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## International Security

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# International Security

BARRY KELLMAN AND STEPHEN DYCUS\*

In 1998, much of the focus of international security was on south Asia and on the spread of weapons of mass destruction. The big stories were Iraq's continued obstruction of United Nations weapons inspectors (UNSCOM) leading to U.S. bombing in December; India and Pakistan detonating nuclear devices; and the U.S. assault on Afghan and Sudanese targets following the bombing of U.S. embassies in Africa. Progress on nuclear weapons control was limited by the Russian Duma's failure to ratify START II. Yet Clinton and Yeltsin were able to identify a few points of agreement at their Moscow Summit.

In domestic policy, 1998 was an equivocal year for international security issues in the 105th Congress. The Senate overwhelmingly approved NATO expansion despite Russian opposition, but Congress also appropriated \$440 million for the Cooperative Threat Reduction program to deal with the problem of insecure nuclear materials and weapons in the former Soviet Union despite considerable Senate disapproval of Russia's sale of nuclear-related technology to Iran. Missile defense continued to be controversial as was the Comprehensive Test Ban Treaty (CTBT); Congress recessed without voting to abrogate the 1972 Antiballistic Missile (ABM) Treaty and without voting on CTBT ratification. In terms of new law, the most significant accomplishments were enactment of the Chemical Weapons Convention Implementation Act and agreement to a new Protocol for International Atomic Energy Agency verification of nuclear-related activities.

Concern over terrorism, especially terrorism involving weapons of mass destruction, became a higher priority in 1998. The United Nations General Assembly adopted the International Convention for the Suppression of Terrorist Bombings. Two Presidential Decision Directives to reduce threats of domestic terrorism were issued. Finally, the United States retained its preeminent position as global arms seller, albeit in a shrinking market.

## I. Iraq

The most momentous international security story of 1998 was the continued conflict over United Nations weapons inspections in Iraq. The erosion of Iraqi cooperation with UNSCOM's

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inspection activities in late 1997 continued to deteriorate throughout 1998. A recurring issue concerned the authority of the United States to use military force against Iraq without new Security Council authorization. The United States claimed continuing authority from Gulf War Resolutions to compel Iraqi cooperation with UNSCOM, but France, Russia, and China have disagreed with this interpretation. The chronology of major events is as follows.

After Iraq ceased cooperation with inspectors and announced that eight presidential sites were off-limits, UNSCOM reported that Iraq had not taken required steps concerning chemical weapons and missile warheads. Secretary-General Annan negotiated a Memorandum of Understanding (MOU) that called for diplomats to accompany UNSCOM on inspections of presidential sites and reconfirmed Iraq's acceptance of all relevant Security Council resolutions. On March 2, the Security Council endorsed the provisions of the MOU and warned Iraq of the severest consequences if Baghdad failed to heed the agreement.<sup>1</sup> In April, UNSCOM experts concluded that Iraq's biological weapons declaration was inadequate and that:

[A] major consequence of the four-month crisis authored by Iraq has been that, in contrast with the prior reporting period, virtually no progress in verifying disarmament has been able to be reported. If this is what Iraq intended by the crisis, then, in large measure, it could be said to have been successful.<sup>2</sup>

By August, Executive Chairman Richard Butler announced that UNSCOM could not assure Iraqi compliance with its obligations. Iraq suspended cooperation with UNSCOM and the International Atomic Energy Agency that the Security Council condemned.<sup>3</sup> On October 26, Butler reported the presence of VX (a chemical weapon) degradation products on Iraqi missile interiors. Five days later, Iraq demanded that Butler be fired and that UNSCOM be restructured to diminish U.S. influence. On November 5, the Security Council ordered Iraq to resume cooperation with UNSCOM.<sup>4</sup> On November 11, most UN staff left Iraq. On November 14, with U.S. bombers in the air, Iraq agreed to allow resumption of inspections, but on November 20, Iraq objected to Butler's demand for documents on chemical and biological weapons programs.

On November 30, UNSCOM reported that Iraq withheld crucial chemical weapons data. On December 9, inspectors were denied access to the ruling Baath party's headquarters; within the week, they left Iraq. The next day, Butler reported that Iraq introduced new restrictions on the monitors' work:

Iraq's conduct ensured that no progress was able to be made in either the fields of disarmament or accounting for its prohibited weapons programmes. . . . [I]t must regrettably be recorded again that the commission is not able to conduct the substantive disarmament work mandated to it by the Security Council and, thus, to give the Council the assurances it requires with respect to Iraq's prohibited weapons programmes.<sup>5</sup>

On December 17, the United States and the United Kingdom initiated four days of aerial bombing against suspected Iraqi military sites. At year's end, UNSCOM's future as well

1. See S.C. Res. 1154, U.N. SCOR, 3858th mtg., U.N. Doc. S/RES/1154 (1998).

2. *Report of the Executive Chairman on the Activities of the Special Commission Established by the Secretary-General Pursuant to Paragraph 9(b)(i) of Resolution 687 (1991)*, para. 130, U.N. SCOR, 3880th mtg., U.N. Doc. S/1998/32 (1998).

3. See S. C. Res. 1194, U.N. SCOR, 3924th mtg., U.N. Doc. S/RES/1194 (1998).

4. See S. C. Res. 1205, U.N. SCOR, 3939th mtg., U.N. Doc. S/RES/1205 (1998).

5. *Letter from the Executive Chairman of the Special Commission Established by the Secretary General Pursuant to Paragraph 9(b)(i) of Security Council Resolution 687 (1991) Addressed to the Secretary General (Dec. 15, 1998)*, U.N. SCOR, 3955th mtg., U.N. Doc. S/1998/1172 (1998).

as the future of United Nations monitoring of Iraq's weapons of mass destruction remains uncertain.

