
PART I

THE INTERNATIONAL FRAMEWORK

Treaty Regimes and International Law

JOHN BURROUGHS

RECOMMENDATIONS OF THE WMD COMMISSION

Disarmament and non-proliferation are best pursued through a cooperative rule-based international order, applied and enforced through effective multilateral institutions, with the UN Security Council as the ultimate global authority. (*Weapons of Terror*, 18)

There is a need to revitalize and strengthen *multilateral cooperative* approaches, because of both their legitimacy and their potential effectiveness in addressing WMD threats. (*Weapons of Terror*, 57)

Governments know that treaties are indispensable. They see many multilateral treaties as an essential part of a commonly agreed and commonly managed world order, which most want to strengthen. The Commission supports that view. (*Weapons of Terror*, 167)

Global norms and treaty regimes play an indispensable role in controlling and eliminating nuclear, biological, and chemical (NBC) weapons. Norms are rule-framed expectations of conduct grounded in patterns of behavior, practical considerations, morality, policy statements and political commitments, and law including requirements set out in treaties. In the case of NBC weapons, law is at the core of the relevant norms. The possession and use of biological and chemical weapons is prohibited by the Biological Weapons Convention (BWC) and Chemical Weapons Convention (CWC). For almost all states, the possession of nuclear weapons is prohibited by the Nuclear Non-Proliferation Treaty (NPT), and their use is at least generally prohibited by international law as set forth by the International Court of Justice. The regimes give institutional life to the norms through regular meetings of states in review processes, and in the case of the CWC and the NPT, through implementing agencies engaged in monitoring compliance, the Organization for the Prohibition of Chemical Weapons (OPCW), and the International Atomic Energy Agency (IAEA). States around the world participate in these processes, monitoring systems, and organizations and thus commit in-depth to the rules on non-use and non-possession of NBC weapons.

One of the greatest strengths of *Weapons of Terror* is its clear explanation

of the importance of norms and regimes. It also effectively conveys that regimes work when there is reciprocity and cooperation. For example, for non-nuclear weapons states to accept enhanced inspection powers of the IAEA to monitor civilian nuclear power programs, they need to see substantial movement on the disarmament side of the regime. The report is refreshingly frank about the lack of reciprocity in the nuclear sphere, stating that it is “easy to see that the nuclear weapon states parties to the NPT have largely failed to implement” their NPT nuclear disarmament obligation.¹

Advantages of Treaty Regimes

The WMD Commission cogently explains why states rely on treaty regimes, observing that:

- Multilateral treaties have emerged over a long period of time as the principal instrument that the world community uses to create clear rules and standards designed to bind all states.
- Participation in the negotiation of a treaty of universal reach, or joining such a treaty, allows a state to feel ownership of and responsibility for the rules that are adopted....
- The procedure of national consent may involve both the executive and the legislative branches of a government, thereby anchoring the international rules more firmly in the national consciousness.
- Rights and obligations are defined by the treaty. A measure of stability is created when states parties are able to predict that other parties are likely to conduct themselves in accordance with the obligations they have assumed. At the same time there is some protection against arbitrary demands and accusations.
- The treaty may offer a basis for monitoring, verification, inspection, resolution of disputes or other action, such as periodic review and follow-up.²

A book released in 2003, *Rule of Power or Rule of Law?*,³ the product of a collaboration between the Institute for Energy and Environmental Research and the Lawyers’ Committee on Nuclear Policy, identifies related benefits, explaining that:

Treaties by their very nature involve some sacrifice of sovereignty. In exchange, treaty regimes contribute to national and global security in important ways, including by:

- articulating global norms;
- promoting and recognizing compliance with norms;
- building monitoring and enforcement mechanisms;
- increasingly the likelihood of detecting violations and ef-

fectively addressing them;

- providing a benchmark for measurement of progress;
- establishing a foundation of confidence, trust, experience, and expertise for further progress;
- providing criteria to guide states' activities and legislation, and focal points for discussion of policy issues.⁴

The role of international law. Reliance on treaty regimes and global norms—on international law—is, or at least should be, greatly bolstered in the United States, a country historically dedicated to the rule of law, by the fact that treaty-based law is part, as the Constitution says, of the “law of the land.” Article VI, clause 2 of the Constitution provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; *and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land;* and the Judges in every States shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. [Emphasis supplied.]

In addition to treaty-based law, the Supreme Court has held, customary international law is “part of our law.”⁵ Customary law is based on the practices of states accompanied by a sense of legal obligation, and in some cases also reflects fundamental humanitarian and moral factors. A classic example is the rule of diplomatic immunity; it was rooted in the practice of states of protecting other countries' representatives long before it was codified in agreements. An example relevant here is the ban on use of biological weapons, contained in the 1925 Geneva Protocol and reinforced by the Biological Weapons Convention. For states not party to either of those agreements—and for decades the United States did not ratify the Geneva Protocol—it is universally accepted that they are nonetheless bound by the ban. The International Court of Justice relied on customary international law—founded largely on treaties with broad participation—for its conclusion that the threat or use of nuclear weapons is generally illegal. Like the United States, all states have mechanisms, which may vary substantially, for integrating treaty- and custom-based international law into their national legal systems.⁶

The case for employment of treaty regimes and global norms to address the multiple security challenges faced by the world is thus a strong one, based both upon a pragmatic view of the need for effective cooperation and the force of the appeal to law. Following the dismantlement of the Berlin Wall and the breakup of the Soviet Union, hopes were high that this approach would be expanded to lower the risks posed by nuclear, chemical, and biological weapons and that other major initiatives would be taken to build global security. During the first decade of the post-Cold War era, those expectations were partially met. The NPT was indefinitely extended in

1995 and negotiations on the Comprehensive Test Ban Treaty (CTBT) were completed in 1996.

Negotiations on the Chemical Weapons Convention were concluded in 1993 and it entered into force in 1997. By 2001, seven years of negotiations by states parties to the Biological Weapons Convention had yielded a draft protocol that would have added a verification regime to the treaty. There were also important steps taken outside the realm of nuclear, biological, and chemical weapons. Notably, the Rome Statute of the International Criminal Court was negotiated in 1998 and entered into force in 2002. By the first decade of the 21st century, however, the surge of multilateral efforts had peaked and indeed had been rolled back.⁷ The United States, as *Weapons of Terror* makes clear, bears the lion's share of responsibility for this development.⁸

The Erosion of Treaty Regimes

Chemical Weapons Convention. The CWC is the most far-reaching disarmament measure ever put into force. It bans the development, acquisition, transfer or use of chemical weapons, requires the destruction of all stockpiles, and obligates states parties to declare chemicals and production facilities that could be used in a manner prohibited by the convention. Declared chemicals and facilities are subject to routine inspections. The CWC was championed by the senior George Bush, and its negotiation at one time seemed a harbinger of a robust multilateralism that would be applied to control of biological and nuclear weapons as well. Instead, the hard-fought Senate battle over ratification of the CWC in 1997 was a signal that the multilateralist agenda was in serious trouble. The Senate eventually did approve ratification, but U.S. compliance is subject to restrictions imposed first by the Senate in the ratification package and then by implementing legislation passed by Congress. The restrictions include a narrowing of the facilities subject to declaration and inspection; prohibition of transfer of samples outside of the country for analysis; and a presidential right to refuse inspections on national security grounds. The CWC does not permit these limitations and contains thorough safeguards for the protection of confidential information. It is in the U.S. interest to support effective inspections in order to verify compliance. But the U.S. restrictions, not surprisingly, are being imitated by other countries, including India and Russia. Despite these defects in the developing regime, it is generally considered a major success. As *Weapons of Terror* explains, the regime does face significant challenges. Among them are ensuring that destruction of stockpiles is completed in a timely fashion and preventing the development and deployment of incapacitating—but often lethal—chemical agents.⁹

Biological Weapons Convention. The BWC was ratified by the United States in 1975 and entered into force that same year. It prohibits state parties from developing, producing, stockpiling, acquiring or retaining biological agents or toxins when they have no justification for defensive or other peace-

ful purposes. It also flatly prohibits “weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.” But the BWC is only a bare ban on possession, lacking any provisions for declarations formally accounting for research facilities and destruction of stockpiles or for inspections to verify compliance. In negotiations beginning in 1995, BWC member states sought to remedy this deficiency by negotiating a comprehensive supplementary agreement known as a protocol.

In July 2001, the Bush administration successfully disrupted the nearly completed negotiations.¹⁰ Then, in a remarkable display of its intense opposition to multilateralism, the administration continued to oppose the protocol despite the September 11, 2001 attacks and the subsequent anthrax attacks. In November 2001, it blocked consideration of more limited international agreements on verification mechanisms. Instead, the administration advocated that states voluntarily implement national measures like adoption of laws criminalizing biological weapons-related activities and promulgation of security standards for handling of pathogens. For the most part, the proposals were already on the international agenda. One reason for U.S. opposition to the protocol may be a reluctance to open the U.S. “biodefense” program to international scrutiny.¹¹ As part of that program, the United States constructed a model bio-bomb and weaponized anthrax,¹² activities which appear to violate the BWC ban on production of such weapons. Those and other projects, such as work on a genetically enhanced super-strain of anthrax, have been carried out in secret, making it impossible for other states to assess whether the projects comply with the BWC.

In rather marked contrast to the strong positions it takes regarding nuclear weapons, *Weapons of Terror* does not call for a renewed effort to negotiate an agreement establishing a verification regime, though it does not preclude this either. Rather it says more generally that a “multifaceted approach is required—one that strengthens the multilateral normative and legal prohibition regime, while linking it with other kinds of governmental and non-governmental, national and international measures.”¹³ Nor does the report address the massive U.S. “bio-defense” program (*see box*).

Other multilateral agreements. Considered by many to be the most significant contribution to international law since the creation of the United Nations at the end of World War II, the Rome Statute of the International Criminal Court establishes the first permanent global tribunal to prosecute crimes against humanity, genocide, and war crimes, as well as aggression once agreement is reached on its definition. Together with associated improvement of capabilities in national legal systems, the court will deter the commission of large-scale atrocities, including those perpetrated with nuclear, biological, and chemical weapons. Although President Clinton signed the Statute at the very end of his term, in an unprecedented move the Bush administration notified the United Nations that the United States does not intend to ratify it, and on multiple fronts is working to block the Court’s jurisdiction over U.S. nationals.

