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---CONFERENCE ON NUCLEAR WEAPONS AND THE LAW

SUJ Attached is a draft of your speech, as promised, for your approval before we go into final and provide copies to Dr. Cohen for distribution with other conference papers.

(25 pages)

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*Margaret Gowin*

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**"Implementation and Verification of Arms Control Arrangements  
The Search for Compliance"**

**Presentation by**

**Ambassador J. Alan Beesley**

**Permanent Mission of Canada to the  
Office of the United Nations at Geneva  
and to the Conference on Disarmament**

**to**

**the Conference on Nuclear Weapons and The Law**

**Ottawa, June 18, 1987**

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Before speaking to my prepared text, I propose to outline the underlying concept on which my comments will be based, which I would have preferred to share with you yesterday morning during the final panel discussion, had time permitted. They are:

Firstly: that quite apart from customary law, but closely related to it, there is an existing body of international law comprising a vast and complex network of bilateral and multilateral treaties which effectively regulate relations amongst states in spite of the lack of sanctions to enforce them;

second: that in the field of arms control alone there are over 20 contemporary treaties laying down obligations which states do observe, such as the Outer Space Treaty, the Seabed Arms Control Treaty, the Antarctic Treaty and the Treaty of Tlatelolco, which place explicit constraints upon the conduct of states over large areas of the globe, including two whole environments;

third: that cases do occur of breaches of treaty obligations, such as those reflected in the 1925 Geneva Poison Gas Protocol, to which both Iran and Iraq are parties, as well as interpretation disputes, such as that concerning the ABM Treaty;

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fourth: that none of the foregoing can legitimately be cited to prove the non-existence or inefficacy of binding international law any more than the continuing commission of murders, robberies, rapes and hooliganism can be cited to prove the absence of a legal code on the municipal plane, where there is ample machinery for enforcing the law;

finally: that if we don't like the scope and content of existing international law, then it is open to Canada and other nations to seek to modify the law and create new laws by the process known as progressive development, just as Canada has done on the law of the environment and the law of the sea, and is now attempting to do on the law of outer space.

The foregoing views were outlined in an article in the 40th Anniversary issue of the UN publication on "Disarmament". Turning now to my text, it is the essence of an arms control and disarmament agreement is that contracting parties agree to renounce, limit or destroy armaments or military forces in return for treaty guarantees in the form of a commitment by other parties to do the same. To ask states to renounce or scrap weapons in return for treaty obligations as an alternative measure of protecting our

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security is to demand of them a very serious and difficult decision. In effect a state accepts a treaty in lieu of weapons as a means of protecting its security. This is a very important undertaking since the primary responsibility of any government must be to protect the security of their country, however defined or perceived. Given this traditional concern with national security, the importance of verification becomes evident: it is the means by which each party maintains confidence, throughout the life of an arms control agreement, that other parties are complying with their obligations while at the same time demonstrating their own good faith. In a world where there are relatively few internationally effective sanctions, verification inevitably must play a critical role in ensuring that a treaty is and remains effective and does not become a source of tension rather than a means of resolving it.

Events of recent years have underscored the critical importance in certain arms control agreements, of compliance with their provisions, and thus of verification of compliance. It is axiomatic that in an imperfect world, just as there can be no arms control without confidence in compliance, there can be no confidence in compliance without adequate verification. It follows that verification can be seen as the very foundation upon which the whole edifice of arms control agreements rests.

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We have seen how even clear cut and specific verification mechanisms in some multilateral agreements such as the Biological and Toxin Weapons Convention of 1972, which is not merely an arms control agreement but a genuine disarmament agreement, have been proven inadequate to dispel suspicions of violations. We have seen in the Gulf War the consequences of the absence of any verification process in the 1925 Geneva Poison Gas Protocol, which is after all only a non-first-use treaty - of the kind advocated by many for the control of nuclear weapons. We have also seen how evidence derived from the verification mechanisms of some bilateral agreements (such as ABM Treaty and the Threshold Test Ban Treaty) can prove ambiguous, create dispute and suspicion rather than confidence and good faith in dealing with situations suggesting ambiguous activities.

