

The Prevention and Prosecution of Terrorist Acts: A Survey of Multilateral Instruments

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The events of September 11, 2001 are etched in Americans' minds. The large-scale attacks occurring on U.S. territory brought home the imperative of preventing terrorism here and abroad, especially in light of the risk that future attacks might be perpetrated with nuclear or other weapons of catastrophic effect. In the years since then, casualties from international terrorism have remained high, largely due to attacks in South Asia and the Middle East.<sup>1</sup>

This report demonstrates that a framework of treaty-based regimes and other international initiatives and programs plays a valuable role in preventing terrorism, and should be strengthened and supported. It is an essential part of a broader campaign that includes intelligence coordination, border security, domestic law enforcement and emergency preparedness.

First, the framework articulates and solidifies the norm that terrorism is a wholly impermissible form of political conduct. The importance of entrenching this norm was well stated by Undersecretary of Defense Douglas Feith:

Our ultimate goal is to change the international environment regarding terrorism—instead of tolerance, [to] an international norm of renunciation and repudiation of terrorism. As I said, we want the world to view terrorism as it views piracy, slave trading or genocide—activities universally repudiated by respectable people. This is not an abstract, philosophical, academic point, but a strategic purpose of great practical significance.<sup>2</sup>

Second, the framework provides tools to prevent terrorists from acquiring weapons of mass destruction (WMD). Among the tools are treaties<sup>3</sup> banning WMD, programs to secure materials and weapons in Russia and elsewhere, and an initiative to prevent and interdict shipment of WMD-related items. The 9/11 Commission placed great emphasis on the need to succeed in this effort, stating that “al Qaeda has tried to acquire or make weapons of mass destruction for at least ten years. There is no doubt the United States would be a prime target. Preventing the proliferation of these weapons warrants a maximum effort.”<sup>4</sup>

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<sup>1</sup>HUMAN SECURITY REPORT: WAR AND PEACE IN THE 21<sup>ST</sup> CENTURY, Human Security Centre, University of British Columbia, Canada 43-44 (2005).

<sup>2</sup> U.S. Department of State, *Feith Says Terrorism Makes Palestinian State Less Likely*, April 26, 2002, available at <http://usinfo.state.gov/regional/nea/summit/text/0426fth.htm>.

<sup>3</sup> Treaties are agreements among states that are respected as binding agreements under international law. Such agreements may also take the form of “conventions” (a term generally used to agreements open to all states or a large number of states) or “protocols” (a term generally used to describe amendments or additional agreements to existing treaties). The three are generally of equal international legal significance and all are required to be ratified as set forth in Article II of the U.S. Constitution. For a discussion of the various terms used to designate an international agreement see United Nations Treaty Collection, *Treaty Reference Guide*, available at <http://untreaty.un.org/English/guide.asp>. To the extent that an arrangement between or among states is not intended to be binding under international law, this is indicated in the discussion of the arrangement. Examples include export control regimes and the Proliferation Security Initiative.

<sup>4</sup>THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 381 (U.S. Government Printing Office, 2004).

Third, the framework provides mechanisms to bring terrorists to justice, including treaties requiring the prosecution or extradition of persons alleged to have committed terrorist acts, and international tribunals.

There are of course problems in working through international institutions, laws, and initiatives. For example, treaties banning WMD may give rise to unwarranted complacency that certain states are in fact complying with the bans. The United Nations—or more accurately, the states working through the UN—has been notoriously slow in arriving at a definition of terrorism. This report fully addresses these and other problems, concerns, and criticisms, indicating when they are justified and what can be done about it.

Part I of the report surveys the conventions on terrorism, the treaties that require prosecution or extradition of suspected terrorists and those that require other anti-terrorism measures relating to finance and to security of nuclear facilities. Part II addresses anti-terrorism efforts in the UN context, including the negotiation of a comprehensive convention on terrorism and the adoption of a Security Council resolution requiring all states to take measures to suppress and prevent terrorism. Part III discusses the potential contribution of the International Criminal Court and other international tribunals to the prosecution of suspected terrorists. Part IV describes the array of international measures relevant to preventing terrorist acquisition of WMD, including WMD treaties, a Security Council resolution, export control arrangements, programs to secure materials and weapons, and the initiative to prevent shipment of WMD-related items.

## **I. Conventions on Terrorism**

### **(A) Treaties in Force**

Twelve multilateral treaties relating to terrorism have entered into force in the last forty years. The United States is a party to all of them.<sup>5</sup>

#### **(1) 1963 Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft<sup>6</sup>**

This treaty does not define specific offenses; it broadly covers “(a) offences against penal law” and “(b) acts which, whether or not they are offences, may or do jeopardize the safety of the aircraft or of persons or property therein or which jeopardize good order and discipline on board.” The state of registration of the aircraft is deemed to have jurisdiction over these acts and must enact legislation or other measures to ensure its ability to prosecute. The Tokyo Convention *inter alia* provides authority for the commander of the aircraft to take necessary measures to protect the aircraft and requires states to permit the aircraft to land and to take custody of the perpetrator when necessary.

Many of the acts that fall within the scope of this treaty are also addressed in more detail in the aviation-related treaties described below.

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<sup>5</sup> A list of the states that have signed, ratified or acceded to each of these treaties, along with reservations attached thereto is available from the United Nations Treaty Collection, <http://untreaty.un.org/English/Terrorism.asp>.

<sup>6</sup> Convention on Offenses and Certain Other Acts Committed on Board Aircraft (“Tokyo Convention”), Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219.

**(2) 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft<sup>7</sup>**

This treaty covers the prosecution of individuals accused of committing hijackings using force, threat of force, or any other form of intimidation. It also covers accomplices and attempted hijackings. State parties agree to adopt legislation making these acts punishable by “severe penalties.” States are required to take measures to establish jurisdiction over acts committed in their territory and in aircraft registered to them. States must also take measures to establish jurisdiction over alleged offenders located in their territory and either prosecute or extradite them.

The Hague Convention improves on the Tokyo Convention by detailing specific unlawful acts and requiring prosecution or extradition and the administration of “severe penalties.”

**(3) 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation<sup>8</sup>**

This treaty covers violent acts against persons on board that are likely to endanger flight safety, destruction of the aircraft, damage to the aircraft that is likely to endanger flight safety, and destruction or damage of air navigation facilities. It also covers accomplices and attempted acts. Like the 1970 Hague Convention, the Montreal Convention requires states to adopt severe penalties against these offenses and to take measures to exercise jurisdiction over acts committed in their territory and in aircraft registered to them. States must also take measures to establish jurisdiction over alleged offenders located in their territory and either prosecute or extradite them.

The distinction between the Hague and Montreal Conventions is that the Hague Convention is aimed at acts of hijackings, whereas the Montreal Convention covers bombings and other violent acts that are likely to cause an aircraft to crash.

**(4) 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents<sup>9</sup>**

This treaty covers violent acts (such as assassination or other attacks) against heads of state and representatives of government and international organizations that are protected under international law. Attempted acts and accomplices are also covered. States are required to make the crimes punishable by appropriate penalties in relation to the gravity of the crime. States must take measures to establish jurisdiction over acts committed in their territory, by their nationals and when the victim is a protected person acting on behalf of the state. States must also establish jurisdiction over suspected offenders located in their territory and prosecute or extradite them.

**(5) 1979 Convention Against the Taking of Hostages<sup>10</sup>**

This treaty defines the offense of hostage-taking as “seiz[ing] or detain[ing] and threaten[ing] to kill, to injure or to continue to detain another person. . . in order to compel a third party. . . to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage.” Attempted acts and accomplices are also covered. It requires states to make the crimes punishable by appropriate penalties given the gravity of the crime and to take measures to

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<sup>7</sup> Convention for the Suppression of Unlawful Seizure of Aircraft (“Hague Convention”), Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105.

<sup>8</sup> Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (“Montreal Convention”), Sept. 23, 1971, 24 U.S.T. 564, 1975 U.N.T.S. 177.

<sup>9</sup> Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167.

<sup>10</sup> International Convention Against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. No. 11081, 1316 U.N.T.S. 206.

establish jurisdiction over offenses committed in their territory, by their nationals and, where appropriate, when hostages are their nationals. States must also establish jurisdiction over suspected offenders located in their territory and prosecute or extradite them.

**(6) 1980 Convention on the Physical Protection of Nuclear Material<sup>11</sup>**

This convention sets standards for the protection of nuclear material being used for peaceful purposes. It applies mainly to material in international transport. States agree that they will only export or import nuclear material if they are assured of certain physical protections as laid out by the convention. States are required to criminalize acts including the theft of nuclear material, fraudulent acquisition of nuclear material, acts without lawful authority that constitute “the receipt, possession, use, transfer, alteration, disposal or dispersal of nuclear material and which cause[ ] or [are] likely to cause death or serious injury to any person or substantial damage to property,” and threats to use nuclear material to cause injury to any person or substantial damage to property. States must take measures to establish jurisdiction for offenses that occur in their territory or by their nationals. States must also establish jurisdiction over suspected offenders located in their territory and prosecute or extradite them.

On July 8, 2005, delegates from 89 countries agreed to fundamental changes that will substantially strengthen the Convention on the Physical Protection of Nuclear Material (CPPNM). IAEA Director-General Mohamed ElBaradei welcomed the agreement, stating that: “This new and stronger treaty is an important step towards greater nuclear security by combating, preventing, and ultimately punishing those who would engage in nuclear theft, sabotage or even terrorism. It demonstrates that there is indeed a global commitment to remedy weaknesses in our nuclear security regime.”<sup>12</sup> The amended CPPNM requires states parties to protect nuclear facilities and material in peaceful domestic use, storage and transport. It will also provide for expanded cooperation among States regarding rapid measures to locate and recover stolen or smuggled nuclear material, mitigate any radiological consequences of sabotage, and prevent and combat related offenses. The new rules will come into effect once they have been ratified by two-thirds of the 112 states parties of the Convention, expected to take several years.

**(7) 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation<sup>13</sup>**

This protocol extends the provisions of the 1971 Montreal Convention to acts of violence at airports serving international civil aviation.

**(8) 1988 Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation<sup>14</sup>**

This convention was drafted largely in response to the 1985 *Achille Lauro* hijacking to address terrorist acts aboard ships. Offenses under the treaty include seizure of control of a ship by threat or use of force; violent acts against persons on board a ship (passengers or crew) that are likely to endanger the safety of its navigation, destruction of a ship or damage likely to endanger the safety

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<sup>11</sup> Convention on the Physical Protection of Nuclear Material, Oct. 26, 1979, T.I.A.S. No. 11,080, 1456 U.N.T.S. 124.

<sup>12</sup> IAEA Press Release, July 8, 2005, available at <http://www.iaea.org/NewsCenter/PressReleases/2005/prn200503.html>.

<sup>13</sup> Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Feb. 24, 1988, S. TREATY DOC. NO. 100-19 (1988), 1589 U.N.T.S. 474.

<sup>14</sup> Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, S. TREATY DOC. NO. 101-1 (1989), 1678 U.N.T.S. 222.

of its navigation and damage to maritime navigation facilities. It covers attempted acts and accomplices. It does not apply to ships used for military purposes. It requires states to take measures to establish jurisdiction over offenses committed in their territory, on ships flying their flag and by their nationals. States must also establish jurisdiction over suspected offenders located in their territory and prosecute or extradite them.

**(9) 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf<sup>15</sup>**

This protocol, which supplements the 1988 Rome Convention, creates a legal regime similar to that which applies to international aviation. This protocol provides for the prosecution of violent acts committed against fixed platforms located on the continental shelf, which are defined as structures attached to the sea bed for “exploration or exploitation of resources or for other economic purposes.”

**(10) 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection<sup>16</sup>**

This convention was drafted largely in response to the 1988 explosion of a Pan Am flight over Lockerbie, Scotland. Recognizing the role that plastic explosives have played in terrorist bombings, this convention requires states to mark plastic explosives with a detection agent that will enhance their detectability. States are required to take measures (which may be penal, but are not required to be) to prohibit and prevent the manufacture of unmarked plastic explosives in their territory. To the extent that states’ police or military retain unmarked plastic explosives, they must be marked, consumed or destroyed within 15 years.

**(11) 1997 Convention for the Suppression of Terrorist Bombings<sup>17</sup>**

This convention defines the offense of terrorist bombings as delivering, placing, discharging or detonating an explosive or other lethal device in, into or against a place of public use, a state or government facility, a public transportation system or an infrastructure facility with the intent to cause death or serious bodily injury; or cause extensive destruction where the destruction results in or is likely to result in major economic loss. States must adopt necessary legislation to make these acts criminal. States are required to take measures to establish jurisdiction for offenses committed in their territory and by their nationals and may establish jurisdiction in other instances, including offenses committed against their nationals and their government facilities. States must also establish jurisdiction over suspected offenders located in their territory and prosecute or extradite them.

**(12) 1999 Convention for the Suppression of the Financing of Terrorism<sup>18</sup>**

Noting that the number and seriousness of terrorist attacks depend on obtaining funding, this treaty criminalizes the financing of terrorism. The offense of financing of terrorism is defined as providing or collecting funds intended to be used to carry out: (a) an act which constitutes an offense under specified terrorism-related treaties (the treaties listed above, with the exception of the 1963 Tokyo Convention and the 1991 Convention on Plastic Explosives) or (b) “any other act

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<sup>15</sup> Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, S. TREATY DOC. 101-1 (1989), 1678 U.N.T.S. 304.

<sup>16</sup> Convention on the Marking of Plastic Explosives for the Purpose of Identification, Mar. 1, 1991, 30 I.L.M. 726 (entered into force June 21, 1998).

<sup>17</sup> International Convention for the Suppression of Terrorist Bombings, Jan. 12, 1998, S. TREATY DOC. 106-6 (1999), 37 I.L.M. 251 (entered into force May 23, 2001).

