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PUBLIC INTERNATIONAL LAW

Arms Control and National Security

JONATHAN GRANOFF, JOHN HARRINGTON, AND BONNIE D. JENKINS*

I. Introduction

This article simply addresses a few issues which we deem paradigmatic of the larger dynamics in the arena of arms control and national security. Whether it is the weaponization of space; fighting in Iraq; negotiating with North Korea; strengthening or weakening the capacity of the Chemical Weapons Convention, the Biological Weapons Convention, or the Nuclear Nonproliferation Treaty to constrain, contain, and eliminate weapons of mass destruction, the tension between the assertion of unilateralism through U.S. military power and the assertion of multilateralism through the establishment of global norms and the promotion of the rule of law defines current events. We have chosen to outline several areas that help to explain these dynamics.

II. International Arms Control Regimes

A. NEW MEASURES

1. *Proliferation Security Initiative, September 2003*

On December 10, 2002, Spanish forces, operating in concert with the United States, seized a North Korean ship, the *So Soan*, in the Indian Ocean. Fifteen Scud missiles lay

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hidden under 40,000 sacks of cement. The missiles and their conventional war heads were seized, but the next day the entire cargo was permitted to continue its journey to Yemen.¹ Why would the United States incur the displeasure of an ally, whose soldiers risked their lives, by allowing the cargo to continue? The answer—because we honor the law.

Under the Law of the Sea Convention, a vessel on the high seas may be stopped by ships of its flag state or if it does not fly any flag or otherwise demonstrate its registration. Therefore, the *So San* was subject to inspection because it had no flag, while the cargo was not illegal. There is no general prohibition against transporting weapons unless a state has agreed to so constrain itself. North Korea is not part of the Missile Technology Control Regime. It has a right to sell missiles, and probably has sold them to Iran, Pakistan, Syria, and others.²

Common sense dictates that there is a need to be concerned about the transport of conventional weapons and to constrain and prevent the proliferation of weapons of mass destruction (WMD). In response to this need, and without reference to the existing multilateral legally binding regimes addressing the elimination of biological and chemical weapons or the nonproliferation of nuclear weapons, President Bush, on May 31, 2003, in an address from the Wawel Royal Castle in Krakow, Poland, introduced the Proliferation Security Initiative (PSI)³ as such a reasonable endeavor. It is a “[partnership] of states working in concert, employing their national capabilities to develop a broad range of legal, diplomatic, economic, military and other tools to interdict threatening shipments of WMD and missile-related equipment and technologies’ via air, land, and sea.”⁴

The international coalition, initially comprised of eleven countries: Australia, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain, the United Kingdom, and the United States, focused on pre-emptive interdiction, seeking to allow ships, aircraft, and vehicles suspected of carrying WMD-related material to and from countries of “proliferation concern” (in particular, North Korea and Iran) to be detained and searched. It will also encourage member countries to deny over-flight rights to suspicious aircraft or ground them when they stop to refuel.⁵ The United States has taken a very aggressive posture in promoting the initiative and has even proposed that non-complying aircraft be “escorted down” to be searched; although Australia in particular has expressed reservations about extending the effort this far.⁶ The coalition has now expanded to include Canada, Denmark, Norway, Turkey, and Singapore. Additionally, over 50 other nations have already expressed their interest and support.

The PSI rests on the authority of the United Nations Security Council Presidential Statement of January 1992, which states that the proliferation of all WMD constitutes a

1. Tony Karon, *Scud Seizure Raises Tricky Questions*, TIME, Dec. 11, 2002, available at <http://www.time.com/time/world/article/0,8599,398592.00.html>.

2. David E. Sanger & Thom Shaker, *U.S. Aides Remain Divided As They Weigh Korea Risks*, N.Y. TIMES, May 11, 2003.

3. For a list of articles on the subject, see <http://www.isn.ethz.ch/linkslib/index.cfm?Parent=3872>. For an excellent legal analysis of the issue, see Benjamin Friedman, The Bipartisan Security Group, *The Proliferation Security Initiative: The Legal Challenge*, (Sept. 4 2003), available at http://www.gsainstitute.org/gsi/pubs/09_03_psi_brief.pdf. See generally, Rebecca Weiner, Monterey Institute of International Studies, *Proliferation Security Initiative to Stem Flow of WMD Material* (July 16, 2003), available at <http://cns.miis.edu/pubs/week/030716.htm> [hereinafter Weiner].

4. Weiner, *supra* note 3.

5. Nicholas Kravev, *U.S. Seeks Asian Aid for Ship Searches*, WASH. TIMES, June 17, 2003.

6. Don Woolford, *New Coalition to Target Terror Weapons*, AAP NEWSFEED, July 8, 2003.

threat to international peace and security, and underlines the need for member states of the U.N. to prevent proliferation. The PSI is also consistent with recent statements of the G-8 and the European Union, establishing that more coherent and concerted efforts are needed to prevent the proliferation of WMD, their delivery systems, and related materials. The PSI seeks to involve in some capacity all states that have a stake in nonproliferation and the ability and willingness to take steps to stop the flow of such items at sea, in the air, or on land. The PSI also seeks cooperation from any state whose vessels, flags, ports, territorial waters, airspace, or land might be used for proliferation purposes by states and non-state actors of proliferation concern.