The U.S. Biodefense Program

Since the terrorist attacks of September 2001, the Bush administration has dramatically increased spending on biodefense research and capabilities.¹ These increasingly secretive biodefense programs threaten to undermine the integrity of the 1972 Biological Weapons Convention (BWC), pose significant risks to local communities, and develop and spread knowledge about the weaponization of the most deadly and incurable biological agents known.² From 2001 to 2006, the United States has spent \$36 billion on biodefense programs.³ The annual budget for these programs, about \$8 billion spread among 11 different government agencies, now exceeds annual spending for nuclear warhead maintenance, research and development—which is about \$7 billion, not including delivery systems, command and control, etc.

The Bush administration's 2004 policy statement, "Biodefense for the 21st Century," describes the continuing development of "an aggressive research program to develop better medical countermeasures" and the construction of new biodefense laboratories.⁴ The new labs include at least 20 facilities given the highest containment designations, biosafety level 3 (BSL-3) and 4 (BSL-4). Such labs create and conduct research on the most virulent biological warfare agents.⁵ The BSL-4 labs are designed to conduct research on pathogens for which there is no known cure, such as Ebola or Marburg.⁶ The increase in the number of these labs, which house facilities such as aerosol chambers where deadly agents are tested on animals, increases the risk that agents will escape containment and threaten local communities.

Although intended to develop biodefense countermeasures, these laboratories and programs inevitably train scientists and engineers in biowarfare techniques, and threaten to erode international mechanisms designed to guard against biological weapons. Further, the "de facto" creation of "biowarfare pathogens," admitted by a former Homeland Security assistant secretary for science and technology,⁷ blurs the line between offensive and defensive biological weapons research, and is likely incompatible with the provisions of the BWC. The lack of transparency in these programs and the construction of BSL-3 and -4 labs at restricted access nuclear weapon laboratories effectively makes U.S. biodefense facilities unaccountable under the treaty. Barbara Hatch Rosenberg, chair of the Federation of American Scientists' working group on the BWC, said the choice of nuclear weapon labs as BSL sites "makes

Continued on next page

it possible for the government to say we can't allow any kind of inspections or visits from outside the government because nuclear security depends on it.”⁸

Also troubling is that the U.S. model has served as the foundation for a “global biodefense boom” where an increasing number of governments are building high-security labs in order to study deadly biological agents.⁹ This has led to fears that other countries might seek to exploit these same loopholes and develop latent bioweapons capabilities under the guise of “defensive” research programs. The Bush administration’s rejection of verification for the BWC further undermines the capacity of the international community, and the U.S. government, to assess whether such programs are actually masking the development of biological weapons. Absent increased transparency in the field of biodefense, best attained through an international inspection regime, the proliferation of these types of programs could paradoxically decrease global security against state and terrorist use of biological weapons.

-
- 1 “Federal Funding for Biological Weapons Prevention and Defense: Fiscal Years 2001 to 2007,” Center for Arms Control and Non-Proliferation, Washington, D.C., 2006 (“*Federal Funding*”).
 - 2 See Joby Warrick, “The Secretive Fight Against Bioterror,” *Washington Post*, July 30, 2006 (“*Warrick*”).
 - 3 *Federal Funding*, p. 1.
 - 4 “Biodefense for the 21st Century,” The White House, 2004.
 - 5 *Federal Funding*, p. 3.
 - 6 Marylia Kelley and Jay Coghlan, “Mixing Bugs and Bombs,” *Bulletin of the Atomic Scientists*, September/October 2003.
 - 7 Quoted in *Warrick*.
 - 8 *Id.*
 - 9 *Warrick*.

The list of security-related multilateral agreements rejected by the United States goes on. The Clinton administration refused to sign the 1997 Mine Ban Treaty prohibiting anti-personnel landmines. However, President Clinton developed a plan for eventual U.S. participation. Reversing that policy course, the Bush administration has announced that the United States will not join the treaty. The Bush administration rejected the 1997 Kyoto Protocol aimed at taking initial steps to reduce emissions of carbon dioxide which contribute to global warming. The severe or catastrophic effects projected from climate change could negatively impact security, not only by affecting livelihoods and settlement patterns, but perhaps also by causing conflict within or among nations due to refugee flows.

Nuclear Non-Proliferation Treaty. Finally, despite the rich history of U.S.-initiated or supported nuclear arms control treaties, U.S. resistance to law-governed multilateralism extends to the nuclear sphere, as the United States rejects commitments undertaken in the Nuclear Non-Proliferation Treaty and its review process. It has rejected ratification of the Comprehensive Test Ban Treaty, implementation of the START process, and preservation of the ABM Treaty; failed to apply the principles of verification, irreversibility, and transparency to the U.S.-Russian reductions agreed in the 2002 Strategic Offensive Reductions Treaty; and expanded, rather than diminished, the role of nuclear weapons in the U.S. military posture. The nature of commitments undertaken in the NPT context and the U.S. record with respect to them are detailed in sections 1.2 and 2.1.

U.S. Denigration of International Law

As the world's leading military and economic power and key architect of post-World War II international institutions, and as a progenitor of the concept of the rule of law, the United States is uniquely positioned to shape the development of the framework formed by the NPT, CWC, BWC, the United Nations Charter, and other security-related treaties. As recounted above, despite generally cooperative relations among major powers and the new awareness of the terrorist threat, the United States recently has refused to comply with commitments made under existing treaties or to enter into new agreements. Instead, the United States increasingly relies upon other modes of exerting power and influence. Among them is the doctrine of preemptive (really preventive) war against states with links to terrorism that seek to acquire NBC weapons, employed as a rationale for the invasion of Iraq without explicit Security Council authorization, and the related doctrine of "counterproliferation" envisaging military action against NBC weapons capabilities (*see section 2.2*). Accompanying steps are: the formation of an ad hoc coalition of states (the Proliferation Security Initiative) prepared to interdict disfavored states' shipment of NBC weapon-related equipment, materials, and delivery systems; Security Council imposition of rules (resolution 1540) aimed at preventing acquisition of and trafficking in NBC weapon-related items by terrorists and other non-state actors (*see section 1.3*); and a G-8 program aimed at securing NBC weapons and materials in Russia and perhaps other countries.

Weapons of Terror captures the essence of this sharp turn in U.S. policy:

Some of the current setbacks in treaty-based arms control and disarmament can be traced to a pattern in US policy that is sometimes called 'selective multilateralism'—an increased US scepticism regarding the effectiveness of international institutions and instruments, coupled with a drive for freedom of action to maintain an absolute global superiority in weaponry and means of their delivery.

The US is clearly less interested in global approaches and treaty making than it was in the Cold War era. In the case of Iraq, the US chose in 2003 to rely on its own national intelligence and to disregard the results of international verification, even though the latter turned out to be more accurate. More importantly, the US has been looking to what is called ‘counter-proliferation’—a policy envisaging the unilateral use of force—as a chief means to deal with perceived nuclear or other WMD threats.

As seen in the war to eliminate WMD in Iraq, and in official statements regarding North Korea and Iran, the US has claimed a right to take armed action if necessary to remove what it perceives as growing threats, even without the authorization of the UN Security Council.

The overwhelming majority of states reject the claims by the US or any other state to such a wide licence on the use of force....¹⁴

The new U.S. approach does *not* imply the rejection of working together with other countries, often allies, on matters of security (*see box*). But it does centrally involve the rejection or minimizing of institutions and norms of near-universal scope, like those based on the treaties on NBC weapons. An accompanying theme has been the downgrading, even the deriding, of international law. John Bolton, U.S. ambassador to the United Nations from 2005 to 2006, has been the foremost exponent of this theme. He has expressed himself most virulently when out of office, as in this 1999 statement:

It is a big mistake for us to grant any validity to international law even when it may seem in our short-term interest to do so—because, over the long term, the goal of those who think that international law really means anything are those who want to constrain the United States.¹⁵

While Bolton and others are not so undiplomatic when in the government, the sentiment accurately conveys a key tenet of present U.S. policy. Sorely lacking is any appreciation of international law and institutions as means for working with other nations in a cooperative, problem-solving approach that can redound to all nations’ benefit. Some of the consequences of this nihilist approach to international law have been visible to all in the Bush administration’s policies of torture and indefinite detention without trial, in stark violation of the Geneva Conventions and other humanitarian/human rights international legal instruments as well as customary international law.

Bolton and others have also criticized international law on the ground that it is not enforceable.¹⁶ Addressing this criticism is a major concern of the WMD Commission. The Commission observes that most states accept the need for law, and honor and implement their obligations concerning NBC weapons and want to be seen as doing so as respectable, law-abiding members

Selective Multilateralism

The U.S. turn away from global norms, regimes, and institutions has been accompanied both by an increased emphasis on military means of combating proliferation and by increased reliance on initiatives in which the United States works with ad hoc groups of states to accomplish policy aims. Thus the United States has not renounced, and indeed has vigorously pursued, cooperative engagement with selected other countries on matters of security. This is demonstrated by G8 programs, export control arrangements, and the Proliferation Security Initiative.