<sup>18</sup> International Convention for the Suppression of the Financing of Terrorism, Jan. 10, 2000, 39 I.L.M. 270 (entered into force April 10, 2002).

intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.”

It is notable that clause (b) of the definition of financing terrorism comes closer to defining “terrorism” than any provision contained in the other 11 treaties. The treaty requires states to adopt penal legislation to prosecute individual offenders and also to hold legal entities liable for offenses committed on their behalf. States are required to take appropriate measures for the identification, detection, and freezing or seizure of any funds used or allocated for financing terrorism, or that are proceeds from terrorism. States must take measures to establish jurisdiction for offenses committed in their territory and by their nationals. There are other instances for which a state may establish jurisdiction, including when an offense is directed toward a state’s territory or nationals. States must also establish jurisdiction over suspected offenders located in their territory and prosecute or extradite them.

**(B) 2005 International Convention for the Suppression of Acts of Nuclear Terrorism**

A recent development in the network of anti-terrorism treaties was the adoption of a convention addressing terrorist acts using, threatening to use, or aiming to use nuclear weapons or radiological bombs or involving damage to a nuclear reactor or facility. It also encourages States to cooperate in preventing terrorist attacks by sharing information and assisting each other in connection with criminal investigations and extradition proceedings. On April 13, 2005, the General Assembly adopted the treaty, and it opened for signature on September 14. It will enter into force when ratified by 22 states. Under its provisions, alleged offenders must be either extradited or prosecuted. It excludes activities of armed forces during an armed conflict, while also providing that it does not address the issue of the legality of the use or threat of use of nuclear weapons by states.

**(C) Assessing the Anti-Terrorism Treaty Regime**

The value that most of these treaties bring to the fight against terrorism is that they require states to take action against terrorist acts or actors within their territories and to ensure that their legal systems, particularly their criminal codes, are equipped to address these crimes. There have been some successes associated with these treaties. For example, in 1986, John F. Murphy, an expert on international terrorism, noted a general decline in aircraft hijacking “due in part to the preventive techniques mandated by [the International Civil Aviation] conventions and now employed both in airports and aboard aircraft.”<sup>19</sup> Although the author observed that hijackings were on the rise again because hijackers were learning to avoid the security devices, he found that “[t]here is also ample evidence that hijackers have been submitted for prosecution either in the states where they have been found or in states to which they have been extradited. The [International Civil Aviation] conventions appear to have played a useful role in support of these prosecutions.”<sup>20</sup>

The treaties on terrorism, however, are limited in what they are able to accomplish. They largely focus on prosecution, not prevention.<sup>21</sup> Due to their *ad hoc* nature, there are gaps in what they cover. For example, they do not extend to assassinations of non-official professionals such as

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<sup>19</sup> John F. Murphy, *The Future of Multilateralism and Efforts to Combat International Terrorism*, 25 Colum. J. Transnat’l L. 35, 45 (1986).

<sup>20</sup> *Id.*

<sup>21</sup> Jennifer Trahan, *Terrorism Conventions: Existing Gaps and Different Approaches*, 8 NEW ENG. INT’L & COMP. L. ANN. 215, 222-25 (2002).

businessmen and journalists and do not specifically criminalize attacks against water supplies, public buses or trains.<sup>22</sup> Most are far from universal, meaning that many states have not adopted them. They do not create any regulatory bodies to monitor implementation or ensure states' compliance. No sanctions exist for states parties that refuse to extradite or prosecute terrorists or that harbor terrorists. Several of the treaties are weakened by failure to reach acts that are committed solely within one state's territory and are inconsistent as to whether they permit refusal of extradition of suspects based on grounds of political acts.<sup>23</sup> The following discussion details some of the attempts being made to address gaps in this treaty system.

Since the September 11, 2001 terrorist attacks, progress has been made on the goal of universal ratification of the anti-terrorism treaties. In September 2001, the Security Council passed Resolution 1373, which requires states to take a series of actions to combat terrorism (discussed below).<sup>24</sup> It also calls upon states to become parties to the twelve international terrorism conventions and to increase cooperation in the fight against terrorism. The Counter-Terrorism Committee (CTC), the committee created to monitor implementation of Resolution 1373, is contributing to states' efforts to become parties to all twelve instruments. The CTC has been identifying those states that need assistance with the ratification process and working to ensure such states receive help from appropriate assistance providers. Prior to Resolution 1373, only a few states had ratified all 12 anti-terrorism conventions. After two years, over 40 states had done so.<sup>25</sup>

Efforts to improve the treaty regime continue within the United Nations, with the General Assembly continuing to negotiate a comprehensive convention on terrorism—including a definition of terrorism - and the Security Council passing resolutions aimed at strengthening member states' anti-terrorism laws. These are discussed below.

## **II. United Nations Activities on Terrorism**

### **(A) The Efforts to Create a Comprehensive Terrorism Convention**

As noted above, because most of the terrorism-related treaties were drafted in response to highly visible terrorist acts, they address only specific acts of terrorism and neglect others. A comprehensive terrorism convention would end this piecemeal response. In his survey of terrorism-related treaties, *International Terrorism: Multilateral Conventions and Documents*, international law scholar M. Cherif Bassiouni observed:

A comprehensive convention which combines all existing conventions pertaining to terrorism into a single updated text would significantly advance the overall objectives of these conventions. Such a comprehensive text would contribute to the elimination of overlaps, gaps and ambiguities which currently exist in the [existing] conventions. It would also eliminate the need to consult multiple legal sources in order to enforce State Party obligations. If this piecemeal subject-matter approach trend continues, there is no end to the number of conventions

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<sup>22</sup> See Michael P. Scharf, *Defining Terrorism As the Peace Time Equivalent of War Crimes: A Case of Too Much Convergence Between International Humanitarian Law and International Criminal Law?*, 7 ILSA J. INT'L & COMP. L. 391, 393 (2001), cited in Trahan, *supra* note 21 at n. 19.

<sup>23</sup> Trahan, *supra* note 21 at 225-26; 229-30.

<sup>24</sup> S.C. Res. 1373, U.N. SCOR, 57<sup>th</sup> Sess. 4385<sup>th</sup> mtg., U.N. Doc. S/Res/1373 (2001).

<sup>25</sup> *Fight against Terrorism Would be long with No Short Cuts, Counter-Terrorism Committee Chairman Tells Security Council*, UN Press Release, Security Council, 4792<sup>nd</sup> mtg., U.N. Doc SC/7823 (2003).

likely to be developed over the years to come, and there is no hope to make the legal mechanisms contained within each convention more effective.<sup>26</sup>

International terrorism scholar John F. Murphy also concluded that a global convention to “define international terrorism, make it an international crime, subject all state parties to the ‘extradite or prosecute’ formula and provide for other forms of cooperation’ would be ideal.<sup>27</sup>

Since 1996, an *ad hoc* committee created by the United Nations General Assembly (‘GA’) in 1996 and open to all UN members has been negotiating a draft comprehensive convention on terrorism. As elaborated by the *ad hoc* committee, the comprehensive convention would define terrorism and require states to criminalize terrorist acts and take measures to establish jurisdiction over terrorist acts.<sup>28</sup> Two main issues have stalled completion of the draft: (1) whether acts committed by persons engaged in the struggle against ‘foreign occupation’ (e.g., Palestinian attacks in Israel) should be considered acts of terrorism, and (2) whether the acts of states’ armed forces, which are already subject to the law of armed conflict during wartime, should be covered by this convention, *i.e.*, whether acts committed by armed forces may be treated as terrorist acts under this convention.<sup>29</sup>

### **(B) The Definition of Terrorism**

The debate over the definition of terrorism, particularly whether the definition of terrorism should exclude resistance against foreign occupation, reflects the often-heard adage that one state’s terrorist is another state’s freedom fighter. It is a tension that has existed since the UN’s first attempts at addressing terrorism in the early 1970s.<sup>30</sup> At that time, there was a larger degree of tolerance for the position that politically motivated acts, particularly those committed in resistance to foreign occupation, did not constitute terrorism. As Professor Malvina Halberstam observes, this was demonstrated in a 1972 General Assembly (GA) resolution relating to terrorism that established an *Ad Hoc* Committee on Terrorism but at the same time ‘reaffirm[ed] the inalienable right to self-determination and independence of all peoples under colonial and racist regimes and other forms of alien domination and uph[eld] the legitimacy of their struggle, in particular the struggle of national liberation movements.’<sup>31</sup> That resolution did not even

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<sup>26</sup> INTERNATIONAL TERRORISM: MULTILATERAL CONVENTIONS AND DOCUMENTS 7 (M. Cherif Bassiouni, ED., 2001).

<sup>27</sup> Murphy, *supra* note 19 at 92.

<sup>28</sup> See *Report of the Ad Hoc Committee established by General Assembly Resolution 5/210 of 17 December 1996*, U.N. GAOR, 57<sup>th</sup> Sess., Supp. No. 37, Annexes I-III, U.N. Doc. A/57/37 (2002).

<sup>29</sup> See *Measures to eliminate international terrorism: Report of the Working Group*, U.N. GAOR 6<sup>th</sup> Comm., 59<sup>th</sup> Sess., Annex, Agenda Item 148, p. 4, U.N. Doc. A/C.6/59/L.10 (2004). See also Jim Wurst, *U.N. Deadlock Continues on Two Terrorism Treaties*, U.N. WIRE, Dec. 10, 2003; Jim Wurst, *Negotiations on Anti-Terrorism Treaties Yield No Progress*, U.N. WIRE, February 4, 2002. Like the definition of terrorism, this issue of whether armed forces should be covered is closely related to the Israeli-Palestinian conflict. The Organization of the Islamic Conference has urged that any exclusion from the treaty’s provisions for the actions of armed forces should also cover situations of foreign occupation.

<sup>30</sup> The goal of achieving a universal definition of terrorism dates back to the League of Nations. The Convention for the Prevention and Punishment of Terrorism included a definition of terrorism, but the treaty never entered into force. See Alex Schmidt, *War Crimes Research Symposium: “Terrorism on Trial”: Terrorism - The Definitional Problem*, 37 CASE W. RES. J. INT’L L. 375, 385 (2005). The UN resumed the attempt to reach a definition after the terrorist attacks at the 1972 Munich Olympics. *Id.* at 386.

<sup>31</sup> See G.A. Res. 27/3034, U.N. GAOR, 27<sup>th</sup> Sess., Supp. No. 30, at 119, U.N. Doc. A/RES/27/3034 (1972), cited in Malvina Halberstam, *The Evolution of the United Nations Position on Terrorism: From Exempting National Liberation Movements to Criminalizing Terrorism Wherever and by Whomever Committed*, 41 COLUM. J. TRANSNAT’L L. 573, 574 (2003).

condemn terrorism, and it was not until 1985 that the GA passed a resolution unequivocally condemning “as criminal, all acts, methods and practices of terrorism wherever and by whomever committed.”<sup>32</sup>

In 2005, efforts to reach a definition on terrorism were re-energized as part of the UN reform process leading to a 2005 summit of world leaders. The Secretary-General and a panel of high-level experts convened for the purpose of making recommendations on global security challenges both urged that a definition of terrorism be included in the Summit outcome.<sup>33</sup> Negotiations were not successful in reaching an agreement on a definition of terrorism. Instead, the 2005 Summit Outcome Document “condemned terrorism in all its forms” and stressed “the need to make every effort to reach an agreement on and conclude a comprehensive convention on international terrorism during the sixtieth session of the General Assembly.”<sup>34</sup>

The Security Council, especially since the September 11 attacks, has also condemned terrorism on numerous occasions and worked towards a definition as well. In 2004, Security Council Resolution 1566 stated that “criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.”<sup>35</sup>

While the General Assembly and the Security Council have condemned terrorism regardless of its motives, there are many member states that oppose this construct of terrorism as unfairly imposed by powerful states and in ignorance of the types of “terrorism” that powerful states wage on repressed states. Libya raised this issue in the 2001 General Assembly debates, speaking on behalf of the Arab Group:

We cannot condemn terrorism and fight it when it hits one country and turn a blind eye when it hits other countries. It is unacceptable to label as terrorism the struggle of peoples to protect themselves or to attain their independence, while at the same time ignoring real terrorism and its many faces - such as occupation...<sup>36</sup>

It is this fundamental disagreement that poses a serious obstacle to achieving a definition.<sup>37</sup> Nevertheless, progress has been made since 9/11 to develop a system to improve states’ capacity

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<sup>32</sup> G.A. Res. 40/61, U.N. GAOR, 40th Sess., 108th plen. mtg., para. 1, U.N. Doc A/RES/40/61 (1985), cited in Halberstam, *supra* note 31 at 575.

<sup>33</sup> See, e.g., In Larger Freedom: Toward Development, Security and Human Rights for All, Report of the Secretary-General ¶ 91 (United Nations 2005); Stephen Stedman, A More Secure World: Our Shared Responsibility, Report of the High-Level Panel on Threats, Challenges and Change ¶ 163 (United Nations 2004).

<sup>34</sup> World Summit Outcome, ¶¶ 81, 83.

<sup>35</sup> S.C. Res. 1566, U.N. SCOR, 59<sup>th</sup> Sess., 5053<sup>rd</sup> mtg., U.N. Doc. S/Res/1566 (2005).

<sup>36</sup> Calls for Resolute Action Against Terrorism Tempered in Assembly by Appeals for Caution in Identifying ‘Enemy,’ U.N. GAOR, 56th Sess., 49th plen. mtg. U.N. Doc. GA/9962 (2001), cited in Aaron J. Noteboom, Terrorism, I Know It When I See It, 81 OR. L. REV. 553, 565 (2002).

<sup>37</sup> Cf. Nicholas Rostow, Before and After: The Changed UN Response to Terrorism Since September 11<sup>th</sup>, 35 CORNELL INT’L L.J. 475, 489 (2002), arguing that it is unlikely consensus will be achieved until the conflicts in the Middle East and over Kashmir are resolved.

to prevent and prosecute terrorist acts, particularly through rules imposed by the Security Council.