These few examples - in multilateral and bilateral agreements - demonstrate both the importance of verification and compliance, and the intense political sensitivity of the whole process of detecting and handling events suggesting possible non-compliance. Indeed, recent concerns about verification and compliance seem in some cases to have eroded confidence among the parties to arms control agreements rather than reinforced it. Nonetheless, it is the Canadian position, which I wish to emphasize, that the careful negotiation and drafting of adequate and effective

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verification provisions in agreements and the development of the necessary implementing mechanisms is essential to preventing such a deterioration of confidence. This applies a fortiori to agreements involving nuclear weapons and nuclear tests.

The role of the lawyer - indeed the role of the law on the international plane - is obvious. I would go further and say that without widespread support for the role of the law on the international plane, going well beyond the utilization of lawyers as legal technicians or mechanical drafting specialists, we will be unsuccessful in our attempt to build a lasting world order and lawyers instead will merely be helping to legalize or legitimize unilateralism and self help on issues involving the Charter prohibitions on the threat or use of force.

Mr. Chairman, I now propose to outline some examples of current steps Canada is taking to contribute in a pragmatic and constructive way to the verification process. I will then come back to the rationale underlying such proposals.

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-- Chemical Weapons: On December 4, 1985, Canada presented to the United Nations Secretary-General a "Handbook for the Investigation of Allegations of the Use of Chemical or Biological Weapons". The Handbook, which was tabled in the Conference on Disarmament in April 1986, is a result of a study by Canadian scientists and officials and represents a practical contribution to the investigation of allegations of non-compliance with existing agreements relating to chemical weapons. In May of this year Canada made available to the international community further results from its on-going research into the verification of CW use in the form of a report entitled: "Verification: Development of a Portable Trichothecene Sensor Kit for the Detection of T-2 Mycotoxin in Human Blood Samples". This report describes a project undertaken as a case study to better understand the technical problems involved in developing appropriate sensors for a team investigating allegations of the use of a "novel" CW agent. An operational kit would be used to screen blood samples in order to reduce the number of samples which must be sent to laboratories for more detailed testing.

Canada will shortly be making available further research relating to procedures for investigating CW use."



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-- Comprehensive Test Ban: On February 7, 1986, the Canadian government announced its decision to spend \$3.2 million over three years to upgrade the Yellowknife Seismic Array as a major Canadian contribution to research into monitoring an comprehensive test ban treaty (CTBT). Yellowknife, in the Canadian Northwest Territories, is recognized as a unique and sensitive location for monitoring global seismic events including underground nuclear tests. The programme to update and modernize the Yellowknife Seismic Array will enable Canada, using the best technology available, to contribute to an international system which one day may constitute an essential monitoring element of a negotiated CTBT. In October 1985, a two-year research grant was awarded to the University of Toronto to examine the effectiveness of using regional seismic data, and in particular high-frequency seismic waves, to discriminate between earthquakes and underground nuclear explosions, including those conducted in decoupled situations. And in October of last year, Canada hosted a technical workshop for seismic and data communications specialists from 17 countries to discuss the exchange of seismic waveform data. This work has been made available to the Conference on Disarmament.

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-- Outer Space: Canada has investigated some aspects of the technical requirements that might exist for verifying a multilateral agreement to control space weapons. Under the "PAXSAT A" study, as it is called, the practical feasibility of the practical application of space-based civilian remote sensing techniques to verify an outer space treaty has been examined. "PAXSAT B", on the other hand, would involve space-based verification of a regional conventional weapons agreement.

Canada recently hosted an Outer Space Workshop in Montreal for delegations to the Conference on Disarmament. This Workshop addressed, in part, the question of verification and it involved discussion of Canada's PAXSAT research.

These two feasibility studies, and their presentation in Montreal and in Geneva, have been warmly welcomed and extremely favourably received by the members of the Conference on Disarmament in Geneva who participated in the Montreal Outer Space Workshop.

-- Non-Proliferation of Nuclear Weapons: Outside the Canadian Government's Verification Research Programme, Canada has developed an extensive programme aimed at developing and improving the verification mechanisms of

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the Non-Proliferation Treaty. As both a user and an exporter of nuclear power reactors and nuclear materials, Canada recognizes that the IAEA must have strong and viable techniques and the active cooperation of the member states.