The United States is spending billions of dollars on a G-8 program aimed at securing nuclear, chemical, and biological warheads and materials in Russia and, to a limited extent so far, other countries.¹ The program builds on the existing U.S.-Russian Cooperative Threat Reduction (“Nunn-Lugar”) program. The Commission views the Cooperative Threat Reduction and G-8 programs in a positive light, and in Recommendation 48 calls for geographical and functional broadening of the latter. The U.S. 9/11 Commission more fulsomely praised the Cooperative Threat Reduction program, emphasizing the importance of preventing terrorists from gaining access to weapons of mass destruction.² In a related development, the 2006 G8 summit on July 15, 2006 announced a “Global Initiative to Combat Nuclear Terrorism,” which would undertake or reinforce cooperation on measures like the “development of technical means to combat nuclear terrorism.”³

The United States also continues to rely heavily on long-established political arrangements with allies and selected other states to restrict or deny exports of technology or materials to non-favored states when the exports would contribute to acquisition of missiles and nuclear, chemical, and biological weapons. Such arrangements include the Missile Technology Control Regime,⁴ the Nuclear Suppliers Group,⁵ and the Australia Group (chemical and biological material and equipment).⁶ The WMD Commission provides a balanced and sound discussion of export controls. It calls them “a valuable part of the overall effort to combat WMD proliferation,” but also notes that critics consider them “exclusive clubs or cartels that have no right to try to dictate global standards,” and that a “growing number of producers of sensitive commodities are not members.”⁷ The Commission envisages a far-reaching reform of export controls, spurred on by the requirements of Security Council resolution 1540. Recommendation 47 calls for the existing export control groups to

Continued on next page

broaden their membership, and for the establishment of a “universal system of export controls providing harmonized standards.” The Commission elaborates that there is a need

to move from a system of control based on barriers to exports to one that addresses all aspects of the potentially dangerous ownership and circulation (both within and between states) of WMD-related goods [that is] grounded in permanent cooperation with the business sector and [requires] proliferation-sensitive transactions to be assessed against universally agreed criteria, regardless of the location of the end-user.⁸

As a provocative extension of the export control regimes, the United States has formed an ad hoc coalition of some 16 states, with cooperation by a total of about 80 countries, known as the Proliferation Security Initiative (PSI). By means including armed interdiction, the states have agreed to prevent disfavored states’ shipment of NBC weapons-related equipment, materials, and delivery systems.⁹ States have the right to regulate commerce within their national jurisdiction and control, for example in a harbor, and to board ships when the “flag state” has given its consent. However, absent Security Council approval or a compelling reason of self-defense, a non-consensual interdiction would violate the established international law principle of freedom of navigation. The United States maintains that questions of permissibility will be addressed on a case by case basis, and that “we do not intend to proceed with interdictions without a clear national or international authority.”¹⁰ Indeed, where interdictions are not *clearly* authorized by existing law, authorization should be sought from the Security Council or another appropriate body. The Commission reserves judgment about PSI, noting that little information has been made available about its application, and that critics “prefer a more multilateral approach, tied more closely to the treaty regimes and the UN Security Council.”¹¹ Former U.S. Secretary of Defense William Perry, a member of the WMD Commission, has observed that it is “wishful thinking to believe that” interdiction could prevent smuggling of a small package of plutonium sufficient to make a bomb.¹²

The U.S. doctrine of military counterproliferation, U.S. emphasis on export control regimes, and the U.S.-led Proliferation Security Initiative represent a sort of selective, political multilateralism,¹³ with a built-in discriminatory approach: some states can be trusted with extremely dangerous materials and devices, others cannot. It

Continued on next page

shows, by contrast, what the United States is turning away from, namely legally binding norms and global institutions that apply universally, based on a conviction that NBC weapons are dangerous in anyone's hands.

-
- 1 "G-8 Adopts \$20 Billion WMD Non-Proliferation Programme," *Disarmament Diplomacy*, No. 66, 2002. The G-8 is comprised of Canada, France, Germany, Italy, Japan, Russia, the United States, and the United Kingdom. See also Richard Lugar, "The Next Steps in U.S. Nonproliferation Policy," *Arms Control Today*, December 2002; Claire Applegarth, "Modest Hike in Threat Reduction Budget," *Arms Control Today*, March 2005; Michael Nguyen, "Albania to Receive Nunn-Lugar Assistance," *Arms Control Today*, December 2004.
 - 2 The 9/11 Commission, "Final Report of the National Commission on Terrorist Attacks Upon the United States," U.S. Government Printing Office, Washington, 2004, p. 381; 9/11 Public Discourse Project, "Report on the Status of 9/11 Commission Recommendations, Part III: Foreign Policy, Public Diplomacy, and Nonproliferation," 2005, p. 3.
 - 3 See G8, "Global Initiative to Combat Nuclear Terrorism: Joint Fact Sheet," 2005. Online at <http://en.g8russia.ru/docs/7.html>.
 - 4 For a description and critique, see Andrew Lichterman, Zia Mian, M.V. Ramana, and Jürgen Scheffran, "Beyond Missile Defense," *International Network of Engineers and Scientists Against Proliferation Briefing Paper*, No. 8, March 2002, pp. 5-6.
 - 5 See Rodney W. Jones and Mark G. McDonough, *Tracking Nuclear Proliferation: A Guide in Maps and Charts*, Carnegie Endowment for International Peace, Washington, 1998, Appendix F.
 - 6 See "Australia Group Adopts New CBW Export Control Guidelines," *Disarmament Diplomacy*, No. 66, 2002.
 - 7 *Weapons of Terror*, pp. 152-153.
 - 8 *Id.*, p. 154.
 - 9 See Paul O'Sullivan, "Chairman's Statement," Proliferation Security Initiative (PSI) meeting in Brisbane, July 9-10, 2003; The White House, Office of the Press Secretary, "Statement on the Proliferation Security Initiative," September 4, 2003; See also Devon Chaffee, "Freedom or Force on the High Seas? Arms Interdiction and International Law," *Science for Democratic Action*, Vol. 12, No. 3, June 2004.
 - 10 U.S. Department of State, "The Proliferation Security Initiative," Background Briefing, *Federal News Service*, September 9, 2003.
 - 11 *Weapons of Terror*, p. 154.
 - 12 William Perry, "It's Either Nukes or Negotiation," *Washington Post*, July 23, 2003.
 - 13 Cf. *Weapons of Terror*, p. 25.

of the international community. By adhering to treaties on NBC weapons, the Commission says, “many states may also want to join the mainstream and help gradually build up a world order that, while demanding restraints for themselves, also gives them a fairly high assurance that others will exercise the same restraints.”¹⁷ Regarding enforcement of obligations, the Commission highlights the power of the Security Council “to mandate or authorize a broad array of measures—from negotiations and recommendations to fact finding, intrusive inspections, economic or other sanctions and full-scale military action.”¹⁸ While the Commission arguably places too much emphasis on the role of the Security Council (*see section 1.3*), on the whole its reasoning is persuasive and indeed could have been more forceful.

First, there is widespread agreement on the importance of respect for law in the international as well as the national spheres. Bill Graham, then Canadian Minister of Foreign Affairs, stated this point well:

Our societies are based on the rule of law, and the sustainable, shared global future we seek must have the same basis, however difficult it may be to obtain universal acceptance of the rules and establish effective means of enforcement.... [W]e do not dispense with domestic law because we know some will defy the law.¹⁹

Second, far more than is commonly understood, states seek to avoid formal international condemnation of their actions, which has significant adverse consequences for their political and economic standing in the world. Further, a range of sanctions is available, including withdrawal of privileges under treaty regimes, embargoes, travel bans, reductions in international financial assistance or loans, and freezing of state or individual leader assets. Issues of non-compliance can also be taken up by international bodies including the IAEA and the OPCW, states parties to treaty regimes acting collectively, the Security Council, the International Court of Justice, which adjudicates disputes among states, and in extreme cases involving individuals’ alleged commission of international crimes, the International Criminal Court as well as national legal systems under the doctrine of universal jurisdiction.²⁰

Recommendation for U.S. Policy

- The United States should respect international law and work to strengthen rule-of-law based cooperative security through the development of effective treaty regimes on nuclear, biological, and chemical weapons.

The Nuclear Non-Proliferation Treaty

JOHN BURROUGHS

RECOMMENDATIONS OF THE WMD COMMISSION

Recommendation 1: All parties to the Non-Proliferation Treaty need to revert to the fundamental and balanced non-proliferation and disarmament commitments that were made under the treaty and confirmed in 1995 when the treaty was extended indefinitely.

Recommendation 2: All parties to the Non-Proliferation Treaty should implement the decision on principles and objectives for non-proliferation and disarmament, the decision on strengthening the Non-Proliferation Treaty review process, and the resolution on the Middle East as a zone free of nuclear and all other weapons of mass destruction, all adopted in 1995. They should also promote the implementation of ‘the thirteen practical steps’ for nuclear disarmament that were adopted in 2000.

Recommendation 3: To enhance the effectiveness of the nuclear non-proliferation regime, all Non-Proliferation Treaty non-nuclear-weapon states parties should accept comprehensive safeguards as strengthened by the International Atomic Energy Agency Additional Protocol.

Recommendation 4: The states parties to the Non-Proliferation Treaty should establish a standing secretariat to handle administrative matters for the parties to the treaty. This secretariat should organize the treaty’s Review Conferences and their Preparatory Committee sessions. It should also organize other treaty-related meetings upon the request of a majority of the states parties.

The Nuclear Non-Proliferation Treaty (NPT) is the only security treaty that permits two classes of members: states acknowledged to possess nuclear weapons and states barred from acquiring them. One hundred and eighty-eight states are members. Only four countries are outside the regime, all with nuclear weapons: India, Pakistan, Israel, and North Korea, the only state to announce its withdrawal.

The NPT strikes a bargain between non-nuclear weapon states, which

are prohibited from acquiring nuclear arms and are guaranteed access to peaceful nuclear technology, and nuclear weapons states, which are obligated to negotiate disarmament. The International Atomic Energy Agency (IAEA) monitors operation of nuclear reactors and other facilities by non-nuclear weapon states with the aim of detecting and thereby preventing diversion of fissile materials (plutonium and highly enriched uranium) for use in weapons. In Article VI, states parties, including nuclear-armed Britain, China, France, Russia, and the United States, agree 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.”

So far as preventing the spread of nuclear weapons, the NPT’s record has been reasonably good. States wishing to retain a nuclear weapons option that initially stayed outside the treaty have eventually joined, among them South Africa, which relinquished its small arsenal, Brazil, and Argentina. Serious efforts to acquire nuclear weapons in violation of the treaty are known to have occurred only in a handful of cases, Iraq, Libya, and North Korea. In addition, Iran failed to report significant nuclear activities to the IAEA over nearly two decades ending in 2003, and is pursuing a uranium enrichment capability that would enable it to fuel nuclear reactors or, should it decide to do so, make nuclear weapons (*see section 3.2*). The vast majority of states have complied with the obligation of non-acquisition, but implementation of the disarmament obligation has been dismal, as explained below and in section 2.1. It is estimated that there were over 38,000 nuclear weapons in the world in 1968 when negotiation of the treaty was completed; today, nearly four decades later, there are two-thirds of that total, about 26,000.¹

The WMD Commission takes a cautiously optimistic approach in assessing the state of the treaty, observing that “two basic ideas at the heart of the NPT continue to have strong international support—that more fingers on more nuclear triggers would result in a more dangerous world, and that non-proliferation by the have-nots and disarmament by the haves will together lead to a safer world.”² Among the problems identified by the Commission, however, are “the failure to make progress towards disarmament” and “breaches of the treaty or of IAEA safeguards obligations by a small number of parties,” namely, the countries mentioned above: Iraq, Libya, North Korea, and Iran.³ The Commission cautions against drawing dire conclusions from the second problem, noting “that that the world is not replete with would-be proliferators nor, as yet, with nuclear-capable terrorists.”⁴ The Commission adds, “As long as relations between the great powers are characterized by cooperation and regional tensions are not heightened, there is probably little reason to fear a collapse of the NPT.”⁵ While alarmism may not be warranted, it is also true (as the Commission is well aware) that if North Korea and Iran become permanent nuclear weapon-possessing states, their respective regions may very well experience additional proliferation. Further, the failure of the nuclear weapon states to meet their disarmament obligation saps the

will of other states to accept or strengthen non-proliferation constraints, such as enhanced IAEA inspection powers under the Additional Protocol to safeguards agreements and restrictions upon withdrawal.

