

WMD terrorism has become a real threat. Even the probability of terrorist organizations using fissile material to build a crude nuclear device is realistic. This publication looks at national and international efforts aimed at curbing WMD terrorism. It examines the different policies worked out by the international community: unilateral and multilateral initiatives, coalitions of the willing and the role of international organizations, both universal, such as the United Nations and the IAEA, and regional, such as NATO and the EU. Unilateralism and ad hoc coalitions are seen as a means for complementing multilateralism and the work done by international organizations. Numerous policies have been devised and several actions carried out. This notwithstanding, international terrorism is still a threat, and a consensual policy remains difficult to achieve because of the North-South division on defining international terrorism, the main cause for the abortive attempt to draft a global convention.

This publication is a follow-up to the conference on "Coordinating Global and Regional Efforts to Combat WMD Terrorism", held in Rome on October 24, 2008. It is not a mere collection of papers, but provides thorough insight into the WMD terrorism phenomenon and can help to define further lines of action.

March 2009

15

English
Series

COORDINATING GLOBAL AND REGIONAL EFFORTS TO COMBAT WMD TERRORISM

edited by Natalino Ronzitti



Quaderni IAI

ISTITUTO AFFARI INTERNAZIONALI

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TABLE OF CONTENTS

Preface	5
List of Acronyms	8
1. The Global Challenge of WMD Terrorism: Evaluating the Threat and US-Led Multilateral Responses, <i>Eric Rosand</i>	11
2. The G8 and the Fight against Nuclear Proliferation: Proposals and Legal Limitations, <i>Masahiko Asada</i>	43
3. The Global Initiative and Other Multilateral Initiatives and Partnerships Against Nuclear Terrorism, <i>Riccardo Alcaro, Nicoletta Pirozzi, Natalino Ronzitti</i>	75
4. Transatlantic Cooperation on the Threat of WMD Terrorism, <i>Jean-François Daguzan</i>	113
5. Fighting off Fatigue: The UN Cornerstone of Antiterrorism Action, <i>Jeffrey Laurenti</i>	125
6. Fighting against WMD Terrorism: What Role for the EU?, <i>Giorgio Franceschini</i>	147
Conference Report, by <i>Mirko Sossai</i>	165
Conference Agenda	187

PREFACE

Is WMD terrorism a real threat? How can a major catastrophe be prevented? Are UN members really coordinating their efforts? Are the individual and joint actions carried out to curb international terrorism really effective? These are among the numerous questions this publication tries to answer. Unlike chemical or biological weapons terrorism, the real danger represented by nuclear terrorism is difficult to measure. Nuclear weapons are difficult to build and the acquisition of fissile material by non-state actors is not easy, now that governments and international organizations have realized that terrorists can go nuclear. However, as Eric Rosand demonstrates in his paper, the hypothesis that Al-Qaeda or other terrorist organizations try to build a crude device by smuggling fissile material or using the black market to acquire it is not unrealistic.

A number of initiatives have been put in place to face the danger of nuclear terrorism. As Asada reminds us, the High-level Panel on Threats, Challenges and Changes instituted by the UN Secretary General recommended “urgent short-term action... to defend against the possible use of nuclear, chemical and biological weapons”. The challenge has been taken up by the G-8 and at the 2008 Hokkaido Tokayo Summit the members pledged to increase their efforts to combat WMD terrorism. Many members of the international community agree upon the need to strengthen the nuclear non-proliferation regime and it is important that the next NPT Review Conference take the necessary steps, even if at the declaratory level. At state level, the North Korean and Iranian nuclear issues have not yet been properly regulated, in spite of the efforts of the IAEA, the Security Council and the joint actions of the most concerned states.

That WMD terrorism cannot be curbed or undermined without multilateral actions illustrated in the paper by Alcaro, Pirozzi and Ronzitti. A number of initiatives complement the activity undertaken by the UN Security Council and the IAEA. The Global Initiative to Combat Nuclear Terrorism is quite recent, as it was launched in 2006. Its membership encompasses all

P5, thus including China, which, on the contrary, is not a member of the Proliferation Security Initiative, for fear that it might constitute a limitation on its freedom of air and sea navigation. The PSI has been adhered to by numerous states and its legality cannot be challenged. Other programmes, such as the Global Nuclear Energy Partnership and the Global Reduction Initiative demonstrate that the work of international organizations should be complemented by coalitions of the willing and able to make the fight against the spread of WMD effective.

Transatlantic cooperation should be increased and extended. Daguzan points out that cooperation should be carried out by several actors and should involve select issues: US-EU cooperation, exchange of intelligence, NATO-EU and US-EU cooperation and a common strategy of communication during emergencies. Transatlantic cooperation also implies a common deterring and countering strategy in the case of an imminent threat.

The numerous initiatives, partnerships and coalitions of the willing and able should not undermine the role of the United Nations which, according to Laurenti, still represents the cornerstone of any anti-terrorism policy. It is true that the UN have not been successful in adopting a global convention against international terrorism, mainly because of the lack of consensus in finding a definition of international terrorism. However, a number of specific anti-terrorism conventions have been concluded and are now in force. Moreover, the General Assembly was successful in adopting a comprehensive counter-terrorism strategy in 2006, and the Security Council has passed anti-terrorist resolutions 1373 (2001) and 1540 (2004). The global effort could be consolidated by using the potential of both the UN and the IAEA more effectively.

In the last few years, the EU has also strengthened its effort to combat international terrorism. EU countries have been the object of suicide attacks and the alert for WMD terrorism is high. Franceschini points out that common strategies have been worked out on WMD terrorism, a competence of the CFSP. In fact, the EU has drafted a number of strategic documents dealing entirely or in part with WMD terrorism: The European Security Strategy (2003), the European Strategy against the Proliferation of WMD (2003), the European Counter-terrorism Strategy (2005). The EU anti-terrorism differs from other unilateral policies in that it upholds the rule of law. Another feature is its cooperation with partners. The problem is that EU policies are often declaratory and it is not always easy to find consensus among its 27 members, two of which are NW possessors.

This publication is not a mere collection of papers presented at the conference held in Rome in the fall of 2008. Each paper was discussed during the conference sessions and was completed thereafter, taking into account the discussion with academics, diplomats, experts and members of the relevant international organizations. The report of the workshop, without identifying the speakers, gives a sense of the lively discussion that took place after each session. Winding up the publication is the conference agenda.

The authors of the papers presented in this publication belong to different schools of thought and come from different geographic areas. This was a deliberate choice of the organizers so as to have as complete an assessment of the phenomenon as possible. However, the responsibility for the opinions expressed in the publication rests with the individual authors, whose views do not necessarily reflect those of the Istituto Affari Internazionali or the Italian Ministry of Foreign Affairs, whose generous financial contribution made the conference possible.

N. R.

LIST OF ACRONYMS

ABM	Anti Ballistic Missile Treaty
AP	Additional Protocol
BWC	Biological Weapons Convention
CBP	Customs and Border Protection (US)
CBRN	Chemical, Biological, Radiological and Nuclear
CFSP	Common Foreign and Security Policy (EU)
CIA	Central Intelligence Agency (US)
CPPNM	Convention on the Physical Protection of Nuclear Materials
CSI	Container Security Initiative
CTBT	Comprehensive Nuclear-Test-Ban Treaty
CTBTO	Comprehensive Test Ban Treaty - Organization
CTC	Counter-Terrorism Committee (UN)
CTED	Counter-Terrorism Committee Executive Directorate (UN)
CTR	Cooperative Threat Reduction
CWC	Chemical Weapons Convention
DHS	Department of Homeland Security (US)
DNDO	Domestic Nuclear Detection Office (US)
DOD	Department of Defence (US)
DOE	Department of Energy (US)
DPRK	Democratic People's Republic of Korea
E3+3	UK, France and Germany + US, Russia and China
EC	European Community
EEZ	Exclusive Economic Zone
EPC	European Political Cooperation
EPG	Exercise Planning Group
ESS	European Security Strategy
EU	European Union
EU3	UK, France and Germany
EURATOM	European Atomic Energy Community
EUROPOL	European Police Office
FATF	Financial Action Task Force
FBI	Federal Bureau of Investigation (US)
FMCT	Fissile Material Cut-Off Treaty

FSB	Federal Security Service (Russia)
G7	Group of Seven
G8	Group of Eight
GAO	General Accounting Office (US)
GFIF	Generation IV International Forum
GICNT	Global Initiative to Combat Nuclear Terrorism
GNPE	Global Nuclear Energy Partnership
GPWG	Global Partnership Working Group
GTRI	Global Threat Reduction Initiative
HEU	Highly Enriched Uranium
HR	High Representative (CFSP)
IAEA	International Atomic Energy Agency
IAG	Implementation and Assessment Group
ICAO	International Civil Aviation Organization
ICC	International Criminal Court
ILC	International Law Commission (UN)
INFCIRC	Information Circular (IAEA)
JAIF	Japan Atomic Industrial Forum's
JLS	Justice, Liberty and Security (EU)
KAERI	Korea Atomic Energy Research Institute
KEDO	Korean Peninsula Energy Development Organization
LEU	Low Enriched Uranium
LWR	Light-water Reactor
MANPADS	Man-Portable Air Defence Systems
MLAT	Mutual Legal Assistance Treaty
MNAs	Multilateral Nuclear Approaches
MTCR	Missile Technology Control Regime
MW	Mega Watt
NAC	New Agenda Coalition
NAM	Non-Aligned Movement
NATO	North Atlantic Treaty Organization
NCR	National Council of Resistance (of Iran)
NGOs	Nongovernment Organizations
NNSA	National Nuclear Security Administration (US)
NPT	Non-proliferation Treaty
NSG	Nuclear Suppliers Group
ODA	Office of Disarmament Affairs (UN)

OPCW	Organization for the Prohibition of Chemical Weapons
P5	Permanent 5 Members (UNSC)
PR	Personal Representative
PrepCom	Preparatory Committee (NPT)
PSI	Proliferation Security Initiative
SC	Security Council (UN)
SFI	Secure Freight Initiative
SGPP	Strengthening Global Partnership Project
SitCen	Joint Situation Centre (EU)
SLD	Second Line of Defence program (DOE)
SUA Convention	Convention of the Suppression of Unlawful Acts against the Safety of Maritime Navigation
UK	United Kingdom
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNMOVIC	United Nation Monitoring, Verification and Inspection Commission
UNSC	United Nations Security Council
UNSCR	United Nations Security Council Resolutions
US	United States
WMD	Weapons of Mass Destruction

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

*Riccardo Alcaro, Nicoletta Pirozzi, Natalino Ronzitti*¹

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 at the level of both the UN Security Council and universal treaties. After resolution 1373 (2001), passed in the aftermath of the Twin Towers terrorist attack, the Security Council enacted resolution 1540 (2004), a landmark example of the world organization's exercise of legislative powers. International conventions dedicated to counter-terrorist activities in the field of WMD, with special emphasis on nuclear weapons, have been adopted more recently and include the International Convention for the Suppression of Acts of Nuclear Terrorism (Nuclear Terrorism Convention) of April 13, 2005, and the Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) of October 14, 2005. The Convention on the Physical Protection of Nuclear Materials (CPPNM) and its 2005 Amendment are also of particular relevance. Account should also be taken of specific Security Council resolutions against countries such as

¹ Riccardo Alcaro authored paragraph 1 and wrote the conclusion (a revised and expanded version of his contribution has been published as an independent article in *The International Spectator*, vol. 44, No.1 (March 2009); Natalino Ronzitti and Nicoletta Pirozzi authored paragraphs 2 and 3, respectively.

