Nonproliferation and Reduction of Nuclear Weapons: Risks of Weakening the Multilateral Nuclear Nonproliferation Norm

Patricia Hewitson
Nonproliferation and Reduction of Nuclear Weapons: Risks of Weakening the Multilateral Nuclear Nonproliferation Norm

By Patricia Hewitson*

I. PREFACE

The United States has a powerful interest in maximizing the effectiveness of the global nuclear nonproliferation regime, partly because it provides the best protection against nuclear terrorism. However, in some respects the policies of the current administration are unlikely to serve this key interest. The Bush administration's main emphasis in the area of nuclear strategy and nonproliferation has been overwhelmingly unilateralist. In some important areas, the focus has been on overly-narrowly defined national interests at the expense of multilateral efforts to curb proliferation. This focus has been evident in an insistence on maintaining utmost unilateral flexibility in U.S. nuclear options. The potential consequences of this unilateralist approach include the erosion of important international nuclear nonproliferation norms. Such an outcome could only harm the security interests of the United States.

This article considers the degree to which the Bush administration's approach to key aspects of nuclear nonproliferation and nuclear strategy has been "multilateralist" or "unilateralist," and the implications of this for the global nuclear nonproliferation regime. The emphasis here is on the ripple effects for the global regime of U.S. policies regarding both nuclear nonproliferation and arms control treaties and the management of the U.S. nuclear arsenal.¹ The remainder of this Preface will set the context for discussion of the global non-

* LLM Candidate, School of Law, University of California, Berkeley (Boalt Hall) and Rotary World Peace Scholar. I would like to thank the following for their helpful comments: Professor David D. Caron, Dr. Urs Cipolat of the Global Security Institute, Mr. Peter Goosen of the South African Department of Foreign Affairs, Ms. Sonja Strahm of the Berkeley Journal of International Law, other contributors to this issue, and one unstinting friend.

¹ Unless otherwise specified, in this article the term "Bush administration" refers to the administration of President George W. Bush, which commenced in January 2001. This article covers the period up until January 20, 2003.

² This article does not focus on the Bush administration's policies concerning suspected or known violations of nuclear nonproliferation obligations by other countries, such as Iraq and North Korea.
proliferation regime and U.S. national interests, outline the concept of "multilateralism" applied here, and conclude with a comment on the approach to arms control treaties and international law which appears to underpin the Bush administration's approach to nuclear issues. The article then addresses several distinct but inter-related areas where U.S. policy has a bearing on the global nuclear nonproliferation regime. Part II examines the issue of missile defense and the U.S. withdrawal from the Anti-Ballistic Missile Treaty. Part III deals with reductions in the U.S. nuclear arsenal, notably the U.S.-Russia Moscow Treaty of May 2002. Recent U.S. policy regarding the Comprehensive Test Ban Treaty is considered in Part IV. Part V first canvasses additional aspects of the Bush administration's policy: its interest in engaging internationally on certain nuclear nonproliferation issues (export controls, threat reduction and strengthening the capabilities of the International Atomic Energy Agency); and its nuclear posture. Part V then addresses the disarmament commitments undertaken by the United States under the Nuclear Non-Proliferation Treaty, and finally points to some of the risks associated with certain parts of the administration's current nuclear-related policy.

A. The Global Nuclear Nonproliferation Regime and U.S. National Interests

U.S. interests and objectives concerning nuclear nonproliferation are inextricably bound up with the fate of the global regime underpinned by the Nuclear Non-Proliferation Treaty (NPT). That treaty is regarded by the United States as "the bedrock of the global efforts to prevent the spread of nuclear weapons." While not perfect, the NPT regime offers a scale of assurance, a powerful and near-universal legal and political norm, and a degree of verification that are simply not achievable without ongoing, concerted multilateral efforts. It has played a major role in keeping to a handful the number of states possessing nuclear weapons, despite dire 1960s prognostications of far worse proliferation trends. It is uniquely important as the collective means of furthering a critical
national security objective of all states: that of minimizing the proliferation of the most dangerous weapons in existence.

No single country, however powerful, could emulate the benefits of the global nuclear nonproliferation regime should that regime be substantially weakened or collapse. Indeed, more powerful nations may well be prime targets for any irresponsible and potentially devastating use of the products of future nuclear proliferation. Indifference to the health of the global regime entails indifference to a crucial long-term security objective of not just the United States but the entire international community. Yet debates about key issues of U.S. nuclear strategy can be imbued with assumptions that the global regime is irrelevant or deeply flawed, and with apparent unconcern about the foreseeable effects on the regime of U.S. policy-making. These tendencies are no less marked in the wake of the events of September 11, 2001.

B. The Meanings of “Multilateralism” and “Unilateralism” in the Context of Nuclear Nonproliferation

This article proceeds on the premise that the multilateral nonproliferation regime offers the best security against nuclear nonproliferation for the United States, for other states, and for the international community as a whole. What is in the interests of the global nonproliferation regime is also in the security interests of individual states, including and perhaps especially the United States. That regime is thus the appropriate reference point for evaluating the implications of nuclear-related policies of individual states. The regime is affected for good or ill by national decisions. It is therefore not particularly helpful to define “unilateralism” and “multilateralism” as simply denoting whether a national policy is undertaken alone or in concert with a number of other states. Instead, in this article a policy outcome is considered “multilateralist” if it operates to enhance, or at any rate not weaken, the global nuclear nonproliferation regime.

“Unilateralism” is used here to indicate not that the United States has acted alone, but that it has prioritized its perceived national security interests above its interests in enhancing the multilateral regime. Action undertaken by the United States alone can and often will further the interests of the global regime, as unilateral activities play an important role in the dynamics of the constantly...
evolving international system. To take one obvious example, current unilateral nuclear testing moratoria on the part of nuclear weapon states serve to strengthen the multilateral nuclear nonproliferation regime. Clearly, there can be no simple equation that all multilateral engagement is by definition "good" or all nominally unilateralist activity "bad." The question concerns not so much the number of states participating in a given activity, nor even the underlying intent, but rather its actual effects on the global nonproliferation regime.10

C. The Bush Administration’s Conceptual Approach to Arms Control, Nonproliferation and International Law

The Bush administration’s approach to nuclear nonproliferation and arms reduction has involved a high degree of skepticism about the value of arms control treaties. This skepticism is graphically illustrated by the views of President Bush’s Under Secretary of State for Arms Control and International Security, John R. Bolton. For Bolton, international law is not law,11 customary international law possesses only “purportedly binding force,”12 treaties are not legally binding,13 and “the underpinnings of international law rest

10. This approach recognizes that national decisions affect, for better or worse, the international system. It does not imply that activities undertaken unilaterally will necessarily detract from the global regime, but asserts that the regime’s centrality and overarching importance—which justifies the choice of “effects on multilateral regime” as the most important criterion for evaluating national policy.


We should be unashamed, unapologetic, uncompromising American constitutional hegemonists. International law is not superior to, and does not trump, the Constitution. The rest of the world may not like that approach, but does not abandon it. International law is not law.

12. Id. at 47.

13. Id. at 4. In Bolton’s view:

A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations... which may in the end be enforced by actual war. This is not domestic law at work. Accordingly, there is no reason to consider treaties as 'legally' binding internationally, and certainly not as 'law' themselves.

Id. at 4-5. Bolton does add that: “This is emphatically not to say that the United States should freely ignore its treaty obligations. Indeed, moral and political obligations in the real international world are often far more binding than ‘law.’” Id. at 5. To sum up, he writes that “treaties are ‘law’ to the extent that they constitutionally adjust private-private and private-public relationships within the United States. Treaties are ‘political’ (or ‘moral’) and not legally binding to the extent that they purport to affect relations among national governments.” Id. at 14. Bolton reportedly proposed before his current appointment that the “unsigned” of one treaty could well lead to a whole series of them. Balint Vazsonyi, Bolton’s Fusillade from Both Barrels, WASH. TIMES, May 13, 2002, at A19. Bolton’s attitude to treaties is further illustrated by his description of the Committee on the Elimination of Racial Discrimination (CERD): “CERD itself is not composed of member UN governments, but eighteen ‘experts’ acting in their individual capacities, elected by signatories to an international convention. It has no more international authority or legitimacy than any random collection of eighteen people at an intersection outside UN headquarters in New York.” Bolton, Is There Really ‘Law’, supra note 11, at 36.
on unacceptable premises for peoples who believe they are entitled to be free."

This blunt rejection of the foundations of the international legal order constitutes an extreme form of unilateralism. It makes it harder for other countries to engage in meaningful dialogue with the United States if senior administration officials refuse to acknowledge the fundamental concept that treaties possess binding legal (not just moral and political) force. Bolton’s “Americanist” philosophy pervades the current U.S. approach to nonproliferation and disarmament issues. It reflects and exemplifies the Bush administration’s approach to treaties generally, and to arms control treaties in particular.

The current administration appears to have little interest in any arrangement that would at all limit the flexibility of its nuclear strategy, irrespective of the impact of this unilateralist stance on the global nonproliferation regime. As demonstrated below, this is evident from the U.S. withdrawal from the ABM Treaty and its emphasis on missile defense; the “flexibility” of the Moscow Treaty’s reductions in strategic nuclear warheads; the continuing U.S. non-ratification of the Comprehensive Test Ban Treaty; the Nuclear Posture Review; the administration’s approach to its NPT disarmament commitments; and the consistent tenor of administration pronouncements regarding nuclear issues.