The NPT Disarmament Obligation in the Post-Cold War Era

The nuclear weapons states have long viewed the NPT as an asymmetrical bargain, imposing specific, enforceable obligations in the present on non-nuclear weapon states, while requiring of nuclear weapon states only a general and vague commitment to good faith negotiation of nuclear disarmament, as set forth in Article VI, to be brought to fruition in the distant future if ever. The 1995 and 2000 NPT Review Conferences, and a 1996 International Court of Justice opinion, decisively rejected that view. It is now established that the NPT requires the achievement of symmetry by obligating the nuclear weapons states to eliminate their arsenals.

1995 Principles and Objectives. In 1995, the year that the NPT was due to expire, the United States and other nuclear weapon states pressed for the treaty to be extended indefinitely. That objective was achieved as part of a larger package that included a set of commitments known as the “Principles and Objectives for Nuclear Non-Proliferation and Disarmament.”⁶ The Principles and Objectives set forth measures for implementation of the Article VI disarmament obligation. They include negotiation of a Comprehensive Test Ban Treaty (CTBT) by 1996, commencement of negotiations on a treaty banning production of fissile materials for use in weapons, and the “determined pursuit by the nuclear weapon States of systematic and progressive efforts to reduce nuclear weapons globally, with the ultimate goal of eliminating those weapons.” Another essential element of the package was a resolution calling on all NPT parties, in particular the nuclear weapon states, to work to establish a zone free of nuclear and other weapons of mass destruction and their delivery systems in the Middle East.⁷

1996 International Court of Justice Opinion. In 1996, the International Court of Justice, the judicial branch of the United Nations, offered a further interpretation of the Article VI obligation. In an advisory opinion on the legality of the threat or use of nuclear weapons requested by the UN General Assembly,⁸ the Court held that the threat or use of nuclear weapons is “generally” contrary to principles of customary international law requiring necessity and proportionality in responding to armed attacks and forbidding the infliction of indiscriminate harm, unnecessary suffering, harm to neutral states, and disproportionate damage to the environment.⁹ While a divided Court was unable to reach a definitive conclusion regarding threat or use in an extreme circumstance of self-defense in which the very survival of a state is at risk, the overall thrust of the opinion is toward categorical illegality, that is, illegality of threat or use in all circumstances. Thus the Court stated that “a use of force that is proportionate under the law of self-defence, must in order to be lawful, also meet the requirements of the applicable law in armed

conflict which comprise in particular the principles and rules of humanitarian law.”¹⁰ A National Academy of Sciences study, carried out by persons well versed in the realities of nuclear weapons and doctrines of use, found it “extremely unlikely” that any threat or use would meet criteria of lawfulness set forth by the Court.¹¹

Going beyond the terms of the General Assembly request, the Court also unanimously held that “[t]here exists an obligation to pursue in good faith and *bring to a conclusion* negotiations leading to nuclear disarmament *in all its aspects* under strict and effective international control.”¹² Quoting this holding from what it called a “landmark” opinion, the WMD Commission commented that:

Such an obligation requires that states actively pursue measures to reduce the numbers of nuclear weapons and the importance of their role in military force structures. Yet, even though nuclear-weapon states ask other states to plan for their security without nuclear weapons, they do not themselves seem to be planning for this eventuality.¹³

In large part, the Court’s statement of the disarmament obligation was an interpretation of Article VI of the NPT. It has been directly endorsed by nearly all states. In the most recent General Assembly vote on the resolution following up on the opinion,¹⁴ 168 states voted for the paragraph containing the Court’s statement of the obligation, including non-NPT states India and Pakistan. Only three states voted against it, the United States, Russia, and Israel; the five abstainers included France and Britain.

It is important that the Court delinked the obligation to achieve nuclear disarmament from the objective of demilitarization referred to in Article VI (“general and complete disarmament”). Nuclear weapon states can no longer plausibly rely on the rationale that elimination of nuclear weapons must await comprehensive global disarmament. It is often assumed that the Article VI reference to “a treaty on general and complete disarmament” envisages an agreement on demilitarization, including major conventional weapons (tanks, aircraft, etc.). It is true that the objective of general and complete disarmament (GCD) does have this meaning. But that does not mean that *a* treaty on GCD would embrace all major weapons. Indeed, the preamble of the NPT points towards the treaty referenced in Article VI as a treaty on *nuclear* disarmament. It refers to “the elimination from national arsenals of nuclear weapons and the means of their delivery pursuant to a Treaty on general and complete disarmament under strict and effective international control.” That is, the preamble seems to refer to a treaty on elimination of nuclear forces as an instance of a type of treaty, the type being treaties on general and complete disarmament, or GCD. Similarly, the Biological Weapons Convention and the Chemical Weapons Convention are both treaties on GCD. As the preamble to the CWC says, they represent “effective progress towards general and

complete disarmament under strict and effective international control, including the prohibition and elimination of all types of weapons of mass destruction.” The Practical Steps for disarmament, discussed below, support this view of Article VI. The unequivocal undertaking to eliminate nuclear arsenals is separated from the reaffirmation of the “ultimate objective” of “general and complete disarmament under effective international control.”

Practical Steps for Disarmament. The 2000 NPT Review Conference further specified what the Article VI disarmament obligation requires. Its Final Document sets forth 13 “practical steps for the systematic and progressive efforts to achieve nuclear disarmament”¹⁵ (*see box, section 2.1*). Reinforcing the holding of the International Court of Justice, a key element is “an unequivocal undertaking by the nuclear weapon States to accomplish the total elimination of their nuclear arsenals.” Other steps include:

- entry into force of the CTBT and a moratorium on nuclear explosive testing in the meantime;
- negotiating a treaty banning production of fissile materials for weapons;
- establishing a subsidiary body on nuclear disarmament in the CD;
- bringing the START II U.S.-Russian strategic reductions agreement into force and concluding a START III agreement while preserving and strengthening the ABM Treaty;
- applying the principle of irreversibility to nuclear weapons reductions and elimination;
- increased transparency with regard to nuclear weapons;
- further developing of verification capabilities;
- measures to further reduce the operational status of nuclear weapons;
- a diminishing role for nuclear weapons in security policies to minimize the risk of their use and to facilitate their elimination.

Like the Principles and Objectives that accompanied the indefinite extension of the NPT, these commitments are often understood to be “political” rather than “legal” in nature. However, given that the agenda was adopted without objection at the Review Conference, it represents participating NPT states’ view of what Article VI requires. At the General Assembly in the fall of 2000, the U.S. representative said that the Final Document “is our guiding light for nuclear nonproliferation and disarmament efforts.”¹⁶ Indeed, under well-established rules of treaty interpretation set forth in the Vienna Convention on the Law of Treaties, the 2000 agenda together with the 1995 Principles and Objectives constitute agreement and practice subsequent to the adoption of the NPT, authoritatively applying and interpreting Article VI.¹⁷

Most of the world’s governments—including allies of the nuclear weapon states—continue to insist on implementation of the commitments made at the 1995 and 2000 NPT Review Conferences. In 2006, the UN General Assembly

once again adopted several resolutions to that effect. Perhaps most important was the “Renewed Determination” resolution sponsored by Japan and nine other countries from both the North and South.¹⁸ It passed overwhelmingly, with 167 countries voting for it and four against: the United States, India, Pakistan, and North Korea; seven abstained. Its adoption means that nearly all governments in the world are now on record as favoring application of the principles of transparency, irreversibility, and verification “in the process of working towards the elimination of nuclear weapons.” This is a ringing endorsement of the principles embedded in the Practical Steps for disarmament agreed in 2000. The resolution wisely singles out two other commitments from the Practical Steps, “the necessity of a diminishing role for nuclear weapons in security policies,” and reduction of “the operational status of nuclear weapons systems.” It also calls for entry into force of the CTBT and negotiations on a Fissile Materials Cut-off Treaty (FMCT). The 2006 resolution put forward by the New Agenda Coalition,¹⁹ the pioneering cross-boundary group,²⁰ was adopted by a vote of 157 for, seven against, and 13 abstentions. It directly affirms the continuing force of the Practical Steps.

Lack of Compliance with the Disarmament Obligation

As elaborated in section 2.1, the United States, and to a lesser extent the other nuclear weapon states, are failing to comply with the NPT disarmament obligation. This is not only due to the lack of progress on most of the Practical Steps identified in 2000, but above all the failure to make disarmament the driving force in national planning and policy with respect to nuclear weapons. The Bush administration expressly rejected certain of the Practical Steps, including ratification of the CTBT, implementation of the START process, and preservation of the ABM Treaty;²¹ failed to apply the principles of verification, irreversibility, and transparency to the reductions agreed in the 2002 Strategic Offensive Reductions Treaty; and expanded, rather than diminished, the role of nuclear weapons in the U.S. military posture.

In large part due to the refusal of the Bush administration to permit reaffirmation of or even reference to the 1995 and 2000 disarmament commitments, the 2005 NPT Review Conference failed to reach agreement on a program of action.²² The lack of progress on compliance with the disarmament obligation thus precluded movement on addressing multiple challenges on the non-proliferation side of the ledger. Chief among these is prevention of transfer of nuclear weapons-related equipment and expertise by non-state networks like that led by A.Q. Khan, one of the creators of Pakistan’s nuclear bomb; achieving the dismantlement of North Korea’s nuclear weapons program and bringing that country back into the NPT; and regulating the acquisition and operation of technologies for production of enriched uranium and separated plutonium to prevent their use in weapons programs. (See sections 1.3, 3.1, and 3.2.)