North Korea and Iran. The Global Initiative to Combat Nuclear Terrorism (GICNT), the Proliferation Security Initiative (PSI) and other multilateral initiatives considered in this paper complement the existing conventions and Security Council resolutions. They are not treaties, rather flexible instruments which call upon participating states to cooperate and take concrete measures. A characteristic is that participating states do frequent exercises and this increases their deterrent capacity and their readiness to intervene in case of terrorist catastrophe. The Initiatives are open to countries interested in combatting WMD terrorism, and the number of participating states has been increasing steadily since their inception.

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 and to recover from a terrorist attack involving nuclear or other radioactive materials. The initiative was solemnly launched by 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 outcome 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 rallying call for like-minded nations to establish effective cooperation mechanisms in the field of nuclear counter-terrorism.² 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 the 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 and detection 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

² The text of the Joint Statement is available on the US Department of State website (<http://www.state.gov/t/isn/rls/other/76358.htm>) and is included in the appendix to the present chapter.

initiative's scope. States are called upon to commit to the GICNT principles on a voluntary basis and in a way that is consistent with national legislation 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 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's legal basis (see below, § 2.3). The GICNT can therefore be characterised as a soft law – 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 the European Union, though at a later stage than the IAEA).

Given the informal character of the GICNT, its initiators did not feel compelled to set up an ad hoc bureaucratic structure, not even a small secretariat overseeing its implementation. Instead, they 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 is only required to send its written endorsement of the Statement of Principles to the co-chairs of the Implementation and Assessment Group (IAG), currently Russia and the United States. In spite of its denomination, the IAG 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, giving advice to countries that might require it, and keeping GICNT participants informed of progress made within the initiative's framework. It is made up of approximately a dozen countries and its composition is said to be subject to change so as to ensure adequate representation of 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's 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 help to enhance capabilities in the various priority areas identified by the GICNT; and organise regular workshops in which experts and officials from different countries can 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 the disposal of the GICNT participants involved in developing exercise activities. Arguably, the exercise and workshop activities are the cornerstone of the Global Initiative. In that 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 was conceived 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.³ As a result, the odds that a terrorist group determined to carry out a nuclear attack actual-

³ 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 18, 2006, *The Global Initiative to Combat Nuclear Terrorism: A Comprehensive Approach to Today's Most Serious National Security Threat*, <http://www.america.gov/st/texttrans-english/2006/July/20060718123926xrsmada2.360171e-02.html>. 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

ly 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.⁴ But the Global Initiative is the first of its kind in that it contributes to developing a systematic, comprehensive and sustained approach to all aspects potentially related to terrorist activities involving the use of nuclear or radioactive materials. It aims at strengthening the synergies and coordination among 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”.⁵ 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 constantly to track nuclear transports – and the reinforcement of security measures at key nuclear facilities.

The second ‘layer’ revolves around the ability to identify, manage, prevent, and criminalise acts related to nuclear terrorism. This heading includes, first, 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, since a number of different actors, in particular law enforcement agencies, might need to coordinate detection and interdiction operations. Multinational cooperation is key to making progress in

refraining 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). It is true, however, that the United States takes part in the GICNT on the assumption that this connection ought not to be ruled out.

⁴ The one it probably resembles the most is the Proliferation Security Initiative, 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.

⁵ Robert G. Joseph, *The Global Initiative to Combat Nuclear Terrorism*, *cit.* (emphasis added).

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 towards achieving the GICNT's goals). Equally important for the Global Initiative's sponsors is to cement the conviction of participating countries that no tolerance should be exercised with regard of groups that might be involved in nuclear terrorism activities. This should prompt countries not only to openly deny safe haven to anyone 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 point relates to the necessity that all activities which can be classified as 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 also target nuclear terrorism 'facilitators' (smugglers of nuclear material, corrupt officials, etc.).

The creation of sound response mechanisms makes up the 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, the police, the fire department, etc.), including the private sector (key infrastructure administrations, private health service providers, etc.) that would be required to provide 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 the 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 to an effective prevention system is to bring all sensitive materials under control and ensure the ability of public authorities to detect illegally held nuclear and/or radioactive substances. In second place, the judiciary and law enforcement agencies must be equipped with

the legal and technical instruments required to prosecute 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 with domestic authorities. The Global Initiative has been designed with this in mind, as it basically aims at enhancing domestic protection by increasing the 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 relating to 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').⁶ Most of the countries with advanced nuclear industries are taking part in the global effort. This not only attests 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, have been successful in winning support from countries usually wary of committing to international arrangements potentially infringing on their internal affairs, such as (for different reasons) China, India, Pakistan, and Israel. 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 place and that many routine state activities can be presented as GICNT-related, should induce some cautiousness when describing the membership increase as an unequivocal success.⁷

GICNT participants have held three meetings since the kick-off conference in Rabat in 2006 to discuss progress, highlight problems, and set new prior-

⁶ See *EU statement in support of the Global Initiative to Combat Nuclear Terrorism (GICNT)*, 17 June 2008,

http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/misc/101246.pdf.

⁷ Richard Weitz, "Global Initiative to Combat Nuclear Terrorism: Steady, But Slow Progress", in *WMD Insights*, No. 26 (August 2008), pp. 18-27,

http://www.wmdinsights.com/I26/I26_G2_GlobalInitiative.htm.

ities in such diverse areas as promoting law enforcement cooperation, minimising the use of highly enriched uranium and plutonium in nuclear reactors, strengthening nuclear forensics, and exploring ways to deter potential terrorist from undertaking nuclear-related acts. The second GICNT meeting took place in Ankara in February 2007; the third in Astana (Kazakhstan) in June 2007; the fourth in Madrid a year later. The conferences offer the occasion for presenting plans and outcomes of the GICNT key activities, e.g. the exercises. At 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 endorse the GICNT Statement of Principles publicly. 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-estimated, assessing their impact remains a rather arbitrary intellectual exercise, not least because of the absence of generally accepted evaluation standards in key priority areas, such as the securing of 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's

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, <http://www.america.gov/st/peacesec-english/2008/June/20080613155515sjhtrop5.305117e-02.html>.

overall amount of such materials and sites – and the lack of mechanisms to provide incentives for GICNT-related action by partner nations other than just the desire to emulate other countries' good performances.¹⁰

The GICNT's 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 a raw evaluation scheme against which to measure GICNT participants' self-reported progress. The setting of standards would expose deficiencies in partner nations' capabilities and, consequently, would result in an incentive to achieving alignment (which, in 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.

As for the exclusion of military facilities from the range of the GICNT, it can be argued that this was a necessary step in order to get support from sensitive countries which could have been extremely reluctant to join otherwise. But, as 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 distinction between civilian and military dimensions: interested countries could therefore promote measures to implement res. 1540 within the GICNT.¹¹

These are only a few suggestions for rectifying some of the Global Initiative's major shortcomings. Yet, they show that those flaws can be addressed without radically altering the voluntary character of participation in the GICNT or shifting the initiative's focus away from the development of domestic capabilities.

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

¹¹ *The Global Initiative to Combat Nuclear Terrorism*, *cit.*

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 by US President Bush on May 31, 2003. 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 4, 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 States¹². The PSI has attracted the support of NATO and the EU, even though they are not officially members of the coalition.

According to the founding states, the PSI does not aim at creating new laws or a new organisation. The participants meet regularly to examine the measures to be taken or to carry out exercises. According to a document prepared for the US Congress, “an informal coordinating structure has developed” in order to meet PSI needs.¹³ Nevertheless, a secretariat in the proper sense has not been set up. The PSI is based on a set of provisions

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 Initiative and International Law”, in Andreas Fischer-Lescano, Hans-Peter Gasser, Thilo Marahun, Natalino Ronzitti (eds), *Frieden in Freiheit - Peace in liberty - Paix en liberté*, Baden-Baden, Nomos, Zürich/St. Gallen, Dike, 2008, pp. 269-284, from which the author has drawn

¹³ Mary Beth Nikitin, *Proliferation Security Initiative (PSI)*, Washington, Congressional Research Service, 4 February 2008 (CRS Report for Congress RL34327), p. 3, <http://fas.org/sgp/crs/nuke/RL34327.pdf>.

¹⁴ The text of the Statement is available on the US Department of State website (<http://www.state.gov/t/np/isn/fs/23764.htm>) and is included in the appendix to the present paper.

enacted soon after the Krakow meeting and contained in the “Statement of Interdiction Principles”¹⁴. This Statement is a declaration which cannot be considered as having treaty value but must 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 that its implementation violates the international obligations relating to the freedom of the seas and of the international air space, as set out in the UN Convention on the Law of the Sea, which is to be regarded as declaratory of contemporary customary international law.

Is the accusation by NAM countries that PSI principles are not in keeping with international law valid? 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 contrary to international law. Taken separately, they seem to conform to the international legal order and the Charter of the United Nations, but is there the risk that they may be implemented in a way that is contrary to international law. The NAM claim has no sound foundation, as will appear from a critical analysis of the PSI principles.¹⁵

2.2. *The PSI activities*

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. A list is not provided. 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

¹⁵ 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: for instance the right of visit and search and the right to establish a blockade.

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 strengthening the relevant international law and framework, including 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 forbidden items 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 and measures that the participant states should carry out at their own initiative or at the request upon good cause presented by another state. In this latter case, a request to undertake a measure of interdiction should be corroborated by credible evidence that the cargo contains prohibited goods.

In order to comply with the statement of principles, 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 transshipment in their ports or air-fields.

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 customs authorities. From a legal point of view, territorial interdiction entails less problems than air or maritime interdiction, which will be the focus of our considerations, once the notion of prohibited cargo has been defined.

What constitutes a prohibited cargo?

The existing treaties forbidding WMD are quasi-universal, such as the Biological Weapons Convention (BWC) and the Chemical Weapons Convention (CWC). Non-party states are not bound by the prohibition, unless one can argue that the obligation not to possess this kind of weapon has become customary international law. 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, already quoted, should be considered: the International Convention for the Suppression of Acts of Nuclear Terrorism concluded on April 13, 2005, and the Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) of October 14, 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, mention has to be made of Security Council resolution 1540 (2004) which is a Chapter VII resolution and is thus 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 weapon delivery systems.

The notion of WMD, means of delivery, and related material has become common currency and its meaning 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 the 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.¹⁶ 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, with embarrassment, 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”¹⁷. In effect, the stopping and searching could not rely on either the law of the sea norms or any Chapter VII Security Council resolution.

Interdiction in marine areas

The rules to be applied are those embodied in the United Nations Convention on the Law of the Sea (UNCLOS), which, as said, are mostly regarded as codifying customary international law and are thus applicable to third states. The United States is not party, but 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

¹⁶ See Michael Byers, “Policing the High Seas: The Proliferation Security Initiative”, in *American Journal of International Law*, Vol. 98, No. 3 (July 2004), pp. 526-545, at pp. 526-527.

¹⁷ See Frederic L. Kirgis, “Boarding of North Korean Vessel on the High Seas”, in *ASIL Insights*, 12 December 2002, <http://www.asil.org/insigh94.cfm>.

areas: internal waters, including ports used for transshipment, 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 (as was done, for instance, in connection with the embargo on the former Yugoslavia by resolution 787-1992). A Security Council Resolution should be based on the UN Charter's Chapter VII, on the rationale that terrorism and WMD constitute a threat to peace.

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, which are allowed into a port only after admission by the port state. The case taken into consideration by the PSI rule is that of transshipment, 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-mile 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 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, in which the power of boarding, inspection and seizure can be exercised against foreign vessels.¹⁸ 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 transshipment, 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 the high seas and states are not allowed to take action against foreign vessels there, unless an exception to the freedom of the high seas

¹⁸ Ian Brownlie, *Principles of Public International Law*, 6th ed., Oxford and New York, Oxford University Press, 2008, pp. 192-195.

