

**PROTECTING THE WORLD FROM WEAPONS OF MASS
DESTRUCTION: REFLECTIONS ON THE *HIGH-LEVEL PANEL*
*REPORT ON THREATS, CHALLENGES AND CHANGE***

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The *High-level Panel Report on Threats, Challenges and Change*¹ was established by the Secretary-General and consisted of sixteen members serving in their individual capacity; they did not represent governments. The chapter of the Report which is of relevance to our subject is entitled “Nuclear, Radiological, Chemical and Biological Weapons”² which included some seventeen recommendations. This Report, together with the “In Larger Freedom” report of the Secretary-General,³ formed the basis for the debate by the Heads of State and Government at the World Summit held in the U.N. General Assembly in 2005. The summit resulted in the adoption, without objection, of

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1. The Secretary-General, *A More Secure World: Our Shared Responsibility: Report of the Secretary-General's High-level Panel on Threats, Challenges and Change, delivered to the General Assembly*, U.N. Doc. A/59/565 (Dec. 2, 2004) [hereinafter *A More Secure World*], available at <http://www.un.org/secureworld/report.pdf>.

2. *Id.* ¶¶ 107-144.

3. The Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All, delivered to the General Assembly*, U.N. Doc. A/59/2005 (Mar. 21, 2005).

Assembly Resolution 60/1, known as the “World Summit Outcome Document.”⁴ That document contained nothing—nothing—about nuclear, radiological, chemical, or biological weapons, a fact that was the issue covered by that chapter of the *High-level Panel Report*. This was, of course, criticized and lamented by many commentators and diplomats, including the then-Secretary-General.

What happened? It is not possible to know for sure, but as we go through the challenges posed by this subject, it might be that the various sides in the debate took a “package deal” approach, rather than a “lowest common denominator” approach. Hence, the various contending sides blocked each other from adopting what might have been otherwise generally acceptable recommendations.

Before we examine those recommendations, let us look at the weapons of mass destruction we are talking about. Their definitions can be found in the three international treaties that I am about to describe, but perhaps it is more effective to examine what these weapons do. I draw from a publication entitled “Weapons of Terror: Freeing the World of Nuclear, Biological and Chemical Arms” issued by the Weapons of Mass Destruction Commission set up by the Swedish Government and headed by Dr. Hans Blix, former Director General of the International Atomic Energy Agency (IAEA), former head of the United Nations Monitoring, Verification and Inspection Commission in Iraq (UNMOVIC), and a lawyer as well.⁵

For nuclear weapons, the Blix Commission simply stated that such weapons “kill by the effects of heat, blast, radiation and radioactive fallout”⁶ and noted that the attacks on Hiroshima and Nagasaki killed an estimated 200,000 people, virtually all civilians.⁷ Finally, it noted that the “nuclear weapons in one strategic submarine have a combined explosive force several times greater than all the conventional bombs dropped in World War II.”⁸

4. 2005 World Summit Outcome Document, G.A. Res. 60/1, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

5. WEAPONS OF MASS DESTRUCTION COMM’N, WEAPONS OF TERROR: FREEING THE WORLD OF NUCLEAR, BIOLOGICAL AND CHEMICAL ARMS (2006), *available at* http://www.wmdcommission.org/files/Weapons_of_Terror.pdf.

6. *Id.* at 32.

7. *Id.*

8. *Id.*

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As to biological and toxin weapons, the Blix Commission said the following:

[They] kill by using pathogens to attack cells and organs in human bodies, although they can be used to target crops and livestock on a massive scale. Some are contagious and can spread rapidly in a population, while others, including anthrax and ricin, infect and kill only those who are directly exposed.⁹

Chemical weapons, according to the Blix Commission “kill by attacking the nervous system and lungs, or by interfering with a body’s ability to absorb oxygen. Some are designed to incapacitate by producing severe burns and blisters.”¹⁰

Weapons of terror indeed they are. What is the law on this?

Recall that the U.N. Charter was drafted and adopted in the summer of 1945, before the first atomic bombs were dropped in August of that year. The Charter does not refer to nuclear weapons or weapons of mass destruction (WMD). But, the Charter does authorize the General Assembly to consider the principles governing disarmament and the regulation of armaments and to make recommendations to the Member States or to the Security Council or both.¹¹ Furthermore, the Security Council “shall be responsible” for formulating plans to be submitted to member states “for the establishment of a system for the regulation of armaments.”¹² The Security Council clearly has a mandate in this area.