## II. India and Pakistan Nuclear Testing

In May, India conducted its first nuclear tests in twenty-four years, followed by Pakistan's first tests ever. These tests were the first since the signing of the CTBT in September 1996, and have jeopardized its success. President Clinton ordered sanctions imposed against India and Pakistan (Pres. Determination No. 98-22 (1998)) as mandated by the Arms Export Control Act.<sup>6</sup> Sanctions include prohibiting the export of all sensitive technology and forbidding all forms of military and foreign aid and credit. The United Nations Security Council condemned the nuclear tests, demanded cessation of tests and an immediate stop to nuclear weapons development programs, and reaffirmed its commitment to the CTBT.<sup>7</sup> Both India and Pakistan subsequently announced that they would be prepared to join the CTBT if various conditions were met, including the removal of sanctions. On December 1, the president waived sanctions against both India and Pakistan.<sup>8</sup>

The nuclear tests by India and Pakistan delayed and may have imperilled enforcement of the CTBT, which prohibits the conduct of nuclear weapon test explosions or any other nuclear explosion anywhere. Under this agreement, each state party undertakes not to carry out any nuclear weapon test explosion or any other nuclear explosion; to prohibit and prevent any nuclear explosions anywhere under its jurisdiction or control; and not to cause, encourage, or in any way participate in the carrying out of any nuclear explosion. The CTBT establishes an organization (CTBTO) to ensure implementation of international verification measures that include a global monitoring system composed of seismological, radionuclide, hydroacoustic, and infrasound monitoring; consultation and clarification; on-site inspections; confidence-building measures; and limited on-site inspections.

President Clinton, in his State of the Union address, urged Senate ratification of the CTBT. In the Senate, however, hearings on the CTBT, which must precede a ratification vote, were not held, but funding was approved to support the CTBT Preparatory Commission that is establishing the treaty's verification regime.<sup>9</sup>

## III. U.S. Attacks Against Afghanistan and Sudan

On August 20, American Tomahawk missiles bombarded suspected training camps controlled by Osama bin Laden in Afghanistan and the Al Shifa pharmaceutical plant in Khartoum, Sudan. The Clinton administration justified the missile attacks as retaliation for truck bombings two weeks earlier that destroyed the American embassies in Nairobi, Kenya and Dar es Salaam, Tanzania. The president sent a letter reporting the raids to Congress on August 21, "consistent with the War Powers Resolution."<sup>10</sup> Despite launching sixty missiles against the Afghan camps, the attack did not kill bin Laden and his associates.<sup>11</sup>

6. 22 U.S.C.A. § 2779aa-1 (West Supp. 1998).

7. SCOR Res. 1172, U.N. SCOR Doc. S/1172 (1998).

8. See The India-Pakistan Relief Act, Pub. L. No. 105-277, § 902 (1998).

9. See Foreign Operations, Export Financing and Related Agencies Appropriations Act, S. 2334, 105th Cong. § 595 (1998).

10. Text of a Letter on Afghanistan and Sudan Strikes, 34 WEEKLY COMP. PRES. DOC. 1650 (Aug. 21, 1998), available in 1998 WL 519488.

11. See James Risen, *Bin Laden Was Target of Afghan Raid, U.S. Confirms*, N.Y. TIMES, Nov. 14, 1998, at A1.

The Clinton administration asserted that the Khartoum chemical plant was financially linked with bin Laden and that a CIA operative found samples of Empta, a chemical precursor of chemical weapons that is of no commercial use, in a soil sample outside of the facility. Subsequently, Sudanese officials produced evidence that the Al Shifa plant produced antibiotics and denied that the plant was in any way a weapons facility. As questions arose about the decision to target the Al Shifa plant, the press reported that none of the service chiefs had been involved in the initial planning for the missile attack, neither was the FBI, nor the Organization for the Prohibition of Chemical Weapons. The Sudanese demanded an independent United Nations investigation of the plant—a demand that the United States has rejected summarily. As Sudan is not a state party of the Chemical Weapons Convention and as there are no grounds for compulsory jurisdiction before the International Court of Justice, the dispute remains unresolved.

#### IV. Nuclear Arms Control

The most important news was what did not happen: Russia did not ratify START II, postponing it until at least 1999. The Clinton-Yeltsin summit in Moscow in September did not make significant arms control progress, but they signed a joint statement to share early warning information on launches of ballistic missiles and space-launch vehicles, building on the Agreement on Measures to Reduce the Risk of Outbreak of Nuclear War of 1971<sup>12</sup> and establishing measures to reduce the risk of a nuclear war and a notification regime for missile launches. Also, a joint statement was signed to address the disposition of weapons-grade plutonium whereby both states will dispose of fifty metric tons of plutonium in a way that renders it unusable again in nuclear weapons. They also agreed to expand bilateral cooperation on export controls by establishing working-level sub-groups to share information on sensitive technologies. However, no progress was made toward an agreement to take nuclear weapons off alert status. Also in September, Energy Secretary Richardson and Russian Minister of Atomic Energy Adamov signed an agreement to create commercial enterprises that will provide peaceful employment opportunities for displaced Russian nuclear scientists and technicians.

Debates over missile defense systems grew more intense in 1998. The Memorandum of Understanding calling for succession to the ABM Treaty by Russia, Kazakhstan, Belarus, and Ukraine, as well as other documents related to the treaty,<sup>13</sup> have not yet been submitted to the Senate for approval. Senator Cochran introduced legislation requiring deployment of an effective National Missile Defense System to shield the United States against limited missile attack. On September 9, the Senate failed for the second time to pass a motion for closure on the bill. The same day, the Standing Consultative Commission met to complete details for a U.S.-Russia agreement on confidence-building measures related to theater missile defense systems.

In May, the Army's Theater High Altitude Area Defense (THAAD) system failed for the fifth straight time. In July, a congressional commission led by former Defense Secretary Donald Rumsfeld warned that a long-range missile threat to the United States could develop much

12. See Agreement on Measures to Reduce the Risk of Outbreak of Nuclear War, Sept. 30, 1971, U.S.-U.S.S.R., 22 U.S.T. 1590, T.I.A.S. No. 7186, 807 U.N.T.S. 57.

