

2002

Arms Control and National Security

John R. Burroughs

Jonathan Granoff

John H. Harrington

Bonnie D. Jenkins

Recommended Citation

John R. Burroughs et al., *Arms Control and National Security*, 36 INT'L L. 471 (2002)
<https://scholar.smu.edu/til/vol36/iss2/14>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in International Lawyer by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

Arms Control and National Security

JOHN R. BURROUGHS, JONATHAN GRANOFF, JOHN H. HARRINGTON,
BONNIE D. JENKINS, BARRY KELLMAN, AND MARK S. ZAID*

I. Introduction

The horrific events of September 11, 2001 defined national and international security concerns for the year. The importance of arms control was strongly emphasized by the Secretary-General of the United Nations, Kofi Annan, on October 1, 2001, before an emergency session on terrorism of the General Assembly when he said,

It is hard to imagine how the tragedy of September 11 could have been worse. Yet, the truth is that a single attack involving a nuclear or biological weapon could have killed millions. While the world was unable to prevent the 11 September attacks, there is much we can do to help prevent future terrorist acts carried out with weapons of mass destruction. The greatest danger arises from a non-State group—or even an individual—acquiring and using a nuclear, bio-

*John R. Burroughs is Executive Director of the Lawyers' Committee on Nuclear Policy, a non-profit group based in New York City, which engages in legal and policy research, education, and advocacy in support of nuclear arms control, disarmament, and non-proliferation and of rule-of-law-based global security in national and international settings. Jonathan Granoff is president of Global Security Institute. Mr. Granoff serves as co-chair of the Committee on Arms Control and National Security of the ABA Section of International Law and Practice, as well as United Nations representative of Lawyers Alliance for World Security. John H. Harrington serves as vice-chair of the Committee on Arms Control and National Security of the ABA Section of International Law and Practice. Mr. Harrington maintains a private practice in Fairfield, Connecticut engaged in International Commercial Arbitration, Land Use, Real Estate, and Elder Law. Bonnie D. Jenkins is a Ph.D. candidate in international relations at the University of Virginia. Ms. Jenkins holds the following positions in the ABA Section of International Law and Practice: Council Member, Co-Chair of the Law Student and New Lawyers Outreach Committee, and Vice-Chair of the Arms Control and National Security Committee. Her areas of specialization are international security, treaty law, arms control, nonproliferation and disarmament of weapons of mass destruction. Barry Kellman is Professor of Law at DePaul College of Law and serves as co-director of the International Criminal Justice and Weapons Control Center of the DePaul International Human Rights Law Institute. Professor Kellman is also a legal authority on the Chemical Weapons Convention and has advised the Defense and Energy Departments on legal issues relating to weapons control. Mark S. Zaid is Of Counsel with the firm of Lobel, Novins & Lamont in Washington, D.C. Mr. Zaid specializes in litigation and administrative claims relating to national security, media law, First and Fifth Amendments, Administrative Procedure Act, and the Freedom of Information/Privacy Acts. Mr. Zaid is also currently Executive Director of The James Madison Project, a non-profit organization promoting reduction of secrecy and government accountability.

logical, or chemical weapon. Such a weapon could be delivered without the need for any missile or other sophisticated delivery system . . . we must now strengthen the global norm against the use or proliferation of weapons of mass destruction. This means, among other actions: Redoubling efforts to ensure the universality, verification and full implementation of key treaties relating to weapons of mass destruction, including those outlawing chemical and biological weapons and the non-proliferation treaty.¹

Prior to September 11, expectations for multilateral progress in arms control were quite low.² The year had begun with the release on January 11, 2001 of the Donald Rumsfeld-chaired *Report of the Commission to Assess United States National Security Space Management and Organization*,³ which expressed strong support for radically departing from the international norm of preserving space from weaponization.⁴ The report, relying heavily on *Vision 2020* of the U.S. Space Command,⁵ which calls for unilateral U.S. "Full Spectrum Dominance" of the entirety of land, oceans, outer space and cyber-space, proposes the preparation for war fighting by the United States in and through space.

Many believed that in the wake of September 11 a new and robust multilateralism would emerge in arms control. These expectations were quickly dashed:

1. The United States boycotted the Comprehensive Test Ban Treaty Conference on Facilitating Entry Into Force in mid November.
2. In December 2001, the United States caused the Review Conference of the Biological Weapons Convention to end abruptly when it proposed terminating the group charged with negotiating a Protocol on verification of compliance with the ban on biological weapons less than two hours before the Protocol's scheduled completion.

1. Press Release, United Nations, Secretary-General, Addressing Assembly on Terrorism, Calls For 'Immediate, Far Reaching Changes' in UN Response to Terror, U.N. Doc. SG/SM/7977, GA/9920 (Oct. 1, 2001), available at <http://www.un.org/News/Press/docs/2001/sgsm7977.doc.htm>. Secretary-General Annan has consistently emphasized the need for progress on arms control in response to terrorism. On September 17, 2001, he stated before the International Atomic Energy Agency, "Making progress in the areas of nuclear non-proliferation and nuclear disarmament is more important than ever in the aftermath of last week's appalling terrorist attack on the United States. The States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) agreed last year that this challenge could not be overcome by halfway measures. Indeed, they concluded that 'the total elimination of nuclear weapons is the only absolute guarantee against the use or threat of use of nuclear weapons.' Regrettably, several important treaties aimed at nuclear non-proliferation, nuclear disarmament or nuclear reductions still await entry into force. It is vitally important for the world community to continue its efforts to implement the commitments already made, and to further identify the ways and means of achieving nuclear disarmament as soon as possible." Press Release, United Nations, Nuclear Disarmament Progress Even More Important After Terrorist Attack on United States Says Secretary-General to Atomic Energy Meeting (Sept. 17, 2001), available at <http://www.un.org/News/Press/docs/2001/sgsm7958.doc.htm>.

2. National Security Advisor Condoleezza Rice stated, "[A] Republican administration will . . . proceed from the firm ground of the national interest, not from the interests of an illusory international community." Condoleezza Rice, *Promoting the National Interest*, FOREIGN AFFAIRS, Jan.-Feb. 2000, at 45, 62.

3. *Report of the Commission to Assess United States National Security Space Management and Organization*, available at <http://www.defenselink.mil/pubs/space20010111.html>.

4. See *Report of the Committee on the Peaceful Uses of Outer Space*, U.N. GAOR, 53rd Sess., No. 20, U.N. Doc. A/56/20 (2001), available at <http://www.un.org/events/unispace3/index.html>; see also United Nations, *General Assembly Resolutions and Treaties Pertaining to the Peaceful Uses of Outer Space*, at <http://www.un.org/events/unispace3/index.html>.

5. U.S. Air Force, Joint Vision 2020, *Future Warfare*, available at <http://www.dtic.mil/jv2020>; see U.S. Space Command, Long Range Plan, available at <http://www.spacecom.af.mil/usspace/LRP/cover.htm>; U.S. Air Force, *America's Air Force Vision 2020*, available at <http://www.af.mil/vision>; U.S. Space Command, *Space and Information: The Warfighter's Edge*, available at <http://www.spacecom.af.mil/usspace>.

3. In December 2001, the United States announced that it would withdraw from the 1972 Anti-Ballistic Missile Treaty and pursue deployment of a national missile defense with the inclusion of space based potentially offensive weapons such as lasers and kinetic kill weapons.
4. In November 2001, the U.N. General Assembly voted overwhelmingly in favor of A/RES/56/23, Prevention of an Arms Race in Outer Space (156 votes in favor; zero opposed, with the United States, Israel, Micronesia, and Georgia nonvoting). The resolution calls for negotiating a multilateral agreement to prevent an arms race in space.⁶ Countries have pinpointed unilateral space weaponization as an indication of the U.S. lack of resolve in arms control.
5. In January 2001, the bipartisan Baker-Cutler Task Force recommended a tenfold increase in funding to safeguard nuclear grade fissile materials. This plea was echoed at the November 2001 meeting of the International Atomic Energy Agency's (IAEA) Special Session on Combating Nuclear Terrorism. The United States has thus far not supported efforts to strengthen safeguards notwithstanding the IAEA report of over 170 cases of trafficking in nuclear materials since 1993, the inadequacy of the safeguards of over 1,000 metric tons of fissile materials in Russia, and the demonstrations by U.S. Army and Navy commando teams that U.S. nuclear facility security systems are woefully inadequate.⁷

In an apparent spirit of cooperation, Russian President Vladimir Putin and President George Bush agreed to reduce nuclear warhead stockpiles to a level of 1,700 to 2,200 by 2012, but ended the year without a formal document. However, a closer look reveals that the United States contemplates retaining roughly seven to nine times as many weapons in a reserve status, thus rendering the cuts somewhat less than purported. Presently, there are over 30,000 nuclear weapons in the world, with over 90 percent in the hands of Russia and the United States, and over 5,000 of those on hair-trigger alert, meaning they could be fired on less than fifteen minutes notice.

However, September 11 did stimulate dramatic military and police initiatives both nationally and internationally. Issues involving immigration and domestic safety ranging from postal services to transportation were elevated to matters of national security in the public consciousness.

Many of these initiatives impacted the daily lives of millions of people. Little if any public debate has taken place. For much of 2001 after September 11, the Congress functioned at a minimal level of efficiency because of an anthrax attack from an unknown origin.

By year's end, military actions in Afghanistan unseated the unrecognized Taliban government and displaced resident al Qaeda militants. Because the definition of the threat as well as victory over it remains undefined, the termination of the campaign cannot be predicted.

In the meantime, the legal regimes, under which prosecutions of those responsible for the attacks will be pursued, remain uncertain. No international tribunal appears likely to be convened to try the culprits under the doctrine of crimes against humanity. The Bush administration has provided for a regime of military tribunals, which have faced much criticism. At the time of this publication, no individual has been identified as a candidate for trial before a tribunal, although hundreds have been detained in Cuba pending identification of their status as terrorists, militants, non-combatants, or otherwise.

6. G.A. Res. 23, U.N. GAOR, 56th Sess., U.N. Doc. A/RES/56/23 (2001), available at http://www.oosa.unvienna.org/SpaceLaw/gares/pdf/ARES_56_23E.pdf.

7. Frank von Hippel, *Recommendations for Preventing Nuclear Terrorism*, J. FED. AM. SCIENTISTS (FAS), Nov.-Dec. 2001, available at www.fas.org/faspir/2001/v54n6/.

This year's review of the Arms Control and National Security Committee marks its first submission following the merger of the Arms Control and Disarmament Committee and the International Law and National Security Committee. Many of the year's ongoing arms control and national security developments overlap, in terms of time and provenance, with those resulting strictly from the September 11th attacks. Because of the body of material flowing from the events of that day, this year's review treats those issues in a separate section. Each section, however, is equally important to an understanding of the current state of those affairs that govern our very existence.

II. September 11, 2001

On September 11, 2001, terrorists hijacked four civilian commercial aircraft over the east coast of the United States on a cloudless and mild late summer morning. At 8:48 A.M., one aircraft struck the North Tower of the World Trade Center. Before fighter aircraft arrived, a second jet slammed into the south face of Tower Two, and another into the Pentagon military headquarters in Washington, D.C. On the fourth aircraft, it is believed that hijackers were overpowered by a group of passengers, but the plane was intentionally crashed into a field in rural Pennsylvania.⁸

The devastating attacks caused the collapse of both towers of the World Trade Center, the destruction of many other buildings in the area, and the collapse of part of the outer ring of the Pentagon's west face. At the World Trade Center, two thousand eight hundred thirty people lost their lives, at the Pentagon, one hundred twenty-five, and forty-five in the crash in Pennsylvania. During the aftermath of the attacks, financial markets suspended trading, and civil aviation halted for two weeks. The resumption of these activities was met with deep reductions in market performance during an already weakened economy,⁹ and the government was forced to fend off an economic crisis while engaging an intractable enemy abroad.

The shock of the event caused a national trauma, immediately followed by a surge in patriotism, charity towards those affected, and bipartisan agreement in support of economic measures and military action. Setting out to eliminate the terrorists, and to prevent further attacks, the mechanisms of a civilized society set about dealing with the calamity in a variety of ways. This tragic act of terrorism mobilized legal initiatives on many fronts. These will be dealt with in three categories: United States, Foreign Countries, and International Bodies.

III. The United States

The attacks shattered a civic sense of security that the U.S. government immediately acted to restore. Beyond the direct effect of those lost, and the destruction of the iconic

8. American Airlines Flight 11, from Boston, Massachusetts, to Los Angeles, California, crashed into the north tower of the World Trade Center with ninety-two people on board. United Airlines Flight 175, from Boston, Massachusetts, to Los Angeles, California, struck the south tower with sixty-five people on board. American Airlines Flight 77, from Washington, D.C. to Los Angeles, crashed into the Pentagon with sixty-four people aboard. United Airlines Flight 93, from Newark, New Jersey, to San Francisco, California, crashed in rural southwest Pennsylvania, with forty-five people on board, *available at* <http://www.cnn.com/SPECIALS/2001/trade.center.victims.main.html>.

9. On December 1, 2001, President Bush announced in his weekly radio address that the U.S. economy had been in recession since March 2001. Press Release, White House, Radio Address by the President to the Nation (Dec. 1, 2001), *available at* <http://www.whitehouse.gov/news/releases/2001/12/20011130-7.html>.

twin towers of the World Trade Center, the public's insular reaction threatened entire industries. During an already weakened economy, national security itself was therefore threatened should the financial condition of the country fail. In order to restore public confidence in air travel, and all manner of public accommodation, the government dedicated itself to bolstering public safety, fighting the threat of further attacks, compensating survivors, and clearing and repairing the damaged property.