A statement of interdiction principles was released in Paris September 4, 2003, by eleven nations that are participating in the Proliferation Security Initiative:⁷ On June 4, 2003, during testimony before the House Committee on International Relations, Under Secretary

7. *Interdiction Principles for the Proliferation Security Initiative*, available at <http://www.dfait-maeci.gc.ca/arms/psi-en.asp> (last modified Feb. 27, 2004). The participants agree to:

Undertake effective measures, either alone or in concert with other states, for interdicting the transfer or transport of WMD, their delivery systems, and related materials to and from states and non-state actors of proliferation concern. "States or non-state actors of proliferation concern" generally refers to those countries or entities that the PSI participants involved establish should be subject to interdiction activities because they are engaged in proliferation through: (1) efforts to develop or acquire chemical, biological, or nuclear weapons and associated delivery systems; or (2) transfers (either selling, receiving, or facilitating) of WMD, their delivery systems, or related materials; (3) adopt streamlined procedures for rapid exchange of relevant information concerning suspected proliferation activity, protecting the confidential character of classified information provided by other states as part of this initiative, dedicate appropriate resources and efforts to interdiction operations and capabilities, and maximize coordination among participants in interdiction efforts; (4) review and work to strengthen their relevant national legal authorities where necessary to accomplish these objectives, and work to strengthen when necessary relevant international laws and frameworks in appropriate ways to support these commitments; and (5) take specific actions in support of interdiction efforts regarding cargoes of WMD, their delivery systems, or related materials, to the extent their national legal authorities permit and consistent with their obligations under international law and frameworks, to include: (a) Not to transport or assist in the transport of any such cargoes to or from states or non-state actors of proliferation concern, and not to allow any persons subject to their jurisdiction to do so; (b) At their own initiative, or at the request and good cause shown by another state, to take action to board and search any vessel flying their flag in their internal waters or territorial seas, or areas beyond the territorial seas of any other state, that is reasonably suspected of transporting such cargoes to or from states or non-state actors of proliferation concerns, and to seize such cargoes that are identified; (c) To seriously consider providing consent under the appropriate circumstances to the boarding and searching of its own flag vessels by other states, and to the seizure of such WMD-related cargoes in such vessels that may be identified by such states; (d) To take appropriate actions to (1) stop and/or search in their internal waters, territorial seas, or contiguous zones (when declared) vessels that are reasonably suspected of carrying such cargoes to or from states or non-state actors of proliferation concern and to seize such cargoes that are identified; and (2) enforce conditions on vessels entering or leaving their ports, internal waters, or territorial seas that are reasonably suspected of carrying such cargoes, such as requiring that such vessels be subject to boarding, search, and seizure of such cargoes prior to entry; (e) At their own initiative or upon the request and good cause shown by another state, to (a) require aircraft that are reasonably suspected of carrying such cargoes to or from states or non-state actors of proliferation concern and that are transiting their airspace to land for inspection and seize any such cargoes that are identified; and/or (b) deny aircraft reasonably suspected of carrying such cargoes transit rights through their airspace in advance of such flights; and (f) If their ports, airfields, or other facilities are used as transshipment points for shipment of such cargoes to or from states or non-state actors of proliferation concern, to inspect vessels, aircraft, or other modes of transport reasonably suspected of carrying such cargoes, and to seize such cargoes that are identified.

of State for Arms Control and International Security, John R. Bolton, announced that the United States had, within the previous two months, intercepted aluminum tubes likely bound for North Korea's nuclear weapons program. Also, a combined French and German effort had intercepted sodium cyanide likely bound for North Korea's chemical weapons program. These two instances are examples of recent interdiction successes.⁸ Subsequent statements from the Administration indicated that there would be few announcements regarding seizures and boardings. Not disclosing the existence of these operations minimizes controversy and maximizes flexibility as the United States and its allies would be free of public pressure.⁹

Bolton's testimony left numerous questions regarding the Administration's position with respect to international law and application of the PSI. Congressman Joe Hoeffel (D-Pa.), a member of the House Committee on International Relations, before which Bolton appeared, propounded, on August 21, 2003, a series of questions to Secretary of State Powell. These questions arose from Bolton's testimony. The questions have not been answered and their relevance has only increased with time. The text below is exactly what was propounded to the Secretary of State. The italicized portion is the author's commentary.

a. Legal and Diplomatic Policy Questions Relating to the "Proliferation Security Initiative"¹⁰

1. "Our goal is to work with other concerned states . . ."

- Who are these states?
- Have there been preliminary talks on this subject?
- What agreements have emerged from the preliminary talks?

Certainly every state that is a member of the Biological Weapons Convention, the Chemical Weapons Convention, both of which entirely bar creation or possession of these weapons, and the Nuclear Nonproliferation Treaty, with 187 states and which only permits five states (The United States, The United Kingdom, Russia, China and France) to have nuclear weapons, with the promise of their negotiated elimination, have a concern to strengthen enforcement of global norms to which they are bound. Thus, one must question, can any state express concern and then join PSI? A state such as Egypt might have a concern regarding Israel which is in its region and is not a party to the NPT and which claims a right to have nuclear weapons. Everyone might claim a concern about Pakistan or India, also not members of the NPT.