Bolton argues that “trying to characterize our policy as ‘unilateralist’ or ‘multilateralist’ is a futile exercise. Our policy is, quite simply, pro-American,

---

17. According to National Security Adviser Condoleezza Rice: “We’re going to be honest with our allies about which treaties are in our interest and are dealing with the problems with which they purport to deal; and those that are not, we’re not prepared to be party to.” Carol Giacomo, Rice Says Rejecting Global Treaties Doesn’t Equal Isolationism, WASH. TIMES, July 30, 2001, at A11. At the same time, Rice argued that, “You’ll not find a more internationalist administration than this administration.” Thom Shanker, White House Says the U.S. is Not a Loner, Just Choosy, N.Y. TIMES, July 31, 2001, at A1.
as you would expect." As indicated above, the approach taken in this article is that it is essential, not futile, to assess the degree to which U.S. policy furthers or impedes the goals of the multilateral nuclear nonproliferation regime. This is because such influence has long-term implications for international security and for the national security objectives of all countries, including the United States.

II.

MISSILE DEFENSE AND THE ANTI-BALLISTIC MISSILE TREATY

A. Pre-2001: Reluctant Support for Missile Defense but Some Concern for the ABM Treaty

1. Background on the ABM Treaty and the U.S. Missile Defense Program

The Anti-Ballistic Missile Treaty between the United States and the Soviet Union was concluded in 1972. Its rationale has been summed up as follows: "Neither the United States nor the Soviet Union would initiate a nuclear attack if it were unable to defend itself against the retaliation that almost certainly would ensue." Each party undertook not to deploy anti-ballistic missile (ABM) sys-

18. John R. Bolton, Under Secretary of State for Arms Control and International Security, Statement to the Conference on Disarmament (Jan. 24, 2002), at http://usinfo.state.gov/topical/poll/arms/02012402.htm [hereinafter Bolton, Conference on Disarmament]. Bolton continued: The main emphasis of the Bush Administration's arms control policy is the determination to enforce existing treaties, and to seek treaties and arrangements that meet today's threats to peace and stability, not yesterday's. Fundamental to the Bush Administration's policy is the commitment to honor our arms control agreements, and to insist that other nations live up to them as well. Id. In the context of the announcement six weeks previously of the unilateral U.S. withdrawal from the Anti-Ballistic Missile Treaty (see Part II below), the subtext of Bolton's remarks is that the United States will not hesitate to repudiate "existing treaties" which, viewed through a "pro-American" policy prism, are deemed no longer to meet "today's threats." This indication is reinforced by the Bush administration's approach to three international instruments signed but not ratified during the Clinton administration: the Comprehensive Test Ban Treaty (CTBT), the Rome Treaty on the International Criminal Court, and the Kyoto Protocol to the U.N. Framework Convention on Climate Change. On the CTBT, see infra part IV. On the other two instruments, see Jean Galbraith, The Bush Administration's Response to the International Criminal Court, 21 BERKELEY J. INT'L L., 683 (2003); Greg Kahn, The Fate of the Kyoto Protocol Under the Bush Administration, 21 BERKELEY J. INT'L L., 548 (2003).


20. Sean D. Murphy (ed.), Contemporary Practice of the United States Relating to International Law, 93 AM. J. INT'L L. 879, 910 (1999). A more detailed outline of the rationale of the ABM Treaty is as follows:

Each side is allowed 100 interceptors, on the theory that if you had a nuclear force of larger than 100 missiles one side would be assured of being able to deter the other, because each side could be assured of delivering the 101st weapon and all those beyond that number. Alternatively, if defenses were left unconstrained, if one side in

https://scholarship.law.berkeley.edu/bjil/vol21/iss3/2
DOI: https://doi.org/10.15779/Z38GM0P
tens for the defense of the territory of its country, not to provide a base for such defense, and not to deploy ABM systems for individual regions. An exception was made for two limited ABM systems per side to cover the party's capital and an Intercontinental Ballistic Missile (ICBM) launch site. The parties also agreed not to develop, test or deploy "sea-based, air-based, space-based, or mobile land-based" ABM systems or components. In short, "the ABM Treaty banned all but the most simplistic forms of defense against intercontinental ballistic missiles . . . prohibiting the use of most radars, space-based sensors, and remote sites for interceptors."24

President Ronald Reagan announced in 1983 a program aimed at achieving a capability to "intercept and destroy strategic ballistic missiles before they reach[ ] our own soil or that of our allies."25 He called on scientists to provide the means to "render[ ] . . . nuclear weapons impotent and obsolete."26 The concept was for a space-based shield protecting the United States against nuclear attack, and the program was labeled the Strategic Defense Initiative (SDI).27 Controversy surrounded both the program's technical feasibility28 and

Mendelsohn, supra note 8, at 614. The original terms of the ABM Treaty allowed 200 interceptors per side, but this was halved by a 1974 Protocol (which reduced the number of permissible missile defense sites from two to one). Id.; see Protocol to the Treaty of May 26, 1972 on the Limitation of Anti-Ballistic Missile Systems, July 3, 1974, U.S.-U.S.S.R., 27 UST 1645, 1042 U.N.T. S. 424 at Article I (in conjunction with Article III of the ABM Treaty, supra note 3).

22. Id. art. III.
23. Id., art. V.1.
24. McCann, supra note 19, at 210.
25. President's Speech on Military Spending and a New Defense, N.Y. TIMES, Mar. 24, 1983, at A20 [hereinafter Reagan Speech]. McCann provides an interesting account of U.S. missile defense activities prior to the initiative begun in 1983. Originating in 1969, the "Safeguard" missile defense system was designed to protect Minuteman missiles at a North Dakota Air Force base. The usefulness of both the U.S. Safeguard and the Soviet Galosh systems became limited as both the United States and the U.S.S.R. began placing multiple warheads on their Intercontinental Ballistic Missiles (ICBMs). Congress ceased funding the Safeguard program with effect from 1976 after voting on this decision in late 1975, one day after the system became operational after six years in development and a total cost of $25 billion. By contrast, the Soviet Union retained Galosh and later expanded it to the "Gazelle" system which is still operational. See McCann, supra note 19, at 224-27.
26. Reagan Speech, supra note 25. In the same speech, Reagan suggested that the program he was announcing "could pave the way for arms control measures to eliminate [strategic nuclear] weapons themselves." Id. Mitchell has argued that "[a]n anti-weapon weapon, missile defense can be lacquered in a veneer of anti-war rhetoric." Gordon R. Mitchell, Japan-U.S. Missile Defense Collaboration: Rhetorically Delicious, Deceptively Dangerous, 25 FLETCHER F. WORLD AFF. 85, 89 (2001). Mitchell also claims that Reagan administration officials and defense industry advocates deliberately appropriated the language of the peace movement in an effort to enhance the political appeal of SDI. Id. at 88-89 (noting Frances FitzGerald's view that Reagan developed SDI to respond to the nuclear arms race in a way that would appeal to the nuclear freeze constituency).
27. See McCann, supra note 19, at 227. The SDI program was colloquially known as "Star Wars."
28. In the words of a missile defense proponent: "Because of its seemingly exotic capabilities, SDI perplexed even some of President Reagan's most hawkish advisers. Almost twenty years later, SDI remains only a vision, for its requisite technology has proven frustratingly elusive. In addition, over $25 billion has been spent on its development." McCann, supra note 19, at 227.
its legality. In terms of international law, there was concern that such a program would constitute a violation of the ABM Treaty, although the Reagan administration argued for a "reinterpretation" of the ABM Treaty which would not preclude the SDI program. In terms of U.S. constitutional law, there was contentious debate as to whether the executive branch had the power to "reinterpret" a treaty without obtaining the advice and consent of the Senate. The SDI program was opposed by Russia and dominated the bilateral nuclear arms control agenda. The SDI goal of a complete missile shield was "abandoned as unworkable" in the late 1980s.


30. See, e.g., Kevin C. Kennedy, Treaty Interpretation by the Executive Branch: The ABM Treaty and "Star Wars" Testing and Development, 80 AM. J. INT'L L. 854, 877 (1986) (arguing that the president is bound by the consenting Senate's understanding of a treaty and may not advance a contrary interpretation in either a domestic or international forum). Kennedy also notes in passing that the U.S. chief negotiator of the ABM Treaty, Gerard Smith, was among the critics of the Reagan administration's understanding of what was permitted under the ABM Treaty. Id. at 862. Professor John Yoo has described the ABM Treaty controversy over the allocation of the treaty power as "perhaps the most significant inter-branch conflict over treaties since the struggle between Federalists and Republicans during the Napoleonic Wars." John Yoo, Politics as Law? The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation, 89 CALIF. L. REV. 851, 859 (2001) (reviewing Frances FitzGerald, WAY OUT THERE IN THE BLUE: REAGAN, STAR WARS, AND THE END OF THE COLD WAR (2000)). A report filed by the Senate Committee on Foreign Relations on September 22, 1987 stated that "[t]he Committee can find no evidence to contradict the conclusion that the Reagan Administration's 'reinterpretation' of the ABM Treaty constitutes the most flagrant abuse of the Constitution's treaty power in 200 years of American history." Senate Report No. 100-164 (1987), partially reprinted in Current Development: The ABM Treaty Interpretation Resolution, 82 AM. J. INT'L L. 151, 157 (1988). The journal's preface to the report extracts notes that Senate Resolution 167 reaffirmed the propriety of the "narrow interpretation" of the ABM Treaty. Id. at 152. The tone of the report indicates the acrimony surrounding the debate. The same report stressed that: "No standard is more fundamental to civilization than the value of honoring a solemn pledge. While the 'reinterpretation' debate has raised many complex and technical questions of international and constitutional law, beneath them all is a simple value with which every American is familiar: the value of honesty." Id. at 158. Here, the Committee's report echoes the principle known in international law as pacta sunt servanda which is codified in Article 26 of the VCLT. See VCLT, supra note 15. In the words of the International Court of Justice, "one of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international cooperation, in particular in an age when this cooperation in many fields is becoming increasingly essential." Nuclear Tests (Austr. v. Fr.), 1974 I.C.J. 268 (Dec. 20), para. 46, cited in Peter Malanczuk, Akehurst's Modern Introduction to International Law 49 n.105 (7th ed. 1997).

