orders define a certain distribution of power and offer standards and processes to ascertain and maintain it in concrete circumstances.[90] The balance of power, then,

[86] Ibid, 105.
[87] Morgenthau, "The Intellectual and Moral Dilemma of Politics", 13.
[88] Morgenthau, *Politics Among Nations, the Struggle for Power and Peace*, 93-94.
[89] Schwarzenberger, *The League of Nations and World Order*, 176-177.
[90] Morgenthau, *Politics Among Nations, the Struggle for Power and Peace*, 96-97.

affects all facets of international law due to the fact that it operates through patterns of direct opposition or of competition. This renders international law unable to compel international relations and politics out of its own force to conform to its commands.

Neither disarmament nor arms control are a solution to the problems brought about by conflicting national interests in international society.[91] Rather, "the armaments race is a mere symptom of the actual problem, which does not lie in the possession of weapons but in the existence of unsolved political problems."[92] The unsolved political problems of necessity "intrude into the disarmament negotiations" and make them "simply a reflection of the different attitudes and interests of the nations undertaking them."[93] Each side "inevitably regards the negotiations as a particular phase of the over-all struggle for power," and tries to gain an advantage "by putting forward certain proposals relating to disarmament."[94]

Sovereignty and nationalism, then, are what gives national interests their preeminent role in relation to international law. The lack of *jus cogens* in international law lies at the heart of this problem. Each subject of international law is "free to limit as it sees fit the exercise of its own sovereignty in favour of another sovereign State or an international institution."[95] International society is, therefore, a precarious international quasi-order where international order rests on the equipoise between power centres of those more equal than the rest.[96] The principle of consent reigns supreme: "every

[91] Morgenthau summarises this belief through the following equation: "Wars are fought with weapons; diminish he quantity of weapons and you thereby diminish the likelihood of war; do away with all weapons and you will have eliminated the likelihood of war, and you will have solved the most urgent problem of international politics." Ibid, 8-9.
[92] Ibid, 9.
[93] Ibid, 9-10.
[94] Ibid, 10.
[95] Schwarzenberger, *A Manual of International Law*, 67.
[96] Schwarzenberger, "Neo-barbarism and international law", 191-192.

subject of international law may decide for itself whether to accept any further restriction of its sovereignty."[97] This has important implications for the treaties and taboos explored in chapter one of this thesis. It explains why taboos can be both accepted and subsequently rejected by states seeking to advance their own interests. Signing up to a ban of weapons has null costs and signals membership of an international society. However, when facing serious threats and regardless of whether there is a taboo or not, states will seek any means—as seen in chapter two—to preserve their integrity.

The unequal nature of states makes the conflicting national interests of states a salient problem due to how international order must necessarily take the form of an association of nations.[98] The implications of this are inescapable, and, in bringing together Schwarzenberger's, Morgenthau's, and Carr's own conclusions together, answer the question of how instances of failure to observe the taboo be best explained: "The more rigid a legal system is in a dynamic environment, the more likely it is that changes considered vital by powerful parties will be brought about by extra-legal means."[99]

This conclusion fundamentally affects the laws of disarmament and arms control, both in their creation—that is, in how the moral taboo associated with the use of a particular weapon is transformed into a legal standard—and in the application of existing treaties. Neither disarmament nor arms control alone can solve the problems brought about by national interests, nationalism, and sovereignty. Armaments races are a symptom of the actual problem, which lies in the existence of unsolved political

[97] Schwarzenberger, *Power Politics*, 3rd ed., 92.
[98] Carr, "The Moral Foundations for World Order", 72-73; Carr, *Nationalism and After, with a new introduction from Michael Cox*, 38.
[99] Schwarzenberger, *Power Politics*, 3rd ed., 93-94.

problems. It is these unsolved and underlying problems that intrude into arms control and disarmament negotiations and treaties, making them a reflection of the different attitudes and interests of the nations undertaking them. This subjects international law to the uncertainty of the power calculations inherent in the nature of national power itself, from which it cannot be wholly unbound.

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