13. Among these were so-called "demarcation" agreements describing theater missile defenses (TMDs) which would be permissible under the Treaty. See Bonnie D. Jenkins & Theodore M. Hirsch, Arms Control and Disarmament, 32 *INT'L LAW.* 427, 432-34 (1998). These agreements have been criticized as unduly restricting U.S. development and deployment of a national missile defense (NMD).

earlier than previously thought.<sup>14</sup> In October, the Clinton administration declared that despite technical setbacks, it would continue to press for development of two ground-based and two sea-based theater missile defense (TMD) systems, an airborne laser system for boost phase interception, and a cooperative program with Italy and Germany—all Department of Defense (DOD)-certified as compliant with the ABM Treaty. It also reiterated its commitment to continue development of a National Missile Defense (NMD) system, and to decide in June 2000 whether to deploy such a system as early as three years thereafter. The administration insists that NMD development and testing will fully comply with the ABM Treaty, but it acknowledges that deployment could require treaty modifications. If agreement on needed modifications cannot be reached, the administration may withdraw from the treaty because of “supreme national interests.”<sup>15</sup>

In August, the UN Conference on Disarmament (CD) agreed to establish an ad hoc committee to begin negotiations on banning the production of fissile material for nuclear weapons purposes. The announcement followed statements from Pakistan and from Israel that each nation would not block the convening of the committee.

In March, the United States and Ukraine signed a nuclear cooperation agreement, and the United States agreed to support Ukraine’s entry into the Missile Technology Control Regime.

## V. NATO

The Senate approved NATO membership for the Czech Republic, Hungary, and Poland.<sup>16</sup> The resolution requires the president to certify, before deposit of instruments of ratification, that the U.S. share (twenty-five percent) of NATO’s budget will not increase as NATO expands. After German elections brought a new government into power, newly-appointed Foreign Minister Joschka Fischer suggested that NATO reconsider its nuclear first-use policy, as advocated during Chancellor Schroeder’s campaign. Both British Foreign Secretary Robin Cook and U.S. Defense Secretary William Cohen responded that NATO’s first-use policy is integral to the NATO strategic doctrine and would not be changed. NATO will hold a summit in April 1999 in Washington on its strategic orientation.

## VI. The Chemical Weapons Convention Implementation Act

The Chemical Weapons Convention (CWC)<sup>17</sup> went into force in April 1997, days after U.S. ratification. In 1998, the CWC gained fifteen new state parties for a total of 121. The CWC bans possession or use of chemical weapons and requires nations having such weapons

14. See *Executive Summary of the Report of the Commission to Assess the Ballistic Missile Threat to the United States* (July 15, 1998) (visited Mar. 25, 1999) <<http://www.fas.org/irp/threat/bm-threat.htm>>. Its report was underscored by tests of intermediate-range missiles in Iran and Pakistan and by a North Korean test of a multi-stage rocket that traveled over Japan.

15. See Deputy Secretary of Defense John Hamre, Statement on the Ballistic Missile Defense Programs (Oct. 2, 1998), available in 1998 WL 18088987. The NMD system “would have as its primary mission defense of the United States—all 50 states—against a threat of a limited ballistic missile attack by a rogue nation. Such a system would also provide some capability against a small accidental or unauthorized launch” from one of the established nuclear capable states.

16. Protocols to the North Atlantic Treaty of 1949 on the Accession of Poland, Hungary and the Czech Republic, Apr. 30, 1998, S. TREATY DOC. NO. 105-36.

17. See The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 32 I.L.M. 800 (entered into force April 29, 1997) [hereinafter CWC]. As of January 1999, the CWC has over 170 signatory States.

to destroy them.<sup>18</sup> State parties must declare extensive information about chemical facilities to the Organization for the Prohibition of Chemical Weapons (OPCW),<sup>19</sup> and facilities must be accessible to on-site searches by OPCW inspectors. Since measures to compel reporting of industrial information or acceptance of inspections are legally effective only through enactment of domestic law, the CWC requires each state party to enact implementing legislation that enables OPCW personnel to carry out their required functions within that state party, authorizes domestic officials to efficiently coordinate their compliance activities, and requires citizens to perform treaty-specified obligations.<sup>20</sup>

In October 1998, as part of the Omnibus Appropriations Act of 1998, Congress enacted the Chemical Weapons Convention Implementation Act (CWCIA),<sup>21</sup> designating the Department of State as the National Authority that will supervise CWC compliance in coordination with an Interagency Group of Department Secretaries and other agency heads.

#### A. PENALTIES FOR CHEMICAL WEAPONS

The CWCIA prohibits production, possession, or use of chemical weapons.<sup>22</sup> Violators will be fined up to \$100,000 per violation, imprisoned, and, if a death occurs, may be executed. The violator must reimburse the United States for any expenses incurred incident to seizing, transporting, or destroying any property. Penalties can apply to any American, anyone on U.S. territory or under U.S. control, or to anyone who harms a U.S. citizen or U.S. property. Anyone convicted of dealing with chemical weapons will forfeit his property, and profits gained may be double fined. In an emergency, property may be seized without notice or a hearing before an indictment is filed.<sup>23</sup> Once seized, the Attorney General will destroy or dispose of the property at the owner's expense, with assistance from the Secretary of Defense.

#### B. REPORTING REQUIREMENTS AND PROTECTION OF CONFIDENTIAL BUSINESS INFORMATION

Under the CWC, each state party must submit declarations of relevant information concerning companies having declarable chemicals above stipulated concentration levels.<sup>24</sup> According to the CWCIA, each such company must maintain and permit access to records and submit information to the Secretary of State. A \$5,000 penalty awaits anyone who fails or refuses to do so; if the violation is done "knowingly," criminal fines or imprisonment of up to one year, or both, may result.<sup>25</sup>

Reported information may contain commercially significant confidential business information (CBI). To prevent that CBI from becoming publicly available, the CWCIA includes penalties

18. *Id.* art. I.