The hijackers were quickly identified as members of the al Qaeda terrorist organization¹⁰ lead by Osama bin Laden,¹¹ a disenfranchised Saudi multi-millionaire, who built a force structure and directed worldwide terror activities under the protection of the Taliban.¹² From Afghanistan, bin Laden disbursed his agents, and coordinated attacks against U.S. personnel and property in several instances.¹³ The investigation of the September 11th attacks rapidly revealed the hijackers had been living and training for their brutal mission within the United States for two years. Many of the terrorists were legally in the United States, some of them on student visas. Others were in the country illegally and had warrants for their arrest. The terrorists benefited from gaps in law enforcement, which hindered transfer of information between competing agencies. The Bush administration and Congress resolved to quickly deal with enforcement deficiencies and promulgate new restrictions on travel in order to respond to the threat of terror, restore the confidence of the public, and stabilize the economy.

This section deals with the efforts undertaken by the executive and legislative branches, to protect and enhance U.S. national security in the aftermath of the September 11th attacks.

10. Al Qaeda or "Al-Qa'ida" ("The Base") was developed by Osama bin Laden and others in the early 1980s to support the war effort in Afghanistan against the Soviets. Although al Qaeda functions independently of other terrorist organizations, it also functions through some of the terrorist organizations that operate under its umbrella or with its support, including: the Al-Jihad, the Al-Gamma Al-Islamiyya (Islamic Group—led by Sheik Omar Abdel Rahman and later by Ahmed Refai Taha, a/k/a Abu Yasser al Masri), Egyptian Islamic Jihad, and a number of jihad groups in other countries, including the Sudan, Egypt, Saudi Arabia, Yemen, Somalia, Eritrea, Djibouti, Afghanistan, Pakistan, Bosnia, Croatia, Albania, Algeria, Tunisia, Lebanon, the Philippines, Tajikistan, Azerbaijan, the Kashmiri region of India, and the Chechen region of Russia. Al Qaeda also maintained cells and personnel in a number of countries to facilitate its activities, including in Kenya, Tanzania, the United Kingdom, Canada and the United States. *Al-Qaeda International: Hearing on Al-Qaeda Before the Senate Subcomm. on Int'l Operations and Terrorism, Comm. on Foreign Relations*, 107th Cong. (2001) (statement of J. T. Caruso, Acting Assistant Director, Counter-Terrorism Division, Federal Bureau of Investigation), available at <http://www.fbi.gov/congress/congress01/caruso121801.htm>.

11. In 1996, bin Laden issued a "fatwah," a religious ruling urging Muslims to kill U.S. troops in Saudi Arabia and Somalia. A second fatwah in 1998 called for attacks on American civilians. CNN.com/U.S., Sept. 27, 2001, at <http://www.cnn.com/2001/US/09/12/binladen.profile/>.

12. The Taliban (Seekers after Knowledge) formed in 1994, drawing largely from the Pashtun population inhabiting Southeastern Afghanistan and Pakistan. Following three years of war, the Taliban seized the Afghan capital city of Kabul in 1997, and Taliban authorities changed the official name of the country to the Islamic State of Afghanistan. The Taliban enforced an oppressive value system based upon its interpretation of Islamic law, and were singled out by the United Nations as a source of world terrorism prior to September 11. Only three countries recognized the Taliban as a legal government—Pakistan, Saudi Arabia, and the United Arab Emirates. *Taliban*, WORLD BOOK ONLINE AMERICAS ED., available at <http://www.aolsvc.worldbook.aol.com/wbol/wbPage/na/ar/co/749759> (last visited Mar. 3, 2002).

13. These incidents include the Millennium bombing plot foiled by a customs officer in Washington State, last year's attack on the USS Cole in Yemen and the nearly simultaneous bombings of the U.S. embassies in Tanzania and Kenya in 1998. CNN.com/U.S., *supra* note 11.

A. EXECUTIVE

President Bush issued a raft of executive orders invoking his authority to call up the reserves,¹⁴ preventing the financing of terrorism,¹⁵ establishing the Office of Homeland Security¹⁶ (see below), enhancing citizen preparedness in the war on terrorism,¹⁷ dealing with detention, treatment, and trial of certain non-citizens in the war against terrorism,¹⁸ and declaring Afghanistan as a combat zone.¹⁹

President Bush submitted the Convention for the Suppression of Financing of Terrorism to the Senate for its advice and consent to ratification, along with the Convention for the Suppression of Terrorist Bombings (see United Nations, below). The Senate approved them, and the President ratified them on June 26, 2002.²⁰ Therefore, the United States is now party to all twelve existing global treaties relating to terrorism. For the most part these treaties concern specific proscribed acts like hijacking of aircraft, violent acts in airports, violent acts on ships, taking of hostages, and attacks on diplomats. The treaties require states to enact legislation enabling prosecution of persons committing the acts, and to either prosecute suspects or extradite them to states with jurisdiction that so request.

The United States also participated in the most recent round of negotiations on a comprehensive convention on terrorism that would apply to all terrorist acts and a convention on nuclear terrorism. Despite the urgency imparted by the September 11th attacks, negotiations on the comprehensive convention have again been stalemated by longstanding issues concerning (1) whether groups engaged in struggles against "foreign occupation" (e.g., Palestinian groups) are covered by laws relating to terrorism or the law of armed conflict; and (2) whether state armed forces, whose use of force in time of war is subject to the law of armed conflict, can also be subject in some circumstance to laws relating to terrorism. The nuclear terrorism convention has received less attention, and probably will be adopted if the issues relating to the comprehensive convention are resolved. One stumbling block is that many states are reluctant to concede that the law of armed conflict, rather than laws prohibiting terrorism governs state use of nuclear weapons. Despite the advisory opinion of the International Court of Justice declaring the general illegality of threat or use of nuclear weapons, the nuclear weapon states have not conceded that use of nuclear weapons would violate requirements of the law of armed conflict including those of necessity, proportionality, and discrimination between civilians and military targets.²¹

The President also quickly signed into law many initiatives, which are covered in the Legislative section below. First, the following subsections review the Office of Homeland Security and military tribunals in greater detail.

14. Press Release, White House, President Orders Ready Reserves of Armed Forces to Active Duty, EO 13223 (Sept. 14, 2001) (amended on Jan. 17, 2002), at <http://www.whitehouse.gov/news/releases> (last visited Aug. 24, 2002).

15. Press Release, White House, Executive Order on Terrorist Financing, EO 13224 (Sept. 23, 2001).

16. Press Release, White House, Executive Order Establishing the Office of Homeland Security, EO 13228 (Oct. 8, 2001).

17. Press Release, White House, Executive Order on Citizen Preparedness in War on Terrorism, EO 13234 (Nov. 9, 2001).

18. Press Release, White House, President Issues Military Order, EO 13235 (Nov. 13, 2001).

19. Press Release, White House, Afghanistan Combat Zone Presidential Order, EO 13239 (Dec. 14, 2001).

20. See <http://www.untreaty.un.org/ENGLISH/terrorism.asp>.

21. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226 (July 30), available at <http://www.icnp.org/wcourt/opinion.htm>.

1. *The Office of Homeland Security*

On October 8, 2001, President Bush established the Office of Homeland Security and named Governor Tom Ridge of Pennsylvania as Assistant to the President for Homeland Security, an advisory position. Governor Ridge's office was endowed with a \$19.5 billion budget for the year 2002.²² The mission is to develop and coordinate the implementation of a comprehensive national strategy to secure the United States from terrorist threats or attacks.²³ Governor Ridge's office is tasked with coordinating the functions of dozens of law enforcement and regulatory agencies. The Governor, in the absence of the President, chairs the Homeland Security Committee.²⁴

From the Emergency Response Fund, \$10.6 billion dollars²⁵ was dedicated to domestic anti- and counter-terrorist duties, which include combating terrorism and weapons of mass destruction (WMD), critical infrastructure protection (CIP), and continuity of operations (COOP).²⁶ In addition, homeland security funding is also earmarked for duties associated with border security (i.e., Immigration and Naturalization Service's enforcement and detention activities, the Customs Service's enforcement activities, the Coast Guard's enforcement activities, the Agricultural Quarantine Inspection Program, and the Department of State's visa program) and aviation security.²⁷

The office also set about to increase the number of sky marshals on U.S. airlines; acquire enough medicine to treat up to ten million more people for anthrax or other bacterial infection; distribute \$1.1 billion to states to strengthen their capacity to respond to bioterrorism and other public health emergencies resulting from terrorism; deploy hundreds of Coast Guard cutters, aircraft, and small boats to patrol the approaches to our ports and protect them from internal or external threats; acquire equipment for certain major mail sorting facilities to find and destroy anthrax bacteria and other biological agents of terror; and station 8,000 National Guard at baggage screening checkpoints at 420 major airports.²⁸

2. *Military Tribunals*

The United States' war against terrorism, as seen in the aftermath of September 11, has not been without controversy on many levels. One of the most controversial issues has been the proposed implementation of military tribunals against certain non-citizens.²⁹ By Mili-

22. White House, The Office of Homeland Security, at <http://www.whitehouse.gov/homeland/>.

23. *Id.*

24. Members of the Homeland Security Committee are the Director of the Office of Homeland Security, Secretary of the Treasury, Secretary of Defense, Attorney General, Secretary of Health and Human Services, Secretary of Transportation, Director of the Office of Management and Budget, Director of Central Intelligence, Director of the Federal Bureau of Investigation, Director of the Federal Emergency Management Agency, Chief of Staff to the President, and Chief of Staff to the Vice President. Homeland Sec. Council, at <http://www.whitehouse.gov/news/releases/2001/10/20011029-16.html>.

25. See Homeland Sec. Council, *supra* note 16.

26. *Id.*

27. *Id.*

28. *Id.*

29. A military commission is a form of military tribunal. The correct use of the term "military commission" has itself been the subject of some debate. In *Madsen v. Kinsella*, 343 U.S. 341, 347 (1952), U.S. Supreme Court Justice Burton stated, "[Military commissions] have taken many forms and borne many names." Most commonly, military tribunals exist in the form of one of the three types of courts-martial authorized by the Uniform Code of Military Justice, General Courts-Martial, Special Courts-Martial, and Summary Courts-Martial. In addition, a military tribunal may also exist in the form of a military commission." Stephen Young,

tary Order issued on November 13, 2001, President Bush stated, "To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order . . . to be tried for violations of the laws of war and other applicable laws by military tribunals."³⁰ The underlying rationale was to speed up the trials of suspected terrorists and to ensure greater secrecy than in ordinary criminal courts.³¹ Yet, criticisms immediately arose over whether the military tribunals would jeopardize civil and due process rights of prisoners and prevent them from receiving a fair trial.³²

The Order applies to individuals who are not U.S. citizens, and for whom

there is reason to believe . . . (i) is or was a member of the organization known as al Qaida; (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or (iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) . . . of this order.³³

Additionally, it must be determined that "it is in the interest of the United States that such individual be subject to this order."³⁴

Upon announcement of the issuance of the Military Order significant debate arose regarding the rules that would be used under such circumstances, including comments from the American Bar Association (ABA).³⁵

United States Military Commissions: A Quick Guide to Available Resources, Mar. 1, 2002, available at <http://www.llrx.com/features/military.htm>.

30. Military Order, § 1(e), 66 Fed. Reg. 57,833 (Nov. 13, 2001), available at <http://www.whitehouse.gov/news/releases/2001/11/print/20011113-27.html>. A copy of the Order is accessible at <http://news.findlaw.com/hdocs/docs/terrorism/bushtribunalord111301.html>.

31. There are approximately 500 individuals in custody. American forces hold close to 200 detainees still in Afghanistan and 300 at a newly constructed high-security jail in Guantanamo, Cuba. Pauline Jelinek, *Of 500 Prisoners from Afghanistan, none yet chosen for military tribunals, Pentagon says*, ASSOC. PRESS, Feb. 26, 2002, available at <http://wire.ap.org/APnews>.

32. Jennifer Hoyt, *Lawmakers demand hearings on Bush's order to allow trials of terrorist suspects before military tribunals*, ASSOC. PRESS, Nov. 14, 2001, available at <http://wire.ap.org/APnews>. Criticism came from abroad as well as domestically particularly from the Europeans who argued that military tribunals would violate various international agreements including the European Convention on Human Rights. Paul Geitner, *Bush plan for military tribunals complicates efforts to extradite suspects from Europe*, ASSOCIATED PRESS, Nov. 27, 2001, available at <http://wire.ap.org/APnews>.

33. Military Order, *supra* note 30, § 2(a)(1). Although the current Order does not allow for prosecution of U.S. citizens, the Bush administration has argued that military commissions can exercise jurisdiction over non-U.S. citizens even in the absence of war. This position was recently articulated in *Mudd v. Secretary of the Army*, a case in which the family of Dr. Samuel Mudd, who provided medical attention to President Lincoln's assassin John Wilkes Booth, has sought to exonerate their ancestor. See Philip A. Gagner, *The Bush Administration's Claim That Even Citizens Can Be Brought Before Military Tribunals, And Why It Should Never Be Put Into Practice*, Dec. 26, 2001, available at http://writ.news.findlaw.com/commentary/20011226_gagner.html.