### **(C) Security Council Resolutions**

#### **(1) Pre-9/11**

The Security Council is uniquely qualified to respond to terrorism and to require states to take measures addressing terrorism. Under Chapter VII of the UN Charter, once the Security Council determines the existence of a threat to international peace and security—and the Council has determined that acts of international terrorism do constitute such a threat<sup>38</sup>—states are required to comply with the measures that the Security Council determines are appropriate to meet this threat. In addition to condemning certain specific acts of terrorism, the Security Council has passed a number of resolutions aimed at denying certain individuals and groups the means to carry out terrorist acts and requiring states to take action against such individuals and groups. For example, Resolution 1267 called for Afghanistan's Taliban regime to stop providing sanctuary and training for international terrorists and to cooperate with efforts to bring indicted terrorists to justice.<sup>39</sup> Resolution 1267 ordered the Taliban to turn over Osama bin Laden to authorities in a state where he had been indicted, such as the United States, or to another state where he would be arrested and prosecuted. It banned flights to Afghanistan, directed states to freeze funds that related to properties owned by the Taliban, and created a committee to oversee implementation of these sanctions. These measures were augmented by Resolution 1333 of December 2000, which included sanctions against the sale of military equipment to the Taliban.<sup>40</sup>

The sanctions regime created under Resolution 1267 has continued to function following the overthrow of the Taliban, by targeting specific individuals and entities for sanctions regardless of their physical whereabouts. All states are required to freeze the assets, prevent transit through their territory, and prevent the supply of arms and military equipment to individuals and entities designated by a Security Council committee established for this purpose (the '1267 Committee').<sup>41</sup> The 1267 Committee, comprised of all Security Council members, maintains and updates the list of Taliban or Al Qaeda-related individuals and entities that are subject to sanctions, and monitors state compliance with these sanctions.

#### **(2) Post-9/11**

The September 11, 2001 terrorist attacks brought a new level of urgency to the issue of terrorism in the United States and the United Nations. The UN Security Council responded to the September 11 attacks in Resolution 1368, passed the following day. The Security Council has the authority to take actions including authorizing use of military force to respond to threats to peace and security, and Resolution 1368 noted the Security Council's "readiness to take all necessary steps" to respond to the attacks. The resolution also recognized "the inherent right of individual or collective self-defence in accordance with the [UN] Charter," thus reaffirming the principle articulated in UN Charter Article 51 that "[n]othing in the...Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." When the United States invaded Afghanistan in its search for the perpetrators of the 9/11 attacks, it did not request authorization from the Security Council. This decision was generally accepted as consistent with this right to self-defense and the terms of Resolution 1368.

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<sup>38</sup> See, e.g., S.C. Res. 1373.

<sup>39</sup> S.C. Res. 1267, U.N. SCOR, 54<sup>th</sup> Sess., 4051<sup>st</sup> mtg., U.N. Doc. S/Res/1267 (1999).

<sup>40</sup> S.C. Res. 1333, U.N. SCOR, 55<sup>th</sup> Sess., 4251<sup>st</sup> mtg., U.N. Doc. S/Res/1333 (2000).

<sup>41</sup> S.C. Resolutions 1267 (1999), 1333 (2000), 1390 (2002), 1455 (2003).

The most far-reaching Security Council response to the 9/11 terrorist attacks was adopted on September 28, 2001 at the behest of the United States. Resolution 1373 *requires* all states to take a series of actions: criminalize the act of providing or collecting funds to be used to carry out terrorist attacks; freeze all funds of individuals or entities with ties to terrorist activities; refrain from supporting entities or persons involved with terrorism, including the elimination of the supply of weapons to terrorists; and deny terrorists safe haven and ensure their prosecution. As described by John Negroponte, the U.S. Ambassador to the United Nations at the time the resolution passed, Resolution 1373 “generat[ed] a worldwide juridical transformation.”<sup>42</sup> Unlike the twelve terrorism conventions, which are only binding on states that ratify them, Resolution 1373, as a decision of the Security Council, binds all states.<sup>43</sup>

As a result, all states, regardless of whether they had consented to do so in any of the terrorism treaties, are by virtue of Resolution 1373 obligated “to prevent and suppress terrorist attacks and take action against perpetrators of such attacks” and to transform their national legislation to criminalize terrorist financing. The obligations set forth in Resolution 1373 are of unlimited duration and can only be terminated by a subsequent Security Council resolution.<sup>44</sup> As described by one international legal scholar, with Resolution 1373, “the United Nations Security Council broke new ground by using, for the first time, its Chapter VII powers under the Charter to order all states to take or to refrain from specified actions in a context not limited to disciplining a particular country.”<sup>45</sup>

Resolution 1373 ushered in a new era for the Security Council acting as global lawmaking body. In April 2004, the Security Council passed Resolution 1540, which requires states to adopt laws and other control measures to prevent the acquisition of weapons of mass destruction by non-state actors, discussed in Part V.<sup>46</sup> Like Resolution 1373, it establishes a sub-committee to monitor state implementation. Security Council Resolution 1566 sets forth a definition of terrorism (without labeling it as such) and called on all states to “ensure that such acts are punished by penalties consistent with their grave nature.”<sup>47</sup> Most recently, Resolution 1624, passed by a Security Council meeting of heads of state during the September 2005 Summit, creates a legal prohibition on incitement to commit terrorist acts.<sup>48</sup>

## **(D) The Counter-Terrorism Committee**

### **(1) Functions of the CTC**

Resolution 1373 called for the creation of the CTC, composed of all Security Council member states, to monitor the implementation of its measures and increase states’ capabilities to fight terrorism. States are required to report to the CTC on the measures they have taken to implement the Resolution. These reports form the basis of the CTC’s work; experts employed by the CTC

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<sup>42</sup> ‘We Must Not Fall Into Complacency’ in *Fight Against Terrorism, Prime Minister of Spain Tells Council*, United Nations Press Release, Security Council, 4752<sup>nd</sup> mtg., U.N. Doc. SC/7754 (2003).

<sup>43</sup> UN Charter, Art. 25 requires all UN Members to “agree to accept and carry out the decision of the Security Council in accordance with the present Charter.”

<sup>44</sup> Ilias Bantekas, *The International Law of Terrorist Financing*, 97 AM. J. INT’L L. 315, 326 (2003).

<sup>45</sup> Paul Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT’L L. 901, 901 (2002).

<sup>46</sup> S.C. Res. 1540, U.N. SCOR, 58<sup>th</sup> Sess., 4956<sup>th</sup> mtg., U.N. Doc. S/Res/1540 (2004).

<sup>47</sup> S.C. Res. 1566, U.N. SCOR, 59<sup>th</sup> Sess., 5053<sup>rd</sup> mtg., U.N. Doc. S/Res/1566 (2004).

<sup>48</sup> S.C. Res. 1624, U.N. SCOR, 60<sup>th</sup> Sess., 5261<sup>st</sup> mtg., U.N. Doc. S/Res/1624 (2005).

review the reports and ask follow-up questions to be answered by states in additional reports.<sup>49</sup> The CTC received initial reports from all 191 countries.

The CTC's assessment of states' capabilities is separated into three stages. The first stage is to ensure that states have the necessary legislation in place to address all aspects of Resolution 1373, with a particular focus on combating the financing of terrorism.<sup>50</sup> The CTC recognized that legislation is a key issue because without an effective legislative framework States cannot develop executive machinery to prevent and suppress terrorism, or bring terrorists and their supporters to justice.<sup>51</sup> The second stage focuses on improving states' executive machinery to best implement counter-terrorism legislation, for example, ensuring that states have in place effective intelligence and police to monitor and apprehend those involved in terrorist activities. The third stage focuses on the implementation of the above legislation and executive machinery to bring terrorists and their supporters to justice.<sup>52</sup> Measures may include cooperation on the exchange of information and judicial cooperation to prosecute terrorists.

The CTC is not itself able to provide assistance to improve states' anti-terrorism capabilities. It works as a switchboard to connect assistance providers with states seeking assistance. One tool offered by the CTC is its database, the CTC Directory of Counter-Terrorism Information and Sources of Assistance, which offers information on standards, best practices and sources of assistance in the area of counter-terrorism.<sup>53</sup> The CTC also maintains a "Matrix of Assistance Requests" that provides an overview of assistance needs, and information on assistance programs.<sup>54</sup>

## (2) Revitalizing the CTC

The early assessment of the CTC was that it was helping to build the political will to combat terrorism but that it lacked the infrastructure to sustain itself. On the positive side, as noted above, it significantly increased membership in the 12 anti-terrorism conventions. Reports to the CTC revealed that a large number of states did not have any legislation tailored to counter terrorism and are now revising their laws. However, the political will to implement this resolution has faded. Three years after the adoption of Resolution 1373, 78 states had failed to meet their latest reporting requirements.<sup>55</sup>

A January 2004 report of the Chair of the Counter-Terrorism Committee highlighted the problems in implementing Resolution 1373 and in particular the difficulties of the CTC's role. The report determined, among other things, that the CTC needed to play a more proactive role in assessing states' needs, needed to better monitor provision of assistance, including with field

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<sup>49</sup> For a discussion of the reporting process, see Rostow, *supra* note 37 at 483-484 (2002); see also the website of the CTC at <http://www.un.org/Docs/sc/committees/1373/work.html> at 335-336.

<sup>50</sup> With respect to financing of terrorism, which is a principal target of Resolution 1373, this first stage goes beyond examining legislation and has already begun looking into states executive machinery to prevent and suppress financing of terrorism. See Rosand *infra* note 52 at 336.

<sup>51</sup> See *About the CTC: Setting Priorities*, available at <http://www.un.org/Docs/sc/committees/1373/priorities.html>. The CTC maintains a website containing the status of states' reports and other key documents. See <http://www.un.org/Docs/sc/committees/1373/>.

<sup>52</sup> Eric Rosand, *Security Council Resolution 1373, the Counter-Terrorism Committee and the Fight Against Terrorism*, 97 AM. J. INT. L. 333, 336 (2003).

<sup>53</sup> See *Directory of Counter-Terrorism Information and Sources of Assistance*. Available at [http://www.un.org/Docs/sc/committees/1373/ctc\\_da/index.html](http://www.un.org/Docs/sc/committees/1373/ctc_da/index.html).

<sup>54</sup> The Matrix of Assistance Requests is available at [http://www.un.org/Docs/sc/committees/1373/ctc\\_da/matrix.html](http://www.un.org/Docs/sc/committees/1373/ctc_da/matrix.html).

<sup>55</sup> UN Press Release, SC/8221, October 19, 2004.

missions, and needed greater coordination and cooperation with regional, subregional and international organizations.<sup>56</sup> The Counter-Terrorism Committee then submitted a proposal for changes to the CTC's structure.<sup>57</sup>

In March 2004, the Security Council endorsed the CTC's reform proposals and unanimously adopted a "reform plan" in Resolution 1535.<sup>58</sup> It is described as "revitalizing" the CTC to strengthen its ability to help states implement their obligations under Resolution 1373.<sup>59</sup> The Committee was restructured to contain an Executive Directorate (hereinafter "CTED"), meaning that the Committee now has a full-time staff of professionals working on its agenda. It was declared operational in December 2005.<sup>60</sup> The CTED is committed to facilitating state assistance and developing a set of best practices for state implementation of counter terrorism efforts. The CTC has also adopted guidelines and procedures for conducting visits to member states, so as to better monitor implementation of Resolution 1373 and to identify more effectively the technical assistance needs of states.<sup>61</sup> The absence of such procedures had been considered a major impediment to the effectiveness of the Committee.

### (3) Assessing the CTC

Even with its revitalization, there are limits as to what the CTC may accomplish. It is a reporting body, not a sanctions body. It is aimed at long-term and cooperative efforts, not challenging states' violations. It is therefore better suited to address states that are willing but unable to improve their national capabilities to fight terrorism than those states that are unwilling to fight terrorism. The CTC may report issues of non-compliance to the Security Council, which must then decide what tools it should bring to bear against states that fail to properly implement the terms of Resolution 1373.

The fact that Resolution 1373 does not include a definition of terrorism had left some ambiguities as to what acts states' legislation must cover. Resolution 1566 clarified this ambiguity with the inclusion of a definition of terrorist acts that states must take measures to prevent and prosecute.

The fundamental limitation of the CTC is that it depends on the political will of its member states. States must be willing to maintain their commitments and use these tools to prevent terrorist acts and apprehend suspected terrorists. Despite its limitations, the CTC nevertheless has an important role to play in strengthening states' capacities to combat terrorism. The exchange of information between state governments and the CTC has generated an unprecedented amount of data on counter-terrorism capacities and practices. The Committee is best-positioned to coordinate the delivery of technical assistance by international and regional organizations and donor states to those requesting it. As the demand for assistance continues to increase, the CTC's function in this regard will become increasingly important.<sup>62</sup> The Committee is also best-positioned to improve coordination and cooperation among the many international and regional

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<sup>56</sup> UN Doc. S/2004/70. Report by the Chair of the Counter Terrorism Committee on the problems encountered in the implementation of Security Council Resolution 1373 (2001).

<sup>57</sup> UN Doc S/2004/124. Proposal for the Revitalization of the Counter-Terrorism Committee.

<sup>58</sup> S.C. Res. 1535, U.N. SCOR, 58<sup>th</sup> Sess., 4936<sup>th</sup> mtg., U.N. Doc. S/Res/1535 (2004).

<sup>59</sup> See UN Press Release SC/8041.

<sup>60</sup> See UN Security Council Presidential Statement, U.N. Doc. S/PRST/2005/64 (2005).

<sup>61</sup> See <http://www.un.org/Docs/sc/committees/1373/procedures.doc> and <http://www.un.org/Docs/sc/committees/1373/guidelines.doc>.