In support of the objective of the IAEA to develop an improved system of safeguards suited to the Canadian CANDU reactor, Canada established the "Canadian Safeguards Research and Development Program" in 1978 which is designed to assist the Agency in the development of safeguards systems for CANDU reactors. The program has received a five-year budget of approximately \$11 million and work under this auspices is already well-advanced.

-- Generic Research: The Canadian government has undertaken a number of research projects to examine general verification principles and techniques. A major element in this generic research has been to amass and review what has been said and reported on this issue by governments, international bodies and academics. As a result, I think it is fair to say that we have developed a unique data base on the subject of verification. To underline Canada's commitment to realizing progress in discussions and research into verification, Canada has

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made widely available, a three volume document compiling almost 700 summaries and academic papers on the subject of arms limitation and disarmament verification. This reference tool will, we hope, assist members of the United Nations as well as serious researchers in their consideration of this topic.

The control of nuclear weapons raises bilateral issues between the superpowers but the issue is also one which affects the vital interests of many other countries - perhaps all - thus necessarily multilateral as well as bilateral negotiation. Canada wholeheartedly supports the dialogue between the superpowers on weapons issues -- concerning strategic nuclear forces, intermediate range nuclear forces and nuclear tests. The Canadian Government regularly makes its views known not only within the NATO Alliance, in bilateral discussions with both the USA and USSR, but through Canada's active participation in multilateral negotiations on nuclear issues particularly in relation to non-proliferation and a comprehensive test ban. It is Canada's position that while such multilateral activities should in no way undermine, detract from or interfere with the on-going bilateral discussions and should be supportive of them, they are nonetheless a vital part of the arms control process which cannot be relegated to a secondary or subsidiary status.

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There are encouraging signs, in spite of frustrations and failures of recent years. Like Canada, many members of the international community have come to recognize the importance of the issues of verification and compliance. It has gradually become a less and less controversial issue, as we have succeeded in developing common ground on the practical problems entailed. It is not without significance as evidence of this progress, that at its 1986 session, the United Nations adopted two resolutions, one dealing with "verification in all its aspects" (41/86 Q) and one with compliance (41/59 J). The fact that both resolutions were adopted without a vote underscores the growing recognition by the international community that, for arms control and disarmament agreements to be effective, they must provide for adequate measures of verification. The resolution on verification (41/86 Q) was adopted by the General Assembly for the second consecutive year. Both verification resolutions, it is worth noting, were initiated by Canada. In the case of the 1986 resolution, there were twice the number of co-sponsors, including representatives from the Western States, Eastern Europe and the non-aligned movement.

These concepts have long since found very practical applications in the Geneva Conference on Disarmament, the only standing multilateral negotiating forum concerned with global disarmament issues, Canada has

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undertaken important initiatives in that forum on verification and compliance, particularly in the chemical weapons negotiations, on the Nuclear Test Ban issue and on the Prevention of an Arms Race in Outer Space.

What do we mean by verification and compliance? Clearly these two subjects are intimately interwoven; however, there are aspects of each which are important to distinguish. Compliance is descriptive of the behaviour of a party in abiding by and fulfilling its arms control obligations, whereas verification refers to the process of determining whether the behaviour of a party is consistent with those obligations. Verification is primarily an information gathering exercise although it involves some judgemental elements regarding the analysis of the data collected. A point to note is that while the verification process may be contemplated in a particular instance when it is demonstrated that a party's behaviour is inconsistent with its obligations, as in the case of poison gas in the Gulf War, the related and equally important political process of dealing with non-compliance is just beginning, as that continuing conflict seem to illustrate all too clearly.

It should be noted that the verification process does not in itself address the issue of sanctions against misbehaviour. No sanction or penal function is necessarily involved. This touches on perhaps the ultimate, and most difficult and sensitive problem in the whole arms control and

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disarmament process -- the political management of the consequences of demonstrated non-compliance. The role of the verification process in this context is limited to providing, albeit in the most comprehensive and objective way possible, relevant data about behaviour. Even so, it can prove invaluable in limiting the scope for unjustified allegations and in providing a basis for reasoned and factually-based decisions by the international community in instances where non-compliance appears to have been demonstrated.