34. Military Order, *supra* note 30, § 2(a)(2).

35. Of course, the issue became the subject of dispute within the U.S. Congress as well and soon became the topic of several pending bills. See Terrorism Tribunal Act, H.R. 3564, 107th Cong. (2001); Foreign Terrorist Military Tribunal Authorization Act, H. R. 3468, 107th Cong. (2001); Military Tribunal Authorization Act, S. 1941, 107th Cong. (2002); Military Commission Procedures Act, S. 1937, 107th Cong. (2002). Additionally, the U.S. Senate held a series of hearings. See *Department of Defense's Implementation of the President's Military Order on Detention, Treatment, and Trial by Military Commission of Certain Non-Citizens in the War On Terrorism*, Hearing before the Senate Comm. on Armed Forces, 107th Cong. (2001), at http://www.senate.gov/%7Earmed_services/hearings/2001/c011212.htm; *DOJ Oversight: Preserving Our Freedoms While Defending*

On December 7, 2001, ABA President Robert Hirshon noted that the use of tribunals deserved serious consideration. "Just as we believe that private communications between attorneys and clients result in better justice, so do we believe that public offers of evidence and proof—that is, public trials—sustain confidence in the fairness of our legal system. For this reason, if no other, the President's Military Order permitting secret military tribunals needs to be carefully considered."³⁶ The ABA commissioned a study in 2001 and in February 2002 the ABA House of Delegates adopted a resolution concerning the President's Military Order creating military tribunals.³⁷ As Mr. Hirshon noted to Senator Patrick J. Leahy in a letter dated February 19, 2002,

The resolution takes no position as to what extent the President as Commander in Chief has constitutional power to create military tribunals. In essence, the resolution recommends that the President and Congress, pursuant to its explicit Article I constitutional powers, should ensure that the Military Order and any implementing regulations respect our core American values of due process and fundamental fairness. Ensuring fair and just tribunals will minimize the possibility that any convictions obtained by a military commission will survive constitutional challenge on due process grounds. The United States also has a strong interest in creating tribunals that other nations regard as independent and unbiased in order to better protect Americans living and traveling overseas who could find themselves subject to similar tribunals impeded by foreign governments.³⁸

a. Past Use of Military Tribunals

"Military commissions derive their authority from the United States Constitution (Articles I and II) and the powers vested in them by statutory law (e.g., Authorization for Use of Military Force, PL 107-40).³⁹ Although their origins in the United States can be traced to the U.S.-Mexico War of 1846-48, when "councils of war" were convened by General Winfield,⁴⁰ the validity and jurisdiction of military commissions was not fully tested until the Civil War. In 1863, Union Army General Order 100 helped to solidify the place of military commissions in the field of military justice by stating that, under the common law of war, military commissions were allowed to prosecute "cases which do not come within the Rules and Articles of War, or the jurisdiction conferred by statute on courts-martial."⁴¹

Against Terrorism, Hearing before the Senate Comm. on the Judiciary (2001), available at <http://judiciary.senate.gov/hearing.cfm?id=129>.

36. Robert E. Hirshon, American Bar Association Responds to the National Tragedy, Remarks Prepared for Delivery, National League of Cities (Dec. 7, 2001), at <http://www.abanet.org/leadership/antiterror.html>.

37. ABA resolution concerning president's military order creating military tribunals (Feb. 2002), available at <http://www.abanet.org/poladv/letters/107th/militarytrib8c.pdf>.

38. See Letter from Robert E. Hirshon, President, American Bar Association, to Senator Patrick J. Leahy, Chairman, Comm. on the Judiciary (Feb. 19, 2002), available at www.abanet.org/poladv/letters/107th/militarytrib021902leahy.html. For additional analysis of military tribunals issued by the ABA, see American Bar Association Task Force On Terrorism and The Law Report and Recommendations On Military Commissions (Jan. 4, 2002), available at <http://www.abanet.org/leadership/military.pdf>.

39. Authorization for Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (2001) [hereinafter Public Law 107-40].

40. Scott General Orders, No. 20 of Feb. 19, 1847, available at <http://familyguardian.tzo.com/Publications/MilitaryGovAndMartLaw/MilitaryGovernmentAndMaritalLaws.pdf>.

41. See Young, *supra* note 29.

This statement was reiterated by the Supreme Court in *Ex Parte Vallandigham*⁴² when the court drew a clear distinction between military commissions and courts-martial.⁴³

The first major legal test of the jurisdiction of military commissions occurred in the period immediately after the Civil War in the landmark 1866 United States Supreme Court decision, *Ex Parte Milligan*.⁴⁴ The jurisdictional boundaries of military commissions were further solidified during World War I when Congress adopted Article of War 15. At the time, Judge Advocate General Enoch H. Crowder, seeking to clarify the status of the military commission, argued, "[A] military commission is our common-law war court. It has no statutory existence, though it is recognized by statute law."⁴⁵ This formal recognition by Congress authorized the use of military commissions for the purposes of prosecuting violations of the law of war. Article of War 15 was later the basis for Article 21⁴⁶ of the Uniform Code of Military Justice, first adopted in 1950 and put into force in 1951.⁴⁷

The last notable use of a military tribunal, which has been compared to our current circumstances, was in 1942 to try eight Nazi saboteurs caught in the United States.⁴⁸ That use was upheld by the Supreme Court in *Ex Parte Quirin*.⁴⁹ The debate concerning the appropriate use of military tribunals was a subject before the Supreme Court several times during the World War II-Korean War period.⁵⁰

42. *Ex Parte Vallandigham*, 68 U.S. 243 (1863).

43. Young, *supra* note 29.

44. *Ex Parte Milligan*, 71 U.S. 2 (1866).

45. S. Rep. No. 130, 64th Cong., 1st Sess. (1816).

46. 10 U.S.C. § 21, art. 21 (2001). Jurisdiction of courts-martial not exclusive. The provisions of this chapter, conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.

47. *Id.*

48. Proclamation No. 2561: Appointment of a Military Commission, 7 Fed. Reg. 5101 (July 2, 1942).

49. *Ex parte Quirin*, 317 U.S. 1 (1942). The eight Nazis came ashore in the darkness of June 17, 1942, "wearing caps of the German Marine Infantry and carrying with them a supply of explosives, fuses, and incendiary and timing devices." *Id.* at 21. Their plan was "to destroy war industries and war facilities in the United States." *Id.* However, they were captured immediately. In adjudicating the challenge, the Court took

no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war. It is enough that petitioners here, upon the conceded facts, were plainly within those boundaries, and were held in good faith for trial by military commission, charged with being enemies who, with the purpose of destroying war materials and utilities, entered or after entry remained in our territory without uniform—an offense against the law of war. We hold only that those particular acts constitute an offense against the law of war which the Constitution authorizes to be tried by military commission.

Id. at 45-46.

Thus, the Court concluded that the President was authorized to order a trial by a military commission, that the Order was lawful, that the Commission was lawfully constituted, and that the petition for habeas corpus was denied. *Id.* at 48.

50. See, e.g., *U.S. ex rel. Toth v. Quarles*, 350 U.S. 11 (1955) (military commission inapplicable to former serviceman arrested for acts that occurred while a servicemember stationed in Korea); *Madsen v. Kinsella*, 343 U.S. 341 (1952) (trial by military commission upheld of civilian military spouse who murdered husband while in U.S.-occupied Germany); *Duncan v. Kahanamoku*, 327 U.S. 304 (1946) (martial law alone no excuse for replacing civilian courts with military commissions); *In re Yamashita*, 327 U.S. 1 (1946) (American military commission jurisdiction upheld over Japanese General Yamashita for alleged war crimes in the Philippines).

b. Current Application of Military Tribunals

On March 21, 2002 the Department of Defense revealed the planned rules and procedures of the military tribunals. These included:

- All suspects would be presumed innocent;
- A guilty verdict would require proof beyond a reasonable doubt;
- The military panel would be comprised of three to seven members;
- Two-thirds of the military panel would be required to reach a guilty verdict;
- A unanimous verdict by the military panel would be needed to impose the death penalty;⁵¹
- Most proceedings would be open to the media, but proceedings can be closed to discuss classified information or protect witnesses;⁵²
- Defendants would be assigned a military lawyer or allowed to hire a civilian lawyer at their own cost;
- No appeals of convictions would be permitted, except to a three-member review panel that would hear the matter within 30 days;⁵³
- Findings and sentences are not final until approved by the President or the Secretary of Defense but findings of not guilty cannot be changed.⁵⁴

At the date of this writing, the extent to which military tribunals will be used to prosecute individuals apprehended during the terrorist war in Afghanistan is still unclear. It is believed that only a handful of the nearly 500 prisoners will be tried before such a military tribunal. Some will be transferred to their country of origin for prosecution, and others will simply be freed. However, the current debate is likely the beginning of much discussion to come particularly given that Department of Defense officials have “conceded that some hard-line guerrillas could be held indefinitely without charges—and even some acquitted by juries might remain in cells to keep them from international mischief.”⁵⁵

3. Military Response

On October 7, 2001, the United States launched an armada consisting of fifteen long-range bombers from six air bases, twenty-five strike aircraft from the carriers Carl Vinson and Enterprise, and fifty tomahawk missiles from U.S. and British submarines. Pre-positioned B-52 and B-1 bombers, based in Diego Garcia in the Indian Ocean, were sent to carpet bomb terrorist training camps in Afghanistan. B-2 stealth bombers also were employed, flying over thirty hours from their bases in the United States to the target areas, and continuing to Diego Garcia for rest and refueling. Even before the campaign the economy of the country was a catastrophe and thus it is believed that the small amounts of humanitarian assistance were appreciated. Thirty-seven thousand five hundred rations were dropped by two C-17 transport aircraft on that first day, with more dropped as the campaign progressed.

51. Other sentences may include life imprisonment or a shorter term, fines and restitution, or other punishment. *Pentagon Unveils Anti-Terror Military Trial Rules*, REUTERS, Mar. 21, 2002, available at http://www.reuters.com/news_article.jhtml.

52. In such cases, the defendant will not have access to the information, but his defense counsel will.

53. Sue Fleming, *Legal Experts Question Military Tribunals*, REUTERS, Mar. 21, 2002, available at http://www.reuters.com/news_article.jhtml.

54. See Fact Sheet: Department of Defense Order on Military Commissions, Mar. 21, 2002, available at <http://www.defenselink.mil/news/Mar2002/d20020321fact.pdf>.

55. Charles Aldinger, *Key Questions Remain on Fate of U.S. War Captives*, REUTERS, Mar. 22, 2002, available at http://www.reuters.com/news_article.html.

The bombing operation hit targets throughout the country. Following October 7, 2001, the military maintained this operational tempo daily throughout most of the campaign to soften Taliban and al Qaeda forces in front of Northern Alliance forces. The ground campaign by the Northern Alliance, which included U.S. and British Special Forces, attacked from their mountain stronghold and captured Mazar e-Sharif, opening a key supply route south to Kabul and east and west to Islamabad and Kandahar, capturing these cities well in advance of estimated timetables. As the forces pursued, U.S. Marines established a presence at Bagram air base, near Kandahar, from which to deploy further operations as the year ended. Before the end of the year, Taliban influence was neutralized in the major population centers, their members killed, captured, deserted or hiding along with their al Qaeda collaborators. Lawlessness, characterized by kidnapping, carjacking and murder, still reigned over the bandit-ridden open roads between these areas.

B. LEGISLATIVE

Congress responded to the attacks on September 11 by immediately passing a resolution committing increased resources in the war to eradicate terrorism, and supporting the determination of the President, in close consultation with Congress, to bring to justice and punish the perpetrators of these attacks as well as their sponsors.⁵⁶ Congress appropriated a \$40 billion Emergency Response Fund to wage war against al Qaeda, aid the reconstruction efforts in New York and Virginia, compensate victims, and strengthen our defenses at home.⁵⁷

Congress, thereafter, authorized the use of U.S. armed forces against those responsible for the attacks under the War Powers Resolution.⁵⁸ This resolution further authorized the President to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks, or harbored those organizations or persons responsible.

Congress also found itself shoring up the airline industry, which represents ten percent of the gross domestic product and is a critical functional component of most other sectors of the U.S. economy. During the two weeks immediately following the attacks, all civil transport aircraft were grounded,⁵⁹ causing a loss of \$300 million to the industry. The industry, already in dire financial condition, was in serious danger of being unable to reopen without government assistance following the attacks and subsequent grounding. On September 22, 2001, Congress passed the Air Transportation Safety and System Stabilization Act⁶⁰ to compensate air carriers for losses incurred by them as a result of the terrorist attack

56. S.J. Res. 22, 107th Cong. (2001).

57. 2001 Emergency Supplemental Appropriations Act for Recovery from and Response to Terrorist Attacks on the United States, H.R. 2888, 107th Cong. (2001). See Public Law No 107-38, Sept. 18, 2001, making emergency supplemental appropriations for the fiscal year 2001 for additional disaster assistance, for anti-terrorism initiatives, and for assistance in the recovery from the tragedy that occurred on September 11, 2001, and for other purposes: (1) providing Federal, State, and local preparedness for mitigating and responding to the attacks; (2) providing support to counter, investigate, or prosecute domestic or international terrorism; (3) providing increased transportation security; (4) repairing public facilities and transportation systems damaged by the attacks; and (5) supporting national security.

58. Public Law 107-40, *supra* note 39. A joint resolution to authorize the use of U.S. Armed Forces against those responsible for the recent attacks launched against the United States.

59. Press Release, FAA, Airports to Remain Closed (Sept. 12, 2001), available at <http://www.faa.gov/apa/pr/pr.cfm?id=1406>.

60. Pub. L. No. 107-42, 115 Stat. 230 (2001).

as an emergency requirement pursuant to Section 252(e) of the Balanced Budget and Emergency Deficit Control Act of 1985 (2 U.S.C. § 901(e)). The Act compensated the airlines in the amount of \$5 billion for their losses as a result of the ground stop, and for "incremental losses" incurred as a direct result through December 31, 2001. Even with this aid, the airline industry lost \$7 billion by the end of 2001.

The most comprehensive congressional action was aimed at taking the legs out from under the terrorists. This law's title is 'Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001.'⁶¹ The sweeping legislation included provisions on electronic surveillance, border security, cybercrime, public safety officers, victims of crime, criminal justice (including statutes created to deal with mass transportation crime), death-eligible conspiracy penalties, biological weapons, trade sanctions, mandatory detention, defining terrorism, and money laundering, among others. The USA PATRIOT Act, an enormous and controversial body of legislation, deserves far more analysis than is possible within the size constraints of this article, which have already been exceeded due to the issues confronting this committee. The committee will publish a supplementary report on the USA PATRIOT Act at a later date and post it to the ABA Web site.⁶²

IV. Foreign Nations

U.S. allies participated by pledging support in a variety of ways, including military, law enforcement, and intelligence sharing. Many countries individually answered the call to assist in jailing suspected terrorists. Police rounded up scores of conspirators in Britain, Germany and Spain soon after the attacks.⁶³ The full array of assistance from all States, including diplomatic, economic, and humanitarian measures, is beyond the scope of this article. However, a few notable examples of foreign legal developments deserve mention because of their close connection to the national security concerns of the United States.