2. We intend "to develop new means to disrupt the proliferation trade at sea, in the air, and on land"

- What are these new means?
- To what extent will this "disruption" impact all other trade?
- What is wrong with the "old" means?
- To what extent have existing international treaties such as the NPT, the CWC, and the BWC failed to slow proliferation? What is being done to strengthen these

8. Testimony of John R. Bolton, Under Secretary for Arms Control and International Security, to the Committee on International Relations, U.S. House of Representatives, June 4, 2003, available at, www.house.gov/international_relations/108/bolt0604.htm (last visited May 25, 2004) [hereinafter Bolton].

9. See Weiner, *supra* note 3.

10. Bolton, *supra* note 8.

international treaties? Is the PSI an enforcement mechanism for the NPT? Will the PSI function as part of a verification structure under the BWC?

- What is wrong with the existing export control regimes (Australia Group, Missile Technology Control Regime, Nuclear Suppliers Group, Wassenaar Arrangement)? What is being done to expand their membership in an effort to have more countries adhere to their standards?

Clearly the existing treaty regimes lack formal enforcement capacity. Many countries have been proposing creation of a permanent WMD inspection organization in the UN but the United States had objected to this process. Will the PSI be able to function to strengthen enforcement of global norms embodied in the treaties or will it be a mechanism whereby the United States can lead in asserting its capacity to interdict without further formal oversight? And, if PSI can be used to interdict WMD, why could any country or another group of countries not assert their concerns and thus right to do the same?

3. This will be a “more dynamic, proactive approach”

- What will this new “proactive” approach cost the U.S. taxpayer?
- What body/bodies will gather the necessary intelligence?
- How will command and control of this new effort be organized?

The underlying issue is whether the Security Council or the members of treaties addressing WMD concerns will be engaged in determining how a shipment of anything is determined to be suspect. Suppose, for example, a shipment of a dual use pharmaceutical technology is going to a country not a member of the Biological Weapons Convention. Would not any neighbor of such a country be reasonable in asserting a “dynamic, proactive approach” to engaging in determining the possible use of materials and technology? Thus concerns are raised regarding who will oversee such an approach which might ultimately use force and will certainly compromise privacy and property rights.

4. We will “develop a broad range of legal, diplomatic, economic, military and other tools to interdict threatening shipments of WMD- and missile-related equipment and technologies”

- Concerning “legal” tools: Is the Administration envisaging a new international treaty regulating trade in sensitive military goods?
- Concerning “other” tools: What other tools is the Administration considering?
- Concerning “threatening shipments”: Who will determine what is “threatening?” Will it be the U.N. Security Council? Will it be NATO? Will it be the U.S., alone or in cooperation with other likeminded countries? What will be done in case of dissent (e.g., if Germany, France, China and/or Russia do not agree with the U.S. assessment)?
- Concerning “WMD- and missile-related equipment”: Such equipment is often so-called “dual-use” equipment, that is, it can be used for both military and civil application. Who will determine whether a shipment is legitimate? How does the Administration intend to collect the necessary intelligence? Will the country of origin and the country of destination be able to participate in the decision-making process? Will there be some kind of judicial process allowing for an objective assessment of the nature of the shipment? To what extent will American business interest be affected by this new trade barrier?
- Concerning “technologies”: Most technologies involved will also be “dual-use.” How will the Administration defend itself against claims that it is preventing other

nations from developing civil nuclear or missile capabilities permitted under international law? What criteria will be used to determine which countries may or may not develop such capabilities? In other words, how will the Administration determine who is trustworthy and who it not? For example, a sensitive shipment leaves Russia on a French boat with destination China, while a shipment containing identical goods leaves North Korea on a Vietnamese boat with destination Iran—how will the Administration avoid maneuvering itself into legal and moral contradictions?

5. “Over time, we will extend this partnership as broadly as possible”
 - Can any state join the effort, or is membership limited to those countries fulfilling certain criteria (e.g., democratic government, signatory of international treaties prohibiting WMD activities, member of military alliance with United States, country with naval forces, member of existing export control regimes)?
 - To what extent will other states participate in the decision leading to the interception of a sensitive shipment? What will be done in the case of disagreement? What will be done if the sensitive shipment is coming from or going to one of the member states of this new non-proliferation group?
6. “We aim ultimately not just to prevent the spread of WMD, but also to eliminate or ‘roll back’ such weapons from rogue states and terrorist groups . . .”
 - Concerning “roll back”: How exactly should this work? Is the Administration proposing the imposition of far-reaching trade blockades (beyond goods related to WMD) on states suspected of developing WMD, in an effort to have them “roll back” their activities? Who will determine whether the “roll back” has been achieved? Will the Administration cooperate with the U.N. Security Council, the International Atomic Energy Agency, and the Organization for the Prohibition of Chemical Weapons? To what extent may such coercive action accelerate the escalation of a conflict, potentially leading to irrational behavior by the target state? To what extent does this new non-proliferation initiative stimulate (i.e., “roll forward”) the desire of potential target states to develop or expand their WMD capabilities?
 - Concerning “rogue states”: What are the criteria making a state “rogue”? Is it the intent to possess WMD, or to continue possessing them? Is it the possibility that such a state may be using WMD against the U.S.? And if so, why are India, Pakistan, China or Russia not considered “rogue” states? Is it the threat to use WMD, if necessary preemptively?
 - Concerning “terrorist groups”: How exactly should this work?
7. “The pursuit of WMD and ballistic missile delivery systems cannot be cost free”
 - The U.S. retains a considerable amount of WMD (i.e., roughly 50 percent of the world’s remaining 30,000 nuclear warheads). In addition to threatening their use, the Administration actively pursues the development of new nuclear weapons. Thanks to years of research and development, the United States possesses state-of-the-art missile capabilities. In addition, the Administration actively pursues the development of new missile capabilities within the framework of the National Missile Defense program. To what extent do the Administration’s proactive proliferation efforts at home: (a) stimulate proliferation abroad or (b) prevent the Administration from gaining the moral high-ground necessary to effectively curb WMD and missile proliferation?