31. Soviet leader Yuri Andropov reportedly said, in response to Reagan's March 1983 announcement, that should Reagan's "conception be converted into reality, this would actually open the floodgates to a runaway race of all types of strategic arms, both offensive and defensive." R. Jeffrey Smith, Reagan Plans New ABM Effort, 220 SCIENCE 170, 170 (1983). On the effect of the U.S. missile defense program on bilateral arms control negotiations, see infra note 170 and text accompanying note 41. Strobe Talbott wrote just after Reagan's March 1983 speech that the most striking thing about the speech was Reagan's "treatment of ABMs as a solution that the U.S. can adopt on its own rather than a problem that must be subject to management with the other superpower. That same instinct for unilateral defense . . . has characterized his custodianship of nuclear weapons more generally." Strobe Talbott, The Risks of Taking Up Shields (Anti-Ballistic Missile Systems), TIME, Apr. 4, 1983, at 20.

2. Status of ABM Treaty

Some commentators have argued that the ABM Treaty did not survive the dissolution of the Soviet Union in 1991. However, "both President George H. W. Bush and President Bill Clinton expressed support for retaining the ABM Treaty throughout their presidencies." In view of the clear recognition by the U.S. executive branch over a number of years that the ABM continued in force, it is difficult to sustain any argument to the contrary at international law.

It has also been argued that a fundamental change of circumstances, meeting the conditions stipulated by Article 62.1 of the Vienna Convention of the Law of Treaties (VCLT), has "effectively rendered the rationale for the ABM Treaty obsolete." Article 62.1 provides that an unforeseen fundamental change of circumstances "may not be invoked as a ground for terminating or withdrawing from the treaty unless: (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound" and "(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty." This provision encapsulates the doctrine of *rebus sic stantibus*. In its Commentary on this provision, the International Law Commission noted that most jurists "enter a strong caveat as to the need to confine the scope of the doctrine within narrow limits and to regulate strictly the conditions under which it may be invoked . . . The circumstances of international life are always changing and it is easy to allege that the changes render the treaty inapplicable."
The key changes in circumstances said to warrant the abandoning of the ABM Treaty concern changes in the former Soviet Union and the "rising threat from 'rogue' states." This argument entails an elastic understanding of the application of Article 62.1 of the VCLT which is not consistent with the stringent language of that provision, nor with how its intent has generally been understood. Such an interpretation would enable and encourage parties to many treaties, including the NPT and other arms control treaties, to evade treaty obligations simply by listing significant changes in the international climate since the relevant state had become party to the treaty in question. This strained interpretation of Article 62.1 thus deserves rejection.

3. Clinton Administration Approach to Missile Defense

The missile defense concept re-surfaced as a major political issue during the Clinton administration. President Clinton indicated in 1993 that the United States would abide by the long-standing restrictive interpretation of what was permitted by the ABM Treaty. President Clinton's Defense Secretary William

whether the necessary conditions for the operation of the doctrine have been satisfied. Id. The restrictions attaching to the *rebus sic stantibus* principle may have partly motivated the common practice of including withdrawal clauses in arms control and disarmament agreements (on which see infra note 65). In view of those restrictions, it is hardly surprising that the United States opted to invoke the ABM Treaty's withdrawal provision when it wished to be released from the obligations of that treaty. Reliance on *rebus sic stantibus* would have required a more objective standard than the subjective and intrinsically unilateralist invocation of the ABM Treaty's withdrawal provision, and the United States could not credibly have demonstrated that this more objective standard was met.


39. Bradley, supra note 38, at 299. On the succession issue, President Clinton argued that "neither a simple recognition of Russia as the sole ABM successor nor a simple recognition of all NIS [Newly Independent States] as the full ABM successors would have preserved fully the original substance and purpose of the ABM Treaty as approved by the Senate in 1972." McCann, supra note 19, at 214 n.22 (citing Letter from President William J. Clinton to Representative Benjamin Gilman (R-N.Y.), Chairman, Foreign Affairs Committee (Nov. 21, 1997)). Russia had issued a statement in January 1992 requesting that the Russian Federation be considered "as a Party to all international agreements in force instead of the USSR." See A MANUAL ON INTERNATIONAL HUMANITARIAN LAW AND ARMS CONTROL AGREEMENTS 739-40 (M. Cherif Bassiouni ed., 2000). A Memorandum of Understanding on Succession (MOUS) was signed on September 26, 1997, together with two Agreed Statements on Demarcation (concerning the demarcation between anti-ballistic missile systems and theater missile defense systems). See Amy F. Woolf, *CRS Brief for Congress, Nuclear Arms Control: The U.S.-Russian Agenda* (Updated May 24, 2002), at 10-12, at http://fpc.state.gov/c6693.htm. The MOUS was described by the State Department as: [establishing] that the Parties to the ABM Treaty shall be the United States, Belarus, Kazakhstan, the Russian Federation, and Ukraine. For the purposes of the MOUS and the ABM Treaty, the latter four states are considered to be the USSR Successor States... the USSR Successor States collectively assume the rights and obligations of the USSR. This means that only a single ABM deployment area is permitted among the four Successor States.

Murphy, supra note 20, at 910 (quoting a statement issued by the State Department on September 26, 1997 which affirmed the continuation in force of the ABM Treaty). According to a Congressional Research Service report, the Clinton administration did not submit the succession and demarcation agreements to the Senate for advice and consent "for fear that the Senate would defeat them." Woolf, supra, at 11. By early 2000, Russia was the only one of the five signatory states to have
S. Cohen announced in January 1999 that the United States planned to develop a land-based national missile defense (NMD) system, and deploy it if technologically feasible, at a cost of $6.6 billion over six years. He noted that such deployment “might require modifications to the scope of the [ABM] treaty. . . . We will seek to amend the treaty if necessary, and we will work in good faith to do so. . . . The ABM Treaty also provides, of course for the right of withdrawal.”

President Yeltsin wrote to President Clinton that unilateral U.S. deployment of a missile defense system “would have extremely dangerous consequences for the entire arms control process.”

A joint statement issued after a meeting of U.S. and Russian officials in June 1999 reaffirmed their countries’ commitment to the ABM Treaty, which was described as a “cornerstone of strategic stability,” and to continuing efforts to strengthen the Treaty. The same statement also reaffirmed the two governments’ ABM Treaty obligations to consider “possible changes . . . that have a bearing on the ABM Treaty and, as appropriate, possible proposals for further increasing the viability of this Treaty.”

The National Missile Defense Act of 1999 provides that: “It is the policy of the United States to deploy as soon as is technologically possible an effective National Missile Defense system capable of defending the territory of the United States against limited ballistic missile attack.” In signing this act into law in July 1999, President Clinton appears to have been motivated by Republican Congressional pressure and by an assessment that any presidential veto would be overridden. President Clinton indicated that a decision as to the future of the missile defense program would be taken in 2000, on the basis of four crite-

ria: technical readiness, the maturity of the ICBM threat from "rogue nations,"
cost, and arms control considerations.\textsuperscript{46} Doubts continued regarding the technical feasibility of missile defense as the program was dogged by poor test results.\textsuperscript{47} Although the Clinton administration had announced that it would assess by June 2000 whether missile defense deployment was warranted, President Clinton ultimately left this decision to his successor.\textsuperscript{48}

When Presidents Clinton and Putin met in June 2000, President Putin indicated Russia's view that the limited missile defense system under consideration by the United States would breach the ABM Treaty, and also rebuffed U.S. interest in amending the ABM Treaty. President Putin proposed a smaller-scale joint Russian-U.S. theater defense system, but President Clinton rejected the idea.\textsuperscript{49} The Presidents' Joint Statement contained similar language to the June 1999 joint statement of officials noted above.\textsuperscript{50}

\textbf{B. Bush Administration Approach: Goodbye ABM Treaty, On with Missile Defense}

[W]e must move beyond the constraints of the 30-year-old ABM Treaty. This Treaty. . . . enshrines the past. No treaty that prevents us from addressing today's threats, that prohibits us from pursuing promising technology to defend ourselves, our friends and our allies is in our interests or in the interests of world peace. . . . When ready, and working with Congress, we will deploy missile defenses to strengthen global security and stability. . . . We are not presenting our friends and allies with unilateral decisions already made. We look forward to hearing their views. . . . We'll also need to reach out to other interested states, including China and Russia. . . . We should leave behind the constraints of an ABM Treaty that perpetuates a [U.S.-Russia] relationship based on distrust and mutual vulnerability.


\textsuperscript{47} See, e.g., Ewing, supra note 29, at 816; Mitchell, supra note 26, at 90-91.

\textsuperscript{48} Rubner, supra note 39, at 276. President Clinton said that the technology was not ready, that more time was needed to educate the Russians and U.S. allies, and that China might respond to missile defense by building up its nuclear arsenal. McCann, supra note 19, at 231-32. Some observers have been less than complimentary about President Clinton's approach to the missile defense issue. "Essentially, President Clinton avoided NMD until it became politically impossible to do so." \textit{Id.} at 228. "President Clinton's position on the missile defense system essentially abdicated to his successor the decision concerning implementation." Ewing, \textit{supra} note 29, at 788-89.


\textsuperscript{50} \textit{See supra} text accompanying notes 42-43. In their June 2000 Joint Statement, the two presidents reaffirmed "their commitment to [the ABM Treaty] as a cornerstone of strategic stability" and to continuing efforts to strengthen the treaty and enhance its viability. \textit{Joint Statement on Principles of Strategic Stability} by the Presidents of the United States of America and the Russian Federation, 36 \textit{Weekly Comp. Pres. Doc.} 1279 (June 4, 2000) at paras. 5, 8, 9 (also \textit{reprinted in} Boese, \textit{supra} note 49).