A. UNITED KINGDOM

The United Kingdom presciently enacted legislation expanding its power to combat terrorism ahead of the September 11th attacks. Terrorism Act 2000 came into force on February 19, 2001. This legislation complied with the United Nations mandate to implement fully the international anti-terrorist conventions to which it is party.⁶⁴ The Act applies to foreign as well as domestic terrorist groups and is the responsibility of the Home Secretary. The Home Secretary has published a list of foreign terrorist organizations to be added to those groups concerned in terrorism in Northern Ireland. Proscription of these organizations under the Terrorism Act 2000 took effect on March 28, 2001.⁶⁵

61. Pub. L. No. 107-56, 115 Stat. 272 (2001).

62. ABA Web Site, Section of Int'l L. & P., Arms Control and Nat'l Sec. Comm., at <http://www.abanet.org/intlaw/divisions/public/arms.html>.

63. The Sydney Morning Herald Web Site, at <http://www.smh.com.au>.

64. U.N. Doc. S/RES/1269 (1999), available at <http://www.un.org/Docs/scres/1999/99sc1269.htm>.

65. The proscribed organizations are as follows: Al-Qa'ida, Egyptian Islamic Jihad, Al-Gama'at al-Islamiya, Armed Islamic Group (Groupe Islamique Armee) (GIA), Salafist Group for Call and Combat (Groupe Salafiste pour la Predication et le Combat) (GSPC), Babbar Khalsa, International Sikh Youth Federation, Harakat Mujahideen, Jaish e Mohammed, Lashkar a Tayyaba, Liberation Tigers of Tamil Eelam (LTTE), Hizballah External Security Organisation, Hamas-Izz al-Din al-Qassem, Palestinian Islamic Jihad-Shaqaqi, Abu Nidal Organisation, Kurdistan Workers Party (Partiya Karkeren Kurdistan) (PKK), Revolutionary People's Libera-

The Act reforms and extends previous counter-terrorist legislation, and puts it largely on a permanent basis.⁶⁶ The Act also: (1) prohibits fund-raising and other kinds of financial support for terrorism, together with power for a court to order forfeiture of any money or other property connected with the offenses; (2) provides the police with powers to arrest and detain suspected terrorists, and broader powers to stop and search vehicles and pedestrians, and to impose parking restrictions; (3) provides examination powers at ports and borders; (4) provides for the treatment of suspects who are detained and for judicial extension of the initial period of detention; (5) proscribes weapons training for terrorist purposes, including recruitment for such training; and (6) proscribes the directing of a terrorist organization, possessing articles for terrorist purposes, possessing information for terrorist purposes, and incitement of overseas terrorism. The Act also includes provisions on extra-territorial jurisdiction and extradition, which will enable the U.K. to ratify the U.N. Conventions for the Suppression of Terrorist Bombings and for the Suppression of the Financing of Terrorism.⁶⁷

The Act repeals previous anti-terrorism measures and adopts a wider definition, recognizing that terrorism may have religious or ideological as well as political motivation, and covers actions which might not be violent in themselves but which can, in a modern society, have a devastating impact. These could include interfering with the supply of water or power where life, health or safety may be put at risk, and the disrupting of key computer systems. Of critical importance is that the Act covers terrorism not only within the United Kingdom, but also throughout the world. This is implicit in the Prevention of Terrorism Act (PTA) definition, but the Act makes it explicit.⁶⁸

The British employed the use of Royal Navy Tomahawk cruise missiles during the first days of the military campaign in Afghanistan, which erupted on October 7. British involvement in 2001, however, consisted primarily of Special Forces units, Royal Air Force (RAF) tanker aircraft providing air-to-air refueling support to U.S. aircraft, and RAF reconnaissance and surveillance aircraft flying operational sorties.⁶⁹ The RAF flew the Northern Alliance Delegation to Bonn to take part in the Petersburg Conference.⁷⁰ Ground personnel assisted the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas. In December the British committed to leading the International Security

tion Party—Front (Devrimci Halk Kurtulus Partisi-Cephesi) (DHKP-C), Basque Homeland and Liberty (Euskadi ta Askatasuna) (ETA), 17 November Revolutionary Organisation (N17), Islamic Army of Aden, and Mujaheddin al Khalq, <http://www.fco.gov.uk/news/dynpage.asp?Page=10514&Theme=11&Template=999>.

66. The previous legislation concerned is: Prevention of Terrorism (Temporary Provisions) Act 1989 (c. 4) (the "PTA"), Northern Ireland (Emergency Provisions) Act 1996 (c. 22) (the "EPA"); and sections 1 to 4 of the Criminal Justice (Terrorism and Conspiracy) Act 1998 (c. 40). Unlike Terrorism Act 2000, these earlier measures required annual parliamentary review. Explanatory Notes to Terrorism Act, *available at* <http://www.hmsi.gov.uk/acts/en/2000en11.htm>.

67. *Id.*

68. *Id.*

69. Operation Veritas: Summary Reports, *available at* <http://www.operations.mod.uk/veritas/summary.htm>.

70. Operation Veritas: RAF Flies Northern Alliance Representative to Bonn, *at* http://www.operations.mod.uk/veritas/bonn_flight.htm.

Assistance Force, code-named operation Fingal.⁷¹ The United Kingdom also pledged financial support to humanitarian, reconstruction and political efforts in Afghanistan.⁷²

B. GERMANY

Germany has pledged a total of 3,900 troops for the anti-terror campaign, including a naval contingent, troops in Afghanistan and about 100 in neighboring Uzbekistan. Immediately following the attacks the German government engaged in aggressive law enforcement and intelligence activities and in identifying sources of financing and terrorist cells. Legislation was enacted increasing airport security, boosting the authority of law enforcement agencies, and providing for the prosecution in Germany of terrorist crimes in other countries, as well as funding provisions totaling \$1.3 billion.⁷³ Germany also hosted the Petersburg Conference in Bonn attended by representatives of various Afghan ethnic groups. The conference produced the Bonn Agreement on the future Governance of Afghanistan, the blueprint for the political stabilization of Afghanistan, which set up a provisional government and established a political and economic framework following the elimination of the Taliban regime.⁷⁴

German military cooperation included the deployment of "Fuchs" armored reconnaissance vehicles, equipped to detect nuclear, biological and chemical (NBC) contamination, with 250 NBC soldiers on standby in Germany; a "Flying Hospital"—an Airbus A310 prepared for medical evacuation—on standby in Germany with its crew; and a naval task force consisting of frigates and fast patrol boats to secure the waterways around the Horn of Africa and disrupt connection routes for terrorist organizations. German troops are an integrated part of the NATO Airborne Warning and Control System (AWACS) that patrolled U.S. airspace since October 2001 in Operation "Noble Eagle."⁷⁵

C. PAKISTAN

Almost immediately following the September 11th attacks, those areas of Afghanistan harboring al Qaeda and Taliban forces emerged as the first to receive a U.S. military re-

71. Austria, Denmark, Finland, France, Germany, Greece, Italy, New Zealand, Netherlands, Norway, Portugal, Romania, Spain, Sweden, Turkey and the U.K. signed a joint Memorandum of Understanding in London on January 10, formalizing their contributions to the Force. Belgium has subsequently also signed the Memorandum, and Bulgaria is also contributing personnel. Operation Fingal, *available at* <http://www.operations.mod.uk/fingal/index.htm>.

72. DFID has set aside £60 million for U.K. assistance to Afghanistan. In September, DFID announced £40 million of emergency humanitarian relief assistance, and in late December committed a further £20 million to support the Interim Administration and the U.N.-led transitional recovery and rehabilitation proves, as well as continuing to respond to humanitarian needs. DFID has provided £26 million to support Pakistan in bearing the additional costs of hosting refugees. This includes £15 million for economic assistance and £11 million for poorer communities, particularly those most affected by new influxes of refugees, to provide additional health, education and other services. DFID has also allocated £2.2 million to agencies in Tajikistan to assist agricultural recovery, food assistance and water supply projects. Foreign & Commonwealth Office News, *available at* <http://www.fco.gov.uk/news/dynpage.asp?Page=10904&Theme=34&Template=999>.

73. German Embassy, Washington D.C., Background Papers, *available at* http://www.germany-info.org/relaunch/info/archives/background/fs_afgan.html.

74. Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Governing Institutions, *available at* www.un.org/Docs/sc/letters/2001/1154e/pdf (last visited June 19, 2002).

75. *Id.*

sponse. However, Pakistan stood between the aircraft carriers and the targets. Security on Pakistan's western frontier had gone largely ignored due to lawless itinerant tribal populations controlling a large mountainous area that straddles the border with Afghanistan. The Pakistani military harbored deeper concerns over the eastern border with India stemming from an ongoing dispute over the Kashmir region that kept forces directed away from Afghanistan. Moreover, the government of the Islamic Republic of Pakistan, as the nation is officially known, was closely tied to the Taliban, and a significant portion of the powerful Pakistani intelligence service, the ISI, were Taliban sympathizers. Pakistan was one of just three countries that recognized the Taliban as the legal government of Afghanistan, and supported its fight against the Northern Alliance for control of the country. The Taliban, in turn, harbored Osama bin Laden, one of the most-wanted people in the world. On the morning of September 11, Pakistan was the United States' most unlikely ally.

Prior to September 11, the United States had restricted foreign aid to Pakistan in 1998 following its successfully testing nuclear weapons. Courting Pakistan for cooperation in the war on terrorism, the Senate authorized the President to waive these restrictions through fiscal year 2003.⁷⁶ This was followed by authorization for financial aid in the amount of \$600 million in direct budget and balance of payment grant programs.⁷⁷ Pakistan returned the favor by allowing military overflights to Afghanistan. Pakistan also disbanded the majority of its intelligence force due to its ties with the Taliban, and made further reassuring internal reforms during the course of the U.S.-led military campaign.

V. International Bodies

A. THE UNITED NATIONS

The United Nations Security Council, on September 12, 2001, unanimously adopted Resolution 1368 (2001)⁷⁸ to formally condemn the attacks of the day before. The Council subsequently adopted Resolution 1373, on September 28, 2001, establishing the Committee Concerning Counter-Terrorism to monitor implementation of the resolution's directive to hinder the movement, harboring and financing of terrorists worldwide.⁷⁹ These resolutions reaffirmed the inherent right of individual or collective self-defense contained in Chapter VII of the Charter of the United Nations.⁸⁰

76. Section 1465 authorizes the President to exercise waivers of foreign assistance restrictions with respect to Pakistan through September 30, 2003, and for other purposes. The President is authorized to waive, with respect to Pakistan, any provision of the Foreign Operations, Export Financing, and Related Programs Appropriations Act for fiscal year 2003.

77. Islamic Republic of Pakistan, *available at* <http://www.pak.gov.pk/terrorist-attacke-america/Terrorist-16nov.htm>—8.

78. Security Council, 4370th Meeting (PM), U.N. Doc. SC/7143 (Sept. 12, 2001), *available at* <http://www.un.org/Docs/scres/2001/res1368e.pdf>.

79. U.N. Resolution, U.N. Doc. S/RES/1373 (2001), *available at* <http://www.un.org/Docs/sc/committees/1373/>.

80. U.N. Charter art. 51, *available at* <http://www.un.org/aboutun/charter> (last visited June 19, 2002). Article 51 states:

Nothing in the present 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. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present

Resolution 1373 made instant global law, requiring all states to implement measures to suppress financing of terrorist operations; deny safe haven to terrorists; eliminate the supply of weapons to terrorists; bring persons who finance, plan, or perpetrate terrorist acts to justice, and cooperate with other states in doing so; and employ effective border controls to prevent the movement of terrorists. Among other things, it also “notes with concern the close connection between international terrorism and transnational organized crime, illicit drugs, money-laundering, illegal arms-trafficking, and illegal movement of nuclear, chemical, biological and other potentially deadly materials . . .” and calls for a global response through national, sub-national, regional and international cooperation.

In an indication of the seriousness with which the mandate is regarded, the resolution establishes a committee to monitor implementation consisting of all Security Council members, the “Counter-Terrorism Committee,” chaired by Britain. The committee has been considering and responding to reports on compliance with the resolution, which all states were required to submit by the end of 2001. So far the level of participation by states has been very high, likely both a signal of the importance that they attach to accomplishing the objectives of the resolution and recognition of the priority given the resolution by the Security Council and the United States.

The Security Council was able to require all states to take the identified measures because the resolution was adopted pursuant to its powers under Chapter VII of the U.N. Charter. Under Chapter VII, once the Security Council determines that there is a threat to international peace and security, it has the authority to obligate states to comply with the measures it determines are appropriate to meet the threat.⁸¹ Such measures have included in the past economic sanctions, the use of military force, and establishment of international tribunals.

Resolutions 1368 and 1373 also reaffirmed previous resolutions in connection with terrorism, the Taliban regime, Osama bin Laden and their violations of human rights, opium production, capture and murder of diplomats and journalists, and the sheltering of terrorists. Both Resolutions 1267 and 1333 had already demanded the Taliban “turn over Osama bin Laden.”⁸² Together, the resolutions had directed that all States freeze Taliban funds, prohibit flights of Taliban-controlled aircraft into or out of Afghanistan, enforce an arms embargo, withdraw advisers and prevent military assistance. Although the Taliban curbed the opium production capacity during a period of well-received crackdowns, the overall picture didn’t change.

On July 30, 2001, the Security Council passed Resolution 1363, which invoked Chapter VII of the U.N. Charter governing a U.N. military response.⁸³ Resolution 1363 created a monitoring mechanism in Afghanistan’s neighboring countries comprised of an expert group versed in arms embargoes, counter-terrorism and drug trafficking, which, in turn, would coordinate a Sanctions Enforcement Support Team with expertise in customs, border security and counter-terrorism. Before the mechanism could become effective the Septem-

Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

81. *Id.*

82. U.N. Resolution, U.N. Doc. S/RES/1333 (2000), available at <http://www.un.org/Docs/scres/2000/res1333e.pdf>; U.N. Resolution, U.N. Doc. S/RES/1267 (1999), available at <http://www.un.org/Docs/scres/1999/99sc1267.htm>.