<sup>62</sup> David Cortright et. al., *An Action Agenda for Enhancing the United Nations Program on Counter-Terrorism*, at 12 (2004), available at [http://www.ctproject.info/html/report\\_1.html](http://www.ctproject.info/html/report_1.html).

bodies concerned with counter-terrorism. Improving performance in these areas will allow the CTC to fulfill its mandate more effectively.<sup>63</sup>

Another important challenge for the United Nations is ensuring that states respect human rights in preventing and suppressing terrorism. The question of how to strike the right balance between protection of human rights and anti-terrorism efforts of terrorism is beyond the scope of this report. It is noteworthy, however, that the actions taken at the UN immediately after 9/11 did not affirm human rights norms in the context of combating terrorism while more recent UN-initiatives to counter terrorism now incorporate human rights language.

Resolution 1373, for example, was criticized for failing to refer to states' duties to respect human rights in the fight against terrorism and the lack of a mandate for the CTC to consider human rights implications of counter terror efforts.<sup>64</sup> The Security Council subsequently began to incorporate normative expressions that human rights be respected in the context of combating terrorism. Security Council Resolutions 1456, 1535 and 1624 require states to "ensure that any measures to combat terrorism comply with all their obligations under international law, and [to] adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law." The World Summit Outcome included a similar statement.<sup>65</sup> The Counter-terrorism Executive Directorate also now includes a human rights expert.

### **III. International Tribunals to Prosecute Terrorist Acts**

Many of the terrorism-related treaties described above are aimed at strengthening states' legal systems to improve their ability to bring terrorists to justice in a national legal system. But there may be incidents where a compelling interest exists for the prosecution of terrorists in an international forum, for example, when a large-scale terrorist attack directly affects a number of states or implicates citizens from a number of countries. For those crimes, there are several possible international tribunals where prosecutions could take place.

#### **(A) The International Criminal Court**

On July 1, 2002, the International Criminal Court (ICC) came into existence.<sup>66</sup> It was created by a treaty, the Rome Statute of the International Criminal Court, that has been ratified by over 100 states,<sup>67</sup> and is the world's first permanent court empowered to prosecute individuals. The ICC is

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<sup>63</sup> *Id.* at 14-21.

<sup>64</sup> See written statement submitted by Amnesty International, Economic and Social Council, Commission on Human Rights, 59<sup>th</sup> Sess., Provisional Agenda Item 11, UN Doc. E/CN.4/2003/NGO/183 *available at* [http://www.unhcr.ch/Huridocda/Huridoca.nsf/e06a5300f90fa0238025668700518ca4/846e64533954171ec1256d03005ac56f/\\$FILE/G0311872.pdf](http://www.unhcr.ch/Huridocda/Huridoca.nsf/e06a5300f90fa0238025668700518ca4/846e64533954171ec1256d03005ac56f/$FILE/G0311872.pdf); *See also* Sergio Vieira de Mello, The High Commission for Human Rights, Address before the Counter-Terrorism Committee of the Security Council (Oct. 21, 2002) *available at* <http://www.un.org/Docs/sc/committees/1373/HC.htm>. For analysis of the controversial Security Council practice pursuant to Resolution 1267 and later resolutions of naming individual "terrorists" whose financial assets are frozen absent a quasi-judicial procedure for affected persons to challenge the action, *see* Jose E. Alvarez, *The Security Council's War on Terrorism: Problems and Policy Options*, in Erica De Wet and André Nollkaemper, eds., *Review of the Security Council by Member States* 119-145 (2003).

<sup>65</sup> World Summit Outcome, *supra* note 34, at ¶ 85.

<sup>66</sup> Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 999 (entered into force July 1, 2002).

<sup>67</sup> Ratification status as of December 2004. The ratification status may be found on the website of the Coalition for the International Criminal Court at <http://www.iccnw.org>.

distinct from the International Court of Justice, the principal judicial organ of the UN, which handles disputes among *states*. The ICC has jurisdiction over crimes against humanity, war crimes and genocide, as well as aggression if and when agreement is reached upon its definition.<sup>68</sup> As a precondition for jurisdiction, crimes must be a) committed on the territory of a state party (or a state that has provided consent to the court's jurisdiction); b) committed by a citizen of a state party (or a state that has provided consent to the court's jurisdiction); or c) referred to the ICC by the UN Security Council. The ICC provides complementary jurisdiction to national courts. That is, the court will act only in cases where the relevant state is either unwilling or unable to exercise jurisdiction.

Acts of terrorism are not crimes *per se* under the ICC statute,<sup>69</sup> but large-scale terrorist attacks of the type and magnitude that occurred on September 11, 2001 would likely fall within the definition of crimes against humanity, which are covered under the ICC statute.<sup>70</sup> The possibility of the ICC trying terrorist acts has been confirmed by the ICC's chief prosecutor Luis Moreno Ocampo. Mr. Ocampo noted that the court's jurisdiction would cover acts on the scale of the 9/11 attacks, provided that the acts satisfy the preconditions for the ICC's jurisdiction (stated above).<sup>71</sup> The 9/11 attacks themselves may not be brought before the ICC because they took place before the ICC statute came into effect on July 2, 2002.

Currently, the United States is actively opposed to the ICC and does not endorse the use of the ICC to prosecute terrorists. The primary objection to the ICC is the fear that it will be used for politically-motivated prosecutions against American soldiers or politicians.<sup>72</sup> Proponents of the court deny that this is a credible risk, arguing that there are sufficient safeguards in place to prevent politically motivated prosecutions.<sup>73</sup>

President Clinton signed the Rome Statute, but simultaneously noted that he did not intend to seek its ratification.<sup>74</sup> In May 2002, the Bush administration revoked the U.S. signature of the

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<sup>68</sup> The ICC will also have jurisdiction over the crime of aggression, once the state parties agree to a definition of the crime.

<sup>69</sup> In the early stages of drafting the ICC statute, the drafters considered including the crime of terrorism. Its inclusion was ultimately rejected, due to political difficulties, including reaching an agreement on a definition. See, e.g., *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Done at Rome on 17 July 1998*, U.N. Doc. A/CONF.183/10, Annex I, Resolution E; see David Scheffer, *Staying the Course with the International Criminal Court*, 35 Cornell Int. L. J. 47, n. 7 (2001-2002).

<sup>70</sup> See Article 7 of the Rome Statute for the ICC's definition of crimes against humanity. For support of the argument that terrorist acts may constitute crimes against humanity, see Richard J. Goldstone & Janine Simpson, *Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism*, 16 Harv. Hum. Rts. J. 13, 15 (2003); see also Scheffer, *supra* note 69.

<sup>71</sup> James Podgers, *An Unused Weapon: International Criminal Court Could Play Role in War Against Terrorism, Says New Chief Prosecutor*, ABA Journal eReport, September 19, 2003, available at <http://www.abajournal.com/ereport.html>.

<sup>72</sup> See, e.g., Marc Grossman, U.S. State Department Under Secretary for Political Affairs, Remarks to Center for Strategic and International Studies (May 6, 2002), available at <http://www.amicc.org/docs/Grossman.pdf>.

<sup>73</sup> See, e.g., Allison Marston Danner, *Navigating Law and Politics: The Prosecutor of the International Criminal Court and the Independent Counsel*, 55 Stan. L. Rev. 1633, 1646-47, 1655 (2003); Remigius Chibueze, *United States Objection to the International Criminal Court: A Paradox of "Operation Enduring Freedom"*, 9 Ann. Surv. Int'l & Comp. L. 19, 36-46 (2003).

<sup>74</sup> William J. Clinton, *Remarks on the Signature of the ICC Treaty* (December 21, 2000). For an analysis of U.S. concerns since the beginning of ICC negotiations, see Pam Spees, *The Rome Statute of the*

Rome Statute.<sup>75</sup> Meanwhile, Congress passed legislation to block U.S. cooperation with and support for the Court, known as the American Servicemembers Protection Act (the ASPA).<sup>76</sup> The ASPA also blocks military funding - in the form of International Military Education Training funds and Foreign Military Financing funds - to states that are parties to the ICC unless those states enter into agreements where they undertake not to send U.S. citizens to the ICC or if the President waives this requirement based on national security.<sup>77</sup> In 2004, Congress added restrictions on economic assistance—in the form of Economic Support Funds - to the ASPA's restrictions on military funding in legislation known as the Nethercutt Amendment.<sup>78</sup>

Despite the U.S. government's general opposition to the ICC, Congress did recognize that the ICC could contribute to bringing terrorists and other international criminals to justice. Thus, the ASPA includes a clause (the Dodd Amendment) that states: "Nothing in this title shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosovic, Osama bin Laden, other members of Al Qaeda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity."<sup>79</sup> This amendment recognizes that the ICC may play a role in prosecuting terrorists in the future, and the United States does not want to foreclose the possibility of involvement in such prosecutions. The sponsor of the amendment, Senator Chris Dodd, stated:

I cannot believe, I do not want to believe, that if we apprehend, through the international community, people I have just mentioned on [the amendment's] list, that under this bill we would be prohibited from assisting in the prosecution of Osama bin Laden, the Islamic Jihad, Saddam Hussein, and other members of the terrorist community in the world.<sup>80</sup>

David Scheffer, former U.S. Ambassador at Large for War Crimes Issues, observed that the possibility of using the ICC to prosecute terrorists is a powerful reason to consider supporting the court: "If only in its own self-interest, the United States will want to collaborate with its allies and friends around the world and explore the utility of the ICC as a potent judicial weapon in the war against terrorism."<sup>81</sup>

Notwithstanding its objections to the ICC, in March 2005 the U.S. abstained rather than vetoed a Security Council referral to the ICC Prosecutor to investigate atrocities in Darfur.<sup>82</sup> Adopted by a

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*International Criminal Court, in* RULE OF POWER OR RULE OF LAW: AN ASSESSMENT OF U.S. POLICES AND ACTIONS REGARDING SECURITY-RELATED TREATIES (Nicole Deller et al. eds., 2002).

<sup>75</sup> U.S. Department of State Press Statement, International Criminal Court: Letter to UN Secretary General Kofi Annan (May 6, 2002).

<sup>76</sup> 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States, Pub. L. No. 107-206, §§ 2001-2015, 116 Stat. 820 (2002) [hereinafter "ASPA"].

<sup>77</sup> ASPA § 2007. The ASPA also authorizes the president to use "all means necessary and appropriate" to bring about the release of U.S. and allied personnel from custody of the ICC. ASPA §§ 2008, 2013. Inferring that the language "all means necessary and appropriate" implies military operations, critics have dubbed the law "Hague Invasion Act" after the city in which defendants would be held for prosecution. Steven Mufson & Alan Sipress, *U.N. Funds in Crossfire Over Court; Exemption Sought for U.S. Troops*, WASH. POST, Aug. 16, 2001.

<sup>78</sup> Appropriations for foreign operations, export financing and related programs for the fiscal year ending September 30, 2006 and for other purposes, Pub. L. No. 109-102 § 574; Stat. 2172 (2004).

<sup>79</sup> ASPA § 2015.

<sup>80</sup> 148 Cong. Rec. S 5132 (daily ed. June 6, 2002).

<sup>81</sup> Scheffer, *supra* note 69, at 49-50.

<sup>82</sup> S.C. Res 1593, U.N. SCOR, 59<sup>th</sup> Sess. U.N. Doc. S/Res/1593 (2005).

vote of 11 in favor, none against, with 4 abstentions (Algeria, Brazil, China, United States), the resolution accommodated the United States by deciding that officials or personnel from a contributing State outside the Sudan which was not a party to the Rome Statute would be subject to the exclusive jurisdiction of that contributing State. The United States refrained from vetoing the resolution based on the need for the international community to work together in order to end the climate of impunity in the Sudan, and because the resolution provided protection from investigation or prosecution for United States nationals.

### **(B) *Ad Hoc International Tribunals***

Another international legal option that may be available to the United States for the prosecution of terrorists is the creation of an *ad hoc* tribunal established by the UN Security Council.

There is precedent for the establishment of Security Council-based *ad hoc* tribunals to prosecute crimes against humanity in the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda.<sup>83</sup> Both tribunals were created by the Security Council acting under its Chapter VII authority<sup>84</sup> to prosecute persons responsible for serious violations of international humanitarian law in the two territories. The Security Council could create a similar tribunal to address serious terrorist acts.<sup>85</sup> Unlike the ICC, an *ad hoc* tribunal would have the ability to prosecute crimes that took place prior to July 1, 2002, the date that the jurisdiction of the ICC took effect. Also, it would likely have more political appeal to the United States than the ICC because such a court would have a limited mandate (tied to a certain act or series of acts) and would be overseen by the Security Council, a body in which the U.S. wields veto power. Such a court would therefore not risk the prosecution of US military personnel or government officials.

Some international law and human rights advocates have supported the use of international tribunals for the prosecution of suspected terrorists apprehended by the United States during the invasion of Afghanistan who are being held in Guantanamo Bay.<sup>86</sup> However, the use of international courts has been rejected by the Bush administration, which instead proceeded with trials in domestic courts and military commissions established by President Bush after 9/11 to try suspected terrorists.<sup>87</sup>

The post-9/11 policies of detaining and trying terrorists have been substantially eroded through challenges in the U.S. courts. The detention of suspected terrorists held in U.S. custody, whether or not for trial by military tribunals, was limited by a pair of decisions handed down by the Supreme Court in June 2004. The Court held that detainees could invoke the writ of habeas corpus to challenge their detentions, meaning that their detentions are open to review in U.S.

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<sup>83</sup> Statute for the International Tribunal for the Former Yugoslavia, S. C. Res. 827, U.N. SCOR, 48th Sess. 3217th mtg., U.N. Doc. 5/Res/827 (1993); Statute for the International Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/Res/955 (1994).

<sup>84</sup> Chapter VII of the UN Charter confers on the Security Council the right to determine the existence of any threat to peace, breach of peace, or act of aggression and decide what measures shall be taken to maintain or restore international peace and security.

<sup>85</sup> See Anne Marie Slaughter, *Use courts, not combat, to get the bad guys*, INT'L HERALD TRIB., Nov. 20, 2003; Goldstone & Simpson, *supra* note 70 at 20-21.