19. *See generally id.* art. VIII.

20. *See id.* art. VII.

21. Chemical Weapons Convention Implementation Act of 1998, Pub. L. No. 105-277, 112 Stat. 268 (to be codified at 22 U.S.C.A. § 6701).

22. The CWCIA adds Chapter 11B—Chemical Weapons to Title 18 of the U.S. Code.

23. Administrative or judicial proceedings concerning forfeiture will be governed by the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 853 (1994).

24. The CWC propounds three "Schedules" of precursor chemicals that could be made into chemical weapons, roughly corresponding to the ease of making a prohibited substance and their industrial value. CWC, Annex on Chemicals. The information that must be declared varies with the Schedule triggering the declaration. *See generally* BARRY KELLMAN AND EDWARD A. TANZMAN, *MANUAL FOR THE NATIONAL IMPLEMENTATION OF THE CHEMICAL WEAPONS CONVENTION* ch. 7 (2d ed. 1998).

25. Chemical Weapons Convention Implementation Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681 (to be codified at 22 U.S.C.A. § 501).

for government officials who willfully disclose CBI. Those penalties are: fine or imprisonment for up to five years, or both, and possible forfeiture of property.<sup>26</sup> Another threat to reported CBI can come in the form of a competitor's Freedom of Information Act<sup>27</sup> request. But the CWCIA erases this threat by exempting reported CBI from FOIA disclosure except to Congress, for compliance or law enforcement purposes. Reported information may be disclosed in the national interest, but an owner may object to the disclosure at a hearing.<sup>28</sup>

The CWCIA contains unprecedented remedies for CBI losses. If an OPCW employee or U.S. official takes CBI in connection with CWC compliance, a civil action or monetary claim may be filed.<sup>29</sup> The claimant must show that its proprietary information was divulged or taken without authorization due to official acts or omissions in connection with CWC compliance.<sup>30</sup> Moreover, any U.S. national or business entity may bring suit against any foreign national or business entity for an unauthorized or unlawful acquisition, receipt, transmission, or use of property resulting from any tort arising from acts or omissions by a U.S. official or any OPCW employee. In any action for just compensation for a taking or for tort damages, the United States may not raise sovereign immunity as a defense.<sup>31</sup>

U.S. policy is to recoup all funds paid for any tort or taking arising from the acts of any foreign person or OPCW employee pursuant to CWC compliance. The Attorney General is authorized to bring an action, in the District Court for the District of Columbia, in any international tribunal, or in the courts of the foreign nation, against any foreign nation for its refusal to indemnify the United States for any liability imposed on the United States by virtue of an inspector who is a national of that nation acting at its direction or behest.<sup>32</sup>

Sanctions may be imposed on foreign companies or foreign governments for any losses for which the United States is liable for a tort or taking if it assists or encourages the publication or disclosure of CBI.<sup>33</sup> The president may waive sanctions against foreign governments on national security grounds, and sanctions may be suspended after full and complete compensation. Finally, a foreigner who improperly deals with CBI may be denied a visa or excluded from the United States.

26. *Id.* § 404(d)-(f).

27. *See* 5 U.S.C. § 552 (1994).

28. Chemical Weapons Convention Implementation Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681 (to be codified at 22 U.S.C.A. § 404).

29. *Id.* § 103(a)(1)-(3). The claimant must notify the U.S. National Authority at least one year before filing the claim so that diplomatic and other remedies to redress the claim can be pursued.

30. To decide if the claimant has satisfied this burden, a court will consider: the information's value; its availability; whether this information is based on patents, trade secrets, or other intellectual property; the information's significance; and the emergence of technology elsewhere after an inspection. *See id.* § 103(a)(4).

31. *See id.* §§ 103(b), (c), (d)(3).

32. *See id.* § 103(d)(1)-(2).

33. With regard to foreign companies, sanctions include:

- (1) no sales of items on U.S. munitions list;
- (2) no exports of items on the control list of § 5(c)(1) of the Export Administration Act;
- (3) opposition to loans or assistance by international financial institutions;
- (4) disapproval of credit through the Export-Import Bank;
- (5) prohibition against any U.S. bank from making loans or providing credit;
- (6) block of any property transaction of interest to the foreign company; and
- (7) denial of landing rights.

With regard to foreign governments, the same seven sanctions may apply, as well as:

- (1) no licenses for export of items on U.S. munitions list;
- (2) no funds for economic or military assistance; and
- (3) termination of assistance under the Foreign Assistance Act of 1961.



## C. CONDUCTING INSPECTIONS

By far, the CWC's most intrusive requirement is for on-site inspections, many focusing on privately-owned facilities. The CWC permits states to negotiate "facility agreements" that specify the time, place, and manner of inspections. The CWCIA significantly expands the role of facility agreements. Owners of most inspectable facilities may demand preparation of a facility agreement even if the CWC does not require one. Moreover, a facility owner may help plan the agreement and may observe the negotiations between the United States and the OPCW.<sup>34</sup> In addition, a facility owner may request assistance from the Secretary of Defense to prepare for inspections.<sup>35</sup>

The CWC allows government representatives to join OPCW inspectors. But federal agents accompanying inspectors into a facility could gain access to areas that they otherwise may lack authority to search. The CWCIA addresses this potential problem by prohibiting agents of the Environmental Protection Agency or the Occupational Safety and Health Administration from joining an inspection. Yet an FBI special agent must accompany each inspection team.<sup>36</sup>

The U.S. government will seek the owner's consent to be inspected, but this consent may be withheld for any reason. If consent is denied, an administrative search warrant to conduct a routine inspection will be sought.<sup>37</sup> More controversial are CWC challenge inspections which any CWC state party may request to resolve doubts about another state's compliance.<sup>38</sup> Access is compulsory to the greatest degree consistent with constitutional protections of search and seizure.<sup>39</sup> Unlike routine inspections, a challenge inspection insinuates suspicions of illegal activity—such a non-routine inspection is designed to determine if wrongful conduct has occurred. Moreover, a challenge inspection could occur anywhere, including facilities that are not declared under the CWCIA's reporting obligations. As it would be difficult to characterize a challenge inspection as an administrative search, a criminal search warrant based upon probable cause is required for a challenge inspection if consent is withheld.<sup>40</sup>