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 the ship is revealed to be without nationality or to have 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 with 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 in international law. However, they are not much help in boarding foreign vessels. To do so, a UNSC resolution clearly authorizing states to board suspected ships on the high seas is needed. However the adoption of such a resolution would be opposed by a number of countries and vetoed by China, for fear of creating new international law.

Alternatively, 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...”.¹⁹ 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 treaties on drug trafficking, which paved the way for the adoption of such a model in other fields (for instance, the UN Protocol on Illicit Traffic of Migrants of December 12, 2000).

For WMD, the first multilateral agreement was the London Protocol of October 14, 2005, additional to the 1988 SUA Convention. A state party

¹⁹ The flag State might also act at the request of a PSI State, corroborating its request with a good cause. The flag State might act on the high seas when it is allowed by international law to exercise its jurisdiction.

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 give its consent on a permanent basis, notifying the International Maritime Organisation's Secretary-General. Revocation is admitted.

The United States has concluded several treaties with states that have 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 policy of open registry or flag of convenience. The United States has concluded such treaties, called boarding agreements in PSI jargon, with Liberia (February 11, 2004), Panama (May 12, 2004), the Marshall Islands (August 13, 2004), Cyprus (July 25, 2005), Croatia (August 1, 2005), Belize (August 4, 2005), Malta (March 15, 2007) and Mongolia (October 23, 2007)²⁰. 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 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. Authorization is given on an *ad hoc* basis. A focal point is indicated and the procedure is rapidly carried out. A problem arises when the government structures of the state that is supposed to

²⁰ Mary Beth Nikitin, *Proliferation Security Initiative (PSI)*, *cit.*, at 4. See also Sean D. Murphy (ed.), "Contemporary Practice of the United States Relating to International Law - 'Proliferation Security Initiative' for Searching Potential WMD Vessels", in *American Journal of International Law*, Vol. 98, No. 2 (April 2004), at 355-356 for the US-Liberia boarding agreement; US Department of State, Ship Boarding Agreements, 20 January 2009), <http://2001-2009.state.gov/t/isn/c12386.htm>

²¹ David Garfield Wilson, "Interdiction on the High Seas: The Role and Authority of a Master in the Boarding and Searching of His Ship by Foreign Warships", in *Naval Law Review*, Vol. 55 (2008), pp. 157-211.

²² Mary Beth Nikitin, *Proliferation Security Initiative (PSI)*, *cit.*, at pp. 3-4.

give its consensus are practically absent because of civil war or anarchy, as happened, for instance, with Liberia²¹.

Measuring PSI success is not easy. It seems that as of 2005-06, a dozen interdictions have been carried out.²²

The law of air interdiction

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 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 an aircraft does not carry a cargo 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]he 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 10, 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 into 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 10, 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 pilots²³. Earlier, in June 2004, Germany enacted the *Luftsicherheitsgesetz*, a bill that entered into force on June 15, 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 *Luftsicherheitsgesetz* allowed the Minister of Defence to order the downing of the aircraft, if was not possible to meet the danger with other means. However, the Constitutional Court held the *Luftsicherheitsgesetz* 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 no prohibited cargo is found, does the visiting state have the obligation to compensate the ship for any loss or damage sustained? UNCLOS Article 110 allows for ships that are suspected of engaging in the slave trade, piracy or unauthorized broadcasting from the high seas or of being without nationality to be visited. 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

²³ Angela A. Onikepe, "Russian pilots protest bill to allow downing of hijacked planes", in *Jurist Paper Chase*, 3 March 2006, <http://jurist.law.pitt.edu/paperchase/2006/03/russian-pilots-protest-bill-to-allow.php>.

aimed at modifying international law. The absence of any provision on compensation is without prejudice to any claim which may be based on general international law or 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 the internal or territorial waters of the coastal state or, on the high seas, on ships flying the national flag of the visiting state. If it is necessary to visit and stop vessels in different circumstances, the visiting state has to rely on the consent principle or on UNSC resolutions. For the time being, PSI activity does not constitute a new 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 be recalled that paragraph 4 of the Statement of Interdiction Principles states 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 cannot be carried out. It is true that interdiction is often subject to contending interpretations. However, the PSI states have periodic meetings and consultations with legal experts and this should help to 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 existing 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 and the Global Threat Reduction Initiative, as well as a number of nuclear detection programmes aimed at preventing illicit trafficking and unauthorised activities of sensitive materials worldwide.

3.1. *The Global Nuclear Energy Partnership*

The Global Nuclear Energy Partnership (GNEP) was announced by US President G.W. Bush during the State of the Union address in January 2006, as part of a new Advanced Energy Initiative.²⁴ Today, the GNEP has 21 partners, 17 observer countries and 3 permanent international non-governmental observers.²⁵ 25 more countries were 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 criticism from non-proliferation groups and outside experts. The Democrat-controlled US Congress substantially sided with those critics and cut the administration's proposed budget for the programme by more than half last year.²⁶ The GNEP was formulated to address three main issues: 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

²⁴ See *State of the Union Address by the President*, Washington, 31 January 2006, <http://www.america.gov/st/washfile-english/2006/January/20060131183307esnam-fuak0.4696772.html>.

²⁵ 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 non-government observers are: International Atomic Energy Agency (IAEA), Generation VI International Forum (GFIF), Euratom. See GNEP website: http://www.gneppartnership.org/docs/GNEP_MemberChart.ppt.

²⁶ See Ivan Oelrich, *Global Nuclear Energy Partnership (GNEP)*, Federation of American Scientists (FAS), updated 2007, http://www.fas.org/programs/ssp/nukes/nuclear_power_and_fuel_cycle/gnep.html.

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 for the recycling of spent fuel through the reprocessing of nuclear waste and its conversion into fuel for fast reactors.²⁷ However, critics claim that the new reprocessing scheme envisaged in the GNEP is unsafe and anti-economical, that there is no evidence of its proliferation-resistance and that, in fact, it makes it easier for terrorists to acquire bomb material.²⁸

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”.²⁹ 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”.³⁰

The GNEP also envisages the creation of a consortium with other advanced nuclear nations aimed at enabling additional countries to acquire nuclear energy by furnishing them with small nuclear power plants and leased fuel, with the provision that the resulting spent fuel would be returned to supplier countries.³¹ The aim of this fuel services programme is to allow nations to access nuclear energy in return for their commitment to refrain from developing their own enrichment and recycling technologies. The GNEP Statement of Principles does not expressly require countries to renounce their rights to acquire sensitive facilities.³² Nevertheless,

²⁷ See US Department of Energy, *The Global Nuclear Energy Partnership: Greater Energy Security in a Cleaner, Safer World*, 6 February 2006, <http://www.energy.gov/media/GNEP/06-GA50035b.pdf>.

²⁸ See Greenpeace, *The Global Nuclear Energy Partnership*, Fact Sheet, <http://www.greenpeace.org/usa/assets/binaries/lobal-nuclear-energy-partnersh>.

²⁹ See Paul I. Bernstein, *International Partnership to Combat Weapons of Mass Destruction*, Washington, National Defense University Press, May 2008 (Center for the Study of Weapons of Mass Destruction Occasional paper 6), http://www.ndu.edu/inss/Occasional_Papers/OP6.pdf.

³⁰ See US Department of Energy, *Global Nuclear Energy Partnership Strategic Plan*, January 2007, http://www.fas.org/programs/ssp/_docs/GNEPStratPlanJan07.pdf.

³¹ See US Department of Energy, *The Global Nuclear Energy Partnership: Greater Energy Security in a Cleaner, Safer World*, *cit.*

³² See *Global Nuclear Partnership Statement of Principles*, 16 September 2007, http://www.gneppartnership.org/docs/GNEP_SOP.pdf.

memoranda of understanding along these lines have already been signed between the United States and several Arab countries, including the United Arab Emirates and Saudi Arabia.³³

There is a possibility that the GNEP will produce the opposite result, actually stimulating some states to acquire independent enrichment capabilities.³⁴ According to detractors of this initiative, the spread of spent fuel reprocessing technology would “relax any remaining constraints and lead to a global reprocessing free-for-all”, thus exacerbating proliferation risks.³⁵ Moreover, they refer to the 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 them”³⁶, claiming that “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”.³⁷ With the increasing scepticism of the US Congress, the presidential election campaign raised some of the issues that have dominated the discussion on the GNEP. While Democratic candidate Barack Obama expressed himself in favour of 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.³⁸ The fate of the GNEP may then be settled during the next US presidential mandate.

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 radiolog-

³³ See Miles Pomper, “GNEP Membership May Double, but Domestic Future in Doubt”, in *GNEP Watch: Developments in the Global Nuclear Energy Partnership*, No. 9 (August 2008), http://www.igloo.org/cigi/download-nocache/Research/nuclear/publicat/gnep_confe%7E5.

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

³⁵ See Edwin S. Lyman, *The Global Nuclear Energy Partnership: will it advance non-proliferation or undermine it?*, 7 September 2006, <http://www.npec-web.org/Essays/20060700-Lyman-GNEP.pdf>.

³⁶ See Paul I. Bernstein, *International Partnership to Combat Weapons of Mass Destruction*, cit.

³⁷ See Edwin S. Lyman, *The Global Nuclear Energy Partnership: will it advance non-proliferation or undermine it?*, cit.

³⁸ See Miles Pomper, *GNEP Membership May Double, but Domestic Future in Doubt*, cit.

ical materials terrorist attacks. 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.

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 weapon-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.³⁹

Most of the initiatives under the GTRI already existed before it was set up: the initiative serves mainly to consolidate and accelerate 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 itself has enthusiastically supported the initiative since it was launched in 2004. In order to promote international cooperation around the GTRI, an International Partners' Conference was held in Vienna in 2004: 590 representatives from 100 IAEA member states attended it, together with 10 non-governmental and international organisations.⁴⁰

The GTRI's 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 2000-2004 period. The other central part of the GTRI's mission, the securitisation of nuclear fuel, also accelerated, but the initial goal of repa-

³⁹ See US Department of Energy, *Global Threat Reduction Initiative Highlights*, 26 May 2004, <http://www.energy.gov/media/ViennaGTRFactSheetFINAL1052604.pdf>.

⁴⁰ See IAEA, *Global Threat Reduction Initiative International Partners' Conference*, Summary of the Proceedings and Finding of the Conference, 18-19 September 2004, Vienna, <http://www-pub.iaea.org/MTCD/Meetings/PDFplus/2004/cn139proc.pdf>.

⁴¹ See Eric Hundman, *The Global Threat Reduction Initiative's First Two Years*, 6 September 2006, <http://www.cdi.org/program/document.cfm?DocumentID=3650>.

triating all fresh fuel of Russian origin by the end of 2005 was not met.⁴¹ Nevertheless, the GTRI has received large amounts of funding over the last years: \$193 million were 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 US from the rest of the world and \$54 million for the protection of this material in the US and the former Soviet Union.⁴²

Aside from its actual results, some have criticised the initiative's disproportionate emphasis on Russian-made fuel, while around two-thirds of the US-made fuel left abroad have not been targeted for removal. In response to these critics, the DOE claims that the US fuel not recovered under the programme is located in low-risk countries like France and Germany.⁴³

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

3.3. *Initiatives in the Field of Nuclear Detection*

The United States is 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 (plutonium and HEU).⁴⁴ 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 has designed and implemented a series of programs to

⁴² See Daniel Arnaudo, "Bush Requests Less for Threat Reduction Program", in *Arms Control Today*, Vol. 38, No. 2 (March 2008), pp. 32-33, http://www.armscontrol.org/act/2008_03/ThreatReduction.

