COORDINATING GLOBAL AND REGIONAL EFFORTS TO COMBAT WMD TERRORISM

Istituto affari internazionali (IAI)
Ministero degli Affari esteri
Rome, 24/X/2008

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Istituto Affari Internazionali

Workshop

on

Coordinating Global and Regional Efforts to Combat WMD Terrorism

ROME
OCTOBER 24, 2008

working language: English

With the support of

Ministero degli Affari Esteri

PALAZZO RONDININI
Via del Corso, 518- Rome

PROGRAM

We thank Banca Antonveneta for kindly providing the conference room

9.30 – 10.00	INTRODUCTION
Welcome address	**Stefano Silvestri,** Istituto Affari Internazionali (IAI), Rome
	Emanuele Farruggia, Arms Control and Non-Proliferation, Italian Ministry of Foreign Affairs, Rome
Introductory Remarks	**Berhanykun Andemicael**, UN Security Council 1540 Committee, United Nations, New York
10.00 – 11.30	SESSION 1 *Assessing the threat of WMD terrorism*
Chair	**Krzysztof Paturej**, Organisation for the Prohibition of Chemical Weapons (OPCW), The Hague
Paper givers	**Eric Rosand**, Center on Global Counterterrorism Cooperation, New York *The global challenge of WMD terrorism: concepts and trends*
	Jean-François Daguzan, Fondation pour la Recherche Stratégique (FRS), Paris *Transatlantic cooperation on the threat of WMD terrorism*
	Discussion
11.30 – 12.00	**Coffee break**
12.00 – 13.30	SESSION 2 *Coordinating global and regional efforts to combat WMD terrorism*
Chair	**Annalisa Giannella**, Council of the European Union, Brussels
Paper givers	**Giorgio Franceschini,** Peace Research Institute, Frankfurt *Fighting against WMD terrorism: what role for the EU?*
	Jeffrey Laurenti, The Century Foundation, New York *The role of the UN and the IAEA in combating WMD terrorism*
	Discussion
13.30 – 14.30	**Lunch**
14.30 – 16.00	SESSION 3 *Addressing the threat of nuclear terrorism: the GICNT and other initiatives*
Chair	**Ian Anthony**, Stockholm International Peace Research Institute (SIPRI)
Paper givers	**Natalino Ronzitti**, **Nicoletta Pirozzi**, **Riccardo Alcaro**, Istituto Affari Internazionali (IAI), Rome *The GICNT and other multilateral initiatives and treaties*
	Masahiko Asada, Graduate School of Law, Kyoto University *The Fight against Nuclear Proliferation and the G8: Proposals and Legal Limitations*
	Discussion
16.00 – 16.10	CONCLUSIONS
	Natalino Ronzitti, Istituto Affari Internazionali (IAI), Rome

(b)

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Introductory Statement

by

Dr. Berhanykun Andemicael*

*Expert, 1540 Committee Expert Group***

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** **1540 Committee website: *http://www.un.org/sc/1540/***

As a member of the 1540 Committee Expert Group, I am pleased to participate in this workshop organized by the *Istituto Affari Internazionali (IAI)*, with the support of the Italian Ministry of Foreign Affairs, on the important subject of coordination of global and regional efforts to combat WMD terrorism. I thank the organizers for the invitation and for their hospitality, and thank also the 1540 Committee for giving me the opportunity to make introductory remarks at the workshop.

The workshop is of particular relevance to the mandate of the 1540 Committee, especially since its purpose is to assess the challenges posed by the threat of terrorism utilizing weapons of mass destruction (WMD) and to stress the need for coordination of the global and regional efforts to combat such a threat. Also relevant is the focus of the workshop on some of the major initiatives being taken by States to address the threat of nuclear terrorism. Nobody doubts that there are few greater dangers today than a terrorist attack or a threat with a weapon of mass destruction. Since the terrorist attacks of 9/11 with hijacked aircraft and the lethal use of mailed anthrax in 2001, the necessity for global vigilance and for effective measures has been widely recognized. The revelation of the A.Q. Khan nuclear black market has illustrated that non-State actors, including terrorists, might have easy access to the most sensitive WMD technology and materials and possibly even to the weapons themselves.

Resolution 1540 and its significance

The importance of UN Security Council resolution 1540 lies in the fact that it focuses on the dangerous nexus between weapons of mass destruction and non-State actors, in particular terrorists, that seek to acquire them and establishes a barrier to prevent such proliferation. The resolution acquires its authority from its unanimous adoption by the Security Council in 2004, acting under Chapter VII of the UN Charter. Significantly, the Council's decision affirms that the proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, constitutes a threat to international peace and security. The resolution seeks to reinforce the non-proliferation commitments undertaken by States and supplements them with explicit provisions to prevent non-State actors from engaging in prohibited activities related to WMD, in particular for terrorist purposes. Resolution 1540 thus seeks to fill a gap in international law in this area by preventing non-State actors from engaging in proliferation-related activities and prohibiting States from providing any support for such activities.

A point to emphasize is that the obligations under resolution 1540 do not conflict with or alter the rights and obligations of State Parties to existing international disarmament and non-proliferation instruments. Indeed, it encourages wider acceptance of those instruments and lays down obligations with a view to filling the existing lacunae. Such efforts to enhance international peace and security are to be taken without hampering international cooperation and trade in materials, equipment and technology, in particular for peaceful purposes.

One cannot underestimate the challenge of seeking to prevent WMD proliferation without hampering the legitimate developmental objectives and aspirations of States. Globalization and the development of world economies have tended to increase this challenge. That is, the availability of sophisticated technology through commercial channels has simplified access also to sensitive materials, with the possibility of their illicit acquisition by non-State actors and their use for terrorist purposes.

Promoting implementation of resolution 1540

Let me outline the main requirements of resolution 1540 (2004), as reaffirmed and elaborated through subsequent resolutions, namely, resolutions 1673 (2006) and 1810 (2008). All States are required:

- First, to refrain from providing any support to non-State actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear chemical, biological weapons and their means of delivery;

- Second: to adopt and enforce appropriate effective laws and controls which prohibit non-State actors from conducting such activities or using such weapons and their means of delivery, in particular for terrorist purposes, and from any attempts to engage or participate in as an accomplice, to assist or to finance such activities;

- Third, to take and enforce effective domestic control measures to account for, secure and physically protect such weapons, delivery means and related materials; and

- Fourth, to improve border and customs controls to detect, deter, prevent and combat illicit trafficking and brokering in such items, establish export, transit, trans-shipment, re-export and end-user controls and also controls on providing funds and services.

In developing a system of such controls, States that have not already done so will need to implement legislation on licensing, enforcement, accounting, securing and physical protection of WMD-related materials. For many States full implementation of the resolution will also require the creation of relevant institutions or inter-agency mechanisms.

It should be noted that full implementation of resolution 1540 is ultimately a national responsibility. The resolution does not prescribe specific standards nor does it specify how the appropriate measures should be elaborated. It is left to the discretion of individual States, but the 1540 Committee is mandated to encourage States through dialogue and experience sharing to fulfill the resolution's requirements and to assist them, if they so request, in order to facilitate implementation of the resolution. The Council recognizes that full implementation of the resolution is a long-term objective and will require continuous efforts at national as well as regional and international levels.

Methods for monitoring implementation

During the 1540 Committee's previous mandates, the primary initial task in promoting the implementation of resolution 1540 was to request States to provide the Committee with information on relevant measures they have taken or plan to take so that its assessment may facilitate further progress in areas that had not yet been addressed. The main method for this purpose has been the compilation of reports submitted by States to the Committee, and examination of each report with the assistance of its group of experts. Other tools of implementation are: outreach workshops at the regional and sub-regional levels, dialogue with individual States, cooperation with relevant organizations and identification of assistance needs and opportunities. My participation in this workshop is part of this effort.

All the information received from States or compiled from official sources, is examined in terms of over 300 questions organized in the form of a standard examination sheet, commonly known as the "matrix." The questions reflect the requirements as specified in each of the operative paragraphs of resolution 1540 and cover the three weapons areas as well as their means of delivery and related materials. This approach has enabled the mapping out of the progress in implementation and facilitated the identification of gaps requiring special attention by member States.

Status of implementation of resolution 1540

As of now, that is, October 2008, 158 Member States have submitted a first report to the 1540 Committee on the status of implementation of the resolution. Of this group, over 100 States have submitted additional information, some of them more than once, in order to update the information compiled in matrices for determining the state of implementation. All the European countries have submitted reports at the outset and have also provided more recent information. To complement the national reports, the European Union has also submitted an EU report on its regulations relevant to 1540 which are applied within its member States. The record of implementation by these States during the past four years is considerable, recognizing however that many of them had already a great deal of relevant legislation in place when resolution 1540 was adopted. Thus, notwithstanding the significant overall progress made so far, we still note that there is diversity in the rate of implementation from country to country. On average, EU members have answered more than 70 percent of the questions or elements in the matrix pertaining to implementation measures. It is noted that the degree of implementation is higher regarding framework legislation than in enforcement measures. The rate of implementation, of course, varies from country to country, ranging from about 50 percent to over 80 percent in individual cases. Additional effort is therefore needed to fill the remaining gaps in framework legislation, and even more so with respect to enforcement measures, that is, civil or criminal penalties for violations, as well as administrative arrangements, if full implementation is to be achieved in the near future.

The way ahead

By adopting resolution 1810 on 25 April 2008, the Security Council, extended the mandate of the 1540 Committee for a period of three years, while also underlining the importance of full implementation of resolution 1540 by all States. Resolution 1810 lays out various steps that the Committee and States will need to take to advance implementation of resolution 1540 -- for example:

- First, States are encouraged to prepare on a voluntary basis summary action plans, with the assistance of the 1540 Committee as appropriate, mapping out their priorities and plans for implementing the key provisions of resolution 1540;

- Second, the Committee will enhance its role as a clearing-house for channeling assistance to States in need, particularly by matching the requests with the offers of assistance. In this regard, States are encouraged to convey to the Committee their assistance requests, using if they wish, a template available for this purpose on the 1540 Committee website.* The completed form will facilitate identifying specific needs so that assistance providers may respond with the relevant projects of assistance;

- Third, as part of the clearing-house function, the Committee is already encouraging States and intergovernmental organizations at the global, regional and sub-regional levels to inform it about the areas in which they are able to provide their Member States with assistance which is of relevance to the work of the Committee;

- Finally, the Committee is actively engaged with interested States and relevant organizations to promote the sharing of experiences and lessons learned in the areas within its mandate in order to facilitate full implementation of resolution 1540.

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* **1540 Committee website:** ***http://www.un.org/sc/1540/***

Before I conclude, allow me to stress that all the topics to be discussed at this workshop are of special relevance to the work of the 1540 Committee. The EU is playing a prominent role to promote full implementation of resolution 1540. To that end it has generously provided funds and has actively participated in the outreach activities of the 1540 Committee in Africa, Asia, Latin America and the Caribbean and the Middle East. The importance of the role of the IAEA and the OPCW is emphasized in resolution 1540 and cooperation with them and with the counter-terrorism committees of the Security Council (CTC and the 1267 Al Qaeda and Taliban Committee) is developing, as strongly encouraged by the Council. In the light of the G-8 Summit Statements addressing resolution 1540, the Committee is hoping to expand its cooperation with the G-8 Non-proliferation Working Group, which has so far been helpful in encouraging States to respond to the committee's requests for reports on implementation. Finally, the Global Initiative to Combat Nuclear Terrorism, with its expanding membership, seeks to complement the efforts of the Security Council and relevant international organizations in addressing many of the priority issues listed in operative paragraphs 2 and 3 of resolution 1540. We can therefore expect a successful workshop from the presentation of such substantive papers today

I would like to thank our host country and all the panelists and participants for their efforts on this crucial subject.

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PAPER ON

THE GLOBAL CHALLENGE OF WMD-TERRORISM: EVALUATING THE THREAT AND US-LED MULTILATERAL RESPONSES

By

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* The author would like to thank Liat Shetret a research assistant at the Center for her invaluable assistance with the researching and writing of this paper, as well as Alistair Millar, the Center's Director, for helpful comments on earlier versions of the paper. Any errors are, of course, the responsibility of the author.

DRAFT- DO NOT QUOTE

Introduction

The terrorist attacks on the United States on 11 September 2001 transformed the debate about international responses to terrorism, with global terrorism quickly reaching the top of the US' agenda. Bombings since 9/11 in numerous places such as Madrid, Bali, London, Istanbul, Casablanca, Islamabad, New Delhi, and Riyadh have demonstrated that countries other than the United States are targets for Al-Qaeda and its affiliates and that attacks were being planned and carried out by groups and individuals with ties to different countries, regions, and continents. All of this has underscored the reality of a complex, urgent global problem that requires a coordinated, comprehensive global response As a result, the issue became and has remained a matter of central concern to existing multilateral bodies. In some instances, the United States led the effort to adapt Cold War institutions to allow them to address what had replaced the Soviet Union as the preeminent threat to the United States: global Islamist terrorism. However, the United States chose a different path when it came to addressing the threat posed by what former US Secretary of Defense Donald Rumsfeld called the deadly "nexus between weapons of mass destruction and the terrorist networks,"[1] which US Government officials continue to view as the greatest national security threat facing the US homeland.

Rather than relying exclusively on the existing multilateral frameworks, which the Bush Administration (and many others) viewed as too cumbersome and slow moving to be able to respond to the most urgent aspect of the threat, the United States chose to promote the development of new, tailored multilateral initiatives, with the goal of being more responsive to the problem. Initiatives such as the Proliferation Security Initiative, the G8 Global Partnership Against the Spread of Weapons of Mass Destruction, and Security Council Resolution 1540, and the support structures it created, have been touted by proponents as essential components of what senior US Government officials have described as a "layered" effort to prevent and respond to catastrophic terrorism, which "demands a cooperative and global response from a growing range of like-minded nations."[2]

This paper will first evaluate the nature of the WMD-terrorism threat today, highlighting the importance of differentiating the threats from nuclear, chemical, biological, and radiological weapons that vary considerably in lethality, consequences of use, and the availability of measures that can protect against them.[3] It also stresses, however, that cooperation among states and enhancing state capacities in a range of areas are essential elements to addressing each component part of the threat. The paper then assesses the strengths and shortcomings of the three above-mentioned US-driven multilateral initiatives, looking at the extent to which they are contributing to efforts to improve cooperation and strengthen these capacities and promote a global response as its architects hoped it would do. The paper concludes by arguing that the Bush Administration's strong preference for seemingly more flexible initiatives, involving a select group of countries, and limiting the size of international bureaucracies has produced mixed results so far. Although it has helped to ensure a more rapid initial response to WMD terrorism, such an approach has also impeded efforts to build and sustain global support to respond to that threat.

I. The WMD-Terrorism Threat

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[1] Jim Garamone, "Rumsfeld Warns of Nexus Between Rogue States, Terror Networks," American Forces Press Service, 3 February 2002 (quoting Donald Rumsfeld).

[2] Thomas D. Lehrman, Acting Office Director, Office of Weapons of Mass Destruction Terrorism, "Building a Layered Defense to Combat Weapons of Mass Destruction (WMD) Terrorism," Remarks to the NPT Conference, Washington College of Law, American University, Washington, DC, 9 February 2006, http://www.state.gov/t/isn/rls/rm/61383.htm.

[3] *Deadly Arsenals* (Washington, DC: Carnegie Endowment for International Peace, 2005), p. 3

Few would dispute former UN Secretary-General Kofi Annan's conclusion that, given the "devastatingly far-reaching impact" of a WMD terrorist attack, our "common goal must be to secure, and wherever possible eliminate nuclear, biological, chemical or radiological weapons and implement effective domestic and export controls on dual-use materials related to weapons of mass destruction."[4] Nevertheless, there remains a debate among experts concerning the likelihood of the WMD-terrorist threat materializing from intentions to capabilities that could lead to future, more deadly attacks. Some view the prospect of Al-Qaeda or an affiliated group getting its hands on WMD to be the greatest security threat facing the United States. Others are even more fatalistic, believing it is a question of when not if. Al-Qaeda's record and statements are straightforward, with Osama Bin Laden saying that acquiring nuclear weapon is a "religious duty" and Al-Qaeda having obtained a fatwa in May 2003 from Saudi cleric Naser al-Fadh that attempted to justify the use of WMD.[5] Developing or acquiring WMD is the only way that Al-Qaeda can alter the current balance of power in its favor, and this explains why the organization's interest in acquiring or developing WMD increased exponentially.[6]

Yet some experts are less alarmist, arguing that seven years after 9/11 the WMD-terrorist threat has diminished and the danger has remained the same or even declined.[7] A former senior CIA official recently wrote that:

> Al-Qaeda "has only a handful of individuals capable of planning, organizing and leading a terrorist operation. Al-Qaeda threatens to use chemical, biological, radiological or nuclear weapons, but its capabilities are far inferior to its desires. Even the 'loose nuke' threat, whose consequences would be horrific, has a very low probability. For the medium term, any attack is overwhelmingly likely to consist of creative uses of conventional explosives.[8]

In fact, for most of the world, these conventional weapons continue to pose a greater security threat than that posed by WMD. Even if the risk may be low, however, the potential damage caused by a WMD attack are so significant that it is understandable to place even the remote possibility that terrorists might acquire WMD at the top of the threat hierarchy and devote considerable attention and resources to trying to address this particular threat.[9]

But what is the actual possibility? WMD is a catchall phrase that includes nuclear, chemical, and/or biological weapons and materials, with varying levels of destructive power and political effect, all requiring specially tailored strategies. One analyst offers a useful description of the relative destructive power of these weapons on an imaginary line "that begins with the nuclear weapons at one extreme, continues through chemical, radiological, and biological and terminates with cyber-weapons (designed to attack computers or critical infrastructure at the far end)."[10] In assessing the risk of a terrorist attack there are three elements to address: "the availability of the

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[4] Remarks by Central Intelligence Agency Director Michael Hayden at the Los Angeles World Affairs Council, 16 September 2008, www.cia.gov/news-information/speeches-testimony/directors-remarks-at-lawac.html.

[5] Rolf Mowatt-Larssen, "The Strategic Threat of Nuclear Terrorism," in *Terrorist Threat and U.S. Response: A Changing Landscape*, Matthew Levitt and Michael Jacobson (eds.), Washington Institute for Near East Policy, Policy Focus #86, September 2008, http://www.washingtoninstitute.org/pubPDFs/PolicyFocus86.pdf, p.8.

[6] Reuven Paz, "Global Jihad and WMD: Between Martyrdom and Mass Destruction," Society for Internet Research, 25 September 2006, www. sofir.org/archives/005026.php.

[7] See, e.g., William Arkin, "Continuing Misuse of Fear," *Bulletin of Atomic Scientists*, vol. 62, no. 5 (Sept/Oct 2006), 45.

[8] Glenn L. Carler, "Overstating Our Fears," *The Washington Post*, 13 July 2008, B 07.

[9] Russell D. Howard, "Preface", in *Weapons of Mass Destruction and Terrorism*, Russell Howard and James J.F. Forest (eds), (New York: McGraw Hill; 2008), xvii.

[10] Christopher F. Chyba, "Toward Biological Security," in *Terrorism and Counterterrorism: Understanding the New Security Environment – Readings and Interpretations*, rev. and updated by Russell D. Howard and Reid Sawyer (Guilford, CT: McGraw-Hill/Dushkin, 2003), 198-99.

relevant materials; the availability of know-how to overcome the obstacles to using those materials to effect an attack; and the existence of actors with the motive to use them."[11] As the below brief survey of the threat reveals, although the prospect of a nuclear terrorist attack may be actually quite remote,[12] the catastrophic consequences of such an occurrence have placed it at the top of the threat hierarchy.

Nuclear Weapons

Writing in the New York Times shortly before the seventh anniversary of 9/11, the respected American journalist, Jeffrey Goldberg, wrote that "the next president [of the US] must do one thing, and one thing only, if he is to be judged a success. He must prevent Al-Qaeda or a Qaeda imitator from gaining control of a nuclear device and detonating it in America."[13] Even a relatively low kiloton bomb would cause mass casualties and enormous environmental damage. Among known terrorist networks, Al-Qaeda has demonstrated its ability to meticulously plan and inflict mass casualty attack and Osama bin Laden has claimed that his network already possesses nuclear and chemical weapons, although there is no evidence to support this. The fact that terrorists have not yet used nuclear weapons is due to a "lack of means rather than lack of motivation."[14]

The good news is that, based on publicly available information, Al-Qaeda does not appear to have made significant progress toward obtaining either an intact nuclear weapon or significant amounts of fissile material and that its intent far outpaces its capability.[15] According to the Weapons of Mass Destruction Commission (WMD Commission),[16] it is unlikely that nonstate terrorists have or could obtain the resources, technology, and expertise needed to develop and manage the significant infrastructure needed to produce the enriched uranium or plutonium required to develop a nuclear weapon. Because of IAEA safeguards and myriad export controls, it is difficult for even most dedicated states to develop nuclear weapons undetected. These international restrictions, combined with the significant financial, scientific, and technical hurdles involved, make it highly unlikely that even most sophisticated terrorist group could process the required fissile material on its own.

It is more plausible for Al-Qaeda and other terrorist groups to seek to build a crude device with illegally acquired fissile material either purchased on the black market or stolen from vulnerable locations, for example countries in the former Soviet Union. Since 1995, the IAEA has maintained an Illicit Trafficking Database, which as of 31 December 2007 contains 1340 confirmed trafficking incidents. Of these, 303 involved the seizure of nuclear material or radioactive sources from persons who possess them illegally and, in some cases, attempted to sell or smuggle them

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[11] Bruce Jones, "Bio-Security, Nonstate Actors, and the Need for Global Cooperation, *Ethics & International Affairs*, vol. 20, no. 2 (summer 2006), http://www.cceia.org/resources/journal/20_2/roundtable/5395.html.

[12] Robin Frost, "Nuclear terrorism after 9/11," Adelphi Paper 378, The International Institute for Strategic Studies, 2005, www.iiss.org.

[13] Jeffrey Goldberg, "On Nov. 4, Remember 9/11," *New York Times*, A27, 9 September 2008.

[14] Matthew Bunn, John P. Holdren, and Anthony Wier, *Securing Nuclear Weapons and Materials: Seven Steps for Immediate Action*, report, Project on Managing the Atom and Nuclear Threat Initiative, Belfer Center for Science and International Affairs, Harvard University, 20 May 2002, www.bcsia.ksg.harvard.edu/publication.cfm.?ctype+book&item_id=90.

[15] Sammy Salama and Lydia Hansell, "Report: Does Intent Equal Capability? Al-Qaeda and Weapons of Mass Destruction," *Nonproliferation Review* vol. 12, no. 3, November 2005, 643.

[16] The WMD Commission was launched by the Government of Sweden in Stockholm on 16 December 2003 to investigate ways of reducing the dangers from nuclear, biological, chemical and radiological weapons. The commission was chaired by Dr. Hans Blix and comprised 14 respected experts from around the work. Its 2006 final report contains sixty concrete proposals on how the world could be freed of nuclear, biological and chemical weapons, with a particular emphasis placed on international cooperation. For more information on the commission see its website: http://www.wmdcommission.org/.

across borders. Of particular concern are those 15 reported incidents involving unauthorized possession of enriched uranium and plutonium.[17]

Thus, the most important step in preventing nuclear terrorism may be ensuring that terrorists are unable to gain access to this material or nuclear devices. Protection efforts should thus focus on those areas with the highest concentration of inadequately secured nuclear material and weapons, with Russia perhaps being the most vulnerable location. As Graham Allison describes, "Russia is the most likely source not because the Russian government would intentionally sell or lose weapons or materials, but simply as an instance of the Willie Sutton principle. When asked why he robbed banks, Sutton answered: 'Because that's where the money is.' Russia's eleven time-zone expanse contains more nuclear weapons and nuclear material than any country in the world, much of it vulnerable to theft,"[18] including as a result of it being loosely guarded. Much of the US-led Cooperative Threat Reduction (CTR) Programs have been intended to strengthen the physical security of Russia's nuclear weapons-related facilities and weapons-usable nuclear warheads and reduce risk that weapon scientists will provide specialized know-how to terrorists.[19] Although Russia is the most obvious vulnerable location, nuclear weapons of other countries – and even more so the stocks of fissile material widely distributed throughout the world – may also be vulnerable to diversion by terrorist groups. For example, Pakistan, because it actually possesses nuclear weapons, materials, and expertise, combined with Al-Qaeda's presence in its Federally Administrated Tribal Areas, its political instability, and revelations in February 2004 of the nuclear black market run by Pakistani nuclear scientist A.Q. Khan – what some have called a "nuclear Wal-Mart" – is another obvious vulnerable spot.[20]

These risks in a world where the "chain of physical security is only as strong as its weakest link... and that the theft of fissile material anywhere can jeopardize security everywhere,"[21] have led to a range of global initiatives in this field, some of which will be discussed in Section II, and highlight the importance of further strengthening international physical protection and export controls and customs enforcement activities. The WMD Commission has emphasized that this involves ensuring that all countries adopt rigorous legislation and export control regimes that are enforced, guards, gates, and fences at certain facilities, and professional (i.e., not susceptible to bribes) personnel to design and implement these laws and controls. Although enhanced international cooperation is essential here, the commission reminds us of some of the obstacles to realizing it. These include "governmental concerns over the erosion of sovereignty, legal liability, budgetary constraints, etc. Such obstacles also hinder the development of stronger multilateral standards or expanded roles for international institutions. The lack of serious consequences for non-compliance with existing standards further erodes both the effectiveness and credibility of those standards."[22]

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[17] Report of the Secretary-General: United Nations Global Counter-Terrorism Strategy: Activities of the United Nations System in Implementing the Strategy, 7 July 2008, UN Doc. A/62/998, para. 92.

[18] Graham Allison, *Nuclear Terrorism: The Ultimate Preventable Catastrophe* (New York: Times Books, 2004), 68

[19] Led by Senators Sam Nunn and Richard Lugar, the US congress laid the foundations for handling the threats posed by insecure stockpiles of WMD. Since 1991, this cooperative initiative has evolved into a broad set of programs across different US agencies, particularly the Defense, Energy and State Departments. Together, these programs have helped to protect, secure and begin destroying nuclear warheads, delivery vehicles (such as bombers, missiles and submarines) and hundreds of metric tons of weapons-usable material. In addition, programs have helped to redirect weapons scientists and engineers from defense work to civilian employment. These scientists, many of whom live under severe economic distress may be tempted to sell their skills to terrorist groups or states.

[20] Alistair Millar and Jason, Ipe, "Cutting the Deadly Nexus: Preventing the Spread of Weapons of Mass Destruction to Terrorists," in *Uniting Against Terror: Cooperative Nonmilitary Responses to the Global Terrorist Threat*, David Cortright and George A. Lopez (eds.), (Cambridge, MA: MIT Press; 2007), 131-32.

[21] Weapons of Mass Destruction Commission, *Weapons of Terror: Freeing the World of Nuclear, Biological and Chemical Arms*, (Stockholm: Weapons of Mass Destruction Commission, June 2006), 86 www.wmdcommission.org/files/Weapons_of_Terror.pdf.

[22] Ibid.

Radiological Weapons

Given the difficulties that an organization such as Al-Qaeda faces in trying to acquire a fissile material let alone a nuclear device, as well as the technical problems associated in building and/or delivering either chemical or biological weapon, which will be discussed below, some experts argue that these groups would try to use a radiological device such as a "dirty bomb" to attack the "West".[23] Conventional explosives and radioactive material purchased on the open market, and found in many hospitals and laboratories could be used to construct a crude and small device like a "dirty bomb." There are some indications that elements of the Al-Qaeda network have shown interest in obtaining radioactive materials on the Russian black market for possible use in a "dirty bomb.[24] A terrorist attack with such a radiological dispersal device could scatter radioactive material over a wide area. Although the death toll from such an attack would not compare with a nuclear attack or even the 9/11 attacks, it could nevertheless have a significant impact as not only could it expose tens of thousand people to dangerous material, but the area where detonated would require rapid evacuation and need to be decontaminated, which could require months. Both the economic damage and disruption and mass hysteria generated out of fear of the unknown effects to radiation exposure could outweigh the effects of the September 2001 attacks.

Effectively addressing the radiological terrorist threat involves controlling sources, detecting radiation, and preparing for and responding to an attack. The high number of radioactive sources around the world – millions are used each day for medical, industrial, research, and commercial purposes – and the limited funds available with which to secure them complicates prevention efforts, although only a small percentage of the sources are considered suitable for making potent radiological weapons.[25] Nevertheless, according to the Center for Nonproliferation Studies, "they must be adequately protected at every stage of their lifecycle—production, sale, transport, use, storage, and disposal. Ensuring that each of these sources is safely and securely used will require time, money, and continued regulatory attention."[26]

Chemical Weapons

Although the destructive impact of chemical weapons should not be taken lightly, they are significantly less threatening than both nuclear and biological weapons, and their physical and political effects are more manageable. While many countries have the capability to produce chemical weapons, few have the motivation to do so as they are seen as morally, politically, and militarily "so useless that no state declares its possession of them except when announcing decisions to abolish them."[27] According to most reports, while Al-Qaeda has researched the production of chemical agents it has been unable to weaponize them,[28] although there have been reports claiming that Al-Qaeda had planned to use cyanide, sarin, or osmium tetroxide in attacks in

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[23] See, e.g., Maxim Worcester, "International Terrorism and the Threat of a Dirty Bomb," *Institut für Strategie- Politik-Sicherheits- und Wirtschaftsberatung*, 25 January 2008, http://se1.isn.ch/serviceengine/FileContent?serviceID=ISN&fileid=A50B1B86-5D8D-B740-3910-39BD8E3C2C8F&lng=en and Jonathan Medalia, "Terrorist "Dirty Bombs': A Brief Primer," *Congressional Research Service Report for Congress,* 1 April 2004, http://se1.isn.ch/serviceengine/FileContent?serviceID=ISN&fileid=EE46A31B-943C-BFD2-D9B2-A61DA15EA86C&lng=en.

[24] O'Neil, p.67.

[25] According to the Center for Nonproliferation Studies, the following relatively common seven reactor-produced radioisotopes could pose particularly high security risks: americium-241, californium-252, cesium-137, cobalt-60, iridium-192, plutonium-238, and strontium-90. "Prevention of Radiological Terrorism," 2008, http://www.nti.org/h_learnmore/radtutorial/chapter05_03.html.

[26] Ibid.

[27] George Perkovich, "Deconflating "WMD," Commissioned by the WMD Commission,, No 17, October 2004, http://www.wmdcommission.org/files/No17.pdf.

[28] Salama and Hansell , p. 618.

Britain, Jordan, and the United States.[29] Further, unlike in the nuclear field, the threat that a nonstate actor might develop and use chemical weapons became a reality in 1990 when the Tamil Tigers used chlorine (taken from a paper processing plant) to attack a Sri Lankan armed forces military base killing 60 people and, more notoriously, in 1994 and 1995 when the Japanese cult, Aum Shinrikyo acquired dual-use technology and used sarin gas in attacks in Japan.[30] With this attack causing around the same number of deaths as the "average Palestinian suicide bomber attack," but leading to over 5,000 people arriving at hospitals requesting medical treatment for sarin exposure, the incident showed that rather than producing mass casualties, an attack using a chemical agent is more likely to produce widespread panic.[31] However, this attack also highlighted both the significant technical difficulties associated with obtaining the necessary materials in sufficient quantities and purity to be able to carry out an attack and the transportation hurdles that need to be overcome.

Nevertheless, the risks of a terrorist attack using chemical weapons are real. Not only are some types of chemical (and biological) weapons relatively easy to develop and not costly, but the inherent dual-use (items which can be used for either military or civilian purposes) nature of many of the key ingredients comprising chemical (and biological) weapons can also be found in perfectly legitimate chemical (and biotechnology) industry sectors in a wide range of countries.[32] This dual-use nature complicates monitoring efforts and is a source of uncertainty when attempting to estimate either arsenal size or latent capabilities to manufacture them.[33] In addition, according to the Department of State's International Security Advisory Board, "several states that are known to be in possession of these [chemical or biological] weapons, arms control treaties notwithstanding, could supply these weapons to terrorists. [Thus] [i]n the future, we can expect that more terrorists will acquire CW and BW, if they have not already done so."[34]

Even greater than the prospect of a terrorist getting their hands on and weaponizing a chemical agent, however, is the targeting by terrorists of civilian chemical sites that produce highly toxic chemicals or vehicles carrying hazardous material, thus obviating the need to target population centers or manufacture the weapon.[35]

Thus, as the WMD Commission highlighted, in addition to ensuring each country has an effective export control regime in place for dual-use goods, all states should ensure they have effective national legal frameworks and capacities to safeguard their chemical industries. Unlike in the nuclear field, where there are a limited number of facilities, the number of relevant sites around

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[29] See, e.g,., Chris Hastings and David Bamber, "Police Foil Terror Plot to Use Sarin Gas in London," *Daily Telegraph* (London), 18 February 2001; "Qa'ida-Linked Chemical Attack in Jordan Could Have Killed 80,000," Agence France Press, 26 April 2004.

[30] John Parachini, "Putting WMD Terrorism Into Perspective," *Washington Quarterly,* vol. 26, no. 4 (autumn 2004), pp. 39-40, http://www.twq.com/03autumn/docs/03autumn_parachini.pdf. Most recently, in 2007 bombers detonated three chlorine-filled trucks in Anbar province in Iraq killing two police officers and sickening some more than 350 Iraqi and coalition soldiers. "Iraq Gas Attack Makes Hundreds Ill, , *CNN,* 18 March 2007, http://www.cnn.com/2007/WORLD/meast/03/17/iraq.main/index.html.

[31] Of the 5,500, only 1,051 people had medical symptoms indicative of sarin exposure, highlighting the difficulties involved in separating those with actual illness from those with panic-induced symptoms, which could further complicate effective healthcare and possibly lead to greater public hysteria. T. Ballard, J. Pate, G. Ackerman, D. McCauley, and S. Lawson, "Chronology of Aum Shinrikyo's CBW Activities," Monterey Institute of International Studies, March 15, 2001.

[32] Andrew O'Neil, "Terrorist Use of Weapons of Mass Destruction: How Serious Is the Threat?," in *Weapons of Mass Destruction and Terrorism*, p. 68.