Revitalizing the NPT

The most important means of revitalizing the NPT is good-faith implementation of the disarmament obligation. At some point, this will require an agreement or agreements that complete that obligation, integrate states outside the NPT, and institutionalize the elimination of nuclear weapons globally (*see section 3.3*). Progress towards that goal will in turn stimulate much greater acceptance of measures identified by the WMD Commission as necessary to strengthen the non-proliferation regime, among them enhanced IAEA inspection powers through the Additional Protocol and solutions to the problem of the spread of uranium enrichment capabilities. Crises in the Middle East and Northeast Asia must also be successfully resolved, to prevent unraveling of the regime in those regions (*see section 3.2*). In the case of the Middle East, this will likely require steps towards implementation of the 1995 Middle East resolution calling for the creation of a zone free of weapons of mass destruction.

To promote implementation of both non-proliferation and disarmament obligations, a stronger NPT institutional capability is needed. As the WMD Commission observes, “the NPT is the weakest of the treaties on WMD in terms of provisions about implementation.... The NPT has no provisions for consultations or special meetings of the parties to consider cases of possible non-compliance or withdrawal, nor to assist in the implementation of the treaty between the five-yearly Review Conferences.”²³ Currently, administrative support for the NPT is provided by the UN Office for Disarmament Affairs, which is under-resourced and has no authority to do anything between review proceedings. Impartial, expert compliance assessment is limited in scope with respect to non-proliferation, since the IAEA is charged by its Statute and safeguards agreements only with monitoring nuclear materials to ensure their non-diversion to weapons. Compliance enforcement with respect to non-proliferation is left largely to the Security Council, which has problems of legitimacy and accountability (*see section 1.3*). There are no treaty provisions for compliance assessment or enforcement with respect to disarmament, and no agency is given any responsibility in this regard. Not surprisingly, the Security Council, whose permanent members are nuclear weapon states, has shown no interest in assessing or enforcing compliance with disarmament commitments.

There have been multiple proposals to strengthen NPT institutional capability, such as adding a secretariat, an executive council, and empowered annual meetings of states parties. The proposals have come from states like Ireland and Canada,²⁴ and have been advanced by Jayantha Dhanapala, chair of the 1995 Review and Extension Conference, former UN Under-Secretary-General for Disarmament Affairs, and a member of the WMD Commission.²⁵ At a minimum, as the WMD Commission recommends, states parties need to establish a secretariat and a mechanism for holding meetings of state parties to address issues of withdrawal and of compliance with both disarmament

and non-proliferation requirements. A further important innovation would be an executive council capable of addressing issues on short notice.

Recommendations for U.S. Policy

- The United States should make compliance with the Nuclear Non-Proliferation Treaty obligation of pursuing and concluding negotiations in good faith on nuclear disarmament the central aim of policy on nuclear weapons, recognizing that implementation of a good-faith obligation cannot be indefinitely postponed.
- The United States should work for the achievement of a zone free of weapons of mass destruction in the Middle East as agreed at the 1995 and 2000 Nuclear Non-Proliferation Treaty Review Conferences.
- The United States should promote mandatory adherence to the Additional Protocol as a condition for supply of cooperation, assistance, materials, and equipment related to the peaceful use of nuclear energy.
- To improve Nuclear Non-Proliferation Treaty governance, the United States should support creation of a secretariat and an executive council. The executive council should be empowered to address, on short notice, issues of withdrawal and compliance with non-proliferation and disarmament obligations. Annual meetings of states parties should be similarly empowered.

The Role of the UN Security Council

JOHN BURROUGHS

RECOMMENDATIONS OF THE WMD COMMISSION

Disarmament and non-proliferation are best pursued through a cooperative rule-based international order, applied and enforced through effective multilateral institutions, *with the UN Security Council as the ultimate global authority*. (*Weapons of Terror*, 18; emphasis supplied)

The Security Council—in close contact with the members of the UN—should be the *focal point* for the world's efforts to reduce the threats posed by existing and future WMD, and to help harmonize, supplement and enforce the many efforts that are made. (*Weapons of Terror*, 57)

Recommendation 60: The United Nations Security Council should make greater use of its potential to reduce and eliminate threats of weapons of mass destruction—whether they are linked to existing arsenals, proliferation or terrorists. It should take up for consideration any withdrawal from or breach of an obligation not to acquire weapons of mass destruction. Making use of its authority under the Charter to take decisions with binding effect for all members, the Council may, *inter alia*:

- require individual states to accept effective and comprehensive monitoring, inspection and verification;
- require member states to enact legislation to secure global implementation of specific rules or measures; and
- decide, as instance of last resort, on the use of economic or military enforcement measures.

Before UN reform has made the Security Council more representative of the UN membership, it is especially important that binding decisions should be preceded by effective consultation to ensure that they are supported by the membership of the UN and will be accepted and respected.

In the current global institutional framework, the UN Security Council is well positioned to act expeditiously and authoritatively to prevent proliferation and advance disarmament. However, the Council's legitimacy and

accountability deficits are powerful reasons to be cautious about relying too much on the Council in this field. While acknowledging such problems, the WMD Commission is nonetheless emphatic about the Council's central role in reducing the risks posed by NBC weapons. It says that the Council should enforce disarmament and non-proliferation requirements, as a last resort employing or authorizing economic sanctions or military action. Moreover, it endorses the Council acting as a global legislator,¹ as it has already done in resolution 1540 aimed at preventing non-state actor trafficking in and acquisition of NBC weapons and materials. As developed below, the Commission has overstated the case for a preeminent Council role; other avenues for enforcement and law-making should additionally be pursued and developed.

The Security Council as the "Ultimate Global Authority"

As the Commission notes, aside from the Security Council, institutional machinery for enforcement of non-proliferation and disarmament requirements is minimal.² The IAEA and the OPCW can withdraw privileges of membership, such as access to technical assistance; in review proceedings for all three NBC weapons treaties, states acting collectively can condemn violators and urge states to apply economic sanctions.³ The BWC and the CWC provide that alleged violations of non-acquisition obligations are to be referred to the Security Council, by the conference of states parties in the case of the CWC, and by individual states in the case of the BWC. As for the NPT regime, the IAEA is empowered by its Statute to refer breaches of safeguards agreements involving diversion of nuclear materials and questions of peace and security to the Council (*see section 3.2*). However, there is no provision in the NPT or elsewhere for breaches of the nuclear disarmament obligation to be referred to the Council. Thus states acknowledged by the NPT to possess nuclear weapons, the United States, Britain, China, France, and Russia, do not face the prospect of Council action regarding lack of compliance with Article VI, and in any event, as permanent members can block Council action.

In contrast, by virtue of the UN Charter, the Security Council has broad powers. It is the only body explicitly authorized to authorize or direct military action, when it has found a threat to international peace and security under Chapter VII of the Charter. Further, while under current international law, economic sanctions may be applied by individual states or called for by international bodies, the Security Council is the only body authorized to *require* all states to impose economic sanctions. Finally, as the UN system has evolved, the Security Council has come to stand at the apex of the international institutional structure, regarded, as the Commission says, as the "ultimate global authority."⁴ The Council was seen to be exercising this authority in the wake of the 1991 Gulf War when it required Iraq, subject to inspections, to dismantle its nuclear, biological, and chemical weapons and missile programs.

Against this background, it is understandable that the WMD Commission lays so much emphasis on the role of the Security Council in anchoring the NBC weapons regimes. There are serious obstacles, however, to the Council effectively fulfilling this role. One is that in seeking to rationalize their illegal invasion of Iraq, the United States and United Kingdom abused Council resolutions taken under Chapter VII requiring Iraq to disarm. That has led to a marked reluctance of Russia, China, and France to allow the Council to ground resolutions regarding the Iran and North Korea situations in a Chapter VII determination of a threat to international peace and security.

A second obstacle is that the five permanent members of the Council all have nuclear arsenals that they are showing no operational signs of intending to eliminate. As permanent members, each of them can veto any Council action regarding nuclear disarmament; this effectively means that the topic is never considered. Just as seriously, the fact that the permanent members generally control the agenda and outcomes of Council deliberations means that Council decisions regarding compliance with nuclear non-proliferation requirements, and to a lesser extent regarding requirements of biological and chemical weapons disarmament, are automatically suspect in the eyes of much of the world. The decisions inherently smack of “do as we say, not as we do.”

A third, related obstacle is that the Council, dominated by five World War II victors, is conspicuously not representative of today’s world. In particular, major states of the developing world, for example India, Indonesia, Nigeria, Brazil, and South Korea, have no say except when they serve two-year terms as one of the ten elected members of the Council. Even then, their role is very limited; by dint of experience, practice, the veto, and influence wielded outside Council chambers, the permanent five, and especially the United States, have the decisive role. Efforts at reform of the Council, to make it more representative, and to limit or extinguish the veto power, so far have faltered, due partly to lack of effective collaboration in such efforts by the permanent five. In particular, they show little interest in limiting the veto power. The Commission politely acknowledges the problem of the non-representative character of the Council in Recommendation 60, calling for “effective consultation” pending reform of the Council.

A fourth obstacle is that the Security Council by design is a political body that acts on an ad hoc basis to maintain peace and security, not a technical or judicial body charged with making determinations in accordance with general principles.⁵ So far as the law is concerned, practice seems to be overtaking design, as the Council in various areas has effectively stimulated or even itself undertaken the development of international legal norms and institutions.⁶ Still, it remains the case that the Council does not engage in recognizable legislative or, even less so, judicial deliberation. Further, the Council is not bound, and does not attempt, to address all cases in a given category or to ensure consistency in treatment of similar situations, a requisite of law. While the Council has been active regarding the Iranian nuclear

program, oversaw the dismantlement in the 1990s of the Iraqi NBC weapons programs, and has played a limited but still significant role regarding the North Korean nuclear weapons program, it had no role in the termination of Libyan NBC weapons programs, did little to address acquisition of nuclear arsenals by India, Pakistan, and South Africa (later dismantled), and has done nothing regarding Israel's acquisition of an arsenal.⁷

Promoting and Enforcing Compliance with NBC Weapons Regimes

In light of these problems, it is crucial, as the Commission indeed recognizes,⁸ to strengthen mechanisms to induce or compel compliance short of Security Council action, while retaining the Council as a back-up. In the case of the NPT, the establishment of an executive council or similar body and a secretariat, along with annual meetings of states parties prepared to call for economic sanctions, would provide means for addressing compliance with both non-proliferation *and* disarmament requirements (*see section 2.1*). The role of the IAEA and its Board of Governors could be expanded, as has occurred on a de facto basis with respect to the Iran program. For example, application of the additional protocol to safeguards agreements giving the IAEA enhanced monitoring powers could be made mandatory in the event of significant violations of safeguards reporting requirements. More ambitiously, the IAEA or a successor to UNMOVIC⁹ could be given authority and technical resources to monitor and investigate "weaponization" whether or not nuclear materials tracked by the IAEA are involved. That would mean, for example, investigation of allegations that a country is engaged in designing warhead delivery vehicles to be mounted on missiles or high explosives used in the first stage of a thermonuclear weapon. Monitoring of weaponization is a task that would be performed by a global disarmament agency in a nuclear weapons-free world, but it is presently needed for prevention of proliferation. Similarly, the IAEA or other body could now play a role in monitoring reductions of existing arsenals.