83. U.N. Charter, *supra* note 80, arts. 39–51.

ber 11th attacks occurred, and an American force would displace any United Nations effort on October 7, 2001.

Resolution 1368, aside from condemning the September 11th attacks, simply called upon the international community to "redouble their efforts to prevent and suppress terrorist acts" and for the "full implementation of the relevant . . . Security Council resolutions, in particular resolution 1269⁸⁴ (1999)."⁸⁵ Resolution 1368 also calls for States to implement relevant international anti-terrorist conventions. Previous efforts by the United Nations to outlaw airline hijackings and related offenses failed to prevent attacks.⁸⁶ Likewise, Resolution 1373 reiterates the need for a monitoring mechanism, such as that called for in Resolution 1363, but provides greater detail for the kinds of information required of the expert group.

In light of the foregoing, the ongoing U.S.-led effort to combat terrorism is well grounded in international law as a matter of collective and self-defense, and is in agreement with resolutions and conventions now in force. Article 51 of the U.N. Charter provides for the right to self-defense "until the Security Council has taken measures to maintain international peace and security."⁸⁷ No such role was assumed and the United States and its allies interpreted the reference to self-defense as approval of the military operations. With U.S. support, the Security Council and the U.N. secretariat have played a central part in forming and securing a post-Taliban regime in Afghanistan.

In addition to the foregoing Security Council resolutions, the U.N. General Assembly hosted the *United Nations Treaty Event-Multilateral Treaties on Terrorism*, October 10–16, 2001, in which seventy-nine states participated. This event resulted in 180 treaty actions (110 signatures and 70 ratifications/accessions and other actions). The International Convention for the Suppression of the Financing of Terrorism received the plurality of treaty actions.⁸⁸

That treaty requires States Parties to criminalize collecting and providing funds for terrorists and to freeze funds used to support terrorism. The treaty also requires states to direct financial institutions to take steps (e.g., to identify the real owners of accounts), and to ensure that funds the institutions handle are not being used to support terrorist operations. This requirement is paralleled by the more general requirement of the resolution that states prohibit their nationals from making funds and services available to persons

84. U.N. Doc. S/RES/1269, *supra* note 64. Resolution 1269 deals with the problem of terrorism, in general, as opposed to that in Afghanistan and dealt with in U.N. Resolution 1267, *supra* note 82.

85. Res. 1368, *supra* note 78.

86. International Convention against the Taking of Hostages, New York, Dec. 17, 1979; International Convention for the Suppression of Terrorist Bombings, New York, Dec. 15, 1997; International Convention for the Suppression of the Financing of Terrorism, New York, Dec. 9, 1999; Convention on Offences and Certain Other Acts Committed on Board Aircraft, Tokyo, Sept. 14, 1963; Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague, Dec. 16, 1970; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal, Sept. 23, 1971; 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, Montreal, Feb. 24, 1988.

87. U.N. Charter, *supra* note 80, art. 51.

88. Other treaties receiving action include the International Convention for the Suppression of Terrorist Bombings, which entered into force May 23, 2001, and the International Convention against the Taking of Hostages, which entered into force on June 3, 1983, among others, *available at* [http://untreaty.un.org/English/](http://untreaty.un.org/English/EVENT_Summary.pdf) *EVENT_Summary.pdf*.

engaged in or financially supporting terrorist operations. Negotiation of the treaty was concluded in 1999, and it entered into force in April 2002.

1. *North Atlantic Treaty Organization (NATO)*

United States' NATO allies⁸⁹ quickly invoked Article 5 of the North Atlantic Treaty.⁹⁰ "[I]f it is determined that this attack was directed from abroad against the United States, it shall be regarded as an action covered by Article 5 of the Washington Treaty."⁹¹

Immediately thereafter, on September 13, 2001, the NATO-Russia Permanent Joint Council met in extraordinary session at the Ambassadorial level. The resulting statement declared, "NATO and Russia are united in their resolve not to let those responsible for such an inhuman act to go unpunished. NATO and Russia call on the entire international community to unite in the struggle against terrorism. NATO and Russia will intensify their cooperation under the Founding Act to defeat this scourge."⁹² Russia also granted overflight access to the United States for military and humanitarian flights into and out of Afghanistan and the surrounding republics. For its part, Russia ruled out direct military involvement in light of its unsuccessful military campaign in Afghanistan, during which over 15,000 Soviet soldiers died, and which sparked more than twenty years of conflict beginning in 1979.

By October 2, 2001, the North Atlantic Council, NATO's top decision-making body, determined that the individuals who carried out the attacks belonged to the worldwide terrorist network of al Qaeda, headed by Osama bin Laden and protected by the Taliban regime in Afghanistan.⁹³ This determination, therefore, confirmed the application of Article 5 to the September 11th attacks. However, NATO did not determine what if any retaliatory military action the alliance would take other than to provide support to any allied effort to stop the scourge of terrorism. NATO deployed surveillance aircraft to the United States to patrol the airspace, and naval elements to the eastern Mediterranean as a show of force.

On December 6, NATO convened on the ministerial level. It issued a statement reiterating its "determination to combat the threat of terrorism for as long as necessary," including use of non-military measures such as the freezing of assets and cutting off the terrorists' financial network.⁹⁴

89. Current members of NATO are: Belgium, Canada, Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Spain, Turkey, United Kingdom and United States.

90. Article 5 of the North Atlantic Treaty states:

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and, in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area. Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.

91. NATO Press Release 124 (Sept. 12, 2001), *available at* <http://www.nato.int/docu/pr/2001/p01-124e.htm>.

92. NATO Press Release (Sept. 13, 2001), *available at* <http://www.nato.int/docu/pr/2001/p010913e.htm>.

93. NATO Update (Oct. 2, 2001), *available at* <http://www.nato.int/docu/update/2001/1001/e1002a.htm>.

94. NATO Press Release, M-NAC-2 159 (Dec. 6, 2001), *available at* <http://www.nato.int/docu/pr/2001/p01-159e.htm>.

2. *United States/Australia/New Zealand*

On September 14, after a cabinet meeting on the terrorist attacks, Prime Minister Howard announced the Australian government had, for the first time, invoked Article 4 of the ANZUS Pact. Similar to Article 5 of the NATO alliance, Article 4 formally commits the signatories to mutual defense. Australian Air Force personnel, on exchange with U.S. forces, have been involved in flying combat air patrols over the continental United States. All Australian military exchange personnel have been authorized to deploy with U.S. forces both in the United States and abroad. Australia has also committed to increasing information sharing with the United States.⁹⁵

This section reviews the array of legal authority pertaining to the war on terror before and after September 11, 2001. Aside from the results of the fighting in Afghanistan, and some arrests made worldwide, tangible benefits of these initiatives to the war on terror may only be measured by the lack of further strikes on the United States. Some of the post-September 11th legal initiatives, such as the PATRIOT Act, have suffered serious criticism on constitutional and other grounds. Future regional conflicts connected to this campaign will face a more rigorous, public and partisan approval process than that which applied to Afghanistan. Nevertheless, the breadth of the al Qaeda network, and the authority granted to the Executive, makes it clear that the war on terror will spread to other areas of the world.

VI. Arms Control and Non-Proliferation

A. COMPREHENSIVE NUCLEAR TEST-BAN TREATY

The Comprehensive Nuclear Test-Ban Treaty (CTBT) commits States Parties to not carry out any nuclear weapons test explosion or any other nuclear explosion in any environment; and to prohibit, prevent, and refrain from, participating, in any way, in the carrying out of such explosions. The Treaty also provides for a complex global verification regime and measures to enhance compliance and redress a situation contravening the Treaty. It established a Preparatory Commission that holds regular meetings until the treaty enters into force, at which time the Commission will transition to the Comprehensive Nuclear Test-Ban Treaty Organization.

The treaty was opened for signature on September 24, 1996. President Clinton was the first world leader to sign the Treaty. He called it, "The longest-sought, hardest-fought prize in arms control history."⁹⁶ Currently eighty-four states have ratified the treaty, including France, the U.K., and Russia.

The treaty was sent to the U.S. Senate for advice and consent for ratification on September 22, 1999. However, the Senate voted 51–48 against ratification, falling eighteen votes short of the two-thirds required for advice and consent. This was the first time in eighty years that the Senate rejected an arms control treaty. According to Article XIV, the CTBT cannot enter into force until forty-four named states ratify the Treaty. These are states that participated in the work of the 1996 session of the Conference on Disarmament and which appear in Table I of the International Atomic Energy Agency's April 1996 edition of "Nu-

95. See *Enduring Alliances in the Face of New Threats*, available at <http://www.state.gov/p/6583.htm>.

96. Press Release, White House, Remarks by the President to the 52nd Session of the United Nations General Assembly (Sept. 22, 1997), available at http://www.state.gov/www/issues/970922_clinton_unga.html.

clear Power Reactors in the World." This includes the five nuclear weapons states,⁹⁷ along with Pakistan, India, Iran, Algeria, North Korea, and Israel.

From 11 to 13 November 2001, the United Nations, as the Treaty's Depositary, convened an Article XIV CTBT conference in New York. The purpose of the conference was to find ways to bring the Treaty into force. Article XIV of the Treaty provides that the Depositary can convene a conference of states that have already deposited their instruments of ratification upon the request of the majority of those states. The purpose of the conference would be to "examine the extent to which [entry into force of the treaty is being achieved] and what measures consistent with international law may be undertaken to accelerate the ratification process in order to facilitate the early entry into force of this Treaty."⁹⁸ Such conferences would be convened on an annual basis, and all state signatories would be invited to the conference.

The first such Conference was convened in Vienna from October 6–8, 1999. In addition to the attendance of states that have ratified the Treaty, also present were representatives of non-signatory States, international organizations and non-governmental organizations.⁹⁹ The final document produced from that Conference noted that the cessation of nuclear tests is an effective nuclear disarmament and non-proliferation measure. At the meeting, Japan was selected to "promote cooperation to facilitate the early entry into force of the Treaty, through informal consultations with all interested countries."¹⁰⁰ Japan held informal consultations in Vienna during 2000 and following these consultations, a letter on behalf of the majority of States that had ratified the treaty was sent to the U.N. Secretary-General requesting that he convene a conference in 2001 in New York pursuant to Article XIV.

The President of the 2001 Conference was Mr. Miguel Marin Bosch from Mexico and the Vice-Presidents were representatives from Austria, Peru, the Republic of Korea, Slovakia and South Africa. The United States, however, did not attend the Conference; it did not send any representative, official or unofficial. The United States stated it was not attending because in its view, the conference was only for states that had ratified the CTBT. Those that had not ratified were to attend as observers. However, China, who has not ratified the treaty, attended. The conference was also open to non-signatory states, and entities were granted observer status, such as specialized agencies, related organizations, intergovernmental organizations, and non-governmental organizations.

The U.S. decision not to attend the conference was a disappointment to many nations who hoped the U.S. desire for multilateral efforts as evidenced in its building the international coalition against terrorism would exist in the CTBT context;¹⁰¹ the efforts to build

97. The five nuclear weapons states are the United States, Russia, China, France, and the United Kingdom.

98. The Comprehensive Nuclear Test-Ban Treaty, *available at* <http://www.state.gov>.

99. Pakistan, Libya, Saudi Arabia, and Zimbabwe also attended.

100. CTBT Article XIV Conference: Final Declaration (Oct. 8, 1999), *available at* <http://www.acronym.org.uk/ctbt/ctbtdec.htm>.

101. Following is a sampling of the expressed concerns:

Russia. Igor D. Sergeev, Assistant to President Putin on Strategic Stability, brought a message from President Putin stating that the Treaty's universality would meet the interests of all the world community. Then Sergeev linked disruption of the CTBT to a weakening of the Non-Proliferation Treaty (NPT) and revision of the ABM Treaty, which would stimulate proliferation of weapons of mass destruction.

Who can guarantee that in such a situation the most dangerous thing will not happen and nuclear weapons will not fall into the hands of terrorists? The international community should preclude any

the international coalition led many to expect positive results from the United States at the conference. Other states were concerned by the Bush administration's decision to partially fund the CTBT Preparatory Commission and its refusal to submit the CTBT to the U.S. Senate for another vote for advice and consent. Early in Bush's administration, the President indicated he would not ask the U.S. Congress to ratify CTBT. In fact, there has been

opportunity for nuclear blackmail and unite its efforts in strengthening the non-proliferation regime. The entry-into-force of the Comprehensive Nuclear-Test-Ban Treaty is the most important step in this direction.

U.K. and France. Naturally more circumspect, the U.K. and France, both of which sent their Foreign Ministers to the conference, sent the United States a message by declaring their strong commitment to the CTBT. Jack Straw, U.K., said, "We now have an obligation to work towards universalizing the CTBT . . . I urge all States which have not yet done so to sign and ratify the Treaty." M. Hubert Vedrine, France, appealed to all the holdouts: "We need multilateral legal instruments for the control of the proliferation in armaments. The obligations and the verification mechanisms which they entail are elements of confidence and stability."

European Union. Foreign Affairs Minister Louis Michel, of Belgium, spoke on behalf of the European Union:

[w]e can only regret the United States' announcement that it will cease to participate in certain activities arising from the Treaty and that it does not plan to reconsider its position on ratification. This is all the more worrying given that until now the United States has played a key role in nuclear arms control, in particular within the framework of the CTBT.

The European Union appeals to the government of the United States, urging it to review its position and participate in our joint endeavours to implement the ban on all nuclear weapon test explosions and all other nuclear explosions.

Sweden. Foreign Minister Anna Lindh of Sweden expressed deep regret that the United States had even voted to keep the CTBT off next year's U.N. agenda, and called on the United States to reconsider its position. She praised the CTBT because:

- It puts the threshold higher for the acquisition of nuclear weapons.
- It prevents a qualitative arms race.
- Its effective verification system builds confidence.