We are working to develop the right mix of offensive and defensive capabilities. If we do so, we believe the result will be that nations are less likely to acquire or use nuclear weapons. (Defense Secretary Donald H. Rumsfeld)

1. Initial Administration Approach to Missile Defense and U.S. Withdrawal from the ABM Treaty

George W. Bush expressed strong support for missile defense during the 2000 presidential election campaign. His administration has viewed the acquisition of missile defense capabilities as a key U.S. objective—irrespective of both countervailing ABM Treaty obligations and the discomfort evoked by the idea in a large number of other countries, including U.S. allies. The new administration regarded the ABM Treaty as "dangerous" and "anachronistic," and as an instrument which had held the United States back from establishing needed defenses. President Bush announced on May 1, 2001 that the administration would proceed "[w]hen ready" to deploy missile defenses, and clearly signaled that the administration wished to escape the ABM Treaty as it stood.

Despite rhetoric about cooperating with others on missile defense, the Bush administration has been determinedly unilateralist on this issue. Writing six months after the administration took office, Ewing noted that it had "repeatedly declared its intention to go forward with a missile defense shield, with or without cooperation from Russia and the international community." Just two weeks after President Bush’s inauguration, his Defense Secretary Donald Rumsfeld said that the United States intended to develop and deploy a missile defense designed to defend against a limited ballistic missile attack, adding that the Bush administration was determined to proceed with missile defense even if it

53. Yoo, supra note 30, at 853. Bush said on September 23, 1999 that to deploy a missile defense program, if elected, his administration would offer Russia amendments to the ABM Treaty and that, should Russia refuse to accept the proposed amendments, "we will give prompt notice, under the provisions of the treaty, that we can no longer be a party to it." David E. Sanger, Bush Offers Arms Talks to China As U.S. Pulls Out of ABM Treaty, N.Y. TIMES, Dec. 14, 2001, at A1.
54. See infra text accompanying notes 88-105.
55. The President’s News Conference With President Vladimir Putin of Russia in Shanghai, 37 WEEKLY COMP. PRES. DOC. 1532, 1534 (Oct. 21, 2001). President Bush said that "[t]he events of September the 11th make it clearer than ever that a cold war ABM Treaty that prevents us from defending our people is outdated and, I believe, dangerous." Id. According to an unnamed "senior administration official," the ABM Treaty was both "dangerous" and "an impediment to better relations with Russia." Nicholas Kralev, Bush Won’t Save ABM Treaty During Putin Visit, WASH. TIMES, Nov. 8, 2001, at A17.
57. For example, Deputy Defense Secretary Paul Wolfowitz told the Senate Armed Services Committee that "[w]hile we have been debating the existence of the threat for nearly a decade, other countries have been busily acquiring, developing and proliferating missile technology," and that "[t]hanks in no small part to the constraints of the ABM Treaty we have wasted the better part of a decade. We cannot afford to waste another one." Ewing, supra note 29, at 817 n.142.
58. See infra text accompanying note 51.
could not overcome objections coming from Russia, China and Europe. National Security Adviser Condoleezza Rice said in July 2001 that the administration would pursue its program to build missile interceptors "whether or not Russia agrees to jointly withdraw from the [ABM Treaty]." After meeting President Putin in July 2001, President Bush announced that the two had agreed to hold talks on possible linkage between abrogation of the ABM Treaty and bilateral reductions of nuclear stockpiles. By August 2001, Under Secretary of State for Arms Control and International Security John R. Bolton had indicated that, if ABM Treaty modifications were not agreed upon within months, the United States might invoke the withdrawal provision of the ABM Treaty.

On December 13, 2001, President Bush announced the U.S. withdrawal from the ABM Treaty. Article XV.2 of the ABM Treaty provides that: "Each Party shall, in exercising its national sovereignty, have the right to withdraw from this Treaty if it decides that extraordinary events related to the subject matter of this Treaty have jeopardized its supreme interests." The U.S. with-

---

61. Ewing, supra note 29, at 790 n.12.
62. Id. at 791.
63. Frederic L. Kirgis, Proposed Missile Defenses and the ABM Treaty, ASIL INSIGHTS, May 2001, at www.asil.org/insights/insigh70.htm. In an interview published in March 2002, Bolton was pressed as to whether or not the Bush administration had offered Russia the option of amending the ABM Treaty before withdrawing from it, especially in view of a 2000 statement by presidential candidate Bush that he would "offer Russia the necessary amendments to the ABM Treaty so as to make our deployment of effective missile defenses consistent with the treaty." See J. Peter Scoblic & Wade Boese, Expounding Bush's Approach to U.S. Nuclear Security: An Interview with John R. Bolton, ARMS CONTROL TODAY, Mar. 2002, at http://www.armscontrol.org/act/2002_03/boltonmarch02.asp. Bolton's response stressed that the administration had discussed a wide range of possibilities with Russia, but acknowledged that:

What we said was we're not going to get into a line-in, lineout amendment of the ABM Treaty because, in fact, that would have been impossible. The treaty is very well written. It was intended to prevent the creation of a national missile defense system, and that's exactly what it did and that's exactly what we wanted to do.

Id.
65. ABM Treaty, supra note 3, art. XV.2. The remainder of Article XV.2 is as follows: "It shall give notice of its decision to the other Party six months prior to withdrawal from the Treaty. Such notice shall include a statement of the extraordinary events the notifying Party regards as having jeopardized its supreme interests." Id. An example of what the United States had in mind about what might constitute "extraordinary events" is provided by the following comment by the head of the U.S. delegation which negotiated the ABM Treaty made on May 9, 1972, two weeks before the treaty was signed: "If an agreement providing for more strategic offensive arms limitations [were] not achieved within five years, U.S. supreme interests could be jeopardized so as to constitute a basis for withdrawal from the treaty." Meredith, supra note 19, at 421 (citing repetition of this statement of Ambassador Gerard Smith's by Secretary Rogers before the Senate Foreign Relations Committee on June 19, 1972.) Withdrawal provisions are common in arms control and disarmament treaties. Examples include the NPT, see infra note 135 and text accompanying note 460, the Biological Weapons Convention and the Outer Space Treaty. See generally JAN KOLASA, DISARMAMENT AND ARMS CONTROL AGREEMENTS: A STUDY ON PROCEDURAL AND INSTITUTIONAL LAW 35-39 (1995).
withdraw became effective on June 13, 2002.66 Scarcely wasting a day, the United States began work in Alaska on a missile defense project which Russia had considered impermissible under the ABM Treaty.67

The United States described the “extraordinary events” giving rise to its withdrawal decision in identical diplomatic Notes sent to Russia, Belarus, Kazakhstan and Ukraine on December 13, 2001.68 In that Note, the United States recognized that the ABM Treaty had been entered into with the USSR, which had ceased to exist in 1991, and that since then the United States had “entered into a new strategic relationship with Russia that is cooperative rather than adversarial” and was “building strong relationships with most states of the former USSR.” The Note went on to say that, since the ABM Treaty’s entry into force in 1972, “a number of state and non-state entities have acquired or are actively seeking to acquire weapons of mass destruction. It is clear, and has recently been demonstrated, that some of these entities are prepared to employ these weapons against the United States.”69 The Note continued that a number of “states” were developing ballistic missiles as a means of delivering weapons of

66. The Bush administration has been subject to some domestic criticism for failing to consult the Senate regarding the ABM Treaty. See, e.g., McCann, supra note 19, at 221. This issue was raised in July 2002 when Secretary of State Powell testified before the Senate Foreign Relations Committee about the U.S.-Russia Moscow Treaty. On that occasion, Senator Feingold (D-Wis.) insisted that the Senate has a Constitutional role to play in terminating treaties, and Secretary of State Powell expressed the belief that the president could withdraw from the Moscow Treaty without need for Senate approval. Ralph Dannheisser, Powell Says U.S. Plans to Cut Total Strategic Warheads to 4,600: Testifies on Bush-Putin Moscow Treaty Before Senate Panel (July 9, 2002), at http://usinfo.state.gov/topical/pol/arms/02070903.htm.


69. Id. The Note suggests that the preparedness of some entities to use weapons of mass destruction against the United States had been “recently demonstrated.” No weapons of mass destruction were used or publicly threatened against the United States in the period leading up to December 13, 2001, and this sentence may be taken to be referring to the attacks of September 11, 2001—if certain points are presumed. The intended meaning appears to be threefold: that by the attacks of September 11, 2001 their perpetrators demonstrated a preparedness to inflict significant U.S. casualties; that those same perpetrators (or perhaps others of like mind?) are either in possession of or seeking weapons of mass destruction; and that the perpetrators or like-minded others would have equally little compunction about inflicting American casualties on the much greater scale which weapons of mass destruction might entail. The Note includes “non-state entities” among those who have acquired or are seeking weapons of mass destruction (WMD), but not among those seeking missiles as a means of delivering WMD. For brief mention of contrasting views on the implications of the September 11, 2001 attacks for threat assessment and for U.S. missile defense policy, see infra text accompanying notes 123-25.
mass destruction, that "these events pose a direct threat to the territory and security of the United States and jeopardize its supreme interests," and that as a result the United States had concluded that it must "develop, test and deploy anti-ballistic missile systems for the defense of its national territory, of its forces outside the United States, and of its friends and allies." 70

The then U.S. Representative to the Conference on Disarmament (CD), Eric Javits, told the Conference on Disarmament in February 2002 that it was "lamentably mistaken" to interpret the U.S. decision to withdraw from the ABM Treaty as "evidence of so-called 'unilateralism.'" 71 Javits said that the United States had explained in private discussions with "a wide range of Allies and friends . . . why we believe that moving beyond the ABM Treaty will contribute to international peace and security." 72