The Administration's proposals to develop new nuclear weapons and lower the threshold for use of nuclear weapons against non nuclear weapons states who are members of the NPT could be understood to constitute a retreat from fulfilling commitments to an "unequivocal undertaking" to obtain the total elimination of nuclear weapons made at the 2000 Review of the NPT. Further, the failure to obtain ratification of a Comprehensive Test Ban Treaty adds weight to international concern with the US's aspirations. It remains to be seen whether counter proliferation policies actually stimulate rather than diminish proliferation when done in contravention to disarmament commitments. A robust open national debate on this issue would be worthwhile.

8. "... the logic of adverse consequences must fall not only on the states aspiring to possess these weapons, but [also] on the states supplying them ..."
 - What "adverse consequences" is the Administration considering against WMD- and missile-related equipment and technologies? Is it the same range of "tools" described above (see point 4)?
 - To what extent will reprisals against suppliers affect U.S. business interests? In other words, will U.S. suppliers have to fear countermeasures by sanctioned foreign supplier countries?
 - China and Russia are big suppliers of sensitive technology. What measures is the Administration considering to bring these two countries into compliance with the new non-proliferation initiative?
9. "If there is a loophole in a law or a weak border point, those responsible for rogue states' WMD programs will try to exploit it. All too often they succeed."
 - Does the Administration possess evidence that substantiates this claim? What "law" is referred to? Is this, in fact, a reference to U.S. export control law?
10. "This Administration imposed sanctions 34 times last year, and has already imposed 12 sanctions this year, with a dozen more in progress on which we will soon be consulting Congress."
 - The sanctions referred to are imposed on entities trading on U.S. soil and thus subject to U.S. legislation. To what extent will the increased risk of being sanctioned for dual-use exports induce foreign investors to operate from countries other than the United States?
 - To what extent will companies/individuals involved in dual-use activities, but operating on foreign soil, be susceptible to U.S. economic sanctions?
11. "Interdiction involves identifying an imminent shipment or transfer, and working to impede and turn back the shipment."
 - To what extent will such "work" include military activities?
 - To what extent is such "work" permissible under international law?
 - To what extent can foreign states subject to U.S. interdiction interpret such action as a hostile act against them?
 - Does "interdiction" include "interception" and "seizure"?
 - Will these interdictions then be brought promptly to the Security Council pursuant to the requirements of Article 51 of the United Nations Charter, or is it the intention of the Administration to assert that the authority of the Security Council need not be invoked?

The underlying question is whether force will be exercised without Security Council approval and without changing the standards relating to the rights of passage on the open seas and skies. State Department Counsel William Taft spoke at the ABA International Law Conference in Washington, DC, on May 8, 2003, and stated that the invasion of Iraq was done to fulfill Security Council resolutions. The legality of this position has not been universally recognized as valid. The PSI raises concerns that the use of force might be rationalized based on a broad Security Council resolution declaring that WMD present a threat to international peace and security without thus specifying how and when force will be used to interdict. This will leave application of force open to the interpretation of individual states and dramatically diminish the respect for the rule of law. Imagine if all states took the position that they could, as and when they please, enforce outstanding resolutions of the Security Council or the General Assembly of the UN.

Secretary Powell has not answered Congressman Hoeffel. In May of 2004, co-author Jonathan Granoff asked Ambassador John Wolf, while at a conference in New York, how a "nation of concern" was to be established and how a nation could terminate such status. He was summarily told that the PSI is not an organization but an activity. Questions remain as to whether PSI will enhance international security by strengthening the rule of law, establish strengthened norms against WMD, or undermine the movement toward their universal prohibition by establishing inequitable standards relating to interdiction and control.

Obviously, states that are members of relevant treaties, such as the Nuclear Nonproliferation Treaty, might claim a concern regarding states which are not members in their own region. Egypt could be so concerned with Israel, for example. Do we envision one set of rules for U.S.-led initiatives and another set of rules for others?² Certainly, law must proceed in establishing rules under which all must seek equal refuge.