⁴³ *Ibidem*.

⁴⁴ See David C. Maurer, *Nuclear Detection. Preliminary Observations on the Domestic Nuclear Detection Office's Efforts to Develop a Global Nuclear Detection Architecture*, Washington, US Government Accountability Office, 16 July 2008, <http://www.gao.gov/new.items/d08999t.pdf>.

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 to enhance and coordinate these efforts within a global nuclear detection architecture in order to implement more effective actions in this field.⁴⁵

However, two kinds 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.⁴⁶ 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 in detecting HEU.⁴⁷

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 crossings 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) is focused on putting radiation detection in place at border crossings – airports, seaports, railway and land crossings. 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 that are to receive detection equipment. At the end of

⁴⁵ See US Department of Homeland Security, *Domestic Nuclear Detection Office website*, http://www.dhs.gov/xabout/structure/editorial_0766.shtm.

⁴⁶ See David C. Maurer, *Nuclear Detection*, cit.

⁴⁷ See Paul I. Bernstein, *International Partnership to Combat Weapons of Mass Destruction*, cit.

2007, radiation portal monitors had been installed in Ukraine, Kazakhstan, Georgia, Armenia, Azerbaijan, Slovenia, Slovakia, Greece, and Mongolia;⁴⁸

- the Megaports Initiative equips major international seaports that ship 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.⁴⁹ Planning calls for installing radiation detection equipment in 75 megaports by 2014.

2) The Container Security Initiative (CSI) is managed by the DHS. The CSI was launched in 2002, in response to increasing concerns about the potential threat of nuclear and radiological terrorism in the aftermath of the September 11th, 2001 attacks.⁵⁰ It identifies and pre-screens high-risk shipping 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.⁵¹ CSI participating countries are offered reciprocity: they can send their officers to US ports and the US Customs and Border Protection (CBP) shares information on a bilateral basis with partners.⁵²

⁴⁸ See Micah Zenko and Matthew Bunn, *Interdicting Nuclear Smuggling. Second Line of Defense Program*, 20 November 2007, http://www.nti.org/e_research/cnwm/interdicting/second.asp.

⁴⁹ See US Customs and Border Protection, *Secure Freight with CSI, Megaports*, Fact Sheet, October 2007, http://www.cbp.gov/linkhandler/cgov/newsroom/fact_sheets/trade_security/sfi/csi_megaports.ctt/csi_megaports.pdf.

⁵⁰ See James Goodby, Timothy Coffey, and Cheryl, Loeb, *Deploying Nuclear Detection Systems. A Proposed Strategy for Combating Nuclear Terrorism*, Washington, NDU Center for Technology and National Security Policy, July 2007 (Defense & Technology Papers 41), http://www.ndu.edu/ctnsp/Def_Tech/DTP%2041%20NuclearDetectionStrategy.pdf.

⁵¹ See US Customs and Border Protection, *CSI: Container Security Initiative*, http://www.cbp.gov/xp/cgov/trade/cargo_security/csi/.

⁵² See US Department of Homeland Security, *Container Security Initiative*, Fact Sheet, http://www.dhs.gov/xprevprot/programs/gc_1165872287564.shtm.

3) The Secure Freight Initiative (SFI) 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.⁵³ 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 is then combined with other intelligence and risk-assessment data and shared with participating countries to improve analysis of high-risk containers.⁵⁴ The initial phase of the SFI involved the deployment of nuclear detection devices in six ports in Pakistan, Honduras, UK, Oman, Singapore, Korea, which are also part of the Megaports and CSI programs.⁵⁵

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 provides integrated data to CSI officers, as well as to DOE and DHS through the National Targeting Center in the US.⁵⁶ These initiatives are all meant to concur with the final objective, as it has been defined by the Bill No H.R. 1 “Implementing Recommendations of the 9/11 Commission Act of 2007”, to scan 100% of all cargo containers heading to the US by 2012.⁵⁷ 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 of getting around the detection system or finding alternative routes towards the US.⁵⁸

⁵³ See US Department of Homeland Security, *Secure Freight Initiative*, http://www.dhs.gov/xprevprot/programs/gc_1166037389664.shtm.

⁵⁴ See HIS, *DHS, DOE Launch Secure Freight Initiative*, 15 December 2006, <http://aero-defense.ihs.com/news/2006/dhs-secure-freight.htm>.

⁵⁵ See Micah Zenko, and Matthew, Bunn, *Interdicting Nuclear Smuggling*, *cit.*

⁵⁶ See US Customs and Border Protection, *Secure Freight with CSI, Megaports*, *cit.*

⁵⁷ See US Congress, *Implementing Recommendations of the 9/11 Commission Act of 2007*, 8 March 2007,

http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h1enr.txt.pdf

⁵⁸ See Micah Zenko, and Matthew, Bunn, *Interdicting Nuclear Smuggling*, *cit.*

3.4. *The Way Ahead*

The programs described above have shown some success, but they still need to be coordinated and prioritised better, while international participation should be further encouraged. First of all, the proliferation of initiatives and partnerships to fight the nuclear threat can place strains on the ability of states to contribute to them, thus posing a capability problem. Moreover, while flexibility can be considered a comparative advantage, more formal and centralised coordination and harmonisation of these activities is required to ensure unity of efforts. Finally, expanding participation and increasing integration of other partners, such as regional anchors and the private sector, could enhance the effectiveness and legitimacy of these initiatives.⁵⁹ One solution is developing a global approach to nuclear non-proliferation, in which international institutions take on 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.⁶⁰

Conclusion

In drawing 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, in terms of both 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 in which the initiative does not bear the 'Made in the USA' label – as in the GICNT, which was originally a Russian idea – the United States rapidly took over 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 for a number of states (NAM and China) which contend that its legal implications are unclear, 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

⁵⁹ See Paul I. Bernstein, *International Partnership to Combat Weapons of Mass Destruction*, cit.

⁶⁰ See James Goodby, Timothy Coffey, and Cheryl Loeb, *Deploying Nuclear Detection Systems*, cit.

scope and aspiration, have not brought into being any new international norms, organisations, or bureaucracies. They rely on voluntary cooperation among sovereign states, with a strong emphasis on developing 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 their contours (see, for instance, the overlap between the Megaports and the Secure Freight Initiatives).

These initiatives attest to the Bush Administration's ability to advance its agenda in the field of nuclear proliferation, including its anti-terrorist 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 of the 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 what 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 great tensions in their relations recently). Also, these initiatives have not run into significant opposition from the expert community, a considerable part of which has often been at odds with other Bush Administration choices regarding non-proliferation and counter-terrorism. In a way, they reflect some peculiarities of the broader Bush Administration's foreign policy, 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 fetter its movements by establishing new international norms, and its scepticism about 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 similar endeavours seems to prove that opposition to this is limited, if it is sensibly applied in a way that contributes to the security of all countries, not only the US. Nevertheless, this 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 mainly due to organisational needs).

The Bush Administration has pointed out 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 correct, but, again, a perceived legal ambiguity (even though it might be erroneous) helps nourish prejudices and mistrust. In order to dissipate such ambiguity, these initiatives should be provided with a more solid legal frame of reference, either by clearly spelling out their legal bases (as in the case of the GICNT) or by working out legal instruments which such initiatives can complement (like 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 in measuring their actual results. This derives partially, as already said, from the lack of assessment schemes, but it also depends on the reluctance of states to pass relevant information on 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 GICNT or the PSI.

To conclude, it seems fair to say that the GICNT, the PSI and other initiatives of this kind can be regarded as positive elements of the Bush Administration's otherwise quite controversial legacy 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 relatively 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 relevant international institutions and agreements, or by making such initiatives as the GICNT and the PSI complementary to the strengthening of the international non-proliferation legal system. This is highly desirable, because the two trends – the upholding of 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.

5. FIGHTING OFF FATIGUE: THE UN CORNERSTONE OF ANTITERRORISM ACTION

Jeffrey Laurenti

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 UN arms

¹ Thus did Iranian president Ali Khamenei - now the Islamic republic's supreme leader - denounce the UN Security Council from the podium of the General Assembly in 1987. Paul Lewis, "Iranian, in UN, Rebuffs Reagan on Ceasefire," *The New York Times*, 23 September 1987, <http://query.nytimes.com/gst/fullpage.html?res=9B0DE7DD1530F930A1575AC0A961948260>.

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

Of course, UN bodies are most productive when their activities are carefully tailored to what universal-membership agencies can deliver. The UN'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 UN 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 confi-

dence 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 UN’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 UN 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 UN 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.

1. 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 US 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 US 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

² Ron Suskind, *The Way of the World*, New York, Harper Collins, 2008, p. 92.

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

UN 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...;

³ Graham Allison, *Nuclear Terrorism. The Ultimate Preventable Catastrophe*, New York, Times Book/Henry Holt, 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 High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, UN Doc. A/59/565, 2 December 2004, p. 45, para. 146, <http://www.un.org/secureworld/report.pdf>.

⁶ *Ibid.*, p. 45, para. 147.

- (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, 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 UN 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 UN-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

⁷ *Ibid.*, pp. 48-49, para. 148.

⁸ Edward C. 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.

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 Leonard Weinberg (ed.), *Democratic Responses to Terrorism*, 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 UN 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.

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

2. Frameworks for Suppressing Terrorist Networks

At the opening of UN general debate following Al Qaeda's coordinated attacks on US 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" gener-

¹⁰ The five pillars in the high-level panel's report were massaged and reconfigured as they made their way through the UN 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 (*The United Nations Global Counter-Terrorism Strategy*, A/RES/60/288, 20 September 2006, <http://daccessdds.un.org/doc/UNDOC/GEN/N05/504/88/PDF/N0550488.pdf>).

¹¹ Joshua Black and Martin Skladany, "The Capabilities and Limits of the United Nations in Fighting Terrorism," in *Combating Terrorism: Does the UN Matter... and How*, New York, United Nations Association of the United States of America, 2002, p. 7.

ally - 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 UN 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 UN 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

¹² S/RES/1368(2001), 12 September 2001, <http://daccessdds.un.org/doc/UNDOC/GEN/N01/533/82/PDF/N0153382.pdf> . 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.’” Jeffrey Laurenti, “A Transformed Landscape: Terrorism and the UN after the Fall of the World Trade Center”, in *Combating Terrorism, cit.*, p. 22.

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 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 UN 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 UN staff and personnel they

¹³ Stefan Talmon, “The Security Council as World Legislature”, *American Journal of International Law*, Vol. 99, No. 1 (January 2005), p. 187.

¹⁴ *Ibid.*, p. 177.

¹⁵ S/RES/1373(2001), 28 September 2001, Para. 6,

<http://daccessdds.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf>.

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, p. 5, <http://www.unhcr.org/refworld/pdfid/46d6b9850.pdf>. 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.

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 - 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

¹⁷ S/RES/1535(2004), 26 March 2004, para. 2,
<http://daccessdds.un.org/doc/UNDOC/GEN/N04/286/41/PDF/N0428641.pdf>.

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 delisting process in 2006.¹⁸ To date, the 1267 sanctions committee has delisted 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.

¹⁸ S/RES/1730(2006), 19 December 2006,

<http://daccessdds.un.org/doc/UNDOC/GEN/N06/671/31/PDF/N0667131.pdf>. Yusuf had already been de-listed on 24 August 2006.

3. 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.

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 US government scarcely needs to rely on CTED to steer deserving applicants its way, the UN 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 UN 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 UN fashion, the terrorism branch provides services to member states that want them and that

¹⁹ See CTC website at <http://www.un.org/sc/ctc/capacity.html>.