The Bush administration proposes a single, integrated ballistic missile defense system "that will be capable of engaging all classes of ballistic missile threats, from short-range tactical missiles to missiles with intercontinental ranges." 73 The plan is to deploy "layered defenses . . . to provide multiple engagement opportunities against threatening targets in boost, mid-course, and terminal phases of flight." 74 In December 2002, President Bush ordered the deployment of an antimissile system within two years. 75 The intention is for ten land-based interceptors by 2004, with an additional ten in 2005. The land-based interceptors, in Alaska and California, would counter long-range missiles after they had left the atmosphere. 76 Also envisaged are up to 20 sea-based interceptors intended to intercept ballistic missiles soon after their launching. 77 Upgraded Patriot missiles would be used against short-range and medium-range

70. Id.
72. Id. Javits added that the United States was also discussing the issue with China.
74. Id. For a more detailed discussion see also the briefing and question-and-answer session held on June 25, 2002 by the Director of the Missile Defense Agency, Air Force Lieutenant General Ronald Kadish. Kadish Briefing, supra note 67.
76. Id.
77. Id. Moreover, Deputy Defense Secretary Paul Wolfowitz said in October 2002 that the administration was exploring the possibility of space-based intercepts. Wolfowitz said that "[s]pace offers attractive opportunities not only for missile defense but for a broad range of interrelated civil and military missions. It truly is the ultimate high ground." Deputy Secretary of Defense Paul Wolfowitz, Frontiers of Freedom (Oct. 24, 2002), at http://usinfo.state.gov/topical/pol/arms/02102501.htm. See also infra note 118.
missiles. However, doubts persist as to whether the program is technically workable.\textsuperscript{78}

In its first two years in office, the Bush administration encountered some problems in obtaining Congressional approval for the funds it desired for missile defense. The administration has nevertheless obtained funding levels not too far short of its requested amounts. President Bush sought $8.3 billion in missile defense funding for fiscal year 2002, an increase of 57 percent.\textsuperscript{79} This request met with resistance from Democrats.\textsuperscript{80} On September 7, 2001, the Democrat-dominated Senate Arms Services Committee approved a revised version of the administration's funding request for 2002. This revised bill redistributed $1.3 billion of the requested $8.3 billion to defense programs other than missile defense. It also prevented the application of missile defense funds for activities "inconsistent" with the ABM Treaty, unless such activities were certified by Congress to be in the national security interest of the United States.\textsuperscript{81} However, by September 21 the Democrats had restored the $1.3 billion and dropped the limitation on activities, saying: "This is the wrong time for divisive debate on issues of national defense."\textsuperscript{82} In the end, Congress approved $7.8 billion for missile defense for fiscal 2002 in the defense appropriations act, which President Bush signed on January 10, 2002.\textsuperscript{83} The softening of the Democrats' stance appears to have been related directly to the circumstance (and politics) of September 11. While the president's request was not approved in full, the $7.8 billion approved marked a significant increase in missile defense funding from the 2001 allocation of about $5.3 billion.

As for fiscal year 2003, President Bush requested $7.8 billion. The Senate Armed Services Committee voted in May 2002 to reduce that amount by $812 million, but then decided to allow the president the option of using the $812 million either for missile defense or for anti-terrorism measures.\textsuperscript{84} In October


\textsuperscript{80} For example, on September 10, 2001, Senate Foreign Relations Chair Joseph R. Biden (D-Del.) described the administration's missile defense plan as a "theological mission" and warned that President Bush faced a "difficult fight" on the defense budget. Nicholas Kralev, \textit{Biden Blasts Missile Defense's Expense}, \textit{Wash. Times}, Sept. 11, 2001, at A14.


\textsuperscript{82} Boese, supra note 81 (quoting Senator Carl Levin (D-Mich.), Chair of the Senate Armed Services Committee).


Published by Berkeley Law Scholarship Repository, 2003
2002, Congress approved $7.4 billion, rather than the $7.8 billion sought by the administration. Press reporting suggests that Congressional approval of an additional $1.5 billion over the next two years will be required to fund the missile defense deployment ordered by President Bush in December 2002. Presumably, the outcome of the November 2002 election will give President Bush and Defense Secretary Rumsfeld a smoother run in seeking missile defense funds from Congress. However, the uncertainty involved in estimating future program costs can be expected to continue to draw criticism.

3. International Opinion and Involvement

Throughout the period prior to the U.S. announcement of its ABM Treaty withdrawal, the attitudes of Russia, China and others towards U.S. missile defense policy remained negative, albeit softening. For example, in February 2001, the head of the Russian Security Council, Sergei Ivanov, said that the Bush administration’s plan would ignite an arms race in space, undermine the entire edifice of arms control agreements, “result in the annihilation of the whole structure of strategic stability and create the prerequisites for a new arms race.” Maintaining China’s consistent opposition, Defense Minister Chi Hao-tian told some U.S. Senators in August 2001 that there were “no grounds” for missile defense development because it would be “detrimental to trust among nations around the world.” French President Jacques Chirac said in January 2001 that U.S. missile defense “cannot fail to relaunch the arms race in the


86. Schmitt, supra note 75.

87. Asked in June 2002 about the cost of a deployable system, the Director of the U.S. Missile Defense Agency, Air Force Lieutenant General Ronald Kadish, said that, “I don’t know what it’s going to cost because we haven’t defined it well enough.” Kadish Briefing, supra note 67. As for the $48 billion then apparently in the budget for future research and development, Kadish said that this amount would change significantly over time. Id. See also McCann, supra note 19, at 251. A report by the Congressional Budget Office released in January 2002 indicated the difficulties of cost estimates in view of “substantial uncertainty” regarding what might ultimately be deployed as opposed to existing programs, and made some estimates about what separate (i.e. stand-alone rather than integrated) ground-, sea- and space-based programs might cost. Wade Boese, Congressional Budget Office Projects Missile Defense Costs, ARMS CONTROL Today, Mar. 2002, at http://www.armscontrol.org/act/2002_03/cbomarch02.asp.


world." In June 2001, President Chirac "chastised" President Bush for "lightly discarding" the ABM Treaty, as Chirac believed it "an indispensable part of global security." German Defense Minister Rudolf Scharping, visiting Moscow, urged preservation of the ABM Treaty. German Foreign Minister Joschka Fischer said around May 2001 that should the United States no longer recognize the ABM Treaty, "it must be replaced only by better ones or more effective ones.

International reaction to the ABM Treaty withdrawal announcement was muted. Russian President Putin said that the U.S. action was "mistaken" and that it could create a "legal vacuum" in arms control at a time of new threats. According to Secretary of State Powell, "[a]lthough Russia did not agree with our decision to withdraw, President Putin’s response that same day was pragmatic in tone... Our withdrawal has not spurred an arms race or undermined strategic stability. In fact, President Putin also used his December 13 statement to call for reductions in strategic offensive weapons." Both Powell and Defense Secretary Rumsfeld have stressed that Putin’s statement in response to the withdrawal announcement recognized that the U.S. decision was not a threat to Russia. The day after the withdrawal took effect, Russia announced that it would not be bound by the "START II" agreement.

The United States has sought partners for cooperation in missile defense, including Russia, NATO and Japan (which remains non-committal despite a 1999 U.S.-Japan Memorandum of Understanding on joint research in theatre

90. Ewing, supra note 29, at 790-91.
91. McCann, supra note 19, at 220-21.
92. Ewing, supra note 29, at 791.
93. McCann, supra note 19, at 221.
94. Sharon LaFraniere, Putin Calls ABM Move ‘Mistaken’: Critics Say Decision Humiliates Russia, WASH. POST, Dec. 14, 2001, at A40. See also Ian Traynor & Julian Borger, Bush Wins the Final Battle for Star Wars: Kremlin Abandons Bitter Opposition, THE GUARDIAN (LONDON), May 16, 2002, at 1 (saying that Putin’s remarks were made “more in sorrow than in anger”).
95. Secretary of State Powell, Prepared Statement to the Senate Foreign Relations Committee (July 9, 2002), at http://usinfo.state.gov/topical/pol/arms/02070902.htm. According to Defense Secretary Rumsfeld, “[f]ar from causing a ‘deep chill’ in relations, the U.S. withdrawal from the ABM Treaty was greeted in Russia with something approximating a yawn.” Rumsfeld, supra note 52.
96. See Powell, supra note 95; Rumsfeld, supra note 52.
99. The Joint Declaration on future U.S.-Russia relations signed by Presidents Bush and Putin on May 24, 2002 (together with the Moscow Treaty) states that the two countries:

have also agreed to study possible areas for missile defense cooperation, including the expansion of joint exercises related to missile defense, and the exploration of potential programs for the joint research and development of missile defense technologies. ... The United States and Russia will, within the framework of the NATO-Russia Council, explore opportunities for intensified practical cooperation on missile defense for Europe.

Joint Declaration by President George W. Bush and President Vladimir V. Putin on the New Strategic Relationship between the United States of America and the Russian Federation, 38 WEEKLY COMP. PRES. DOC. 894, 897 (May 24, 2002).
Some support for the Bush administration’s approach to missile defense has come from the United Kingdom, Hungary, Italy, Poland and Spain. The United States has been campaigning for support from European allies on missile defense, and will need the cooperation of the United Kingdom and Denmark for the U.S. missile defense deployment announced in December 2002.