For any inspection, the State Department must notify the facility owner or operator within six hours of receiving a request for access.<sup>41</sup> It is unlawful for anyone to willfully fail or refuse to permit entry or to disrupt, delay, or otherwise impede a legally authorized inspection. A \$25,000 penalty will apply to each violation; a knowing violation will, in addition, lead to criminal penalties including fines and imprisonment of up to one year. Anyone accused of an inspection violation may have a hearing before an administrative law judge. Anyone found guilty may have their export privileges suspended or revoked.<sup>42</sup>

34. Chemical Weapons Convention Implementation Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681 (to be codified at 22 U.S.C.A. § 302).

35. *Id.* § 310.

36. *Id.* § 303.

37. *Id.* § 305(b). The CWCIA explicitly lists what information the government must provide to the judge and what the warrant must specify.

38. See CWC, *supra* note 17, art. IX.

39. *Id.* annex, pt. X, § 41.

40. Chemical Weapons Convention Implementation Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681 (to be codified at 22 U.S.C.A. § 6701).

41. *Id.* § 304. That notice must specify the type of inspection, why that facility was selected, the time and date of the inspection's start, and the names and titles of inspectors. The CWCIA excludes from access, unless required by the convention: financial data, sales and marketing data (other than shipment data), pricing data, personnel data, research data, patent data, data maintained for compliance with environmental or occupational health and safety regulations, or personnel and vehicles entering and personnel and personal passenger vehicles exiting the facility.

42. *Id.* § 501.

Various CWCIA provisions are contentious. One limits the number of inspections at commercial facilities; another would allow the president to block a challenge inspection in the United States on national security grounds. The CWCIA's sampling provisions are exceptionally contentious. Under the CWC, inspectors may take samples and transfer them off-site for analysis. However, Congress prohibited transfer of any sample collected in the United States to any foreign laboratory.<sup>43</sup> Some international officials have protested that this prohibition contradicts the CWC and may encourage other states to invoke a similar restraint on inspections, which could undermine verification. Negotiations are on-going between the OPCW and the U.S. government to reach a workable settlement.

## VII. Monitoring of Nuclear Sites by the International Atomic Energy Agency

For decades, the International Atomic Energy Agency (IAEA) monitored critical points where nuclear material could be diverted and precisely measured and accounted for registered nuclear material (of which the IAEA was cognizant) in order to detect diversion.<sup>44</sup> Since discovery of Iraqi and North Korean clandestine nuclear programs, the IAEA has considered strategies to strengthen the effectiveness of safeguards<sup>45</sup>—particularly in regard to detecting undeclared activities and facilities. Many analysts recommended that the IAEA obtain more information on states' nuclear programs together with increased access for IAEA inspectors to more records and more locations. "Expanded declarations" were recommended to require member states to provide additional data related to nuclear capabilities supplemental to declarations of safeguarded materials. Increased transparency could identify items relevant to such capabilities, including critical dual-use items relevant to the nuclear fuel cycle in addition to source or special fissionable material, as well as requiring member states to submit reports on the quantities used, applications, and their location.

In 1993, the Standing Advisory Group on Safeguards Implementation (SAGSI) recommended measures to improve the efficiency of safeguards, denoted as 93 + 2. Many of these measures required negotiation of new arrangements with IAEA member states. Increasing the breadth of reported information increased the number of inspected sites, and inspectors were given new rights of access, including new environmental monitoring and analysis measures for detecting undeclared nuclear material, equipment or activities. On May 15, 1997, the IAEA Board of Governors adopted a draft Model Protocol (INFCIRC/540) for negotiating an additional, country-specific agreement to implement enhanced 93 + 2 safeguard procedures that provides for a clearly-defined and near-uniform set of verification measures that significantly expands the items and locations subject to IAEA verification.

In 1998, the United States and the IAEA negotiated a new Protocol, INFCIRC/175,<sup>46</sup>

43. See CWCIA § 304.

44. See International Atomic Energy Agency, *Information Circular/288*, art. 7(b) [hereinafter INFCIRC/288]: The Agency shall apply safeguards . . . to enable the Agency to verify, in ascertaining that there has been no withdrawal of nuclear material . . . from activities in facilities while such material is being safeguarded under this Agreement, findings of the accounting and control system of the United States.

45. "Safeguards" refers to a full array of verification activities that the IAEA undertakes as required by the Nuclear Non-Proliferation Treaty, July 1, 1968, 7 I.L.M. 809, 21 U.S.T. 483.

46. See DRAFT PROTOCOL ADDITIONAL TO THE AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE INTERNATIONAL ATOMIC ENERGY AGENCY FOR THE APPLICATION OF SAFEGUARDS IN THE UNITED STATES OF AMERICA [hereinafter INFCIRC/175].

which adopts the Model Protocol almost verbatim.<sup>47</sup> INFCIRC/175 is a substantially different document than its predecessor, INFCIRC/288, containing declaration obligations and requirements for inspections that apply to many more facilities, including many facilities previously not subject to IAEA verification activities. Moreover, the scope of the IAEA's authority to conduct verification activities is far more expansive; even at sites heretofore safeguarded, new procedures will apply. Finally, there are more extensive responsibilities for the U.S. government: collecting information for declarations; enabling access to privately-owned facilities; and ensuring the confidentiality of information.

"Expanded declarations" now apply to nuclear-related activities that do not involve source or special nuclear material.<sup>48</sup> Much broader information must be provided than that required by INFCIRC/288, which covered only nuclear reactors, fuel fabrication plants, and reprocessing facilities. The protocol requires additional information on: (1) research and development facilities; (2) uranium mines as well as uranium and thorium concentration plants; (3) enrichment facilities; (4) high-level waste facilities; (5) decommissioned facilities; (6) nuclear-related exports and imports; and (7) "locations outside facilities" where nuclear material was used. These declarations should enable the IAEA to gain a clearer understanding of the nature and scope of U.S. nuclear activities (other than those activities having national security significance) consistent with the IAEA's activities in other member states.