The question of what to do when a party is found to be not observing its commitments, which might be termed the "enforcement" problem, is one which, as this audience knows well, plagues international law in general, even more than it does on the domestic plane, where breaches of the law may also occur and go unpunished. (The recent jury decision on the Goetz case provides food for thought.) A further complicating factor in the case of arms control agreements, is that it is often very difficult to establish definitely that a violation has occurred should there be ambiguity of evidence and/or imprecision in the nature of the obligation in question. Even at the best of times, compliance disputes have the potential to become highly politically-charged exercises. On this last issue, the role of lawyers as draftsmen is clear but the traditional role of the lawyer in dispute settlement is also highly relevant. Both these considerations argue for care in drafting arms control obligations and the design, as much as is possible, of a verification mechanism that can provide clear and definitive evidence.

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Arms control agreements frequently include mechanism for handling complaints about non-compliance. The Antarctic Treaty, which demilitarizes the Antarctic, provides a classic example. As already indicated, the 1925 Geneva Gas Protocol contains no such process. However, just such verification processes are at this very moment the subject of extensive negotiations in Geneva in the Conference on Disarmament where the chemical weapons convention is one of the most important items on the agenda and certainly the one on which most progress is being made. I am not, incidentally, aware of any instance in which the USSR has insisted on more stringent verification proposals than those of the USA on chemical weapons as suggested by one speaker yesterday morning. Verification procedures such as those in existing agreements and those under negotiation in Geneva require explicit agreement by the parties to air and resolve such complaints. They may take a variety of forms including a simple undertaking to consult and cooperate, the establishment of a more formal consultative commission, and the referral of complaints to the consideration of existing international institutions, as in the case of the Biological Weapons agreement and of the Antarctic agreement. One possibly useful concept is the idea of separating international data collection, i.e., fact-finding, which would take place in response to a complaint, from its interpretation. The ENMOD Treaty took a step in this direction. Another potentially useful idea is to include a series of escalating steps in terms of international consideration of complaints. It seems to me that these quasi-judicial processes are too important for the lawyers to leave them to the political and military technicians.



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It must be conceded that while such procedures are important and can be further developed and improved, in practice it is difficult to generate authoritative and effective actions by the parties to the treaty or the international community with respect to violators. To say that the law is in a primitive stage of development is to understate the problem. The danger is that in the final analysis, the preferred - and sometimes the only - option open to a party placed at risk by another's non-compliance may be to withdraw from the treaty and to prepare some counter capability to offset the advantage obtained by the violator. This is not an acceptable situation. It presupposes an overriding need to negate any advantage achieved by non-compliance. It also underlines the importance, for example, of ensuring sufficient advance warning of violations, through appropriate verification mechanisms. This ultimate option of withdrawal is a very serious one indeed and, if such action is to avoid carrying at the least serious political consequences and at the worst much more serious consequences, it would have to be demonstrably justified beyond reasonable doubt that violations have occurred. That phrase "reasonable doubt" seems to have legal connotation doesn't it. When we think of the massive amount of jurisprudence domestically on the issue and the paucity of jurisprudence on it on the international plane, the nature and extent of the problem becomes clear.

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There are other extremely important points to be borne in mind concerning verification. Verification can be said to perform several functions, but there would seem to be four of particular importance: deterrence of non-compliance, confidence-building, removal of uncertainty and treaty assessment. Through its primary role in holding out a credible prospect of detection on non-compliance with an agreement, verification serves to protect the security of all the parties to an agreement. When adequate and effective verification increases the risk of detection that a prospective violator would face, the temptation to seek advantage by violating an agreement is reduced and deterrence is enhanced. There are political costs to a violator in being exposed.

Second, verification also seeks to demonstrate compliance not merely non-compliance or possible non-compliance. Continued evidence or demonstration of compliance with an agreement can develop and maintain confidence in the intentions of other parties. The element of good faith is central to the law of treaties as a whole, and arms control in particular, applicable both to the fulfilment of treaty obligations and their interpretation. This increased trust based on demonstrated good faith could have positive benefits for the conduct of relations between the states in question as well as for international relations generally. Equally so, the cynical assumption of the automaticity and inevitability of bad faith on the part of the other side negates the whole arms control process.