<sup>86</sup> See, e.g., Anton L. Janik, Jr., *Prosecuting Al Qaeda: America's Human Rights Policy Interests Are Best Served By Trying Terrorists Under International Tribunals*, DENV. J. INT'L L. & POL'Y 498, 521-31 (2002).

<sup>87</sup> See e.g. U.S. v. Massaoui, No. 01-455-A, (E.D.Va). (federal criminal trial of suspected terrorist); see also Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg., (Dep't of Defense, November 13, 2001).

courts.<sup>88</sup> The Court stopped short of declaring a right of all detainees to a full criminal trial, instead holding that they are entitled to “a meaningful opportunity to contest the factual basis for [their] detention before a neutral decisionmaker,” in accordance with due process of law.<sup>89</sup>

Subsequently, the use of the military commissions established by the Bush Administration to try suspected terrorists was rejected by the Supreme Court in *Hamdan v. Rumsfeld*.<sup>90</sup> This case concerned a Guantanamo detainee, Salim Ahmed Hamdan, a Yemeni who was allegedly Osama bin Laden's driver in Afghanistan. The Supreme Court ruled that the tribunals did not meet the requirements of the Geneva Conventions and the U.S. Uniform Code of Military Justice for failing to confer certain protections to the accused, including the right to be present, equivalent to those provided by courts martial for U.S. military personnel.<sup>91</sup> The Armed Services Committees of the Senate and the House of Representatives held hearings in July 2006 to consider amendments to the Uniform Code of Military Justice in order to permit military commissions to proceed.<sup>92</sup> It is not known what legislation, if any, will emerge

The decision to use military tribunals had been harshly criticized by human rights activists and many international legal experts. The president of the American Society of International Law at the time of the announcement, Anne-Marie Slaughter, defended the use of international tribunals for these detainees: “The difference between military commissions and an international tribunal is the sanction and legitimacy of the global community. An international tribunal would demonstrate the depth of international solidarity against terrorism.”<sup>93</sup> On the other hand, Ruth Wedgwood, international law professor and advisor to the Department of Defense on military tribunals, observed that preference for military tribunals over international *ad hoc* tribunals is partly because the *ad hoc* tribunals do not have the ability to handle a volume of cases and will not offer sufficient protection for sensitive intelligence information.<sup>94</sup> Others have suggested expanding the mandate of existing *ad hoc* tribunals to allow for the prosecution of terrorists.<sup>95</sup>

It is clear even in this brief review of US policy that the United States has not embraced the use of international tribunals to prosecute terrorists. Indeed, this is one of the most controversial uses of international legal mechanisms for American policy makers. Even with the rejection of the US military tribunals, the possibility of international tribunals does not appear to be an option in the near term. Nevertheless, employing international tribunals to dispense international justice is no longer only an ideal, and prosecution of past and future terrorist acts in a variety of international legal forums is a real option.

#### **IV. Multilateral Instruments Addressing Weapons of Mass Destruction**

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<sup>88</sup> *Rasul v. Bush*, 124 S. Ct. 2686 (2004).

<sup>89</sup> *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004).

<sup>90</sup> *Hamdan v. Rumsfeld*, 165 L.Ed.2d 723 (2006).

<sup>91</sup> *Id.* Recent legislation stripped the judiciary of jurisdiction to hear cases regarding Guantanamo detainees except for specific limited appellate jurisdiction and jurisdiction, but the *Hamdan* case referenced above held that such legislation did not apply to cases pending at enactment. See Detainee Treatment Act of 2005, as included in the Department of Defense Appropriations Act, 2006, Public Law No: 109-148 (2005).

<sup>92</sup> See Neil A. Lewis, *Military Lawyers Prepare to Speak on Guantanamo*, N.Y. TIMES, July 11, 2006; Kate Zernike et al., *Administration Prods Congress to Curb the Rights of Detainees*, N.Y. TIMES, July 13, 2006

<sup>93</sup> Anne Marie Slaughter, *Al Qaeda Should Be Tried Before the World*, N.Y. Times, Nov. 17, 2001.

<sup>94</sup> Ruth Wedgwood, *Al Qaeda, Military Commissions and American Self-Defense*, 117 POL. SCI. Q. 357, 369-73 (2002).

<sup>95</sup> See Paul R. Williams & Michael P. Scharf, *Prosecute Terrorists on a World Stage*, L.A. TIMES, Nov. 18, 2001.

The December 2002 United States *National Strategy to Combat Weapons of Mass Destruction* reflects how closely this administration links proliferation of WMD with the threat of terrorism: “[T]errorist groups are seeking to acquire WMD with the stated purpose of killing large numbers of our people and those of our friends and allies—without compunction and without warning.” The report goes on to name a number of international regimes that are intended to control access to and prevent use of WMD. The White House expressed the goals of strengthening and ensuring compliance with these instruments, creating new regimes to serve these goals and “cultivat[ing] an international environment that is more conducive to nonproliferation.”<sup>96</sup> Nonproliferation can be achieved by enhancing measures “that seek to dissuade or impede proliferant states and terrorist networks, as well as to slow and make more costly their access to sensitive technologies, material and expertise.”

Describing the successes of treaties and export control regimes, the Director of the State Department’s Office of Chemical, Biological, and Missile Nonproliferation said:

These efforts have impeded progress in missile and [chemical and biological weapons] programs of concern -- among other things causing delays, forcing the use of elaborate and time-consuming procurement networks, and compelling reliance on older and sometimes less effective technology. They have established a global political and legal barrier against the spread of WMD and led to unprecedented international inspections of nuclear and chemical weapons programs. Each has recorded a number of successes and each faces unique challenges.<sup>97</sup>

The relevant instruments described below range from multilateral treaties to less formal cooperative export control groups and codes of conduct.

**(A) WMD Treaties**

The primary purpose of these instruments is to address state actions. However, they also contain provisions that are useful in improving states’ abilities to block terrorists’ access to WMD and their precursors.

**(1) 1968 Nuclear Nonproliferation Treaty<sup>98</sup>**

Nuclear weapons and facilities pose several distinct risks in connection with terrorism. There is a risk that a state engaged in developing or acquiring nuclear weapons or materials will sell or transfer them to terrorists. There is a risk that terrorists will steal a nuclear weapon. Another risk is terrorist diversion of nuclear materials from a nuclear facility or during transit to manufacture a radiological weapon (a dirty bomb), which disperses radioactive material rather than creating a nuclear explosion. If sufficiently resourced and organized, there is a risk that terrorists will obtain fissile materials and then build a nuclear explosive device. There is also a risk that the nuclear facilities themselves will be attacked and disperse radioactive material.

The Nuclear Nonproliferation Treaty (NPT) and its monitoring agency, the International Atomic Energy Agency (IAEA), address these threats in a variety of ways. With respect to states

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<sup>96</sup> The White House, NATIONAL STRATEGY TO COMBAT WEAPONS OF MASS DESTRUCTION 4 (Dec. 2002).

<sup>97</sup> *Strengthening Multilateral Nonproliferation Regimes: Hearing before the Subcomm. on International Security, Proliferation and Federal Services of the Senate Comm. on Government Affairs*, 107<sup>th</sup> Cong. (2002) (statement of Vann H. Van Diepen, Deputy Assistant Secretary of State).

<sup>98</sup> Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 UST 483, 729 UNTS 161.

transferring weapons to terrorists, the NPT prohibits nuclear weapon states (China, France, Russia, the United Kingdom and the United States) from transferring to any recipient whatsoever nuclear weapons or nuclear explosive devices or control over such weapons. The non-nuclear weapon states agree not to develop nuclear weapons or accept their transfer. All states are entitled to use nuclear energy for peaceful purposes. All but four states take part in this regime.<sup>99</sup>

In order to ensure that NPT non-nuclear weapon states are not diverting nuclear energy programs for use in weapons, they are required to accept comprehensive safeguard agreements relating to their peaceful nuclear activities with oversight from the IAEA. Pursuant to these safeguards, the IAEA conducts inspections that, among other things, verify records and inventories.

#### (a) IAEA Measures to Combat Terrorism

After 9/11, the IAEA added initiatives and expanded existing programs to better guard against terrorism, many of which are set forth in its “Action Plan on Combating Nuclear Terrorism,” published in March 2002.<sup>100</sup> The focus areas of the action plan are prevention, detection and response.

The IAEA issues recommendations to help states improve the physical protection of their nuclear materials and facilities.<sup>101</sup> It also monitors and works to combat the illicit trafficking in nuclear material. It maintains a database on illicit trafficking and offers training to member states’ customs and police officials. Since 1993, the IAEA database has recorded “approximately 630 confirmed incidents of trafficking in nuclear or other radioactive material.”<sup>102</sup> Training is also offered to strengthen states’ systems for accountancy and control of nuclear materials. Finally, the IAEA also promotes the development of national legislation and adherence to related international agreements and guidelines.<sup>103</sup>

Although the IAEA continues to evolve in the face of heightened fears of nuclear terrorism, its mandate is limited. The recommendations regarding protection of nuclear materials and facilities are only recommendations; unlike the safeguard agreements, they are not binding obligations. Under the existing system, the ultimate responsibility for intra-state security of nuclear materials is not in the hands of the IAEA but with states themselves. As with the CTC, the success of these initiatives depends on the capabilities and the will of states.

#### (b) Nuclear Fuel Cycle Technology

Non-nuclear weapon states regard the acquisition of technology to produce plutonium and enriched uranium to power nuclear reactors as their right under the NPT, should they choose to exercise it. However, the same technology can also produce materials for weapons. In the wake of revelations about the Pakistan-based nuclear proliferation network led by nuclear metallurgist

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<sup>99</sup> India, Pakistan and Israel, never subscribed to this regime. A fourth state, North Korea, announced the withdrawal of its membership in January 2003.

<sup>100</sup> The Action Plan is described in *Excerpts from the Introductory Statement by IAEA Director General Dr. Mohamed ElBaradei to the IAEA Board of Governors*, March 18, 2002, available at <http://www.iaea.org/worldatom/Press/Statements/2002/ebsp2002n001.shtml>.

<sup>101</sup> See, e.g., *The Physical Protection of Nuclear Material and Nuclear Facilities*, IAEA Doc. INF/CIRC/225/Rev. 4 (Corrected) [undated], available at [http://www.iaea.org/worldatom/Programmes/Protection/inf225rev4/rev4\\_content.html](http://www.iaea.org/worldatom/Programmes/Protection/inf225rev4/rev4_content.html).

<sup>102</sup> Statement by IAEA Director-General Dr. Mohamed ElBaradei, *Nuclear Proliferation and the Potential Threat of Nuclear Terrorism* (Nov. 8, 2004).

<sup>103</sup> These initiatives are described in *Nuclear Security – Progress on Measures to Protect Against Nuclear Terror: Report by the Director-General*, IAEA Doc. GOV/INF/2002/11-GC/(46)/14, Attachment 1 at 2-3 (August 12, 2002), available at [http://www.iaea.org/worldatom/Press/News/PDF/action\\_plan.pdf](http://www.iaea.org/worldatom/Press/News/PDF/action_plan.pdf).

A.Q. Khan, the North Korean denial of IAEA monitoring of its fissile materials production capabilities, and concerns that Iran may be seeking a nuclear weapons capability, proposals have emerged to control the spread of uranium enrichment and plutonium reprocessing technology. One of the drivers for this trend is the desire to limit access of terrorists to the materials. About a dozen countries, including those possessing nuclear arms, now have such technology.

One proposed course of action is for exporting countries to deny the technology to additional states, as called for by President Bush. The G-8 responded to President Bush's call by declaring a moratorium on supply to non-possessing states, but the far larger Nuclear Suppliers Group has yet to take any action. A second course is indicated by IAEA Director-General Mohamed ElBaradei's call for "working towards multilateral control over the sensitive parts of the nuclear fuel cycle - enrichment, reprocessing, and the management and disposal of spent fuel."<sup>104</sup> While this proposed approach has received favorable comment from states and others, its implementation does not seem imminent.

### (c) The Role of Disarmament

The NPT goes beyond establishing a monitored nonproliferation regime; it also includes a commitment to disarmament made by the nuclear weapon states. Article VI states: "Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control." Although that language intentionally left the nuclear weapon states' commitment vague and indefinite, in recent years, states parties have clarified what the obligation entails, and the nuclear weapons states have agreed to arms control/disarmament measures.<sup>105</sup> Nuclear weapons states most recently made such commitments in the Final Declaration of the NPT 2000 Review Conference.<sup>106</sup> They include the entry into force of the Comprehensive Test Ban Treaty, negotiating a treaty to ban production of fissile material for nuclear weapons, and making the reduction and elimination of nuclear arsenals irreversible and verified.

If these steps are taken by all nuclear weapon states, they will also help to reduce and secure nuclear materials and explosives that would be available for acquisition or diversion by terrorists. In recent years, though, the nuclear weapons states, and particularly the United States, have backpedaled on the 2000 commitments. The May 2005 NPT Review Conference failed to reach any agreement, in large part due to deep division over the current status of the commitments.<sup>107</sup> The breakdown of the Review Conference was followed by the failure to agree on any measures or even language regarding non-proliferation and disarmament of nuclear and other weapons of mass destruction at the September 2005 World Summit.<sup>108</sup> One consequence has been an inability to advance action on widely agreed non-proliferation goals like enhancing the inspection powers of the IAEA, or to take on the difficult task of coming to agreement on proposals to control the spread of nuclear fuel cycle technology.

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<sup>104</sup> Mohamed ElBaradei, In Search of Security: Finding an Alternative to Nuclear Deterrence, Remarks at the Center for International Security and Cooperation, Stanford University (Nov. 4, 2004), available at <http://www.iaea.org/NewsCenter/Statements/2004/ebsp2004n012.html>.

<sup>105</sup> See John Burroughs & Elizabeth Shafer, *The Nuclear Nonproliferation Treaty*, in *RULE OF POWER OR RULE OF LAW?*, *supra* note 74 at 24-29.