B. DEVELOPMENTS IN EXISTING MEASURES

1. *Treaty for the Nonproliferation of Nuclear Weapons, March 5, 1970*

The Treaty for the Nonproliferation of Nuclear Weapons (Nonproliferation Treaty, or NPT) is the central legal instrument, with 187 states parties, addressing the control of nuclear weapons, warheads, delivery systems and fissile material. This treaty sets forth obligations of member states to negotiate toward complete nuclear disarmament, prevent proliferation, and foster the peaceful use of nuclear energy.¹¹ However, since the 2000 Review Conference,¹² there has been little progress in fulfilling pledges toward irreversible, legally verifiable disarmament. In fact, there is a deepening concern that the treaty's core bargain of the Non-Nuclear Weapons States' nonproliferation with access to the peaceful use of nuclear technology, in exchange for disarmament by the Nuclear Weapons States, is corroding. This section will analyze the NPT in light of these concerns.

In 2003 alone, the United States declared its intent to create new types of nuclear weapons and to use them, North Korea announced its possession of nuclear weapons and withdrew

11. Treaty on the Non-Proliferation of Nuclear Weapons, available at <http://disarmament.un.org:8080/wmd/npt/npttext.html> (last visited May 13, 2004). See generally, <http://disarmament.un.org:8080/wmd/npt/index.html> (last visited May 25, 2004).

12. The multinational Conference on Disarmament meets at the United Nations every five years, preceded by annual preparatory conferences, in order to negotiate steps to implement article VI of the NPT.

from the NPT, and the revelation of Libya's nuclear program proved that states, and presumably non-state actors, surreptitiously may obtain elements necessary to produce nuclear weapons. These developments have robbed the NPT of the momentum gained prior to its 2000 Review Conference.

In the year 2000, the NPT parties unanimously produced a final document, in which the conference agreed "on the following practical steps for the systematic and progressive efforts to implement Article VI of the [NPT]."¹³ The so-called Thirteen Practical Steps have since been relied upon as the basis against which disarmament progress is to be measured. Almost immediately, these thirteen goals were confounded by unilateral U.S. action.

In 2001, the United States withdrew from the Anti-Ballistic Missile (ABM) Treaty, while embracing Ballistic Missile Defense (BMD), an action most of the world regards as a stimulant to proliferation and adverse to NPT obligations and goals. It has already begun to fuel a new arms race where Russia has begun to develop smarter missile systems and China has begun a robust nuclear weapons program. Moreover, it does not even purport to be effective against terrorist threats.

The aggravation of the treaty withdrawal was exacerbated when The Moscow Treaty reduced the number of operationally deployed warheads, by merely warehousing them for later use and having no verification provision. Following these stifled gestures, in 2003 the United States administration announced its intention create new low yield and earth penetrating nuclear warheads¹⁴ and called for lessening the lead time to renew testing of nuclear weapons.

As of December 8, 2003, during the General Assembly vote on resolutions regarding disarmament and security (Resolutions), and at the 2003 preparatory session (PrepCon) for the 2005 Review Conference, and through other actions,¹⁵ the United States position with regard to the first seven, and thirteenth, steps (due to space constraints, steps eight through twelve were omitted, but are no less important¹⁶) was further clarified as follows:

1. *Entry into Force of the Comprehensive Test Ban Treaty.* The UN General Assembly adopted the CTBT in 1996, but the US Senate in 1999 failed to ratify it following a sharply abbreviated review process. The current administration has stated it will not refer this treaty to the Senate for its advice and consent, which is necessary for the treaty to enter into force. On the Resolutions, the United States cast the only vote against one calling for bringing the CTBT into force. It was adopted by a vote of 173 to one, with four abstentions.¹⁷

2. *Moratorium of nuclear weapons testing or nuclear explosions.* Recently, the cessation in testing has been threatened by the President's 2001 Nuclear Posture Review. In his remarks before the Senate Armed Services Committee, Ambassador Linton F. Brooks, Under Secretary

13. 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. See <http://disarmament.un.org:8080/wmd/npt/finaldoc.html> (last visited May 25, 2004).

14. \$15.5 million of Department of Defense budget will be spent on the first year of a three-year feasibility study on The Robust Nuclear Earth Penetrator (RNEP).

15. For an interesting view on the 2003 invasion of Iraq and its impact on the NPT, see Weiss, Nuclear Weapons and Preventive War, Lawyers Committee on Nuclear Policy, Address to Parliamentarians' Network for Nuclear Disarmament, Nov. 2, 2003, at <http://lcnp.org/disarmament/nuclearweaponspreventivewar.htm>.

16. See NGO Committee on Disarmament, Peace and Security, *DISARMAMENT TIMES* 8 (Spring 2004); Bipartisan Security Group, Policy Brief, *Status of the Nuclear Non-Proliferation Treaty, Interim Report*, June 2003, available at <http://www.gsinsitute.org> [hereinafter *Status*].