In the Security Council itself, it should be recognized that issues of compliance with disarmament/non-proliferation requirements, such as violations regarding reporting nuclear activities to the IAEA, do not necessarily rise to the level of threats to international peace and security.¹⁰ Accordingly, a Council response need not be taken under Chapter VII, "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression." Invoking Chapter VII and finding a threat to the peace opens the way to authorization of military action, and is taken by many to automatically imply that possibility, with the further possibility that the United States may (wrongly) regard itself as entitled to "enforce" Council edicts. As Hans Blix has noted, Chapter VI, "Pacific Settlement of Disputes," can provide an appropriate basis for Council action, since it envisages Council recommendations with respect to situations whose continuance may jeopardize peace and security.¹¹

It can further be argued that invocation of Chapter VII is not required to give Council action a binding character; in Article 25 of the UN Charter, member states agree to carry out decisions of the Council. It is true that Chapter VII is the only part of the Charter identifying specific bases for Security Council decisions. Nonetheless, the International Court of Justice held binding a non-Chapter VII Security Council resolution calling upon states to act consistently with the General Assembly's termination of South Africa's mandate to administer Namibia.¹² The Court invoked Article 25 in stating that UN member states must comply with Council decisions to maintain peace and security in conformity with the purposes and principles of the UN Charter. Moreover, innovation is needed to make Council work in this area effective. There is precedent: Security Council establishment of peacekeeping operations was definitely an innovation; it is nowhere contemplated in the Charter.

Security Council resolutions adopted in July 2006 regarding the North Korea test launch of ballistic missiles¹³ and the Iran nuclear program¹⁴ may represent an evolution of Council practice in the direction suggested here. In both cases, the Council did not determine that a threat to peace and security existed. The resolution on North Korea did not invoke Chapter VII, yet "required" all member states to prevent transfer or procurement of missile-related items to or from North Korea. The resolution on Iran invoked Chapter VII only with reference to Article 40, which authorizes the Council to "call upon" states to comply with "provisional measures." Yet the resolution's provision "calling upon" Iran to take steps identified by the IAEA Board of Governors, notably suspension of enrichment and reprocessing-related activities, was regarded as binding by Council members. Resolution 1737, adopted in December 2006, goes further, "deciding" that Iran shall suspend fuel-cycle activities and that states shall refrain from assisting Iran's nuclear and missile programs. Still, while invoking Article 41 of Chapter VII regarding coercive measures not involving the use of force, it contains no finding of a threat to the peace.

As previously noted, the Security Council's choice of language reflects the post-Iraq war desire to avoid any implication that use of force is anticipated or implicitly authorized. Its readiness to adopt new approaches also seems to flow from the Council's assertion of an expanded role in preventing proliferation, going back to a 1992 presidential statement and exemplified in the post-9/11 era by resolution 1540, discussed below.¹⁵ The Council deserves criticism for focusing only on proliferation, not existing arsenals, and in the case of Iran, arguably has been hijacked for U.S. policy goals going far beyond concerns about the Iranian nuclear program.¹⁶ Nonetheless, to the extent that the Council is developing less confrontational and more flexible techniques for authoritatively addressing non-proliferation compliance issues, that is to the good.

The Security Council Responsibility for “Regulation of Armaments”

The Security Council could dramatically boost its legitimacy in preventing proliferation and undertake a mission crucial to global security by fulfilling a long-ignored responsibility assigned to it by the UN Charter: Article 26 provides that the Council “shall be responsible for formulating ... plans to be submitted to the Members of the United Nations for the establishment of a system for the regulation of armaments.”¹⁷ Today there is no global agreement on control and reduction of major conventional arms—tanks, aircraft, artillery—or missiles and other delivery systems that can carry both conventional and NBC warheads. Nor, aside from the general disarmament obligation of the NPT, is there any global treaty on reduction and elimination of nuclear arsenals. Initiating a process of controlling major conventional arms would reduce the risks of war (especially among advanced industrial powers, war could be devastating regardless of whether nuclear weapons were used) and, in the words of Article 26, promote “the least diversion for armaments of the world’s human and economic resources.” Given the interrelationships between nuclear and other strategic forces (*see sections 2.4 and 3.3*), it would also facilitate the achievement of the enduring elimination of nuclear weapons. A genuine process of nuclear disarmament initiated by the Council and its nuclear weapon-possessing permanent five members would have great authority.

Referring to the Council’s failure to implement Article 26, the WMD Commission observes: “While the conditions of the Cold War might explain the passivity in the past it might be questioned whether there is today any good reason why the Council, which comprises as permanent members the states with the world’s largest diversion of resources for armaments, should not embark upon the role laid upon it.”¹⁸ In addition to the benefits accruing directly from demilitarization, Security Council-generated movement toward elimination of nuclear weapons and reduction of major conventional arms would build the Council’s authority to prevent proliferation, because the problem of double standards would be alleviated. It would also squarely address a principal factor causing states to consider or undertake acquisition of nuclear weapons, military imbalances caused by some states’ possession of nuclear forces and major conventional forces.

The Security Council as Global Legislator

Under U.S. leadership, in April 2004 the Security Council adopted resolution 1540, which seeks to prevent non-state actor acquisition of, or trafficking in, NBC weapons-related equipment, materials, and delivery systems. The term “non-state actor” refers not only to terrorists, but also to brokers, businesses, and unauthorized state officials. Invoking its authority under Chapter VII of the UN Charter to maintain international peace and security, the Security Council *required* every state in the world to adopt

appropriate measures—national criminal laws, export controls, border controls, physical security and materials accounting techniques—to achieve those objectives, and to report to the Council that they have done so. In a cursory manner, the resolution generally urges compliance with existing NBC weapons treaties, but the resolution itself contains no mandatory disarmament provisions.¹⁹ Its focus is on prevention of proliferation by and through non-state actors.

In some ways resolution 1540 reinforced and elaborated obligations states already have under the NBC weapon treaties, and applied them to the relatively few states outside those treaties. In other ways the resolution forged new ground, notably by requiring all states to adopt export controls as appropriate; previously export controls had been the subject of non-binding arrangements among groups composed of a limited number of states (*see section 1.1*). The Commission captured this function of the resolution in saying the Council should “help harmonize, supplement and enforce the many efforts that are made.”²⁰ However, harmonization is a challenging task. One of the criticisms of the resolution is that its vague definitions of key terms like “related materials” may undermine higher standards employed by existing export control groups and lay a foundation for uneven implementation.²¹ The reference to “appropriate” controls, as opposed to uniform controls pursuant to universal standards, is intended to accommodate the fact that states at different levels of development have different goods to monitor. However, it too injects vagueness and subjectivity into the requirement.

Like most observers, the Commission is generally appreciative of resolution 1540, while also noting that its power to adopt such resolutions must be exercised “in broad consultation with and for the benefit of the whole UN membership.”²² The proviso is well-taken. In the case of resolution 1540, there were strong criticisms of the way the resolution was negotiated among the permanent members, then presented to the rest of the Council with only a limited opportunity for input and minimal adjustment of the draft based on that input.²³ More generally, the Commission has underestimated the problems posed by mandatory Council action, this time in its new 21st century role as a global legislator.

Following on resolution 1373 of September 2001, requiring all states to adopt measures to suppress terrorism, in resolution 1540 the Council acted as a global legislator, requiring all states to adapt their national legal and regulatory systems to address a *problem of global scope*. This is not comparable to previous Council decisions over the decades imposing requirements on states with respect to *particular situations*, such as the embargo on arms trade with the Taliban regime.²⁴ With the exception of Article 26 on regulation of armaments, the UN Charter makes no explicit provision for the Council to engage in or promote global law-making. In contrast, the General Assembly is empowered to and does recommend to member states the development of international law through treaty negotiation.²⁵ This is no mere problem of lack of direct textual support. Rather, as one critic explains, “having the Security

Council, a fifteen-Member body not accountable to other UN organs, impose obligations on all 191 members threatens to weaken one of the cornerstones of the traditional international law structure, namely, the principle that international law is based on the consent of States.”²⁶

When there is an urgent need, here demonstrated by the Khan nuclear supply network and the 9/11 attacks, and when the Security Council acts within the bounds of a general consensus, as it did in the cases of resolutions 1373 and 1540, those objections probably are not insuperable. It is certainly true that negotiating multilateral treaties is a cumbersome, time-consuming process, tied to the practice of seeking consensus of many states.²⁷ Such negotiations may become hostage to demands that many states regard as going beyond the objective of the enterprise, for example, access to biotechnology in the case of the effort to negotiate a verification protocol for the BWC. The Charter does require members to carry out Council decisions, and as noted above, in a developing international system innovation is sometimes desirable. Moreover, when member states subsequently accept the Council actions, as they generally have done for both resolutions, this arguably operates as a sort of “healing” of any violations of the Charter, at least with respect to Council actions in the field of terrorism.²⁸

None of this, however, necessarily translates into vigorous and effective implementation of resolution 1540. The evidence so far is that states are meeting the reporting requirements, and adopting some measures in response to the resolution, but it certainly has not had anything close to a transformative effect.²⁹ Security Council legislation by resolution is not the optimal way to strengthen and create law-based global regimes that engender compliance through reciprocity and participatory decision-making. By its nature, the resolution was not the product of negotiations involving all affected states, as a treaty would be. Nor did it benefit from the expertise and experience that would be contributed by many states in a multilateral negotiation. While there is a Council committee assessing states’ reports, the resolution establishes no agency or compliance and review procedures comparable to those found in the treaties on NBC weapons. Again, the Council is controlled by states possessing nuclear weapons, and suffers more generally from problems of legitimacy and accountability.