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 UN'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 UN mantle on an issue that is often characterized - in the American debate above all - as primarily of vital interest to US national security.

4. 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

²⁰ *Strengthening international cooperation and technical assistance in preventing and combating terrorism: Report of the Secretary-General*, A/60/164, 25 July 2005, pp. 7 and 12-13, <http://daccessdds.un.org/doc/UNDOC/GEN/V05/868/42/PDF/V0586842.pdf>.

²¹ *Ibid.*, 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, 27 September 2005, p. 42, <http://daccessdds.un.org/doc/UNDOC/GEN/V05/885/68/PDF/V0588568.pdf>.

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 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:

²³ Graham Allison, *Nuclear Terrorism*, *cit.*, p. 20.

²⁴ *Ibid.*, p. 199.

- 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 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 UN’s member states had still not filed a single

²⁵ S/RES/1540(2004) 28 April 2004, para. 3, <http://daccessdds.un.org/doc/UNDOC/GEN/N04/328/43/PDF/N0432843.pdf>.

²⁶ Stefan Talmon, “The Security Council as World Legislature”, *cit.*, p. 188.

²⁷ *Ibid.*, p. 178.

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 UN 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.

²⁸ *2008 Report of the Committee established pursuant to Resolution 1540, S/2008/493*, 30 July 2008, Annex IV,

<http://daccessdds.un.org/doc/UNDOC/GEN/N08/409/78/PDF/N0840978.pdf>. 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.

In addition to credibility, the agency also has financial resources - indeed, it has *among the largest assessed budgets of the UN'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 US 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

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

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

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 D. Ferguson of the Council on Foreign Relations urges its doubling (*Preventing Catastrophic Nuclear Terrorism*, New York, Council on Foreign Relations, March 2006 (Council Special Report 11), p. 26, <http://www.cfr.org/content/publications/attachments/NucTerrCSR.pdf>).

hands. Agency and UN 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.

5. 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 US 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 of Washington’s regnant conservatives toward the United Nations and multilateral commitments 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

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

destruction in recent years has seemed erratic if not schizophrenic, at least in multilateral settings.

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. It was such urgency 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 UN 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 US 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 UN system is in capacity-building assistance. A UN-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 UN 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 be immensely

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

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 UN 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.

CONFERENCE REPORT

Mirko Sossai

1. Introduction

The conference on “Coordinating Global and Regional Efforts to Combat WMD Terrorism” was organised jointly by the Istituto Affari Internazionali and the Italian Ministry of Foreign Affairs. It took place in Rome on 24 October 2008. This report is a brief account of the proceedings of the meeting: it is not an official record and does not reflect the official views of any of the participants.

The workshop was divided into three sessions, which addressed the following topics: assessing the threat of WMD terrorism; coordinating global and regional efforts to combat WMD terrorism; addressing the threat of nuclear terrorism: the Global Initiative to Combat Nuclear Terrorism (GICNT) and other initiatives.

In his welcoming address, Counsellor Emanuele Farruggia, of the Italian Foreign Ministry, recalled the purpose of the conference: to explore how better to coordinate global and regional efforts to combat the threat represented by the use of weapons of mass destruction by terrorist groups. He pointed out that only concerted activities by the international community can defeat this scourge, emphasising the need for multilateral prevention. He underlined Italy’s strong commitment to the universal and effective implementation of both the counterterrorism treaties and Security Council resolution 1540 (2004) and the Government’s support for the Proliferation Security Initiative. Finally, after having stressed the role played

by the G8 in anti-WMD proliferation, Counsellor Farruggia stated that the Italian G8 Presidency in 2009 will support the existing initiatives and try to find new ways to cooperate with the other partners.

2. Assessing the Threat

2.1 *Small Groups Can Inflict Catastrophic Damages*

The European Security Strategy, adopted in December 2003, emphasizes that in the event of terrorist use of weapons of mass destruction, “a small group would be able to inflict damage on a scale previously possible only for States and armies”.

In the opinion of one author, three elements need to be considered in assessing the threat of a terrorist attack with WMD: the availability of relevant materials; the necessary know-how to use them; and the existence of motivated actors.

As for the latter point, all speakers agreed that Al-Qaeda still represented the major threat. In that respect, it was held that the complex structure of this terrorist network should not be underestimated. At least three different levels can be indentified: first, that of Osama Bin Laden, Al-Zahawiri and the leaders; second, the level of regional affiliated groups; third, the level of less coordinated individuals living in Western societies.

It was noted that there is a debate on the likelihood that Al-Qaeda’s threat of using WMD will change from intentions to action. Some experts believe that it is a question of when not if. Osama Bin Laden has already affirmed that acquiring nuclear weapon is a “religious duty”. It was noted that Al-Qaeda’s interest in acquiring or developing WMD has increased exponentially, since this is the only way to alter the balance of power in its favour. The matter of the financing of terrorism was also raised at the conference: the United Nations estimates that the total amount of illegal funds is between 500 and 1000 billion dollars, a significant part of which is devoted to terrorist activities. Other experts observed that the threat has diminished since September 2001. Al-Qaeda’s capabilities are far below its desires. Therefore, the terrorist use of conventional weapons now constitutes a greater threat than WMD terrorism.

Even if the risk is low, the potential catastrophic consequences of the use of WMD by terrorist groups nevertheless must be addressed with considerable attention and adequate resources.

To understand the whole scenario better, one of the speakers stressed the connections between terrorist networks and other actors, including sponsoring States, organised crime and the so called 'private proliferation' networks. A well known example of the latter threat is the nuclear black market created by Pakistani scientist A.Q. Khan.

Finally, the issue of the terrorist groups' motivation to use WMD was widely discussed. Attention was devoted to the literature analysing the spread and impact of apocalypse cults worldwide. In that regard, the various initiatives at regional and universal level aimed at understanding and addressing the root causes of terrorism were deemed a positive development.

2.2 The Different Impact of the Three WMD Categories

WMD is a catchall notion that includes nuclear, radiological, chemical and biological weapons and materials. It is important to differentiate the level of the threat, according to the variables of destructive power, probability and political effect.

The use of chemical weapons was considered the least threatening scenario. On the one hand, the 'possession prestige' is limited at present in comparison with other WMD, as confirmed by the attitude of States, especially since the entry into force of the Chemical Weapons Convention. In addition, significant technical difficulties associated with obtaining the necessary materials were reported. Nevertheless, the risk remains concrete.

The threat that non-state actors might use them became a reality when Tamil Tigers used chlorine in 1990 and, later in 1994 and 1995, when the Japanese Aum Shinrikyo sect used sarin in attacks in Japan. It was reported that Al-Qaeda had planned to use chemicals in the United Kingdom, Jordan and the United States.

Furthermore, recent advances in chemistry and the convergence of chemistry and biology would create new risks in this regard given the dual-use potential of many chemical compounds. These developments complicate the verification efforts of the Organisation for the Prohibition of Chemical Weapons (OPCW). Finally, the worst scenario in this context was recognised as being the threat of terrorist attacks against chemical industries. The WMD Commission, chaired by Hans Blix, recommended in its 2006 final report entitled 'Weapons of Terror: Freeing the World of Nuclear, Biological, and Chemical Arms', that all States should ensure security in and for chemical facilities through legislation and agreements with industry.

As for biological weapons, it was recalled that former UN Secretary-

General Kofi Annan warned that the most important under-addressed threat was terrorists using a biological weapon. Various experts indeed expressed their concern over the likelihood of bio-terrorist attacks. Several reasons were identified: relevant materials would be much easier to acquire than nuclear weapons; the effects on the population of an attack would be difficult to counter; progress in life sciences would favour the availability, even to individuals, of the technological know-how; and finally, there would be technical difficulties in detecting production facilities.

However, several conference participants agreed that the most problematic aspect was the lack of an effective cooperation mechanism among States. The institutional framework to counter the proliferation of biological weapons is the least developed. Unlike both the Chemical Weapons Convention (CWC) and the Nuclear Non-proliferation Treaty (NPT), the 1972 Biological and Toxic Weapons Convention (BTWC) did not envisage a verification system to monitor the treaty's implementation and to provide the necessary assistance in building States' capacities.

The proposal made by former UN Secretary-General Kofi Annan in the 2006 report "Uniting against Terrorism" has received little consideration so far. He suggested that the United Nations should coordinate and facilitate a forum that would "bring together the various stakeholders - Governments, industry, science, public health, security, the public writ large - into a common programme, built from the bottom up, to ensure that biotechnology's advances are used for the public good and that the benefits are shared equitably around the world."

2.3 *"How Real is this Nuclear Terrorism Thing?"*

This was the question posed by President George Bush to his intelligence briefer in 2006. In the view of one analyst, nuclear terrorism appears to be inevitable in the present scenario: the prevention of such an attack should be a priority for the next US President. Two factors explain why the threat is so real for the United States: "poorly guarded" nuclear facilities in the former Soviet Union and "America's porous border controls".

It was observed that it would be hard for even the most sophisticated terrorist group to produce a nuclear weapon. Three elements are essential in designing and manufacturing such a device: the availability of fissile material; technical knowledge and adequate infrastructure. That is why it can be argued that it is more plausible for terrorists to steal nuclear material and radioactive sources from vulnerable locations or to acquire them through

the black market. The International Atomic Energy Agency (IAEA) Illicit Trafficking Database recorded, in the period between 1995 and 2007, 1340 confirmed trafficking incidents.

Given the difficulties in making or obtaining nuclear explosive devices, it was noted that Al-Qaeda might try to use radiological weapons, or dirty bombs. Terrorist groups might also seek to disperse radioactivity by attacks on nuclear facilities. The most effective response is limiting the access to such material and devices by non-state actors: therefore physical security measures are crucial.

The fact that terrorists have not yet used nuclear weapons is due to a “lack of means rather than lack of motivation.” But this conclusion was questioned by one of the participants, who pointed out the importance of another variable: given the complexity of its preparation and organisation, the materialising of a nuclear attack also depends on the efficacy of the decision-making process within a terrorist network.

3. Global Responses to WMD Terrorism

Threat assessment revealed that each type of weapon and material poses a distinct set of challenges for States and the international community. However, all participants in the conference shared the view that cooperation at various levels was essential to address the threat adequately. A wide range of multilateral tools have been developed prior to and after 9/11.

3.1 System of Multilateral Treaties

The traditional framework of inter-State cooperation to counter the global threat of WMD terrorism is based on a system of multilateral treaties. Before September 2001, the treaty regime consisted of two distinct networks of interlocking treaties: the former aimed at fostering the prevention and repression of terrorist acts; the latter aimed at stopping the horizontal (inter-State) spread of nuclear, chemical and biological weapons.

The legal framework in the field of counter-terrorism is composed of 13 sectorial conventions that identify and criminalize specific terrorist activities. The conventions were developed under the auspices of the United Nations and its specialized agencies: their core provision obliges States to either extradite or prosecute persons suspected of the covered offences. Notably, some of those instruments address the threat of WMD terrorism:

the 1980 Convention on the Physical Protection of Nuclear Material and the recently adopted 2005 International Convention for the Suppression of Acts of Nuclear Terrorism.

In that context, one of the participants referred to the persistent difficulties in working out a comprehensive convention on international terrorism. Disappointment was expressed regarding the lack of progress during the past few sessions of the UN *ad hoc* Committee, due to divergent views essentially on the exceptions to the Convention's scope of application.

The NPT, the CWC, and the BTWC are the three key treaties which constitute the pillars of the WMD non-proliferation and disarmament regime. Though these instruments were not designed to address the threat of chemical terrorism directly, it was argued that correct national implementation of their provisions contributes to ensuring that WMD are not misused in any manner, including for terrorism.