[33] "Report on Building International Coalitions to Combat Weapons of Mass Destruction Terrorism," International Security Advisory Board, US Department of State, 5 February 2007, p. 7, www.state.gov/documents/organization/66363.pdf,.

[34] Report on Building International Coalitions to Combat WMD-Terrorism, International Security Advisory Board, Department of State, 5 February 2007, p. 6, http://www.state.gov/documents/organization/66363.pdf.

[35] CITE

the globe that require enhanced protection are in the thousands.[36] As is the case with the protection of nuclear and bio-technology facilities, with terrorist groups proving adept at finding the weak link in the security chain, there is a need to develop and implement global security standards in this field.

Biological Weapons

Following the attacks of 11 September 2001, there were a number of reports of Al-Qaeda seeking a biological weapons capability, including of an Al Qaeda-affiliate group, Jemmah Islamiyah, attempting to procure and weaponize biological agents.[37] In April 2006, former UN Secretary-General Kofi Annan warned that "the most important under-addressed threat relating to terrorism, and one which acutely requires new thinking on the part of the international community, is that of terrorists using a biological weapon."[38] Annan persuasively wrote that

> [b]iotechnology, like computer technology, has developed exponentially. Such advances herald promising breakthroughs and are on of the key battlefronts in our attempt to eliminate infectious diseases that kill upwards of 14 million people every year. They can, however, also bring incalculable harm if put to destructive use by those who seek to develop designer diseases and pathogens.[39]

This concern is shared by many experts, who also view the prospect of terrorists using biological weapons against population centers as the most likely scenario across the wide-ranging WMD threat spectrum.[40]

A number of reasons are cited to justify this concern, in addition to the dual-use nature of biological agents. For example, biological weapons agents are sometimes used as pesticides or for other legal purposes and are much easier to acquire than nuclear weapons and it requires much lower amounts of these agents to produce the same killing impact as chemical weapons.[41] In addition the effects of a biological attack on the target population would be difficult to counter, as emergency authorities would come under tremendous strain in trying to administer medical assistance, in particular vaccines, to a widely affected population.[42] As noted by the WMD Commission, "the facilities to undertake research on or produce biological agents are more difficult to detect and easier to hide than facilities to produce fissile material for nuclear weapons. [As a result], the difficulties of detection enhance the risk of a surprise appearance of a new biological-weapon capability."[43] Moreover, the global bio-technology and health industry is rapidly growing, leading to an increase in the number of scientists and an increase in the availability, even to individuals, of the technological know-how and materials for weaponizing biological agents.[44] However, although necessary materials for manufacturing biological weapons agents are increasingly available, it still remains difficult to weaponize for use against a targeted population.[45]

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[36] Ibid. p. 136.
[37] Maria Ressa, "Reports: Al Qaeda Operative Sought Anthrax," CNN, 10 October 2003; Judith Miller, "U.S. Has New Concerns About Anthrax Readiness," *New York Times,* 28 December 2003.
[38] Report of the Secretary-General, "Uniting Against Terrorism: Recommendations for a Global Counter-Terrorism Strategy," UN Doc. A/60/825, 27 April 2006, para 57..
[39] Ibid.
[40] See, e.g., O'Neil, p.68
[41] Jonathan Tucker, "Introduction," in *Toxic Terror: Assessing Terrorist Use of Chemical and Biological Weapons* (Boston: MIT Press; 2000), 5.
[42] Rebecca Katz, "Public Health Preparedness: The Best Defence Against Biological Weapons," *The Washington Quarterly*, vol. 25, no.3, 69-82.
[43] WMD Commission, p.41.
[44] Jones.
[45] Christopher Chyba, "Biological Security After September 11th," *Stanford Journal of International Relations,* vol. 3, no.2, fall-winter 2002, http://www.stanford.edu/group/sjir/3.2.03_chyba.html.

For example, despite its significant financial resources and expertise, the Japanese terrorist group Aum Shinrikyo was unsuccessful in its attempts to weaponize anthrax.

Perhaps most significantly for purposes of this paper, despite the fact that few security issues highlight the need and potential for global standards and cooperation, the international framework to facilitate the development of standards and to foster cooperation is the least developed among the different WMD-terrorism fields. For example, although no state admits to possessing a biological weapon or has programs to develop such weapons, the Biological and Toxic Weapons Convention (BTWC) allows states parties to retain biological agents/toxins for peaceful purposes. Yet, unlike both the Chemical Weapons Convention (CWC) and the Nuclear Nonproliferation Treaty (NPT), the convention lacks a verification system to determine if a state's declared peaceful program has an offensive military purpose and a central institution to monitor the implementation of the BTWC regime and work with countries to develop the necessary capacities to implement it. More broadly, as will be discussed in more detail below, despite the bio-terror threat, bio-security defenses and cooperation remain under-developed.

Further, unlike in the chemical and nuclear arenas, the material and technology in the biological field is so diffuse that proliferation controls alone are not sufficient to guard against the proliferation of dangerous biological agents, which can easily cross borders without human help. More seriously, "they exist in nature inside countries all over the world." [46]

Instead, greater attention needs to be paid to building more effective defenses. The strengthening of national public health systems and infectious disease surveillance around the globe should thus be a priority, recognizing that, as is the case more broadly in addressing the WMD-terrorism threat, no national effort will be effective over the long term without similar efforts at the international level.[47] Stimulating broad-based cooperation by all states to strengthen public health systems of the weakest and poorest states should thus also be a priority. To his credit, former UN Secretary-General Kofi Annan sought to draw the world's attention to the bio-terrorism threat and called for the UN to play a leading role in creating a forum "that would bring together the various stakeholders – governments, industry, science, public health, security, public – into a common program, built from the bottom up, to ensure that bio-technology's advances are used for public good and that benefits are shared equitably around the world."[48] Regrettably, however, although the General Assembly acknowledged the importance of this proposal, little progress has been made to date in carrying it forward.

II. Multilateral Responses

As the above brief overview of the WMD-terrorism threat shows, each type of threat often presents a somewhat distinct set of complex challenges for states and the wider international community as they try to prevent terrorists from gaining the material, equipment, and expertise to develop and weaponize it. However, at least three commonalities deserve mention, particularly in the context of designing an effective *global* response. First, in each case, cooperation, whether at the global, regional, or national levels or between government and the private sector, including the scientific community, is essential to be able to address the particular threat. Second, because of the global nature of the threat, which is partly due to the ease with which information and technology is now available to individuals and groups around the world, the global response to the particular threat will only be as strong as the world's weakest link. Third, there is a range of steps countries need to take to counter the threat effectively. This includes the adoption and implementation of effective laws and export-control regulations, the establishment of effective accounting and physical security

[46] WMD Commission Report, p.41.
[47] Jones.
[48] Uniting Against Terrorism, para. 57.

measures for WMD-related materials, properly trained customs, intelligence, and other law enforcement officials, and ensuring a culture of security at all civilian chemical, biological, and nuclear facilities. Many countries lack the financial resources and technical expertise necessary to take these and other steps to respond to the threat and thus strengthening state institutions and other capacities needs to be an essential component of an effective long-term global response. .

The international community had joined together prior to 9/11 to develop an elaborate web of global treaties and initiatives to address the WMD threat which at that time centered almost exclusively on proliferation by and to states, some of which included training or other technical assistance programs. The pre-9/11 regime consisted of a network of interlocking treaties, organizations, inspections, and arrangements aimed at halting the spread of nuclear, chemical and biological weapons. Three key treaties lie at the heart of the regime: the NPT, which enshrines a bargain between five declared Nuclear Weapons States and the remaining Non-Nuclear Weapons states parties with the aim of restraining the spread of nuclear weapons; the CWC, which prohibits the development, possession, or use of chemical weapons; and the BTWC, which bans the development, possession, or use of biological weapons. Much has been written of the contributions that the IAEA and Organization for the Prohibition of Chemical Weapons (OPCW) are making to efforts to strengthen the nuclear non-proliferation and the chemical prohibition regime respectively, the lack of a similar institution in the bio-weapons area, and the challenges this presents to address the bio threat effectively at a global level.[49] For example, although the nuclear and chemical weapons are subject to certain inspection and verification arrangements and are also covered by some international export control arrangements, efforts to negotiate a verification mechanism for biological weapons remain stalled.

Even before the prospect of nonstate terrorists getting their hands on WMD rose to the top of the threat chart for the US and other states, the shortcomings in the nonproliferation treaty regimes, including the cumbersome, consensus-based decision-making processes, lax enforcement, lack of universality, and the divergent threat assessments, which were exacerbated by the proliferation shocks of the 1990s, were well-known. Given these limitations, the fact that the regimes were not designed to address the threat posed by individuals or groups getting their hands on the deadly weapons, the unfortunate reality that the 9/11 attacks showed the willingness of nonstate terrorists to cause indiscriminate casualties and destruction, and the Bush Administration's general ambivalence towards multilateral institutions, it should come as little surprise that the post-9/11 era has witnessed the creation of a series of *ad hoc*, informal initiatives, generally at the urging and under the leadership of the US, and an increase in use of the UN Security Council to seek to fill the gaps left by the existing nonproliferation regime.[50]

This section will focus on three of the post--9/11 responses, each initiated by the US, which illustrate the diversity of multilateral tools that have been employed to address the threat, each making use of a different type of multilateral framework: the UN, the G8, and a "coalition of the willing" approach.

The Proliferation Security Initiative

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[49] See, e.g., WMD Commission Report; Brian Finaly and Elizabeth Turpin, "The 'Next One Hundred' Project: Constructing a Global Toolkit to Support States-at-Risk and Strengthen the International Nonproliferation Regime," Stimson Center, 2006, www.stimson.org/ctr/pdf/100Description.pdf; and Natasha Bajema, "Evolving Threats, Evolving Policy: U.S. Attitudes & Multilateral Institutions for Nuclear, Biological and Chemical Weapons," *Center on International Cooperation: An Occasional Paper, Studies in Security Institutions,* vol. 2, July 2005.

[50] See, e.g., Olivia Bosch and Peter van Ham, "Global Non-Proliferation and Counter-Terrorism: The Role of Resolution 1540 and Its Implications," in *Global Non-Proliferation and Counter-Terrorism* (Olivia Bosch and Peter Van Ham, eds), (Royal Institute of International Affairs; London, 2007); and Bajema, p.10.

The most innovative, controversial, and perhaps least effective of these is the Proliferation Security Initiative (PSI). Launched by President Bush in May 2003, with 16 "core" states from the global North to address a gap in international counter-proliferation regime highlighted by a December 2002 incident. A Spanish warship on patrol in the Indian Ocean as part of the US-led war in Afghanistan, acting on a tip from US intelligence, stopped a North Korean cargo ship en route to Yemen. Though dangerous, the cargo included fifteen scud missiles armed with conventional warheads, was not illegal and Spain lacked the legal authority to seize the weapons. Spanish officials were only able to board because the ship had a range of problems with its paperwork, including its registration as "under international law a ship on the high seas may only be searched if it is without nationality or if it is stopped by the nation with which it is registered." [51]

The founding PSI countries pledged to use their national capabilities to develop a broad range of legal, diplomatic, economic, military, and other tools to interdict such illegal shipments of WMD and WMD-related materials and equipment in the future via land, sea, and air.

The PSI is not a formal organization: it lacks a charter, a secretariat, established funding or even a method of reporting successes or failures apart from announcements by the US or other participating governments.[52] According to Wade Boese of the Arms Control Association, the entire initiative "conforms to the [US] administration's preference for acting with coalitions of the willing that permit the greatest freedom of action possible.[53] Instead of members it has "supporters" which are encouraged, but not required, to commit to a Statement of Interdiction Principles to strengthen and enforce their own nonproliferation laws, and to participate in training activities and actual interdiction operations. It started as an alliance among countries like Australia, Britain, and Japan, the US has recently asserted that more than 90 countries now support the PSI.[54] It is difficult to assess what this actually means as declaring one's support for the initiative does not require any particular action or bind one to any decisions, and countries can decide on case-by-case basis whether they will participate in a given exercise. In fact, according to a former US official involved in its creation, the PSI was initially meant to be small. It "was precisely an answer to the ossified, broad based proliferation structures that were failing us," he said. "It was meant to be an association of like-minded nations genuinely worried and serious about counter-proliferation."[55] Yet, the continuing lack of participation in PSI by key countries such as China, India, Pakistan, Indonesia, and Malaysia in what needs to be a global effort to address the WMD-terrorism threat, let alone counter proliferation, highlights one of the drawbacks of a "coalition of the willing" approach.[56]

The extent to which the PSI and its operational activities have contributed to countering proliferation is a subject of considerable debate. Although WMD interdiction efforts took place with international cooperation before PSI was formed, supporters argue that PSI training exercises and boarding agreements give a structure and expectation of cooperation that will improve interdiction

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[51] Rebecca Weiner, "Proliferation Security Initiative to Stem Flow of WMD Material," Center for Nonproliferation Studies at the Monterey Institute of International Studies, 16 July 2003, www.cns.miis.edu/pubs/week/030716.htm .

[52] Mary Beth Nikitin, "Proliferation Security Initiative (PSI)," *Congressional Research Service Report to Congress,* 4 February 2008, http://fas.org/sgp/crs/nuke/RL34327.pdf.

[53] Wade Boese, "Implications of UN Security Council Resolution 1540," Presentation to the Institute of Nuclear Materials Management Panel Discussion, 15 March 2005, www.armscontrol.org/events/20050315_1540.

[54] "Washington Declaration for PSI 5th Anniversary Senior-Level Meeting," *US Department of State*, 28 May 2008.

[55] Eli Lake, "Anti-WMD Program's Architect Questions Its Effectiveness," *New York Sun*, 29 May 2008 (quoting David Wurmser), www.nysun.com/foreign/hadley-questions-us-security-initiative/78843/.

[56] See, e.g., Mark Valencia, "The Proliferation Security Initiative in Perspective, " *Nautilus Institute Policy Forum Online*, 25 May 2006, www.nautilus.org/fora/security/0641_Valencia.html and Mayuka Yamazaki, "Origin, Developments and Prospects for the Proliferation Security Initiative," Institute for the Study of Diplomacy Edmund A. Walsh School of Foreign Service, Georgetown University, 2006, pp. 8-9, www.isd.georgetown.edu/JFD_2006_PSA_Yamazaki.pdf.

efforts.[57] Measuring success, however, remains difficult as, according to the US Department of State, "the results of our interdiction efforts must necessarily be kept in classified channels because of sensitive sources and methods." However the Department further provides that the US "has worked successfully with multiple PSI partners in Europe, Asia and the Middle East to prevent transfers of equipment and materials to WMD and missile programs in countries of proliferation concern."[58] In addition, the State Department International Advisory Board claimed, without any support, that the PSI "led to the unraveling of the A.Q. Khan proliferation network and Libya's decision to give up WMD."[59] It is also not clear the extent to which any of this cooperation was facilitated by the existence of the PSI or would have taken place even in its absence.

In addition, although an informal coordinating structure has developed, with an operational experts group meeting on a periodic basis, some question how sustainable the PSI is so long as it retains its informal nature, as the current arrangement lacks an mechanism or authority "to bind PSI adherents to this cooperative endeavor." [60] This *ad hoc* arrangement, which lacks even a coordination focal point let alone an ability to serve an as information clearinghouse, can impede the cooperation the PSI is designed to foster. As a result, some have called for the transformation of the PSI into a more formal structure "without creating an unwieldy bureaucratic superstructure,"[61] which might include institutionalized communication channels via the creation of an official point of contact in each relevant government, a mechanism to allow for more coordination with other nonproliferation bodies and frameworks, and something more than merely asking to support a voluntary set of principles.[62] If all other non-proliferation controls fail, the ability of concerned states to take coordinated interdiction action provides a final opportunity to stop illicit transfers. The Proliferation Security Initiative has helped participating states improve and coordinate their interdiction capabilities and holds promise both in its operational effectiveness and in its deterrent impact. However, the ad hoc nature of the initiative and its limited applicability could erode its promise over time.

Further, while support for the PSI has increased, its long-term viability will likely remain in doubt so long it continues to generate considerable criticism from those who prefer a broader and international law-based multilateral approach to addressing global threats, and one which is more closely linked to the existing treaty regimes and the Security Council.[63] In addition, the ability of the PSI to attract a wider swath of countries may require finding a stronger legal basis for the operational activities contemplated by the initiative. Perhaps in recognition of this need, in early 2004 the US sought to include language in Security Council Resolution 1540 welcoming the PSI and calling on states to interdict, if necessary, WMD-related shipments. Reflecting a concern about directly linking the PSI to a binding Council resolution, however, China objected to both the inclusion of the word "interdict" and the reference to PSI. As a result, the diluted final draft merely calls on countries to "take cooperative action to prevent illicit trafficking" in WMD.

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[57] http://fas.org/sgp/crs/nuke/RL34327.pdf

[58] "Proliferation Security Initiative Frequently Asked Questions (FAQ)," *U.S. Department of State Fact Sheet, Bureau of International Security and Nonproliferation*, 22 May 2008, www.state.gov/t/isn/rls/fs/105213.htm.

[59] "Report on Building International Coalitions to Combat Weapons of Mass Destruction Terrorism," International Security Advisory Board, US Department of State, 5 February 2007, p. 7, www.state.gov/documents/organization/66363.pdf,.

[60] See, e.g., Alex Reed, "The PSI: Too Much, Too Soon," *The Stimson Center*, 13 August 2007, http://www.stimson.org/cnp/?SN=CT200708131442.

[61] Prepared testimony by Mark Fitzpatrick, Senior Fellow for Non-Proliferation, International Institute for Strategic Studies Before a Joint hearing of the House Committee on Foreign Affairs' Subcommittee on the Middle East and South Asia, and the Subcommittee on Terrorism, Nonproliferation and Trade, 27 June 2007, http://foreignaffairs.house.gov/110/fit062707.htm.

[62] Fitzpatrick and Reed.

[63] WMD Commission, p. 154.

In October 2005, however, the US did succeed in getting support for an amendment to the International Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA) in October 2005 at the International Maritime Organization diplomatic conference.[64] SUA signatory countries agreed to amend SUA to allow interdiction on the high seas if the ships are registered to countries that are parties to the SUA.[65] Although this has somewhat strengthened the legal underpinning of the PSI, "some countries have struggled to find ways to maintain consistency between this rather radical amendment and their existing national legislation."[66]

Finally, in addition those who criticize the *ad hoc* nature of the PSI, the uncertain legal basis for its activities, its limited transparency, and lack of broad-based participation, some argue that the emphasis PSI supporters place on it among the panoply of responses to the WMD-terrorism threat, makes counter-proliferation and interdiction more of a priority than it warrants based on the wider threat. According to the Stimson Center's Alex Reed, this

> distracts governments from more important activities: mainly, securing WMD materials at their source. While interdiction is an important component of the nonproliferation regime, it is much more difficult to carry out than material security enhancement. If terrorist groups cannot get their hands on the materials necessary to build weapons of mass destruction, there is no need to worry about trafficking and interdiction. Once bad actors acquire the material, they are very difficult to track. Even the best interdiction regime cannot overcome intelligence deficits. Some governments may allow their material security efforts to stagnate, believing that participation in PSI is an adequate contribution to international nonproliferation.[67]

Reed therefore persuasively argues that "the US Government, as the founder and leader of PSI, should make clear that PSI participation should be a springboard into other efforts for states first entering the nonproliferation arena."[68]

G8 Global Partnership Against the Spread of Weapons and Materials of Mass Destruction

Material security enhancement is in fact one of the objectives of the G8's Global Partnership, which was launched by the G8 leaders at the 2002 summit. With 11 September having reminded the world that ultimately securing WMD materials at their source and investing in threat reduction today is much less costly than the consequences of a terrorist attack tomorrow, it reflected their desire to make a financial pledge to show their commitment to preventing terrorists from obtaining WMD.[69] It was also created to improve the coordination of the growing number of different international nonproliferation assistance and threat reduction programs that then existed in the former Soviet Union such as the US-Russia Cooperative Threat Reduction program. With the identification of spending priorities and by defining implementation guidelines, the expectation was that the G8 and others could carry out their work more efficiently and avoid "program redundancy by holding coordination meetings on the Global Partnership regularly throughout the year."[70]

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[64] On 14 October 2005, the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation was adopted by the Diplomatic Conference on the Revision of the SUA Treaties.
[65] This is despite oppositions from non-NPT countries such as India, Pakistan and Israel.
[66] Yamazuki, p. 12.
[67] Reed.
[68] Ibid.
[69] "Global Partnership Basics," Strengthening the Global Partnership, 2004, www.sgpproject.org/resources/GPbasics.html.
[70] Ibid.

The $20 billion pledged over 10 years ($10 billion by the US and $10 billion by the others, including Russia) was designed to provide the means for tighter control over chemical, biological, radiological, and nuclear weapons and materials, initially in Russia and then elsewhere, and particularly to prevent terrorist acquisition of such devices and technologies. Among the Global Partnership's priority concerns, as enumerated in its founding document, have been the destruction of chemical weapons; the dismantlement of decommissioned nuclear submarines; the disposal of fissile materials; and finding alternative employment for former weapons scientists. Since 2002, the Global Partnership has been expanded to include 14 non-G8 donors, including the EU,[71] all of which have signed onto the six principles to prevent terrorists or those that harbor them from acquiring or developing WMD or related materials, equipment, and technology, and one additional recipient, Ukraine.[72]

The G8 (and before it the G7) has historically been criticized as a "rich-man's club" that excludes non-Western powers, particularly those that are playing an increasingly important role in the global economy. As a result, the legitimacy of its actions have been questioned by some. Such criticisms, however, would not seem to apply to the Global Partnership, which is essentially a technical assistance/capacity building program meant to improve the coordination among major donors in a priority area. The G8's willingness to include non-G8 donor countries in the Global Partnership has further helped to enhance its reputation. In addition, although not a formal organization and lacking a permanent secretariat (the current G8 President's foreign ministry serves as an *ad hoc* secretariat for the partnership during the year), the coordinating mechanism it established involving senior experts from capitals to exchange information on plans for Global Partnership projects, avoid program redundancy, and discuss implementation challenges has helped ensure some continuity during the rotating G8 presidency. Further, this Global Partnership Working Group produces a comprehensive report and charts that offer an account of pledges and the project areas to which they are allocated, which helps increase public awareness of its work and the threats it is seeking to address.[73] As result of this transparency, it has avoided some of the criticism that has leveled against the way in which the PSI conducts its business.

The work of the Global Partnership has also benefited considerably from the efforts of the Strengthening Global Partnership project SGPP, a consortium of 24 research institutes around the world working to build political and financial support for the partnership.[74] Before concluding its work in January 2008, the SGPP produced a number of reports, including a 2003 study recommending threat reduction priorities for the future and a 2006 critical assessment of the progress being made by the Global Partnership, and also sponsored a range of outreach and awareness activities.[75] This constructive, organized engagement between governments and nongovernment organizations (NGOs) from different regions is critical to raising public awareness of the threat and building public support for government (and intergovernmental responses to address it. As such, the SGPP is a model that should be replicated in the context of addressing the WMD-terrorism threat more broadly, including in supporting the PSI and implementation of Security Council Resolution 1540, where there has so far largely been only criticism from NGOs of the PSI and *ad hoc* interactions between the 1540 Committee and NGOs.

Despite some of its successes the Global Partnership has come under criticism in a number of areas. For example, much of the money pledged has yet to be used to implement projects, with a

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[71] The non-G8 countries are: Finland, Norway, Poland, Sweden, Switzerland, Netherlands, Australia, Belgium, the Czech Republic, Denmark, Ireland, New Zealand, and the Republic of Korea.

[72] For a list a complete list of these principles see www.g8.gc.ca/2002Kananaskis/globpart-en.asp.

[73] Robert Einhorn and Michele Flournoy, "Assessing the G8 Global Partnership: From Kananaskis to St. Petersburg," *Center on Strategic and International Studies*, July 2006, http://www.csis.org/media/csis/pubs/060701_g8_global_partnership.pdf, 5-6.

[74] For more information on the SGPP see www.sgpproject.org.

[75] Ibid.

lack of effective leadership and management from Russia being cited as one of the reasons.[76] In addition, despite its efforts, coordination among the countries involved continues to suffer,[77] in part because many countries themselves are poorly coordinated with no individual responsible for coordinating national threat reduction assistance activities in many G8 countries including the US.[78] Perhaps more importantly, however, the Global Partnership has not been most active in the areas of greatest risk, thus it is unclear the extent to which the initiative is reducing the WMD-terrorism threat. According to the *Center on Strategic and International Studies,*

> to some extent, a natural division of labor is occurring amongst Global Partnership donor states, with many focusing on tasks that are easily supported in their home parliaments or that take advantage of a particular technical competency they possess. However, this strategy risks giving too little emphasis to other, potentially more important Kananaskis priorities. Thus, chemical weapons destruction and submarine dismantlement have received the most attention to date, especially among non-U.S. donors, while reducing nuclear and biological terrorism threats has been a lower priority.[79]

As a result, after six years, some of the priorities set forth by the G8 in 2002 are still underfunded.

In addition, despite the positive steps taken to broaden participation in the G8 initiative, additional steps are needed to make the program truly global: this involves expanding the participation of donor countries, but more importantly those on the receiving end of the program's projects beyond Russia and the Ukraine. The goal should be not only to expand the donor base to allow the program to provide assistance wherever needed to reduce the threat of catastrophic terrorism, but as a source for assistance to support broader efforts to address WMD-terrorism. For example, the Global Partnership now includes a wide range of countries that have considerable expertise and funds available to provide technical assistance and other capacity building assistance to states aimed at addressing various aspects of the WMD-terrorism threat. Thus, it could deepen its relationship with the Security Council's 1540 Committee to allow it to become more active in helping countries implement their obligations under Resolution 1540 to improve export controls, increase border security, and strengthen physical protection of nuclear and biological facilities.[80]

Security Council Resolution 1540 and the 1540 Committee

Motivated by the heighted risk of WMD and related material falling into the hands of terrorists, which was underscored in early 2004 by the revelations of a nuclear black-market run by Pakistani scientist A.Q. Khan and a recognition of both the gaps in the existing international global nonproliferation framework to address this threat and the urgent need to fill them, the Security Council adopted a ground-breaking resolution in late April 2004 aimed at combating WMD-terrorism. The resolution (Resolution 1540) requires all UN member states to undertake a series of measures to prevent the proliferation and transfer to terrorist and other nonstate actors of biological, chemical, and nuclear weapons; their delivery systems; and related materials. The resolution is "exceptional in that it compels every UN member state to criminalize the proliferation of WMD to

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[76] Jon Wolfsthal, Testimony before the U.S. House of Representatives International Relations Committee, Subcommittee on International Terrorism and Nonproliferation on "Nonproliferation and the G-8," 30 June 2005, http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=17146.

[77] Rüdiger Lüdeking, Deputy Commissioner for Arms Control and Disarmament, Federal Republic of Germany, "G8 Global Partnership at Midpoint," in Global Partnership Update, no. 10, January 2008, http://www.csis.org/media/csis/pubs/080208_gp_update.pdf, p. 4.

[78] Ibid.

[79] Einhorn and Flournoy, p. 28.

[80] Ibid.

nonstate actors in its national legislation and establish effective domestic controls to prevention proliferation."[81]

Among the lacunae in the nonproliferation treaty and export control regimes it was intended to fill were: 1) the focus of the existing regimes on states rather than non-state actors; 2) the lack of universal participation in, let alone implementation of, the existing regimes; 3) the lack of an organization mandated to address the proliferation of biological weapons and agents; and the 4) difficulties under the current cumbersome regimes for identifying and taking enforcement measures against noncompliant countries. In addition, the resolution not only addresses financial, accountability, border, and protection controls, thus going beyond what is included in the BTWC, CWC, and NPT, but its preamble presents illicit trafficking in WMD or related materials as a threat to international peace and security for the first time.[82]

Much has been written about the controversial nature of the resolution and the unprecedented amount of concern that non-Council members, in particular those from the Non-Aligned Movement (NAM), voiced when it was adopted.[83] Although all UN member states agree to be bound by decisions of the Security Council, the Council, in the view of some countries and experts, circumvented the traditional treaty-making process by which states must give their consent to be bound by imposing obligations of a general nature on all countries.

The binding nature of the resolution, the complexity and breadth of its requirements, and the controversy surrounding its adoption highlight the issue of implementation. Although initially opposed by the United States, the Council's decision to establish a committee modeled on its Counter-Terrorism Committee, which would not only monitor countries efforts to implement the resolution, but engage in cooperative dialogue and help them find the assistance they need, was both a recognition of the implementation challenges that would lie ahead and a *sine qua non* for getting support from a number of Council members for the adoption of the resolution.

As was pointed out shortly after its adoption, the implementation challenges are enormous. "This is especially true for many of the world's developing states, some of which, even if they have the will to do so, lack the necessary resources. States particularly affected are those which are not already parties to the relevant WMD treaties (NPT, CWC, BTWC) and do not therefore already have the appropriate measures in place — and those which, although parties, have not fully implemented their obligations."[84] As accurately described by Professors Lawrence Sheinman and Johan Bergenas, "[b]eyond political will — which is lacking in many cases either because the challenges addressed in 1540 are seen as remote from a given country's concerns and as an effort by the United States and its allies to force the entire international system to partake in the 'War on Terrorism' — there is the question of human, structural, and institutional capacity."[85] Even the US recognized at an early stage the significant capacity shortfalls that exist around the world in these areas. It understood that the stark reality is that "we live in an era of global economies and growing interdependence no state will remain unaffected by WMD proliferation, and none of us is stronger

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[81] Monika Heupel, "Implementing UN Security Council Resolution 1540: A Division of Labor Strategy," Carnegie Endowment for International Peace: Carnegie Papers, no. 87, June 2007.

[82] Bosch and van Ham, p. 10.

[83] See, e.g., Eric Rosand, "The Security Council as Global Legislator: *Ultra Vires or* Ultra Innovative?," *Fordham International Law Journal* 28(1), 542-590; and Stefan Talmon, "The Security Council as World Legislature," *American Journal of International Law*, 99(1): 175-193.

[84] Gabriel H Oosthuizen, and Elizabeth Wilmshurst, "Terrorism and Weapons of Mass Destruction:United Nations Security Resolution 1540," Chatham House Briefing Paper, September 2004.

[85] Lawrence Scheinman and Johan Bergenäs, "Strengthening a Weak Link in the Global Security Chain: Regional Implementation of UN Security Council Resolution 1540," *CNS Feature Stories*, 9 September 2008, www.cns.miis.edu/stories/080909_1540.htm.

than the weakest link."[86] And it underscored the importance of ensuring states receive the assistance they need to address their capacity shortfalls.

All of this highlights the essential role that the 1540 Committee and the group of experts it asked the Secretary-General to hire to support must play. The WMD Commission concluded that the controversial resolution "would seem to have significant potential" if the Council "provides [to the committee] the necessary institutional resources for monitoring implementation and assists states in complying."[87]Others hoped that the efforts of the committee could "represent the beginnings of minimum global standards for preventing proliferation"[88] and develop effective global standards in fields where none currently exist such as the physical protection of nuclear facilities around the world.[89]

In their more than four and a half years of existence, the committee and its group of experts have contributed to global efforts to implement resolution 1540, but in rather modest ways. For example, their most significant accomplishment so far may have been the development of a common matrix that takes stock of all legislation and measures (existing and planned), and their enforcement, being taken to implement the resolution in those 155 countries that have submitted the requested national report to the committee.[90] The committee has helped convene regional workshops to promote implementation of the resolution, and has begun to ratchet up its efforts to facilitate the provision of technical assistance, including through the preparation of templates for those requesting and offering assistance. Lacking the resources or mandate to provide assistance itself, however, the committee must rely on bilateral and multilateral donors to fill the gaps, which underscores the importance of deepening cooperation with the Global Partnership, as well as with the IAEA, OPCW and other multilateral and bilateral partners capable of providing assistance in areas relevant to the resolution. Thus, the Council's 23 February 2007 open debate on cooperation between the 1540 Committee and international organizations[91]was an important development. However, the fact that the committee had yet to engage seriously with these outside bodies nearly three years after the adoption of Resolution 1540 highlights the slow-moving pace at which it operates, where the consensus approach tends to impede the decision-making process.

In fact, starting from its early days when it took the committee many months to negotiate its rules of procedures and decide what should be the role of its group of experts, it has found consensus difficult to reach on many issues, including its program of work, how to use the matrices (for example, whether they can be used by the committee and its group of experts to judge member state implementation), how broadly to share the matrices, whether the committee's experts can use public sourced material in analyzing a country's implementation efforts, the content of its biannual report to the Security Council (it took nearly five months for the 15 committee members to agree on the draft prepared by the experts), and the extent to which the committee should engage with NGOs. Many of the difficulties in the committee reflect an extension of the controversy that surrounded the adoption of the resolution in the first place – that the Security Council was usurping the role of the General Assembly by adopting a resolution that imposes obligations of a general nature on all countries – and which has yet to disappear.

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[86] Andrew Semmel, Principal Deputy Assistant Secretary for Nuclear Nonproliferation, "UN Security Council Resolution 1540: The U.S. Perspective," Remarks at Conference on Global Nonproliferation and Counterterrorism: United Nations Security Council Resolution 1540, Chatham House, London, England, 12 October 2004, www.mtholyoke.edu/acad/intrel/bush/semmel.htm.

[87] WMD Commission, p. 55.

[88] Bajema, p. 13.

[89] David Fidler, "International Convention for the Suppression of Acts of Nuclear Terrorism Enters into Force," *The American Society of International Law, Insights*, 5 July 2007, www.asil.org/insights/2007/07/insights070705.html.

[90] United Nations Security Council, "Report of the committee established pursuant to Resolution 1540 (2004)," UN Doc. S/2008/493, 8 July 2008, para. 17.

[91] Such as the International Atomic Energy Agency, and the Organization on the Prohibition of Chemical Weapons, and the World Customs Organization.

The committee recognizes that full implementation of the resolution will require time, sustained capacity-building efforts, and a long-term commitment to its objectives by all states.[92] However, it continues to fall short in providing itself and its group of experts with the necessary mandate and tools to maximize its ability to help achieves these supposedly urgent goals.

For example, it has authorized the hiring of only eight experts to support its work, which reflects both the initial US desires "to avoid new bureaucracy while establishing swift and, hopefully, effective measures within a system where it could expect to have significant leverage"[93] and the desires of committee members from the NAM to try to limit the impact of a committee and a resolution, they felt should not have involved the Security Council from the start.