One notable aspect of the current U.S. missile defense program is the promised extension of missile defense protection to U.S. allies, apparently in return for support for the U.S. foreign policy agenda. According to Deputy Defense Secretary Paul Wolfowitz, “The strategic rationale for providing missile defense protection to our allies was clearly stated by [Defense] Secretary [Donald] Rumsfeld in his remarks at the [June 2002] NATO Defense Ministerial: ‘Rogue states capable of delivering [weapons of mass destruction] to Western capitals could make building future coalitions against aggression difficult, if not impossible.’” Thus put, the purpose of using missile defense technology to defend U.S. allies would be to protect them from threats which might make them less willing to participate in U.S.-led military operations.

C. Evaluation: Missile Defense Program and ABM Treaty Withdrawal Send Wrong and Unilateralist Signal

Missile defences should not be seen as an alternative to the norm of nuclear non-proliferation and disarmament.

In a traditional strategic, set-piece way, the Bush administration’s pursuit of missile defense could prove to be smart, long-term thinking—if it works. But continuing to make it the centerpiece of an ongoing defense strategy after September 11,
while slighting multilateral efforts to contain proliferation, is nothing short of delusional.  

Nuclear nonproliferation remains a U.S. security objective of paramount importance. The Bush administration has presented missile defense as an integral and essential component of U.S. security policy. However, this characterization is not convincing. The concept of missile defense and the means by which the current administration has pursued it (notably the unilateral U.S. ABM Treaty withdrawal in the face of international opposition) are liable to encourage rather than impede nuclear proliferation.

1. Missile Defense Program

The missile defense program has been questioned on grounds of its unproven technical feasibility, its cost, and its potential to offset the benefits of reductions in the U.S. nuclear arsenal (by militating against reductions on the part of other nuclear weapon states). Underlying much of the criticism is the idea that missile defense invites a build-up of the offensive forces of others. One critic has referred to “President Chirac’s analogy about history’s long argument between the sword and the shield: improving one merely drives a spiraling search for innovation in the other.” It has also been argued that missile defense capability might diminish U.S. emphasis on diplomatic efforts to avert a potential attack, thereby making more likely an attack which could be catastrophic should missile defense fail. The responses of missile defense propo-


108. For example, Mendelsohn suggests that “it is very likely that a national ballistic missile defense program will be at the same time ineffective, costly and disruptive of the nuclear weapons reduction process.” Mendelsohn, supra note 8, at 615. He argues further that: “If we deploy a significant national missile defense, it will make it more difficult, if not impossible, for truly steep reductions in the arsenals of China and Russia. It might even stimulate additional Chinese deployments.” Id. at 616-17.

109. See, e.g., Graham, supra note 8, at 58: “The link between strategic offensive and defensive systems remains as critical today as it was during the Cold War.” This link was recognized by President Reagan, who said, when announcing in 1983 what became known as the Strategic Defense Initiative, “I clearly recognize that defensive systems have limitations and raise certain problems and ambiguities. If paired with offensive systems, they can be viewed as fostering an aggressive policy and no one wants that.” Reagan Speech, supra note 25. Strobe Talbott wrote at the time that “[i]t is part of the paradox and perversity of nuclear weapons . . . that defensive systems can be every bit as treacherous as the offensive ones they are meant to counter.” Talbott, supra note 31.


111. McCann, supra note 19, at 250. McCann quotes John Pike as arguing that missile defense capability might:

embolden the [U.S.] president to take diplomatic risks that would recklessly expose thousands (perhaps millions) of civilians . . . rather than pursuing diplomatic alternatives in a stalemate conflict, [the president] could dig in and dare a ‘state of concern’ to follow through on its promise to launch an ICBM [Intercontinental Ballistic Missile], hoping NMD [National Missile Defense] would force the adversary to back down.

Id. Pike adds that, should such an attack eventuate and NMD fail, “you have more dead Americans than every other war put together.” Id. See also Mitchell, supra note 26, at 94.
ments to the arguments of critics are often unconvincing. For example, McCann argues that: "To the extent the Russians and the Chinese really believe that National Missile Defense [NMD] will serve as a 'backdoor' to American first strike capability, President Bush has pledged to link NMD with nuclear arms reduction."112 However, as noted below, the reassurance value of nuclear arsenal reductions agreed upon in 2002 between the United States and Russia is heavily qualified by their limited and revocable nature.113 China, with a nuclear arsenal much smaller than Russia's,114 is far more likely than Russia to feel threatened by the missile defense program. China is thought to be improving its nuclear weapon capabilities. For example, a Pentagon report released in July 2002 suggested that China is upgrading its nuclear forces and will increase the number of Intercontinental Ballistic Missiles (ICBMs) that could be targeted at the United States.115 Missile defense proponents generally argue that China would be taking these measures irrespective of whether the United States had a significant missile defense program. This argument questionably assumes that the significant U.S. missile defense program will have a negligible impact, if any, on Chinese nuclear planning.

The characterization of missile defense as being "purely defensive" has also been questioned.116 If the United States does deploy a workable missile defense system, it may in the process (whether deliberately or not) enhance its offensive technology. For example: "If you want to intercept something in space, you could use the same capability to target something on land."117 There is particular concern about the possibility of offensive space weaponry.118 Ex-

112. McCann, supra note 19, at 263.
113. See infra text accompanying notes 204-231.
114. See infra note 156 and accompanying text. See also RULE OF POWER OR RULE OF LAW?, supra note 32, at 62 (stating that China now has about 20 long-range ballistic missiles, and that: "If most of these are wiped out in a first strike, then the remaining could be dealt with by even a limited missile defense (presuming it worked.")
116. See, e.g., Mitchell, supra note 26, at 94.
117. Id. at 95 (quoting Marc Vidricaire, member of the Canadian Delegation to the Conference on Disarmament).
118. The United States opposes moves to negotiate in the Conference on Disarmament (CD), a new treaty on preventing weapons deployment in space, arguing the sufficiency of existing treaties relating to space. See, e.g., Eric M. Javits, U.S. Ambassador to the Conference on Disarmament, Speech to the Conference on Future Security in Space (May 28, 2002), DISARMAMENT DOCUMENTATION, at http://www.acronym.org.uk/docs/0205/doc17.htm. See also Possible Elements for a Future International Legal Agreement on the Prevention of the Deployment of Weapons in Outer Space, the Threat or Use of Force Against Outer Space Objects, Working Paper submitted at the CD by China, Russia, Vietnam, Indonesia, Belarus, Zimbabwe and Syria (June 27, 2002), DISARMAMENT DOCUMENTATION, at http://www.acronym.org.uk/docs/0206/doc10.htm. This issue has played a role in the deadlock which has beset the CD in recent years. On potential uses of space, see comments of Deputy Defense Secretary Wolfowitz, supra note 77. The context here includes the 1997 United States Space Command document, Vision for 2020. A couple of quotations give the flavor of that document. The first is from U.S. Space Command Commander-in-Chief General Howell M. Estes III:

The increasing reliance of US military forces upon space power combined with the explosive proliferation of global space capabilities makes a space vision essential. As stewards for military space, we must be prepared to exploit the advantages of the
experience with nuclear weapons has shown the difficulty of returning the genie to the bottle and minimizing proliferation once new weapons have been developed. There is simply no guarantee that proliferation of missile defense technology itself would not ensue—as was the case with nuclear weapon technology and missile systems—if missile defense were once known to be (a) technologically feasible, (b) actually deployed by the United States, and (c) capable of bringing offensive advantages. The costs involved may appear to render this unlikely, but steep costs have not prevented the development of national nuclear weapons programs. Perhaps the most formidable costs are those now being assumed by the United States: the costs of development and testing to find out whether the concept is workable. In view of prevailing technical uncertainty, it is highly questionable whether any other country would devote resources to develop missile defense capabilities (and associated offensive technology) if the United States did not. 119

The attacks of September 11, 2001 appeared to consolidate the Bush administration’s already strong resolve on missile defense, and were mentioned by President Bush when he announced in December 2001 the U.S. withdrawal from the ABM Treaty. 120 In the wake of the attacks, polls suggested that U.S. public support for missile defense rose. 121 As noted above, in the immediate aftermath

space medium. This vision serves as a bridge in the evolution of military space into the 21st century and is the standard by which United States Space Command and its components will measure progress into the future.

The second quotation is by way of a mission statement: “US Space Command—dominating the space dimension of military operations to protect US interests and investment. Integrating Space Forces into warfighting capabilities across the full spectrum of conflict.” United States Space Command, Vision for 2020 (Feb. 1997), at 3, at www.gsimstitute.org/resources/Extras/Vision_2020.pdf. While U.S. language has been more moderate in the period since Vision for 2020, the United States remains opposed to measures which will limit its space options. This position is linked to a concern to protect U.S. space assets, which have an important role in supporting U.S. military operations. Mitchell argues that: “A buildup of space weapons with capability to execute offensive missions might begin with noble intentions of ‘peace through strength’ deterrence, but this rationale glosses over the tendency that ‘the presence of space weapons . . . will result in the increased likelihood of their use.’” Mitchell, supra note 26, at 97-98.


120. President Bush said that the ABM Treaty was signed:

at a much different time, in a vastly different world . . . Today, as the events of September the 11th made all too clear, the greatest threats to both our countries come not from each other or other big powers in the world but from terrorists who strike without warning or rogue states who seek weapons of mass destruction.

Remarks Announcing ABM Treaty Withdrawal, supra note 64, at 1784. The September 11, 2001 attacks were also obliquely referred to in the U.S. diplomatic Note to Russia on the U.S. withdrawal from the ABM Treaty. See supra text accompanying note 69. In the view of one NGO advocate for nuclear disarmament, “September 11, 2001 did not create new missile threats, but it was utilized to push through already developed policy preferences . . . The terrorist attacks handed a temporary carte blanche to missile defense advocates.” Johnson, supra note 110, at 6.