Accordingly, the WMD Commission has laid too much emphasis on the role of the Security Council as a “focal point” for action to reduce the risks of NBC weapons. Especially absent reform of the Security Council to make it more representative and accountable, the emphasis going forward should be on making the existing treaty regimes—including review processes, implementing agencies, and governance mechanisms—more effective, and on negotiating new multilateral treaties as needed. Despite the time-consuming and difficult nature of such negotiations, it remains the best way to obtain in-depth investment by a wide range of states in an international norm, institution, or regime. The Rome Statute of the International Criminal Court illustrates how multilateral negotiations can be stimulated by Security Council action,

in that case the Council's establishment of ad hoc international tribunals for the former Yugoslavia and Rwanda. A similar path could be followed with respect to resolution 1540.

Recommendations for U.S. Policy

- The United States should work with other states to utilize and improve governance mechanisms for the nuclear, biological, and chemical weapons regimes instead of relying on the Security Council as the first resort to deal with issues of non-compliance with non-proliferation and disarmament obligations.
- When a non-compliance matter is before the Security Council, the United States should seek political solutions that address underlying perceptions and conditions of insecurity, and favor innovative approaches to inducing and enforcing compliance that avoid, when possible, the direct or implied invocation of the possibility of military action.
- To improve the effectiveness of the Security Council in this and other fields, the United States should vigorously support reforms to make it more representative, transparent, and accountable.
- The United States should support multilateral treaty negotiations, not Security Council resolutions, as the optimal means of global law-making.

The Breakdown of Disarmament Machinery

JENNIFER NORDSTROM

RECOMMENDATIONS OF THE WMD COMMISSION

Revitalizing the Conference on Disarmament

The UN machinery is often seen as operating at three levels: a deliberative level (the United Nations Disarmament Commission), a consensus-building level (the United Nations General Assembly First Committee) and a body for negotiating treaties (the Conference on Disarmament). At present, all three of these main components of the machinery are plagued to different degrees by political obstacles and blockages. (*Weapons of Terror*, 178)

Recommendation 58: In order for the Conference on Disarmament to function, it should be able to adopt its Programme of Work by a qualified majority of two-thirds of the members present and voting. It should also take its other administrative and procedural decisions with the same requirements.

Negotiating a Cut-off of Fissile Materials for Weapons

Recommendation 26: The Conference on Disarmament should immediately open the delayed negotiations for a treaty on the cut-off of production of fissile material for weapons without preconditions. Before, or at least during, these negotiations, the Conference on Disarmament should establish a Group of Scientific Experts to examine technical aspects of the treaty.

Preventing an Arms Race in Outer Space

Recommendation 45: All states should renounce the deployment of weapons in outer space. They should promote universal adherence to the Outer Space Treaty and expand its scope through a protocol to prohibit all weapons in space. Pending the conclusion of such a protocol, they should refrain from activities inconsistent with its aims, including any tests against space objects or targets on earth from a space platform. States should adapt the international regimes and insti-

Continued on next page

tutions for space issues so that both military and civilian aspects can be dealt with in the same context. States should also set up a group of experts to develop options for monitoring and verifying various components of a space security regime and a code of conduct, designed inter alia to prohibit the testing or deployment of space weapons.

Recommendation 46: A Review Conference of the Outer Space Treaty to mark its 40th year in force should be held in 2007. It should address the need to strengthen the treaty and extend its scope. A Special Coordinator should be appointed to facilitate ratifications and liaise with nonparties about the reinforcement of the treaty-based space security regime.

Convening a World Summit on Disarmament

Recommendation 59: The United Nations General Assembly should convene a World Summit on disarmament, non-proliferation and terrorist use of weapons of mass destruction, to meet after thorough preparation. This World Summit should also discuss and decide on reforms to improve the efficiency and effectiveness of the UN disarmament machinery.

Revitalizing the Conference on Disarmament

The Geneva-based Conference on Disarmament (CD) is the standing UN body responsible for negotiating disarmament treaties. Here, governments have negotiated the main treaties on nuclear, biological, and chemical weapons. The last agreement reached in the CD was the Comprehensive Test Ban Treaty, whose negotiations were concluded in 1996. New norms and regimes will likely also be negotiated in the CD, so its successful functioning is crucial for progress on disarmament.

The Conference has not been able to conclude a treaty for the past decade because its members disagree over what to negotiate, and how to do so. The CD's rules of procedure require the 65 Conference members to agree by consensus on a program of work. The program of work generally establishes one or more mandates defining the subject of the treaty to be negotiated or topic to be discussed and the goals of the treaty or discussion. For the past ten years, however, Conference members have disagreed on both the subjects and their corresponding goals. This lack of consensus has meant no movement at all.

The underlying reality is that governments are using the Conference's

rules of procedure to block progress due to continuing differences in disarmament and non-proliferation priorities. The policy differences are masked by procedural wrangling, making it difficult to pinpoint blame or to clearly and simply define the debate for the public. Debates over priorities take place under the guise of finding a compromise on a program of work. Some governments suggest having an open discussion on priorities in order to clarify the underlying disagreements.

There are four topics within the CD on matters related to nuclear weapons: a Fissile Materials Cut-off Treaty (FMCT), Prevention of an Arms Race in Outer Space (PAROS), nuclear disarmament (meaning elimination of nuclear weapons), and negative security assurances (guarantees of non-use of nuclear weapons against states not possessing them). Under a widely but not universally agreed proposal from 2003, a program of work would encompass negotiation of an FMCT; discussion of PAROS, including examination of the possibility of negotiating a treaty; negotiations of security assurance “arrangements” which could take the form of a treaty; and discussion of “progressive and systematic efforts to attain” nuclear disarmament.¹ In 2007, the six presidents of the CD introduced another proposal that gained support in some quarters and possibly lost support in others. This proposal would also initiate negotiations on an FMCT, but without verification in the negotiating mandate; discussion of PAROS without the explicit possibility of negotiating a treaty; discussions “dealing with appropriate international arrangements” of negative security assurances; and discussions on nuclear disarmament and the prevention of nuclear war.²

Many of the Western states prioritize the fissile materials treaty and believe it is the only issue ripe for negotiation. Prior to compromising on the most recent proposal, which the United States just indicated it will not oppose,³ the United States has gone a step beyond prioritizing an FMCT and refused to agree to any program of work that includes the other three issues. China and Russia have refused to agree to a work program that *does not* include the prevention of deploying weapons in space, the agenda item usually referred to as PAROS. Members of the Non-Aligned Movement (NAM) insist upon the inclusion of nuclear disarmament and security assurances. Some member states think security assurances could be subsumed under nuclear disarmament. Other members, particularly those, like Iran and Cuba, which feel directly threatened by nuclear weapons, prefer that security assurances be debated separately, and soon.

Several of these states have been using the consensus rule to block progress in one of two ways. Either they have blocked consensus if their priority issue is not included in the program of work, or they have blocked consensus if the priorities they do not wish to proceed are included. Although many governments are blocking consensus by insisting on their own priorities, until now the United States was the only government insisting on its priority and *only* its priority. It was not even willing to agree to a program of work in which other priorities are only *discussed*.

Recent developments have shown a more complicated picture. Because the United States has been blocking work on any other issue, it was easy for other governments to say they would go along with the majority if their issue was covered with a degree of seriousness. In 2006, minor progress was made by holding week-long “structured” discussions on the priority topics despite the lack of a program of work.⁴ This approach was further developed with daily discussions during the First Session of 2007, culminating in the proposal for work described above. While the United States has agreed to the proposal, other CD delegations, including China, India, Pakistan, Egypt, Algeria, and Iran, have not yet given their positions on the proposal and are indicating resistance to it. While all of these delegations supported the 2003 proposal for work, they may have reservations about this proposal either because the mandates for PAROS and NSAs are weaker, or because their support for the original compromise package has changed. Some may try to introduce amendments strengthening the mandates of their priority issues, which would likely cause either the United States or France to oppose it.⁵

If CD member states accept this proposal, the CD would begin negotiating a treaty for the first time in a decade, and formally continue work in three other areas. This is the best opportunity for breaking the present impasse, and is not likely to come again soon. If it fails, it will be necessary to look at alternative options for moving forward.

Before this proposal was presented, the WMD Commission recommended that the CD alter its rules to allow administrative and procedural decisions to be adopted by a two-thirds majority of members voting and present in order to break the impasse. The Commission did not address how this alteration would be done, but if it is not feasible in the CD, it perhaps could be accomplished by the General Assembly or a World Summit. Another problem is that key states could simply decline to participate in negotiations, an outcome the consensus approach was designed to avoid in the first place. Presumably, however, CD members would consider this possibility in deciding whether to adopt a contested decision by a two-thirds majority. Of course, if initiation of negotiations were successful, the policy differences underlying the obstructionist tactics would remain. Still, states would at least be able to work toward resolving those differences in negotiations, something that is not facilitated by the present rules of procedure.

Another approach would be to undertake negotiations on one or more of the priority topics outside the CD, imitating the “Ottawa process” resulting in the adoption of the treaty banning anti-personnel landmines. Ignoring U.S. opposition, Canada initiated negotiations outside of the established but stalemated channel for controls on landmines, the review process for the Convention on Certain Conventional Weapons. The United States eventually participated in the negotiations but declined to sign the agreement when its demands were not met.⁶ Other non-parties include Russia, China, India, and Pakistan. Again, however, in the nuclear weapons context, the question of whether weapon-possessing states would participate is a crucial consideration.

The ban on landmines was important to a large number of countries due to the widespread use of mines, regardless of whether the world's most powerful states joined the negotiations or agreement. In the case of nuclear weapons, in contrast, it is only a handful of countries that possess them, thus making the participation of those countries especially vital for the successful conclusion of an effective treaty. For example, some governments have suggested negotiating an FMCT outside of the CD. The Bush administration opposes this approach.⁷ Yet U.S. involvement is crucial if an FMCT is to be meaningful and successful, in light of its large stocks of fissile materials and its capacity to produce more.