A far broader range of facilities may be inspected than under INFCIRC/288.<sup>49</sup> Also, the locations within facilities at which IAEA inspectors will have access are much broader.<sup>50</sup> The range of inspection activities that the IAEA may carry out is also much broader, including: (1) visual observation; (2) collection of environmental samples; (3) utilization of radiation detection and measurement devices; and (4) "other objective measures" as agreed to by the Board of Governors following IAEA-U.S. consultations.<sup>51</sup> Moreover, the United States may offer the IAEA access to additional locations or may request the IAEA to conduct verification activities at a particular location, and the IAEA must reasonably act on such a request.<sup>52</sup> The United States must provide the IAEA with access to locations that inspectors may specify in order to carry out wide-area environmental sampling or satisfy IAEA requirements at other locations.<sup>53</sup>

The United States may arrange for managed access to prevent dissemination of sensitive information.<sup>54</sup> The IAEA must maintain a regime to protect against disclosure of confidential information, including information it learns of through implementation of the protocol. The regime must include: (1) principles and associated measures for handling confidential

47. The Draft Additional Protocol's one significant difference from the Model Protocol is Article 1.b. which establishes a national security exclusion:

"The United States shall apply, and permit the Agency to apply this Protocol, excluding only instances where its application would result in access by the Agency to activities with direct national security significance to the United States or to the locations or information associated with such activities."

*Id.* art. 1.b.

48. *Id.* art. 2.

49. *Id.* art. 4.

50. *See id.* art. 5.

51. *Id.* art. 6.

52. *See id.* art. 8.

53. *See id.* art. 9.

54. *See id.* art. 7.

information; (2) conditions of staff employment relating to protecting confidential information; and (3) procedures in cases of breaches of confidentiality.<sup>55</sup>

According to an L/OES-drafted memorandum of law prepared in connection with the additional protocol, the new Safeguards Agreement will constitute a treaty for purposes of U.S. law, requiring Senate advice and consent to its ratification because: (1) its implementation may require additional legislation; (2) the Additional Protocol will involve "commitments or risks" affecting the entire nation; and (3) it should be in force indefinitely and has a high degree of formality associated with important international agreements.

## VIII. Initiatives To Thwart Catastrophic Terrorism

### A. U.N. CONVENTION FOR THE SUPPRESSION OF TERRORIST BOMBINGS

The United Nations General Assembly adopted the International Convention for the Suppression of Terrorist Bombings (Convention),<sup>56</sup> making it an international crime to bomb a public or government place, a transportation system or an infrastructure facility with the intent to cause death or injury or destruction.<sup>57</sup> The Convention also criminalizes attempting, conspiring, or assisting others to accomplish a prohibited act.<sup>58</sup>

Each state party must criminalize these offenses under its domestic law; such acts may not be justified "by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature and are punished by penalties consistent with their grave nature."<sup>59</sup> Significantly, each state party must investigate facts pertaining to persons under its jurisdiction alleged to have committed an offense, and, if appropriate, ensure that person's prosecution or extradition.<sup>60</sup> Further provisions specify legal assistance requirements, obligations to extradite, and procedural rights of accused offenders. Notably, no offense within the meaning of the Convention may be viewed as a political offense.<sup>61</sup> The Convention will enter into force thirty days after the deposit of the twenty-second instrument of ratification.<sup>62</sup>

### B. DOMESTIC INITIATIVES

Since fiscal year 1995 and after the bombings of a federal building in Oklahoma City, the World Trade Center in New York City, and a U.S. military facility in Saudi Arabia, Congress has increased funding to help federal law enforcement officials fight terrorism. The government's policy on combating terrorism has four major purposes:

1. reduce the vulnerabilities of the United States to terrorism;
2. prevent and deter terrorist acts before they occur;
3. respond to terrorist acts, including apprehension and punishment of terrorists and management of the consequences of terrorists acts; and
4. develop effective capabilities to address the threat posed by nuclear, chemical, or biological materials or weapons.

55. *See id.* art. 15.

56. *International Convention for the Suppression of Terrorist Bombings*, U.N. GAOR 6th Comm., 52nd Sess., U.N. Doc. A/RES/52/164 (1997) [hereinafter *Terrorist Bombing Convention*].

57. *See id.* art. 1.

58. *See id.* art. 2.

59. *Id.* art. 5.

60. *See id.* art. 7(2).

61. *See id.* art. 11.

62. *See id.* art. 22.

On May 22, 1998, Clinton announced Presidential Decision Directives 62 and 63 (PDD-62 and PDD-63), establishing the National Coordinator for Security, Infrastructure Protection and Counter-Terrorism within the National Security Council. (The Senior Interagency Coordination Group on Terrorism had been the coordinating body for the Domestic Preparedness Program.) Richard Clarke, the first National Coordinator, was tasked with creating a "new and systematic approach to fighting the terrorist threat of the next century." These new directives promote ten counterterrorism strategies: apprehension and prosecution, preventing disruptions abroad, international cooperation, preventing weapons acquisition, crisis management, transportation security, critical infrastructure, government continuity, countering foreign threats domestically, and protection of Americans abroad.

PDD-62 establishes a comprehensive strategy for military preparedness and response, allocating \$300 million for chem-bio defense and \$100 million to provide diagnostic, detection, and protective equipment to local and state agencies.<sup>63</sup> The primary component of this strategy is enhanced communication and coordination among federal and local government as well as international organizations and foreign governments. Clarke has implemented a four-part program: (1) coordinating local agencies; (2) coordinating federal agencies; (3) detecting and intercepting the flow of weapons and equipment that may be used by terrorist groups; and (4) disrupting terrorist organizations. Clarke also announced that the government reserves the right to use a first strike in self-defense against terrorist groups.