17. John Burroughs, *The Shameful U.S. Record in 2003 Disarmament Votes at the United Nations*, Lawyers Committee on Nuclear Policy (Dec. 9, 2003), available at <http://lcnp.org/disarmament/usgarecord.htm>.

of Energy for Nuclear Security, stated that the Department of Energy is working to improve "test readiness" to an eighteen-month period for establishing test parameters (from a current three-year requirement, at a cost of \$12 Million). This readiness is set as a "prudent hedge against the possibility of a problem arising in the stockpile that cannot be confirmed, or a fix certified, without a nuclear test."¹⁸ During that same address, Mr. Brooks stated that one of the four goals served by U.S. nuclear forces is "to *defend* against and *defeat* those threats that, for whatever reason, we do not deter." In the current climate, such undeterred threats may include non-state actors dwelling within states that possess their own nuclear weapons. Such a doctrine lowers the threshold for the use of nuclear weapons, and promotes proliferation to those who would join us in such combat.

3. *Fissile Materials Ban (FISSBAN)*. The Conference on Disarmament has been unable to negotiate a ban on the production of weapons grade fissile material due, in part, to proposed linkages by some members to stalled negotiations on a treaty for the prevention of an arms race in outer space (PAROS). Also, India and Pakistan wish to link FISSBAN to full date-certain implementation (disarmament) of Article VI by the declared nuclear weapons states. Finally, another group of states wishes to include within FISSBAN the disposal of existing stocks of fissile material. In January 2003, five former CD Presidents proposed the creation of four ad-hoc committees mandated to: (1) negotiate a FISSBAN; (2) informally negotiate PAROS issues; (3) informally negotiate nuclear disarmament; and (4) "negotiate" a formal agreement regarding negative security assurances. The A-5 proposal underscores that FISSBAN negotiations ultimately must lead to a "non-discriminatory, multilateral and internationally and effectively verifiable" treaty.¹⁹ U.S. acquiescence to the A-5 proposal would amount to a fresh start for on-track negotiations and commitments, provided that any new measures are drafted and carried out within the spirit of the NPT.

4. *Creation of a CD Subsidiary Body to Discuss Disarmament*. The foregoing A-5 proposal would break the deadlock currently preventing a CD subsidiary body with a mandate to negotiate disarmament. Thus far, no such body has been established.

5. *Irreversibility of any reductions to nuclear arsenals*. This logical element of disarmament implies the complete destruction, as opposed to storage, of nuclear weapons. The unilateral withdrawal from the ABM Treaty caused the scrapping of the START II Treaty. The Moscow Treaty, with its storing provisions, did not mitigate the loss of START II, as the reductions were temporary, and reversible. At the December General Assembly vote, only the United States and India voted against a resolution calling for compliance with the tenets of irreversibility, verifiability, and transparency spelled out in the Thirteen Practical Steps.²⁰ The resolution was adopted 164 to two, with fourteen abstentions. With these actions, the United States has demonstrated to the world its ever-tightening grip on its warheads.

6. *Elimination of Nuclear Arsenals*. The current administration's proposal to manufacture new classes of nuclear weapons, and to shorten the time required for the testing of those weapons, is clearly in conflict with this step with no need for further comment or clarification. With SORT due to expire, and no relief measures in the pipeline, permanent re-

18. Amb. Linton F. Brooks, Statement of Ambassador Linton F. Brooks, Under Secretary of Energy for Nuclear Security and Administrator, National Nuclear Security Administration before the Senate Armed Services Committee, Subcommittee on Strategic Forces (Mar. 24, 2004), available at http://www.nnsa.doe.gov/docs/2004-Mar-24_SASC_testimony-19Mar04.pdf.

19. *Report of the Conference on Disarmament*, U.N. GAOR, U.N. Doc. CD/1364 (1995).

20. Path to the total elimination of nuclear weapons.

ductions are not guaranteed, nor is total elimination of these arsenals. The 2001 Nuclear Posture Review states that the United States intends to maintain the current U.S. force structure until 2020 or longer.

7. *Early implementation of START II, and conclusion of START III, while preserving the ABM treaty as a basis for further reductions.* The United States pulled out of the ABM treaty in 2001, causing the Russian withdrawal of its START II ratification (with U.S. ratification still pending), thereby locking out further START III negotiations, which had begun informally in Helsinki, Finland. Total reductions from these programs would have resulted in the elimination of all land-based MIRVed ICBMs,²¹ and verified reductions to as low as 2,000 warheads. The years of potential progress lost by the scrapping of the START accords will never be regained.

8. In the midst of these setbacks it is good to note that the Comprehensive Test Ban Treaty Organization is still making progress. The United States has provided enhanced capabilities by granting access to imagery, supporting technology development, and maintaining data exchange agreements with Russia. More than 100 of the 321 monitoring stations of the International Monitoring System have been installed and are on line. Nearly universal support is significant, as it underscores the unbroken commitment of the majority of countries to reach the goal of a legally binding universal nuclear test ban.²²

Unfortunately, during the period with which this article is concerned, there was no progress toward either disarmament or nonproliferation, in general, or any substantial furtherance of the "Thirteen Steps" agreed to at the 2000 NPT Review Conference three years earlier. The 2005 Review Conference will be held in April.