Given the growing number of tasks the committee is assigning to the experts, which now include dialoguing with 192 states and international, regional, subregional bodies, however, it is ever more clear that the current number of experts is woefully inadequate. Although a "division of labor strategy"[94] which involves a range of stakeholders is needed and is being developed to implement the resolution, it will not be sustainable over the long-term unless the committee also enlarges its group of experts to coordinate (albeit loosely) this effort. In addition to expanding the group (and ensuring it has the requisite expertise), however, the committee needs to take additional steps to strengthen its ability to facilitate the delivery of capacity-building assistance and perhaps even allow the group to provide legislative and export-control regulation drafting assistance directly to states. Such steps could include creating a roster of experts from different countries, which could be called upon as needed to provide 1540-specific assistance to a country that requests it.[95] A 1540 capacity-building trust fund could be established in the UN Office of Disarmament Affairs (ODA) to fund such assistance delivery activities. In addition, the committee could encourage more engagement between the group of experts and NGOs, which, according to some estimates, deliver at least one-third of global assistance in fields related to the implementation of resolution 1540.[96] Although NGOs have worked with the ODA and the group of experts to help raise awareness of 1540 obligations in different regions around the world, the committee has not allowed the experts to involve NGOs in their capacity-building facilitation efforts. Given the resistance of some committee members to allowing for greater NGO involvement, NGOs should become proactive and establish an NGO network of groups interested in promoting the implementation of the resolution, including by providing capacity-building assistance to countries in need. Such a network could be modeled on the SGPP, which recently ended its work.

Sustaining global support for the implementation of resolution 1540 will also require the committee to allow its group of experts to provide independent analysis of the WMD-terrorism threat, highlighting its different regional and subregional dimensions, regions, something they are currently prevented from doing. Although there are plenty of NGOs and states that offer assessments of the WMD-terrorism threat, few would be seen as having the necessary objectivity and could be relied on by committee and its group of experts as they seek to develop priority issues and regions on which to focus. Having a "UN" analysis could thus enhance the credibility of the committee and the Council when they speak about the urgency and global nature of the threat. The analysis could be modeled on that undertaken by the Security Council's Al-Qaeda/Taliban

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[92] United Nations Security Council, "Report of the committee established pursuant to Resolution 1540 (2004)," UN Doc. S/2008/493, 8 July 2008.

[93] Olivia Bosch and Peter van Ham, "Global Non-Proliferation and Counter-Terrorism: The Role of Resolution 1540 and Its Implications," *Global Non-Proliferation and Counter-Terrorism: The Impact of UNSCR 1540* (Bosch and van Ham, eds.) (Clingendael Institute; The Hague, 2007), p. 5

[94] Heupel.

[95] Unfortunately, the committee rejected such a proposal in September 2008. Conversation with 1540 group of experts, September 2008.

[96] Interview with 1540 Committee group of experts, September 2008.

Sanctions Committee's Analytical Support and Sanctions Monitoring Team, which helps maintain global support for the council's Al-Qaeda/Taliban sanctions regime. Without any independent analysis to explain why the threat is not simply that Al-Qaeda might employ WMD in an attack against the US homeland or its interests abroad, but that, for example, biological or chemical agents produced in a sub-Saharan African country with lax monitoring of any biological or chemical facilities could be used by a local insurgency group or otherwise in the context of a civil war, it will be difficult to convince many countries of the urgency of both the threat and allocating the necessary domestic resources to address it.

Highlighting this problem is the fact that "many participants in various activities designed to promote awareness and implementation of the [1540] resolution, however, have noted that either their government or parliament did not understand the extent of their involvement in the production, consumption or trade in WMD proliferation-related items."[97] Several asked the expert group for this kind of information about their state.[98] As one of the committee's experts has recently written, "raising awareness of these concerns among all states, particularly among those that need assistance, should increase support for greater implementation. Understanding the extent to which any state has ties to the production, consumption or trade in 1540-related items should also help the committee and those offering assistance to work more effectively and efficiently."[99]

Finally, combating WMD-terrorism is not a top priority in many countries in regions such as Africa, Southeast Asia, and the Pacific Islands. Many view it primarily as part of a "Western-imposed" agenda, particularly when the pressure for doing so is coming from the Security Council. Thus, sustaining global support for 1540 implementation will require paying more attention to highlighting the broader benefits that will accrue to states when they implement the resolution. This means, for example, explaining how "putting in place effective border controls would affect not only WMD, but small arms and light weapons, illicit drug and human trafficking and the like. This is true for all states, not just a privileged few, and it carries with it benefits that... extend into the economy generally and reinforce domestic efforts to meet social and economic objectives and raise the level of prosperity more generally."[100]

The 1540 Committee cannot rely exclusively on regional outreach workshops to do this as it does not allow for the country- and often situation-specific messaging that will be needed to achieve this objective. Sustained engagement between the committee's group of experts and national officials in capitals is a missing piece of the equation. However, these experts, unlike those which support the Council's efforts to monitor implementation of the Al-Qaeda/Taliban Sanctions regime and resolution 1373, currently lack a mandate for this sort of activity.

In short, as this brief overview of some of the limitations of the committee's group of experts reveals, although the committee – and the council itself -- continues to remind all states of the urgency in full implementation of the resolution and a long-term commitment, given the gravity of the threat facing the international community, it has yet to act in a way that reflects this same urgency. The irony is that the United States, the country whose President came to the General Assembly in September 2003 and called on the Security Council to adopt the resolution that became 1540 and reiterated its importance five years later in his final speech to the world body, has been unwilling to take the lead in ensuring that the committee provides the group of experts with what is needed in terms of both mandate and resources to maximize the UN's contribution to global implementation efforts. Partly because of these shortcomings, the committee's ability to spearhead a

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[97] Richard Cupitt, "Non-Paper on Developing a Methodology for 1540 Assistance Engagement," Draft, 27 August 2008, p. 1. [Copy on file with author]
[98] Ibid.
[99] Ibid.
[100] Lawrence Sheinman, "Conclusion," in *Implementing Resolution 1540: the Role of Regional Organizations* L. Scheinman (ed.), (United Nations; 2008), pp. 157-158

global implementation effort has been compromised, an effort one expert described as "feeble, to the point of negligence."[101]

Conclusion

The advent of a new brand of terrorism that operates across borders and transnational networks and whose groups and supporters seek to inflict mass casualties, coupled with the destructive threshold crossed on 9/11, means that a terrorist attack using WMD will continue to be a realistic prospect for the foreseeable future.[102] Although there are differences of opinion as to the likelihood of such an attack, few would dispute the fact that if one were to materialize, the impact could be catastrophic. Few would also contest 1) the need for cooperation at all levels to address the WMD-terrorist threat effectively over the long-term, 2) the importance of ensuring that all states have the capacities to prevent their territory from being used as a base for WMD-terrorism-related activities, 3) the significant capacity shortfalls that need to be plugged as a matter of priority, and 4) thus the essential role for multilateral bodies and frameworks.

Given the urgency of the threat the United States faced after the 9/11 attacks, the shortcomings in the global nonproliferation framework in place on that date, and the Bush Administration's general ambivalence toward multilateral institutions, with its preference for "a la carte" multilateralism, it is not surprising that the United States sought to develop new multilateral mechanisms to help address the WMD-terrorism threat. In designing and spearheading efforts to create the PSI and the G8 Global Partnership, and persuade the Security Council to adopt resolution 1540, the United States was motivated in part by the need to act quickly, the slow-moving nature of international institutions, a skepticism of international bureaucracies, and the desire not to unnecessarily constrain US freedom of action. Although each of the new initiatives was launched with great speed and fanfare, making a significant political and media splash each time, insufficient attention and resources was given to how to maximize and sustain their impact over the longer term. Particularly with regard to the PSI and resolution 1540, this approach has proven counter-productive and slowed down more sustainable and effective efforts to address the deadly nexus between WMD and terrorism. Corrective action is therefore needed to ensure that these and other multilateral mechanisms are provided the mandate, structures, and resources that reflect the urgency, potential severity, global scope, and long-term nature of the threat.

[101] Fitzpatrick.

[102] Andrew O'Neil, "Terrorist Use of Weapons of Mass Destruction: How Serious Is the Threat?," in *Weapons of Mass Destruction and Terrorism,* Russell Howard and James J.F. Forest (eds), (New York: McGraw Hill; 2008), p. 65.

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PAPER ON

TRANSATLANTIC COOPERATION ON WMD TERRORISM

By

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DRAFT- DO NOT QUOTE

Given the opportunity of what is at stake, the United States and European governments should be planning now how they would respond to an imminent terrorist attack involving WMD.

Stephen J. Flanagan (director INSS/NDU)[1]

The question of WMD terrorism is a major issue. Some events in the last fifteen years make us conscious of this new threat: Aum Shinrikyo and the gas sarin attacks in 1994 (Matsumoto) and 1995 (Tokyo) ; 1995 (radiological bomb find in a park in Moscow); and the major biological attacks with Anthrax agent in United States (Autumn 2001). Moreover, at many times, the Al Qaida's leading members have expressed their own interest for these means. These affirmations were confirmed from 2002 by the discovering of plans and training books in Afghanistan and Europe. The Saoudian Cheikh, Naser Bin Hamad al-Fadh, published a fatwa (now denied) in 2003 to legitimate the use of WMD against the enemies of Islam.[2] Last but not least, it is absolutely necessary to refer the 250 p. published by Ayman Al-Zawahiri (Al Qaida n°2) on internet in March 2008, *The Absolution*, and precisely the chapter "retaliations", defending the right to "lay waste the territory of the Enemy".[3]

Structural effects:

As a matter of fact, with the increase in the effect of publicity engendered by the globalization, a local terrorist can benefit from global repercussions. The accessibility of technical knowledge now permits any group, governmental or otherwise, to profit from readily available knowledge, often considered as declassified by the Western nations, but potentially dangerous when it is diverted to terrorist uses (the ex-Iraqi nuclear program, or the existence of terrorist sites on the Internet). Moreover, the actions of groups can be rendered less visible thanks to the fragmentation of tasks and dispersed production. "the time to take the next logical step is now. " said Senator Lugar: "In a world in which terrorist attack on our country can be planned in Germany, financed in Asia, and carried out in United States, old distinctions between "in" and "out of area" have become irrelevant."[4]
In addition, the globalization of means of communication, most notably the media, is contributing equally to the growth of the terrorist risk, to the extent that disadvantaged populations can follow world events via satellite channels and witness a display of opulence from which they feel totally excluded. The phenomenon of exclusion is true for each country, as much internally (infra-state) as externally (extra-state). The coexistence of this set of factors nowadays renders the advanced societies more vulnerable than in the past to wide-ranging and more reactive terrorist attacks, with a predictable augmentation of the panic effect.

So looking to forecast a little bit the future, we could take into consideration the fact that the "cultural accessibility" (the willingness to do) crosses over the theoretical accessibilty" (generalization of knwoledge) and the "technology accessibilty" (the capability to do).

The difficulty to embrace the whole spectrum of WMD Terrorism :

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1 Strategic Forum, Sustaining US-European global security cooperation, http://findarticles.com/p/articles/mi_m0QZY/is_217/ai_nl5950663, p. 4.

2 See the paragraph: « Al Qaida et les armes de destruction massive » in Jean-François Daguzan, *Terrorisme(s) abrégé d'une violence qui dure*, CNRS Editions, Paris 2006, p. 154-159.

3 Ayman Al-Zawahiri, *L'absolution*, Editions Milelli, Paris, 2008, p. 191-196.

4 Richard G. Lugar, Redefining NATO's Mission: Preventing WMD Terrorism, *The Washington Quarterly*, Summer 2002, p. 11.

The real new development would seem to be the availability of means formerly reserved to the State, to non-governmental groups or indeed individuals. The spread of knowledge has had much to do with this, as well as the increase in the level of education of much of the world population; combined with these, globalization has done its work. The French "*Livre blanc sur la défense et la sécurité nationale*", published in June 2008, stressed on this dramatic evolution: "En accélérant les échanges de toute nature, la mondialisation facilite *les programmes de prolifération d'armes prohibées ou régulées* par les traités internationaux. Ces développements sont le fait non plus seulement de la volonté de certains États, mais aussi des initiatives prises par des réseaux privés et clandestins (p. 25). « *L'hypothèse la plus grave actuellement identifiée est celle d'une attaque terroriste majeure sur le territoire européen, utilisant des moyens non conventionnels, de type nucléaire, chimique ou biologique, couplée à une situation de guerre dans l'une des zones d'intérêt stratégique pour l'Europe. »(p. 39)* [5] And the *Livre blanc sur la politique étrangère et européenne de la France* published in july 2008 adds: "*De ce point de vue, la conjonction de ces armes (WMD) avec la menace terroriste ou une crise régional majeure au Moyen-Orient, apparaît comme l'un des scénarios les plus préoccupant.*" [6]
Finally, the dual nature of a number of techniques (especially chemical and biological), access to powerful computers, and sometimes the availability of a mercenary work force, have shattered the sphere reserved to the State. Nonetheless, not all these means are easily accessible, by virtue of their nature and the different disciplines of massive destruction involved. Nuclear terrorism is considered by many specialists to be the least likely option at the moment. The technological hurdles and miniaturization pose problems which have to be overcome; this can only be done with national-level resources, which would imply "remote control" terrorism by a "godfather" state (described as *sponsor* by anglo-saxon analysts). On the other hand, the dispersal of radioactive substances seems, *a priori*, more easily achieved. But chemical and biological threat are generally considered as the most achievable.

WMD Terrorism goes to the worse threat (large Nuclear or epidemic biological attack; eg. Smallpox) to the smallest (poisoning some persons or blackmail). It gives a huge challenge to the Authorities who are in the necessity to take into consideration every hypothesis as possible even if the biggest ones are low in the scale of probabilities. Of course many experts or medias are the more often thinking to the worse hypothesis (essentialy a huge pandemic attack with smallpox). But the plausibility is clearly given to chemical attacks throuhg industrial products (like chlorine, for example) or biologgical agents less lethal and more accessible. During the last years chemical attemps in Irak but also in Jordan (huge chlorine attacked just blocked by security services) show the terrorist interest for market chemical products.

The technical dimension is, of course fundamental. The discussion of non-conventional terrorism would make no sense, in the eyes of most authors, if it did not include the new accessibility of technologies formerly reserved to the exclusive military use of states, and henceforth subject to use by non-governmental groups. The term "terrorism by massive destruction " has been widely used by American writers. It deserves to be widely queried. Certainly, there is a new "requirement" on the part of certain terrorist groups for more lethal weapons (Oklahoma City, World Trade Center, Nairobi etc). But their use does not necessarily imply this dimension of "massive destruction", a term which current writers use to excess and mostly for reasons more political than analytical. It is, perhaps, necessary to speak of a quest for more media-worthy weapons, or of **"mass impact",** a term which is becoming more and more current among specialists. This is why the term non-conventional terrorism seems more appropriate in this respect, since it corresponds better to the different hypotheses of use, which run from the "image" of an attack of mass destruction, to its acknowledged execution (probably the least likely option). The term "non-conventional" refers,

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5 Editions Odile Jacob, Paris, 2008.

6 Sous la présidence d'Alain Juppé et de Louis Schweitzer, Livre blanc sur la politique étrangère et européenne de la France – 2008-2020 – La France et l'Europe dans le monde, Paris, p. 16.

from our point of view, less to the military sense of conventional or non-conventional weapons, than to a new approach to terrorism on the part of groups (one could also say "non-conformist").

The possibility to do serious harm to a potentially more powerful adversary by inflicting heavy civilian or military losses, or disorganizing his economy has to be seriously taken in consideration. Geostrategic but also Tactic considerations can explain the fact that chemical and biological weapons constitute an attractive alternative for small terrorist groups. Hence the concept currently in vogue in the United States of "asymmetric war", born after the Gulf War, appears pertinent, and seems to be able to justify the theory according to which the Western countries, and particularly the United States, by accentuating their conventional military superiority, incite their potential enemies to use such weapons. Unable to match their adversaries on the conventional military field, terrorist movements may place their hopes in the possibility of using a sufficiently terrible threat.

Many states, and not the smallest ones (one thinks obviously of the United States) now consider that chemical and biological terrorism as one of the principal threats to international security and place this question at the heart of their strategic preoccupations. As Senator Lugar added: "We are facing a "vertex of evil" - an intersection of WMD and terrorism."[7]

To counter the threat of WMD Terrorism, some crucial issues have to be addressed.

Strategic issues:

The causes:T

Radicalism is a threat for all societies. It is necessary to play on the roots of radicalism (doctrines, recruitment, ideology spread off). EU DG JLS (Justice, Liberty and Security) for instance develop programmes specially dedicated to the analysis of Radicalism in Europe. This action is a crucial stake.
The motivations for use of WMD: Now there is an extended literature on Apocalypse in the Muslim world which makes largely reference to the destruction of the world and especially of the enemies of Islam.[8] In other countries we found the spread of Apocalypse Cults (as the Rajneshees[9] and Aum Shinrikyo were the best dramatic example). These models of potential WMD Terrorist would be seriously taken in consideration.[10]

The networks:

The networks of terrorism and proliferation were strictly different in the past. Now the bareer between the two dimensions is progressively desapearing. On the other hand, the islamist networks acquire more autonomy from the central office in Central Asia. this evolution could imply more imagination. The last Al-Zawahiri's book gives the authorization to use all means available.
This new networks now fit with organized crime networks. There is actually arms networks, clandestine or dissimulated air cargo transportation[11]; and compleasant marittime fleet to carry on any goods via containers. The *Proliferation Security Initiative* (PSI) put the hinge on the control of maritime fluxes. Recent exercizes have been launch to work on the control of containers ships in

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7 idem, p. 11.

8 See Jean-Pierre Filiu, *l'Apocalypse dans l'Islam*, Fayard, Paris,2008.

9 This sect poisoned salad bars in a Oregon town in 1984 by injecting the agent *Francisca tularensis* making dozen of illness.

10 See Arthur J. Deikman, Them and Us : Cult Thinking and the Terrorist Threat, Bay Tree Publishing, Berkeley Cal., 2003.

11 See the remarquable Mark Bromley & Hugh Griffiths'works at SIPRI on this sepecial topics.

Asia (*Pacific Shiel'07*) and Europe (*Adriatic Gate'07* in Slovenia and *Smart Raven* in Lituania) in 20007.

At last the discovering of the private proliferation network of the Pakistanese Dr; AQ Khan is a very good example of a growing risk of private proliferation. To follow the connection between terrorist networks, proliferation networks and crime networks is a crucial stake.

The technical means:

From the simple chemical substance to the nuclear bomb, the spectrum of terrorist means is extremely large. Some Chemical products could be find on the market; radiological sources exist in industrials goods; when biological agents as smallpox or military enriched uranium or plutonium are particularly difficult to find (See Al Qaida's numerous tentatives). During the last four years attemps in Irak and blocked attack in Jordan put in evidence the use of chlorine as terrorist mean. this tendancy has to be very seriously to be taken in consideration. The existence of "orphan" radiological sources in Central Asia or Africa is also concern of anxiousness.

On the other hand, States require a large range of technology to counter technically the WMD threat:
Control and Identification of products, agents and technologies; neutralization; destruction without collateral damages;

The finances:

Huge steps have been jump the last years. the creation of Financial action task force (FATC - GAFI in French) offers a new tool to adress the question of financing the terrorism; Now, Transatlantic efforts try to apply the same methods to financing of the proliferation of WMD but the task is not easy. The report of the General accounting office (GAO) in 2004 quoted the fact that illegal funds crossing over the planet were estimated by United Nations between 500 to 1000 billions dollars. A significant part of these funs is dedicated to terrorism and proliferation.[12]

The Ministries of the FATF countries meeting at Washington on 12th of april 2008 approved the revised mandate of this organization which lead the priorities for the period 2008-2012. This new mandate must tackle with "the new threats affecting the integrity of the financial system as the financing of proliferation."

The FATF report on the financing of terrorism, published on 22th of february 2008 describes precisely the spectrum of terrorism finance and put the hinge on the complexity of the networks and its methods. In the perspective of the reinforcement of the national and international capabilities and of an extension of the mandate to the finances of proliferation, it would be interesting to think to a more narrow co-peration between intelligence services and treasury research team at national and transatlantic level. Then it seems to us urging to mix, to favour cross borders between people which are working on financing terrorism and financing proliferation. For now the system seems to walk on one leg. It is time to put it on two.[13]

The sponsors' connexions

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12 *Investigating Money Laundering and Terrorist Financing Federal Law Enforcement Agencies Face Continuing Coordination Challenges*, 11 may 2004, 15 p. ; www.gao.gov/cgi-bin/getrp?GAO-04-707.

13 see, Marie-Christine Dupuy-Danon, Réseaux et financements in *Les défis de la prolifération au XXIème siècle*, Actes de la journée d'études du 13 juin 2007, Paris, p. 38-42.

The real danger in WMD terrorism, is the risk to see States transfering or facilitating technology transfers to terrorist groups. the UN resolution 1540 adresses directly such an hypothesis. More over, the resolution forbids strictly any form of co-operation between States and Groups and refers to the seventh chapter of the Chart in case of transgression.
Even if we consider that a State could have the common sense to avoid to facilitate the access of WMD technology or weapons itself to groups or any non-state actors. we must adress this issue like a crucial challenge. Failed States, Countries were various groups are struggling for power, desesperate leaders or apocalyptic/ultra religious sub-groups in military or state services could have such a temptation. At last the command/control of military weapons or technologies is not the same everywhere.
The stake for US and Eu is now to insure the surveyance of such evolutions through intelligence means; to develop a common response (if possible) in case of evident smuggling; and to help the good-willing countries to fulfil their international obligations with a real enforcement effect and clearly it is not easy.

On the side of the response, the main functions to develop or increase in the struggle against WMD Terrorism and the transatlantic co-operation are : Prevention; Detterence; Countering measures; Restoration and Resilience. Every of them could be a source of cooperation between European Union and United States.

Prospect for a reinvigorated transatlantic co-operation: Think for a Holistic Strategy

The principle of "Holistic Strategy" proposed by Gijs de Vries for Biodefense could be extended to the WMD terrorism in a transatlantic way.[14] This term has to be undzerstand as a "global" strategy. Senator Lugar adds; "Through intelligence sharing, termination of illicit financial channels, support of first responders, diplomacy and public information."[15] Formally, the principle of c-operation against the threat of terrorism and proliferation have been settled in the UE-EU declarations of Dromoland Castle, the 26th of June 2004 and recalled in the Declarations of 20th of June 2005. Both Powers decides to support the UN actions against terrorism and proliferation; to struggle against the terrorist finance; to ehance their own capabilities to detect, investigate, prosecut and prevent terrorist acts; to insure the security of international transport and the borders control; to deal with the consequences of huge attempts and to help Third Countries to reinforce their own defence and the obligations to comply with UN or international requirements. Everything has been said. But each item could be elaborate:

- Combatting the ideology: "Finally the transtlantic partners must realise that there are important opportunities for cooperation in the war of ideas. A chasm of understanding exists between the US and the broader Arab and Muslim world, while many European countries struggle to cope with large domestic Muslim populations that have yet to be integrated into European society."This words from Roy Mc Cullough are topical. A real common reflection has to be organized to share the experience in combatting the radical ideology "in" and "out" the national countries. Due to historical reasons, US and EU approaches are very different. To open a dialogue on objectives and methods is a frist crucial step. [16]

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14 *Biosecurity and Biodefense:* Bioterrorism Strategy, Practice and Science, Vol. 5, number 3, 2007, p. 194.
15 *Redefining Nzto's Mission: Preventing WMD Terrorism*, Op. cit. p.9.
16 Roy Mc Cullough, *The future of Transatlantic Cooperation,* October 2004, SAIC, Center for European Security, p. 30. 15th Annual SAIC Wilton Park Conference.

- Leave the Mount Olympus : United States have more to suggest than to impose. The 20 Megaports initative and the visa MLAT were the very good examples of an constraining policy imposed by United States to its best Allies. United States should work with EU for more co-ordinated and balanced response to WMD Terrorism.
- More coordination for international initiatives (1540, PSI, G8,...):

- United States and EU must work together to reinforce the international processes of co-operation and alert for Bio events (WH0) and to increase or improve the capacities of the disarmament treaties to address the WMD threat (NTP, CIAB, CIAC). There is now useful discussion in the framework of the OPCW in order to image prolonging the convention in the perspective of chemical terrorism.
  An interesting way should be to take the international pandemic avian flue strategy as a model or a prototype of Transtlantic cooperation including communications assets and procedures.

- Exchange of intelligence. Now we are in a "one way street" where the European furnished friendly information when United States give partial and scarce information. Most analysts in intelligence issues advocate for a real intelligence sharing. "Jeremy Shapiro and Daniel Byman said that "U.S. efforts to minimize the flow of information for use in trial have created widespread anger. One complaint from European is a call for the United States to share more. Because sharing is seen as a one-way street, few Europeans leaders, to say nothing of the general populace, openly support it."[17]

- Nato-EU cooperation: Shapiro & Byman said :"Yet Nato's military orientation makes it less suitable for counterterrorism, as most of the issue concern domestic security and law enforcement. Only the EU has the broad mandate to act on domestic and security issues and enjoys the necessary legitimacy within Europe."[18] (p. 47) But Nato has a role to play on training and response; development of Military means to detect, deter and restore. Nato has a crucial role to play in order to counter the WMD terrorist threat in operations. At last the Militaries remain the ultimate bareer if the civil protection system unfortunately collapsed.

- US-EU cooperation: To organize common exercises and simulation more systematically. Atlantic Storm was a very good example of such a methodology. Organized by The Center for Biosecurity of UPMC, the Center for Transatlantic Relations of Johns Hopkins University and the Transatlantic Biosecurity Network,the exercize *Atlantic Storm* simulated an attack on smallpox in the European territory with spread off on the USA.

- To elaborate a common strategy on communication: To communicate during an emergency crisis is extremely difficult. Example like Katrina Storm show us the stake for a good communication. In a case of a huge event (nuclear or bio) implying by definition both side of Atlantic a co-ordination of the communication is absolutely necessary. The question of "Who" and "How" is crucial. This is the reason why it would definitively be necessary to identify the main momenta of the crisis and to have the most advanced technical communication systems capable to connect crisis situation centers. More over, to organize a common framework of communication on "time of crisis" (messages, wording, etc.) would be a useful way of co-operation.

- Toward a more coherent Outreach Strategy: it is necessary to favour a more stable and secure international environment. Both US and EU have to help States to adress the new threat and to suscribe effectively to the obligations of the treaties, UN resolutions and any

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17 Briging the Transatlantic Counterrorism Gap, *The Washington Quarterly*, Autumn 2006, p. 48.

18 idem, p. 47.

non formal initatives. For instance the implementation of the resolution 1540 is a crucial stake.

It is the reason why we develop programmes for Training all persons concerned by the struggle of WMD terrorism. From Custom and intelligence officers, special forces, civil security responders, to security forces and Policy makers, but also hospital and emergency specialist, and so on. In order to maximize the effects and to save the money in constrained periode, common programmes should be imagined.

- Dettering and countering: in the case of an imminent and huge threat (that is to say the proofed evidence of the preparation of a MD attemp), it seems useful to imagine some transatlantic procedures in order, if necessary, to to eliminate the threat. The challenge is enormous. First, the operation must protect the population, if done in urban area; avoid the explosion or dispersion er dissemination of any agents or substance; insure the security of forces. all these constraints made a long training and a close co-operation indispensable. The publicity of such capabilities could play a role of detterrence. Flanagan said thé US "administration might propose – in Nato, EU and bilateral channels – enhanced intelligence cooperation to uncover terrorist plots involving WMD; understandings on efforts to disrup execution of any such WMD attack plans (including agreed procedures for rapid, combined military, intellig, and police operations); and plans for European-American co-operation on mitigation efforts in the aftermath of any attack."[19]
- The role of Think Tanks could be crucial. It had been put in evidence during the major conference on European Union and proliferation organized by the French presidency of EU at Paris, in 15th and 16th of July 2008.
- The common understanding of the threat and the response means is an essential piece of a global strategy. We could suggest to create a co-ordinated Transatlantic network on WMD terrorism analysis. This network could animate the public debate and work on the definition of good practices on radicalisation. the work on theoretical analysis of WMD terrorism is also crucial due to the amount of stupidness that we could read on that topic everywhere. The Think Tanks could play an essential role in enlighting the medias with coherent and reliable information.

De Vries said in his paper that the struggle against terrorism gave the last seven years interesting steps and results but "No Strategic Break through" [20] This reflection is right. At the level of chief of states and governments as well as the EU institutions level. Every progress are the result of attempts and it is not sure that we could except any WMD attempt, even a small one, to be better! At European level the stake is more co-ordination between member states, to upgrade the level of less advanced states, to organize more precisely the defence and the response against WMD terrorism.
At the Transatlantic level. the stake is to reach a real balanced relationship and not the imposition by constraining means of procedures imagined in United States without concertation.

"Stop the minuet: it's time to tango!"said Leo Michel.[21] It is a very "mot d'ordre", a good slogan for Transatlantic Co-operation. But tin order to play a good tango the partners have to train together during a long period and to have the same level of knwoledge and the same consideration one with the other.

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19 Sustaining US-European Global Security Cooperation, op. cit, p. 3

20 idem p. 8

21 Leo G.Michel, Eurofuture, Winter 2004, www.ndu.edu/inss/Repository/Eurofuture-2Winter.pdf

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Istituto Affari Internazionali

Workshop

on

Coordinating Global and Regional Efforts to Combat WMD Terrorism

ROME, OCTOBER 24 2008

working language: English

With the support of

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OUTLINE ON

FIGHTING AGAINST WMD TERRORISM:
WHAT ROLE FOR THE EU?

By

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DRAFT- DO NOT QUOTE

In its 2003 Security Strategy the European Union identified five major threats to international peace and security: failed states, regional conflicts, organized crime, terrorism and the proliferation of WMD. Taken together, terrorism and the proliferation of WMD represent one of the most worrying trends the EU might have to face in upcoming decades However unlikely, the scenario of a terrorist attack on a European population centre using a weapon of mass destruction cannot be ruled out for three major reasons:

- The persistence of the new global terror networks (i.e. al-Qaeda), which show no sign to retreat despite being targeted by a global "war on terror".
- Their small but determined presence in major EU countries such as the UK, Italy, Spain, France and Germany - as shown in a number of attempted (and sometimes "successful") terror attacks aimed at producing mass casualties.
- Their increased interest shown in acquiring chemical, biological and nuclear WMD capabilities.

The European Union addressed this new threat in a number of key documents - the European Security Strategy (2003), the EU Strategy Against Proliferation of Weapons of Mass Destruction (2003) and the EU Counter-Terrorism Strategy (2005) - which are based on a number of distinctive principles: prevention, protection, cooperation between Member States, international cooperation and effective multilateralism. These principles are upheld in the EU "Common Positions", which define the common line each Member State is asked to endorse in international fora. Their practical implementation is outlined in the EU "Joint Actions", where concrete measures to prevent non-proliferation and WMD terrorism are being allocated financial resources.

The concept of "effective multilateralism" deserves particular attention, as it denotes the specific European approach to construct security in the 21st century: its main pillar consists of a regime-based governance, based on the rule of (international) law. The EU strategy of combating WMD terrorism in this context follows the following guidelines:

- Strengthening the international treaties addressing the proliferation of biological, chemical and nuclear weapons, i.e. the BWC, the CWC and the NPT.
- Overcoming shortcomings of the existing regimes, and thus strengthening their effectiveness.
- Combating WMD terrorism within the constraints of international law, i.e. respecting human rights in the fight against terrorism and leading by example in the implementation of arms control agendas.

The challenges of this approach are manifold and will be addressed in the paper in detail: five major challenges of implementing effective multilateralism will be addressed. First, there is a growing trend to question the effectiveness of multilateral governance and to devalue the existing regimes as not suitable to tackle the "new WMD threats". Second, multilateralism requires cooperation by the addresses of these policies and might not succeed in some "hard cases" such as Iran. Third, to act as a credible actor advocating strict adherence to international law, the EU must lead by example, and at the same time be united and coherent in its foreign policies: the internal divisions within the EU before the Iraq war might have undermined this ambition and shall not be repeated. Fourth, the EU must deal internally with a very heterogeneous constellation of actors, which have sometimes quite divergent views on treaty compliance, especially in the field of nuclear disarmament. Fifth, by advocating rule-based governance the EU raises the normative bar very high and might come under pressure, when searching for pragmatic solutions as in the India nuclear deal and (to some extent) with Iran.

Still, these challenges should not obscure the fact the multifaceted EU strategy centred around international law and effective multilateralism might prove to be the most enduring and long-ranging approach to tackle WMD terrorism in an ever more interdependent 21st century.

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PAPER ON

FIGHTING OFF FATIGUE: THE U.N. CORNERSTONE OF ANTITERRORISM ACTION

By

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DRAFT- DO NOT QUOTE

Within hours of the devastating attack that leveled the World Trade Center, both the General Assembly and the Security Council of the United Nations unanimously adopted resolutions affirming the solidarity of the entire international community and calling on all states to assist in tracking down the perpetrators of history's deadliest terrorist attack. The U.N. actions went virtually unreported in the American media, which gave measurably more attention to the resolution of the North Atlantic Council the same day that invoked Article 5 of the North Atlantic Treaty, the mutual defense commitment at the core of the Western alliance.

To American opinion leaders, NATO represented hard power, reliable allies, and decisive action. The United Nations, by contrast, conjured paralysis by the powerless, compromises with antagonists, and—a rare point of agreement with the loathed Iranians—"a paper factory for issuing worthless and ineffective orders."[1] Yet it was to the derided United Nations, rather than NATO, that the United States returned in the weeks following the attacks to coax, cajole, and compel governments to track down terrorist cells. It was the United Nations, rather than NATO, that the United States would invoke in restive Muslim countries to cloak its forceful measures against Al Qaeda in the mantle of global justice and legitimacy.

Nonetheless, the dismissive narrative that had become rooted in Washington in prior decades would repeatedly reassert itself as the leaders in the global war on terror expanded their campaign. Would the United Nations show its mettle, and even prove its existential relevance, by enforcing its resolutions against a known proliferator of weapons of mass destruction who was also a known accomplice of terrorists? Could U.N. arms inspectors be trusted to ferret out hidden stockpiles of weapons materials? Can the international community rely on an organization so divided that it cannot even promulgate a legally operative definition of terrorism?