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Verification has a third role, however - perhaps the most important - that of clarifying facts and removing uncertainty, where doubts arise. When an ambiguous activity is detected, an effective verification system will counteract false alarms by producing clear evidence of compliance. Incidentally, if uncertainty continues with respect to an activity's legitimacy, it may be an indication of an inadequacy in a treaty provision, as much as an indication of bad faith-here again the role of law and the lawyers in ensuring against such laucunae.

Finally, verification can provide a means of surveillance and appraisal of the effectiveness of the treaty itself. By providing a broad range of objective, operationally relevant data, verification provisions can provide an invaluable information base for the continuing review and assessment of a treaty's operation in practice and, perhaps, point the way to possible changes in either the substance of the treaty and/or its manner of application, as well as providing useful and instructive guidelines for future treaties.

What standard of effectiveness should be demanded of any verification system? Must a verification mechanism be so fool-proof as to be capable of detecting without any shadow of a doubt every possible violation? Does adequate

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verification mean 100% certainty of detection? Clearly, no verification can be totally fool-proof. The question is, does it need to be? - particularly on such subjects as CW and CTB where ambiguous events are inevitable. An appropriate standard that I would suggest for your consideration is the following: a verification mechanism must be able to detect, beyond a reasonable doubt, any violation of an agreement that would permit a state to acquire or clearly indicate an intention to acquire a military capability threatening to the national security of any other party. Such a presupposes timely verification. The verification system must be capable of detecting a violation early enough so that innocent parties would be able, if necessary, to respond appropriately to negate any advantage that a violator or party alleging violation - might gain.

A number of questions are raised by the adoption of such a standard for verification. First, it means that a significant degree of intrusion is likely to be required in order to gather the necessary evidence. While methods of verification should seek to minimize the amount of such interference, it is unavoidable that some intrusion will occur. It is just such intrusive means of verification which is most sensitive. Yet cannot be inappropriate. An arms control agreement constitutes in essence a contractual exchange: in return for limitation on military options,

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of adversaries, greater information about relevant military activities of all parties must be provided for verification purposes. In effect a certain constraint on the exercise of sovereignty, present in all treaties including the UN Charter, self-imposed by the acceptance of an agreement, is compensated for by an increase in security. The real trade-off is that arms are renounced or destroyed in return for treaty guarantees -- I nearly said "merely" treaty guarantees, for that is how some see them. The essence of the trade-off, of course, is the additional security provided to each party by the proven renunciation or reduction of the arms of other parties -- provided there can be adequate assurances that this will occur.

A second point arising from adopting the above standard of effectiveness for verification is that not all violations may be conclusively detected. Some argue that a verification system should be capable of detecting any act of non-compliance no matter how insignificant. Verification in this sense serves as a means of measuring the political value that a party attached to a treaty and non-compliance becomes a measure of how much trust can be placed in the behaviour of that country with respect to the treaty in question as well as other agreements. If a country does not adhere to all the details of treaties, however insignificant, will the country always adhere to the significant provisions? To adopt such an approach places a very heavy burden on the treaty - and on its verification mechanism. Taken to extreme, it can be a pretext for refusing to negotiate arms control agreements.

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It is important to keep a reasonable perspective concerning the importance of an act of non-compliance. In an ideologically complex world, all instances of non-compliance may have to be addressed, if only because of their impact on confidence between countries; but the significance attached to each incident should vary depending on the nature of the non-compliance involved. The response must be proportionate to the act of non-compliance. (I hope this does not open up a further discussion of proportionality.) The pattern of non-compliance is also important here: a long series of violations, each quite trivial in itself, has quite a different connotation from that of one or two seemingly isolated ones. Properly designed verification systems can go a long way to provide full and appropriate information on which to make judgements on the significance of violations, but still it will be political authorities that make the final assessment. Such authorities should, of course, have access to some legal as well as scientific, technical, political and military advice.