III. The Invasion of Iraq and the Coalition Authority: Arguments for and against Invasion in Iraq

In 2002, the Bush administration demanded that the UNSC authorize force to remove Saddam Hussein from power in Iraq, in part because of the failure of Hussein to abide by international obligations to eliminate his WMD and infrastructure.²³ The international debate over the U.S. decision to invade Iraq that ensued at the time, and which continues today, highlights the larger disagreement about using the doctrine of prevention as a means of addressing national security concerns.

The first national strategy promulgated by the Bush Administration was the National Security Strategy of the United States of America.²⁴ That document contains what many now term "The Bush Doctrine," that the United States may strike an entity that may intend harm to its interests or citizens before any hostile action occurs. The Doctrine provides, in relevant part, the following:

21. Intercontinental Ballistic Missiles carrying Multiple Independently Targetable Reentry Vehicles.

22. *Status, supra* note 16, at 3.

23. A large part of the United States rationale for invasion of Iraq was that Saddam continued to produce and harbor weapons of mass destruction. Much debate centered on whether the international community should have allowed the international inspectors the opportunity to continue their inspections in Iraq or whether a more aggressive action (military force) was warranted. Many European states, including France and Germany, preferred steps that gave diplomacy a chance to play out. In their view, preemptive or preventive war cut short possible diplomatic options for resolution.

24. The 1986 Goldwater-Nichols Department of Defense Reorganization Act mandates an annual report to Congress detailing the National Security Strategy of the United States, *available at* www.whitehouse.gov/response.index.html (last visited May 13, 2004).

For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack.

We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction—weapons that can be easily concealed, delivered covertly, and used without warning.²⁵

A. LEGAL PRECEDENTS

The Kellogg-Briand Pact of 1928 renounced war as an instrument of national policy. The agreement provides that states will, “solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.”²⁶ The Pact “formed the basis for ‘crimes of peace’ that are described in the Charter of the Nuremberg tribunal as crimes aimed at planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties.”²⁷

The United Nations Charter requires its members to refrain from the threat or use of force against the territorial integrity or political independence of another state, or any manner that is inconsistent with the purposes of the United Nations.²⁸ Article 2(3) of the Charter requires all members to settle their international disputes by peaceful means so that international peace and security are not endangered. Article 2(4) requires that all members refrain from the threat or use of force against the territorial integrity or political independence of any state, or in any way inconsistent with the purposes of the United Nations. The exception to the above provisions can be found in Article 52 that affords the right of self-defense if, “an armed attack occurs against a member of the United Nations, until the Security Council takes measures necessary to maintain international peace and security, and collective actions under Chapter VII.”²⁹

When the United States and other supporting nations, including the United Kingdom and Australia, invaded Iraq, many international lawyers argued that the action departed from both the legal precedents set out above and the previous doctrine of preemption. The Bush Doctrine does not require specific evidence of a pending attack, as set forth under the doctrine of preemption.

The doctrine of preemption, which has been an accepted policy of the United States, is narrowly defined. The doctrine is based on the theory that action must be taken to prevent an imminent threat. Preemptive action is one to forestall the mobilization and deployment of existing forces. Prevention, on the other hand, is action taken by a state in the absence of specific evidence of an impending attack. It is taken to forestall the creation of new

25. See <http://www.whitehouse.gov>; see also, Duncan E. J. Currie, ‘Preventive War’ and International Law After Iraq, May 22, 2003, at www.globelaw.com/Iraq/Preventive_war_after_Iraq.htm [hereinafter Currie].

26. The Kellogg-Briand Pact, 1928.

27. Currie, *supra* note 25.

28. *Id.*

29. U.N. CHARTER.

military assets. It is based on the premise that a state must go to war because the war with a particular adversary is inevitable and will thereby avert a danger that may occur at some undefined future time. In the case of Iraq, the use of force was to ensure Iraq did not obtain WMD and military assets, falling within the definition of prevention. There was no clear impending attack on the United States. Therefore, while the administration defines its actions under the National Strategy as preemption, the vast majority of international legal scholars have defined the administration's definition in the National Security Strategy and in Iraq as prevention.³⁰

Why is this important? Many international lawyers would argue that preemption is arguably legal and the legality rises when a state is about to be imminently attacked. However, there is no precedent and no justification in international law for preventive war.³¹ The facts did not provide a legal basis for preemption but for prevention, which has no legal basis.

The arguments presented for and against war in Iraq are both legal and policy in nature.

B. REASONS FOR PREVENTIVE ACTION IN IRAQ

Arguments were made that Iraq should be invaded because Saddam Hussein possessed WMD (biological, chemical and nuclear) and if allowed to acquire nuclear weapons, he would not be deterred and more dangerous in his region. Hussein failed to live up to his obligations imposed by United Nations Security Council Resolutions (UNSCR) since the end of the 1991 Gulf War. There have been over fifteen UNSCRs requiring that Iraq, among other things, surrender all of its weapons of mass destruction, associated research and production equipment.³² Others point to the use by Hussein of chemical weapons against Iran in the Iran-Iraq war and on his own people in March 1998, during the attack on the Kurdish town of Halabja, as an example of his willingness to use WMD. Finally, Hussein has tormented his own people and during his twenty years in power caused the disappearance of about 200,000 Iraqis in his prisons.³³ Another argument was that during the Cold War, the United States could rely on deterrence to prevent an attack by the Soviet Union. However, today the proliferation of small chemical, biological and nuclear weapons creates the need to act earlier to prevent a possible attack. In addition, it is clear that sanctions and coercive diplomacy failed.