For its part, much of that international community has struggled to mask a certain *schadenfreude* at a hubristic superpower's seeming meltdown during the waning months of an administration that once strode the world supremely confident of its power to re-shape it. The U.S. government under George W. Bush has never conceded a course correction has been underway. But after 2005 it increasingly found itself compelled tacitly to acknowledge the drastically shrinking utility of unilateral action and to revert to the United Nations and its NATO allies to cope with one unraveling situation after another. Moreover, leaders of the U.S. military, in particular, have become fervent advocates for strengthening diplomatic and development capacities, both multilateral and national, as they have experienced the frustrations of reliance on military power alone.

Ironically, as much of the international community appears increasingly fatigued with the rhetoric and demands of the global war against terrorism – and when the issue has lost its political punch even with the American public whom the 2001 attacks had so traumatized – it is the embedding of counterterrorism in the agenda, bureaucracy, and routines of the United Nations that is sustaining continued governmental attention to the dangers of terrorism even when top-level political attention has moved elsewhere.

One should not imagine that the crisis of American power in the later years of the Bush administration has triggered a surge in U.S. interest in dealing with the grave nexus of terrorism and weapons of mass destruction through the United Nations and its agencies. Still, both Washington and those who take their cues from Washington seem more willing, even before the inevitable

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[1] Thus did Iranian president Ali Khamenei—now the Islamic republic's supreme leader--denounce the U.N. Security Council from the podium of the General Assembly in 1987. *The New York Times*, "Iranian, in U.N., Rebuffs Reagan on Ceasefire," 23 September 1987.

change in power in American politics, to consider what U.N. bodies can achieve and how they can help spread burdens and reduce frictional costs.

Of course, U.N. bodies are most productive when their activities are carefully tailored to what universal-membership agencies can deliver. The U.N.'s transparency and accountability to all its members mean that it cannot, except perhaps in the most exceptional circumstances, keep secrets or share sensitive intelligence information; the experience of the U.N. weapons commissions overseeing Iraq's disarmament was the exception that buttressed this rule. The United Nations does not deploy border guards or naval patrols, and it borrows its military units from its member states and almost always sends them as peacekeepers to war-torn territories to build confidence in peace rather than impose an outcome by war. So for those specializing in "hard security" -- the "real men" who, Washington lore had it, would "go to Tehran" after the fall of Baghdad – the United Nations has seemed a diplomatic backwater in the war on terror, a venue of dubious "relevance" for confronting the 21st century challenge of terrorism.

Yet the U.N.'s specialized operational agencies do monitor nuclear facilities and chemical plants. Its political bodies do crystallize emerging international norms in declaratory resolutions and fashion them into the legal obligations of treaty law. They do respond to security emergencies with mandates binding all U.N. member states to collective action, and both can and do impose coercive measures against malefactors. Its secretariats do nurture ties and convene meetings with national officials from operational levels of every government – officials from states that may have awkward or nonexistent relations with each other. Yes, the U.N. political machinery may be creaky and easily immobilized, and yes, the exquisite indirectness of its diplomatic discourse can exasperate "can-do" officials dispatched to work with it. Yet the United Nations stands out as a unique and indispensable element of a successful strategy to suppress terrorist violence and to assure that the plotters of such violence never obtain the most terrible of weapons to terrorize humankind.

Terrorism's WMD Challenge

Exactly a week after the attacks on the Pentagon and World Trade Center, five letters were dropped into mailboxes feeding into the U.S. postal facility in Trenton, New Jersey, addressed to the New York headquarters of America's largest television news networks and, oddly, to its most notorious scandal-mongering supermarket tabloid, the *National Enquirer*. Within weeks, other letters carrying a Trenton postmark arrived in Senate offices in Washington. All contained what seemed to be talcum powder. All were laced with anthrax – and all left a trail of anthrax spores through the postal processing system as they made their way to their addressees, infecting other mail, gravely infecting seventeen persons along the way, and killing five. Capitol offices were shut down for weeks; mail delivery to both the Capitol in Washington and United Nations headquarters in New York was suspended for months.

To a world already jittery after the jihadist attacks from the air, the anthrax assault signaled an even more frightening turn in terrorist tactics: What damage might implacable political extremists inflict, and what wider terror might they sow, if they get their hands on weapons of mass destruction? If a handful of anthrax-tainted envelopes could create such havoc, what if terrorists loosed a cloud of poison gas in Piccadilly Circus—or detonated a nuclear bomb in Times Square? Might not five, but five thousand, persons die in the first case – and five hundred thousand in the second? What can governments do to prevent the realization of such an apocalyptic scenario?

The United States has considerable confidence that strict government safeguards make it all but impossible for terrorists to divert materials from U.S. nuclear facilities to fashion and detonate a nuclear weapon. (It has had less reason for confidence about the security of its biological weapons

labs, since the anthrax attacker almost certainly had worked and obtained the anthrax spores inside one.) But the United States has much less ability to prevent the diversion of nuclear materials into terrorists' hands overseas, and its control over vessels and vehicles entering its ports and territory is far from airtight. Its security against WMD attack requires intensive collaboration with security officials of other states—those with nuclear facilities from which materials could be diverted, and those whose territory could be a transit point for the dangerous materials. European countries may be even more vulnerable; while they have every reason to feel that fervent jihadists do not direct quite the fury at them that they direct toward the American Satan, their borders are easier to access and penetrate, and Europe's storied history provides many appealing (and appalling) targets of high visibility. National security officials in Europe no less than the United States must rely on international collaboration to reduce the risk as close to zero as possible.

There is, to be sure, some uncertainty about how serious the risk of nuclear terrorism really is. "How real is this nuclear terrorism thing?" a somewhat skeptical George Bush asked his intelligence briefer in late 2006, five years after the World Trade Center attacks. "What are the terrorists really capable of? I want to break out their capability from our fear."[2] Former Pentagon official Graham Allison retorts that fear is justified. Pointing to "poorly guarded" nuclear facilities in one-time Soviet territory and "America's porous border controls," Allison insists, "If we continue along our present course, nuclear terrorism is inevitable."[3] But where Allison sees "a real, clear, present danger," Hans Blix, former director-general of the International Atomic Energy Agency and chief weapons inspector in Iraq, is unperturbed. "The risks are not zero," he acknowledges, but the dire warnings about nuclear terrorism involve "a bit of hyping. It plays into anxiety."[4]

U.N. Secretary-General Kofi Annan's high-level panel on global security did not rate the odds of WMD terrorism, but saw it as presenting "unprecedented dangers." To the extent that the risk is one of lethal materials leaching out, the panel concluded that tightening nations' and international agencies' control of those materials would be an essential complement to a broader anti-terrorism strategy.[5] That broader strategy itself, the panel warned, must go far beyond "the current 'war on terrorism' [with its] approaches to terror focusing wholly on military, police and intelligence measures."[6] Reflecting a wide swath of international opinion that the Bush administration's testosterone-fueled approach had alienated, the panel insisted that the United Nations needed to pursue a "comprehensive strategy that incorporates but is broader than coercive measures," one that "addresses root causes and strengthens responsible States and the rule of law and fundamental human rights." The panel listed the key components of what the United Nations should pursue as "a comprehensive strategy, which includes:

> (a) Dissuasion, working to reverse the causes or facilitators of terrorism, including through promoting social and political rights, the rule of law and democratic reform; working to end occupations and address major political grievances…;
> (b) Efforts to counter extremism and intolerance, including through education and fostering public debate…;
> (c) Development of better instruments for global counter -terrorism cooperation, all within a legal framework that is respectful of civil liberties and human rights, including in the areas of law enforcement; intelligence -sharing,

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[2] Ron Suskind, *The Way of the World* (New York: Harper Collins, 2008), p. 92.

[3] Graham Allison, *Nuclear Terrorism: The Ultimate Preventable Catastrophe* (New York: Henry Holt and Company, 2004), p. 120.

[4] The Century Foundation/Friedrich Ebert Stiftung, "Windows of Opportunity? Prospects and Challenges for Reversing Weapons Threats," event transcript, 10 April 2008, pp. 6 (Allison) and 8 (Blix), at http://www.tcf.org/list.asp?type=EV&pubid=220.

[5] *A More Secure World: Our Shared Responsibility*, Report of the Secretary-General's High-Level Panel on Threats, Challenges, and Change (United Nations: 2004), ¶146, p. 48.

[6] *Ibid.*, ¶147.

where possible; denial and interdiction, when required; and financial controls;
(d) Building State capacity to prevent terrorist recruitment and operations;
(e) Control of dangerous materials...."[7]

This five-pronged approach--which became the basis for the General Assembly's eventual adoption of a comprehensive counter-terrorism strategy in 2006—included some glancing rebukes to Washington conservatives, reflecting an international orientation that to many Americans "seemed more worried about counter-terrorist measures than about terrorism itself."[8] The first prong, seeing terrorism's "root causes" in unresolved political disputes, had become anathema to Washington, though it reflected a longtime consensus in the developing world born of the mid-20th century struggles against colonialism.[9]

The second element--countering extremism and intolerance through education and public debate--drew general acceptance. President Bush led the United States back into UNESCO, the U.N. Educational, Scientific and Cultural Organization, in part from a recognition of that agency's unique potential in educational bridge-building. His administration assented to a U.N.-led "dialogue of civilizations" – intended precisely to rebut the "clash of civilizations" thesis propounded by conservative Western scholars like Samuel P. Huntington – that would seek to develop common ground through interfaith exchanges, even though the dialogue was proposed by none other than Iranian president Mohammed Khatami.

It has been particularly in the last three dimensions of the comprehensive strategy the General Assembly took from Annan's high-level panel that the lead combatant in the war against terrorism could find common ground with most others in the international community in practical ways, even if the pointed conditionality on "a legal framework that is respectful of civil liberties and human rights" might make Washington wince. Taken together, it is these three pillars—***developing legal and operational frameworks*** for countries' cooperation in suppressing terrorist networks; ***building states' capacity*** to suppress them; and ***controlling WMD materials***—that underpin international efforts to control terrorism and prevent terrorist access to weapons of mass destruction.[10]

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[7] *Ibid.*, ¶148, pp. 48-49.

[8] Edward Luck, "Global Terrorism and the United Nations: A Challenge in Search of a Policy," p. 1, paper prepared for United Nations and Global Security Initiative (United Nations Foundation), 2004, www.un-globalsecurity.org/papers_cat/terrorism_non_state_actors.asp#11.

[9] "[A]rmed insurgencies against colonial rule frequently attacked police stations, markets, schools, and local officials to destabilize the colonial regime, and inevitably the embattled imperial power would label the rebels opposing it as 'terrorists' –inuring an entire generation of Asians and Africans against Western denunciations of terrorism." Jeffrey Laurenti, "The United Nations and Terrorism," in *Democratic Responses to Terrorism*, Leonard Weinberg ed. (New York/London: Routledge, 2008), pp. 70-71. "European governments beset by terrorist attacks against their authority in Indochina, Algeria, or Angola pointedly preferred to keep the U.N. at arms length, aware that most member states would diagnose colonial rule as the underlying political cause of the violence." General Assembly resolutions about terrorism, starting with the 1972 condemnation of the deaths of Israeli athletes at the Munich Olympics, for the next two decades invariably also fixed blame on the "colonial, racist, and alien régimes" whose "repressive and terrorist acts...give rise to" such attacks on innocents.

[10] The five pillars in the high-level panel's report were massaged and reconfigured as they made their way through the U.N. political process. The panel's reference to reversing terrorism's "causes or facilitators" disappeared from the Secretary-General's "Uniting Against Terrorism" follow-up report (http://www.un.org/unitingagainstterrorism/); control of dangerous materials was transmuted into measures to prevent and combat terrorism in the global counter-terrorism strategy finally adopted by the General Assembly (A/RES/60/288).

Frameworks for suppressing terrorist networks

At the opening of U.N. general debate following Al Qaeda's coordinated attacks on U.S. embassies in Kenya and Tanzania in 1998, President William J. Clinton "devoted his entire address to the United Nations General Assembly to the subject of terrorism, invoking an earnest plea for solidarity that was noteworthy for failing to offer any practical measures that the United Nations system could take."[11] Nor did the Bush administration, reeling from the shock of the September 11 attacks, think on its own to look to enlist the United Nations in a coordinated counter-terrorist offensive. It was the French, who held the Security Council presidency that month, who hammered out with Washington the initial Security Council response the day after, which sweepingly declared "terrorist attacks" generally—and not just those of the previous day—as posing "a threat to international peace and security," and thus falling under the umbrella of Chapter VII of the U.N. Charter.[12]

Likewise, it was the French and British who outlined to Washington a proposal for Security Council action that would not only summon the full membership to act against terrorist networks, but set ground-breaking new precedents for Council activism in a security emergency. The Bush administration embraced the idea, and the Security Council adopted Resolution 1373 little more than a fortnight after the fall of the Twin Towers. Copying key provisions from two international conventions that the General Assembly had released to member states since 1997, the Council specifically invoked its authority under Chapter VII to command action by member states, requiring them to:

- Criminalize the flow of funds to terrorist networks and freeze those networks' financial assets;
- Suppress terrorist recruitment and block the flow of arms to terrorist groups;
- Furnish "early warning" of terrorist plots of which their intelligence services become aware by "exchange of information"; and
- Institute effective border controls to prevent the movement of terrorists.

The convention for the suppression of terrorist bombings, from which some of these provisions were copied, had barely entered into force, with only 29 states parties, when the Council imposed them as obligatory on all U.N. member states. Only four governments had ratified the convention to suppress terrorist financing from which the far-reaching controls on financial flows were mandated. Strikingly, the resolution was adopted just a day after it was presented to the Council in informal consultations, at a public meeting that lasted just five minutes. [13] Yet in the subsequent General Assembly debate, aside from complaints by a handful of states about the secretive process, "No speaker expressed concerns that the Council was legislating in that resolution

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[11] Joshua Black and Martin Skladany, "The Capabilities and Limits of the United Nations in Fighting Terrorism," in *Combating Terrorism: Does the U.N. Matter... and How*, Policy Report of the United Nations Association of the United States of America (2002), p. 7.

[12] Security Council Resolution 1368. Moreover, in affirming for the first time that the Charter's "inherent right of individual or collective self-defence" applied to the threat posed by "any act of international terrorism" by non-state actors, the Security Council "set a notable precedent in international law and practice that bolsters the long-standing argument of the United States, Israel, and other states victimized by terrorist acts about the legitimacy of military responses as 'self-defense.'" Laurenti, "A Transformed Landscape: Terrorism and the U.N. after the Fall of the World Trade Center," in *Combating Terrorism, op.cit.*, p. 22.

[13] Stefan Talmon, "The Security Council as World Legislature," *American Journal of International Law*, Vol. 99, No. 1 (Jan., 2005), p. 187.

for the international community, although some Council members, it seems, had expected such concerns."[14] As the reporting and monitoring process mandated under 1373 played itself out in the years that followed, however, concerns mounted about the Council's asserted power to issue directives to the legislatures of member states – and would be fiercely debated when proposed mandates for controlling weapons proliferation came before the Security Council in 2004.

Resolution 1373 established a monitoring panel of the Security Council, the Counter-Terrorism Committee (CTC), to receive, evaluate, and recommend action on the reports it required of member states. The resolution called on "all States to report to the Committee, no later than 90 days from the date of adoption of this resolution..., on the steps they have taken to implement this resolution."[15] Not all states made their initial reports within the stipulated three months, but by U.N. standards—where countries' representatives in New York routinely set deadlines for information from states for which their capitals rarely feel similar urgency—the response rate proved extraordinary: within nine months, 150 nations had reported, and ultimately all 192 member states made at least one report to the CTC, even the ghostly "government" recognized by the United Nations as representing Somalia.[16]

The New York missions of the Council's fifteen member states, initially supported only by a tiny complement of U.N. staff and personnel they themselves seconded, eventually found the work too burdensome and tedious, and in 2004 the Security Council established a permanent secretariat as "a special political mission" to handle the Council's terrorism file, the Counter-Terrorism Committee Executive Directorate (CTED),[17] which now has a staff of forty. Its role remains focused on monitoring states' capacity to fulfill the Council's antiterrorism mandates, and on nudging donors to provide concrete resources to weak but well-intentioned states in order to strengthen their ability to control the flow of money, arms, and terrorist agents through their territory. The 1373 committee and its executive directorate see themselves as helpful to the member states, not adversarial to them, and they have steadfastly refused to name governments they believe are willfully noncompliant, much less call for sanctions against them.

There is another Security Council subsidiary body that does name names, and that is the Al Qaeda/Taliban sanctions committee established by the Security Council under Resolution 1267 of 1999. This had been pressed by the Clinton administration in emulation of the successful sanctions regimes that the Council had placed against Libya and Sudan for the terrorist attacks those two countries' governments were believed to have sponsored against passenger aircraft of Pan Am and UTA, and against Egyptian president Hosni Mubarak, respectively. Resolution 1267, however, was directed against a non-state terrorist network, Al Qaeda, and the internationally unrecognized Taliban regime then controlling much of Afghanistan. The sanctions imposed by 1267 proved rather less efficacious than those against Tripoli and Khartoum, as events two years later would demonstrate, but the sanctions regime remained in place—and indeed acquired new importance—

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[14] *Ibid.*, p. 177.

[15] Security Council Resolution 1373, adopted 28 September 2001, Para. 6.

[16] Somalia's "transitional national government" proudly reported its successes against terrorism in its first report (breaking up a pro-bin Laden demonstration in Mogadishu, the pronouncement of an antiterrorist speech by the president on the occasion of national teachers day), and pleaded for "urgent and adequate assistance from the international community to be able to comply with Resolution 1373." *Report on the Action taken by the Government of Somalia to implement United Nations Security Council Resolution 1373 (2001)*, S/2001/1287. What the transitional government asked for in the way of assistance was, however, much more focused on Somali reconstruction than on CTC priorities: Rather than help with money-laundering enforcement and tighter border controls, the Mogadishu authorities sought "rehabilitation and reconstruction of state institutions," "reconciliation and peace building," and "disarmament, demobilization and reintegration" that despairing donors had withheld for a decade.

[17] Security Council Resolution 1535, adopted 26 March 2004.

after the more extraordinary measures undertaken in the autumn of 2001 changed the political balance in Afghanistan without eliminating the targets cited in the resolution (the Al Qaeda network, Osama bin Laden specifically, and other persons and groups associated with them, specifically including the Taliban).

The United States and occasionally other governments presented the committee with names of terrorist groups and individuals that states would be obliged to ban, bar, or arrest, with over 400 names inscribed by the committee. The lack of a consistent process for evaluating names proposed for the list (most of which were initially accepted for proscription based on American intelligence, with minimal vetting), or for removing them if suspicions proved wrong, occasioned a growing outcry. Several Arab governments stoutly rejected American efforts to list groups combating Israel as Al Qaeda associates. The case of a Swedish national of Somali birth, Ali Ahmed Yusuf, who was slapped on the list in November 2001 with scant evidence of Qaeda ties, finally discredited the informal listing process, leading the Council to prescribe a formal de-listing process in 2006.[18] To date, the 1267 sanctions committee has de-listed thirteen individuals and 25 entities that had been proscribed for Taliban or Qaeda links. The Council promulgated, in Resolution 1617 (2005), a checklist on which each member state was asked periodically to report regarding any contact with persons or groups on the 1267 sanctions committee list: Was this name added to the visa lookout list? Was a visa requested and denied for this person? Have financial institutions in the country been notified to report any account or transaction involving this person or group? Have any assets of the listed person or entity been frozen? Has he (those listed are almost invariably male) made any attempts to purchase arms?

Certainly the effectiveness of the "watch list" for those whom the 1267 committee has linked to Al Qaeda or the Taliban depends on the capacity of the individual state to control its borders, oversee its financial institutions, and police suspicious behavior by foreign nationals within its territory. Given the dramatic differences in state capacity between wealthy republics and highly developed police states, on the one hand, and low-income countries that devote scarce security spending to maintaining a minimum of public order and regime stability, the fact that there is a global watch list for potential terrorists at all is a remarkable achievement that probably can only be achieved through the universal reach of the United Nations. There is no evidence that any state is actively seeking to protect the Qaeda and Taliban individuals and entities named on the list—not even Pakistan. What laxity as may be observed in enforcement of 1267 sanctions is inevitably attributed to underdeveloped capacity rather than political malevolence.

Strengthening capacity in incapable states

The Counter-Terrorism Committee Executive Directorate pores over the reports of governments (and occasionally outside sources) to evaluate the rigor of each member state's legal code with respect to the international standards for suppression of terrorist networks; the capacity of its financial system to track and block financial flows to terrorist organizations; the efficacy of the country's border and customs controls; the resources and professional ability of its police and law enforcement agencies for monitoring and controlling suspected terrorist agents; arms trafficking through the country that may add firepower to terrorist cells; and the state of maritime and transportation security in the country. Only a minority of states can mobilize the human and financial resources to cope effectively with all these areas of potential terrorist activity; most of the others plausibly plead that their straitened condition leaves them unable to make significant improvements in antiterrorist security without outside assistance.

[18] Security Council Resolution 1730, adopted 19 December 2006. Yusuf had already been de-listed on 24 August 2006.

The counter-terrorism secretariat is not, however, an assistance provider. It has no voluntary fund from which it could furnish resources to weak but willing states. Rather, its vocation is that of matchmaker for bilateral assistance efforts, responsible for identifying states, mostly in the developing world, that have coherent plans to improve their capacity but lack the means to implement them. While the U.S. government scarcely needs to rely on CTED to steer deserving applicants its way, the U.N. secretariat plays a significant role in identifying capacity-building projects in vulnerable developing countries that European or other donor states might find it convenient to support. Many of these projects involve training of officials in specialized fields of law enforcement, financial regulation, and customs; some involve hiring them.

While CTED takes pains to describe itself as "an intermediary for contacts between potential donors and recipients" and decidedly "not an assistance provider,"[19] the General Assembly does fund a separate secretariat unit with a mandate to provide technical assistance to the many member states that lack the resources or experience to bar their doors to terrorist groups. The Terrorism Prevention Branch of the U.N. Office on Drugs and Crime toils in the relative obscurity of Vienna, far away from the Security Council and its subsidiary bodies. In classically unthreatening U.N. fashion, the terrorism branch provides services to member states that want them and that the Counter-Terrorism Committee in New York says need them. In just its first few years the office has provided legal advisory services on a bilateral basis directly to 22 countries that needed to revise their legal codes to meet the international standards set by the Council; its regional workshops have trained officials from scores of other countries.[20] Fourteen countries provided the voluntary contributions to finance its technical assistance activities since creation of the terrorism branch, which totaled just $1.6 million in 2005,[21] supplementing the assessed financing of $950,000 the General Assembly provided for terrorism branch staff from the U.N.'s regular budget—itself a remarkable allotment in a time of bitter North-South battles over spending caps on the assessed budget. High-income countries provide additional staff on a voluntary, seconded basis.[22]

Still, these amounts are quite limited when compared with the cost of effective port policing, border controls, and intelligence gathering on terrorist cells. The branch has resources to meet the assistance needs of only a fraction of the states with certifiably weak capacities; others have to seek bilateral assistance directly from wealthier countries. There may, however, be domestic political repercussions for many brittle governments in the developing world if they are seen as relying on an unpopular donor government, and many governments in the developing world seem to prefer a U.N. mantle on an issue that is often characterized—in the American debate above all—as primarily of vital interest to *U.S.* national security.

Blocking terror groups' access to WMD

The primary goal in counter-terrorist strategies both of governments and of the international community is the suppression of violent terrorist networks. Both the military efforts in what had been a parasitical Al Qaeda's unfortunate host, Afghanistan, and the global efforts at enlisting all governments in tracking and blocking Qaeda activity, movements, financial flows, and recruitment, have had a significant impact in disrupting the terror networks' capacity to launch coordinated, sophisticated operations. These have been crucial to averting the ultimate nightmare scenario of a

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[19] See http://www.un.org/sc/ctc/page2.html.

[20] *Strengthening international cooperation and technical assistance in preventing and combating terrorism: Report of the Secretary-General*, A/60/164, pp. 7 and 12-13.

[21] *Op. cit.*, A/60/164, pp. 13-14. The three largest donors to the terrorism branch have been Italy, Austria, and Britain, which together have contributed half of the $6.1 million received over its short lifetime.

[22] *Consolidated budget for the biennium 2006-2007 for the United Nations Office on Drugs and Crime*, E/CN.7/2005/12/Add.1, p. 42.

dramatic terrorist strike incinerating an entire city with a nuclear weapon. And there has been little doubt that that nightmare has been Al Qaeda leaders' dream.[23]

In early 2004, when Graham Allison rang his alarm about the "inevitability" of nuclear terrorism, he hoped that presidential candidates in the United States that year would be persuaded to pursue immediate action focused specifically on terror networks' acquisition of weapons material. "The United States must convince all nations to strengthen their domestic laws against trafficking in nuclear materials and technology," he wrote.[24] In fact, the Bush administration had already been working quietly for several months with the other permanent members of the Security Council to draft a resolution to do just that, again under the mandatory power of the Council for coping with threats to international peace and security. Intended to provide a patina of international legal authority to Washington's Proliferation Security Initiative, including the administration's asserted intention to interdict vessels suspected of carrying cargo that could be used to make weapons of mass destruction or related delivery systems, the resolution text was refined in successive iterations to rein in any such interpretation.

As finally adopted, Resolution 1540 would call upon "all States, in accordance with their national legal authorities and legislation *and consistent with international law* [emphasis added], to take cooperative action to prevent illicit trafficking in nuclear, chemical or biological weapons, their means of delivery, and related materials." This authorization was too carefully circumscribed to persuade European governments to join seafaring interdiction efforts of suspect vessels. But the resolution, invoking the Council's Chapter VII authority to issue binding directives to maintain international security, also established a number of strong new mandates on states:

- It barred states to "from providing any form of support to non-State actors" seeking to develop, acquire, manufacture, or transport WMD --and required them to adopt and enforce legislation to prohibit and prevent non-state actors from doing so. This presented the first time nonproliferation measures were extended to non-state actors (a category inclusive of, but broader than, terrorist groups).
- It demanded that states establish controls to prevent the proliferation of WMD--"and their means of delivery"--with strict accounting for items that could be used in their production and transport and with tightened border controls, "including through international cooperation when necessary" (no reference to non-state actors here).
- It obligated all states to maintain "national export and trans-shipment controls" over items "that would contribute to proliferation."[25]

In contrast to the lightning-like adoption of 1373 thirty months before, the proposed anti-proliferation resolution triggered widespread expressions of opposition, particularly from developing countries, to a Western-dominated Security Council arrogating "legislative" powers to itself. The Council met repeatedly in informal consultations to revise the text three times over the course of a month, and it held an open debate in which thirty-six states outside the Council participated.[26] The objections made inside the Council by Pakistan were voiced in the open debate by such non-members of the Council that year as India, Mexico, Egypt, and Indonesia (and, perhaps less surprisingly, by Cuba and Iran).[27] But other developing countries, such as Chile, claimed to see no new legal obligations in the resolution beyond what extant conventions already required of their states parties, except that they now would be refocused on a very real terrorist threat and would

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[23] Allison, *Nuclear Terrorism*, p. 20.

[24] *Ibid.*, p. 199.

[25] Security Council Resolution 1540, adopted 28 April 2004.

[26] Talmon, p. 188.

[27] *Ibid.*, p. 178.

apply in all countries. With the final round of revisions, the resolution won unanimous adoption, leaving the constitutional disputes about Security Council legislating for another day.

Sixty member states filed the first report required by Resolution 1540 within six months of its adoption, after which the response rate from capitals dropped precipitously. By July 2008—more than four years after the resolution's adoption—nearly a quarter of the U.N.'s member states had still not filed a single report on the steps they were taking to prevent terrorist access to nuclear, biological, or chemical weapons materials, as well as access by other governments intent on acquisition of such materials or missile delivery systems.[28] On the other hand, two-thirds of the 155 countries that did file reports provided follow-ups and updates, often reporting on measures they had adopted in the interim to strengthen their controls. Forty-six countries, ranging from Cuba to the United States, have made formal offers of assistance to others in meeting the standards of 1540.[29] Seventeen countries have requested assistance in their reports; the Philippines is representative, if perhaps more specific than most, in describing its needs--training for first responders, personnel training and radiation-sensitive instruments for border control, physical protection of a research reactor, and enforcement of container security in its ports.

There are more than three hundred research reactors around the world, many of them attached to universities and only minimally secured; there are more than twice as many power reactors. The U.N. agency that was created a half century ago to promote peaceful uses of nuclear energy, the International Atomic Energy Agency, is tasked with monitoring those reactors, and serves as the international community's front line in restraining nuclear weapons proliferation. The IAEA is the main repository of international nuclear expertise, and its hard-earned reputation for impartiality under a succession of able directors-general—even in the face of heavy political pressures from powerful states--has given it high credibility in most capitals. The agency's member states approved strengthened safeguards procedures after the IAEA's embarrassing failure to uncover Iraq's secret nuclear weapons program in 1990, and its finding in early 2003 that Baghdad no longer had such a program was vindicated by events.

In addition to credibility, the agency also has financial resources—indeed, it has among the largest assessed budgets of the U.N.'s specialized agencies. Fully 39 percent of its 2007 assessed budget of €268-million was devoted to its safeguards against weapons proliferation—up from 36 percent in 2000 (when its then dollar-denominated budget, at today's exchange rates, was €145-million). The IAEA had always had a constituency in Washington's security establishment, and the United States was traditionally its largest voluntary contributor by far; but over the course of the current decade the agency has diversified its donor base, with the U.S. share of both technical cooperation funds and extrabudgetary contributions sliding from 31 and 60 percent respectively to 26 and 39 percent; sharply increased contributions from a number of European governments in that period (and from oil-rich countries such as Qatar, Libya, and Iran) have contributed to the broadening of the voluntary resource base.[30]

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[28] *2008 Report of the Committee established pursuant to Resolution 1540*, S/2008/493, Annex IV. Three-quarters of the thirty-seven states that as late as 2008 had never filed a 1540 report were in Africa, and nearly all of these ranked among the continent's least developed and most war-ravaged countries; the only non-reporting country with a known nuclear capacity was North Korea.

[29] Cuba, for instance, bilaterally offers "expertise to the implementation of State Systems of Accounting for and Control of Nuclear Material" in the Latin America and Caribbean region. At the other end of the spectrum, the United States offers applicant states bilateral assistance on 1540 issues through a half dozen federal departments, including on money laundering, control of WMD materials, export controls, and border security. The assistance Washington offers multilaterally is through provision of technical and legal experts, primarily through the International Atomic Energy Agency.

[30] Data come from the IAEA Annual Reports and the Agency's Accounts for the respective years.

While the IAEA took the lead in creating a program of activities to protect against nuclear terrorism as early as 2002, and has beefed up its assessment and advisory missions to respond to the requests from some states for expert assistance in meeting the counter-terrorist objectives and international standards set by 1540,[31] the agency's weapons focus and funding remain primarily focused on the safeguards against *states'* proliferation. Its inspectors can detect in declared nuclear facilities discrepancies in nuclear fuel accounts, which could conceivably be a warning flag of diversion to illicit purchasers—but which actually have fueled suspicions of possible state diversion to weapons research and development.

In fact, the concerns about terrorist access to nuclear weapons and about state proliferation are very closely related. Resolution 1540 wove the two tightly together, and arguably was even more directed at interdicting potential outside support for Iran's alleged nuclear weapons and missile development programs than at keeping nuclear weapons out of Osama bin Laden's hands. Agency and U.N. officials privately acknowledge that their efforts are often seen as addressing an American more than a global priority; one told this writer that "most countries seem to cooperate on 1540 as a 'favor' to the United States," rather than as something in their own security interest.

Revitalizing the global coalition

Washington's energetic efforts against further proliferation of nuclear weapons have encountered an increasingly surly international response as American leaders over the past two decades have ceased even giving lip service to the promise, enshrined in the nuclear nonproliferation treaty, of eliminating nuclear arsenals. It is hard to engender enthusiasm among the nuclear have-nots for vigorously upholding a two-tiered nuclear world That may change with the incoming administration. Senator Barack Obama committed himself to the goal of complete elimination of nuclear weapons, and even Senator John McCain has invoked the "dream" of President Ronald Reagan of a nuclear-free world. If the new president overcomes the inertia that has insulated the U.S. nuclear weapons establishment long after the end of the cold war arguably rendered its arsenals obsolete, he may find it possible to re-energize the international coalition against proliferation and particularly against nuclear seepage into the hands of violent terrorist networks.

Certainly the grudging ambivalence toward the United Nations and multilateral commitments of Washington's regnant conservatives in this century's first decade has made it hard for them to reap the potential harvest of the many constructive seeds of effective counter-terrorism that were sown in this period. Analysts are beginning to acknowledge that, "despite early attention and fanfare, 1540 has received neither the consistent support of the United States, nor the sustained commitment from the international community, required to advance it from a lofty objective to an effective instrument of nonproliferation."[32] It is hard enough, in the balky politics of the United Nations system, to achieve optimal results even when there is genuine unity of purpose and whole-hearted commitment among leading states. But Washington's approach to suppression of weapons of mass destruction in recent years has seemed erratic if not schizophrenic, at least in multilateral settings.

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[31] The agency estimated it would need a minimum of $15.5 million a year to pay for its nuclear security assistance program, which a number of mainstream nuclear policy analysts in Washington acknowledge is far less than what is needed to improve security at laxly monitored nuclear facilities in much of the developing world. Charles Ferguson of the Council on Foreign Relations urges its doubling (*Preventing Catastrophic Nuclear Terrorism*, CSR No.11, Council on Foreign Relations, March 2006, p. 26)

[32] Brian Finlay and Rita Grossman-Vermaas, "The United Nations and the Nuclear Challenge: Technology Proliferation, Globalization, and the Role of the UN," in *The United Nations and Nuclear Order*, ed. Jane Boulden, Ramesh Thakur, and Thomas Weiss (Tokyo: United Nations University Press, forthcoming 2009)

The adamant opposition of the Bush administration has left negotiations in limbo on a monitoring and enforcement regime to give teeth to the Biological Weapons Convention. Conservatives' hostility to the director-general of the Organization for the Prohibition of Chemical Weapons—arising, he claimed, from his insistence that American chemical companies face the same intrusive inspections as every other country's--forced the ouster of José Bustani in early 2002, less than two years after his reelection by acclamation. A similar fate was plotted for the IAEA's Mohammed ElBaradei in 2005, whose tactless professionalism in unmasking the flawed premises for invading Iraq deeply antagonized administration hardliners, but even Western allies now drew the line.