<sup>106</sup> 2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, *Final Document*, May, 2000.

<sup>107</sup> See David E. Sanger, *Month of Talks Fails to Bolster Nuclear Treaty*, N. Y. Times, May 28, 2005.

<sup>108</sup> Jim Wurst, *Nonproliferation, Disarmament Matters Dropped from U.N. Summit Document*, GLOBAL SECURITY NEWSWIRE, September 14, 2005.

## (2) 1972 The Biological Weapons Convention<sup>109</sup>

Parties to this treaty (the “BWC”) are prohibited from developing, acquiring or retaining microbial or other biological agents or toxins in quantities that have no justification for prophylactic, protective or other peaceful purposes or means of delivery of these agents or toxins. States are prohibited from transferring the prohibited items to any recipient whatsoever, directly or indirectly, and may not assist or encourage “any State, group of States or international organizations” to manufacture or acquire these items. States must also enact laws to prohibit the development or possession of bioweapons and equipment in their territory.

This treaty contains the basic framework to address biological weapons, but it lacks the necessary measures to restrain states from acquiring or using bioweapons and to ensure that states are protecting against terrorist bioweapons activity in their jurisdictions. The BWC contains no mechanisms to monitor compliance. It does not require states to prosecute people who are found to be violating the treaty’s prohibitions.

Between 1994 and 2001, BWC parties worked to fill in some of the gaps in the BWC with the negotiation of a protocol, a legally binding regime of declarations and inspections. It also would have required states to adopt criminal laws to prosecute individuals engaged in bioweapon activity. In July 2001, however, the United States put an end to the creation of this or any additional legally binding mechanism. The United States explained that it rejected the protocol because it would be ineffective (largely because of the difficulty in detecting small quantities of biological agents) and would compromise national security and commercial proprietary information.<sup>110</sup> As a substitute for the protocol, states parties, led by U.S. proposals, are considering ways to strengthen the convention through non-legally binding measures. Proposals include adopting legislation to criminalize offenses, devising a procedure to clarify and resolve compliance concerns on a voluntary basis, drafting a code of conduct for scientists, strengthening national security measures for handling toxins, and enhancing international response capabilities.<sup>111</sup>

There are no current plans to add to the BWC the type of monitoring regime that exists for chemical and nuclear weapons. Many arms control experts have pointed to the need to resume efforts toward a binding multilateral arrangement. Although such a protocol would not be able to detect all cheaters, supporters argue that it would offer benefits of increased transparency, deterrence and provide international standards and oversight.<sup>112</sup>

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<sup>109</sup>Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, Art. 13(2), 26 UST 583, 1015 UNTS 163.

<sup>110</sup> Donald Mahley, *Statement by the United States to the Ad Hoc Group of Biological Weapons Convention States Parties*, July 25, 2001, available at <http://usinfo.state.gov/topical/pol/arms/stories/01072501.htm>. *But see* Donald Mahley’s Testimony before a House Subcommittee less than a year prior, wherein he stated that achieving a successful BWC Protocol would be “extraordinarily difficult, but that makes it a worthy challenge.” *The Biological Weapons Convention: Status and Implications: Hearing before the Subcomm. on National Security, Veterans Affairs, and International Relations of the Comm. on Government Reform*, 106<sup>th</sup> Cong. 14 (2003).

<sup>111</sup> The proposed measures are set forth in the Fifth Review Conference of the States Parties to the BWC, *Final Document*, 2002, available at [http://www.opbw.org/rev\\_cons/5rc/docs/final\\_dec/BWC-CONF.V-17-\(final\\_doc\).pdf](http://www.opbw.org/rev_cons/5rc/docs/final_dec/BWC-CONF.V-17-(final_doc).pdf). States parties had their most recent meeting to advance these proposals in December, 2004, available at [http://www.opbw.org/new\\_process/msp2004\\_conf.htm](http://www.opbw.org/new_process/msp2004_conf.htm).

<sup>112</sup> *See, e.g.,* Barbara Hatch Rosenberg, *Allergic Reaction: Washington’s Response to the BWC Protocol*, ARMS CONTROL TODAY, July/August 2001.

### (3) 1993 Chemical Weapons Convention<sup>113</sup>

States parties to the Chemical Weapons Convention (the "CWC") agree never to develop, acquire or use chemical weapons or transfer them to anyone, and those with stockpiles agree to destroy them. Each state party must declare the contents of its stockpiles and allow routine inspection of "dual-use" chemicals and facilities that could be used in a prohibited manner. The CWC prohibits the transfer of the most dangerous chemicals to non-member states.

The CWC creates a legal mechanism to help prevent chemical terrorism. The monitoring and accounting of chemicals and facilities help to deny terrorists' access and deter potential diversions. States are required to ensure the physical security of their chemical facilities. Also, with the requirement that states enact criminal laws prohibiting individuals within their jurisdiction from producing, transferring and using chemical weapons, states are better able to investigate and prosecute chemical weapons-related terrorist activities. The regime includes a mechanism for challenge inspections in the event that one state suspects that another state is violating its provisions. This mechanism would be useful in the event a member country had permitted someone in its jurisdiction to acquire chemical weapons.<sup>114</sup>

Implementation of these provisions is conducted with assistance from the Organization for the Prohibition of Chemical Weapons ("OPCW"). The OPCW's mission includes ensuring the destruction of member states' chemical weapons and the prevention of their re-emergence, providing protection and assistance against chemical weapons, encouraging international cooperation in the peaceful uses of chemistry and working for the universal ratification of the CWC.

In order to be most effective against terrorism, the CWC requires progress in a number of areas. It has not achieved universality, that is, many states are not yet members, and some states outside the CWC regime are suspected of developing weapons programs. There are concerns that some member states are attempting to develop chemical weapons. Challenge inspections have not yet been exercised. One reason, according to the United States, is that the OPCW is currently incapable of conducting the work required in a challenge inspection.<sup>115</sup> Expressing a commitment to strengthen the organization and improve its management, the United States led a successful movement to change OPCW's leadership in 2002.

### (4) Summary Regarding WMD Treaties

The NPT, BWC and CWC are not directly targeted at terrorists, but rather aim to address state behavior. They can make a significant contribution in regard to terrorism because they prohibit transfer of materials to terrorists and criminalize possession of WMD materials. The ability of these treaties to succeed in curbing terrorists' acquisition of weapons of mass destruction depends to a large extent on the willingness of states to adhere to their treaty commitments. Universal adoption of the treaties is needed. At this time, there are a number of significant states outside of these regimes.<sup>116</sup>

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<sup>113</sup> Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Jan 13, 1993, S. Treaty Doc. No. 103-21, 1974 U.N.T.S. 3.

<sup>114</sup> For more information on the CWC's contributions to preventing terrorism, see Organization for the Prohibition of Chemical Weapons, *Possible Responses to Global Terrorist Threats [undated]*, available at <http://www.opcw.org/resp/>.

<sup>115</sup> See, e.g., *Expounding Bush's Approach to U.S. Nuclear Security, An Interview with John R. Bolton*, ARMS CONTROL TODAY, March 2002.

<sup>116</sup> As stated above, four states are outside the NPT regime: India, Israel, North Korea and Pakistan. The list of states parties and signatories to the BWC and the CWC may be found at <http://www.icrc.org/ihl>.

The NPT and CWC, which include established declaration and inspection regimes, have the most potential for detecting illicit transfers to either terrorist groups or other states outside the treaty regime. The BWC, on the other hand, is in need of further strengthening to be an effective tool against transfers of bioweapons to terrorists.

**(B) Security Council Resolution on WMD and Non-State Actors**

In an address to the General Assembly in September 2003, President Bush stated:

Today, I ask the U.N. Security Council to adopt a new anti-proliferation resolution. This resolution should call on all members of the U.N. to criminalize the proliferation of weapons -- weapons of mass destruction, to enact strict export controls consistent with international standards, and to secure any and all sensitive materials within their own borders. The United States stands ready to help any nation draft these new laws, and to assist in their enforcement.<sup>117</sup>

Led by the United States, in April 2004, the Security Council adopted Resolution 1540, which seeks to prevent "non-state actor" acquisition of, or trafficking in, WMD weapons-related equipment, materials, and delivery systems.<sup>118</sup> The term "non-state actor" refers not only to terrorists, but also to unauthorized state officials and to businesses. The reasons for this scope are illustrated by the Pakistan-based nuclear proliferation network led by nuclear metallurgist A.Q. Khan. The Pakistani government maintains that it did not authorize Khan's activities, and businesses from several countries around the world contributed to the Khan network. Acting under Chapter VII of the Charter, the Security Council *required* every state in the world to prohibit non-state actor acquisition of and trafficking in WMD weapons and related items. It also mandated the adoption of appropriate measures - national criminal laws, export controls, border controls, law enforcement efforts, physical security and materials accounting techniques - to prevent such acquisition and trafficking.

In some ways the resolution added new obligations for states, for example regarding export controls and border controls. Also, previously there had been no explicit requirement under the NPT and the Biological Weapons Convention that acquisition of and trafficking in nuclear and biological weapons be made criminal by national legislation. In other ways the resolution reinforced existing obligations and also applied them to the relatively few countries not party to the NPT and the biological and chemical weapons conventions. There is a parallel between Resolution 1540 and the Resolution 1373, described above, in that both are aimed at revising states' legal systems to respond to terrorist activities, both impose mandatory requirements on all states, and both establish a committee made up of all members of the Security Council to implement the resolution.<sup>119</sup>

**(C) Export Controls**

Export control regimes are made up of groups of states that agree to restrict the sale of goods to certain countries or to ensure that safeguards or end-use guarantees are applied to the export and

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<sup>117</sup> George W. Bush, President of the United States, Address before the United States General Assembly (Sept. 23, 2003), *available at* <http://www.whitehouse.gov/news/releases/2003/09/20030923-4.html#>.

<sup>118</sup> S.C. Res. 1540, *supra* note 46.

<sup>119</sup> See Merav Datan, *Security Council Resolution 1540: WMD and Non-State Trafficking*, DISARMAMENT DIPLOMACY, April/May 2005.

sale of sensitive technologies and materials.<sup>120</sup> The United States regards these regimes as crucial to the fight to keep dangerous materials out of the hands of so-called rogue states and terrorists.

Although these arrangements cover many of the same materials that are regulated under the treaties listed above, the goals of these regimes differ from those of treaties. A treaty regulating a potentially dangerous material generally establishes a comprehensive ban on the maintenance or use of that material for hostile purposes and establishes an accounting or inspection regime for the peaceful use of these materials. In contrast, export control regimes are not legally binding at the international level; they involve a grouping of countries that do not restrict their own use of the subject material but voluntarily agree to limit, through legislation and regulation, transfers to foreign nationals, entities and states not meeting certain criteria (for example, acceptance of IAEA safeguards) or otherwise deemed untrustworthy. Export controls are often able to control a broader scope of dual-use materials, including software, lab equipment and other technology that not covered by the treaties.

The export control regimes described below have made efforts post 9-11 to strengthen their controls against terrorist acquisition of the subject materials.

### **(1) Australia Group**

One export control group that is specifically mentioned in the U.S. *National Strategy to Combat Weapons of Mass Destruction* is the Australia Group. The Australia Group is an “informal network of countries that consult on and harmonise their national export licensing measures on [chemical and biological weapon] items.”<sup>121</sup> The group is made up of thirty-three participants from Europe, North America, and Asia that apply licensing measures to the export of specified chemicals, biological agents, and dual-use chemical and biological manufacturing facilities and equipment. These export controls are aimed at both curbing proliferation and also “allow[ing] legitimate trade to prosper in an unfettered manner and promot[ing] peaceful economic development everywhere.”<sup>122</sup> Since 9/11, the Australia Group has revised its export restrictions to include items that would be useful to terrorists rather than states.<sup>123</sup>

### **(2) The Missile Technology Control Regime**

Formed in 1987, the MTCR restricts the export of delivery systems (and related technology) capable of carrying a 500-kilogram payload for a distance of at least 300 kilometers and systems capable of delivering weapons of mass destruction. Its group of thirty-three participants largely overlaps with the countries that make up the Australia Group.<sup>124</sup> The members agree to a set of guidelines for the export of a list of materials. Some transfers are prohibited; others are subject to the satisfaction of specific conditions or the provision of certain assurances. The director of the State Department’s Office of Chemical, Biological and Missile Nonproliferation described the value of this regime: “MTCR Partners’ vigorous enforcement of export controls consistent with the

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<sup>120</sup> Nuclear Threat Initiative, *Glossary of Terms*, available at [http://www.nti.org/b\\_aboutnti/b\\_index.html](http://www.nti.org/b_aboutnti/b_index.html).

<sup>121</sup> *The Australia Group: New Measures to Fight the Spread of Chemical and Biological Weapons*, Australia Group Press Release AG/Jun02/Press/7, June 7, 2002. Available at <http://projects.sipri.se/cbw/research/AG-press-Jun02.html>.

<sup>122</sup> Australian Department of Foreign Affairs & Trade, International Security Affairs Division, *The Australia Group*, available at [http://www.dfat.gov.au/security/downloads/australian\\_group.pdf](http://www.dfat.gov.au/security/downloads/australian_group.pdf). Includes a list of participants.

<sup>123</sup> See United States General Accounting Office, *Strategy Needed to Strengthen Multilateral Export Control Regimes*, Report to Congressional Committees, GAO-03-43, October 2002, available at <http://www.gao.gov/cgi-bin/getrpt?gao-03-43>.

<sup>124</sup> List of participants can be found at <http://www.state.gov/t/np/rls/prsrl/2002/14497.htm>.