Now is the time, she urged, to implement the commitments for nuclear disarmament set forth at the NPT Review Conference of 2000 and put an end to nuclear testing, halt the production of fissile material for nuclear weapons, reinforce efforts to contain proliferation of weapons of mass destruction, and promote multilateral solutions.

New Zealand. Foreign Minister Phil Goff of New Zealand said:

As long as nuclear weapons persist, with a growing risk that they could ultimately fall into the hands of terrorists, we live with a sense of insecurity and under the shadow of nuclear devastation. We cannot be complacent. This is not a game. The World Trade Centre was not a nightmare we can wake from. It happened and worse may be ahead of us.

South Africa. Abdul S. Minty, Deputy Director-General of Foreign Affairs, South Africa, expressed concern that "a rising unilateralist paradigm shift" in the field of nuclear disarmament and non-proliferation is taking place that has the potential to undermine international treaty regimes.

If the Treaty does not enter into force, it will weaken the non-proliferation and disarmament machinery and deal a blow to the international community's quest to achieve a world free from the threat of nuclear devastation. Surely, Mr. President, we cannot allow this to happen, as we would be sending a signal that we had the opportunity to act, but failed to do so because we could not act together for the common good of the international community and the future of generations still to come.

Ireland. Foreign Affairs Minister Brian Cowen of Ireland, called on all remaining states whose ratification is necessary to take action without delay and without conditions. "It is evident that a widespread political will exists globally for this treaty to enter into force."

increased interest in Washington to develop low-yield nuclear weapons in addition to proposals to reduce the lead-time for nuclear test preparations.¹⁰² Many Europeans stress that the U.S. administration has not supported CTBT or its NPT commitments through its policy choices. Malcolm Savidge, United Kingdom Labour MP and Chair of the All Party Working Group on Non-Proliferation, noted that safe and verifiable reduction in nuclear weapons could be achieved only through cuts that are codified in a treaty. Speaking of both the United States and Russia he stated, "They should remember the promises given only last year in New York to 'maintain and strengthen the Anti-Ballistic Missile Treaty.' We look to them to promote a safer world, in which treaties are honored, and trust is combined with verification."¹⁰³

At the CTBT conference, the U.K. representative, Foreign Minister Jack Straw, delivered a speech from his government. He noted that after the events of September 11, "old Cold War adversaries have emerged as allies in every aspect of the coalition against terrorism . . . but this emerging consensus must go deeper still. We have to seize this moment to tackle the other challenges which we face together."¹⁰⁴

In addition, in a U.N. vote to place the CTBT on the agenda for work at the 2002 General Assembly meeting, the United States was the only country to vote against this procedural motion. This was seen as more evidence of U.S. unwillingness to work with the international community on banning nuclear weapons tests.¹⁰⁵

In his opening remarks, U.N. Secretary-General Kofi Annan stated that the events of September 11, 2001 made it clear to everyone that the international community could not afford to allow further proliferation of nuclear weapons.¹⁰⁶ He noted that it is of utmost importance that the international community of states reduces the risk of nuclear weapons falling into the hands of terrorists. He pointed out that the main purpose of the conference was to find ways of encouraging states that have not yet signed and ratified the Treaty to do so, particularly those states whose ratifications are required for entry into force.

Of the forty-four states needed to ratify the treaty before it can enter into force, thirty-one have ratified. These include Argentina, Australia, Austria, Bangladesh, Belgium, Brazil, Bulgaria, Canada, Chile, Finland, France, Germany, Hungary, Italy, Japan, Mexico, Netherlands, Norway, Peru, Poland, Republic of Korea, Romania, Russian Federation, Slovakia, South Africa, Spain, Sweden, Switzerland, Turkey, Ukraine and the United Kingdom. The states required to ratify for entry into force of the Treaty that have not done so include Algeria, China, Columbia, Democratic People's Republic of Korea, Democratic Republic of the Congo, Egypt, India, Indonesia, Iran, Israel, Pakistan, United States and Viet Nam.

During the conference three countries ratified the Treaty: Ecuador, Nauru and Singapore. Some countries, whose ratifications are required for entry into force, indicated their willingness to ratify soon. These include Algeria, Indonesia, Columbia and Viet Nam. The representative from Libya also expressed his country's intention to accede to the treaty.

102. Press Release, BASIC Publications, U.S. Nuclear Agenda Provokes European Unease: Parliamentarians Urge Greater U.S. Cooperation Internationally (Nov. 9, 2001).

103. *Id.*

104. See Christine Kucia, US Boycott Dampens Hopes, BASIC: Nuclear Futures, Nov. 11, 2001, *available at* http://www.basicint.org/CTBTUpdate_Nov12.htm.

105. *Id.*

106. 'Precious, But Fleeting' Opportunity Exists to Free World of Nuclear Threat, Secretary-General Tells Test-Ban-Treaty Conference, U.N. Doc. SG/SM/8020, DC/2816 (2001), *available at* <http://www.un.org/News/Press/docs/2001/sgsm8020.doc.htm>.

As noted earlier, China, the other nuclear weapons state yet to ratify the treaty, attended and addressed the conference. The Chinese representative, Shen Guofang, noted that the CTBT is essential to preventing the horizontal and vertical proliferation of nuclear weapons and the treaty will promote nuclear disarmament.¹⁰⁷ However, despite the large number of signatories and ratifications and the preparations underway for entry into force, it has been five years since the treaty opened for signature. The prospect for its entry into force "does not allow for optimism."¹⁰⁸ The Chinese government's basic support for the treaty had not changed. China would honor its commitment to pursue a moratorium on nuclear-test explosions and continue to actively support and participate in preparations for the eventual entry into force of the Treaty. Guofang noted that the Chinese government had reviewed the treaty and now the People's Congress would "deliberate on the Treaty according to the relevant legal procedures."¹⁰⁹

The participating states at the Conference stressed the importance of a universal, internationally and effectively verifiable, and comprehensive nuclear test-ban treaty as a major instrument in the field of nuclear disarmament and non-proliferation. They renewed their commitment to work for universal ratification of the treaty and its early entry into force. In this respect, some of what these states called for are as follows:

- All states that have not yet signed the treaty to sign and ratify it as soon as possible and to refrain from acts which would defeat the object and purpose in the meanwhile;
- All states that have signed but not yet ratified the treaty, in particular those whose ratification is needed for entry into force, to accelerate their ratification processes with a view to early successful conclusion;
- Recall the fact that two states out of the three whose ratifications are needed for the treaty's entry into force but which have not yet signed it (Pakistan and India)¹¹⁰ have expressed their willingness not to delay the entry into force of the Treaty, and call upon them to sign and ratify it as soon as possible; and
- Note the ratification by three nuclear-weapon states and call upon the remaining two (United States and China)¹¹¹ to accelerate their ratification processes with a view to early successful conclusion.

In January 2001, General John M. Shalikashvili (USA ret), Special Advisor to the President and the Secretary of State for the Comprehensive Test Ban Treaty and former Chairman of the Joint Chiefs of Staff, reported to the President his findings and recommendations from his review of the CTBT.¹¹² In brief, he stated that after his discussions with senators, senior members of the administration, leading national security experts from former administrations and representatives of non-governmental organizations, scientific and diplo-

107. Nuclear Test-Ban Treaty 'Pillar' of System Controlling Weapons of Mass Destruction, Canada's Foreign Minister Tells Conference: 17 More Speakers Address Treaty's Value, Needed Ratifications; China Says No Reason for Optimism about Prospects for Entry into Force, U.N. Doc. DC/2818 (Nov. 12, 2001), <http://www.un.org/News/Press/docs/2001/DC2818.doc.htm>.

108. *Id.*

109. *Id.*

110. These two states were not mentioned by name in the Final Document.

111. These two states were not mentioned by name in the Final Document.

112. Gen. John M. Shalikashvili (USA, ret.), Special Advisor to the President and the Secretary of State for the Comprehensive Test Ban Treaty, Letter to the President and Report on the Findings and Recommendations Concerning the Comprehensive Nuclear Test Ban Treaty, Washington, D.C. (Jan. 4, 2001), *available at* http://www.state.gov/www/global/arms/ctbtpage/ctbt_report.html.

matic experts, and visits to nuclear weapons laboratories, he supports the treaty, "just as [he] did when [he] served as Chairman of the Joint Chiefs of Staff." His belief in the treaty was strengthened following his many interviews. The treaty, in his view, "is a very important part of global non-proliferation efforts and is compatible with keeping a safe, reliable U.S. nuclear deterrent." He further stated, "I believe that an objective and thorough net assessment shows convincingly that U.S. interests, as well as those of friends and allies, will be served by the treaty's entry into force."¹¹³

VII. Non-proliferation Export Controls

Export controls are intended to serve the national security, foreign policy, and non-proliferation interests of the United States. They help stem the proliferation of weapons of mass destruction and are designed to limit the military and terrorism-support capability of certain countries.

The biggest event regarding export controls in 2001 was the lifting of sanctions against India and Pakistan as a result of their assistance to the United States in the war against terrorism. Following the Indian and Pakistan nuclear tests in May 1998, the United States announced it would impose sanctions against both countries. The sanctions were designed to send a strong message to would-be nuclear testers; to have maximum influence on Indian and Pakistani behavior; to target the governments, rather than the people, and to minimize the damage to other U.S. interests. The sanctions included the termination or suspension of foreign assistance under the Foreign Assistance Act with exceptions provided by law (e.g., humanitarian assistance, food, or other agricultural commodities), termination of \$21 million in economic development assistance and housing guarantee authority for India, termination of Foreign Military Sales under the Arms Export Control Act and revocation of licenses for the commercial sale of any item on the U.S. Munitions List, suspension of the delivery of previously approved defense articles and services to India, and the halting of any new commitments of U.S. government credits and credit guarantees by U.S. government entities (e.g., Overseas Private Investment Corporation, Export-Import Bank). Most assistance to Pakistan had already been suspended (for example, see below, the reference to Section 508 of the Foreign Operations Appropriations Act).

In November 1998, President Clinton waived for one year some of the sanctions imposed against India and Pakistan because both countries were making progress in non-proliferation talks. He lifted some parts of the Pressler Amendment (noted below) and enabled Pakistan to receive American economic and military assistance. He also allowed U.S. companies doing business in India and Pakistan who wished to invest in these two countries to have access to assistance and risk insurance through the Export-Import Bank, and the Overseas Private Investment Corporation.

Following the September 11th attacks on the United States, President Bush waived many of the sanctions still remaining against Pakistan and India. The only sanctions now in effect are restrictions on exports to Indian and Pakistani entities of nuclear or missile proliferation.¹¹⁴ President Bush also waived remaining sanctions under Section 102 of the Arms Export Control Act that were in effect against India and Pakistan since 1998. In addition,

113. *Id.*

114. U.S. Dep't of State, Office of the Spokesman, Fact Sheet: Sanctions on India and Pakistan (Sept. 28, 2001), *available at* <http://www.pmdtc.org/IndiaPakistan.htm>.

the Bureau of Export Administration (BXA) under the Department of Commerce has gone back to its pre-sanctions policy of case-by-case review of export license applications to export dual-use nuclear non-proliferation and missile technology controlled items to India and Pakistan; BXA no longer has an automatic denial policy against those countries for such applications. In addition, the Commerce Department has reduced the number of Indian and Pakistan entities on the Entity List in Part 744 of the Export Administration Regulations.¹¹⁵ The entity list was originally developed to help U.S. exporters identify foreign end users that require individual export licenses for certain sensitive U.S. commodities and technology of proliferation concern.

On October 27, 2001, President Bush signed into law S. 1465, which authorizes the President to waive sanctions against Pakistan through fiscal year 2003. The waived sanctions include:

- Section 508 of the Foreign Operations Appropriations Act, which had prohibited direct assistance to Pakistan because its democratically elected government was overthrown in a military coup in October 1999;
- The Brooke Amendment of the Foreign Operations Act that barred certain assistance for countries that are in default of U.S. Government loans; and
- Section 602(q) of the Foreign Assistance Act, which barred assistance to any country in default during a period in excess of six calendar months, in payment to the United States of principal or interest on any loan made the country under the Foreign Assistance Act.

The President also waived against Pakistan the prohibition against export-import guarantees, insurance and credits to any non-nuclear weapons state that detonates a nuclear device, and the Pressler Amendment that prohibits military assistance and transfers of military equipment or technology unless the President certified Pakistan does not possess a nuclear explosive device. In addition, the Symington Amendment is waived. That Amendment blocks the use of the Foreign Assistance Act or Arms Export Control Act funds for economic assistance, military assistance or international military education and training, assistance for peacekeeping operations, or military credits or guarantees to any country that receives from any other country nuclear enrichment equipment without safeguards. Finally, the President waived against Pakistan missile sanctions under the Arms Export Control Act that barred U.S. Munitions List and dual-use export licenses and U.S. contracts for two years for entities involved in transfer of Missile Technology Control Regime class missiles and technology.¹¹⁶ This was imposed on specific entities in Pakistan in November 2000 and September 2001.

VIII. Anti-Ballistic Missile (ABM) Treaty

The ABM Treaty permits the United States and Russia to have one ABM deployment area and so located that such an area cannot provide for a nationwide ABM defense or become the basis for developing such a defense. The Treaty also prohibits development,

115. India/Pakistan Economic Sanctions: Frequently Asked Questions, *available at* <http://www.mac.doc.gov/sanctions.faq.htm>.

116. "The MTCR restricts the export of delivery systems and related technology for those systems capable of carrying a 500 kilogram payload at least 300 kilometers, as well as systems intended for the delivery of weapons of mass destruction." See FAS: Weapons of Mass Destruction, *available at* <http://www.fas.org.nuke/control/mtrc>.

testing and deployment of sea-based, air-based, space-based, and mobile land-based and anti-missile systems.¹¹⁷ In agreeing to these provisions, each country left unchallenged the penetration capability of the other state's retaliatory forces. The parties also agreed to limit qualitative improvement of their ABM technology (e.g., not to develop, test, or deploy ABM launchers capable of launching more than one interceptor missile at a time or modifying existing launchers to give them this capability); systems for rapid reload of launchers are similarly barred.