Some have suggested that there is a need for a general International Verification Organization (IVO) with responsibility for monitoring compliance with a number of existing or prospective multilateral agreements. Such proposals have sometimes taken the form of an international body responsible for a particular type of verification

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technology such as satellites. Other states have proposed an international verification body in the context of monitoring specific agreements. Such a body could be created for the verification as a chemical weapons convention. Proposals for international bodies to verify specific agreements often look to the International Atomic Energy Agency as a working model of such an arrangement. Such bodies provide a practical solution to verification questions and could perform very useful work in the monitoring of certain agreements. They could also serve as a stepping stone towards the eventual creation of a general IVO, should the international community agree on the desirability of establishing such an institution or institutions.

The Canadian government continues to support the development of technically expert, treaty specific verification mechanisms when this is appropriate. Such bodies can perform valuable data collection and analysis functions. The competence and functions of these mechanisms, however, must be explicitly accepted by all the parties to the agreements to which they are relevant. At some future time, it may be that the parties of several treaties might agree to merge several verification organizations into one. It is the Canadian position, however, that it is not practical or expedient to try to create a verification organization which could act independently of the wishes of

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the parties to treaties, that would seek to be an arbitrator or umpire in compliance disputes. Canada has not sought to pass judgement about the compliance disputes concerning agreements to which Canada is not a party, as we neither possess the appropriate data to make such judgements, nor the legal right to do so. Because our vital security interest may be engaged by such actions, we do urge all countries to observe the obligations they have undertaken as part of arms control agreements. Unambiguous compliance serves to build confidence between states which can lead to further arms control agreements and improvements in international relations in general.

The Canadian approach to verification is that it is a critical factor in the arms control process. The Canadian Government has devoted substantial resources to examining this subject in a practical, constructive and innovative way that, we hope, will contribute to progress towards developing meaningful arms control and disarmament agreements. One of the principles that underlies our Verification Research Programme is that verification can be profitably examined independent of specific treaty contexts. While the verification provisions of a particular treaty must be determined by the purposes, scope and nature of that agreement, much valuable work on general principles, provisions and techniques can be done well before actual



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negotiations begin. The work of the United Nations Disarmament Commission (UNDC) -- a deliberative body -- which recently began examining the question of "verification in all its aspects" is an example of a potentially profitable international exercise that could contribute to the development of guidelines and procedures to assist arms control negotiators. Canada this year chaired the Working Group on verification at the UNDC, where it was an agenda item as a result of a Canadian initiative.

As already indicated, Canada has also undertaken considerable research work of a more specific nature relating to verification. These activities are often more widely known abroad for their value, than at home. In line with Canada's responsibilities, this work has focussed on multilateral verification.

#### CONCLUSION

We live today in an imperfect world, too frequently characterized by suspicion, uncertainty and lack of trust. Regrettably, in the history of international affairs, this lack of trust has all too often been justified by the actions of some countries. We must, therefore, be cautious where important questions of national security are involved. We must seek to ensure that compliance with arms control

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undertakings is adequately verified and that non-compliance is reliably detected. Arms control is central to the development of a secure and peaceful world. It is a prerequisite to the achievement of the rule of law on the international plane. It is incumbent on all of us, lawyers and non-lawyers alike, to seek to contribute to this process.

The search for assured compliance is not always an easy one. It is, nevertheless, an ongoing search that must take place throughout the life of arms control and disarmament agreements. If an agreement significantly affects the security of parties, it is only to be expected that they will want assurance that their security is not placed at risk by the non-compliance of other parties. Such assurance is best achieved by expressly providing for adequate and effective verification mechanisms in agreements.

Verification should also help to meet the need to institutionalize, in the context of relations between states, the same kind of accepted rules, procedures and expectations as those that govern the conduct of relations among individuals in all civilized societies. Such rules and procedures do not presume bad faith or malevolent intent on the part of others, but they allow for such a possibility as well as provide a framework in which unjustified accusations can be authoritatively rebutted, misunderstandings clarified and resolved, and actual non-compliance objectively established.

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Canada's Verification Research Programme seeks to directly address these important tasks. As Canada's Secretary of State for External Affairs, the Right Honourable Joe Clark stated before the House of Commons on 21 October 1986:

"Many of the persisting obstacles to negotiating progress arise directly from a lack of trust. The priority attention Canada has given to verification issues in particular attacks this question directly. Arms control agreements alone do not produce security; confidence in compliance produces security. Verification justifies that confidence."