The administration also alleges that there were connections between Osama bin Laden and the Iraqi regime. The September 11, 2001 terrorist attacks highlighted the importance of not waiting for another terrorist attack before preventive measures should be implemented. The consequences of doing so are too high. Many thousands of Americans died in the last terrorist attack; many more could die in the next one. Finally, once Hussein acquired nuclear weapons, he could not be overthrown without serious losses and dangers.³⁴

30. Michael E. O'Hanlon, et al., *The New National Security Strategy and Preemption*, BROOKINGS INST. POL'Y REV., Policy Brief #113, Dec. 2002 [hereinafter O'Hanlon].

31. Jim Wurst, *Association of Lawyers, Physicians Criticize War Plans*, UN WIRE, Feb. 14, 2002, at <http://www.just-international.org/Jim-Wurst-Iraq.html> [hereinafter Wurst].

32. O'Hanlon, *supra* note 30.

33. James A. Russell & James J. Wirtz, The Center for Contemporary Conflict (CCC), *Strategic Insight: Preventive War against Iraq*, available at <http://www.ccc.nps.navy.mil/rsepResources/si/nov02/middleEast.asp> (last visited May 25, 2004) [hereinafter Russell & Wirtz].

34. Paul W. Schroeder, *What Would Kant Say? Iraq: The Case Against Preemptive War*, AMER. CONSERVATIVE, available at www.amconmag.com/10_21/iraq.html (last visited May 25, 2004).

C. REASONS AGAINST PREVENTIVE ACTION IN IRAQ

A major rationale against preventive war in Iraq was that it set a precedent for other states to emulate. The action lowers the threshold for states that may consider preventive action. The United States' decision to invade Iraq will weigh heavily in the calculations of other states.³⁵ In addition, interstate war today is very infrequent, and should remain so.

Basing military action on prevention entails the making of military and policy decisions about how much risk a state is willing to make and if it should fight now while the costs are relatively low or wait and possibly confront a more dangerous adversary.³⁶

The criteria for the use of the doctrine of preemption are a legal barrier that is not easily overcome. The overall concern expressed by most international lawyers is that the Security Council authorizes any such action. The UN Charter and customary and international law require peaceful settlement of disputes be first sought as the situation may still be ripe for negotiation. As noted, many argued that there was also no imminent threat of aggression on the part of Iraq. "There is no precedent in international law for use of force as a preventive measure when there has been no actual or imminent attack by the offending state."³⁷

Another reason posed for not invading Iraq was that it did not have the support of many of the United States' longest and closest allies. For example, Germany and France, and eventually Canada opposed the war in Iraq. It is considered unjust, aggressive, imperialist, and, even if successful, would have disastrous effects on the United States' alliances and friendships.³⁸ States also have the right to be recognized and treated as independent.

While some doubted whether Hussein could be deterred once he acquired weapons of mass destruction, particularly nuclear weapons, it was unlikely Hussein would do something as suicidal as to attack the United States or one of its allies directly. There was also no direct connection shown between Hussein and bin Laden, or anyone else in the Iraqi regime. Others believed the United States should seek other means to address its national security concerns. For example, demonstrating U.S. leadership and resolve is a better means to discourage terrorists. "Our allies and friends consider a preemptive war on Iraq a proof not of resolve and leadership, but of recklessness and unilateralism and want no part of it."³⁹

In addition, the campaign against al Qaeda in Afghanistan was still ongoing. Going into Iraq would involve inserting thousands of U.S. troops into the Middle East. If Hussein were toppled, the United States would have new responsibilities of occupying, administering, rebuilding, democratizing, and stabilizing Iraq, "tasks of unreckoned costs and manifold difficulties for which neither the American public nor the administration have demonstrated much understanding, skill, or stomach."⁴⁰ It also leaves open a number of other important questions. For example, how can the doctrine be uniformly applied since it relies on the variables of a particular situation? How does the doctrine affect the overall relations among states?⁴¹

35. O'Hanlon, *supra* note 30.

36. Russell & Wirtz, *supra* note 33.

37. Wurtz, *supra* note 31.

38. Shroeder, *supra* note 34.

39. *Id.*

40. *Id.*

41. *Id.* Russell & Wirtz, *supra* note 33.

As a result of these concerns regarding the use of force under the doctrine of preventive action, this new United States' policy is viewed by some as being too open-ended, excessively reliant on military options, and extremely costly when applied.⁴² The doctrine of preventive war, often used synonymously with preventive action, if adopted broadly, could well lead to lawlessness in international behavior, and loosen the legal constraints limiting when states may take military actions against others under international law.

42. Mackubin T. Owens, Editorial, *The Bush Doctrine and the Poverty of International Relations Theory* (Sept. 2003), at www.ashbrook.org/publicat/oped/owens/03/ir-theory.html (last visited May 25, 2004).