In that respect, it was pointed out that the CWC represented a good case-study. Although the Convention does not contain the word "terrorism", since 2001 the OPCW has worked with other organisations to build States' capacities against terrorism. In particular, the implementation of Article X CWC – according to which Member States have the right to request and to receive assistance and protection against the use or threat of use of chemical weapons if they consider that CW have been used against them – offers an important contribution to global anti-terrorist efforts.

In addition, one of the speakers at the conference focused on the initiatives taken by the IAEA to reinforce the NPT regime as a tool to counter nuclear terrorism. Stress was preliminarily put on the interconnections between the goal of fighting terrorism and the question of an effective nuclear non-proliferation regime.

In that respect, he first mentioned the initiatives by IAEA Director General ElBaradei for multinational control of fuel enrichment and reprocessing. A Special Event on Assurances of Supply and Assurances of Non-Proliferation took place in September 2006 during the 50th regular session of the IAEA General Conference. In recent years, options have been discussed to create a new mechanism that would assure supply of nuclear fuel and reactors to countries which want them, while strengthening non-proliferation through better controls over the sensitive parts of the nuclear fuel cycle.

It was acknowledged that a second crucial element of the nuclear non-proliferation regime is the safeguards agreements that non-nuclear-weapons States parties are obliged to conclude with the IAEA under Article III of the NPT. In particular, the Additional Protocol to such agreements, based

on the model approved by the IAEA Board of Governors in 1997, represents an instrument of vital importance: but the number of States in which the Additional Protocol is in force is low – far from satisfactory. This raised the question whether conclusion of the protocol is legally required under the NPT. Some States Parties argued that the conclusion of the instrument is mandatory under Article III, but several counter-arguments could be made against that proposition.

Finally, it was noted that the shortcomings of the existing disarmament and non-proliferation treaties were well-known, even before 2001. However, with the rise to the top of the world agenda of the threat of WMD terrorism, it became clear that the existing regime was not designed to address the risk of non-state actors acquiring and using non-conventional weapons. In the post 9/11 era, the Bush Administration sought to fill the gap left by the agreements in force, launching several initiatives. One of which was the adoption of a Security Council resolution under Chapter VII of the UN Charter.

3.2 UN Action Against Aerrorism: The Role of UN Political Organs

All participants at the conference agreed on the indispensable role of the United Nations in the fight against WMD terrorism. It was stressed that UN action against international terrorism dated back to the seventies. Both the political organs of the United Nations – the General Assembly and the Security Council – have adopted a series of resolutions on the fight against terrorism.

During the Cold War period and the nineties, the General Assembly played a leading role. It adopted a series of crucial resolutions on the topic, also promoting the adoption of multilateral conventions on specific terrorist acts. In 2006, the General Assembly eventually adopted a comprehensive counter-terrorism strategy, on the basis of the proposals included in “A More Secure World: Our Shared Responsibility”, a report prepared in 2004 by the Secretary-General’s High-Level Panel on Threats, Challenges, and Change. The Panel’s five-pronged-approach was then refined and reconfigured by the Secretary General’s “Uniting against Terrorism” follow-up report. In particular, the last three dimensions of the comprehensive strategy adopted by the General Assembly were taken to constitute the global framework of international efforts to control terrorism and prevent terrorist access to weapons of mass destruction. The three pillars are: developing legal and operational frameworks for countries’ cooperation in suppressing

terrorist networks; building states' capacity to suppress them; and controlling WMD materials.

After 9/11, with the urgency of responding to the threat posed by global terrorist networks, a useful tool was found in the Security Council's powers under Chapter VII of the UN Charter. It was noted that the post-Cold War system of international relations allowed the Security Council to substitute for the General Assembly as the key actor in UN counter-terrorism action. With the adoption of resolution 1373 (2001), the Security Council, for the first time in its history, qualified an abstract phenomenon – “terrorist attacks” generally – as “a threat to international peace and security”. It provided a series of general and abstract mandatory rules on the fight against terrorism that seemed to be intended to remain in force without any limitation in space and time. One of the speakers emphasized that the adoption of the resolution was only possible in the setting of the existing legal regime provided by general international law and the universal counter-terrorism instruments. In particular, the resolution contained key provisions from the two international conventions that the General Assembly had adopted in late nineties: the 1997 International Convention for the Suppression of Terrorist Bombings and the 1999 International Convention for the Suppression of the Financing of Terrorism.

It was clear that the traditional law-making process could not establish universal detailed obligations in a short time. As a matter of fact, the adoption and entry into force of international conventions have drawbacks that rule out a quick response: the limited number of State parties, the lengthy internal procedures of ratification and the recourse to reservations.

Resolution 1373 (2001) established a monitoring body, the Counter-Terrorism Committee (CTC), with the mandate to receive and examine reports from member States. In fact, 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”. The response was indubitably successful: all 192 member states made at least one report to the CTC. In 2004, the Security Council created a permanent secretariat under the CTC, the Counter-Terrorism Committee Executive Directorate (CTED). Its task is to strengthen capacity in incapable states. However, the CTED is not an assistance provider, rather it seeks to facilitate bilateral assistance efforts, as an intermediary for contacts between potential donors and weak but well-intentioned States. The CTC has never referred non-compliant States to the attention of the Security Council: therefore, sanctions have never been approved against them.

Nevertheless, sanctions still play an important role in the counter-terrorism strategy of the UN Security Council. Since 9/11, the Security Council began to approve 'targeted sanctions' against individuals and terrorist groups in order to improve the effectiveness of the sanctioning mechanism and to reduce the humanitarian impact on civilians. The series of resolutions related to the Taliban and Al-Qaeda represented a clear evolution of the sanctions regime: while the sanctioning measures were at first directed to the international unrecognised government in Afghanistan and the terrorists there, the adoption of resolution 1390 subsequently changed the target as they directly affected persons and entities with no connections to a specific territory or State. Most important was the request for a Sanctions Committee to maintain an updated list, based on information provided by the States and regional organizations, of individuals and entities designated as associated with Osama bin Laden, including those in the Al-Qaeda.

3.3 Security Council Resolution 1540 (2004)

As early as resolution 1373, the Security Council called upon all States "to find ways of intensifying and accelerating the exchange of operational information, especially regarding actions or movements of terrorist persons or networks; forged or falsified travel documents; traffic in arms, explosives or sensitive materials; use of communications technologies by terrorist groups; and the threat posed by the possession of weapons of mass destruction by terrorist groups". However, after a long negotiation process in formal and informal settings, the Security Council decided to adopt a specific resolution in April 2004 aimed at combating WMD terrorism.

Resolution 1540 affirmed that proliferation of WMD constituted a threat to international peace and security and required all UN member states to undertake a series of measures to prevent the proliferation and transfer to terrorist and other non-state actors of biological, chemical, and nuclear weapons; their delivery systems; and related materials. On the nuclear non-proliferation front, several participants mentioned the continuous relevance of the more classical Security Council resolutions against specific countries, such as North Korea and Iran. The point was made that the case of this latter country showed that an NPT party can prepare for the development of nuclear weapons without violating international law. The Security Council approved a series of resolutions [1696 (2006); 1737 (2006); 1747 (2007) and 1803 (2008)] on Iran's suspension of all enrichment-related and reprocessing activities, as well as work on all heavy water-

related projects, as well as on the adoption of economic sanction measures. By approving resolution 1540, the Security Council intended to fill the gaps in the non-proliferation treaty and export control regimes. One of the presentations at the conference identified some of them as follows: the focus of the existing regimes on horizontal proliferation, in other words on States rather than on non-state actors; the lack of universal participation in the existing regimes; the lack of an organization tasked with addressing the proliferation of biological weapons and agents; and the difficulties under the current regimes in taking enforcement measures against non-compliant countries.

Much criticism was levelled against the controversial nature of the resolution and in particular the alleged law-making power of the Security Council. Some experts argued that the measures adopted by resolution did not fall within the scope of the competencies conferred on the Council by the United Nations Charter. Non-Council members, in particular those from the Non-Aligned Movement, expressed their concern about the risk that the Security Council, acting as world legislator, would circumvent the traditional principle of State consent. Many States continue to consider the resolution as part of a Western-imposed agenda.

One of the main challenges is the relationship with the pre-existing non-proliferation legal regime based on the three key treaties. The resolution states that “none of the obligations set forth in this resolution shall be interpreted so as to conflict with or alter the rights and obligations of State Parties to the Nuclear Non-Proliferation Treaty, the Chemical Weapons Convention and the Biological and Toxin Weapons Convention or alter the responsibilities of the International Atomic Energy Agency or the Organization for the Prohibition of Chemical Weapons”.

The resolution established a Committee to monitor the implementation for a period of no longer than two years. Its mandate was then renewed by resolutions 1673 (2006) and 1810 (2008). Interestingly, the latter resolution extended the mandate for a period of three years – the result of a compromise between the proposals submitted by the US (5 years) and China (2 years).

Like the Counterterrorism Committee, the 1540 Committee was mandated to receive and evaluate States’ reports on the implementation of the resolution. The total number of States that have submitted at least one report since 2004 is 158. That means that 40 countries, mainly from the African continent, have not yet submitted a report. The Committee has developed a matrix to evaluate the status of national implementation: a standard examination sheet made up of over 300 questions. It was noted that the rate of implementation ranged from about 50 percent to over 80 percent in

individual cases. The Committee also convened outreach conferences at the regional level; promoted dialogue with individual States and cooperation with relevant organisations; facilitated the identification of States donors and recipients of assistance.

It was argued that the contribution of the 1540 Committee and its group of experts to implementing the resolution has been rather modest. The question posed by one of the participants was about the goal States wanted to achieve with the adoption of resolution 1540. It was observed that too much emphasis was put on the reporting obligation, rather than on building States' capacity: this has been confirmed by the poor quality of some national reports.

Another expert pointed to the slow-moving pace at which the Committee operates. Because of the consensus approach within the Committee, it took the Committee a long time to negotiate its rules of procedure and decide on its programme of work, the working methods of its experts and the content of its report to the Security Council.

A problem of human resources was also recognised. It was noted that the Committee authorised the hiring of only eight experts to support its work: in this way, several member States tried to limit the resolution's impact. For full implementation of resolution 1540, it was deemed crucial that the Committee enlarge its group of experts and improve the delivery of capacity-building assistance. The point was made that what was lacking was sustained engagement by the Committee's group of experts with national officials of member States. To enhance its credibility, the Committee should eventually allow its experts to provide independent analysis of the threat posed by WMD terrorism.

Finally, it was observed that effective coordination and cooperation with intergovernmental organisations and NGOs should be promoted: several conference participants stressed that the Security Council's open debate on cooperation between the 1540 Committee and international organizations held on 23 February 2007 was an important development.

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

The G8 leaders launched the Global Partnership Against the Spread of Weapons and Materials of Mass Destruction at the 2002 summit in Kananaskis, Canada.

Under this initiative, the G8 countries intended to support projects for more

effective control over chemical, biological, radiological and nuclear weapons and materials, initially in Russia, and in particular to prevent terrorists from acquiring them. The G8 leaders defined the following as “priority concerns”: the destruction of chemical weapons; the dismantlement of decommissioned nuclear submarines; the disposal of fissile materials; alternative employment for former weapons scientists. They also agreed on six principles to prevent terrorists or those that harbour them from acquiring or developing WMD: promote multilateral treaties that help prevent the spread of weapons, materials, and know-how; account for and secure those items; promote physical protection of facilities; help detect, deter, and interdict illicit trafficking; promote national export and transshipment controls; and manage and dispose of nuclear, biological and chemical weapons materials.