121. According to a survey conducted by the Council on Foreign Relations and the Pew Research Center for the People and the Press, the proportion of Americans favoring missile defense increased from 56 percent in early September 2001 to 64 percent in November 2001—with the
of the attacks the Democrats softened their opposition to the administration’s missile defense plans.\textsuperscript{122} Some commentators view September 11 as demonstrating that the most serious threats to the United States will not be addressed by the expensive missile defense program.\textsuperscript{123} The response to this point from missile defense proponents has been that all avenues of defense should be explored.\textsuperscript{124} It is noteworthy that the U.S. “intelligence community” concluded in a report released in January 2002 that, in relation to chemical, biological, radiological and nuclear materials, “U.S. territory is more likely to be attacked with these materials from nonmissile delivery means—most likely from terrorists—than by missiles, primarily because nonmissile delivery means are less costly, easier to acquire, and more reliable and accurate. They also can be used without attribution.”\textsuperscript{125} Paradoxically, then, the effect of the September 11 attacks was both to shore up public and political support for missile defense and to demonstrate the gravity of terrorist threats against which missile defense would be useless.

If the efficacy of the U.S. missile defense program remains dubious in the medium to long term, it could prove a very costly mistake. But if missile defense does prove effective, the United States may well be caught in an endless cycle of ensuring that its program is immune to countermeasures,\textsuperscript{126} and of de-

---

\textsuperscript{122} See supra text accompanying notes 79-83.

\textsuperscript{123} For example, Hirsh argues that:

The likely main threat to Americans will not be ballistic missiles launched from a rogue state that knows it will face massive retaliation; it will be a WMD loaded into a boat or truck by a small number of hate-filled people who lack a ‘return address’ and are undaunted by the threat of retaliation. Missile defense will not work in those cases, and a beefed-up homeland defense will improve only marginally America’s ability to stop them before they are used.

Hirsh, supra note 16, at 35.

\textsuperscript{124} For example, Republican Representative Bob Schaffer argues: “How ridiculous it would be to start leaving the front door unlocked just because burglars had recently found it easier to enter through the back door.” Bob Schaffer, \textit{The Case for Missile Defense: Today, the Need Is Greater than Ever}, \textit{Wash. Times}, Oct. 19, 2001, at A21. By contrast, critics often draw an analogy between the missile defense program and “the Maginot Line, the wall built after World War I to protect France from German invasion: Brilliantly constructed. Thorough to a fault. But utterly useless against the real threats at hand.” Kim Holmes, \textit{Easy Assumptions on Missile Defense}, \textit{Wash. Times}, Nov. 14, 2001, at A14. (Holmes, himself a proponent of missile defense, was here paraphrasing David Halberstam.)


\textsuperscript{126} General Ronald Kadish, director of the Missile Defense Agency, has spoken of “a never-ending journey once we have missile defense capability, because it’s like anything else in the military world. We have countermeasures and counter-countermeasures that people develop so they could get the advantage.” Kadish Briefing, supra note 67. A report by scientists from the Union of Concerned Scientists and MIT concluded in 2000 that “[a]ny country capable of deploying a long-range missile would also be able to deploy countermeasures that would defeat the planned [National Missile Defense] system.” UCS/MIT, \textit{Countermeasures: A Technical Evaluation of the Operational Effectiveness of the Planned US National Missile Defense System} (Executive Summary), at http://ucesusa.org/global_security/missile_defense/page.cfm?pageID=581. The same report suggested that
developing its own countermeasures for use against missile defense systems which may come to be deployed by others. Increasing international attention is being devoted to the problem of stemming missile proliferation. Concerted multilateral action to instill and enforce a norm against missile proliferation might prove a far safer and more effective means of achieving U.S. security objectives than a unilateral program which has a destabilizing impact, alienates many other countries, and invites a race between missile defense and countermeasures.

2. U.S. Withdrawal from ABM Treaty

The U.S. withdrawal from the ABM Treaty set a new and dangerous precedent for the invocation of withdrawal provisions, which are common to most arms control agreements—including the “bedrock” NPT. One missile defense proponent has argued that President Bush’s December 2001 announcement that the United States would withdraw from the ABM Treaty “settled the ABM Treaty’s unsettled legal status,” and that the withdrawal would “render mute those who persist in venerating an outlived treaty based on antiquated logic.” By contrast, another supporter of missile defense suggested prior to the withdrawal announcement that the issue of the legal status of the ABM Treaty “would retain its importance even in the event of a unilateral U.S. withdrawal from the treaty, in that the Bush administration would undoubtedly have

most ideas underlying countermeasures “are as old as ballistic missiles themselves,” and that all countries that have deployed long-range ballistic missiles had developed—and in some instances deployed—countermeasures for their missiles. Id. The report also argued that, in the field of missile defense, operational and technical factors made defense more difficult than attack—thus enabling attackers “to compensate for US technical superiority.” Id. See also Countermeasures: The Achilles Heel of Missile Defenses, n.d., Union of Concerned Scientists Missile Defense Fact Sheet #5, at http://clw.org/pub/clw/coalition/missile5.htm (last visited Apr. 15, 2003).

127. For example, in November 2002 the 33-member Missile Technology Control Regime adopted a non-binding International Code of Conduct Against Ballistic Missile Proliferation, which was enthusiastically supported by the United States. See, e.g., John R. Bolton, Under Secretary for Arms Control and International Security, Remarks at the Launching Conference for the International Code of Conduct Against Ballistic Missile Proliferation (Nov. 25, 2002), at http://usinfo.state.gov/topical/pol/arms/02112501.htm. In 1999, Russia proposed a comprehensive “Global Control System” involving a notification regime, which apparently was not supported by the United States; and a U.N. study of the issue is underway, albeit with limited support. Mark Smith, On Thin Ice: First Steps for the Ballistic Missile Code of Conduct, ARMS CONTROL TODAY, July-Aug. 2002, at http://www.armscontrol.org/act/2002_07-08/smithjul-aug02.asp. Welcoming the Code, U.N. Secretary-General Kofi Annan stressed the “need to continue international efforts to deal with the issue of missiles in its totality,” noting the absence of any “universally accepted norm or instrument specifically governing” the development, acquisition, deployment or use of missiles. Press Release, Secretary-General Welcomes Launch of International Code of Conduct Against Ballistic Missile Proliferation (Nov. 25, 2002), U.N. Doc. No. SG/SM/8523, at http://www.un.org/News/Press/docs/2002/SGSM8523.doc.htm. Burroughs and Wurst have observed that, in the past, “both NPT conferences and the General Assembly have been ineffective in addressing the critical issues posed by missile proliferation and missile defenses.” John R. Burroughs & Jim Wurst, A New Agenda for Nuclear Disarmament: The Pivotal Role of Mid-Size States, at http://www.lcnp.org/disarmament/NAndsept2.htm. Smith argues that the new Code’s norm is too weak, and that this demonstrates that “its drafters were unable to reach consensus on the unacceptability of missiles.” Smith, supra, at 11.

128. See supra text accompanying note 7. See also supra note 65 and infra note 135.

129. McCann, supra note 19, at 219.

130. Id. at 223.
to answer to a skeptical international community.\textsuperscript{131} The latter analysis is more persuasive from a long-term perspective, notwithstanding the absence of an international outcry in the aftermath of the U.S. withdrawal decision.

Several factors may help to explain why the international response to the U.S. ABM treaty withdrawal was so muted in spite of the strength of international opinion opposing withdrawal. In reacting to the U.S. announcement, states would have noted that the response of Russia, the only other party to the ABM treaty,\textsuperscript{132} was apparent acquiescence (however reluctant and indeed forced that acquiescence may have been known to be).\textsuperscript{133} Russia’s own stance seems to have been influenced by a desire to improve broader bilateral relations with the United States. Just three months after September 11, 2001, and in the context of the “coalition against terrorism,”\textsuperscript{134} the prevailing mood of sympathy toward the United States may have militated against strong international protests in reaction to the U.S. withdrawal announcement. Moreover, no “shock value” attached to the announcement, which had been so clearly signaled by the Bush administration that to some degree other states may have been resigned to the apparently inevitable.

The U.S. withdrawal from the ABM Treaty bears comparison with North Korea’s March 1993 announcement of withdrawal from the NPT,\textsuperscript{135} and now

\textsuperscript{131} Ewing, supra note 29, at 790 n.14. This is despite Ewing’s own view that the United States is not legally bound by the ABM Treaty (because of the conjunction of the “clean slate” doctrine of treaty succession law and U.S. constitutional law; or, in the alternative, because “changed circumstances” make the imposition of the ABM Treaty on the U.S. “unreasonable.”) See id. at 793.

\textsuperscript{132} See supra note 39. The Memorandum of Understanding on Succession (MOUS) never entered into force.

\textsuperscript{133} Russia could not have raised legal arguments against the U.S. invocation of the ABM Treaty’s withdrawal provision. “Acquiescence” is used here to denote the absence, in Russia’s response to the U.S. withdrawal announcement, of strident diplomatic protests or efforts to rally international opposition. It is noteworthy that Russia greeted the December 2002 U.S. missile defense announcement (see supra text accompanying notes 75-78) with regret and said that it marked a “destabilizing new phase.” Michael Wines, Moscow Miffed Over Missile Shield but Others Merely Shrug, N.Y. TIMES, Dec. 19, 2002, at A18.

\textsuperscript{134} See, e.g., David E. Sanger & Elisabeth Bumiller, U.S. to Pull Out of ABM Treaty, Clearing Path for Antimissile Tests, N.Y. TIMES, Dec. 12, 2001, at A1. See also RULE OF POWER OR RULE OF LAW?, supra note 32, at 63 (regarding this factor and other points about the context of the U.S. withdrawal from the ABM Treaty).