The international law regimes dealing with the three types of WMD are governed by the following three international treaties, all of which are treaties ratified by the United States and thus binding in our law (the year indicated being the year of entry into force):

- a) The 1970 Treaty on the Non-Proliferation of Nuclear Weapons (NPT);¹³

9. *Id.*

10. *Id.*

11. U.N. Charter art. 11, para. 1.

12. *Id.* art. 26.

13. Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 [hereinafter NPT].

- b) The 1975 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons (BTWC);¹⁴ and
- c) The 1997 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (CWC).¹⁵

Each of these three treaties aims for universal participation. Weapons control regimes work best if all states adhere to them. There are 190 parties to the NPT;¹⁶ significantly, India, Israel, and Pakistan were never parties, and North Korea has announced its withdrawal.¹⁷ For the BTWC, the number of parties is around 155, and for CWC around 180.

Let us examine the similarities of the three Conventions:

- a) They all deal not only with the weapon itself, but also with the equipment or materials needed to build it;
- b) While the verification regimes differ widely, the ultimate body responsible for deciding what to do in case of non-compliance is the Security Council of the United Nations.
- c) All three share the same sort of withdrawal provision found in numerous arms control treaties: if a state party decides that extraordinary events, related to the subject matter of the treaty, have jeopardized the supreme interests of its country, it may withdraw from the treaty upon issuing a statement of those extraordinary events and informing the other states parties and the Security Council. Often referred to as the "Achilles' heel" of arms control treaties, this provision has been invoked twice by North Korea to purport to get out of

14. Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163 [hereinafter BTWC].

15. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, *opened for signature* Jan. 13, 1993, S. TREATY DOC. NO. 103-21, 1974 U.N.T.S. 45 [hereinafter CWC].

16. U.N. Office for Disarmament Affairs, Treaty on the Non-Proliferation of Nuclear Weapons (NPT), <http://disarmament2.un.org/wmd/npt/index.html> (last visited Oct. 6, 2007).

17. *Timeline: North Korea's Nuclear Weapons Development*, CNN.com, Jan. 6, 2004, <http://www.cnn.com/2003/WORLD/asiapcf/east/08/20/nkorea.timeline.nuclear>.

its NPT treaty obligations.¹⁸ Interestingly, neither the United States nor the United Kingdom, I understand, have accepted North Korean pronouncements as being in conformity with the withdrawal clause.

As to key differences:

- a) Banning the weapon. The BTWC and the CWC completely prohibit making the weapon—no development, production, or stockpiling (The CWC also prohibits the use of the weapon.) The NPT includes a similar prohibition on making or possessing the weapon but only for “non-nuclear weapon states” (NNWS), which are defined as any state party other than China, France, the Russian Federation, the United Kingdom, and the United States (NWS). Thus, two categories are established: the five nuclear weapon states, which just happen to also be the five permanent members of the Security Council, and everyone else. In exchange for agreeing to forgo the development of nuclear weapons, the NNWS were promised access to nuclear technology for peaceful purposes, either through developing their own capacity or through import, but always under an IAEA inspection regime. In addition, all parties including the NWS undertook to “pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.”¹⁹ For international lawyers, it is of interest to note that the International Court of Justice was called upon to give advice on whether the use or threat of use (not mere possession) of nuclear weapons per se violates international law.²⁰ A majority concluded that, in general, customary international law would be violated as such weapons are, by definition, indiscriminate and civilians would inevitably suffer particularly cruel effects.²¹

18. *Id.*

19. NPT, *supra* note 13, art. VI.

20. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 228 (July 8).

21. *Id.* at 257-59, 266.

However, the court divided evenly on whether the use of such weapons would be contrary to law in the “extreme circumstance of self-defense, in which the very survival of a State would be at stake.”²² The president of the court cast his deciding vote for the proposition that it was not possible under current international law to reach a conclusion on that point.²³

- b) The inspection regime. For the NPT, no inspection regime was established in the Treaty itself. Rather, this function was “contracted out” to the IAEA,²⁴ which had been established some ten years before and had developed a voluntary, safeguards system to monitor the uses of nuclear energy to verify the peaceful, “non-military nature” of such activities. Thus, NNWS under the NPT are required to conclude bilateral “safeguards” agreements with the IAEA to govern the inspections regime to oversee the peaceful nuclear activities of such states. The regime was designed to verify that nuclear material was not diverted from peaceful purposes to prohibited uses (that it was always accounted for—nothing missing) and to give assurances that there were no undeclared (clandestine) nuclear activities which were thus not being inspected. If there is a finding by the IAEA of non-compliance, the matter is sent to the General Assembly and the Security Council. For BTCW, there is no verification regime at all. If a state party has a complaint regarding non-compliance, it simply goes to the Security Council. Several attempts have been made to establish a verification regime, but these have failed. Perhaps it would involve too intrusive a regime over a significant portion of the industry that uses material suitable for either totally benign or weapon purposes. For CWC, a sophisticated inspection regime exists involving inspections of the destruction of the weapon within a given time frame. Challenge inspections are possible by a state party and again, it is the Security Council which is involved in claims of non-compliance.