The United States agreed to commit 10 billion dollars, with a further 10 billion to be raised among other donors (including Russia) for disarmament projects over a ten-year period. Since 2002, the Global Partnership has been expanded to the European Union and 13 other donor States (Finland, Norway, Poland, Sweden, Switzerland, the Netherlands, Australia, Belgium, the Czech Republic, Denmark, Ireland, New Zealand and the Republic of Korea).

At the conference, one of the speakers drew attention to the achievements and shortcomings of the Global Partnership: first of all, it has definitely been successful in involving other non-G8 donors, thus enhancing its reputation; its working group (GPWG), responsible for expert-level implementation of the initiative, has provided coherence and continuity during the rotating G8 presidency. A further quality is its transparency. The GPWG produces a comprehensive report each year, which helps increase public awareness of its work.

Among the shortcomings, it was observed that much of the money pledged had yet to be used to implement projects; in addition, the Global Partnership continues to suffer poor coordination among the countries involved. But the most serious problem was deemed to be that the initiative has not been very active in those priority areas which are specifically aimed at reducing the WMD terrorism threat. It was nevertheless held that the G8 Hokkaido Summit Leaders Declaration was a positive step with regard to control of nuclear materials.

On a more general level, various participants put forward the issue of the future of G8 summits. As is well known, various proposals have been submitted to enlarge its membership to include the fast growing economies, such as China and India, both of which are expected to become major world players in the years ahead.

3.5 'Coalition of Willing' responses: PSI and Other Initiatives

After 9/11, the Bush administration's strategy against WMD proliferation was characterised by constant activism in proposing and leading new forms of *à la carte* multilateralism to address the gaps in the non-proliferation regime. The US approach prioritised political cooperation in the context of informal initiatives, which do not imply the elaboration of new, binding legal obligations. Those efforts could be seen as the implementation of the 'coalition of the willing' concept first formulated in the 2002 US National Security Strategy.

Among the initiatives and partnerships to fight WMD terrorism, one has to mention the Proliferation Security Initiative; Global Initiative to Combat Nuclear Terrorism; the Global Nuclear Energy Partnership; the Global Threat Reduction Initiative and a number of detection programmes aimed at preventing illicit trafficking and unauthorised activities with sensitive materials worldwide, which includes the Second Line of Defense, the Container Security Initiative and the Secure Freight Initiative.

The initiatives are usually open to all countries willing to combat WMD terrorism and the number of participating states has been increasing steadily since their inception. A common feature is that participating states organise frequent exercises and this increases their deterrent capacity and the readiness to intervene in case of terrorist catastrophe.

Several participants agreed that all these initiatives proved the Bush Administration's ability to advance its global agenda in the field of non-proliferation by non-state actors. It was argued that they might be regarded as positive elements of the Administration's otherwise controversial legacy. They were however criticised for their legal ambiguity which could fuel prejudices and mistrust. Another problem was seen to be the difficulty in measuring their results and success, due to a lack of transparency. Finally, their informal coordinating structures were deemed insufficient to control the cooperative endeavours of the participating States.

(a) The Proliferation Security Initiative

The Proliferation Security Initiative (PSI) is the most innovative, but also the most controversial of these initiatives, from the point of view of its unclear legal implications. Launched in Krakow on 31 May 2003 by US President Bush, it is aimed at countering the illegal trafficking of WMD and WMD materials and technologies. Currently some 90 States are members of or support the PSI, including all permanent members of the Security

Council, with the exception of China. The PSI is not an intergovernmental organization: it lacks a charter, a bureaucratic structure (for instance, there is no permanent secretariat), and established funding. There is no reporting mechanism: recent activities and achievements are simply announced by the US or other participating governments.

The gap that the PSI seeks to address is highlighted by the *So San* incident, which occurred in December 2002. Two Spanish warships, acting on the request of the United States, stopped *So San*, a North Korean cargo ship, en route to Yemen, in the Arabian Sea: the cargo included fifteen scud missiles armed with conventional warheads. The ship was stopped on the high seas but no treaty forbids the transfer of missiles. The Yemen protested and the ship was then released.

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 4 September 2003 and adopted the “Statement of Interdiction Principles”. The document should be regarded as soft law: in other words, it is not legally binding but is a political commitment by which the participating States should abide. Though the PSI Statement explicitly affirms its consistency with international law, a number of countries expressed their concern that its implementation would violate international obligations relating to the freedom of the seas and of the international air space.

One of the presentations at the conference focused on the legal implications of the PSI. Participants are to “undertake effective measures for interdicting the transfer or transport of WMD, their delivery systems, and related materials to and from State and non-state actors of proliferation concern”. The key concept is ‘interdiction’. 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.

As for maritime interdiction, the main question relates to the measures that States are allowed to take in high seas. The rules to be applied are those embodied in the United Nations Convention on the Law of the Sea (UNCLOS): WMD terrorism does not constitute an exception to the general rule included in Article 110 UNCLOS, which provides that a warship which encounters a foreign ship on the high seas is not justified in boarding it. Therefore, consent remains the mechanism on which to ground a counter-proliferation policy on the high seas. The PSI principles refer to this customary rule, asking states “to seriously consider providing consent under the appropriate circumstances to the boarding and searching of its own flag

vessels by other states...". It was noted that consent might be given on an *ad hoc* basis or that it could be the result of a formal agreement between two or more states. The first multilateral agreement of this kind is the London Protocol of 14 October 2005, additional to the 1988 SUA (Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation): it establishes a mechanism based on the flag State's consent, to allow the boarding of a vessel on the high seas suspected of transporting WMD or radioactive or fissile material. In addition, the United States has concluded several bilateral treaties with States that have huge merchant marines: Liberia, Panama, the Marshall Islands, Cyprus, Croatia and Belize. 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.

As for air interdiction, the point was made that the treatment of foreign aircraft over-flying a PSI State is more difficult to regulate. The main question addressed at the conference was what would happen if an aircraft entered the air space of the territorial state without its consent and the local state intended to inspect the aircraft, in particular when the aircraft did not abide by the order to land. It was argued that interception should be implemented in accordance with Article 3-bis of the 1944 Chicago Convention on International Civil Aviation, which however applies only to civil aircraft and does not encompass the case of foreign military aircraft intruding another state's national space. That provision clearly forbids the use of weapons against an aircraft in flight. However, in recent years new legislation has been enacted both in Russia and in Germany. In particular, paragraph 14 of the German *Luftsicherheitsgesetz* allowed the Minister of Defence to order the downing of the aircraft, if it was not possible to meet the danger with other means; but then the Constitutional Court demanded its abrogation.

Finally, it was suggested that the PSI should adopt guidelines on compensation for the damage sustained by a vessel once a suspicion has been revealed unfounded. In any case, the absence of any provision on compensation in the "PSI Statement of Principles" does not do prejudice to any claim which may be based on general international law or on relevant conventions.

(b) The Global Initiative to Combat Nuclear Terrorism

The Global Initiative to Combat Nuclear Terrorism (GICNT) was announced by US President George W. Bush and Russian President Vladimir Putin on the eve of the G8 summit of St. Petersburg, held in July

2006. The initiative is aimed at establishing effective cooperation mechanisms in the field of nuclear counter-terrorism.

A 'Statement of Principles' defining the objectives and scope of the initiative was adopted by 13 countries in Rabat, six months after its launching. Eight principles guide the action of GICNT participants in the following areas: control and physical protection of nuclear materials; detection and proper handling of illicitly held 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: that was identified by participants as one of the main structural flaws. Again the Statement is to be considered a soft law instrument, consistent with international law: there is explicit reference in the document to the relevant international conventions and Security Council resolutions.

The initiative has no institutional structure. An Implementation and Assessment Group has been set up as part of the Initiative, which comprises a dozen countries: its task is to contribute to developing a 'Plan of Work', to give advice to countries that might require it, and to keep GICNT participants informed of progress made within the initiative's framework.

One of the speakers argued that the exercise and conference activities were the cornerstones of the Global Initiative. A positive assessment was made of these activities, as they are instrumental in framing a common nuclear counter-terrorism 'culture': they help reproduce credible scenarios, test capabilities, develop new operational concepts, spread best practices, and accelerate exchange of information.

As for the response mechanisms, the development of emergency plans at national and local level was deemed particularly important. In the case of a nuclear or radiological terrorist attack, local actors (municipalities, police, fire-fighters, etc.), including the private sector (key infrastructure administrations, private health service providers, etc.), would be required to provide a first response.

It was observed that strong emphasis on the domestic dimension was key to winning the support of China, India, Pakistan, and Israel, which are usually wary of committing to international arrangements potentially infringing on their internal affairs. As of June 2008, the GICNT counted 73 countries, including all EU members. In the view of one speaker, assessing their impact remains very difficult, not least due to the absence of generally accepted evaluation standards in key priority areas.

4. Regional Responses

4.1 EU Initiatives to Counter WMD Terrorism

The European Security Strategy, adopted in December 2003, identified five major threats to international peace and security: failed states, regional conflicts, organized crime, terrorism and the proliferation of WMD. The strategy emphasized that ‘the most frightening scenario is one in which terrorist groups acquire weapons of mass destruction’. In fact, it recognized that Europe represented at the same time ‘a target and a base for such terrorism’ because of the persistence of the new global terror networks and their small but determined presence in major EU countries. That is why the uncontrolled spread of WMD, their means of delivery, and related material to non-state actors for terrorist purposes, is perceived as the worst possible danger.

The European Union has addressed the new major threats to peace and security in a number of other key documents, including the EU Strategy Against Proliferation of Weapons of Mass Destruction in 2003 and the EU Counter-Terrorism Strategy in 2005. The cornerstones of the European approach are the principles of prevention, protection, cooperation between Member States, international cooperation and effective multilateralism.

It was suggested that the EU policies in the field of WMD terrorism need to be assessed in a historical perspective.

Several participants in the conference in Rome underlined the holistic approach of the EU’s action against terrorism. The cross-pillar dimension is confirmed by the over 100 activities which have been launched. They are listed under the four strands of the EU Counter-Terrorism Strategy endorsed by the European Council in December 2005: prevent, protect, pursue, and respond.

It was observed that the main challenge in the European context is the possible lack of coherence among the Member States in implementation efforts. However, one of the speakers noted that, in negotiating and adopting common positions, the EU represented a ‘microcosm’. The approval of a compromise formula within the Council might serve as a useful starting point for negotiations in other multinational forums.

One of the presentations focused on “effective multilateralism” as the key element of the EU’s external action for the promotion of international security in the 21st century. The development of a stronger international society, well functioning international institutions and a rule-based interna-

tional order are the main objectives. In fact, EU action in implementing the Strategy against the proliferation of WMD is based on the following guidelines: strengthening the international treaties addressing the proliferation of biological, chemical and nuclear weapons; redressing the shortcomings of the existing regimes, and thus strengthening their effectiveness; combating WMD terrorism within the constraints of international law: respecting human rights in the fight against terrorism and leading by example in the implementation of arms control agendas.

A comparative analysis of EU documents and the US National Security Strategy, made public a year earlier, shows the difference at that time between the two sides of the Atlantic in the approach towards security issues. Indeed, the first term of the Bush administration was characterised by a certain scepticism *vis-à-vis* international law as an effective tool in countering the new threat of terrorist networks. It was repeatedly stressed during the conference that the US approach, particularly in the period in which John Bolton was Under Secretary of State for Arms Control and International Security, oscillated between unilateralism and plurilateralism, with a strong emphasis on the creation of 'coalitions of the willing' .