MTCR Guidelines and Annex continues to make it more difficult for proliferators to get items for their missile programs, increasing the cost, time, and effort required.<sup>125</sup>

The MTCR is now placing more emphasis on combating the risk of missile components and components falling into the hands of terrorism. At the 2002 plenary meeting of the MTCR, the partner states agreed to study possible changes to better address this risk, and in 2003, announced some revisions to the guidelines, including a national “catchall requirement” that would “provide a legal basis to control the export of items that are not on a control list, when such items are destined for missile programs.”<sup>126</sup>

### (3) The Nuclear Suppliers Group

The Nuclear Suppliers Group (NSG) is made up of forty states that have the ability to supply items designed for nuclear use, that adhere to non-proliferation arrangements (such as the NPT), and that have national policies to implement export controls. The aim of the group is “to contribute to prevention of the proliferation of nuclear weapons through export controls of nuclear-related material, equipment, software and technology, without hindering international cooperation on peaceful uses of nuclear energy.”<sup>127</sup> The NSG was formed in 1974 in response to India’s nuclear weapon test, which had demonstrated that nuclear materials transferred for peaceful purposes could be used for a nuclear weapons program.

The group follows two sets of voluntary guidelines. The first set governs exports of items designed for nuclear use (including source materials such as plutonium and uranium and nuclear reactors and equipment).<sup>128</sup> This set is known as the “Trigger List” because the export of items on this list triggers application of IAEA safeguards to the recipient facility. The second set governs exports of nuclear-related dual-use equipment and materials and related technology.<sup>129</sup>

Regarding prevention of terrorism, the NSG acknowledges the importance of information sharing, closer cooperation of member states’ law enforcement agencies and support of the anti-terrorism work of the IAEA.<sup>130</sup> At the initiative of the United States, the NSG has revised its guidelines to better address the threat of nuclear terrorism.<sup>131</sup>

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<sup>125</sup> Van Diepen, *supra* note 97. The MTCR only addresses the supply side of missile technology. The United States has also lead the creation of a code of conduct aimed at the demand side, known as the International Code of Conduct against Ballistic Missile Proliferation (ICOC). It is a voluntary “political commitment” aimed at preventing states from developing and stockpiling missile technology. The text may be found at <http://projects.sipri.se/expcon/drafticoc.htm>. See also John Bolton, Remarks at the Launching Conference for the International Code of Conduct Against Ballistic Missile Proliferation, (Nov. 25, 2002), available at <http://www.state.gov/t/us/rm/15488.htm>. A critical review of the ICOC is found at [http://www.basicint.org/pubs/Notes/2002international\\_code.htm](http://www.basicint.org/pubs/Notes/2002international_code.htm),

<sup>126</sup> Plenary Meeting of the Missile Technology Control Regime, MTCR Press Release, September, 2003; MTCR Press Release, Plenary meeting of the Missile Technology Control Regime, MTCR Press Release, September 2002. Both documents are available at <http://www.mtcr.info>.

<sup>127</sup> Press Statement, Nuclear Suppliers Group Plenary Meeting, (May 16-17, 2002), available at <http://www.nsg-online.org/PRESS/2002-03-press-prague.pdf>.

<sup>128</sup> See *Communication Received from Certain Member States Regarding Guidelines for the Export of Nuclear Material, Equipment and Technology*, IAEA Doc. INFCIRC/254/Rev.5/Part 1 (May 2003), available at <http://www.nuclearsuppliersgroup.org/PDF/infirc254r6p1-030516.pdf>.

<sup>129</sup> See *Communication Received from Certain Member States Regarding Guidelines for the Transfers of Nuclear-Related Dual-Use Equipment, Material, Software and Related Technology*, IAEA Doc. INFCIRC/254/Rev.5/Part 2 (May 2003), available at <http://www.nuclearsuppliersgroup.org/PDF/infirc254r5p2-030516.pdf>.

<sup>130</sup> Press Statement, Nuclear Suppliers Group Plenary Meeting, (May 16-17, 2002).

<sup>131</sup> See INFCIRC/254/Rev.5/Part 1, *supra* note 128 and INFCIRC/254/Rev.5/Part 2, *supra* note 129.

#### (4) Wassenaar Arrangement

The Wassenaar Arrangement was formed in 1996 by thirty-three states, most of which are party to the other export control regimes.<sup>132</sup> It is designed to prevent destabilizing accumulations of arms and dual-use technologies by promoting transparency, information sharing and greater responsibility in transfers. Member states apply restrictions to a list of items to “ensure that transfers of arms and dual-use goods and technologies do not contribute to the development or enhancement of military capabilities that undermine international and regional security and stability and are not diverted to support such capabilities.”<sup>133</sup> The Wassenaar Arrangement is made up of states that are producers or exporters of arms or industrial equipment and that maintain non-proliferation policies and appropriate national laws.

With respect to terrorism, the Wassenaar Arrangement seeks to prevent the acquisition of conventional arms and dual-use goods and technologies for use by terrorists. To this end, it has developed new means for sharing information and for implementing concrete actions to strengthen export controls over these items. New initiatives to address terrorism include guidelines for the export small arms and light weapons, which the group believes are the preferred weapons of terrorists.<sup>134</sup>

#### (5) The Zangger Committee

Pursuant to NPT Article III.2, States Parties must subject safeguards to transfers to any non-nuclear weapon State of (a) source or special fissionable material, or (b) equipment or material especially designed or prepared for the processing, use or production of special fissionable material’ The 35-member Zangger Committee (ZC), also known as the Nuclear Non-Proliferation Treaty Exporters Committee, is responsible for “harmoniz[ing] implementation” of this provision of the NPT.<sup>135</sup> The ZC maintains a “Trigger List” of (a) source or special fissionable materials, and (b) equipment or materials especially designed or prepared for the processing, use, or production of special fissionable materials. Export of items on this list trigger a requirement for the application of IAEA safeguards to recipient non-nuclear weapon States.<sup>136</sup> The Trigger List covers items that could contribute to a nuclear explosive program, including plutonium, highly-enriched uranium, reactors, reprocessing and enrichment plants, and equipment and components for such facilities. ZC member states agree that Trigger List items may only be exported if they are 1) not used for nuclear explosives, 2) subject to IAEA safeguards in the recipient non-nuclear weapon state, and 3) not re-exported unless they are subject to safeguards in the new recipient state.

The relative informality of the ZC has enabled it to take the lead on certain nonproliferation issues that would be more difficult to resolve in the Nuclear Suppliers Group (NSG).<sup>137</sup> For

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<sup>132</sup> The list of participants may be found at <http://www.wassenaar.org/welcomepage.html>.

<sup>133</sup> The Wassenaar Arrangement, *Initial Elements*, (July 11-12, 1996), available at <http://www.wassenaar.org/docs/IE96.html>.

<sup>134</sup> The Wassenaar Arrangement, *Public Statement for 2002 Plenary*, (Dec. 12, 2002), available at <http://www.usun-vienna.usia.co.at/wassenaar/public02.html>.

<sup>135</sup> See U.S. Department of State, Bureau of Non-proliferation, Fact Sheet: Zangger Committee, (Sept. 10, 2003); includes a list of member states, available at <http://www.state.gov/t/np/rls/fs/3054.htm>.

<sup>136</sup> The Trigger List was first published in September 1974 as IAEA document INFCIRC/209 and has been amended several times since then. The most current form is in *Communication of 15 November 1999 Received from Member States Regarding the Export of Nuclear Material and of Certain Categories of Equipment and Other Material*, IAEA Doc. INFCIRC 209/Rev. 2 (March 2000).

<sup>137</sup> See U.S. Department of State, Bureau of Non-proliferation, Fact Sheet: Zangger Committee, (Sept. 10, 2003), available at <http://www.state.gov/t/np/rls/fs/3054.htm>.

example, the Committee recently agreed to add plutonium separation technology to the Trigger List. However, the ZC is also less stringent than the NSG, which requires its members to agree to full scope safeguards.

#### **(6) Assessing the Export Control Regimes**

Export controls offer states the ability to proceed with commerce relating to sensitive materials while also protecting them from diversion or misuse. They target proliferation by limiting and regulating the supply of materials that would be available for terrorists or “rogue states.”

However, there are several limitations to these regimes as instruments of non-proliferation. They establish a two-tier system of countries that may have and countries that are restricted from having; they only consist of voluntary, political commitments; and it is for each country through its own national legislation and regulations to interpret and implement the guidelines. Because of their voluntary nature, the regimes have no explicit mechanisms to enforce compliance with nonproliferation commitments. No inspection or monitoring systems are in place for member countries. Other concerns, as noted by a report by the United States General Accounting Office, include the rapid pace of technology that requires control lists to be constantly updated and also “secondary proliferation,” which is the growing capability of nonmember countries to develop their own sensitive materials, and then sell them outside the regime.<sup>138</sup> Modifying the control lists is a slow task because the regimes operate by consensus, allowing each country a veto.

Export control regimes are an important contribution but in themselves are not sufficient to end proliferation. Ending proliferation requires action on many fronts, including, as noted in *Arms Control Today*, “arms control agreements, multilateral sanctions and incentives, and counterproliferation, all of which are aimed at offering viable alternatives to merely coping with the effects of proliferation.”<sup>139</sup>

#### **(D) Other Multilateral Nonproliferation Initiatives**

##### **(1) Cooperative Nonproliferation Agreements between the United States and Former Soviet States**

The Cooperative Threat Reduction Program, also referred to as the “Nunn-Lugar Program” after the Senators who sponsored its founding legislation, was developed in the early 1990s to assist former Soviet states in safeguarding and destroying large stockpiles of weapons of mass destruction and related infrastructure. The logic behind the program is that these states do not have the money to properly dispose of these materials, or safeguard them from theft or diversion by other states or terrorists. The intelligence that contributed to the creation of these weapons is similarly in need of safeguarding.

Programs have included deactivating warheads, assisting countries with the removal of their nuclear weapons by providing funds and technical expertise, safeguarding chemical stockpiles and biological weapons laboratories and employing former scientists of the Soviet Union so they will not be tempted to sell sensitive information.<sup>140</sup> Total funding is about one billion dollars.<sup>141</sup>

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<sup>138</sup> See United States General Accounting Office, *Nonproliferation: Strategy Needed to Strengthen Multilateral Export Control Regimes*, (Oct. 2002), available at <http://www.gao.gov/new.items/d0343.pdf>.

<sup>139</sup> Michael Beck & Seema Gahlaut, *Creating a New Multilateral Export Control Regime*, ARMS CONTROL TODAY, April 2003.

<sup>140</sup> Richard Lugar, *The Next Steps in U.S. Nonproliferation Policy*, Arms Control Today, December 2002.

<sup>141</sup> Claire Applegarth, *Modest Hike in Threat Reduction Budget*, Arms Control Today, March 2005.

In December 2003, President Bush signed the Nunn-Lugar Program Expansion act, which allows \$50 million of Nunn-Lugar funding to be used for countries outside the former Soviet Union. Albania is the first country to receive a pledge of assistance under the expanded Nunn-Lugar Program, which will be used to destroy its chemical weapons stockpile.<sup>142</sup>

The 9/11 Commission has emphasized the importance of the program. Its report stated that “al Qaeda has tried to acquire or make weapons of mass destruction for at least ten years. There is no doubt the United States would be a prime target. Preventing the proliferation of these weapons warrants a maximum effort—by strengthening counterproliferation efforts, expanding the Proliferation Security Initiative, and supporting the Cooperative Threat Reduction program.”<sup>143</sup> In a November 2005 report on the status of its recommendations, the Commission assessed progress under the program, stating that it

has significant accomplishments over the past 14 years in dismantling former Soviet weaponry (40% of ICBMs, 51% of warheads, 64% of strategic bombers and 58% of missile silos), but much remains to be done to secure weapons-grade nuclear materials. The size of the problem still dwarfs the policy response. Approximately half of former Soviet nuclear materials still lack adequate security protection.<sup>144</sup>

The Commission added generally that “[p]reventing terrorists from gaining access to weapons of mass destruction must be elevated above all other problems of national security” and that the president “should develop a comprehensive plan to dramatically accelerate the timetable for securing all nuclear weapons material around the world.”<sup>145</sup>

## (2) G-8 Initiatives

In June 2002, the G-8 member states agreed to participate in a “Global Partnership Against the Spread of Weapons and Materials of Mass Destruction.” Pursuant to this partnership, the United States agreed to spend \$10 billion toward dismantlement efforts over ten years, and the other G-8 nations agreed to collectively spend an additional \$10 billion. The Global Partnership is intended to enhance programs in Russia and other former Soviet states, including the following:

- Reducing strategic missiles, bombers, silos and submarines;
- Ending weapons-grade plutonium production;
- Reducing excess weapons-grade plutonium;
- Upgrading storage and transport security for nuclear warheads;
- Upgrading storage security for fissile material;
- Reducing nuclear weapons infrastructure;
- Destroying chemical weapons;
- Eliminating chemical weapons production capability;
- Securing biological pathogens;
- Providing peaceful employment for former weapons scientists;
- Enhancing export controls and border security; and

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<sup>142</sup> Michael Nguyen, *Albania to Receive Nunn-Lugar Assistance*, Arms Control Today, December 2004.

<sup>143</sup> The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States 381 (U.S. Government Printing Office, 2004).

<sup>144</sup> 9/11 Public Discourse Project: Report on the Status of 9/11 Commission Recommendations, Part III: Foreign Policy, Public Diplomacy, and Nonproliferation 3 (2005).