22. *Id.* at 266.

23. *Id.*

24. *See* NPT, *supra* note 13, art. III, para. 1.

How has this system worked? The BTWC and CWC regimes have not had complaints of non-compliance so there is little history to guide us on the extent of compliance with their basic legal obligations. For the NPT, it is quite a different story. In the case of North Korea, the system worked in the sense that IAEA inspectors found anomalies in the information provided by the government and in their own technical findings; they needed clarification because the findings indicated more was going on in the nuclear field than declared by the government. This sparked the first North Korean withdrawal from the NPT. Even with its return for a time, the discrepancies were never resolved and the IAEA continued to insist on the required clarifications. The second withdrawal came about because of U.S. allegations of clandestine nuclear activities. In the case of Iraq, after the first Gulf War, it was discovered that Saddam Hussein had set up a considerable secret infrastructure to plan and develop nuclear weapons. Inspectors before the war did not have the legal authority to inspect outside certain parameters. The IAEA fixed this by devising an “additional protocol” to the normal safeguards agreement, providing for more intrusive inspections and the requirement that states provide much more information on “dual use” activities and equipment.²⁵ But, not all NPT parties have agreed to the Additional Protocol. I will discuss the case of Iran below.

If the legal/treaty measures do not provide enough regulation of WMD, what other mechanisms are being used to help protect the world from these horrific weapons?

- a) Export controls. For all three types of weapons, informal arrangements have been set up by exporting/technology holding states to coordinate their export controls over goods and equipment which could be used for the prohibited purposes. They agree among themselves, outside the regimes of the treaties, what conditions to impose before exporting material or equipment that could be diverted from peaceful to weapon purposes.

25. Int'l Atomic Energy Agency [IAEA], *Model Protocol Additional to the Agreement(s) Between State(s) and the International Atomic Energy Agency for the Application of Safeguards*, IAEA Doc. INFCIRC/540 (corrected) (Sept. 1997), available at <http://www.iaea.org/Publications/Documents/Infcircs/1998/infcirc540corrected.pdf>.

- b) Initiatives to prevent, interdict, and reduce the demand for the dangerous or “proliferation sensitive” materials. Several programs exist along these lines. For example, the United States has established, with about sixty other countries, the Proliferation Security Initiative (PSI) designed to interdict unauthorized shipments or transfers of WMD, missile systems and related materials.²⁶ The PSI is designed to cover both state and non-state actors. The Initiative involves control over U.S. and PSI partners’ flagships (including stop, search, and seizure), ports, and territorial waters. Airplanes, airports, and airspace are also included.
- c) Reducing material. The Global Threat Reduction Initiative is a U.S. program aimed at reducing and securing high-risk nuclear and radiological materials and equipment in cooperation with governments world-wide.²⁷ It targets, for example, Russian- and American-originated highly enriched material or spent fuel, requiring that it be returned for processing into less-proliferation sensitive material.
- d) Make fuel available to NNWS. An initiative by the Director General of the IAEA and supported by the United States and Russia, would guarantee a supply of nuclear material for peaceful purposes so that NNWS could not claim they were justified in developing enrichment and reprocessing capabilities (as Iran has done). A “fuel bank” run by the IAEA or a state at competitive rates would provide a steady flow of material without the need to construct proliferation-sensitive facilities.²⁸
- e) End production. Cutting off the production of nuclear fissile material has been the subject of treaty negotiations for some

26. See BUREAU OF NONPROLIFERATION, THE PROLIFERATION SECURITY INITIATIVE (2005), <http://usinfo.state.gov/is/img/assets/4756/brochure1.pdf> (last visited Oct. 6, 2007).

27. See [ExpectMore.gov](http://www.expectmore.gov), Detailed Information on the Global Threat Reduction Initiative Program Assessment, <http://www.whitehouse.gov/omb/expectmore/detail/10003239.2006.html> (last visited Oct. 6, 2007) (White House website providing detailed information on the Global Threat Reduction Initiative Program).