Throughout 2001, the U.S. administration met with Russian officials to try to reach an understanding for the United States to pursue a national missile defense system and withdraw from the ABM Treaty. The result of these meetings was that Russia remained committed to the Treaty and would not agree to its demise or with the U.S. decision to build an ABM System.

Following the September 11th attacks, there was some question as to the relevance of an anti-ballistic missile system in light of the new types of threats facing the United States. Some arms control advocates noted that the new threats would not be from missile attacks but from nuclear weapons carried in suitcases or other similar means. However, the U.S. administration continued to believe that the greatest threats to both the United States and Russia come not from each other or other big powers but from terrorists or rogue states that seek weapons of mass destruction.¹¹⁸ As a result, the U.S. administration believed it should pursue its ability to develop effective defenses against those possible attacks. President Bush stated, "Defending the American people is my highest priority as Commander-in-Chief, and I cannot and will not allow the United States to remain in a treaty that prevents us from developing effective defenses."¹¹⁹ The U.S. administration argued that since the treaty's entry into force in 1972 new states and non-state actors have acquired or are actively seeking weapons of mass destruction (WMD). Some states are developing ballistic missiles, including long-range missiles, to deliver WMD. These developments are viewed as a threat to the United States and jeopardize the U.S. supreme national interests. Additionally, the treaty was repeatedly defined by the Bush administration as "a cold war relic."

On December 13, 2001, the United States formally informed Russia of the U.S. withdrawal from the ABM Treaty. In this notice the United States expressed, "The United States recognizes that the Treaty was entered into with the USSR, which ceased to exist in 1991. Since then, we have entered into a new strategic relationship with Russia that is cooperative rather than adversarial, and are building strong relationships with most states of the former USSR."¹²⁰

However, despite the arguments provided by the Administration for pursuing a national missile defense system, the Administration has had to face a multitude of criticisms regard-

117. See U.S. Department of State Web site, at <http://usinfo.state.gov/topical/pol/terror/01092302.htm>.

118. U.S. Dep't of State, President Discusses National Missile Defense, Remarks by George W. Bush, President, The Rose Garden, Washington, D.C. (Dec. 13, 2001), available at <http://www.state.gov/t.ac/rls/rm/2001/6847.htm>.

119. *Id.* But note, Senator Robert Byrd in a Senate speech of the same day said, "We are advancing headlong into committing our nation and our treasures to an untried and unproven missile defense system, which we may or may not need and which may or may not protect us, while at the same time we are in full retreat from the arms control treaties and policies that have helped stabilize the world for decades."

120. Press Release, U.S. Department of State, Text of Diplomatic Notes Sent to Russia, Belarus, Kazakhstan and Ukraine (Dec. 13, 2001).

ing its decision to withdraw from the Treaty and pursue missile defenses.¹²¹ The Administration has proposed a "layered defense program" that would include missiles launched from the ground and from ships, and lasers fired from aircraft and from satellites. The Administration plans to deploy the ground-based system (which is likely years away from being ready) in Alaska in 2004. As yet, however, except for the ground-based system now being tested, the technology does not exist. Many have argued that the United States could continue to test various missile defense systems without withdrawing from the Treaty. Up until that time the United States and Russia could have negotiated changes to the treaty to allow its continuance. Philip Coyle, a former director of testing and evaluation at the Pentagon, stated there was no urgent need to withdraw from the Treaty at this time. He noted, "The treaty is not now an obstacle to proper development and testing of a national missile defense system."¹²² While operational testing might require modifications to the Treaty, that stage is not in the near future.

The Bush administration has also been criticized for its withdrawal as another example of a unilateralist approach in its foreign policy, as also shown in the dismissal of the Kyoto global warming agreement, the biological weapons protocol, the U.N. conference on small arms and the decision not to attend the 2001 CTBT Conference. Most important, however, is the impact of the withdrawal on other U.S. nuclear non-proliferation commitments.

121. In a formidable critique, Senator Joseph Biden, Chairman of the Senate Committee on Foreign Relations stated in relevant part:

One of the lessons we should have learned from the devastating attack of Sept. 11 is that terrorists determined to do this nation harm can employ a wide variety of means, and that weapons of mass destruction—chemical, biological or even nuclear—need not arrive on the tip of an intercontinental ballistic missile with a return address. That's why the Joint Chiefs of Staff argue that an ICBM launch ranks last on the "Threat Spectrum," while terrorist attacks constitute the greatest potential threat to our national security.

The administration's obsession with missile defense—with a price tag in excess of a quarter-trillion dollars for the layered program on the president's wish list—is doubly troubling because of the attention and resources being diverted from critical efforts to address genuine threats. While the president says nonproliferation is a high priority, his actions speak louder. Notwithstanding promises of new efforts, the fiscal year 2002 budget that he requested would have cut more than \$100 million out of programs designed to corral Russia's "loose nukes," provide help that Russia has requested to destroy its chemical weapons stockpile and prevent unemployed Russian scientists from selling their services to terrorist organizations.

Only when it comes to missile defense is the administration pushing hard. But nothing could be more damaging to global nonproliferation efforts than to go forward with Star Wars. Russia has enough offensive weapons to overwhelm any system we could devise, so the real issue is what happens in China and throughout Asia.

China currently possesses no more than two-dozen ICBMs. Our own intelligence services estimate that moving forward with national missile defense could trigger a tenfold increase in China's expansion of its nuclear capability. And that doesn't take into account likely Chinese behavior if an arms race ensues, something many experts argue is inevitable when both India and Pakistan respond as expected by ratcheting up their nuclear programs.

Thus, the cost of unilaterally walking away from the ABM Treaty and forging ahead with national missile defense includes not only dangerous neglect of the real threats we face but the likelihood that we will unleash a new arms race that will create a nuclearized Asia.

Joseph R. Biden Jr., *Missile Defense Delusion*, WASH. POST, Dec. 19, 2001, at A39, available at <http://www.washingtonpost.com/wp-dyn/articles/A62922-2001Dec18.html>.

122. Counsel For a Livable World, Bush, Putin Set for Key Decisions on ABM Treaty and Missile Defense, OCT. 31, 2001, available at <http://www.clw.org/nmd/bushputinupdate.html>.

For example, the withdrawal is viewed by some arms controllers as a step away from the U.S. commitment in Article VI of the Non-proliferation Treaty to, "pursue negotiations in good faith on effective measures relating to the cessation of the nuclear arms race at an early date and to nuclear disarmament . . ."¹²³ In the Final Document of the 2000 NPT Review Conference, NPT states welcomed the progress being achieved in nuclear weapons reduction and noted that the ABM Treaty was a "cornerstone of strategic stability and a basis for further reductions of strategic offensive weapons . . ."¹²⁴ These statements highlight the fact that many NPT States Parties view the ABM Treaty as part of the overall agreement by the nuclear weapons states to take steps toward eventual nuclear disarmament. The ABM withdrawal reflects to many a definite move by the United States away from nuclear disarmament.

Also controversial has been the expense of the program. The latest estimate prepared by the Congressional Budget Office provides that the layered missile defense would cost between \$158 billion and \$238 billion. This is in addition to the \$148 billion spent on research and development since the missile defense idea was first proposed in the 1950s. Yet, the Space-Based Infrared System is many years behind schedule and program cost estimates now amount to \$23 billion from \$10 billion in the past year.¹²⁵

In addition, some scientists have argued that using decoys that cannot be distinguished from the missile defense radar can circumvent any missile system. The missile system will also not reliably track primitive, "wobbly" missiles launched by rogue states.¹²⁶ Others argue that the threat of ballistic missile attack has been overestimated, and that it is much less today than it was fifteen or twenty years ago.¹²⁷ The reduction in U.S. and Russian arsenals along with international efforts to prevent the spread of missile technology greatly reduces the danger of nuclear attack.

Other countries expressed their concern with the U.S. move to withdraw from the treaty, particularly China and Russia. Despite the U.S. assertion that the anti-ballistic system is not focused on China and Russia, China is not so convinced. The U.S. missile defense plans would increase U.S. military leverage vis-à-vis all states, which certainly includes China and possibly one day, Russia. China is vehemently opposed to the deployment of U.S. ballistic missile defenses. It contends that the U.S. missile defenses are targeted at China and its limited deterrent of about twenty intercontinental missiles.¹²⁸ It has also stated that the U.S. deployment of missiles could endanger arms control and non-proliferation agreements and spark an arms race on earth and in outer space. Russia, while agreeing that the world had changed and that new threats may emerge, remained opposed to the U.S. missile defense plans. It viewed the ABM Treaty as a key element of international security that should be

123. Treaty on the Non-Proliferation of Nuclear Weapons, available at <http://www.state.gov/t/ac/trty/5078.htm>.

124. 2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, available at <http://www.un.org/Depts/dda/WMD/nptrevhome.html>.

125. Joseph Cirincione, *Missile Defense After September 11 and the ABM Withdrawal*, PROLIFERATION NEWS AND RES., Jan. 4, 2002, available at <http://www.ceip.org/files/nonprolif/templates>.

126. Shield of Dreams, *Just the Facts: High-Tech Hubris*, available at <http://www.shieldofdreams.org/fact1.shtml>.

127. David Cortright & Alistair Millar, Fourth Freedom Forum, *A Better Missile Defense Program: International Cooperation and Disarmament*, available at http://www.fcni.org/issues/nuc/sup/missile_freedforum01.htm.

128. Arms Control Association, *Chinese Statements on U.S. Missile Defense Plans*, available at <http://www.armscontrol.org/factsheets.chinesenmd.asp>.

preserved.¹²⁹ Russia also believed ballistic missiles launched by rogue states or terrorists were not the most urgent threat to international security, nor were strategic missile defenses the correct solution. Prior to the withdrawal, Russia indicated its willingness to negotiate changes to the treaty rather than scrapping it. However, the Administration cited its commitment to withdraw whether or not Russia agreed to its withdrawal.¹³⁰

Congress remains divided over the issue. There appears to be some agreement on the need to press ahead with the deployment of short-range or theater missile defenses.¹³¹ There is a belief that the threat here is greater and there is a U.S. capability against Scuds (missiles with a range of 100 to 300 miles). However, Congress disagrees even more on long-range defense. In fact, recently, the House Appropriations Committee cancelled the satellite system that is very important to the long-range missile defense systems.¹³² These differences are reflected not only in Congress but also in the Departments of State and Defense where individuals hold different views on the program and the value of the ABM Treaty.

IX. Nuclear Warhead Reductions and Related Nuclear Nonproliferation Issues

The United States has announced it will reduce "operational" strategic deployed nuclear weapons to 3,800 by 2007, and to 1,700–2,200 by 2012. Russia will make a similar reduction. The reductions are codified in the short and starkly simple Strategic Offensive Reductions Treaty, signed May 24, 2002 in Moscow (Moscow Treaty). These developments are positive at least in the sense that they advance the reduction process, which paradoxically has been stalemated since the Soviet Union disintegrated. However, in several serious and interrelated ways the reductions fall short of the thirteen practical steps agreed to at the 2000 NPT Conference for the systematic and progressive efforts to implement Article VI of the NPT.¹³³

129. Arms Control Association, *Russian Statements on U.S. Missile Defense Plans*, Oct. 2001, available at <http://www.armscontrol.org/factsheets/russianmd.asp>.

130. Many arms control experts note also the ripple effect of U.S. withdrawal from the ABM Treaty. Specifically, India and Pakistan may feel less compelled to limit the future advances of their own nuclear and missile programs if they believe both the United States and Russia are no longer bound by commitments that limit U.S. and Russian nuclear and missile technological developments.

131. Cirincione, *supra* note 125.

132. *Id.*

133. The thirteen steps are listed in the Final Document, Volume I, Parts I and II, of the 2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons. This document can be found at <http://www.un.org/Depts/dda/WMD/2000FD.pdf>. Briefly, the thirteen steps are as follows: (1) the signature and ratification of the CTBT; (2) a moratorium on nuclear-weapon-test explosions; (3) negotiations on a fissile treaty banning the production of fissile material; (4) establishment of a body in the Conference on Disarmament to deal with nuclear disarmament; (5) application of irreversibility to nuclear disarmament, nuclear and other related arms control reduction measures; (6) a nuclear weapons states undertaking to achieve the total elimination of their nuclear arsenals leading to nuclear disarmament; (7) early entry into force and implementation of START II and conclusion of START III; (8) completion and implementation of the Trilateral Initiative between the United States, Russia and the IAEA; (9) steps by nuclear-weapons states leading to nuclear disarmament that promotes international stability (this step has several sub-steps); (10) nuclear-weapons states to place fissile material designated by each of them as no longer required for military purposes under IAEA or other international verification and arrangements for disposition; (11) reaffirmation that objective of states in disarmament process is general and complete disarmament; (12) regular reports by all states parties on implementation of Article VI of the NPT and recalling the advisory opinion of the ICJ; and lastly, (13) further development of the verification capabilities to provide assurance of compliance with nuclear disarmament agreements to achieve maintenance of a nuclear-weapons-free world.

For example, the U.S. plan in general does not call for destruction of delivery systems or dismantlement of warheads. According to Natural Resources Defense Council (NRDC), fifty MX missiles are to be deactivated, but their silos will be retained, as will missile stages and the warheads. Four of eighteen U.S. Trident submarines will be withdrawn from the strategic nuclear force, but will then be converted to carry conventional cruise missiles. Beyond these measures, no additional strategic delivery platforms are scheduled to be eliminated from nuclear forces. In contrast, START I requires, and START II would have required, the destruction of delivery systems, and the 1997 Helsinki commitment to START III additionally envisaged accounting for, and dismantling of, warheads.