Even as it edged toward realism in President Bush's second term, his administration could not muster enthusiasm even for the most innocuous international commitments against terrorism. While the five permanent members of the Security Council signed the Convention for the Suppression of Acts of Nuclear Terrorism with a flourish at the 2005 world summit, it has entered into force without any of them, save Russia, having ratified it. Most West European countries also signed the convention at that summit, yet few have gotten around to ratifying it. Justifiably or not, the lackadaisical pace at which Western governments have acted on this measure suggests the dissipation of the sense of urgency about the threat of terrorism that prompted swift action in the months after September 11 on long-stalled ratifications of the dozen extant antiterrorism conventions. European and American legislators should give themselves a deadline of summer 2009 for approving their countries' ratifications of the nuclear terrorism convention, if only to counter the impression that WMD terrorism has faded as an issue.

Far more intractable is the continuing impasse among U.N. member states on defining "terrorism" in international law. For a decade this has been the principal stumbling block to agreement on a comprehensive convention that would establish reciprocal commitments among states parties for apprehending accused terrorists, for freezing their assets, and either trying or extraditing them. Arab countries, and the Islamic conference more broadly, continue to insist on carving out an exception when the attackers claim to be resisting foreign occupation; they remain unwilling to assume an obligation to cooperate with Israel in suppressing groups attacking Israeli settlers in occupied Palestinian territory. If a new Israeli government and U.S. president can resume progress toward a final Israeli-Palestinian settlement, the dangerous loophole championed by the Islamic conference should be swiftly set aside.

Another area where Europeans and Americans can make some concrete gains through the U.N. system is in capacity-building assistance. A U.N.-administered fund would be a significant complement to the bilateral training and assistance programs aimed at upgrading detection and enforcement capacities in smaller or poorer states. In many vulnerable countries the multilateral nature of the assistance provider will enhance public and political support for investment in building this particular capacity.

The U.N. General Assembly convened a two-day meeting with counter-terrorism experts from capitals in early September 2008 to review implementation of the comprehensive strategy against terrorism that was adopted two years before, as Annan's high-level panel had proposed. Officials related their countries' claimed successes; there was widespread self-congratulation for the Assembly's sagacity in adopting a holistic strategy rather than follow blindly a one-dimensional militarized or "securitized" approach. Yet there was also an unmistakable sense of fatigue with the issue of terrorism, a sense that the political spotlight had already moved on.

On the sidelines, outside the Assembly hall, a former counter-terrorism advisor to President Bush acknowledged that "It's not a 'war on terrorism'.... The war on terrorism as a metaphor and as a concept is not constructive." The executive director of CTED lamented that, "given short election

cycles, the political cycles, there's always a danger of a loss of focus and a loss of commitment and enthusiasm in the political wind," even though "the threat is not diminishing." A vice-chair of the 1540 committee admitted that "maybe as individuals, we may feel some exhaustion and some fatigue. But at the state level, as governments, we cannot afford to entertain a sense of fatigue on a matter as important as counterterrorism." A senior Egyptian counter-terrorism official remarked that "the strategy is fine. If it works – good.... Has it any effect on any country in the world in terms of real value? In counterterrorism, I argue not. The only good thing about it, it shows solidarity of the international community against terrorism."[33]

Even if reinforcing the solidarity of the international community were all that the United Nations had accomplished, that would immensely important in sustaining governments' willingness to cooperate against border-hopping terrorist networks. As CTED director Mike Smith observed, "This is a major international problem, and we have to keep focused on it. And that's something that the U.N. actually makes a real contribution in trying to do." Frictions arising from major powers' purported unilateralism or aggressiveness may have soured the political mood on responding to terrorism. But international conventions and Security Council resolutions have formalized ongoing obligations and cross-national collaboration at the technical level, ensuring that an infrastructure that guards against deadly terrorist violence continues to function even if publics' and politicians' attention moves elsewhere.

The measures put in place internationally over the past decade do not guarantee public safety against the dangers of nuclear terrorism. But they have already made it far harder for attackers to strike. A renewed political commitment in leading capitals to the international system, and especially to long agreed proscriptions on the most terrifying weapons, can make those measures far surer guarantees.

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[33] "Counter-Terrorism and the International Community: Waxing Fatigue, Waning Commitment?" Roundtable transcript, The Century Foundation and Center on Global Terrorism Cooperation, 5 September 2008, http://www.tcf.org/list.asp?type=EV&pubid=235.

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PAPER ON

THE GLOBAL INITIATIVE AND OTHER MULTILATERAL INITIATIVES AND PARTNERSHIPS AGAINST NUCLEAR TERRORISM

By

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Introduction

International legislation to fight international terrorism and to counter the possibility that terrorist organizations make use of weapons of mass destruction (WMD) has been enacted both at the level of the UN Security Council and of universal treaties. After resolution 1373 (2001), passed in the aftermath of the Twin Towers terrorist attack, the Security Council enacted resolution 1540 (2004), which is a landmark example of legislative powers exercised by the world organization. International conventions dedicated to counter terrorist activities in the field of WMD, with special emphasis on nuclear weapons, have been only recently adopted and include the International Convention for the Suppression of Acts of Nuclear Terrorism (Nuclear Terrorism Convention) concluded on April 13th, 2005, and the Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) of October 14th, 2005. The Convention on the Physical Protection of Nuclear Materials (CPPNM) and its 2005 Amendment is also of particular relevance. One has also to take into account the specific Security Council resolutions against countries, such as North Korea and Iran. The Global Initiative to Combat Nuclear Terrorism (GICNT), the Proliferation Security Initiative (PSI) and other multilateral initiatives taken into account in this paper are complementing the existing conventions and Security Council resolutions. They are not treaties, but rather flexible instruments which call upon participating states to cooperate and to take concrete measures. A characteristic is that participating states do frequent exercises and this increases their deterrent capacity and the readiness to intervene in case of terrorist catastrophe. The Initiatives are open to countries interested to combat WMD terrorism and the number of participating states has been steadily increasing after their inception.

1. The Global Initiative to Combat Nuclear Terrorism

1.1. Objectives and structure

The Global Initiative to Combat Nuclear Terrorism (GICNT) is an innovative, multi-pronged action designed to boost national and international capabilities to reduce the risk of, as well as to recover from, a terrorist attack involving nuclear or other radioactive materials. The initiative was solemnly launched by the US and Russian presidents George W. Bush and Vladimir Putin on the eve of the July 2006 St. Petersburg G8 summit, and can be viewed as a major output of the often overlooked bilateral cooperation between Russia and the United States in such key policy areas as nuclear non-proliferation and counter-terrorism. It was presented as a rally call for like-minded nations to establish effective cooperation mechanisms in the field of nuclear counter-terrorism.[1] Convening in Rabat, Morocco, some six months after the US-Russian joint statement, a 'vanguard' group of 13 countries produced a page-long 'Statement of Principles' defining objectives and scope of the newly established initiative.

The document lists eight principles that should guide the action of GICNT participants in priority areas spanning protection of nuclear materials, prosecution of terrorists seeking to acquire or use nuclear or radioactive materials, and response to terrorist attacks involving such materials. Military-related nuclear materials and facilities are excluded from the initiative's scope. States are called upon to commit to the GICNT principles on a voluntary basis and in a way consistent with national legislations and relevant international obligations. Indeed, many measures envisaged by the eight principles draw on the spirit, and in some cases even the letter, of a number of international arrangements, such as the Nuclear

[1] The text of the Joint Statement is available on the US Department of State website (www.state.gov/t/isn/rls/other/76358.htm) and is included in the appendix to the present paper.

Terrorism Convention, the CPPNM and its 2005 Amendment, and UN Security Council resolutions 1373 and 1540, which are all explicitly referred to as the GICNT legal basis (see below, § 2.3). The GICNT can be therefore characterised as soft law, i.e.an informal – that is, not legally binding – international arrangement resting on both national actions and cooperation among sovereign states. However, the Statement of Principles does include a reference to the International Atomic Energy Agency's role as a key contributor to international nuclear security and an important source of technical expertise supporting GICNT participants' efforts. The agency takes part in the initiative as an 'observer' (a position that has also been accorded to the European Union, though at a lager stage than IAEA).

Given the informal character of the GICNT, its initiators have not felt compelled to set up an ad hoc bureaucratic structure, not even a small secretariat overseeing its implementation. Instead, they have agreed upon a short terms of reference spelling out criteria and mechanisms for action. Participation is activated by an extremely simplified procedure: the state willing to join in is only required to send its written endorsement of the Statement of Principles to the co-chairs of the Implementation and Assessment Group (AIG), currently Russia and the United States. In spite of its denomination, the AIG serves as an implementation 'facilitator' rather than a supervisor. Its main task is to contribute to developing a 'Plan of Work' collecting the activities that GICNT participants plan to carry out in a given period of time, give advice to countries that might require it, and keep informed GICNT participants on progress made within the initiative's framework. It is made up of around a dozen countries and its composition is said to be subject to change so as to ensure adequate representation of the GICNT membership (no change has occurred so far). Its current members are, apart from co-chairs Russia and the United States, Australia, Canada, China, France, Germany, Italy, Japan, Kazakhstan, Turkey, and the United Kingdom.

According to the Global Initiative terms of reference, the governments of participating countries are expected to take steps to enlarge GICNT membership; provide and receive assistance to fellow governments; require domestic agencies involved in GICNT-related activities, including private sector actors, to report progress (or lack thereof) on a regular basis; and ensure that national legal systems are developed in line with the GICNT principles. Most importantly, Global Initiative participants are called upon to host or join in national or multinational tabletop and field exercises which can be of help in enhancing capabilities in the various priority areas identified by the GICNT; and organise regular workshops where experts and officials from different countries may have the opportunity to present results, put forward solutions to common problems, and build up a shared understanding of the challenges posed by nuclear terrorism. In early 2008 Russia and the United States created an Exercise Planning Group (EPG) tasked with collecting information, recommendations and proposals from GICNT participants about past and planned exercises. The ultimate goal is to have a constantly updated set of exercise guidelines at disposal of GICNT participants involved in the development of exercise activities. Arguably, the exercise and workshop activities are the cornerstone of the Global Initiative. To the extent they help reproduce credible scenarios (including emergencies), test capabilities, develop new operational concepts, spread best practices, and accelerate exchange of information, they are instrumental in framing a common nuclear counter-terrorism 'culture'.

1.2. Rationale and main features

The Global Initiative to Combat Nuclear Terrorism has been conceived of in response to the emergence and potential combination of three elements: a) transnational terrorist networks driven by a radical ideology which have indicated no restraint in the damage they would be ready to inflict on civilian populations; b) nuclear programmes developed in secrecy by unpredictable governments or regimes, which could potentially transfer sensitive materials

and knowledge to non-state actors; c) non-state organisations smuggling nuclear technologies and, possibly, materials.[2] As a result, the odds that a terrorist group determined to carry out a nuclear attack actually acquires weapon-usable nuclear materials – arguably the most difficult task facing the group – are no longer as unfavourable as in the past.

In encouraging action on all fronts of the fight against nuclear terrorism, the GICNT builds upon a number of existing national and international counter-terrorism and non-proliferation arrangements, frameworks, and programmes.[3] But the Global Initiative is the first of its kind (the PSI apart) in that it contributes to developing a systematic, comprehensive and sustained approach to address all aspects potentially related to terrorist activities involving the use of nuclear or radioactive materials. It aims at strengthening synergies and coordination of domestic agencies, between public and private entities, and among Global Initiative participants. As a senior US official has explained, the GICNT establishes "a growing network of partner nations that are committed to taking effective measures to build a *layered defence-in-depth* that can continuously adapt to the changing nature of the threat".[4]

The first 'layer' of defence is the protection of nuclear and radioactive materials at the source. GICNT principles urge states to enhance accounting and control capabilities – for instance by creating or improving up-to-date inventories and systems able to constantly track nuclear transports – and the reinforcement of security measures at key nuclear facilities.

The second 'layer' revolves around the ability to identify, manage, deny, and criminalise acts related to nuclear terrorism. Under this title is included in the first place the capacity to detect, as well as to properly handle, nuclear or radioactive materials so as to interdict illicit trafficking and track down the perpetrators as well as those who might have facilitated their illegal acts. A strong emphasis is put on the need to develop interoperable capabilities, due to the fact that a number of different actors, in particular law enforcement agencies, might be in the need to coordinate in detection and interdiction operations. Multinational cooperation is key to make progress in this policy area even more than in others, as improved and interoperable national detection systems would greatly reduce the risks of sensitive transports going unnoticed (it is not surprising that the establishment of a 'global detection architecture' has been identified as a fundamental step forward towards achieving GICNT goals). Equally important for the Global Initiative sponsors is to cement the conviction of participating countries that no tolerance should be exercised with regard of groups that might involve in nuclear terrorism activities. This should prompt countries not only to openly deny safe haven to anybody associated with such activities, but also to pursue an aggressive strategy to block access to financial resources that could be diverted to malicious purposes of this kind. This

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[2] See the remarks to the Capitol Hill Club of the then US undersecretary of state for arms control and international security, Robert G. Joseph, on July 18th, 2006, *The Global Initiative to Combat Nuclear Terrorism: A Comprehensive Approach to Today's Most Serious National Security Threat*, http://www.state.gov/t/us/rm/69124.htm. Mr. Joseph made an explicit reference to al-Qaeda's open objective to acquire nuclear or radiological materials, though evidence of actual pursuit of such substances on the part of al-Qaeda and other unspecified organisations is scarce. He put a direct link between these organisations and the "growing nuclear threat from states sponsors of terrorism", a reference to countries such as Iran and North Korea. Analytical accuracy would suggest to refrain from feeding the perception that these governments would be ready to transfer nuclear materials and/or technologies to groups willing to use them in a terrorist attack, not least because no solid evidence has ever emerged about nuclear connections between Iran's or North Korea's governments and radical, al-Qaeda-like organisations (actually, no armed group of which Iran is a 'sponsor' is known as having the ambition to carry out a terrorist attack with nuclear materials). True is, however, that the United States takes part in the GICNT on the assumption that this connection ought not be ruled out.

[3] The one it probably resembles the most is the Proliferation Security Initiative (PSI), especially regarding its loose structure. Like the PSI, the GICNT is an informal network of willing states committed to strengthening cooperation links in order to achieve a set of shared objectives.

[4] Robert G. Joseph, *The Global Initiative to Combat Nuclear Terrorism: A Comprehensive Approach to Today's Most Serious National Security Threat*, cit. (emphasis added).

point relates to the necessity that all activities which can be brought under the range of nuclear terrorism should be properly criminalised. Would-be nuclear terrorists pose too grave a threat to national and international security to get away with light sentences due to gaps in domestic criminal codes. This effort should target nuclear terrorism 'facilitators' (nuclear smugglers, corrupted officials, etc.) as well.

The creation of sound response mechanisms makes up a third 'layer'. These mechanisms may include the development of emergency plans at national and local level. The latter is of particular importance as, assuming that an attack with a nuclear weapon represents a remote eventuality, a more likely scenario is a terrorist group detonating an explosive device filled with nuclear or radioactive substances which would impact a limited area of a city, a key infrastructure (an airport, for instance) or another kind of civilian target (a tourist resort, etc.). In these cases, it is local actors (municipalities, police, fire-fighters, etc.), including in the private sector (key infrastructure administrations, private health service providers, etc.) that would be required to give a first response. This could include a number of activities, ranging from cordoning off the contaminated area to evacuation, treatment of wounded and/or contaminated civilians, avoiding actions that could hamper post-detonation forensics, etc., whose efficacy depends on rapidity and right sequencing. There is no way to achieve that without strong, and tested, coordination among the various national, local, and private responders.

In conclusion, the key of an effective prevention system is to bring under control all sensitive materials and ensure the ability of public authorities to detect illegally held nuclear and/or radioactive substances. In second place, there is the necessity for the judiciary and law enforcement agencies to be equipped with legal and technical instruments for adequately prosecuting nuclear-related terrorist activities. The final challenge is to set up organisational and technical mechanisms to mitigate the consequences of a successful terrorist attack. The onus of developing effective nuclear terrorism counter-measures rests mainly on the shoulders of domestic authorities. The Global Initiative has been designed with this in mind, as it basically aims at enhancing domestic protection through increased partnership capacities of its participants. Its general objective is to provide participating countries with a constantly upgraded blueprint to improve their protection, detection, prosecution and response capabilities concerning terrorist activities involving nuclear or radioactive materials.

1.3. Progress and early assessment

In just over two years, the 13-strong 'vanguard' group of GICNT participants has rapidly expanded to 73 countries (as of June 2008), including all EU members (furthermore, the EU takes part in the GICNT in its own capacity as 'observer').[5] Most of the countries with advanced nuclear industries have taken part in the global effort. This is not only a testimony that the rationale of the Global Initiative is relative unchallenged, but also that the non-binding nature of its provisions, as well as the strong emphasis on the domestic dimension, has been key to win support from countries usually wary of committing to international arrangements potentially infringing on their internal affairs, such as (for different reasons) China, India, Pakistan, or Israel.[6] Indeed, the fact that participation in the GICNT is *de facto* a zero-cost undertaking, given that no evaluation and verification mechanism has been put in

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[5] See *EU statement in support of the GICNT*, 17 June 2008, www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/misc/101246.pdf.

[6] The Proliferation Security Initiative has been less successful in these countries (except Israel) out of legal worries (they argue that the PSI would contemplate the resort to extra-legal measures such as the blocking and searching of shipments of foreign flag in international waters). China has been particularly vocal in expressing scepticism about the PSI.

place and that many routine state activities can be presented as GICNT-related, should induce to some cautiousness when referring to the membership increase as an unequivocal success.[7]

GICNT participants have held three meetings after the kick-off conference in Rabat in 2006 to discuss progress, highlight problems, and set new priorities in such diverse areas as promoting law enforcement cooperation, minimising the use of highly enriched uranium and plutonium in nuclear reactors, strengthening nuclear forensics, or explore ways to deter potential terrorist to embark in nuclear-related acts. The second GICNT meeting took place in Ankara in February 2007; the second in Astana (Kazakhstan) in June 2007; the fourth in Madrid a year later. The conferences offer the occasion to present plans and outcomes of the GICNT key activities, eg the exercises. In the Madrid meeting of June 2008 Spain was able to provide partner nations with the results of a major tabletop exercise it carried out in May, which involved different agencies and a considerable number of fellow GICNT countries.[8] Last June Kazakhstan organised a field exercise simulating an attack by terrorists on a key nuclear facility. In addition, a great many other activities have been conducted under the umbrella of the Global Initiative. These include a workshop on radiological emergency response in Beijing and a major conference on law enforcement cooperation in Miami sponsored by the US Federal Bureau of Investigation (FBI) in cooperation with Russia's Federal Security Service (FSB). Senior, when not top, officials have regularly attended the meetings, along with representatives from the research and private sector. Key private actors, in particular, have been increasingly called upon to submit public endorsement of the GICNT Statement of Principles. Companies which have done so include Hutchison Port Holdings, the port investor, the French nuclear industry giant Areva, and General Electric.[9]

Although these achievements should not be under-appreciated, assessing their impact remains an intellectual exercise subject to a great deal of arbitrariness, not least due to the absence of generally accepted evaluation standards in key priority areas, for instance in securing nuclear materials at the source. In addition, in spite of its claim to comprehensiveness, the GICNT suffers from structural flaws, notably the exclusion of military-related nuclear materials and facilities – representing a considerable part of the world overall figure of such materials and sites – and the lack of mechanisms to incentivise GICNT-related action by partner nations other than the desire to emulate other countries' good performances.[10]

The GICNT main sponsors should promote the use of tested security standards in protection, detection, and prosecution activities. While compliance with such standards would remain voluntary, they would at least provide as a row evaluation scheme against which to measure GICNT participants' self-reported progresses. The setting of standards would expose deficiencies of partner nations' capabilities and, consequently, would result in an incentive towards alignment (which, on its turn, could be included in the assistance programmes provided by the most technologically advanced countries). This would help improve the capacity to assess the impact of some GICNT-related activities.

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7 Richard Weitz, *Global Initiative to Combat Nuclear Terrorism Steady, But Slow Progress*, «WMD Insights», August 2008, www.wmdinsights.com/I26/I26_G2_GlobalInitiative.htm.

8 The tabletop exercise focused on reviewing international reporting and information exchange; contributing to defining what amounts to an 'international alert'; integrating existing national and international nuclear detection mechanisms into a 'global detection architecture'. Spain has stood out for its activism within the GICNT: apart from hosting the first big GICNT-related tabletop exercise and the fourth GICNT meeting, it has planned a field exercise for this fall.

9 Jacquelyne S. Porth, *Accelerated Cooperation Needed to Fight Nuclear Terrorism*, 13 June 2008, www.america.gov/st/peacesec-english/2008/June/20080613155515sjhtrop5.305117e-02.html.

10 On the GICNT flaws, see *The Global Initiative to Combat Nuclear Terrorism*, The Henry L. Stimson Center Issue Brief, May 30, 2007, www.stimson.org/cnp/?SN=CT200705181262; and Richard Weitz, *Global Initiative to Combat Nuclear Terrorism Steady, But Slow Progress*, cit.

As for the exclusion of military facilities from the range of the GICNT, it could be argued that this was a necessary step in order to get the support from sensitive countries which could have been extremely reluctant to join otherwise. But, as it has been rightly underlined, while the Global Initiative does not encompass military-related materials and sites, other international arrangements upon which it explicitly builds do. UN Security Council resolution 1540, for instance, makes no difference between civilian and military dimensions: interested countries could therefore promote measures to implement res. 1540 within the GICNT.[11]

These are only some suggestions to rectify some of the major shortcomings besetting the Global Initiative. They show however that those flaws can be addressed without radically altering the voluntary character of participation in the GICNT nor shifting the initiative's focus away from the development of domestic capabilities.

2. The Proliferation Security Initiative

2.1. Objectives and structure

The Proliferation Security Initiative (PSI) is a multinational undertaking aimed at countering the illegal trafficking of WMD and WMD materials and technologies. It was launched in Krakow on May 31st, 2003 by US President Bush. The 11 founding states (Australia, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain, the United Kingdom, and the United States) met in Paris on September 4th, 2003 and adopted the "Statement of Interdiction Principles". Four other participants (Canada, Norway, Russia, Singapore) joined to form the Core Group of 15 states. Canada and Denmark joined the PSI as non-Core Group members. Currently some 90 states are members of or are supporting the PSI. All permanent members of the Security Council are thus PSI members, with the exception of China, which has declared that it is not interested in joining the club. States are free to abandon the coalition. Till now nobody has withdrawn. It seems, on the contrary, that a number of states are unofficially collaborating on an *ad hoc* basis with the more powerful members of the coalition, namely the United States[12]..

The PSI is not aimed at creating new laws or a new organisation. The participants meet regularly to examine the measures to be taken or to carry out exercises. Nevertheless, a secretariat has not been set up. The PSI is based on a set of provisions enacted soon after the Krakow meeting and contained in the "Statement of Interdiction Principles"[13]. This Statement is a declaration which cannot be considered has having treaty value but should rather be regarded as soft law – a kind of political commitment by which the participating states should abide. Even though the Statement of Interdiction Principles is not legally obligatory, it should not contradict existing international law. Yet, a number of countries, namely those belonging to the Non-Aligned Movement (NAM), affirm that the PSI contradicts international law and, if implemented, would be in violation of the international obligations relating to the freedom of the seas and of the international air space.

What follows is an inquire on whether or not the PSI principles are at odds with international law. Taken separately, they may conform to the international legal order and the Charter of the United Nations, but there is the risk that they may be implemented in a way that is

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[11] *The Global Initiative to Combat Nuclear Terrorism*, The Henry L. Stimson Center Issue Brief, May 30, 2007, www.stimson.org/cnp/?SN=CT200705181262.

[12] For an expanded consideration of the PSI, see the article by N. Ronzitti, author of this part of the present paper, "The Proliferation Security Inititative and International Law", in Fisher-Lescano, Gasser, Marahun, Ronzitti (eds.), Frieden in Freiheit, Nomos-Dike, 2008, 269 ff., on which the author relied

[13] The text of the Statement is available on the US Department of State website (www.state.gov./t/np/rls/fs/23764.htm) and is included in the appendix to the present paper.

contrary to international law. In order to ascertain this point, existing practice must be reviewed.[14]

2.2. The PSI principles

The PSI is aimed at preventing "states or non-state actors of proliferation concern" from acquiring WMD, their delivery systems, e.g. missiles, and related materials. The Statement does not contain a list of proliferators, be they states or non-state entities. This is the task of the PSI participants, which are supposed to identify countries and entities involved in proliferation through their efforts in developing or acquiring WMD and associated delivery system or in transferring those weapons, their delivery systems and related materials. An exchange of information is provided for. Intelligence is the primary source of information and states are obliged to protect confidential information. In identifying proliferators, PSI states may refer to the UN resolutions listing individuals and non-state entities. But they have only limited value for the PSI, since those lists, with the exception of the ones related to Iran and North Korea, usually refer to terrorists and terrorist entities. There is also an obligation to review and strengthen national legislation to achieve the PSI objective, including a commitment to strengthen the relevant international law and framework. This encompasses existing export control regimes such as the Australia Group or the Missile Technology Control Regime (MTCR).

The activity that PSI states are to undertake to impede and stop shipment of items indicated by the PSI is qualified as "interdiction". Interdiction comprises a number of actions specified in the Statement. In effect, interdiction is a new term and is not a term of art like blockade or contraband. However, it includes activities that are not very different from measures against contraband in time of war. For vessels, interdiction includes stopping, searching and seizing cargo. For aircraft, interdiction involves forced landing and seizure of prohibited cargo as well as denial of the right of transit if a foreign aircraft is suspected of having prohibited cargo on board. Consequently, the Statement spells out the activities that the participant states should carry out. They are to take the relevant measures at their own initiative or at the request upon good cause shown by another state. This means that a request to undertake a measure of interdiction has to be accompanied by credible evidence that the cargo transported constitutes or includes prohibited goods.

The concrete measures to be taken are listed as follows. Participants should:

- not transport or assist in transporting prohibited goods and not allow persons under their jurisdiction to do so;
- take measures against their vessels in their internal or territorial waters and on the high seas;
- take measures against suspicious foreign vessels in sea areas under their national jurisdiction (internal and territorial waters or contiguous zones); such measures should also be taken against vessels entering or leaving their ports, internal or territorial waters;
- take into serious consideration a request for giving consent that a suspected vessel flying their flag be boarded and searched by the requested state or other participant;
- request suspected aircraft over-flying their territory to land for inspection and deny transit right to such aircraft;
- inspect vessels and aircraft used for transhipment in their ports or airfields.

[14] It is assumed that the PSI is to be applied in time of peace as States enjoy far more extensive rights than those foreseen by the PSI in wartime.

2.3. Implementing PSI principles

The PSI implies that measures aimed at impeding the transfer of prohibited goods are also taken at the territorial border and that the transit of prohibited cargo is forbidden. This is mainly a problem for custom authorities. From a legal point of view, territorial interdiction entails less problems than air or maritime interdiction. It is the reason why we better focus on maritime and air interdiction. A few words on notion of prohibited cargo are necessary.

Notion of prohibited cargo

The existing treaties forbidding WMD are quasi-universal, such as the Biological Weapons Convention (BWC) and the Chemical Weapons Convention (CWC). But non-party states are not bound by the prohibition. The same is true for the Nuclear Non-Proliferation Treaty (NPT), with the difference that declared nuclear-weapon-states parties are allowed to possess nuclear weapons.

Two new treaties should be considered: the International Convention for the Suppression of Acts of Nuclear Terrorism concluded on April 13th, 2005, and the Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) of October 14th, 2005. They address the question of non-state actors. The Protocol prohibits the transport of WMD and the material necessary for their construction. State-to-state transfer of nuclear material is permitted if the transfer does not violate the NPT. The Nuclear Terrorism Convention obliges states to criminalize the conduct of individuals possessing fissile or radioactive material for committing terrorist activities.

In addition to treaties forbidding WMD, one has to mention Security Council resolution 1540 (2004) which is a Chapter VII resolution and thus is obligatory for all UN members. This resolution addresses non-state actors and is aimed at preventing them (mainly terrorist entities) from acquiring WMD and their means of delivery. The ban adopted by UNSC Res. 1718 (2006) against North Korea is more comprehensive. It covers WMD, their means of delivery and related material as well as a long list of conventional weapons. The Security Council also adopted resolution 1737 (2006) against Iran, restricting the shipment of items which could contribute to Iran's nuclear programmes, including weapons delivery systems.

The notion of WMD, means of delivery and related material has become a term of art as can be induced from the PSI Principles and the above quoted Security Council resolutions. However it is not exempt from uncertainty as to the content of prohibition under the existing treaty law. For instance, there is no general convention forbidding the production, possession and transfer of missiles. The concept of related material is also very broad. However the production and transfer of nuclear material falls under the IAEA regime and this helps to identify the category. The case of *So San* illustrates the difficulty in identifying prohibited goods under the PSI.[15] The *So San* was a North Korean ship transporting Scud missiles to Yemen. The ship, which according to some commentators was registered in Cambodia, was stopped in the Arabian Sea by two Spanish warships (acting on the request of the United States) which dispatched experts in explosives on board. The Scuds were hidden in a cargo of concrete. The Yemen protested and the ship was released. The ship was stopped on the high seas but no treaty forbids the transfer of missiles. The White House was obliged to admit that "in this instance there is no clear authority to seize the shipment of Scud missiles from North Korea to Yemen" and that "there is no provision under international law prohibiting Yemen from accepting delivery of missiles from North Korea"[16].

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[15] See M. Byers, "Policing the High Seas: The Proliferation Security Initiative", 98 *AJIL* (2004), 526-545, at 526-527.

[16] See F.L. Kirgis, "Boarding of North Korean Vessel on the High Seas", In *Asil Insight*, December 12, 2002.

Maritime interdiction

The rules to be applied are those embodied in the United Nations Convention on the Law of the Sea (UNCLOS), which are mostly regarded as codifying customary international law and are thus applicable to third states. The United States, for instance, considers the rules of navigation embodied in UNCLOS as part of customary law. With the exception of Turkey, all other PSI states are parties to UNCLOS. According to the Statement of Principles, PSI states should take action in the following sea areas: internal waters, including ports used for transhipment, territorial sea, contiguous zone and high seas. Action should be taken to the extent that it is allowed by international law, including UN Security Council resolutions.

Inspection of ships in the territorial state's ports does not raise any particular problem of international law, unless the foreign ship is a warship. But this would not be the case in point, since the PSI rule addresses merchant vessels and warships are allowed in port only after admission by the port state. The case taken into consideration by the PSI rule is that of transhipment, an activity usually carried out by merchant vessels anchored in a port or in a sea terminal. The same regulation applies, *mutatis mutandis*, to vessels entering or leaving internal waters or the territorial sea. Suspected vessels should be subject to boarding, search, and seizure of prohibited cargo.

Measures might be taken within the contiguous zone. According to Article 33 UNCLOS, states are allowed, within their 24 miles contiguous zone, to exercise the control needed to prevent infringement of their customs, fiscal, immigration or sanitary regulations within their territory or territorial sea and to punish infringement of the above regulations committed within their territory or territorial sea. Even though the power of exercising control is less intense than stopping a ship and bringing it into port, the majority of states consider the contiguous zone a zone with special rights of jurisdiction, where the power of boarding, inspection and seizure can be exercised against foreign vessels.[17] On this point, the PSI principles, which call upon the participant states to stop and search vessels and to seize prohibited cargoes, are in keeping with international law. The law of the sea allows for action to be taken if there is transhipment with the aid of a hovering vessel between a ship anchored beyond the contiguous zone and the coast.

The Statement of Interdiction Principles does not address the exclusive economic zone (EEZ). For the purposes of the Interdiction Principles, this is a zone of high seas and states are not allowed to take action against foreign vessels, unless an exception to the freedom of the high seas can be invoked. Article 110 of UNCLOS, which lists those exceptions, is not of much help. The only two relevant exceptions are related to ships without nationality and the right of approach (*vérification du pavillon*), with the latter giving only limited rights unless it is discovered that the ship is without nationality or has the same nationality as the visiting ship. The right of hot pursuit should be added (and the pursuit may start from internal waters, the territorial sea or the contiguous zone).

Terrorism and WMD proliferation are not a valid excuse for boarding a foreign vessel transporting a PSI prohibited cargo. Terrorism cannot be equated to piracy and proliferation is not contemplated as an autonomous exception. The Protocol additional to the SUA Convention, for instance, does not list the transport of nuclear material as an exception to the freedom of the high seas. UNSC resolution 1540 does not give the right to board foreign vessels and the resolutions against North Korea and Iran (1718 (2006) and 1737 (2006)) do not confer the right to stop North Korean and Iranian vessels on the high seas. Self-defence, state of necessity and lawful exercise of countermeasures are valid pleas to in international law. However, they are not much help in boarding foreign vessels.

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17 I. Brownlie, *Principles of International Law*, 6th ed., Oxford, 2003, 192-193.

On the contrary consent is a sound mechanism on which to ground a counter-proliferation policy on the high seas and the boarding of foreign vessels. The PSI principles single out this customary plea, asking states "to seriously consider providing consent under the appropriate circumstances to the boarding and searching of its own flag vessels by other states...".[18] Consent may be given on an *ad hoc* basis or can be the result of a formal agreement between two or more states. Examples may be drawn from bilateral treaties on drug trafficking and from the December 20th, 1988 Vienna Convention against illicit traffic of narcotic drugs and psychotropic substances. This model has been followed and refined by the UN Protocol on Illicit Traffic of Migrants of December 12th, 2000, which has also set up a mechanism for facilitating consensus, such as the indication of a focal point by States parties.

For WMD, the first multilateral agreement was the London Protocol of October 14th, 2005, additional to the 1988 SUA Convention. A state party whose warship encounters a vessel of another state party on the high seas suspected of transporting WMD or radioactive or fissile material may ask the flag state for permission to board and search the vessel. The request is made on an *ad hoc* basis. A state, when ratifying the Protocol or at any moment afterward, may notify the International Maritime Organisation Secretary-General that consent is given on a permanent basis. Revocation is admitted.