28. Press Release, IAEA, IAEA Seeks Guarantees of Nuclear Fuel, IAEA Doc. PR2006/15 (Sept. 15, 2006), <http://www.iaea.org/NewsCenter/PressReleases/2006/prn200615.html>.

time in Geneva, but they have been stalled over disagreement about what to do with the existing stockpiles of fissile material.²⁹

Let me address briefly two issues in the forefront of today's WMD crises. First, North Korea. Recently, six nations signed an "initial actions" agreement in Beijing, which, according to the State Department, "begins to put North Korea back on track to realize the commitments" of 2005 by which that country agreed to "abandoning all nuclear weapons and existing nuclear programs and returning, at an early date" to the NPT and the IAEA.³⁰ Time will tell how the implementation of this new agreement proceeds.

Second, Iran. While Iran claims that it has a right to enrich uranium as part of its peaceful nuclear energy program, the IAEA Board of Governors found that there had been a history of concealment and failure to declare certain activities to the agency, and therefore reported the matter to the Security Council. The Council has decided that over and above its obligations under NPT and the safeguards agreement with the IAEA, Iran was required, under Chapter VII of the Charter, to suspend all proliferation-sensitive nuclear activities, including all enrichment-related and all reprocessing activities, as confidence-building measures.³¹ The Council also adopted limited economic sanctions with regard to the sale or supply of material and equipment that could be of benefit to Iran's nuclear program.³² As its President has indicated that Iran

29. See Jacquelyn S. Porth, *U.S. Urges Negotiations to Ban Material for Nuclear Bombs*, U.S. DEP'T. OF STATE (USINFO), Feb. 8, 2007, <http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2007&m=February&x=20070208173438sjhtrop0.1509821> (last visited Sept. 9, 2007).

30. *North Korea: An Important First Step*, U.S. DEP'T. OF STATE, Feb. 20, 2007, <http://www.state.gov/r/pa/scp/80575.htm> (last visited Oct. 8, 2007); *North Korea Agrees to Abandon Its Nuclear Weapons Programs*, U.S. DEP'T. OF STATE (USINFO), Sept. 19, 2005, <http://usinfo.state.gov/eap/Archive/2005/Sep/19-210095.html> (last visited Oct. 8, 2007).

31. See Press Release, Security Council, Security Council Demands Iran Suspend Uranium Enrichment by 31 August, or Face Possible Economic, Diplomatic Sanctions, U.N. Doc. SC/8792 (July 31, 2006), available at <http://www.un.org/News/Press/docs/2006/sc8792.doc.htm>.

32. Press Release, Security Council, Security Council Imposes Sanctions on Iran for Failure to Halt Uranium Enrichment, Unanimously Adopting Resolution 1737 (2006), U.N. Doc. SC/8928 (Dec. 23, 2006), available at

would not comply, the Council will have to determine what to do next.³³

Finally, all roads seem to lead back to the Security Council. Besides the non-compliance provisions of the three treaties, you may recall that I mentioned several provisions of the Charter, one referring to the role of the Council. Recently the Council has assumed a more active role in the area of WMD and terrorism beyond the Charter-mentioned role of armament regulation. In 2004, the Council adopted Resolution 1540, by which it affirmed “that proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, constitutes a threat to international peace and security.”³⁴ Under Chapter VII, it decided that states shall take certain steps to enforce effective measures to establish domestic controls to prevent proliferation of WMD, and established a committee to report to the Council on the implementation of the resolution. While the Security Council has addressed proliferation of WMD particularly in the context of non-state actors and terrorism, it has yet to involve itself in the disarmament field in any significant way.

One reason the *High-level Panel Report* generated controversy was that it did not shirk from raising issues over which agreement would prove difficult. It recommended various seemingly uncontroversial measures: support for PSI; an increase in the timeline for reaching the goals of the Nuclear Threat Initiative³⁵ and for destroying chemical weapons; support for the Russian/U.S. measures to reduce the risk of accidental war; and support for periodic invitations by the Security Council to the heads of the IAEA and CWC Secretariat to report to the Council on areas of concern as well as breaches of their conventions. Additionally, the report recommended a re-start of the Fissile Material Cut-off Treaty and a

<http://www.un.org/News/Press/docs/2006/sc8928.doc.htm>.