Second, beyond the operational deployed strategic forces, the United States plans to retain large numbers of warheads in a responsive force capable of redeployment within weeks or months. NRDC estimates that at the level of 1,700 to 2,200 operationally deployed strategic warheads to be reached in ten years, there would be an additional 1,350 strategic warheads in the responsive force, as well as scores of spares. This approach is explicitly justified on the basis of a need for flexibility. Yet it remains undoubtedly contrary to the principle of irreversible disarmament, step five of the thirteen steps. Indeed, U.S. planners have expressly rejected that principle.

Third, the United States has made no indication that it plans to reduce the readiness level of the operationally deployed strategic arms. Today, both the United States and Russia each have about 2,000 warheads on high alert, ready for delivery within minutes or an order to do so. Projecting present practices forward, it has been estimated that at the 2012 level of 1,700–2,200 operationally deployed warheads, the United States would have 900 on high alert. One could see this as a sort of slow-motion dealerting process, all the more so given that the responsive force planned by the United States is essentially in a dealerted status. But there is no reason the reductions in operationally deployed forces have to be spread out over so many years. Nor should they be maintained in a high alert status, whatever their numbers. This slow-motion dealerting, to levels that, a decade from now, are still capable of immediately inflicting societal destruction, is not what non-nuclear weapons states intended when they insisted on the inclusion of concrete agreed measures to further reduce the operational status of nuclear weapons systems and a diminishing role for nuclear weapons in security policies in the 2000 NPT agenda.

Fourth, the NPT reference to the START process was an endorsement of making reductions legally binding. After initial hesitation, the Bush administration accepted a legally binding agreement on reductions, the May 2002 Moscow Treaty. It requires only that the United States and Russia limit “strategic nuclear warheads” to 1,700–2,200 by the year 2012. It does not require the dismantlement of delivery systems or warheads, nor does it foreclose the United States or Russia from retaining warheads in storage. The extent to which reductions will be transparent and verified remains to be determined through consultation mechanisms. Thus, while in form the Moscow Treaty is a treaty obligation, in substance it fails to apply established arms reduction techniques (dismantlement, verification), and therefore falls short of expectations of NPT States Parties expressed in 2000.

Fifth, under START II, there would have been 3,000–3,500 deployed strategic arms by 2007. Under the 1997 Helsinki commitment to negotiate START III, there would have been 2,000–2,500 such arms by that year. In contrast the U.S. plan anticipates 3,800 deployed strategic arms by 2007. Given a change in the counting formula (warheads on submarines being overhauled, about 250 at any time, are not included), the target for 2012 of 1,700–2,200 deployed strategic weapons, reflected in the Moscow Treaty, is about the range

anticipated by the Helsinki commitment. Thus, in addition to its other serious deficiencies, the U.S. plan calls for reductions on a slower schedule than in the START process.

Regarding U.S.-Russian non-strategic arms reductions, step 9c of the thirteen steps calls for further reduction of non-strategic nuclear weapons, based on unilateral initiatives and as an integral part of the nuclear arms reduction and disarmament process. There has been no progress in this regard since 2000. Indeed, the 1991 Bush-Gorbachev parallel unilateral withdrawal of non-strategic arms from deployment have yet to be subjected to the requirements of the reduction and disarmament process, that is, they are not transparent, they are not irreversible, they have not been verified, and they have not been codified in legally binding form.

The United States and other nuclear weapons states have fallen short of complying with the NPT obligations and the thirteen steps. For example, there is no sign that the Article VI obligation as now understood in light of its authoritative interpretation by the ICJ and the 2000 unequivocal undertaking to eliminate nuclear arsenals have been integrated into U.S. nuclear planning. Rather the obligation seems to remain a rhetorical flourish for international settings.

X. Controlling Biological Weapons

The most important, indeed virtually the only important, development concerning WMD non-proliferation was the unsuccessful effort to strengthen the 1972 Biological Weapons Convention (BWC). The BWC's prohibition against developing or acquiring biological weapons is undermined by the absence of capabilities to verify compliance and by its scarcely addressing threats that non-state groups might use biological weapons.

After the Gulf War and discovery of Iraq's bioweapons program, the BWC States Parties established the Ad Hoc Group (AHG) to draft a legally binding instrument to strengthen the effectiveness and improve the implementation of the BWC. In early 2001 a near-consensus was reached on a Protocol drafted by the AHG's chairman, Tibor Toth of Hungary. The Protocol called for States Parties to declare certain facilities and activities if they had or used biological weapons in the past and disclose whether they have national biological defense programs or activities. States Parties must disclose other relevant facilities such as maximum biological containment facilities. Declared facilities would be subject to randomly selected transparency visits. The proposed Protocol also outlined procedures to investigate suspicious outbreaks of disease and suspected bioweapon facilities. To encourage states to join, it guaranteed States Parties assistance and protection against the use or threat of biological weapons and established measures to promote scientific and technological cooperation exchanges in peaceful biotechnology, including genetic engineering, biological agents, toxins, and capabilities to combat disease.¹³⁴

Despite having long participated in the protocol's negotiation, the United States rejected the draft protocol in July, claiming that it would be ineffective to detect non-compliance and that it would be burdensome for the American biopharmaceutical sector.¹³⁵ Because biological warfare facilities lack external signatures, it would allegedly be impossible to

¹³⁴ *Id.*

¹³⁵ Ambassador Donald Mahley, U.S. Special Negotiator for Chemical and Biological Arms Control Issues, Statement by the United States to the Ad Hoc Group of Biological Weapons Convention States Parties, Geneva, Switz. (July 25, 2001), available at <http://www.state.gov/t/ac/rls/rm/2001/5497.htm>.

identify all of the facilities capable of conducting illicit BW activities. Only a small fraction of the pool of facilities in a country that could be used for offensive biological warfare purposes would be declared and subject to routine inspection. States conducting offensive biological warfare activities will either not declare such facilities or will hide them at declared facilities beneath an effective cover of legitimate biological activities. Even if a bio-weapons facility is visited, illicit biological warfare work could be easily concealed or cleaned up, rendering it highly improbable that international inspectors would detect evidence of non-compliance. The United States also faulted the mechanism to investigate suspicious facilities and disease outbreaks. The delay in securing approval for an investigation request from the implementing organization and getting a team physically on the ground may be enough time to clean up or otherwise conceal evidence of a BWC violation.

The U.S. rejection of the protocol set off a wave of condemnation among states that had actively negotiated the protocol as well as non-governmental organizations that had long supported efforts to strengthen the Convention. All this served to heighten interest in the Fifth BWC Review Conference (RevCon) scheduled for November. In the interim, of course, the events of September 11 and the subsequent anthrax attacks compounded that interest. Notably, the RevCon was to be the first and only negotiating forum following September 11 focusing on how to control weapons of mass destruction. Amidst the President's calls for a new global coalition to root out terrorists wherever they may be, diplomats arrived in Geneva with a heightened appreciation for the consequences of inaction.

As an alternative to the rejected protocol, the United States put forth a nascent set of proposals. Strengthening national criminal legislation and legal assistance and cooperation capabilities was the centerpiece of its initiatives. Also included was support for multilateral controls on basic biological research. No international regulatory system was advocated, despite recognition that such a system would be the only way to distinguish legitimate from illegitimate activities. With regard to efforts to combat covert BW activities, the only relevant initiative was in favor of making controls on transfers of weapons-relevant equipment and materials more vigorous.

Despite interest in these proposals, diplomats' repeated inquiries as to how these measures might be implemented went unanswered, and calls for a follow-on process to elaborate these measures met constant U.S. opposition. A dilemma arose: Most participants recognized that the BWC is too weak to prevent non-compliance and that the protocol did not solve the problem—there is a need for a process to design alternative solutions. But the United States, having objected to the protocol, opposed a continuing process.

Even so, the United States succeeded in including references to the threat of terrorism in the RevCon's Final Declaration—a prime U.S. objective. Moreover, the United States won support for proposals to strengthen States' criminal laws as well as to enhance World Health Organization's capabilities to detect disease outbreaks. By the RevCon's final day, the United States had succeeded in: (1) putting the protocol effectively to rest; (2) amassing overt worldwide recognition of the threat of bioterrorism and the need for the BWC to address that threat; and (3) shifting the focus of negotiations from how to verify compliance to how to detect non-compliance.

At 5:00 P.M. on the RevCon's last day (due to close at 6:00 P.M.), the United States proposed to formally terminate the Ad Hoc Group's mandate. That proposal had not been part of the U.S. negotiating positions up to that point, nor had the delegation informed anyone, including our allies, that such a proposal would be made. Taken completely by surprise and recognizing that it would not be possible in the remaining time to evaluate

that proposal, an immediate recess was called. Notably, as national delegations met in their regional group, all European Union delegations boycotted the meeting of the Western Group, refusing to sit through another meeting where they felt lied to by the Americans. Fervid discussions brought the delegations back only to approve an unprecedented suspension of the Review Conference with no final declaration or any other substantive accomplishment.

Although the proposal to terminate the mandate of the AHG seems innocuous, both its timing and its substance struck deeply at mutual understandings that had sustained the RevCon's discussions for the preceding three weeks. Throughout the RevCon, a most critical issue was whether the United States would agree to a process that could generate arrangements to strengthen the BWC. The AHG's protocol was widely viewed as a flawed set of arrangements, but the Group's mandate was (and is) the only process to consider measures to make the BWC more effective. At the end of lengthy discussions to consider a new process, with the United States resisting alternative formulations, the overt termination of the AHG's mandate meant that instead of discussing how to move forward, the delegates were being asked to move backward eight years, without any prospect of having a replacement forum or mechanism.

The offer of such a reversal, especially at such a late hour, was received by every other delegation as insulting. Thus, the proposal was not only substantively contrary to the objectives of every other delegation; it was also diplomatically offensive. Most aggrieved were our European allies who had spent much of previous three weeks serving as a bridge between the United States and nations of the non-aligned movement (NAM). With its proposal, the United States collapsed the foundations of that bridge, leaving them with the appearance of either ignorance or hypocrisy. On the floor and during the recess, diplomats demonstrated bitter fury at what had transpired, especially that there was no prior notice.

With the abrupt suspension of the Review Conference in its final hours after the United States shocked the conference, no action was taken on the U.S. proposals or on any other matter. The Review Conference is due to resume after a one-year suspension in November 2002.

XI. Conclusion

At the outset of the CTBT Conference in November 2001, Secretary-General Kofi Annan said, "We have a precious but fleeting opportunity to render this troubled world a safer place, free from the threat of nuclear weapons."¹³⁶ A sober analysis of the current situation will generate cause for profound concern. The U.S. failure to support the CTBT does not bode well for an indefinite extension of the current moratorium against testing nuclear weapons. Plans to terminate the ABM Treaty and build a massive missile defense do not bode well for continued reliance by non-nuclear weapons states of pledges and commitments made by the United States in multilateral arms control forums. The ABM Treaty was reaffirmed recently at the 2000 Review Conference of the NPT by 187 States Parties, many of who must rely on the integrity of the most powerful. The extension of military dominance into outer space under a policy in which "Full Spectrum Dominance"

136. 'Precious, But Fleeting' Opportunity Exists to Free World of Nuclear Threat, Secretary-General Tells Test-Ban-Treaty Conference, U.N. Doc. SG/SM/8020, DC/2816 (2001), available at <http://www.un.org/News/Press/docs/2001/sgsm8020.doc.htm>.

is the stated goal does not bode well for a global cooperative security regime at lower levels of armaments. For the commitments of the NPT to be fulfilled the cooperation and leadership of the United States is essential. That cannot be expected in the near future.

The utter breakdown of the Biological Weapons Convention does not bode well for international controls over these weapons. The failure to convene any international tribunals to address international conspiracies to commit crimes against people, countries, or humanity in favor of singular reliance on one country's legal regime will certainly diminish the promotion of international law.

The United States can and should prosecute crimes against citizens. But it is clear that terrorists have and will continue to attack both legitimate and illegitimate regimes the world over for a variety of reasons. In the long-term, should the United States unilaterally become the world's preeminent policeman and judge? Is this consistent with our national character, and our democratic values? Is it in our long-term security interests?

The U.S. failure to vigorously promote and strengthen international legal regimes, coupled with questions regarding motives for U.S. international interventions places stability at risk.¹³⁷ Much of the world suspects that economic opportunity and self-interest have a disproportionate influence on U.S. policy, notwithstanding our long history of promoting economic development and human rights universally, as well as threats to U.S. security. In order to prove these suspicions unfounded, very disciplined and open critical debate and discussion will ensure these suspicions wrong and ensure the objectivity of policy planning.

Finally, we must recognize the importance of promoting the equality before the law regarding individuals as well as countries. It is axiomatic that all must be equally accountable and equally protected as a matter of principle. Will law serve the lawless? Let us reflect on Robert Bolt's *A Man for All Seasons*.

Thomas Moore is challenged, "So, now you would give the Devil the benefit of law!" and he answers, "Yes, what would you do? Cut a great road through the law to get after the Devil?"

His friend replies, "I'd cut every law in England to do that!"

Moore retorts, "Oh, And when the last law was down, and the Devil turned round on you—where would you hide—all the laws being flat? This country's planted thick with laws from coast to coast—man's laws, not God's—and if you cut them down—and you are just the man to do it—do you really think you could stand upright in the winds that would blow then? Yes, I would give the Devil the benefit of the law, for my own safety's sake."

The core principles under which so much civilized progress has been made these last few hundred years need not be diminished one iota. Indeed, the strongest societies are, and will remain those that guard freedom at every level under the rule of law.

137. Certain facts raise suspicions. On September 7, 2001, Chevron and Texaco were cleared for a merger by the Federal Trade Commission. The merged entity will have a combined enterprise market value of over \$100 billion. Among its assets is a 45 percent interest in the nine billion barrels of reserves in the Tengiz oil field of Kazakhstan, near Afghanistan. Exxon/Mobil owns a 25 percent interest in the field, bringing U.S. corporations' interests to 70 percent. Condoleezza Rice was until recently on the Board of Directors of Chevron and Vice President Cheney served on the Kazakhstan Oil Advisory Board. It is possible that these interests do not have an effect on policy decisions.