The United States has concluded several treaties with states having huge merchant marines without requesting a genuine link for attribution of their nationality to ships, even if a strict connection with their legal order is lacking. This is the well known phenomenon of open registry policy and flag of convenience. The United States has concluded such treaties, called boarding agreements in PSI jargon, with Liberia (February 11th, 2004), Panama (May 12th, 2004), the Marshall Islands (August 13th, 2004), Cyprus (July 25th, 2005), Croatia (August 1st, 2005) and Belize (August 4th, 2005)[19]. The states that have concluded boarding agreements account for over 60% of world tonnage. This notwithstanding, further agreements are being negotiated. Sometimes an understanding is deemed sufficient and a formal agreement is not considered necessary.

The agreements provide for the suspected vessel of the state party to be stopped and visited on the high seas in order to verify whether it has a PSI prohibited cargo on board. The agreements confer reciprocal rights and duties, even though only the United States has the power to arrest and inspect suspected vessels on the high seas. The boarding agreements dictate a standard procedure for arresting the vessel, with small differences. If a US warship encounters a suspected ship on the high seas, it may ask the flag state to confirm the ship's nationality. The requested party, once nationality has been established, may decide to inspect the ship or may authorize the requesting party to board and visit it. The procedure is rapid. Each party designates the authority competent for administering the procedure, which should be concluded in two hours. If the requesting party receives no answer, consent is presumed to be given and the requesting party may proceed to arrest and inspect the suspected vessel. The boarded vessel remains under the jurisdiction of the flag state, which may renounce in favour of the jurisdiction of the boarding state.

(c) *Air interdiction*

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[18] The flag State might also act at the request of a PSI State, showing a good cause for corroborating its request. The flag State might act on the high seas when it is allowed by international law to exercise its jurisdiction.

[19] CRS Report for Congress, "Proliferation Security Initiative (PSI)", Updated September 14, 2006, at 4. See also Sean D. Murphy (ed.), "Contemporary Practice of the United States" in 98 *AJIL* (2004), at 355-357 for the US-Liberia boarding agreement.

If an aircraft is parked on a PSI airfield, the measures to be taken are not controversial under international law. The aircraft may be inspected in order to ascertain if it is carrying prohibited cargo and, if it is, the cargo may be confiscated. This measure may be taken against a civil aircraft. It is open to question whether a military aircraft may be inspected as this kind of transport enjoys immunity from local sovereignty. As a rule, police authorities may be authorised by the flag state to inspect an aircraft, with the commander granting consent. It has to be pointed out that an aircraft's entry into another state requires the consent of the territorial sovereign. If the aircraft is transporting prohibited cargo, the local sovereign should deny permission to enter its skies and land on its territory. If a foreign aircraft releases a non-faithful declaration, the local state authorities are allowed to inspect the aircraft as a countermeasure against the flag state's illicit conduct. When entering foreign skies and landing in a foreign airfield, the aircraft should abide by the instructions given by the local state. If they are not observed, entry into the other territory is illegal and the local state may resort to the measures needed to meet the situation.

This is confirmed by the 1944 Chicago Convention on International Civil Aviation (ICAO). Its Article 3 states that no state aircraft of a contracting state, a wording which also encompasses aircraft employed in military service, "shall fly over the territory of another State or land thereon without authorization by special agreement or otherwise, and in accordance with the terms thereof". This means that the local state may require, as a condition for landing or over-flying its territory, that the aircraft not be carrying a cargo on board forbidden by the PSI rules. This is the sole Chicago Convention rule on military aircraft. The Convention applies to civil aircraft and on entry and inspection matters the territorial state enjoys a full right, as is stated in Article 16: "[T]the appropriate authorities of each of the contracting States shall have the right, without unreasonable delay, to search aircraft of the other contracting States on landing and or departure, and to inspect the certificates and other documents prescribed by this Convention".

The treatment of foreign aircraft over-flying a PSI state is more difficult to regulate. According to the Statement of Interdiction Principles, the PSI state should deny the transit of suspected aircraft. This is a power that falls within the competence of the territorial state, as stated by the Chicago Convention. The territorial state may also prohibit over-flight of its territorial waters, since aircraft are not entitled to a right of innocent passage like ships. A question arises, however, if the aircraft enters the air space of the territorial state without its consent or if consent has not been granted but the local state intends to inspect the aircraft. What happens if the aircraft does not abide by the order to land? The Statement of Principles affirms that suspected aircraft in flight over the air space of a PSI state should land to be submitted to inspection and, if found, the prohibited cargo should be confiscated. The aircraft should be obliged to land through recourse to the interception procedure. Interception should be implemented in accordance with Article 3-bis of the Chicago Convention, added to it by the Montreal Protocol of May 10th, 1984, concluded after the Sakhalin Island incident when the Soviet Union destroyed a civil aircraft. Article 3-bis applies only to civil aircraft and does not encompass the case of foreign military aircraft intruding another state's national space. It establishes the following:

a) Duty to refrain from the use of weapons against civil aircraft in flight. In the case of the interception of intruding civil aircraft, the lives of persons on board and the safety of the aircraft must not be endangered.
b) The Chicago Convention contracting states have the right to require intruding aircraft to land at some designated airfield. The same is true if there are reasonable grounds for suspecting that the aircraft is employed for activities incompatible with the Chicago Convention.

c) Right to take appropriate measures requiring the intruding aircraft to desist from those activities. The measures to be taken should be consistent with the obligations stated under letter a).
d) Duty of all intruding civil aircraft to comply with the orders given by the territorial state. To this end, states should enact appropriate regulations and should render public their rules on the interception of civil aircraft.
e) All states should ensure that civil aircraft registered or operated by persons resident in their territory are not employed for purposes inconsistent with the Chicago Convention. However the violation of such a duty cannot justify resort to measures forbidden under a) and the use of forceful reprisals is prohibited.

As far as use of force is concerned, the Chicago Convention is no longer a source of contending interpretations after the May 10th, 1984 amendment and the addition of Article 3-bis. The use of weapons against an aircraft in flight is forbidden. However, many recent regulations enacted to meet the danger of international terrorism are inconsistent with the obligations stated by the current text of the Chicago Convention. In March 2006, the Russian Federation approved an anti-terrorism bill with a provision allowing the use of weapons against an aircraft in flight hijacked by terrorists. The law raised the protest of Russian pilots[20]. Earlier, in June 2004, Germany enacted the *Luftsicherheitgesetz*, a bill that entered into force on June 15th, 2005, allowing the Minister of Defence, as air commander in chief, to take appropriate measures against a hijacked plane, if there were reasonable grounds to suspect that it was being used as a weapon. Paragraph 14 of the *Luftsicherheitgesetz* allowed the Minister of Defence to order the downing of the aircraft, if was not possible to meet the danger with other means. The Bundestag raised the question before the Constitutional Court which held the *Luftsicherheitgesetz* contrary to the German Constitution and stated that the bill should be abrogated.

2.4. Compensating inspected vessels

If a ship is stopped and searched on the high seas and after the visit it is discovered that the ship is not transporting any prohibited cargo, has the visiting state the obligation to compensate the ship for any loss or damage sustained? UNCLOS Article 110 allows for ships to be visited that are suspected of engaging in the slave trade, piracy or unauthorized broadcasting from the high seas or suspected of being without nationality. The same provision states that compensation is due if the suspicion proves to be unfounded. The provision embodies a general principle, which is confirmed by the 2005 Protocol additional to the SUA Convention, even though it regulates a different context. Article 8-bis paragraph 10 of the Protocol implies that consent to board is granted by the flag state of the boarded ship. If damages occur during the visit, the boarded vessel is entitled to compensation.

The Statement of Interdiction Principles does not embody any regulation on compensation. However, it should be reasserted that the PSI is not aimed at modifying international law. The absence of any provision on compensation does not prejudice any claim which may be based on general international law or on relevant conventions. It would be advisable for the PSI to enact guidelines on the matter.

2.5. The legality of the PSI

Land interdiction does not raise any particular problem. Maritime interdiction is carried out within internal or territorial waters of the coastal state or, on the high seas, in connection with ships flying the national flag of the visiting state. If it is necessary to visit and stop vessels in

[20] A.A. Onikepe, "Russian pilots protest bill to allow downing of hijacked planes, in *Jurists* (University of Pittsburgh School of Law), Friday, March 3, 2006.

different circumstances, the visiting state has to rely on the consent principle. For the time being, this cannot be configured as a development of customary international law since PSI activity is an exception to the freedom of the seas, to be added to those envisaged by Article 110 of UNCLOS. The same considerations are applicable, *mutatis mutandis*, to air interdiction, where implementation of the PSI raises delicate questions, since human life cannot be endangered.

It should also to be recalled that paragraph 4 of the Statement of Interdiction Principles affirms that the activities carried out by participating States should be in keeping with national legislation and international law. This means that an activity not in conformity with international law should not be carried out. It is true that interdiction is a matter often subject to contending interpretations. However, the PSI states have periodical meetings and consultations with legal experts and this could help work out common rules.
The PSI should be seen as an instrument complementing the existing anti-proliferation regimes and disarmament treaties on WMD, namely the NPT, the BCW and the CWC. It is an instrument of soft law complementing the recent anti-terrorism treaties, such as the UN Convention against Nuclear Terrorism and the 2005 Protocol additional to SUA Convention. The PSI can also be viewed as a means for implementing Security Council Resolution 1540 (2004) which calls upon states to cooperate in the fight against international terrorism. Thus it is not an element of fragmentation, but concurs in adding new strength to the current anti-proliferation framework, made up of international treaties, security council resolutions and instruments of soft law.

3. Other initiatives and partnerships to fight nuclear terrorism

Among the other initiatives and partnerships to fight nuclear terrorism, there are the Global Nuclear Energy Partnership, the Global Threat Reduction Initiative and a number of nuclear detection programmes aimed at preventing illicit trafficking and unauthorised activities of sensitive materials worldwide, which includes the Second Line of Defense, the Container Security Initiative and the Secure Freight Initiative.

3.1. The Global Nuclear Energy Partnership

The Global Nuclear Energy Partnership (GNEP) was announced by US President Bush during the State of the Union address in January 2006, as part of a new Advanced Energy Initiative.[21] Today, the GNEP has 21 partners, 17 observer countries and 3 permanent international nongovernmental observers.[22] 25 more countries have been invited to join the partnership by signing its Statement of Principles at the ministerial meeting in October 2008.

While the international membership of the GNEP has grown significantly since its launch and may more than double in the next months, this initiative has generated significant debate on a number of fronts and fierce critics by non-proliferation groups and outside experts. The

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[21] See *State of the Union Address by the President*, United States Capitol, Washington, D.C., 31 January 2006, available at http://www.whitehouse.gov/stateoftheunion/2006/.

[22] The partners are: Australia, Bulgaria, Canada, China, France, Ghana, Hungary, Italy, Japan, Jordan, Kazakhstan, Republic of Korea, Lithuania, Poland, Romania, the Russian Federation, Senegal, Slovenia, Ukraine, United Kingdom and the United States. The observer countries are: Argentina, Belgium, Brazil, Czech Republic, Egypt, Finland, Germany, Libya, Mexico, Morocco, Netherlands, Slovakia, South Africa, Spain, Sweden, Switzerland, and Turkey. The permanent international nongovernment observers are: International Atomic Energy Agency (IAEA), Generation VI International Forum (GFIF), Euratom.
See http://www.gneppartnership.org/docs/GNEP_MemberChart.ppt.

Democratic-controlled US Congress substantially sided with those critics and last year cut the administration's proposed budget for the programme of more that half.[23]

The GNEP has been formulated to address issues related to three main aspects: growing energy demand, nuclear non-proliferation across the globe and integrated management of used nuclear fuel. It was presented by the US Department of Energy (DOE) as a programme to expand nuclear energy use in the US and in foreign countries, supporting economic growth while reducing the release of greenhouse gases and the proliferation threat. It includes the development of new proliferation-resistant technologies, which should allow the recycling of spent fuel through the reprocessing of nuclear waste and its conversion in fuel for fast reactors.[24] However, critics have claimed that the new reprocessing scheme included in the GNEP is unsafe and uneconomical, that there is no evidence of its proliferation-resistance and that, in fact, it makes easier for terrorists to acquire bomb material.[25] Moreover, the spread of spent fuel reprocessing technology "will relax any remaining constraints and lead to a global reprocessing free-for-all", thus exacerbating proliferation risks.[26]

In any case, "any non-proliferation benefits that might be realised through the technology innovations envisioned by the GNEP are many years – probably decades – away".[27] The GNEP Strategic Plan, released by the US DOE in January 2007, is itself cautious in addressing the non-proliferation benefits of the partnership's provisions: "there is no technology 'silver bullet' that can be built into an enrichment plant or reprocessing plant that can prevent a country from diverting these commercial fuel cycle facilities to non-peaceful use".[28]

The GNEP also envisages the creation of a consortium with other advanced nuclear nations aimed at enabling additional countries to acquire nuclear energy by providing them small nuclear power plants and leased fuel, with the provision that the resulting spent fuel would be returned to supplier countries.[29] The aim of this fuel services programme is to allow nations to access nuclear energy in return for their commitment to refrain from developing enrichment and recycling technologies. The GNEP Statement of Principles does not expressly require countries to abide their rights to acquire sensitive facilities.[30] Nevertheless, memoranda of understanding along these lines have already been signed between the United Sates and several Arab countries, including the United Arab Emirates and Saudi Arabia.[31]

In general terms, there is a diffuse fear that "the GNEP will lead to a permanent two-tier system comprised of those who provide enrichment services and those who must purchase

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23 See *Global Nuclear Energy Partnership (GNEP),* Federation of American Scientists (FAS), available at http://www.fas.org/programs/ssp/nukes/nuclear_power_and_fuel_cycle/gnep.html.

24 See *The Global Nuclear Energy Partnership: Greater Energy Security in a Cleaner, Safer World,* United States Department of Energy, available at http://www.gnep.energy.gov.

25 *The Global Nuclear Energy Partnership,* Fact Sheet, Greenpeace, available at http://www.greenpeaceusa.org.

26 See Lyman, Edwin S., *The Global Nuclear Energy Partnership: will it advance non-proliferation or undermine it?,* 2006, available at http://www.npec-web.org/Essays/20060700-Lyman-GNEP.pdf.

27 See Bernstein, Paul I., *International Partnership to Combat Weapons of Mass Destruction,* Center for the Study of Weapons of Mass Destruction, Occasional paper 6, May 2008, available at http://www.ndu.edu/inss/Occasional_Papers/OP6.pdf.

28 U.S. Department of Energy, *Global Nuclear Energy Partnership Strategic Plan*, January 2007, available at http://www.fas.org/programs/ssp/_docs/GNEPStratPlanJan07.pdf.

29 See *The Global Nuclear Energy Partnership: Greater Energy Security in a Cleaner, Safer World,* cit.

30 See *Global Nuclear Partnership Statement of Principles*, available at http://www.gneppartnership.org/docs/GNEP_SOP.pdf.

31 See Pomper, Miles, *GNEP Membership May Double, but Domestic Future in Doubt,* GNEP Watch: Developments in the Global Nuclear Energy Partnership, No. 9, August 2008.

them".[32] Moreover, "no self-respecting nation would be receptive to a message that reprocessing and plutonium recycling are essential technologies for fully realising the benefits of nuclear power, yet must remain off limits to all but a few privileged countries".[33] In this perspective, "the possibility exists that the GNEP will actually stimulate interest on the part of some states to acquire independent enrichment capabilities".[34]

Against the increasing scepticism of the US Congress, the campaign for presidential elections has raised some of the issues that have dominated the discussion over the GNEP. While Democratic candidate Barack Obama has expressed his favour for interim storage solutions rather than near-term and less proliferation-resistant reprocessing, de facto rejecting some of the fundamental tenets of GNEP, Republican candidate John McCain supported the expansion of domestic nuclear power and spent fuel reprocessing.[35] The fate of the GNEP may be then settled by the outcome of the US Presidential elections.

3.2. The Global Threat Reduction Initiative

The Global Threat Reduction Initiative (GTRI) was announced by the US Secretary of Energy Spencer Abraham in 2004 as an additional step in the Bush Administration's campaign for the prevention of nuclear or radiological materials terrorist attacks. In fact, this initiative is in line with an approach that tries to address proliferation risks through ad hoc multilateral initiatives.

The GTRI is aimed at securing, removing, relocating or disposing vulnerable materials worldwide through the following main actions:

- converting civilian research reactors worldwide from Highly Enriched Uranium (HEU) to Low Enriched Uranium (LEU), not suitable for manufacturing nuclear weapons;
- removing and repatriating Russian-origin fresh HEU and US-origin research reactor spent fuel from existing locations worldwide;
- protecting weapons-usable material sites worldwide until a more permanent threat reduction solution can be implemented, thus addressing the risk of theft and sabotage;
- establishing a comprehensive global database to identify and prioritise nuclear materials and equipment of proliferation concern not being addressed by existing threat reduction efforts.[36]

It is a collaborative programme run by a semi-autonomous agency within the US DOE known as the National Nuclear Security Administration (NNSA), in close cooperation with the IAEA and other global partners. Most of the initiatives under the GTRI already existed before its creation: it can be described as a consolidation and acceleration of nuclear and radiological materials removal efforts already carried out by the DOE and other actors worldwide, such as the IAEA and the G8.

The IAEA has enthusiastically supported the initiative since it was launched in 2004. In order to promote international cooperation around GTRI, an International Partners' Conference was

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32 See Bernstein, Paul I., *International Partnership to Combat Weapons of Mass Destruction,* cit.

33 See See Lyman, Edwin S., *The Global Nuclear Energy Partnership: will it advance non-proliferation or undermine it?,* cit.

34 See Bernstein, Paul I., *International Partnership to Combat Weapons of Mass Destruction,* cit.

35 See Pomper, Miles, *GNEP Membership May Double, but Domestic Future in Doubt,* cit.

36 See *Global Threat Reduction Initiative Highlights*, available http://www.energysavingtips.gov/media/ViennaGTRFactSheetFINAL1052604.pdf.

held in Vienna in 2004: 590 representatives from 100 IAEA member states attended it, together with 10 non-governmental and international organisations.[37]

The GTRI long-term objective is to complete 106 conversions by 2014: a first assessment of the initiative conducted in 2006 showed a quickening in the conversion pace since its creation in 2004, compared to the situation in the period 2000-2004. The other central part of the GTRI's mission, the securitisation of nuclear fuel, also accelerated, but fell behind schedule, since the initial goal to repatriate all fresh fuel of Russian origin by the end of 2005 was not met.[38]

Nevertheless, the GTRI has received large amount of funding over the last years: $193 million have been allocated for 2008, while the budget requested for 2009 is $220 million, of which $ 68 million for the repatriation of nuclear and radiological material to Russia and the United States from the rest of the world and $ 54 million for the protection of this material in the US and former Soviet Union.[39]

Beyond its actual results, some have criticised the disproportionate emphasis of the initiative on Russian-made fuel, even while around two-thirds of US-made fuel left abroad have not been targeted for removal. In response to these critics, the DOE claimed that the US fuel not recovered under the programme is located in low-risk countries like France and Germany.[40]

Looking at the contribution of the initiative to the fight against nuclear proliferation, an important aspect would be to harmonise and coordinate the efforts in the framework of the GTRI with parallel work conducted by the international community – such as IAEA programmes, the Global Initiative to Combat Nuclear Terrorism and the G8 Global Partnership against the Spread of Weapons and Materials of Mass Destruction – in order to avoid overlapping and increase the impact of these initiatives.

3.3. Initiatives in the field of nuclear detection

The United States are also engaged in a number of nuclear detection initiatives, aimed at preventing illicit trafficking and unauthorised activities involving nuclear and radiological materials worldwide. According to the IAEA, there were 1,080 confirmed incidents of this kind between 1993 and 2006, 18 of which involving weapons-usable material – that is plutonium and HEU.[41] In order to respond to the risk posed by these incidents in terms of acquisition and use of nuclear weapons and related material for terrorist purposes, the US have designed and implemented a series of programs to combat nuclear smuggling domestically and abroad.

These programs are managed by different bodies within the US administration, namely the Department of Homeland Security (DHS), the Department of Defence (DOD), the Department of Energy (DOE) and the Department of State (State), in cooperation with foreign partners. A Domestic Nuclear Detection Office (DNDO) was created in 2005 within the DHS

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37 See *Global Threat Reduction Initiative International Partners' Conference,* Summary of the Proceedings and Finding of the Conference, 18-19 September 2004, Vienna Austria.

38 See Hundman, Eric, *The Global Threat Reduction Initiative's First Two years*, Center for Defense Information, 6 September 2006, available at http://www.cdi.org/program/document.cfm?DocumentID=3650.

39 See Arnaudo, Daniel, Bush Requests Less for Threat reduction program, in Arms Control Today, March 2008, available at http://www.armscontrol.org/act/2008_03/ThreatReduction.

40 Ibidem.

41 See United States Government Accountability Office, *Nuclear Detection. Preliminary Observations on the Domestic Nuclear Detection Office's Efforts to Develop a Global Nuclear Detection Architecture*, 16 July 2008, available at http://www.gao.gov/new.items/d08999t.pdf.

to enhance and coordinate these efforts within a global nuclear detection architecture in order to implement more effective actions in this field.[42]

However, two series of obstacles can be identified: some impediments are linked to coordination, technological and management challenges in the development of such an overarching framework, due to the involvement of various domestic and foreign actors.[43] Other limitations derived from the complexity of the issue at stake: international nuclear detection strategies must face challenges such as the porous nature of international borders, the existence of alternative smuggling routes and the difficulty to detect HEU.[44]

Current nuclear detection programs include:

1. The Second Line of Defence program, which is run by the DOE's National Nuclear Security Administration, seeks to interdict illicit trafficking of nuclear and radiological material through airports, seaports, and border crossing in Russia and other key transit states. In particular, it helps states install and use radiation detection equipment at these sites, also providing training and support. It is organised into two key initiatives:

- the Core Program (SLD-Core), focused on putting radiation detection in place at border crossings – airports, seaports, railway, and land crossing. When it was initiated in 1998, the program was limited to Russia, but since 2002 it has been extended to other nine countries, including Ukraine, Kazakhstan, Georgia, Armenia, Azerbaijan, Slovenia, Slovakia, Greece, and Mongolia. To date, 117 sites have been equipped in Russia, and the US has agreed to equip all of Russia's border crossings (for a total of 350) by the end of 2011. Outside Russia, the program has identified more than 100 additional sites to receive detection equipment. At the end of 2007, radiation portal monitors had been installed in Ukraine, Kazakhstan, Georgia, Armenia, Azerbaijan, Slovenia, Slovakia, Greece, and Mongolia;[45]

- the Megaports Initiative, which equips major international seaports shipping cargo to the United States with radiation detection equipment without posing an undue burden on commercial operations. By the end of 2007, it was operational at ports in 12 countries and was in various stages of implementation at 17 additional ports, while agreement were being negotiated with approximately 20 additional countries in Europe, Asia the Middle East, and South America.[46] Planning calls for installing radiation detection equipment in 75 megaports by 2014.

2. The Container Security Initiative (CSI) and the Secure Freight Initiative (SFI) are both managed by the DHS. The CSI has been launched in 2002, in response to the increasing concerns about the potential threat of nuclear and radiological terrorism in the aftermath of the attacks of September 11th, 2001.[47] It identifies and pre-screens high-risk shipping

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42 See Department of Homeland Security, Domestic Nuclear Detection Office, http://www.dhs.gov/xabout/structure/editorial_0766.shtm.

43 See United States Government Accountability Office, *Nuclear Detection*, cit.

44 See Bernstein, Paul I., *International Partnership to Combat Weapons of Mass Destruction,* cit.

45 See Zenko, Micah and Bunn, Matthew, *Interdicting Nuclear Smuggling. Second Line of Defense Program,* 20 November 2007, available at http://www.nti.org/e_research/cnwm/interdicting/second.asp.

46 See US Customs and Border Protection, *Secure Freight Adds New Layer to CSI and Megaports Defenses,* Fact Sheet, October 2007, available at http://www.cbp.gov/linkhandler/cgov/newsroom/fact_sheets/trade_security/sfi/csi_megaports.ctt/csi_megaports.pdf.

47 See Goodby James, Coffey, Timothy, and Loeb, Cheryl, *Deploying Nuclear Detection Systems. A Proposed Startegy for Combating Nuclear Terrorism,* Center for Technology and National Security Policy, National Defense University, July 2007, available at http://www.ndu.edu/ctnsp/Def_Tech/DTP%2041%20NuclearDetectionStrategy.pdf.

containers at ports of departure before they start their trip to the US. CSI operates now at 58 foreign seaports in North America, Europe, Asia, Africa, the Middle East, and Latin and Central America, covering 86 percent of all maritime container volume destined for the US. Under CSI, a team of US officers is deployed to work with host nation counterparts to target containers that pose a potential threat. The World Customs Organization, the European Union and the G8 supported CSI expansion and have adopted resolutions implementing CSI security measures introduced at ports throughout the world.[48] CSI participating countries are offered reciprocity: they can send their officers to US ports and US Customs and Border Protection (CBP) share information on a bilateral basis with partners.[49]

3. The Secure Freight Initiative is the most recent of the nuclear detection initiatives examined, as it was launched in December 2006. The SFI is aimed at deploying a globally integrated network of radiation detection and container imaging equipment to seaports worldwide. It is designed to scan containers in foreign ports for radiation and evaluation of risk factors before they are allowed to depart for the US and other international locations. In the case of a detection alarm, both homeland security personnel and host country officers simultaneously receive an alert.[50] The DHS is responsible for installing the necessary communications infrastructures and works with host governments during the alarm resolution process. Data gathered on the containers are then combined with other intelligence and risk-assessment data and shared among participating countries to improve analysis of high-risk containers.[51] The initial phase of the SFI involved the deployment of nuclear detection devices in six foreign ports in Pakistan, Honduras, UK, Oman, Singapore, Korea, which are also part of the Megaports and CSI programs.[52] The SFI is not intended to replace the Megaports Initiative or the CSI, but to complement and coordinate with them. In fact, SFI uses Megaports scanning equipment and provide integrated data to CSI officers, as well as to DOE and DHS through the National Targeting Center in the US.[53]

These initiatives should all concur to the final objective, as it has been defined by the H.R. 1 Implementing Recommendations of the 9/11 Commission Act of 2007, to scan 100% of all cargo containers heading to the United States by 2012.[54] However, there are serious doubts about the wisdom and feasibility of this goal, also taking into account the physical limits associated with identifying shielded nuclear material, the possible inefficiencies of border control agencies in foreign countries, the possibility to defeat the detection system or to find alternative routes towards the US.[55]

3.4. The way ahead

The programs described above have shown some success, but they still need to be better coordinated and prioritised, while international participation should be further encouraged. First of all, the proliferation of initiatives and partnerships to fight the nuclear threat can place

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[48] See Department of Homeland Security, CSI: Container Security Initiative, available at http://www.cbp.gov/xp/cgov/trade/cargo_security/csi/.

[49] See US Department of Homeland Security, Container Security Initiative, Fact Sheet, available at http://www.dhs.org.

[50] See US Department of Homeland Security, Secure Freight Initiative, available at http://www.dhs.gov.

[51] See DHS, DOE Launch Secure Freight Initiative, HIS, 15 December 2006, available at http://aero-defense.ihs.com/news/2006/dhs-secure-frieght.htm.

[52] See See Zenko, Micah and Bunn, Matthew, *Interdicting Nuclear Smuggling. Second Line of Defense Program*, cit.

[53] See See US Customs and Border Protection, *Secure Freight Adds New Layer to CSI and Megaports Defenses*, cit.

[54] US Congress, Implementing Recommendations of the 9/11 Commission Act of 2007, 8 March 2007, available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h1enr.txt.pdf.

[55] See Zenko, Micah and Bunn, Matthew, *Interdicting Nuclear Smuggling. Second Line of Defense Program*, cit.

strains on the ability of states to contribute to them, thus posing a capability problem. Moreover, while flexibility can be considered as a comparative advantage, a more formal and centralised coordination and harmonisation of these activities could be required to ensure unity of efforts. Finally, expanding participation and increasing integration of other partners, such as regional anchors and private sector, could enhance the effectiveness and legitimacy of these initiatives.[56] One solution could be identified in the development of a global approach to nuclear non-proliferation, in which international institutions assume a leading role and the legal framework is provided by UN Security Council Resolution 1540, which encourages international cooperation in criminalising the possession of nuclear materials and tightening control over such materials.[57]

Conclusion

When it comes to draw some conclusions about the kind of initiatives dealt with in this paper, the first point to be made is that the United States plays an absolutely predominant role, both in terms of their formulation and implementation. Some measures are actually programmes carried out on a global scale by different departments of the US Administration. And even in cases when the initiative does not bear the 'Made in the USA' label on it – as in the GICNT, which originated from a Russian idea – the United States has rapidly assumed leadership responsibility. A second point to reflect upon is the broad international participation from which these initiatives seem to benefit. Even the PSI, which is by far the most controversial due to its unclear legal implications, can count on the overt and unofficial support of numerous countries. In the third place, it is worth stressing once again that all these initiatives, though global in their range and aspiration, have not brought about any new international norm, organisation, or bureaucracy. They rely on voluntary cooperation among sovereign states, with a strong emphasis on the development of domestic assets. A last remark concerns their sheer number, which has increased steadily in the last few years, with the result that it is not always possible to discern the outlines (see, for instance, the overlap between the Megaports and the Secure Freight Initiatives).

These initiatives are witness of the Bush Administration's ability to advance its agenda in the field of nuclear proliferation, including its antiterrorist side on a global scale. It is noteworthy that, with few exceptions, most initiatives mentioned in this paper have been welcomed by US allies and partners, including those who have opposed or been highly sceptical about Bush Administration's policies, as well as by the majority of the big powers (China's negative view of the PSI being the biggest exception). Indeed, the combination of nuclear proliferation and terrorism is perceived as a major threat well beyond US borders, and it seems that most countries are willing to seek Washington's cooperation in this field regardless of whatever divergence they might have on other issues (as shown, for instance, by the fact that Russia and the US have continued to show strong commitment to the GICNT despite their relations have experienced great tensions in the last months). Also, these initiatives have not run into significant opposition in the expert community, a considerable part of which has often been at odds with other Bush Administration's choices regarding non-proliferation and counter-terrorism.

In a way, these initiatives reflect some peculiarities of the broader Bush Administration's foreign policy attitude, such as the strong reliance on state-to-state relationships (and an equally strong emphasis on expanding the range of US national capabilities abroad instead of creating international ones), its reluctance to tie its hands with the establishment of new

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56 See Bernstein, Paul I., *International Partnership to Combat Weapons of Mass Destruction*, cit.

57 See See Goodby James, Coffey, Timothy, and Loeb, Cheryl, *Deploying Nuclear Detection Systems. A Proposed Startegy for Combating Nuclear Terrorism*, cit.

international norms, and its mistrust in the efficacy of multilateral organisations. From this perspective, they can be seen as loose implementation instances of the 'coalition of the willing' concept first elaborated in the US 2002 National Security Strategy, which by all accounts is one of the most controversial principles of the Bush Administration's approach to foreign policy. And yet the strong international support for the GICNT and other similar endeavours seems to attest to the fact that opposition to this principle is limited, if it is sensibly applied in a way that contributes to the security of all countries, not only of the US. This, however, does not suffice to rein in the risk of excessive politicisation of these initiatives, especially the PSI. The absence of any kind of truly international control or supervision does not help in this regard (in fact, the nucleus of a secretariat has been established within the PSI, although this is due mainly on organisational needs).

The Bush Administration has made the point that informal state-to-state cooperation allows for a degree of flexibility, and therefore efficacy, which would be impossible to achieve within the framework of international institutions. This might be right, but, again, legal ambiguity helps nourish prejudices and mistrust. In order to dissipate such ambiguity, these initiatives should be provided with a more solid legal frame of reference, be it by clearly spelling out what their legal basis is (as in the case of the GICNT) or by working out legal instruments to which such initiatives can be complementary (on the pattern of the UN Security Council resolutions against Iran and North Korea). Furthermore, problems associated with the informality of these initiatives are not limited to the legal dimension. An equally important question for the GICNT and the PSI is the difficulty to measure their actual results. This partially derives, as already said, from the lack of evaluation schemes, but it also depends on the reluctance of states of passing relevant information to the public. Citing the need to protect confidential data, states feel free to report progress and success without providing clear evidence. More transparency would not harm the purpose of the GICNT or the PSI.

To conclude, it seems fair to say that the GICNT, the PSI and other initiatives of this kind might be regarded as positive elements of the otherwise quite controversial legacy of the Bush Administration in the field of nuclear non-proliferation and counter-terrorism. Given the continued presence of the threat these initiatives are meant to tackle and the relative strong international support they have enjoyed, it is likely that the next US Administration, even if Democratic, will want to expand and develop them. The point is whether it will do so by following the Bush Administration's line of downgrading, if not neglecting, the role of other relevant international institutions and agreements, or by making such initiatives as the GICNT or the PSI complementary to the strengthening of the international non-proliferation legal system. This is highly desirable, because the two trends – the upholding of the international norms and the development of more informal ways to fill the gaps in the existing legal systems – would be mutually reinforcing.

APPENDIX

The GICNT Statement of Principles

Participants in the Global Initiative to Combat Nuclear Terrorism are committed to the following Statement of Principles to develop partnership capacity to combat nuclear terrorism on a determined and systematic basis, consistent with national legal authorities and obligations they have under relevant international legal frameworks, notably the Convention for the Suppression of Acts of Nuclear Terrorism, the Convention on the Physical Protection of Nuclear Material and its 2005 Amendment, United Nations Security Council Resolutions 1373 and 1540. They call on all states concerned with this threat to international peace and security, to make a commitment to implement on a voluntary basis the following principles:

- Develop, if necessary, and improve accounting, control and physical protection systems for nuclear and other radioactive materials and substances;

- Enhance security of civilian nuclear facilities;

- Improve the ability to detect nuclear and other radioactive materials and substances in order to prevent illicit trafficking in such materials and substances, to include cooperation in the research and development of national detection capabilities that would be interoperable;

- Improve capabilities of participants to search for, confiscate, and establish safe control over unlawfully held nuclear or other radioactive materials and substances or devices using them.