The EU's implementation of the "effective multilateralism" principle was not considered unproblematic. Five major challenges were identified. The first was seen to be the tendency to question the effectiveness of the existing treaty regime as not suitable for tackling the "new WMD threats". Second, the "hard cases", like Iran, have revealed the limits of multilateralism when one of the essential parties does not intend to cooperate. Third, the lack of unity and coherence among member States on foreign policy issues, as the reaction to the war in Iraq demonstrated, risks undermining the EU's role as a credible actor advocating strict adherence to international law. Fourth, the EU member States have sometimes taken quite divergent views on treaty compliance, especially in the field of nuclear disarmament. The 2005 NPT Review Conference constituted a clear example: suffice it to recall the rift within the EU between those supporting the 13 practical steps towards nuclear disarmament and those obstructing their implementation.

Finally, there was some speculation as to whether, by advocating a rule-based international order, the EU member States have raised the moral bar too high. It was argued that the EU might find itself under pressure, when pragmatic solutions turn out to be the only way to achieve a compromise deal with certain countries.

4.2 *Transatlantic Cooperation*

The 2003 European Security Strategy stated that “one of the core elements of the international system is the transatlantic relationship. This is not only in our bilateral interest but strengthens the international community as a whole. NATO is an important expression of this relationship”.

The 2004 Dromoland Castle Declarations on Combating Terrorism and on the Non-Proliferation of Weapons of Mass Destruction provide the framework for cooperation between the US and the EU. The bilateral cooperation extends to developing comprehensive and efficient border security processes, more secure travel documents, contacts between the respective law enforcement agencies and improved information-sharing abilities. In the 2005 Declaration, the US and EU pledged to intensify collaboration and coordination in promoting strict implementation of and compliance with relevant treaties, agreements and commitments on non-proliferation. They expressed their intention to enhance the security of weapons-usable materials, facilities, and technology. The “EU-US Joint Programme of Work on the Non-proliferation of Weapons of Mass Destruction” reflects this commitment to addressing proliferation threats.

It was stressed that NATO has a crucial role to play in countering the WMD terrorist threat, in particular in training and response activities and developing the military means to detect, deter and restore .

The participants generally agreed on the importance of improving transatlantic cooperation. In that respect, several proposals were put forward during the conference. The creation of a transatlantic research network on WMD terrorism was suggested in order to develop a common understanding of the threat: think tanks could foster knowledge on the issue of radicalisation and root causes of terrorism. Furthermore, it was held that the two sides of the Atlantic should improve intelligence sharing; elaborate a common strategy for communication in the course of a terrorist crisis; and develop a more coherent outreach strategy, offering capacity-building assistance.

Finally, one of the speakers suggested the metaphor of tango dancing to describe the transatlantic relationship: to dance well – it was suggested – the partners have to train together for a long period, have the same level of knowledge and each one should grant the other the same consideration . But it was also noted that, when dancing the tango, someone has to take the lead.

5. Challenges

5.1 Risk of Diminished Perception of the Emergency

The present section of the report addresses the main challenges to the legal and operational framework for combating WMD. Seven year after the terrorist attacks against the Twin Towers and the Pentagon in September 2001, the first challenge is the risk of a diminished perception of the emergency. As a consequence, there is a danger of a loss of focus and of commitment and enthusiasm politically. The sense of urgency of the terrorist threat prompted swift action in the months after September 11. In 2008, the time has come to consolidate these efforts: therefore, it is important to reinforce the public's attention and the solidarity of the international community. This would sustain governments' willingness to cooperate against WMD terrorism. In the view of one speaker, European and American legislators should give themselves a deadline – summer 2009 – for ratifying the nuclear terrorism convention in their country, if only to counter the impression that WMD terrorism has faded as an issue.

5.2 An Integrated Approach against WMD Terrorism

One of the crucial questions tackled by the conference was how to coordinate the proliferation of initiatives taken in the last seven years to counter WMD terrorism. The concern shared by conference participants was that the international community had done a lot but that the different activities are not coordinated enough and therefore are not effective enough. This lack of coordination is also attested to by the insufficient cooperation between the two communities of 'counterterrorism' and 'WMD' experts. The participants at the conference agreed that the United Nations should take a leading role both in trying to keep States focused on the WMD terrorist threat and in coordinating the initiatives launched at various levels.

5.3 The Role of the United Nations

Since 2001, the United Nations has accomplished an extraordinary task in defining a global strategy to face the threat to international peace and security posed by terrorist networks. The General Assembly and the Security Council have contributed enormously to the development of a legal system combating

terrorism. The Terrorism Prevention Branch of the U.N. Office on Drugs and Crime operates a significant assistance programme. But the United Nations also faces a problem of lack of coordination among its different components. In particular, what should be avoided is competition between the General Assembly and the Security Council, and the duplication of roles among the various actors. In addition, it was noted that human and financial resources are insufficient to allow the organisation to fulfil its mandate effectively.

Finally, some participants hoped for a positive solution to the continuing impasse among UN member States in defining “terrorism” in international law. It was argued that the comprehensive Convention on terrorism would be adopted only if a new Israeli government and the US President could resume progress toward a final Israeli-Palestinian settlement.

5.4 Focus on Prevention

Prevention lies at the core of global efforts against WMD terrorism. First of all, several speakers stressed the importance of real intelligence sharing as the primary source of information to provide “early warning” of terrorist plots. The disclosure of sensitive information is undoubtedly a delicate issue: the point was made that intelligence sharing across the Atlantic essentially remains a “one-way” process and that the United States should do more.

Physical protection of biological, chemical and nuclear materials and physical security of weapons were considered crucial for preventing sabotage, attacks and thefts. It was pointed out that a good example of a global framework to upgrade safety and to prevent and respond to WMD emergencies is the work of the IAEA in the areas of nuclear safety, security, and safeguards. The framework it provides includes advisory international standards, codes, and guides; binding international conventions; international peer reviews to evaluate national operations, capabilities, and infrastructures; and an international system of emergency preparedness and response. The preventive function of export controls was also emphasised during the conference. An increasing number of States have joined the various informal, voluntary, non-treaty-based arrangements to coordinate their export controls on dual-use materials related to weapons of mass destruction: the Australia Group, the Missile Technology Control Regime, the Nuclear Suppliers Group (NSG), the Zangger Committee and the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies.

It was felt that the five export controls regimes should improve their imple-

mentation efforts in view of the threat of non-state actors. However, one of the speakers showed how challenging the task can be by describing the difficulties encountered by the NSG in moving toward consensus on strengthening controls on transfers of enrichment and reprocessing equipment, facilities and technology.

Finally, several participants agreed that 'prevention' required recruiting reliable personnel in adequate number and having the necessary technical competence.

5.5 Respect for Human Rights while Countering Terrorism

In several resolutions, both the Security Council and the General Assembly reaffirmed that States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law.

Some participants observed that much remains to be done. In that regard, the *Kadi* case, decided upon by the European Court of Justice on 3 September 2008, was mentioned: the Court found that the regulation giving effect to the SC resolutions adopted against Al-Qaeda infringed upon the appellants' fundamental rights under EC law, including the right to be heard before a court of law, the right of effective judicial review, and the right to property.

To conclude, one of the main challenges for counter-terrorism cooperation is that the development of more effective instruments has to be carried out within a legal framework that is respectful of human rights.



Istituto Affari Internazionali

Conference on

Coordinating Global and Regional Efforts to Combat WMD Terrorism

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PROGRAM

We thank Banca Antonveneta for kindly providing the conference room

9.30 – 10.00	INTRODUCTION
Welcome address	Ettore Greco , 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 <i>Assessing the threat of WMD terrorism</i>
Chair	Krzysztof Paturej , Organisation for the Prohibition of Chemical Weapons (OPCW), The Hague
Paper givers	Eric Rosand , Center on Global Counterterrorism Cooperation, New York <i>The Global Challenge of WMD Terrorism: Evaluating the Threat and US-Led Multilateral Responses</i> Jean-François Daguzan , Fondation pour la Recherche Stratégique (FRS), Paris <i>Transatlantic Cooperation on the Threat of WMD Terrorism</i>
	Discussion
11.30 – 12.00	Coffee break
12.00 – 13.30	SESSION 2 <i>Coordinating global and regional efforts to combat WMD terrorism</i>
Chair	Annalisa Giannella , Council of the European Union, Brussels
Paper givers	Giorgio Franceschini , Peace Research Institute, Frankfurt <i>Fighting against WMD Terrorism: What Role for the EU?</i>

	<p>Jeffrey Laurenti, The Century Foundation, New York <i>Fighting off Fatigue: The UN Cornerstone of Antiterrorism Action</i></p> <p>Discussion</p>
13.30 – 14.30	Lunch
14.30 – 16.00	<p>SESSION 3 <i>Addressing the threat of nuclear terrorism: the GICNT and other initiatives</i></p>
Chair	Ian Anthony , Stockholm International Peace Research Institute (SIPRI)
Paper givers	<p>Natalino Ronzitti, Nicoletta Pirozzi, Riccardo Alcaro, Istituto Affari Internazionali (IAI), Rome <i>The Global Initiative and Other Multilateral Initiatives and Partnerships Against Nuclear Terrorism</i></p> <p>Masahiko Asada, Graduate School of Law, Kyoto University <i>The G8 and the Fight against Nuclear Proliferation: Proposals and Legal Limitations</i></p> <p>Discussion</p>
16.00 – 16.10	CONCLUSIONS
	Natalino Ronzitti , Istituto Affari Internazionali (IAI), Rome

INDEX (1996-2009)

- *La nuova iniziativa europea per lo spazio: Global Monitoring for Environment and Security*, Federica Alberti (n. 32, ottobre 2008, pp. 157)
- *Il programma Joint Strike Fighter F-35 e l'Europa*, Michele Nones, Giovanni Gasparini, Alessandro Marrone (n. 31, ottobre 2008, pp. 93)
- *Cooperazione transatlantica nella difesa e trasferimento di tecnologie sensibili*, di Alessandro Marrone (n. 30 giugno 2008, pp. 132)
- *Le prospettive dell'economia globale e il ruolo delle aree emergenti, Global Outlook 2007, Rapporto finale*, Laboratorio di Economia Politica Internazionale (n. 29, novembre 2007, pp. 155)
- *Il Golfo e l'Unione Europea. Rapporti economici e sicurezza*, a cura di Roberto Aliboni (n. 28, settembre 2007, pp. 117)
- *Un bilancio europeo per una politica di crescita*, Maria Teresa Salvemini e Oliviero Pesce (n. 27, giugno 2007, pp. 104)
- *La politica europea dell'Italia. Un dibattito aperto*, a cura di Raffaello Matarazzo (n. 26, novembre 2006, pp. 153)
- *Integrazione europea e opinione pubblica italiana*, a cura di Michele Comelli e Ettore Greco (n. 25, maggio 2006, pp. 72)
- *Nuove forme di procurement per la difesa*, Sara Mezzio (n. 24, giugno 2005, pp. 85)
- *Francia-Italia: relazioni bilaterali, strategie europee/France-Italie: relations bilatérales, stratégies européennes*, di Jean-Pierre Darnis (n. 23, marzo 2005, pp. 96)
- *La Politica europea di vicinato*, di Riccardo Alcaro e Michele Comelli, (n. 22, marzo 2005, pp. 68)
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- *Presenza ed impegni dell'Italia nelle Peace Support Operations*, di Linda Landi, (n. 16, gennaio 2003, pp. 83)
- *La dimensione spaziale della politica europea di sicurezza e difesa*, a cura di Michele Nones, Jean Pierre Darnis, Giovanni Gasparini, Stefano Silvestri, (n. 15, marzo 2002, pp. 48)
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