PDD-63 focuses on enhancing the nation's capability to protect the continuity and viability of critical infrastructures.<sup>64</sup> PDD-63 defines critical infrastructures as those physical and cyber-based systems that are so vital that their incapacity or destruction would have a traumatic or debilitating impact on the United States. These systems generally include electrical power, oil and gas, telecommunications, banking and finance, transportation, vital government operations, emergency services, and water supply systems.

### C. THE ROLE OF THE FBI

The FBI is the lead agency for combating domestic terrorism and a key supporting agency for combating international terrorism. The FBI defines terrorism as an unlawful act or threat of force or violence, committed by a group of two or more individuals against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives. From fiscal years 1995 to 1998, FBI counterterrorism resources more than doubled, increasing from about \$256 million in 1995 to about \$581 million in 1998. In total, from 1995 to July 31, 1998, the FBI had allocated an estimated \$1.6 billion to carry out its counterterrorism mission; about \$609 million is allocated for the FBI's counterterrorism mission in 1999.<sup>65</sup>

The FBI's counterterrorism activities include:

(1) Preventive and crisis management efforts to detect and investigate terrorism against U.S. persons and property, both in the United States and abroad. The FBI must coordinate investigation of the credibility of threats with other federal agencies including the Department of Energy

63. See Presidential Decision Dir. 62 (1998) (visited Mar. 31, 1999) <<http://www.fas.org/irp/offdocs/pdd-62.htm>>.

64. See Presidential Decision Dir. 63, 63 Fed. Reg. 41,804 (1998) (also available at <<http://www.fas.org/irp/offdocs/pdd-63.htm>>).

65. See GENERAL ACCOUNTING OFFICE, LETTER REPORT GGD-99-7, COMBATING TERRORISM—FBI'S USE OF FEDERAL FUNDS FOR COUNTERTERRORISM-RELATED ACTIVITIES (Fiscal Years 1995-1998) (1998).

(DOE), Department of Health and Human Services (HHS), Environmental Protection Agency (EPA), Department of Defense (DOD), and the Federal Emergency Management Agency (FEMA), and direct an operational response. The FBI manages the federal government's Terrorist Threat Warning System, which communicates terrorism-related information to other law enforcement agencies. The FBI disseminates unclassified terrorism threat and warning information to law enforcement agencies nationwide through its teletype National Law Enforcement Telecommunications System (NLETS). The FBI also transmits information regarding the potential for terrorism to U.S. businesses through its Awareness of National Security Issues and Response Program (ANSIR).<sup>66</sup>

(2) Training and preparedness exercises for FBI personnel and local law enforcement personnel who will work with the FBI, foreign police, and, in conjunction with the DOD, law enforcement officials, judges, and prosecutors from the former Soviet Union and Eastern Europe. During fiscal year 1998, the FBI spent about \$1 million coordinating crisis management training exercises. Under the Domestic Preparedness Program<sup>67</sup> to prevent and respond to terrorist activities involving weapons of mass destruction, the FBI participates in training events that are designed to enhance federal, state, and local responders' capability to deal with incidents involving weapons of mass destruction. As of June 30, 1998, the FBI had participated in such training for twenty-six U.S. cities and had plans to accommodate an additional ninety-four cities.

(3) Forensic and other support functions. The FBI Laboratory's Explosive Unit and Bomb Data Center trains bomb technicians and investigators and maintains an information clearinghouse about terrorists and bombing incidents. Similarly, the laboratory's Forensic Science Research and Training Center provides forensic training to approximately 1,500 forensic scientists and officers from crime laboratories and law enforcement agencies annually.

(4) Research and development projects. In fiscal year 1998, the FBI's Forensic Science Research Unit initiated thirty new counterterrorism research and development projects totaling more than \$5 million. Eighteen of these projects are being conducted in cooperation with DOE under a 1998 science and technology memorandum of understanding. Program successes include facilitating dispersal of chemical/biological terrorist devices and developing a data base to assist law enforcement officials in identifying perpetrators of chemical/biological/radiation terrorist incidents.

(5) Leadership of joint terrorism task forces and participation in interagency working groups. The FBI manages standing Joint Terrorism Task Forces in eighteen cities to facilitate exchanges of intelligence and coordinate activities among law enforcement personnel. The FBI is a member of the Interagency Intelligence Committee on Terrorism, which enhances processing, analysis and distribution of foreign intelligence information by sharing information on terrorist activities and assessing indications of terrorist threats. The FBI also operates the Infrastructure Vulnerability/Key Asset Protection Program, which maintains information on critical facilities in the United States to assist in contingency planning if these facilities become terrorist targets.

66. The FBI has two Weapons of Mass Destruction units at FBI Headquarters. One unit addresses operations, cases, and threats, which reportedly tripled in 1997 over 1996 figures. In 1997, the FBI investigated over 100 weapons of mass destruction cases. The other unit implements the FBI's countermeasures program, which coordinates exercises, deployments, and the FBI's role in training first responders.

67. See 50 U.S.C.A. 2311 (West Supp. 1998) (commonly known as the Nunn-Lugar-Domenici Act).

#### D. THE ROLE OF THE DEPARTMENT OF DEFENSE

The Department of Defense has also undertaken substantial counterterrorism responsibilities. Concerned that weapons of mass destruction (WMD) are increasingly available to terrorists, Congress designated the DOD as the lead agency to enhance domestic preparedness for responding to and managing the consequences of terrorists' use of WMD. Under the act, the DOD can provide training, exercises, and expert advice to emergency response personnel and lend equipment to local jurisdictions.<sup>68</sup> The Secretary of Defense has designated the Assistant Secretary for Special Operations and Low-Intensity Conflict as the policy office and the Secretary of the Army to carry out the Domestic Preparedness Program.<sup>69</sup>

A Senior Interagency Coordinating Group (SICG), chaired by the Federal Emergency Management Agency and guided by the National Security Council, oversees the program to coordinate and enhance state and local response capabilities. The army's Chemical and Biological Defense Command (CBDCOM) implements the program through the Army Director of Military Support, and CBDCOM experts provide information and advice through a newly-established help line. The DOD established a hotline to report incidents and request technical assistance through the existing National Response Center for hazardous materials spills.