- Prevent the provision of safe haven to terrorists and financial or economic resources to terrorists seeking to acquire or use nuclear and other radioactive materials and substances;

- Ensure adequate respective national legal and regulatory frameworks sufficient to provide for the implementation of appropriate criminal and, if applicable, civil liability for terrorists and those who facilitate acts of nuclear terrorism;

- Improve capabilities of participants for response, mitigation, and investigation, in cases of terrorist attacks involving the use of nuclear and other radioactive materials and substances, including the development of technical means to identify nuclear and other radioactive materials and substances that are, or may be, involved in the incident; and

- Promote information sharing pertaining to the suppression of acts of nuclear terrorism and their facilitation, taking appropriate measures consistent with their national law and international obligations to protect the confidentiality of any information which they exchange in confidence.

Global Initiative participants recognize the role of the International Atomic Energy Agency (IAEA) in the fields of nuclear safety and security and the IAEA has been invited to serve as an observer to the Initiative. All participants commend the IAEA for its action in the field of nuclear security. Participants intend for the IAEA to contribute to the Initiative through its ongoing activities and technical expertise.

The initial partner nations intend to establish a terms of reference for implementation and assessment to support effective fulfillment of the initiative, including by facilitating the provision of assistance to participants that may require it, and facilitating suitable exercises.

They express the desire to broaden participation in the Global Initiative to other countries who share the common goals of the Initiative, are actively committed to combating nuclear terrorism, and endorse the Statement of Principles.

The PSI Statement of Interdiction Principles

The Proliferation Security Initiative (PSI) is a response to the growing challenge posed by the proliferation of weapons of mass destruction (WMD), their delivery systems, and related materials worldwide. The PSI builds on efforts by the international community to prevent proliferation of such items, including existing treaties and regimes. It is consistent with and a step in the implementation of the United Nations Security Council Presidential Statement of January 1992, which states that the proliferation of all WMD constitutes a threat to international peace and security, and underlines the need for member states of the U.N. to prevent proliferation. The PSI is also consistent with recent statements of the G8 and the European Union, establishing that more coherent and concerted efforts are needed to prevent the proliferation of WMD, their delivery systems, and related materials. PSI participants are deeply concerned about this threat and of the danger that these items could fall into the hands of terrorists, and are committed to working together to stop the flow of these items to and from states and non-state actors of proliferation concern.

The PSI seeks to involve in some capacity all states that have a stake in non-proliferation and the ability and willingness to take steps to stop the flow of such items at sea, in the air, or on land. The PSI also seeks cooperation from any state whose vessels, flags, ports, territorial waters, airspace, or land might be used for proliferation purposes by states and non-state actors of proliferation concern. The increasingly aggressive efforts by proliferators to stand outside or to circumvent existing nonproliferation norms, and to profit from such trade, requires new and stronger actions by the international community. We look forward to working with all concerned states on measures they are able and willing to take in support of the PSI, as outlined in the following set of "Interdiction Principles".

Interdiction Principles for the Proliferation Security Initiative:

PSI participants are committed to the following interdiction principles to establish a more coordinated and effective basis through which to impede and stop shipments of WMD, delivery systems, and related materials flowing to and from states and non-state actors of proliferation concern, consistent with national legal authorities and relevant international law and frameworks, including the United Nations Security Council. They call on all states concerned with this threat to international peace and security to join in similarly committing to:

1) Undertake effective measures, either alone or in concert with other states, for interdicting the transfer or transport of WMD, their delivery systems, and related materials to and from states and non-state actors of proliferation concern. "States or non-state actors of proliferation concern" generally refers to those countries or entities that the PSI participants involved establish should be subject to interdiction activities because they are engaged in proliferation through: (1) efforts to develop or acquire chemical, biological, or nuclear weapons and associated delivery systems; or (2) transfers (either selling, receiving, or facilitating) of WMD, their delivery systems, or related materials.

2) Adopt streamlined procedures for rapid exchange of relevant information concerning suspected proliferation activity, protecting the confidential character of classified information provided by other states as part of this initiative, dedicate appropriate resources and efforts to interdiction operations and capabilities, and maximize coordination among participants in interdiction efforts.

3) Review and work to strengthen their relevant national legal authorities where necessary to accomplish these objectives, and work to strengthen when necessary relevant international laws and frameworks in appropriate ways to support these commitments.

4) Take specific actions in support of interdiction efforts regarding cargoes of WMD, their delivery systems, or related materials, to the extent their national legal authorities permit and consistent with their obligations under international law and frameworks, to include:

a) Not to transport or assist in the transport of any such cargoes to or from states or non-state actors of proliferation concern, and not to allow any persons subject to their jurisdiction to do so.

b) At their own initiative, or at the request and good cause shown by another state, to take action to board and search any vessel flying their flag in their internal waters or territorial seas, or areas beyond the territorial seas of any other state, that is reasonably suspected of transporting such cargoes to or from states or non-state actors of proliferation concerns, and to seize such cargoes that are identified.

c) To seriously consider providing consent under the appropriate circumstances to the boarding and searching of its own flag vessels by other states, and to the seizure of such WMD-related cargoes in such vessels that may be identified by such states.

d) To take appropriate actions to (1) stop and/or search in their internal waters, territorial seas, or contiguous zones (when declared) vessels that are reasonably suspected of carrying such cargoes to or from states or non-state actors of proliferation concern and to seize such cargoes that are identified; and (2) enforce conditions on vessels entering or leaving their ports, internal waters, or territorial seas that are reasonably suspected of carrying such cargoes, such as requiring that such vessels be subject to boarding, search, and seizure of such cargoes prior to entry.

e) At their own initiative or upon the request and good cause shown by another state, to (a) require aircraft that are reasonably suspected of carrying such cargoes to or from states or non-state actors of proliferation concern and that are transiting their airspace to land for inspection and seize any such cargoes that are identified; and/or (b) deny aircraft reasonably suspected of carrying such cargoes transit rights through their airspace in advance of such flights.

f) If their ports, airfields, or other facilities are used as transshipment points for shipment of such cargoes to or from states or non-state actors of proliferation concern, to inspect vessels, aircraft, or other modes of transport reasonably suspected of carrying such cargoes, and to seize such cargoes that are identified.

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PAPER ON

FIGHT AGAINST NUCLEAR PROLIFERATION AND THE G8: PROPOSALS AND LEGAL LIMITATIONS

By

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Introduction

The 11 September 2001, terrorist attacks and the ensuing anthrax incidents in the United States marked the opening of a new era in a number of respects. From an international security perspective, they showed that the gravest threat to international peace and security might no longer be the proliferation of weapons of mass destruction to additional States, but may now be their proliferation to terrorists and other non-State actors. *The National Security Strategy of the United States of America* of September 2002 described this possibility as follows: "[t]he gravest danger our Nation faces lies at the crossroads of radicalism and technology. Our enemies have openly declared that they are seeking weapons of mass destruction, and evidence indicates that they are doing so with determination."[i]

Such perception is not specific to the United States alone; it has widely been shared by the international community. The Report of the High-level Panel on Threats, Challenges and Change entitled, *A More Secure World: Our Shared Responsibility*, published in December 2004, declared the need for "[u]rgent short-term action ... to defend against the possible terrorist use of nuclear, radiological, chemical and biological weapons."[ii] In the same year, the United Nations (UN) General Assembly adopted a resolution on the "[m]easures to prevent terrorists from acquiring weapons of mass destruction."[iii] Within the framework of G-8, the Gleneagles summit document of "G-8 Statement on Counter-Terrorism" of 2005 referred to the fact that they had "carried forward initiatives to prevent the spread of weapons of mass destruction to terrorists and other criminals."[iv] This year at the Hokkaido Toyako Summit, the G8 leaders pledged that "[they] will reinforce [their] efforts to tackle a wide array of threats including Chemical, Biological, Radiological and Nuclear (CBRN) terrorism."[v] Thus, the global threat has rapidly been shifting from one originating from States to one from non-State actors.

In combating WMD terrorism, it is necessary not only to directly face such terrorism itself but also to indirectly address the question by dealing with the proliferation of relevant materials and technologies. In the nuclear field which has been experiencing the age of renaissance, it is likely that more and more counties will have access to nuclear materials and sensitive technologies. Any strategy to combat nuclear terrorism would have to include the aspect of non-proliferation.[vi]

1. North Korean and Iranian Nuclear Issues and the Response of the IAEA and the Security Council

On the nuclear nonproliferation front, the pivotal role has been played by the Nuclear Nonproliferation Treaty (NPT) and the International Atomic Energy Agency (IAEA). Since around the turn of the century, however, the NPT-IAEA regime has suffered fundamental challenges from several quarters. Most notable are North Korea's non-compliance with its Safeguards agreement and withdrawal from the NPT as well as Iran's non-compliance with its Safeguards agreement and suspected nuclear weapons development. Let us take a brief look at main facts related to each of these challenges.

(1) North Korean Nuclear Issue

It was reported in October 2002 that when U.S. Assistant Secretary of State James Kelly visited North Korea, one of his counterparts, Deputy Foreign Minister Kang Sok Joo, admitted that the DPRK has clandestinely pursued development of nuclear weapons based on uranium enrichment. This was a prelude to the renewed nuclear crisis on the Korean Peninsula after the first such crisis in 1993-94. To this revelation of nuclear weapons development, the KEDO's (Korean Peninsula Energy Development Organization) Executive Board decided to suspend heavy oil deliveries to North Korea as of the December 2002 shipment. Heavy oil deliveries had been made as an implementation of the 1994 Agreed Framework between the United States and the DPRK,[vii] which constituted the solution of the first nuclear crisis on the Peninsula. In response to this

suspension of oil delivery, the DPRK decided to lift the freeze of nuclear facilities, which was also part of the arrangement contained in the Agreed Framework. Further, Pyongyang cut the seals and disabled surveillance cameras, both placed by the IAEA, and then ordered the IAEA inspectors to leave the country.

In the light of these developments, the IAEA's Board of Governors adopted a resolution (GOV/2003/3) on 6 January 2003 by consensus, deploring "in the strongest terms" the DPRK's unilateral acts to remove and impede the functioning of containment and surveillance equipment at its nuclear facilities, and calling for its urgent and full cooperation with the Agency.[viii] But it stopped short of submitting the issue to the U.N. Security Council.

North Korea responded on 10 January by declaring the resolution "unjust"; at the same time, it announced that it was withdrawing from the NPT. In a letter of 10 January 2003 to the President of the Security Council, the DPRK informed the latter that it decided to revoke the "suspension" on the effectuation of its withdrawal from the NPT and accordingly "the DPRK's withdrawal from the NPT will be effectuated fully from 11 January 2003." In June 1993, Pyongyang had suspended its first announcement of withdrawal from the NPT in a Joint Statement with the United States, which provided that North Korea "has decided unilaterally to suspend as long as it considers necessary the effectuation of its withdrawal from the [NPT]."[ix] Pyongyang further announced later in January that it would reactivate the reactors to secure electricity supply that had been lacking due to the stop of heavy oil delivery from the KEDO.[x]

Faced with these announcements, the IAEA Board of Governors finally decided in its resolution of 12 February 2003 to report to the Security Council the DPRK's non-compliance and the Agency's inability to verify non-diversion of nuclear material.[xi] The resolution was adopted by an overwhelming majority with no objection and only Russia and Cuba abstaining.[xii] However, the Security Council did not act on this IAEA submission, either in the form of a resolution or a Presidential Statement.

It was in its Resolution 1718(2006) of 14 October 2006 that the Security Council at last acted on the North Korean nuclear development. In direct response to the nuclear test proclaimed by the DPRK on 9 October, the Council not only "demand[ed]" that Pyongyang shall "not conduct any further nuclear test" but also that it "immediately retract its announcement of withdrawal" from the NPT and return to the Treaty as well as to the IAEA safeguards.[xiii] The Security Council further "decide[d]" that "the DPRK shall abandon all nuclear weapons and existing nuclear programmes in a complete, verifiable and irreversible manner," and "shall act strictly in accordance with the obligations applicable to parties under the [NPT] and the terms and conditions of its [IAEA] Safeguards Agreement."[xiv] The above measures corresponded to some of the core commitments that the DPRK had made in the Joint Statement of the Six-Party Talks in September 2005.[xv] The resolution also imposed economic sanctions by deciding that all UN member States shall prevent the supply or transfer to the DPRK of items, materials, equipment, goods and technology, "which could contribute to DPRK's nuclear-related, ballistic missile-related, or other weapons of mass destruction-related programmes."[xvi]

This resolution arguably obligated North Korea to retract the withdrawal announcement and return to the NPT. As such, it is remarkable that despite the right to withdraw from the NPT guaranteed to all the parties to the Treaty, it effectively refused that right in relation to the DPRK.

(2) Iranian Nuclear Issue

In a sense, the Iranian nuclear issue is more tangled, notwithstanding Iran has not developed nuclear weapons or tested them yet. The DPRK violated its Safeguards agreement and withdrew from the NPT, thus maintaining a hostile attitude to the Treaty. Iran, while likewise violating the Safeguards agreement repeatedly, remains party to the NPT and ostensively tries to solve the issue within the framework of the Treaty. However, it could be said that the Iranian path is more devious and bears more profound implications for the NPT regime, because it has more plainly shown that an NPT party may be able to prepare for the development of nuclear weapons without violating international law: i.e., by first conducting nuclear activities for peaceful purposes disguisedly and

then by withdrawing from the Treaty once the preparation is completed. Thus, an NPT party could acquire nuclear weapons without violating international law technically.

In August 2002, the National Council of Resistance of Iran (NCR), an Iranian dissident group, helped expose Iran's undeclared nuclear activities by providing information about nuclear sites at Natanz (uranium enrichment) and at Arak (heavy water production).[xvii] Initially, Iran responded to the IAEA's calls and requests in a relatively favorable manner: It formally declared the two facilities to the IAEA in February 2003[xviii]; it decided to engage in "full co-operation with the IAEA" to address and resolve all requirements and outstanding issues, as well as voluntarily to suspend all uranium enrichment and reprocessing activities in the Tehran Statement of 21 October 2003[xix]; and it signed the Additional Protocol to the Safeguards Agreement on 18 December 2003.

Iran continued its voluntary suspension of uranium enrichment-related activities until August 2005, when the new Iranian president, Mahmoud Ahmadinejad, inaugurated and resumed nuclear activities at the Isfahan uranium conversion facility. On 24 September 2005, the IAEA Board of Governors adopted a resolution finding that Iran's many failures and breaches of its obligations under its NPT Safeguards Agreement constitute "non compliance." It did not immediately refer the Iran issue to the Security Council but left the door open by stating that the Board will address the timing and content of the report required under Article 12C (report of non-compliance to the Security Council), due to the objection to referral by Russia and China.[xx]

In response to Iran's removal of IAEA seals on enrichment-related equipment as well as its resumption of uranium enrichment-related R&D activities at Natanz in January 2006, the IAEA Board of Governors on 4 February adopted a resolution to report to the Security Council the steps required of Iran by the Board, including the re-establishment of "full and sustained suspension of all enrichment-related and reprocessing activities" to be verified by the IAEA.[xxi]

After making attempts several times to ensure Iran's suspension of uranium enrichment activities, the Security Council finally adopted a resolution on 31 July 2006 under Article 40 of Chapter VII of the UN Charter (S/RES/1696(2006)), in which it "demand[ed]" that "Iran shall suspend all enrichment-related and reprocessing activities" to be verified by the IAEA.[xxii] The resolution also "call[ed] upon" all States to "prevent the transfer of any items, materials, goods and technology that could contribute to Iran's enrichment-related and reprocessing activities and ballistic missile programmes."[xxiii] The measures taken by this resolution were later amplified by "decide[ing]" Iran's suspension of all enrichment-related and reprocessing activities as well as work on all heavy water-related projects, and also "decid[ing]" on further economic sanction measures, in subsequent resolutions including Resolutions 1737(2006), 1747(2007) and 1803(2008).

This series of Council resolutions are indeed remarkable in that they have demanded a party to the NPT to "suspend" the exercise of part of its inalienable right guaranteed under the NPT, i.e. the right to "develop research, production and use of nuclear energy for peaceful purposes" (Art. IV), though whether they have actually accomplished their intended objectives is another question.

2. Proposals and Reactions thereto to Reinforce the Nuclear Non-Proliferation Regime

(1) Proposals by IAEA Director General Mohamed ElBaradei and U.S. President George Bush

As seen in the preceding section, the international community has embarked on ambitious projects in the treatment of individual nuclear proliferation-related cases by imposing sanctions against those States that have withdrawn from the NPT or are suspected of developing nuclear weapons, though not really committing a violation of the NPT in a strict legal sense – a move which was in itself epochal in the UN history. At the same time, it seems also essential to reinforce the existing nuclear non-proliferation *regime* itself so that another Iran or North Korea would not emerge.

The nuclear non-proliferation regime is not limited to the NPT per se; it also encompasses other collateral measures agreed upon in such forums as the IAEA, Nuclear Suppliers Group (NSG) and the G8.

It is perhaps IAEA Director-General Mohamed ElBaradei who first pointed out in a dramatic way the risk of nuclear proliferation through peaceful activities permitted under the NPT. He referred to the fact that uranium enrichment and reprocessing of spent fuel are both not proscribed under the NPT, but the resulting high-enriched uranium and plutonium could both be used to produce nuclear weapons. He continued by pointing out that: "Under the current regime, therefore, there is nothing illicit in a non-nuclear-weapon state having enrichment or reprocessing technology, or possessing weapon-grade nuclear material. And certain types of bomb-making expertise, unfortunately, are readily available in the open literature. Should a state with a fully developed fuel-cycle capability decide, for whatever reason, to break away from its non-proliferation commitments, most experts believe it could produce a nuclear weapon within a matter of months."[xxiv]

Based on such a sense of crisis, ElBaradei proposed, among others, that the processing of weapon usable material (separated plutonium and high-enriched uranium) in civilian nuclear programmes, as well as the production of new material through reprocessing and enrichment be limited by agreeing to restrict these operations exclusively to facilities under multinational control. At the same time, he mentioned the need that these limitations be accompanied by an assurance of fuel supply. With regard to the back end of the nuclear fuel cycle, ElBaraei also proposed that consideration be given to multilateral approaches to the management and disposal of spent fuel and radioactive waste.[xxv] These proposals were reiterated at a Carnegie conference held in June 2004.[xxvi]

In a similar vein, U.S. President George W. Bush put forward a seven-point proposal in his address at the National Defense University on 11 February 2004. After pointing out that the NPT has a loophole, he proposed that the world's leading nuclear exporters should ensure that States have reliable access to fuel for civilian reactors, "so long as those states renounce enrichment and reprocessing." Moreover, he proposed that the "Nuclear Suppliers Group should refuse to sell enrichment and reprocessing equipment and technologies to any state that does not already possess full-scale, functioning enrichment and reprocessing plants."[xxvii]

Other important proposals that President Bush announced included that "only states that have signed the Additional Protocol be allowed to import equipment for their civilian nuclear programs."[xxviii] Although he said "sign" the Additional Protocol, he may well have meant that the Protocol should be brought into force, because he added that nations that are serious about fighting proliferation will "approve and implement" the Additional Protocol. In any case, this proposal again was something to be dealt with at the NSG.

(2) Reactions to the Proposals concerning the Ban on Sensitive Nuclear Transfer (by the NSG and the G8)

Although the ElBaradei initiative and the Bush proposals were put forward with common concerns in mind, their approaches were different. While the ElBaradei initiative was designed to place the sensitive nuclear technologies under multilateral controls, the Bush proposals were intended to achieve their objectives by employing unilateral measures within the framework of NSG. As such, the latter proposals were prone to subject themselves to criticism that they introduce a new discrimination between those that can possess enrichment and reprocessing equipment and technologies and those not, in addition to the original discrimination inherent in the NPT.

The Plenary of the NSG held in May 2004 immediately after the Bush proposals were made could not agree on the proposed measures. Instead, it met stiff resistance. Several NSG members objected that barring future enrichment and reprocessing exports could lead other governments to complain that they are being denied their right under the NPT to nuclear technologies for peaceful purposes.[xxix]

In June of the same year, however, the G8 members at the Sea Island Summit agreed as follows:

> "To allow the world to safely enjoy the benefits of peaceful nuclear energy without adding to the danger of weapons proliferation, we have agreed to work to establish new measures so that sensitive nuclear items with proliferation potential will not be exported to states that may seek

to use them for weapons purposes, or allow them to fall into terrorist hands. The export of such items should only occur pursuant to criteria consistent with global nonproliferation norms and to states rigorously committed to those norms. We shall work to amend appropriately the Nuclear Suppliers Group (NSG) guidelines, and to gain the widest possible support for such measures in the future. We aim to have appropriate measures in place by the next G-8 Summit. In aid of this process, *for the intervening year, we agree that it would be prudent not to inaugurate new initiatives involving transfer of enrichment and reprocessing equipment and technologies to additional states.* We call on all states to adopt this strategy of prudence. We will also develop new measures to ensure reliable access to nuclear materials, equipment, and technology, including nuclear fuel and related services, at market conditions, for all states, consistent with maintaining nonproliferation commitments and standards"[xxx](emphasis added).

This represented a partial realization of the Bush proposals. As mentioned earlier, President Bush had proposed a ban on the sale of enrichment and reprocessing equipment and technologies to any State that had not already possessed full-scale, functioning enrichment and reprocessing plants.

There are some differences between the Bush proposal and the G8 agreement regarding the transfer of sensitive nuclear equipment and technologies. First, in terms of timeframe, the Bush proposal contained no specific timeframe for the measure to be applied, while the G8 members intended to act pursuant to the agreed measure until the NSG guidelines were amended, which was expected to take place by the next G8 Summit, a sort of "moratorium" on the transfer. Second, in substantive terms, President Bush in effect proposed a "ban" on the sale of sensitive equipment and technologies to any State that did not possess full scale, functioning plants, whereas G8 members only agreed not to inaugurate new initiatives involving transfer of such equipment and technologies to additional States. In other words, G8 agreement did not rule out the possibility of transferring such equipment and technologies to receivers, so long as they had already contracted for the transfer, even if they did not possess full-scale, functioning plants. On the other hand, G8 members decided not to launch new initiatives of transfer to additional States, irrespective of the size or the functional status of relevant plants in the potential receiving States.

Despite such minor differences, the Sea Island agreement may be seen as an important interim measure for the eventual acceptance of the Bush proposal by the NSG, because G8 members include many major suppliers of nuclear related equipment and technologies. What's more, the G8 moratorium had since been renewed every year and continued till this year. Thus, though not so salient, G8 has played an important role of supplementing and covering inaction of the NSG.

At the Heiligendamm Summit meeting of June 2007, the G8 showed some hint of change in this respect. While agreeing to continue to undertake previously agreed actions (i.e. the moratorium), they did so "on the understanding that should the NSG not reach consensus on appropriate criteria by 2008, [they] will seriously consider alternative strategies to reduce the proliferation risks associated with the transfer of enrichment and reprocessing goods and technologies."[xxxi] It was not clear at that time what they had in mind as "alternative strategies," but the above quoted phrase implied that the moratorium might terminate at the 2008 G8 summit meeting.

In July 2008 at the Hokkaido Toyako Summit meeting, the G8 members agreed in a Declaration regading this issue as follows:

"We welcome the significant progress made by the Nuclear Suppliers Group (NSG) in moving toward consensus on a criteria based approach to strengthen controls on transfers of enrichment and reprocessing equipment, facilities and technology. We support the NSG effort to reach consensus on this important issue. Additionally, we agree that *transfers of enrichment equipment, facilities and technology to any additional state in the next year will be subject to conditions that, at a minimum, do not permit or enable replication of the facilities*; and where technically feasible reprocessing transfers to any additional state will be subject to those same conditions"[xxxii](emphasis added).

The "criteria based approach" referred to above means that instead of totally banning the transfer of enrichment and reprocessing equipment and technologies as Presidnet Bush proposed in 2004, their transfer may be allowed if certain criteria (conditions) are met. Therefore, the above quoted

Hokkaido Toyako language, to which G8 members all agreed, reflects the fact that the United States abandoned its insistance that new NSG Guidelines have to include a total ban on the export of sensitive nuclear technologies except for those States already possessing them.

The assessment of any criteria based approach would depend on the criteria or conditions themselves. In the case of the G8, their agreement provides for the conditions "that, at a minimum, do not permit or enable replication of the facilities," as far as enrichment equipment, facilities and technology are concerned. It is not wholly clear what is meant by this, but it seems to mean that a transfer of such equipment, facilities and technology is allowed only if it is in a manner that the recipient State could not replicate the equipment or facilities transferred as if they are in a black box, so that they would not proliferate the technology any further. Accoridng to the Summit Declaration, this expressly applies to enrichement but not to reprocessing equipment and facilities. Black box type tranfer appears technically more difficult in the case of reprocessing equipment and facilities.

Thus, the Hokkaido Toyako Declaration has allowed new initiatives for sensitive nuclear transfers virtually for the first time in five years, albeit with conditions. It may or may not be a setback for nuclear non-proliferation efforts, depending on whether the black box type transfer is sufficiently proliferation resistant. Assuming that it is so registant, it should also be borne in mind that there is no guarantee that the black box approach will be agreed upon in the next plenary of the NSG, because it may have been agreed upon only for "the next year" and only in the "G8" framework.

(3) Reactions to Other Proposals by Director General ElBaradei and President Bush

Other important proposals made by Director General ElBaradei and President Bush include ones to make control of enrichment and reprocessing multinational and to make the signing of Additional Protocol a condition for countries seeking equipment for their civilian nuclear programs. Neither of these proposals have become a reality in any of the relevant forums to date.

(a) Multilateral Nuclear Approaches

As for the ElBaradei initiative on the multinational control of enrichment and reprocessing, it has not fully been materialized either in the IAEA or in the G8, though there are some developments in the former framework. In the IAEA, Director General ElBaradei appointed an international expert group in June 2004 to consider options for possible multilateral approaches to the front and back ends of the nuclear fuel cycle. The expert group submitted its report to the Director General in February 2005, in which it presented a set of five actions gradually introducing multilateral nuclear approaches (MNAs), i.e., (1) reinforcing existing commercial market mechanisms, (2) developing international supply guarantees with the IAEA participation, (3) promoting voluntary conversion of existing facilities to MNAs, (4) creating multilateral MNAs for new facilities, and (5) developing a nuclear fuel cycle with stronger multilateral arrangements.

Since the NPT does not prohibit its parties from conducting enrichment or reprocessing activities per se, there is no other approach to MNA than to gradually introduce relevant measures. First such efforts have been made in the area of fuel supply guarantees as an incentive for those States that are in need of nuclear fuel to voluntarily abandon national enrichment and reprocessing activities. A Special Event on Assurances of Supply and Assurances of Non-Proliferation held in September 2006 during the 50th regular session of the IAEA General Conference, attracted several ideas for establishing multilateral control of nuclear fuel cycle, including those of Germany, Japan, Russia, UK as well as the six-nation proposal. However, it is not clear whether MNAs could achieve their expected objectives even if they are established in an ideal form.

First, it is hard to imagine that those States that are determined to develop nuclear weapons would join the MNAs by voluntarily giving up their right to conduct enrichment and reprocessing activities. More generally speaking, it is not expected that those States that should join the MNAs would actually join them. This can be ascertained by the reactions of Iran to the E3+3's repeated

proposals to "suspend" its enrichment-related and reprocessing activities. Indeed, Iran has openly declared that it does not seek nuclear fuel supply; rather, its goal is to establish nuclear technologies for peaceful purposes.[xxxiii]

This is not to say that such systems as MNAs are meaningless. They may contribute to the prevention of another Iran from emerging. Still, the future participants in the MNAs would be able to withdraw from them once they are determined to develop nuclear weapons. Conversely, if the MNAs, for fear of such realization, prohibit withdrawal at all, they would be faced with a problem of lack of participation. It has been reported that many potential recipients either remain indifferent or voice fears that a new "cartel" might be created.[xxxiv] In any case, it is not easy to establish a multilateral control of nuclear fuel cycle which is both meaningful for non-proliferation purposes and attractive to potential beneficiaries.

(b) Additional Protocol

By contrast, there is no doubt that Additional Protocol is an instrument of vital importance in nuclear verification, and its universalization would dramatically contribute to the strengthening of nuclear non-proliferation regime. The effectiveness of Additional Protocol was convincingly demonstrated by the fact that on 17 August 2004 South Korea declared that it conducted uranium enrichment activities in 2000 without reporting to the IAEA. South Korea so declared based on a report of June 2004 by the Korea Atomic Energy Research Institute (KAERI) that it had conducted the experiments in question. It was said that the KAERI reported its experiments, because it thought that the fact would in any case be revealed when the IAEA conducted environmental sampling in the course of the complementary access that was due in accordance with the Additional Protocol that had entered into force for it in February of that year.[xxxv]

Notwithstanding its clear effectiveness or, in some cases, because of it, the current status of the Additional Protocol is less than satisfactory: only 88 States[xxxvi] out of 186[xxxvii] non-nuclear-weapon States Parties to the NPT have brought it into force to date. Director General ElBaradei urged in his statement at the General Conference of the IAEA in 2007 that: "It is now more than ten years since the Model Additional Protocol was approved by the Board of Governors. Just over half of the 162 States with safeguards agreements now have additional protocols in force. This includes more than two thirds of the countries with nuclear material under safeguards. But I would not call this satisfactory progress."[xxxviii]

In the successive Preparatory Commissions of the NPT Review Conference, "the need for the Additional Protocol to be universalized" has been reaffirmed in the Chairman's Working Papers.[xxxix] Many participants in the Commissions have argues that the strengthened safeguards system (i.e., a comprehensive safeguards agreement coupled with the Additional Protocol) constitutes the NPT's "verification standard."[xl] There have even been States that advocate that the Review Conference should take a decision to the effect that "the Additional Protocol is mandatory under Article III of the [NPT]."[xli]

These are all valid statements from a non-proliferation standpoint. However, it is also important that we know the legal framework that could limit the scope of the measures to be taken to reinforce the NPT regime, because whenever the developed counties try to strengthen the non-proliferation regime, developing countries tend to respond negatively by referring to the "inalienable right" to use nuclear energy for peaceful purposes enshrined in Article 4 of the NPT or to other relevant provisions of the Treaty. To examine these arguments, we will address in the next section the following legal questions: whether the conclusion of an Additional Protocol is legally required under the NPT; what would be the effect of possible interpretative agreement at an NPT Review Conference to the effect that Additional Protocol is required under the NPT; and whether it is legally allowed to require the conclusion of an Additional Protocol as a condition for nuclear transfer.

3. Legal Limitations to the Measures to Reinforce Nuclear Non-Proliferation Regime

(1) Additional Protocol as Safeguards under the NPT

(a) Interpretation of Article 3 of the NPT

The first question is whether we could legally require non-nuclear-weapon States party to the NPT to conclude an Additional Protocol. The relevant NPT provision is Article 3, paragraph 1, which provides each of such States Parties to "accept safeguards, as set forth in an agreement to be negotiated and concluded with the International Atomic Energy Agency in accordance with the Statute of the International Atomic Energy Agency and the Agency's safeguards system." There is no specific reference to the Comprehensive Safeguards Agreement, or its model agreement (INFCIRC/153) there.

In this connection, States such as Canada and Australia have proposed that the NPT Review Conference should take a decision to the effect that "the Additional Protocol is mandatory under Article III of the Treaty." In order to justify this proposal, they have argued that "safeguards requirements have evolved over time and must continue to evolve to meet present and future challenges, and that the international community must remain vigilant, remembering that no non-proliferation tool is perfect."[xlii] They also contended that "safeguards" referred to in Article 3 of the NPT is not a static concept but a concept that could evolve as the objective security environment changes; and since a model Additional Protocol was adopted by the IAEA in 1997 to respond to the newly revealed proliferation risks, it is natural for the NPT States Parties to conclude an Additional Protocol.[xliii]

However, is it tenable to say that Additional Protocol is "mandatory" under the NPT? In the same Chairman's Working Paper in which the need to universalize the Additional Protocol was reaffirmed and the strengthened safeguards system was referred to as the NPT's verification standard, views were also recorded that concluding an Additional Protocol should remain "a voluntary confidence-building measure."[xliv] This seems to have reflected the NAM countries' stress that "it is fundamental to make the distinction between legal obligations and voluntary confidence-building measures, in order to ensure that such voluntary undertakings are not turned into legal safeguards obligations."[xlv]

So as to counter these arguments, it is necessary to forge strong and persuasive arguments in favor of the universalization of Additional Protocol as a mandatory measure under the NPT. As far as its legal aspect is concerned, however, one must admit that it is hard to do so. Against the Australia-Canadian proposal, several counter-arguments could be made.

(i) Article 3 obligation is fulfilled by concluding INFCIRC/153 agreement

First, it is true that Article 3, paragraph 1, of the NPT does not refer to Comprehensive Safeguards or INFCIRC/153 specifically and leaves some leeway for an evolutive interpretation. However, those States Parties to the NPT that have concluded a Comprehensive Safeguards Agreement before the adoption of the model Additional Protocol in 1997 must consider that they have already fulfilled their obligations under Article 3, paragraph 1, of the Treaty by concluding such an Agreement. In fact, the Final Declaration of the Third Review Conference of the NPT held in 1985, for instance, stated that "[t]he Conference notes with satisfaction that the commitments in Articles I-III have been met and have greatly helped prevent the spread of nuclear explosives."[xlvi]

In addition, the model for a Comprehensive Safeguards Agreement (INFCIRC/153) provides in its first paragraph that: "The Agreement should contain, *in accordance with Article III. 1* of the Treaty on the Non-Proliferation of Nuclear Weapons, an undertaking by the State to accept safeguards, in accordance with the terms of the Agreement, on all source or special fissionable material ..."[xlvii] (emphasis added). This sentence implies that by concluding a Comprehensive Safeguards Agreement the obligation under Article 3 of the NPT is met. Although one may say that this represents no more than a recommendation on the part of the IAEA, States Parties to the NPT have demonstrated that they hold the same view by repeating essentially the same sentence in their respective Comprehensive Safeguards Agreements with the IAEA.[xlviii]

A second counter-argument against the proposition in favor of the mandatory conclusion of an Additional Protocol would be that if the conclusion of an Additional Protocol is an obligation under Article 3, paragraph 1, it would follow that quite a number of NPT States Parties are in "violation" of that paragraph, given the fact that only 88 States Parties to the NPT have concluded an Additional Protocol.[xlix] However, there is little hint of States Parties viewing the situation that way. Even Canada, which is advocating the above proposition, was merely *proposing* that the States Parties should agree that the conclusion of an Additional Protocol is an obligation under the NPT.