<sup>145</sup> *Id.*

- Improving safety of civil nuclear reactors.<sup>146</sup>

At the 2004 G-8 Summit, members of the global partnership recommitted to raising \$20 billion by 2012 and welcomed the expansion of the Global Partnership to include other donor governments.<sup>147</sup> The most recent progress review at the 2005 G-8 Summit noted “visible progress” with projects to address the priority areas of destruction of chemical weapons, dismantling submarines, disposition of fissile materials and employment of former weapons scientists. The review warned, however, that “more needs to be done to increase the momentum so that the current substantial pledges can be turned into completed projects by 2012, primarily in Russia.”<sup>148</sup>

### (3) Proliferation Security Initiative

According to the National Strategy to Combat Weapons of Mass Destruction, interdiction is a “critical part of the U.S. strategy to combat WMD and their delivery means.”<sup>149</sup> Consistent with this approach, in May 2003, President Bush unveiled a new initiative to develop “direct, practical measures to impede the trafficking in weapons of mass destruction, missiles and related items.”<sup>150</sup> This is known as the Proliferation Security Initiative (PSI). It is a global effort by states<sup>151</sup> “which, using their own laws and resources, will coordinate their actions to halt shipments of dangerous technologies to and from states and non-state actors of proliferation concern - at sea, in the air, and on land.”<sup>152</sup> The initiative does not specify any one state as its target, although it has generally been characterized as directed at North Korea and possibly Iran.<sup>153</sup> It is also intended to prevent the spread of WMD to terrorists.<sup>154</sup>

In its first stages, PSI participants agreed to share information on suspected proliferation and trafficking, and to conduct joint interdiction training exercises. At a PSI meeting on September 4,

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<sup>146</sup> The White House, Office of the Press Secretary, *Fact Sheet: G-8 Summit – Preventing the Proliferation of Weapons of Mass Destruction* (June 27, 2002), available at <http://www.whitehouse.gov/news/releases/2002/06/20020627-7.html>. See also James C. Kraska, *Averting Nuclear Terrorism: Building a Global Regime of Cooperative Threat Reduction*, 20 Am. U. Int’l L. Rev. 703, 744-56 (2005).

<sup>147</sup> G8 Action Plan on Nonproliferation (June, 2004).

<sup>148</sup> G8 Global Partnership Annual Report, G8 Senior Group (June 2005).

<sup>149</sup> NATIONAL STRATEGY TO COMBAT WEAPONS OF MASS DESTRUCTION, *supra* note 96.

<sup>150</sup> Paul O’Sullivan, *Chairman’s Statement: From the Proliferation Security Initiative (PSI) meeting in Brisbane* (July 9-10, 2003), available at [http://www.dfat.gov.au/globalissues/psi/chair\\_statement\\_0603.html](http://www.dfat.gov.au/globalissues/psi/chair_statement_0603.html).

<sup>151</sup> The PSI began with eleven countries as members, which has subsequently increased to fifteen: Australia, Britain, Canada, France, Germany, Italy, Japan, the Netherlands, Norway, Poland, Portugal, Russia, Singapore, Spain, and the United States. In addition, Turkey and Denmark sent representatives to the PSI’s December 2003 operational experts meeting. See Michael Byers, *Policing the High Seas: The Proliferation Security Initiative*, 98 Am. J. Int’l L. 526, 528 (July 2004).

<sup>152</sup> The White House, ‘Principles for the Proliferation Security Initiative’, *Statement by the Press Secretary* (Sept. 4, 2003). “States or non-state actors of proliferation concern” is defined in the Statement of Interdiction Principles as “those countries or entities that the PSI participants involved establish should be subject to interdiction activities because they are engaged in proliferation...” Proliferation Security Initiative, *Statement of Interdiction Principles* (Sept. 4, 2003).

<sup>153</sup> See, e.g., Barbara Slavin, *11 nations join plan to stop N. Korean ships; U.S. hopes to put squeeze on Kim*, USA TODAY, July 23, 2003; Wade Boese, *Countries Draft Guidelines for Intercepting Proliferation*, ARMS CONTROL TODAY, September 2003.

<sup>154</sup> President George W. Bush, Remarks by the President to the People of Poland (May 31, 2003).

2003, the participants agreed to a set of principles for taking actions in support of interdiction.<sup>155</sup> They are a set of political undertakings that the United States and other PSI participants will disseminate to governments with which they have diplomatic relations in hopes that they will gain widespread support.<sup>156</sup> Under the PSI principles, actions that a state agrees to take include the following: board and search ships flying their flag that are suspected of transporting the subject materials; “seriously consider” giving consent to other states boarding and searching ships flying their flag that are suspected of transporting the subject materials; stop and/or search vessels in their internal waters “that are reasonably suspected of carrying such cargoes to or from states or non-state actors of proliferation concern” and seize such cargoes; and require suspect aircraft that are transiting their airspace to land for inspections and to seize such cargoes.<sup>157</sup> Some sixty nations have agreed informally to cooperate with PSI members on an *ad hoc* basis to intercept “fogué” ships and aircraft in their territorial waters and airspace.<sup>158</sup>

The interdiction principles are limited to instances of interdiction by a state on a vessel flying its own flag, by a state with consent of the state whose flag it flies, or by a state in whose territory the suspect vessel is located.<sup>159</sup>

On June 1, 2005, Croatia became the fourth state following Liberia, Panama, and the Marshall Islands to sign a Proliferation Security Initiative Shipboarding Agreement with the United States. The shipboarding agreement signed by the United States and Croatia aims to facilitate cooperation between the two countries to prevent the maritime transfer of proliferation-related shipments by establishing points of contact and procedures to expedite requests to board and search suspect vessels in international waters. If a U.S.- or Croatian-flagged vessel is suspected of carrying proliferation-related cargo, either Party to this agreement can request the other to confirm the nationality of the ship in question and, if needed, to authorize the boarding, search, and possible detention of the vessel and its cargo.

In a September 2003 press briefing, the State Department explained that questions of permissibility would be answered on a case-by-case basis, and that “we do not intend to proceed with interdictions without a clear national or international authority.”<sup>160</sup> Yet the PSI raises a variety of legal issues relating to the law of the sea. It is a well-established principle of international law that states have jurisdiction over ships flying their flags. However, a state boarding a ship in its territorial waters that is flying another state’s flag (without consent of that state) raises issues relating to the right of innocent passage that is recognized as customary law and is codified in the United Nations Convention on the Law of the Sea (UNCLOS).<sup>161</sup> Innocent passage is defined as “not prejudicial to the peace, good order, or security of the coastal State.”<sup>162</sup> The list of acts that would be determined as prejudicial to peace, good order or security do not include transporting WMD materials. However, the list of acts prejudicial to the peace does include “any threat or use of force against the sovereignty, territorial integrity or political

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<sup>155</sup> *Statement of Interdiction Principles*, *supra* note 152.

<sup>156</sup> *State Department Background Briefing: The Proliferation Security Initiative*, FEDERAL NEWS SERVICE (Sept. 9, 2003).

<sup>157</sup> *Statement of Interdiction Principles*, *supra* note 152.

<sup>158</sup> Byers, *supra* note 151, at 529.

<sup>159</sup> Michael Evans, *US plans to seize suspects at will*, THE TIMES (LONDON), July 11, 2003.

<sup>160</sup> *State Department Background Briefing*, *supra* note 156.

<sup>161</sup> United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3 (entered into force Nov. 16, 1994) (The U.S. has signed but not ratified the treaty, and accepts its substantive provisions, other than those relating to deep sea bed mining, as binding statements of customary law; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. V, introductory note, at 5 (1986)).

<sup>162</sup> UNCLOS, *supra* note 161, Art. 19.

independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations.<sup>163</sup> The authority to board ships suspected of transporting WMD materials when consent is not given would likely fall under this latter provision.

Interdiction on the high seas also implicates the right to freedom of navigation on the high seas which is recognized as a basic right of all states. A few exceptions to the freedom of navigation exist in UNCLOS, but the search for WMD material is not included. Under customary law as codified in UNCLOS the United States has the authority to board a ship on the high seas when the ship does not display a state's flag (effectively making them pirate ships), or when the state under whose flag the ship sails gives permission to board the ship.<sup>164</sup> Since an important objective of the PSI is to halt WMD trafficking among "rogue" states (which would not give permission to board ships flying their flag), this may place the PSI's objectives in conflict with its members' legal obligations. Attempts have been made to justify the PSI's broader interdiction principles under a customary law rule of anticipatory self-defense; however, this route does not hold much promise as there is insufficient state practice to support the existence of such a rule. The United States may instead pursue the route of modifying current legal obligations by treaty. Treaty-based exceptions to the above rules on interdiction on the high seas have been created for cases of narcotics trafficking<sup>165</sup> and illegal fishing<sup>166</sup>; this may serve as a model for an additional exception based on trafficking of WMD material. Significantly, the United States concluded agreements in 2004 with Panama<sup>167</sup> and Liberia<sup>168</sup>, the two nations with the world's largest shipping registries. The agreements provide procedures for granting consent on short-notice to board ships registered under the signatory nations' flags; the agreement with Liberia allows consent to be presumed if a response to a request is not received within two hours.<sup>169</sup>

Shipping WMD material poses clear risks for proliferation by states and acquisition by non-state actors. The existing legal regime may not provide authority for states to respond to these concerns. Treaty-based modifications to this regime would be of limited effectiveness because they would apply only to signatory states. Another possibility is to pass a Security Council resolution directed against a suspect state, designating a right to board and seize, which would become immediate international law.

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<sup>163</sup> *Id.*

<sup>164</sup> *See id.* Art. 20.

<sup>165</sup> *See, e.g.*, United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Dec. 20, 1988), 28 ILM 493, U.N. Doc. E/CONF.82/15, *available at* [http://www.unodc.org/pdf/convention\\_1988\\_en.pdf](http://www.unodc.org/pdf/convention_1988_en.pdf). In addition, the United States has concluded twenty-three bilateral treaties with Caribbean and Central American states on this subject. For a table of these agreements, *see* <http://www.ciponline.org/facts/mar.htm>.

<sup>166</sup> Agreement for the Implementation of the Provisions of the UN Convention on the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Art. 21(1), UN Doc. A/CONF.164/37, 34 ILM 1542, at 1563 (1995), *available at* [http://www.un.org/Depts/los/convention\\_agreements/convention\\_overview\\_fish\\_stocks.htm](http://www.un.org/Depts/los/convention_agreements/convention_overview_fish_stocks.htm).

<sup>167</sup> Amendment to the Supplementary Arrangement Between the Government of the United States of America and the Government of the Republic of Panama to the Arrangement Between the Government of the United States of America and the Government of Panama for Support and Assistance from the United States Coast Guard for the National Maritime Service of the Ministry of Government and Justice, May 12, 2004, *available at* <http://www.state.gov/t/np/trty/32858.htm>.

<sup>168</sup> Agreement Between the Government of the United States of America and the Government of the Republic of Liberia Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea (Feb. 11, 2004), *available at* <http://www.state.gov/t/np/trty/32403.htm>.

<sup>169</sup> *Id.* Art. 4 § 3d.

PSI has been praised by some as filling in the gaps of the non-proliferation regime (especially for states that are not monitored by the IAEA because they are outside of the NPT), and increasing deterrence and dissuasion. Although many PSI activities are kept secret, a prominent claimed success of the PSI was the September 2003 seizure of cargo in a German ship headed for Libya. The cargo included parts for centrifuges used to enrich uranium for nuclear weapons programs. The Bush administration credited the seizure as contributing to Libya's decision to give up its nuclear weapons program.<sup>170</sup> However, later reports indicated that the interception resulted from preexisting counterproliferation efforts.<sup>171</sup> Generally, beyond the legal concerns, the potential of the program has also met with some skepticism. For example, former Secretary of Defense William Perry observed, "The administration has suggested that it would interdict such transfers [of products from North Korea's nuclear program]. But a nuclear bomb can be made with a sphere of plutonium the size of a soccer ball. It is wishful thinking to believe we could prevent a package that size from being smuggled out of North Korea."<sup>172</sup>

#### **(E) Assessing the Regimes to prevent Terrorists from Acquiring WMD**

The measures described above range from those that are more universal in character and binding under international law (conventions and Security Council resolutions) to those in which the United States and its allies control trade and shipping of WMD-related material and take initiatives to secure dangerous materials and weapons. There are advantages to the more universal approach. The WMD conventions offer global monitoring organizations and processes. As they apply equally among states, they offer incentives for each state to comply, as other states are doing the same. There are valid concerns that these regimes are not able to detect all instances of cheating and that they create a false confidence that by virtue of having signed on to a treaty, a state is cooperating. These concerns do not require the abandonment or downgrading of the existing regimes; the United States may instead decide to improve monitoring and strengthen mechanisms to inspect and investigate allegations of non-compliance, as well as relying on its own means of monitoring and encouraging compliance. On the other hand, the non-universal nonproliferation regimes offer the United States the opportunity to more tightly control outcomes and flexibility in responding to emerging developments, without having to subject its own behavior to international regulation. However, they cause resentment among states which are the targets of, e.g., export controls, and tend to be stopgap in character, serving to slow rather than to stop proliferation. They may best be seen as needed complements to developing global regimes.

### **V. Conclusion**

Since the end of World War II, international law has served the United States by internationalizing norms that are at the heart of its political and social structure. An international system has been installed for civil and political rights, women's and children's rights, freedom from torture and slavery, and the accountability of leaders who commit genocide, crimes against humanity, and war crimes. Much of this system has been implemented at the initiative of the United States. The norm that condemns terrorism is in need of similar institutionalization and internationalization.

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<sup>170</sup> Robin Wright, *Ship Incident May Have Swayed Libya; Centrifuges Intercepted in September*, THE WASHINGTON POST, January 1, 2004.

<sup>171</sup> Wade Boese, *Key Interdiction Initiative Claim Misrepresented*, ARMS CONTROL TODAY, July/August 2005.

<sup>172</sup> William Perry, *It's Either Nukes or Negotiation*, WASH. POST, July 23, 2003; *see also The Proliferation Security Initiative: An interdiction strategy*, STRATEGIC COMMENTS, August 2003, available at <http://www.iiss.org/stratcomfree.php?scID=282>.

In pursuit of a norm of repudiation of terrorism, and of capabilities to prevent terrorism, the legal instruments, institutions, initiatives, and arrangements surveyed in this paper—from the anti-terrorism conventions to Security Council resolutions to anti-WMD treaty regimes to the Proliferation Security Initiative—all need vigorous implementation underpinned by the understanding and support of the legal profession and the general public.

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