33. See, e.g., Elaine Sciolino, *U.S. and Europe Draft U.N. Resolution on Iran*, N.Y. TIMES, May 2, 2006, at A1.

34. Non-Proliferation of Weapons of Mass Destruction, S.C. Res. 1540, U.N. Doc. S/RES/1540 (Apr. 28, 2004).

35. See NTI.org, About NTI, http://www.nti.org/b_aboutnti/b_index.html (last visited Oct. 15, 2007) (“NTI’s mission is to strengthen global security by reducing the risk of use and preventing the spread of nuclear, biological and chemical weapons. NTI seeks to raise public awareness, serve as a catalyst for new thinking and take direct action to reduce these threats.”).

Security Council promise of collective action if a nuclear attack or a threat thereof was directed at NNWS. It also called for a re-start of negotiations for a verification regime for the BTWC and for making the Additional Protocol for IAEA safeguards agreements the new standard for compliance with the NPT. It further called for the Council to call for immediate verification of the activities of any country withdrawing from one of the WMD conventions.

The “elephant in the room” may have been the recommendation that the NWS “must take several steps to restart disarmament,” including complying with their NPT obligation to “move towards disarmament and be ready to undertake specific measures in fulfillment of these commitments.”³⁶ Plus, they should reaffirm their commitment not to use nuclear weapons against NNWS. The U.S. position is basically that over the years it and Russia have been reducing their nuclear stockpiles. Just recently the United States pointed out that it now has the smallest stockpile of nuclear weapons since the Eisenhower Administration and that they are more efficient, more secure and modernized.³⁷ For critics of the U.S. position, this argument is countered by a reference to the quality and deadly force of the new weapons; they may be fewer in number, but are much greater in destructive capability—fewer but “leaner and meaner.”

Critics such as those on the Blix Commission blame the increased risk of proliferation and possible transfer of WMD to terrorists on the fact that the NWS have not taken serious steps toward disarmament. They contend that as the NPT obligation toward disarmament by the NWS seems to be a dead letter, other states and non-state actors are encouraged to forego any obligations they might have regarding proliferation and to begin the search for WMD as a matter of national defense and in response to perceived threat from the NWS who do not take seriously their disarmament obligation. In the critics’ view, what is needed is not more effective WMD, but rather political and economic incentives and security guarantees.

One reply of the United States has been that the order of who should start disarming first is wrong. In order to achieve the

36. *A More Secure World*, *supra* note 1, ¶ 120.

37. USINFO, *Nuclear Weapons Still Key to U.S. Security*, *Energy's Brooks Says*, July 15, 2005, http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2005&m=July&x=20050715_162958adynned0.5247919 (last accessed Sept. 9, 2007).

elimination of nuclear weapons, according to Christopher Ford, U.S. Special Representative for Nuclear Nonproliferation in the State Department, the global environment must make it both possible and realistic to do so, rather than simply a Utopian dream.³⁸ What is needed is to eliminate the threat of international terrorism and rogue operations from such terrorist groups as Al-Qaeda, as well as to move against emerging regional nuclear arms race dynamics. The security climate has to improve so that the NWS will feel secure enough that the risks are worth taking to achieve the goal of nuclear disarmament.

In sum, the High-level Panel recommendations on WMD may not have been included in the Summit Outcome Document because of continued severe disagreements over the general and complete disarmament issue. But, the High-level Panel's Report provides a useful checklist of measures to reduce the threat of WMD. While not adopted in 2005, they remain on the table and if a "take small steps first" negotiating approach is taken, many recommendations might eventually be adopted. As for the current situation, it is not a "disaster"—at least not yet. The North Korean agreement gives hope, and no other states have withdrawn from WMD treaties. The Iranian situation is troublesome, but Iran does not possess the weapon as yet, and the Council is engaged in assuming its responsibility. What is absolutely clear is that the NWS, the permanent members of the Council, must deal with the perception of their failure to abide by their NPT commitment to good faith negotiations for a disarmament treaty under strict and effective international controls. The longer that perception continues, the more likely the nuclear nonproliferation regime will be at risk. There will be difficult policy choices ahead; legal regimes can only take us so far. What is needed is a true political will among the NWS (which to be effective will have to include all nuclear weapons powers such as India, Pakistan, and Israel) to shore up the nonproliferation regime and change the perception they are defending at all costs their "privileged" position.

The public will have to be heard on this. All of us on this planet are in need of protection against the hideous effects of these weapons of terror.

38. Christopher A. Ford, U.S. Special Representative for Nuclear Nonproliferation, *The NPT Review Process and the Future of the Nuclear Nonproliferation Regime*, Remarks to the NPT Japan Seminar (Feb. 6, 2007), available at <http://www.state.gov/t/isn/rls/rm/80156.htm>.