(ii) Procedural requirement under Article 3

Third, it could be pointed out that if the obligation under Article 3, paragraph 1, included the conclusion of an Additional Protocol, then Article 3, paragraph 4, would lose nearly all meaning. Paragraph 4 provides for the deadlines for the conclusion of an agreement with the IAEA "to meet the requirements of Article [3]." According to it, States Parties to the NPT must commence negotiation of such agreements within 180 days from the original entry into force of the Treaty (i.e., March 5, 1970), except that those adhering to the NPT after the 180-day period must commence the negotiation not later than the date of adherence; in either case, the agreement must enter into force not later than 18 months after the initiation of negotiations. These provisions are almost irrelevant to the Additional Protocol, which was adopted in 1997. They could only be relevant to the Additional Protocol for those States Parties that adhered to the Treaty around 1997. In other words, it is reasonable to assume that most NPT parties must have thought that "safeguards" as referred to in Article 3, paragraph 1, were such measures as are contained in INFCIRC/153, which was adopted in March 1971,[l] 12 months after the entry into force of the NPT, in time for the strict timeframe set out in the NPT, and that they did not envisage that any new safeguards document would be developed afterwards.

(iii) Additional Protocol as a product of the IAEA

A fourth possible counter-argument against the above proposition would be related to the fact the model Additional Protocol was adopted by the IAEA's Board of Governors. It is true that there is a close link between the NPT and the IAEA as exemplified by the very provision of Article 3, paragraph 1. However, strictly speaking, the IAEA is not the implementing organization of the NPT. In fact, the membership of the IAEA is different from that of the NPT: India, Israel and Pakistan, which are outside the NPT, are members of the IAEA and usually two of them (India and Pakistan[li]) are Board members, whereas a number of NPT parties are not members of the IAEA.[lii] Therefore, those States Parties to the NPT which are not members of the IAEA may contend that they cannot accept something produced by a body with which they have nothing to do.

It is true that INFCIRC/153 is a product of the IAEA, and non-nuclear-weapon States Parties to the NPT are bound to conclude a Safeguards agreement based on that document. This is, however, as Article 3, paragraph 1, so obligates; and once they conclude it, that obligation should be deemed to be discharged.

It could also be argued that, as the IAEA sometimes does,[liii] that since Article 3, paragraph 1, of the NPT provides for the conclusion of an agreement "in accordance with ... the [IAEA's] safeguards system," the obligation under this paragraph may evolve as the IAEA's "safeguards system" evolves. However, the authority to interpret treaty provisions lies with its States Parties, subject to the ruling of the competent courts and tribunals.[liv] Unless the NPT explicitly mandates the IAEA to update as necessary its "safeguards system" in the meaning of Article 3, paragraph 1, such an argument would not easily be accepted by the holders of the authority. And indeed, despite the Australian claim otherwise,[lv] the majority of the NPT States Parties (NAM countries) hold the view that they are not legally obliged to conclude an Additional Protocol. In other words, whether to conclude an Additional Protocol should be considered to be optional. Otherwise, it would follow that NPT parties would, in effect, continue to automatically be bound by documents to be produced

by a body whose members are different from them, which seems something NPT parties have not accepted in signing or ratifying the Treaty.

(iv) Possible rebuttal based on "Fundamental Change of Circumstances"

There may be a rebuttal to these counter-arguments, employing legal rules concerning the fundamental change of circumstances. According to it, although those States Parties to the NPT which have concluded a Comprehensive Safeguards Agreement may have been regarded as having already fulfilled the obligation under Article 3, paragraph 1, the circumstances have fundamentally changed after the revelation nuclear weapons development by Iraq as well as their suspected development by North Korea and Iran, leading to the change of the content of the obligation under the said paragraph of the NPT to include that of the conclusion of an Additional Protocol. Is such an argument justifiable?

"Fundamental change of circumstances" has long been recognized as a rule having a theoretically sound basis, while at the same time the possibility of abuse in its actual application has as long been cautioned. Under the Vienna Convention on the Law of Treaties, the relevant article includes extremely strict conditions for the invocation of this concept, which is defined as "fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties." Article 62 enumerates the conditions for its invocation as follows: (1) "the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty" *and* (2) "the effect of the change is radically to transform the extent of obligations still to be performed under the treaty." It does not seem easy to meet these two cumulative conditions satisfactorily, though it is true that the current international situation offers a new, grave challenge to the nuclear non-proliferation regime.

Moreover, suppose that it is proved that the current situation meets the above two conditions, one still could not say that the conclusion of an Additional Protocol is now an obligation of NPT States Parties, because as far as the provisions of the Vienna Convention is concerned, the rule of "fundamental change of circumstances" is one for a termination or suspension of the operation of a treaty or a withdrawal from a treaty, and not for a change of interpretation.

(b) Possible Interpretative Agreement at NPT Review Conference

As discussed above, it is hard to interpret Article 3, paragraph 1, of the NPT as legally requiring its non-nuclear-weapon States Parties to conclude an Additional Protocol. However, what has been said thus far does not necessarily rule out the possibility that NPT States Parties *agree* at a Review Conference that "safeguards" referred to in Article 3 include not only those provided by a Comprehensive Safeguards Agreement but also those supplemented by an Additional Protocol to it. If that comes true, the above counter-arguments may lose all their validity, because States Parties are the masters of their treaty. How could such an agreement be assessed in legal terms?

(i) Powers and Functions of NPT Review Conference

First, we have to identify the powers and functions of the NPT review conferences. According to Article 8, paragraph 3, of the NPT, review conferences are convened "in order to *review the operation* of this Treaty with a view to assuring that the purposes of the Preamble and the provisions of the Treaty are being realized" (emphasis added). Although it would not follow from this that the Review Conferences have the power to give an authoritative interpretation of the Treaty, it is also true that it is necessary to interpret treaty provisions in order to review its operation. There are indeed examples in which a review conference of a disarmament treaty has given a (new) interpretation of its provision. Thus, the Fourth Review Conference of the Biological Weapons Convention held in 1996 agreed regarding the interpretation of Article 1 of the Convention prohibiting development, production, stockpiling, other acquisition or retention of microbial or other biological agents or toxins as follows: "the *use* by the States Parties, in any way

and under any circumstances, of microbial or other biological agents or toxins ... is effectively a violation of Article I of the Convention"[lvi](emphasis added). This agreement was reflected in the Final Declaration of the Conference.

On the other hand, it is an undeniable fact that the NPT, just like other disarmament treaties, does not expressly stipulate that its Review Conferences have the power to give an authoritative interpretation of the Treaty.

Moreover, States Parties absent from the Review Conference where a new interpretation of the term "safeguards" is agreed upon, may argue that they cannot accept the new interpretation as an authoritative interpretation of the Treaty. Although they are expected to attend Review Conferences, their argument would not be unreasonable. If so, a possible agreement on a new interpretation of Article 3 at a Review Conference would provide no more than one of the elements for interpretation, though it may carry weight. How important the element is would depend on the way in which the agreement is phrased, formulated and adopted.

One of the pertinent examples[lvii] may be found in the Final Document of the 2000 NPT Review Conference. The so-called 13 steps[lviii] contained therein, which include such measures as ratification of the Comprehensive Nuclear-Test-Ban Treaty (CTBT), moratorium on nuclear test explosions and negotiations on a Fissile Material Cut-Off Treaty (FMCT), have sometimes been described as "the common interpretation of the NPT community of how Article VI meant to be fulfilled" (Harald Müller).[lix] However, Christopher Ford, U.S. Special Representative for Nuclear Nonproliferation, argues in criticizing such description that "[i]t would be absurd ... to suggest that the [13] steps constituted a legally binding obligation."[lx] This argument looks as if it is for the sake of criticism, because Müller himself describes the 13 steps as "politically binding" in the same place. In any case, it is important to note that both agree that the 13 steps are not legally binding; particularly so in light of the fact that the Final Document of the 2000 Review Conference was adopted by consensus.

According to the Rules of Procedure of the NPT Review Conference, all the decisions are to be taken by consensus in principle. However, if consensus is not attainable, decisions on substantive matters, including the adoption of the Final Document (containing Final Declaration), are to be taken by a two-thirds majority of those present and voting, provided that they include at least a majority of the participants.[lxi] Thus, although the NPT Review Conferences have adopted all their decisions by consensus so far, it is possible that a Review Conference adopts its Final Declaration containing a new interpretation of Article 3 by two-thirds majority, if consensus cannot be reached on the interpretation. In such a case, the new interpretation given would lose much of its authority. For this reason, the Conference would most likely choose not to adopt the new interpretation or the Final Declaration containing it under such circumstances. Should the Conference adopt it, the interpretation would not be opposable to those States Parties that opposed to it, at least.

(ii) Agreement as a "subsequent agreement" or "subsequent practice"

As discussed earlier, the rule of "fundamental change of circumstances" is a rule for the termination or suspension of the operation of a treaty or the withdrawal therefrom, and not for the interpretation of a treaty. However, there are some rules on interpretation that take into account what happens after the conclusion of a treaty. They are the rules on "subsequent agreement" and "subsequent practice."

As regards "subsequent agreement," the Vienna Convention on the Law of Treaties refers, as an element to be taken into account together with the context, to "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" (Art. 31, para. 3(a)). It is natural to consider that if States Parties agree on an interpretation of a specific provision of a treaty, it becomes the authentic interpretation of it, since the power of authoritative interpretation of a treaty rests with its States Parties, unless otherwise provided in the treaty. The Commentary of the UN International Law Commission (ILC) which drafted the Vienna Convention stated as follows: "an agreement as to the interpretation of a provision reached after the conclusion

of the treaty represents an authentic interpretation by the parties which must be read into the treaty for the purpose of its interpretation."[lxii] The question is what kind of agreement could constitute a "subsequent agreement" here, particularly in terms of the participation in the agreement. In this regard, it should be concluded that such an agreement ought to be one among all the States Parties to the treaty[lxiii] in the light of a similar requirement for the "subsequent practice," to be discussed below.

With this requirement, a possible agreement at a Review Conference on a new interpretation of Article 3 of the NPT would not qualify as "subsequent agreement" under Article 31 of the Vienna Convention, since it is next to impossible for a Review Conferences to be attended by all the Parties to the NPT. Even the 1995 Review and Extension Conference of the NPT, which decided on the future fate of the Treaty, was not participated in by all the States Parties at that time. [lxiv] However, if the Conference agrees on a new interpretation by consensus, it could count as an agreement of a substantial number of States Parties. It may further be possible that the agreement reached at a Review Conference will become an authentic interpretation of the article concerned by acquiescence, if those absent from the Conference do not raise any objections to the agreement. Abstract possibility aside, however, such realization is not plausible in view of the fact that there are still several States Parties to the NPT that openly object or express reservations to the conclusion of an Additional Protocol.[lxv]

Along with "subsequent agreement," the Vienna Convention refers, as another element to be taken into account in interpreting a treaty, to "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" (Art. 31, para. 3(b)). According to the Commentary of the ILC, the Commission considered that "subsequent practice establishing the understanding of the parties regarding the interpretation of a treaty should be included in paragraph 3 as an authentic means of interpretation alongside interpretative agreements," and that "the phrase 'the understanding of the parties'[lxvi] necessarily means 'the parties as a whole'."[lxvii]

Subsequent "practice" in our context means the conclusion of an Additional Protocol by NPT parties. For such a practice to become "subsequent practice" in the sense of Article 31 of the Vienna Convention, it is necessary that the practice is such as to establish the agreement of all the States Parties to the NPT that the conclusion of an Additional Protocol is an obligation under the NPT. This does not mean that all the States Parties must conclude an Additional Protocol for the practice to constitute "subsequent practice" under the Vienna Convention. Such a requirement would make almost meaningless the very interpretation that Article 3 of the NPT obliges States Parties to conclude an Additional Protocol; if all the States Parties have already concluded an Additional Protocol, there is no practical need to make it an obligation, except for those which will adhere to the Treaty in the future. It would suffice that all the States Parties either actually conclude an Additional Protocol or accept the conclusion as a practice adopted pursuant to Article 3 of the NPT. The ILC's Commentary stated that it is not necessary for every party to individually have engaged in the practice, and that "it suffices that it should have accepted the practice."[lxviii]

It would, however, be difficult to establish that all the States Parties that have not concluded an Additional Protocol have accepted such a conclusion as something done pursuant to Article 3 of the NPT. In practical terms, moreover, it is unlikely that they accept it in light of the fact mentioned above.

(2) Additional Protocol as a condition for Nuclear Cooperation

It has been proved difficult to conclude that the conclusion of an Additional Protocol is a legal requirement under Article 3 of the NPT. If so, there is no way to accomplish the objective of universalization of Additional Protocol other than taking steps involving incentives and disincentives. One such step is to require the conclusion of an Additional Protocol as a condition for nuclear transfer in the framework of export control.

(a) Nuclear Suppliers Group

Nuclear-related exports have mainly been governed by the Guidelines of the Nuclear Suppliers Group (NSG). The NSG was established in 1975 in response to the Indian nuclear explosion in the previous year. Today, its two sets of Guidelines provide a policy to be followed by its members in supplying items especially designed or prepared for nuclear use (nuclear transfer) and nuclear-related dual-use items (nuclear related transfer), respectively. In 1992, spurred on by the revelations about Iraq's illegal nuclear weapons development, the former Guidelines for nuclear transfer were amended to include as a condition for nuclear supply the entry into force of a comprehensive safeguards agreement.[lxix] This revision was supported by the NPT parties in 1995 when they adopted the "Principles and Objectives for Nuclear Non-Proliferation and Disarmament"[lxx]at the Review and Extension Conference, and in 2000 when they adopted the Final Document at the Review Conference.[lxxi]

The proposal put forward by President Bush in 2004 was designed to go one step further by making the signing or the conclusion of an Additional Protocol a condition for nuclear transfer. Such a proposal is desirable from nuclear non-proliferation perspectives, but whether it is legally tenable is another question.

(b) Rights and Obligations under the NPT

The NPT in Article 3, paragraph 2, obligates the States Parties not to provide "(a) source or special fissionable material, or (b) equipment or material especially designed or prepared for the processing, use or production of special fissionable material" (hereinafter collectively referred to as "nuclear materials and equipment") to non-nuclear-weapon States, "unless the source material or special fissionable material shall be subject to the safeguards required by this Article." This is an obligation of nuclear suppliers party to the NPT to require the recipient State to apply safeguards to the nuclear material relevant to the nuclear transfer (hereinafter referred to as "item-specific safeguards").[lxxii] Here, we should look at the question from two different standpoints: One from a supplier's and the other from a recipient's standpoint, in the context of their rights and obligations under the NPT.

From a supplier's standpoint, it would not run counter to its obligations under the NPT, if the supplier State Party does more than what the Treaty obliges it to do by requiring the recipient State to apply comprehensive safeguards agreement or even an Additional Protocol, rather than simply requiring the application of item-specific safeguards. Instead, such a step would be in conformity with and even promote the nuclear non-proliferation objectives of the NPT.

From a recipient's point of view, on the other hand, legal questions may arise if the recipient is a party to the NPT, particularly with regard to its rights under the Treaty. Article 4, paragraph 2, of the NPT provides for the "right" of all the parties to "participate in ... the fullest possible exchange of equipment, materials and scientific and technological information for the peaceful uses of nuclear energy." Thus, the recipients party to the NPT are guaranteed of their "right" to participate in the fullest possible exchange of nuclear equipment, etc., perhaps as long as they comply with their (basic) obligations under the Treaty.[lxxiii] The main obligations of non-nuclear-weapon States Parties to the NPT include: not to receive or acquire nuclear weapons or other nuclear explosive devices (Art. 2) and to accept safeguards and conclude an agreement with the IAEA for that purpose (Art. 3). Requiring what is not required under the NPT, and categorically rejecting nuclear cooperation with States Parties not meeting the new requirement, could raise a legal problem.

Based on the above general considerations, we should distinguish between requiring the acceptance of comprehensive safeguards as in the NSG Guidelines as amended in 1992, and requiring the conclusion of an Additional Protocol as in the new proposals. In the former case, the rights of the non-nuclear-weapon recipients party to NPT would not at all undermined by the new requirement introduced in 1992, because they are already obliged to accept comprehensive safeguards by the NPT (Art. 3, para. 1). However, requiring the conclusion of an Additional Protocol, which exceeds what the non-nuclear-weapon States Parties are obliged to do under the

NPT, as a condition for nuclear cooperation as guaranteed under Article 4 of the Treaty, could pose a legal problem of infringement of their right.

That said, the right that may be considered to be infringed here is relatively moderate in nature. The obligation of the suppliers party to the NPT corresponding to that right is merely to "facilitate" the fullest possible exchange of nuclear equipment, materials and information as well as to "co-operate in contributing" to the further development of the applications of nuclear energy for peaceful purposes (Art. 3, para. 2). Strictly speaking, they are not really obliged under the Treaty to actually supply any nuclear equipment, materials or information to any demander party to the NPT.

Moreover, if the obligation under Article 3 is made to include the conclusion of an Additional Protocol through an interpretative agreement reached at a Review Conference or any other NPT related conferences, the infringement of legal right of non-nuclear-weapons States Parties will not arise in practice. In this sense, the proposal to condition nuclear cooperation upon the conclusion of an Additional Protocol is closely linked with the interpretation of obligation under Article 3, paragraph 1, of the NPT.

Conclusions

This year, the NPT commemorated the 40th anniversary of its signature. However, its effectiveness has been questioned, with various challenges from inside and outside of the Treaty. Added to them is the recent decision by the NSG on the India-specific exemption from its rules and guidelines, which may well further undermine the already beleaguered nuclear non-proliferation regime.

Faced with all this, the international community has produced a number of proposals to reinforce the non-proliferation regime. Back in 2003-2004, IAEA Director General Mohamed ElBaradei and U.S. President George W. Bush proposed certain important measures to be taken to this end. However, it has proved that it is not so easy to agree on new measures in relevant forums. For instance, the Bush proposal that the NSG should agree to refuse the transfer of sensitive nuclear equipment and technologies has not been realized for five years now.

Under such circumstances, the G8 can play an important role. In the case of the proposed ban on transfer of sensitive nuclear equipment and technologies, it had been agreed among G8 members not to inaugurate new initiatives involving transfer of such equipment and technologies to additional States, serving essentially the same objectives as the Bush proposal. Such a supplementary role played by the G8 in the absence of agreement in the relevant forums or during the interim period till the agreement is finally reached, can be found in other fields as well, such as the control of man-portable air defense systems (MANPADS)[lxxiv] and the prevention of terrorists from gaining access to weapons of mass destruction.[lxxv]

Perhaps the G8 should consider the possibility of pursuing another important measure that has been proposed but not yet been agreed upon by the NSG, i.e. the conclusion of an Additional Protocol as a condition for nuclear transfers. Such an agreement, if reached among G8 members, would be expected to be very effective for the universalization of Additional Protocol, because the G8 includes major nuclear supplier States. In the same vein, the Japan Atomic Industrial Forum's (JAIF) Study Group on Nuclear Non-Proliferation presented to the Government of Japan in April 2008 a proposal that the G8 countries agree to make the supply of nuclear-related equipment, material or technology conditional on the conclusion of an Additional Protocol, with the G8 summit meeting then to be held at Hokkaido Toyako in mind.[lxxvi]

It may be that the NSG has not been able to agree on this particular measure for legal reasons; some of its members may hold a view that the measure is in conflict with the provisions of the NPT regarding the right to peaceful use of nuclear energy and nuclear cooperation. But that is not necessarily the case as we examined in this paper.

Politically, the introduction of such a measure has become more difficult now that a consensus decision was made on the India-specific exemption at a recent NSG plenary. It is unlikely that NAM countries accept or understand a measure according to which any recipient of nuclear equipment and materials must have concluded an Additional Protocol, while India has been placed

in a position to receive them without even concluding a comprehensive safeguards agreement. But precisely because of that, something should be done somewhere as an interim or supplementary measure.

On the economic front, it is conceivable that if the G8 takes a decision to make the conclusion of an Additional Protocol a condition for nuclear transfers, non-G8 suppliers would take advantage of such a decision by benefiting from their unconditional transfers of nuclear equipment and materials. But certain economic disadvantage should be tolerated in the interest of strengthened nuclear non-proliferation regime. Already, Australia has made the Additional Protocol a condition for the supply of Australian uranium to non-nuclear-weapons States.[lxxvii] G8 members should not hesitate to follow the Australian precedence collectively.

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[i] White House, *The National Security Strategy of the United States of America*, September 2002, preface.
[ii] A/59/565, 2 December 2004, p. 43, para. 135.
[iii] A/RES/59/80, 3 December 2004. This was the third such resolution of the UN General Assembly since 2002. See A/RES/57/83, 22 November 2002; A/RES/58/48, 8 December 2003; A/RES/60/78, 8 December 2005; A/RES/61/86, 6 December 2006.
[iv] "G8 Statement on Counter-Terrorism," Gleneagles, 2005, para. 2.
[v] "G8 Leaders Statement on Counter-Terrorism," Hokkaido Toyako Summit, 2008, para. 3. See also "Report to G8 Summit Leaders from the G8 Experts on International Terrorism and Transnational Organized Crime," Hokkaido Toyako Summit, 2008, p. 4.
[vi] Patricia McNerney, the principal deputy assistant secretary of state in the Bureau of International Security and Nonproliferation of the U.S. Department of State, said that a broad partnership of nations must be prepared to act against weapons proliferation and the illicit arms trade to successfully fight international terrorism. U.S. Department of State, "Weapons Proliferation Poses Serious Threat, Official Says," 12 June 2008.
[vii] "The Agreed Framework between the United States of America and the Democratic People's Republic of Korea" was signed on 21 October 1994 in Geneva as a non-legal, political document. The heart of the Agreed Framework lied in a deal under which North Korea would freeze its nuclear program by first freezing and eventually dismantling its three graphite-moderated reactors -- with a generating capacity of 5 MW, 50 MW and 200 MW, the former two located in Yonbyon and the latter in Taechon, and the latter two being under construction at that time -- and two related facilities (the reprocessing facility and the fuel fabrication plant); in return, the United States would make arrangements for the provision to the DPRK of a light-water reactor (LWR) project with a total generating capacity of approximately 2,000 megawatts. The United States also committed itself to provide 500,000 tons of heavy oil annually for the DPRK to cover the energy shortage to be caused by the freeze of the graphite reactors. To finance and construct the above project an international consortium of States, called the Korean Peninsula Energy Development Organization (KEDO), was established in March 1995 by an Agreement on the Establishment of the KEDO among the United States, South Korea and Japan.
[viii] GOV/2003/3, 6 January 2003.
[ix] "Joint Statement of the Democratic People's Republic of Korea and the United States of America," New York, 11 June 1993.
[x] *Asahi Shinbun*, 12 January 2003.
[xi] IAEA, "IAEA Board of Governors Adopts Resolution on Safeguards in North Korea," Media Advisory 2003/48, 12 February 2003.
[xii] *Yomiuri Shinbun*, 13 February 2003.
[xiii] S/RES/1718(2006), 14 October 2006, paras. 2, 3, 4.
[xiv] Ibid., para. 6.
[xv] "Joint Statement of the Fourth Round of the Six-Party Talks Beijing," 19 September 2005, para. 1.
[xvi] S/RES/1718(2006), para. 8.
[xvii] Sharon Squassoni, *Iran's Nuclear Program: Recent Development* (CRS Report for Congress, 22 February 2007), p. 2.
[xviii] GOV/2003/40, 6 June 2003, p. 2, para. 5.
[xix] "Statement by the Iranian Government and visiting EU Foreign Ministers," 21 October 2003, paras. 2(a), 2(b).
[xx] Article 12C of the IAEA Statute provides that: "The Board shall report the non-compliance to all members and to the Security Council and General Assembly of the United Nations."
[xxi] GOV/2006/14, 4 February 2006, para. 2.

[xxii] S/RES/1696(2006), 31 July 2006, para. 2.
[xxiii] Ibid., para. 5.
[xxiv] Mohamed ElBaradei, "Towards a Safer World," *The Economist*, Vol. 369, No. 8346 (October 18, 2003), p. 52.
[xxv] Ibid., p. 52.
[xxvi] Mohamed ElBaradei, "Nuclear Non-Proliferation: Global Security in a Rapidly Changing World," Keynote Address, Carnegie International Non-Proliferation Conference, Washington, DC, 21 June 2004.
[xxvii] White House, "President Announces New Measures to Counter the Threat of WMD: Remarks by the President on Weapons of Mass Destruction Proliferation, National Defense University, Washington, D.C." 11 February 2004.
[xxviii] Ibid.
[xxix] Wade Boese, "Nuclear Suppliers Pass on U.S. Proposals," *Arms Control Today*, Vol. 34, No. 6 (July/August 2004), p. 43; idem, "U.S. Nuclear Trade Restriction Initiatives Still on Hold," *Arms Control Today*, Vol. 34, No. 10 (December 2004), p. 19.
[xxx] "G-8 Action Plan on Nonproliferation" 9 June 2004.
[xxxi] "Heiligendamm Statement on Non-Proliferation," 8 June 2007, para. 13.
[xxxii] "G8 Hokkaido Toyako Summit Leaders Declaration," 8 July 2008, para, 66.
[xxxiii] *Yomiuri Shinbun*, 10 January 2005.
[xxxiv] Oliver Meier, "The Growing Nuclear Fuel-Cycle Debate," *Arms Control Today*, Vol. 36, No. 9 (November 2006), p. 43.
[xxxv] See Jungmin Kang, Tatsujiro Suzuki and Peter Hayes, "South Korea's Nuclear Mis-Adventures," Special Report, Nautilus Institute, September 10, 2004.
[xxxvi] As of September 1, 2008.
[xxxvii] As of September 1, 2008 and according to the Office for Disarmament Affairs, United Nations.
[xxxviii] "Statement to the Fifty-First Regular Session of the IAEA General Conference 2007 by IAEA Director General Dr. Mohamed ElBaradei," 17 September 2007.
[xxxix] NPT/CONF.2010/PC.II/WP.43, 9 May 2008, para. 36; NPT/CONF.2010/PC.I/WP.78, 11 May 2007, para. 30.
[xl] NPT/CONF.2010/PC.II/WP.43, 9 May 2008, para. 38; NPT/CONF.2010/PC.I/WP.78, 11 May 2007, para. 30.
[xli] "United Nations Third Preparatory Committee for the 2005 NPT Review Conference, Cluster II Issues, Statement by Mr. David Mason, Deputy Head of Mission, Australian Permanent Mission to the UN, Vienna, 29 April 2004," p. 1; "The third session of the Preparatory Committee for the 2005 Review Conference of the Parties to the Treaty on the Non-proliferation of Nuclear Weapons, Cluster II: Implementation of the Provisions of the Treaty Relating to the Non-Proliferation of Nuclear Weapons, Safeguards and Nuclear Weapon Free Zones Issues, Statement by Canada," p. 2.
[xlii] Ibid.
[xliii] Ibid.
[xliv] NPT/CONF.2010/PC.II/WP.43, 9 May 2008, para. 38; NPT/CONF.2010/PC.I/WP.78, 11 May 2007, para. 30.
[xlv] "Statement by Mr. Febrian Alphyanto Ruddyard, Delegation of the Republic of Indonesia on behalf of the Group of Non-Aligned States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons at the Second Session of the Preparatory Committee for the 2010 Review Conference of the States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Geneva, 28 April – 9 May 2008, on Cluster 2 Issues," p. 1. See also "Statement by the Indonesian Delegation at the 2nd Session of the Preparatory Committee for the 2010 Review Conference of the Parties to the Non-Proliferation Treaty, on Cluster 2 Issues, Geneva, 5 May 2008," p. 2.
[xlvi] NPT/CONF.III/64/I, Geneva, 1985, Annex I, p. 3, para. 3.
[xlvii] INFCIRC/153, para. 1.
[xlviii] See, e.g., Article 1 of the Agreement between the Government of Japan and the International Atomic Energy Agency in Implementation of Article III.1 and 4 of the Treaty on the Non-Proliferation of Nuclear Weapons of 4 March 1977, INFCIRC/255, March 1978
[xlix] As of 24 September 2008.
[l] David Fischer, *History of the International Atomic Energy Agency: The First Forty Years* (IAEA, 1997), pp. 254-255, 257.
[li] For 2007 - 2008.
[lii] The members of the IAEA number 145, while the NPT has 190 States Parties, as of 2008.
[liii] See, e.g., "Statement on behalf of the IAEA Secretariat on Cluster II Issues, NPT Preparatory Committee: 5 May 2008," p. 2.
[liv] See, e.g., Ian Brownlie, *Principles of Public International Law*, 5th ed. (Clarendon Press, 1998), p. 631.
[lv] Australia claimed that "Australia and many others are of the firm view that the 'Agency's safeguards system' which non-nuclear weapon state NPT Parties are obliged to accept comprises the Additional Protocol together with a comprehensive safeguards agreement." "United Nations Third Preparatory Committee for the 2005 NPT Review Conference, Cluster II Issues, Statement by Mr. David Mason, Deputy Head of Mission, Australian Permanent Mission to the UN, Vienna, 29 April 2004," p. 1.
[lvi] "Final Declaration of the Fourth Review Conference of the Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction," *United Nations Disarmament Yearbook*, Vol. 21 (1996), p. 217, Article I, para. 3.

[lvii] Another example may be found in a decision of the NPT Review and Extension Conference of 1995, which required full-scope safeguards for new supply arrangements for nuclear materials. The NSG decision on India-specific exemption of 6 September 2008 has deviated from that NPT commitment. See William Potter, "Goodbye to Nuclear Export Controls" (date not given).

[lviii] See NPT/CONF.2000/28 (Parts I and II), New York, 2000, pp. 14-15.

[lix] Harald Müller, "Farewell to Arms: What Blocking Nuclear Disarmament?," *IAEA Bulletin*, Vol. 46/2 (March 2005), p. 13.

[lx] Christopher A. Ford, "Interpreting Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons," *The Nonproliferation Review*, Vol. 14, No. 3 (November 2007), p. 412.

[lxi] Rule 28 of the Rules of Procedure. See, e.g., NPT/CONF.2000/1, 21 May 1999, pp. 121-122.

[lxii] *Yearbook of the International Law Commission*, 1966, Vol. II, p. 221, Commentary to Article 27, para. 14.

[lxiii] The same view is held by Professor Georg Nolte as far as the requirement itself is concerned. A/CN.4/L.741, 5 August 2008, p. 32, para. 24.

[lxiv] 175 out of the 178 States Parties at that time participated in the Conference.

[lxv] Brazil, for instance, has been among those States. See, e.g., William Huntington, "Brazilian Regulator Denies Uranium Claims," *Arms Control Today*, Vol. 35, No. 9 (November 2005), p. 37.

[lxvi] ILC's draft Article 27, paragraph 3(b), read as follows: "(b) Any subsequent practice in the application of the treaty which establishes *the understanding of the parties* regarding its interpretation" (emphasis added).

[lxvii] *Yearbook of the International Law Commission*, 1966, Vol. II, p. 222, Commentary to Article 27, para. 15.

[lxviii] Ibid.

[lxix] "Guidelines for Nuclear Transfers," INFCIRC/254/Rev.9/Part1, November 2007, para. 4(a).

[lxx] Its paragraph 12 provides that: "New supply arrangements for the transfer of source or special fissionable material or equipment or material especially designed or prepared for the processing, use or production of special fissionable material to non-nuclear-weapon States should require, as a necessary precondition, acceptance of the Agency's full-scope safeguards and internationally legally binding commitments not to acquire nuclear weapons or other nuclear explosive devices." NPT/CONF.1995/32 (Part I), Annex, Decision 2, para. 12.

[lxxi] NPT/CONF.2000/28 (Parts I and II), p. 6, para. 36.

[lxxii] There is another way of interpreting Article 3, paragraph 2, according to which "safeguards" in this paragraph refers to comprehensive safeguards. But this interpretation is not widely supported. Quentin Michel, "Critical Reflections on the Treaty on the Non-Proliferation of Nuclear Weapons," *Nuclear Law Bulletin*, No. 80 (December 2007), p. 25.

[lxxiii] Compliance with the (basic) obligations is not explicitly provided for in Article 4 as a condition for the exercise of the right. But according to the Vienna Convention on the Law of Treaties, a material breach of a multilateral treaty by one of the parties may lead to a suspension of the operation of the treaty in whole or in part or to the termination of it (Art. 60, para. 2).

[lxxiv] Certain measures to tighten the control of MANPADS were agreed upon at the Evian Summit meeting of June 2003, before the Wassenaar Arrangement later agreed to revise its Elements for Export Controls of MANPADS in December 2003. See "Elements for Export Controls of Man-Portable Air Defence Systems (MANPADS)," as agreed at the 2003 Plenary; "Enhance Transport Security and Control of Man-Portable Air Defence Systems (MANPADS): A G8 Action Plan," Evian, 2 June 2003.

[lxxv] Certain measures to prevent terrorists, or those that harbor them, from gaining access to weapons or materials of mass destruction were agreed upon at the Kananaskis Summit meeting of June 2002, some of which were later incorporated in Security Council Resolution 1540 (2004). See "Statement by G8 Leaders: The G8 Global Partnership against the Spread of Weapons and Materials of Mass Destruction," Kananaskis, 27 June 2002; S/RES/1540(2004), 28 April 2004.

[lxxvi] Japan Atomic Industrial Forum Study Group on Nuclear Non-Proliferation, "Proposals for Promoting the Peaceful Use of Nuclear Energy and Reinforcing Nuclear Non-Proliferation: Toward a Simultaneous Solution to Global Warming and Energy Security," April 2008, p. 3.

[lxxvii] It also urges all other uranium suppliers to do likewise. See "Treaty on the Non-Proliferation of Nuclear Weapons, First Preparatory Committee Meeting for the 2010 Review Conference, Vienna, 30 April – 11 May 2007: Statement delivered in the General Debate by H.E. Caroline Millar, Permanent Representative of Australia to the United Nations, Ambassador for Disarmament," p. 2.