Negotiating a Cut-off of Fissile Materials for Weapons

The consequences of the blockage in the Conference on Disarmament have been dire for negotiations on a treaty banning the production of fissile materials for nuclear weapons. Fissile materials are defined as “materials that can sustain an explosive fission chain reaction,” and generally refer to highly enriched uranium and plutonium.⁸ The production or acquisition of such material is necessary for making nuclear weapons. As the WMD Commission notes, the world community has long supported banning the production of fissile materials for use in nuclear weapons.⁹ The scope of a Fissile Materials Cut-off Treaty (FMCT) was established by a 1993 consensus UN General Assembly resolution.¹⁰ This led to the development of a 1995 mandate for the negotiation of a fissile materials treaty within the Conference on Disarmament, accompanied by the understanding that the issue of how to address existing stocks could be dealt with in the negotiations.¹¹ The 1995 NPT Review and Extension Conference committed states parties to the “immediate commencement and early conclusion of negotiations” on an FMCT.¹² In 2000, the NPT Review Conference urged the CD to agree on a program of work which includes “the immediate commencement of negotiations on [an FMCT] with a view to their conclusion within five years.”¹³

Despite widespread support for an FMCT, for ten years governments have been unable to begin negotiations in the Conference on Disarmament due to the lack of consensus on a program of work, as discussed above. In recent years, a new problem has emerged: governments no longer agree on the scope of an FMCT and, therefore, the mandate for negotiations. Reversing a longstanding U.S. position, in 2004 the Bush administration announced its belief that an effectively verifiable FMCT is not feasible because it would require “an inspection regime so extensive that it could compromise key signatories’ core national security interests ... and still would not provide high confidence in the ability to monitor compliance.”¹⁴ At a 2006 CD session, the United States introduced a draft FMCT and a draft mandate for its negotiation.¹⁵ The draft mandate dropped language in the 1995 agreed mandate that set an “internationally and effectively verifiable” agreement as the goal. The mandate for negotiations on an FMCT in the most recent

proposal for work in the CD also uses this language. Every other member of the CD that has discussed the matter of verification supports aiming for a verified FMCT. Many see it as strictly necessary for a legitimate and effective treaty, and most are skeptical of the utility of an unverified treaty. In the context of discussing the most recent proposal for work, Iran and India have said verification must be included in an FMCT's negotiating mandate. As discussed in section 2.1, the WMD Commission and other experts believe that verification is feasible, and that solutions can be found to other difficult problems like that of existing stocks.

In order to remove the immediate roadblock to progress, the United Kingdom has supported taking the reference to verification out of the negotiating mandate on the understanding it could be dealt with in negotiations instead. Most Western states support this position and have been calling for the start of negotiations "without preconditions." The WMD Commission is open to this approach.¹⁶ However, it is important to be wary of a producing a treaty with no or limited verification provisions. It is true, as the United States argues, that rapid agreement on a simple ban on production of fissile materials for weapons would impede growth of arsenals in Israel, Pakistan, and India.¹⁷ This result, however, could also be attained by an extension and formalization of the existing moratorium accepted by Britain, France, Russia, and the United States.

The establishment of a verification regime would also be crucial in accounting for existing stocks, preventing their use in weapons, and moving towards their verified reduction and elimination. States agreed to adopt the Biological Weapons Convention (BWC) in 1972 and to negotiate a verification protocol separately. But after two decades of technical feasibility studies and negotiations resulted in a draft verification protocol, the Bush administration withdrew U.S. support for the negotiations, leaving the BWC unverified.¹⁸ Despite this history, many states are hopeful that the United States will eventually return to supporting verification of an FMCT when faced with facts, or following the election of a new administration.

Preventing an Arms Race in Outer Space

Weapons of mass destruction are banned from outer space by the 1967 Outer Space Treaty, but conventional weapons are not. As the WMD Commission explains, the world relies extensively on space technology, from meteorology to communications.¹⁹ For this reason, all states have a vested interest in protecting space, not least the United States, which has the largest number of space assets. Satellites are also used for early warning on missile launches, and attacks on satellites could be seen as the first sign of nuclear war. Importantly, and not noted by the WMD Commission, deploying any weapons in space would not only impede nuclear disarmament but would also likely kick start a new arms race—on earth as well as in space.

There are not yet any known weapons in space, but based on developments

over the past decade there is ample reason to be concerned that the United States is headed toward deploying them. The 1997 U.S. SPACECOM document “Vision for 2020” outlined a new military vision to control space and integrate space forces, in order to acquire “full spectrum dominance.”²⁰ The Bush administration withdrew from the Anti-Ballistic Missile Treaty in June 2002, arguing that the treaty would restrict testing and deployment of planned missile defense systems, including space-based ones. For a number of years, the United States and Israel abstained on the annual UN General Assembly resolution on preventing an arms race in outer space. In 2005 and again in 2006, the United States went further and cast the sole negative vote. On June 13, 2006, the United States told the Conference on Disarmament it would continue research on space weapons.²¹ The *U.S. National Space Policy* released in October 2006 states that:

The United States will oppose the development of new legal regimes or other restrictions that seek to prohibit or limit U.S. access to or use of space. Proposed arms control agreements or restrictions must not impair the rights of the United States to conduct research, development, testing, and operations or other activities in space for U.S. national interests.²²

As explained in section 2.4, development and deployment of space-based anti-satellite, anti-missile, and ground-attack systems face serious technical, financial, and strategic obstacles. This reality underlines the irrationality of U.S. opposition to arms control initiatives covering outer space. Nonetheless, there is considerable momentum behind U.S. efforts despite the unnecessary threat to international security posed by such programs. For example, Missile Defense Agency plans call for testing and deployment of a “test-bed” of up to six space-based missile interceptors in 2010-2012.²³

A legal regime to prevent weaponization of space could be created by a protocol to the Outer Space Treaty, as the WMD Commission suggests, or a new stand-alone international agreement. In the meantime, governments can engage in confidence building measures such as unilaterally renouncing the deployment of weapons in space and developing codes of conduct.²⁴ States have done some space security work in the Committee on the Peaceful Uses of Outer Space by developing “rules of the road” to mitigate space debris. As the state with the largest number of space assets, the United States has the most to lose from space debris. Because this is the one area where the Bush administration has not blocked multilateral work towards space security, some hope to use work on space debris as a first step toward preventing the weaponization of space.

The WMD Commission does not recommend dealing with space weapons within the Conference on Disarmament, though it has been on the CD agenda for years and is one of the CD’s four core issues. Instead it favors initiation of an Outer Space Treaty review process that would address broad

issues of space security and the establishment of a ban on all space-based weapons through negotiation of a protocol to that treaty. This is one possible path. However, as the CD is mandated to negotiate arms control and disarmament treaties, it is also a logical place to consider a new international instrument. Russia and China, the two major proponents of a new treaty to prevent the weaponization of space, insist that it be negotiated in the CD. The CD has accumulated some expertise in space policy. Russia and China have published several working papers on treaty issues, such as definitions, verification, and the current space policy regime. The UN Institute for Disarmament Research has held working sessions on space security in the CD for the last three years.

Currently, military issues of space are dealt with in the CD in Geneva, while civilian issues including space debris are dealt with in the Committee on the Peaceful Uses of Outer Space in Vienna. However, the majority of space assets are dual use, with civilian and military applications. We therefore agree with the WMD Commission that space security requires more interaction between these bodies, as well as the development of a comprehensive framework that can deal with both aspects.

Convening a World Summit on Disarmament

In recent years the international community has become increasingly divided on revitalizing disarmament and strengthening non-proliferation efforts. The 2005 NPT Review Conference ended in failure and acrimony largely because the Bush administration refused any reference to agreements reached at previous review conferences. Later that year at the World Summit, states again were unable to agree to a single word on nuclear disarmament and non-proliferation after the newly appointed U.S. ambassador, John Bolton, demanded drastic revisions to the outcome document. The WMD Commission concluded that the world's states must try again, and called for the convening of a World Summit on disarmament, non-proliferation, and terrorist use of WMD. The summit would also decide on reforms to improve the effectiveness of UN disarmament machinery. The Commission's call echoes that made in 2000 by Kofi Annan for an international conference on eliminating nuclear dangers.²⁵

For years, members of the Non-Aligned Movement have been calling for a fourth General Assembly Special Session on Disarmament (SSODIV) in order to lay out a disarmament program on both NBC and conventional weapons, and to ensure that UN disarmament institutions are up to the challenge. However, these proposals have gone nowhere, in large part due to U.S. opposition.

A World Summit on disarmament, non-proliferation and terrorist use of NBC weapons, as proposed by the WMD Commission, and an SSODIV each have their advantages. An SSODIV would build on the tradition of previous SSODs, and would address NBC weapons in the context of an overall demili-

tarization program, thus allowing consideration of linked issues, for example, missiles that can carry all types of warheads. A World Summit would bring together heads of state. It would follow on the 2005 Summit which, despite its shortcomings on nuclear issues, was able to carve new paths in areas like UN human rights machinery, and on the highly successful 2000 Summit which placed the reduction of poverty on the global agenda. Such a summit would focus exclusively on NBC weapons, and above all, on nuclear weapons. Because a World Summit would take place at a higher political level and has the endorsement of the WMD Commission, it seems the preferable course.

Regardless of which approach is ultimately taken, both a World Summit and an SSODIV would help catalyze governmental action on disarmament. Furthermore, the vast majority of the people in the world—including majorities in the nuclear weapon states—support the global elimination of nuclear weapons.²⁶ The subject no longer receives the attention it once attracted, but when it is raised, the global public overwhelmingly supports disarmament. A World Summit or SSODIV would assist greatly in turning that latent support into political pressure for disarmament.

Recommendations for U.S. Policy

- The United States should work with other countries to achieve agreement on a program of work for the Conference on Disarmament to commence negotiations on a Fissile Materials Cut-off Treaty and substantive discussions, with the possibility of negotiation, on preventing weaponization of space, nuclear disarmament, and security assurances. The United States should also support the WMD Commission's recommendation to eliminate the consensus requirement for procedural decisions in the Conference on Disarmament.
- The United States should terminate research and development of space weapons, renounce them, and protect U.S. space assets through the negotiation of a treaty banning all weapons in space.
- The United States should support the convening of a World Summit of heads of state on disarmament, non-proliferation, and terrorist use of nuclear, biological, and chemical weapons, or a UN General Assembly Special Summit on Disarmament.