The Defense Against Weapons of Mass Destruction Act also authorizes: (1) funds for the DOD to assist the Secretary of Health and Human Services in establishing Metropolitan Medical Strike Teams (MMST) to improve local jurisdictions' medical response capabilities for a WMD incident; (2) a telephonic link to provide data and expert advice for state and local officials responding to WMD emergencies; (3) a rapid response information system, including an inventory of rapid response assets and a database on chemical and biological materials; and (4) a chemical/biological rapid response team. The Director of Military Support and CBDCOM designed a training program to build on the existing knowledge and capabilities of those who would first deal with a WMD incident locally—fire, law enforcement, medical personnel, and hazardous materials technicians.<sup>70</sup>

On October 1, 1998, several Pentagon agencies were merged to form the Defense Threat Reduction Agency (DTRA) to combat WMD threats. DTRA Director, Dr. Jay C. Davis, will report to the Under Secretary of Defense for Acquisition and Technology.

#### E. DEPARTMENT OF STATE'S ANTITERRORISM ASSISTANCE

Since 1983, the Department of State's Antiterrorism Assistance Program (ATA) has provided assistance and rewards to friendly governments that face a significant threat from terrorism. Training programs under the ATA include bomb detection and deactivation, hostage negotiations, dignitary protection, crime scene investigation, and airport security. The State Department's Office of the Coordinator for Counterterrorism decides, in part based on a country's human rights record, which countries receive ATA training. In fiscal year 1998, \$19 million was allocated to the ATA as one of a variety of efforts to implement the twenty-five proposals

68. See GENERAL ACCOUNTING OFFICE, LETTER REPORT GAO/NSIAD-98-74, *COMBATING TERRORISM: THREAT AND RISK ASSESSMENTS CAN HELP PRIORITIZE AND TARGET PROGRAM INVESTMENTS* (1998).

69. See GENERAL ACCOUNTING OFFICE, LETTER REPORT GAO/NSIAD-99-3, *COMBATING TERRORISM—OPPORTUNITIES TO IMPROVE DOMESTIC PREPAREDNESS PROGRAM FOCUS AND EFFICIENCY* (1998).

70. See *Department of Defense Plan for Integrating National Guard and Reserve Component Support for Response to Attacks Using Weapons of Mass Destruction* (Jan. 1, 1998) (visited Mar. 31, 1999) <<http://www.defenselink.mil/pubs.wmdresponse/index.html>>.

made at the Paris Ministerial Conference on Terrorism.<sup>71</sup> The Paris Conference focused on international cooperation, deterrence, prosecution, international treaties, information exchange, and interdiction of terrorist funding.

## IX. Intelligence

Congress amended the Foreign Intelligence Surveillance Act to permit the use of "pen registers" and "trap and trace" devices on telephone lines (to record information about outgoing and incoming calls) in foreign intelligence and international terrorism investigations. A judicial order is required or, in an emergency, the Attorney General's authorization. These new measures echo the act's provisions approving wiretaps and physical searches in such investigations.<sup>72</sup> Congress also amended the Central Intelligence Agency Act of 1949 to include whistleblower protection for CIA employees or contractors who report to congressional intelligence committees complaints or information about, inter alia, violations of laws or executive orders or false statements to Congress. Similar protections were extended to employees and contractors of other intelligence agencies.<sup>73</sup> These measures augment existing safeguards for executive branch employees in the Whistleblower Protection Act of 1989.<sup>74</sup>

## X. Arms Sales

The United States led in global arms sales (\$5.3 billion), but the arms market fell to its lowest point in eight years at \$24.2 billion. The United States also delivered the most weapons worldwide, more than the United Kingdom, France, Russia, and China combined.<sup>75</sup>

On July 31, 1998, a federal district judge imposed an \$8.6 million fine (the maximum allowable) on IBM's Russian subsidiary for selling seventeen high-speed computers to a Russian nuclear weapons lab.<sup>76</sup> Also, the Bureau of Export Administration placed the company's export privileges on probation for two years.

In May, the European Union approved a code of conduct of arms exports, pledging to deny arms exports to states that may use the weapons for internal repression or aggressively against other states and to consider an importer's human rights record before approving an arms sale.<sup>77</sup>

71. See Ministerial Conference on Terrorism: Agreement on 25 Measures (July 30, 1996). See also Denver Summit of the Eight Foreign Ministers' Progress Report (June 21, 1997).

72. See Foreign Intelligence Surveillance Act, Pub. L. No. 105-272, § 601, 112 Stat. 2396, 2404-2410 (1998).

73. See Foreign Intelligence Surveillance Act, Pub. L. No. 105-272, §§ 701-702, 112 Stat. 2396, 2413-2417 (1998).

74. 5 U.S.C.A. §§ 1201-1222 (West Supp. 1998).

75. See RICHARD GRIMMETT, CONVENTIONAL ARMS TRANSFERS TO DEVELOPING NATIONS 1990-1997 (U.S. Congressional Research Service Report). See Barbara Opall-Rome, *France Was First in '97 Arms Deals To Developing Nations*, DEF. NEWS, Aug. 10, 1998, at 17. See also G. O'Callaghan & B. Wood, *Wheeling & Dealing: The World-Wide Weapons Trade Industry*, BULL. ATOM. SCI., Jan. 1999.

76. See Jeff Gerth, *I.B.M. Guilty of Illegal Sales To Russian Lab*, N.Y. TIMES, Aug. 1, 1998, at A1.

77. See Pamela Pohling-Brown, *EU Code on Arms Transfers Agreed*, JANE'S DEF. WKLY., June 3, 1998.