\textsuperscript{135} See Statement of the Government of the Democratic People’s Republic of Korea (Mar. 12, 1993, reprinted in International Atomic Energy Agency (IAEA) INFCIRC/419 (Apr. 8, 1993), Annex 7 [hereinafter North Korean Statement of March 12, 1993]. The NPT provides that each party shall “have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country.” NPT, supra note 6, art. X.1. Article X.1 also provides that a withdrawing party must provide three months’ notice of withdrawal to other parties and to the United Nations Security Council, with such notice to include “a statement of the extraordinary events it regards as having jeopardized its supreme interests.” Id. On the scope of the NPT’s withdrawal provision, see Perez, supra note 8, at 774-96. North Korea’s 1993 withdrawal announcement followed its rejection of an IAEA request for additional information and site access (flowing from inconsistencies identified by the IAEA between North Korea’s initial declaration as to nuclear material and the findings of 1992 IAEA inspections). North Korea had acceded to the NPT in 1985, but concluded its safeguards agreement with the IAEA only in 1992. See Agreement Between the Government of the Democratic People’s Republic of Korea and the International Atomic Energy Agency for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons, Jan. 30, 1992, reprinted in International Atomic Energy Agency, INFCIRC/405 (May 1993). In its 1993 withdrawal announcement,
also with North Korea's NPT withdrawal announcement of January 2003. In the case of North Korea's 1993 NPT withdrawal announcement, international reaction took several forms. As NPT co-depositaries, the United States, the United Kingdom and Russia issued a joint statement that "withdrawal from the NPT would constitute a serious threat to regional and international security." The International Atomic Energy Agency (IAEA) Board of Governors decided on April, 1 1993 to report North Korea's non-compliance, and the IAEA's inability to verify nondiversion of nuclear material, to the United Nations Security Council. The Security Council adopted Resolution 825 on May 11, 1993, calling upon North Korea to reconsider its withdrawal announcement and to honor its NPT and safeguards agreement obligations. Intensive negotiations between North Korea and the United States led to the announcement by North Korean, one day before its NPT withdrawal would have taken effect, of its decision "unilaterally to suspend, as long as it considers necessary, the effectuation of its withdrawal from the NPT." North Korea then claimed a "unique status" under the NPT, and continued to refuse the IAEA the access it requested to specified sites. The problem was defused for a time by the conclusion in October 1994 of a bilateral "Agreed Framework" between the United States and North Korea. In January 2003, however, North Korea announced "an automatic and immediate effectuation" of its NPT withdrawal ("now that the US has


Perez, supra note 8, at 762 n.40 (citing North Korean statement of June 11, 1993).

For example: "The DPRK [Democratic People's Republic of Korea] finds itself in a unique status of having temporarily suspended the effectuation of its announced withdrawal from the NPT. . . . The inspection activities that befit the DPRK's current unique status are only the inspection activities necessary for maintaining the continuity of safeguards." Memorandum of the Foreign Ministry of the Democratic People's Republic of Korea (Apr. 20, 1994), reprinted in International Atomic Energy Agency INFCIRC/442 (May 9, 1994) at 1, 6.

Agreed Framework Between the United States of America and the Democratic People's Republic of Korea, Oct. 21, 1994, U.S.-N. Korea, reprinted in International Atomic Energy Agency INFCIRC/457 (Nov. 2, 1994), at http://www.iaea.org/worldatom/Documents/Infcircs/Others/infcirc457.pdf. The Agreed Framework focused on the assisted provision for North Korea of light water reactors (to replace North Korea's less proliferation-resistant graphite-moderated reactors), and also the delivery of heavy oil to North Korea, in return for North Korea's freezing and eventual dismantling of its graphite-moderated reactors and related facilities and North Korea's remaining party to the NPT and allowing the implementation of its safeguards agreement with the IAEA (including allowing certain types of inspections, according to the stages reached in the light water reactor project). See id. at paras. I(1)-(3), IV (1)-(3). The Agreed Framework also provided that: "The U.S. will provide formal assurances to the DPRK [Democratic People's Republic of Korea] against the threat or use of nuclear weapons by the U.S." Id. at para. III(1). For an early assessment of the Agreed Framework, see Sloss, supra note 137, at 870-75.
unilaterally abandoned its commitments to stop nuclear threat and renounce hostility towards the DPRK"), and declared itself "totally free from the binding force of [its] safeguards accord with the IAEA."\textsuperscript{142} Whether North Korea's withdrawal from the NPT should take effect on January 11, 2003 or on April 10, 2003 is contentious.\textsuperscript{143} It is assumed in this article that North Korea's announced NPT withdrawal had not taken effect at the time of writing.

142. Statement by the North Korean Government broadcast by the Korean Central News Agency, \textit{reproduced at http://www.acronym.org.uk/docs/0301/doc02.htm} [hereinafter \textit{North Korean Statement of January 10, 2003}]. The January 10, 2003 statement cited the June 11, 1993 U.S.-North Korea Joint Statement, by which North Korea had "unilaterally announced a moratorium [on its NPT withdrawal] as long as it deemed necessary." The January 2003 statement added that "we have no intention to produce nuclear weapons," and also referred to the June 1993 Joint Statement as the source of the commitments which North Korea claimed to have been abandoned by the United States.

143. While Article X.1 of the NPT requires three months notice of withdrawing parties, North Korea claims that its NPT withdrawal took effect on January 11, 2003 (i.e., one day after its withdrawal announcement), asserting its self-proclaimed "unique status under the NPT." \textit{See}, e.g., U.N. Press Release, \textit{Conference on Disarmament Debates Middle East, North Korean Withdrawal from Nuclear Non-Proliferation Treaty, Other Topics, Remarks by the North Korean representative to the Conference on Disarmament in January 20, 2003, at http://www.unog.ch/news2/documents/newsen/dc0306e.htm} [hereinafter \textit{Conference on Disarmament Debates Middle East, North Korean Withdrawal}]. \textit{See also North Korean Statement of January 10, 2003, supra note 142} (for reference to "immediate effectuation"). North Korea would presumably argue one day to be a sufficient period for the withdrawal announcement to take effect because the 1993 three-month withdrawal period was one day short of completion when North Korea announced the "suspension" of its withdrawal on June 11, 1993. As Chairman of the Preparatory Commission for the 2005 NPT Review Conference, Sweden's representative to the Conference on Disarmament strongly rejected this view in late January 2003, arguing that North Korea remained bound by the NPT because NPT parties do not recognize that it is "possible to 'save' parts of the 90-day withdrawal period from one occasion to another." \textit{Conference on Disarmament Debates Middle East, North Korean Withdrawal, supra.} In a statement issued on the day of North Korea's January 2003 withdrawal announcement, IAEA Director-General Mohamed ElBaradei said that, under Article X of the NPT, "a decision to withdraw can only be effected after three months." \textit{Press Release IAEA/1354, Atomic Energy Agency Director-General Calls On Democratic People's Republic of Korea to Reverse Decision on Treaty Withdrawal, January 10, 2003 at http://www.un.org/News/Press/docs/2003/IAEAI354.doc.htm} [hereinafter \textit{IAEA Director-General February 10, 2003}]. As for the implications of the withdrawal announcements for North Korea's safeguards agreement with the IAEA, the view of the IAEA following North Korea's 1993 withdrawal announcement was that North Korea remained bound by all provisions of its safeguards agreement as long as its NPT withdrawal had not taken effect. \textit{See} \textit{Sloss, supra note 137}, at 766 n.51. In a resolution of February 12, 2003, the IAEA Board of Governors confirmed that the safeguards agreement "remains binding and in force." \textit{IAEA Board of Governors Adopts Resolution on Safeguards in North Korea, IAEA Media Advisory 2003/48, Feb. 12, 2003, para. c. at http://www.acronym.org.uk/docs/0302/doc07.htm} (containing text of Resolution) [hereinafter \textit{IAEA BOG Resolution of February 12, 2003}]. In his Introductory Statement to the meeting of the Board of Governors which passed that resolution, IAEA Director-General ElBaradei said that North Korea has been in chronic non-compliance with its safeguards agreement since 1993 and that:

\begin{quote}
  since 1994 [North Korea] has sought shelter behind the US-[North Korea] 'Agreed Framework,' claiming a legally untenable 'unique status' under the NPT to circumvent compliance with its non-proliferation obligations. This status . . . has been rejected by the [IAEA] Board of Governors and the [IAEA] General Conference, which unequivocally declared the safeguards agreement to be binding and in force. \textit{Introductory Statement to the Board of Governors by IAEA Director-General Dr. Mohamed ElBaradei, Feb. 12, 2003, at http://www.acronym.org.uk/docs/0302/doc07.htm}. Writing in 1994, \textit{Sloss persuasively expressed doubts that North Korea's "suspension [of NPT withdrawal] can be construed as anything but a full revocation of its notice" (noting that Article 68 of the Vienna Convention on the Law of Treaties (VCLT) expressly contemplates revocation but not suspension of

https://scholarship.law.berkeley.edu/bjil/vol21/iss3/2
DOI: https://doi.org/10.15779/Z38GM0P
North Korea's January 2003 NPT withdrawal announcement was overshadowed by the heavy emphasis then being placed by the U.S. administration and the international media on international inspections underway in Iraq in relation to suspected nuclear, chemical and biological weapons programs, and by the apparently imminent military action in Iraq by the United States and a "coalition of the willing." Even in this overshadowed context, there was a pronounced and negative international reaction to North Korea's announcement. A number of nations expressed condemnation and concern. The U.N. Secretary-General and the IAEA Director-General respectively urged North Korea to "reconsider" and "reverse" its withdrawal decision. The IAEA Board of Governors after some weeks reported North Korea to the Security Council for North Korea's non-compliance with its safeguards agreement, and the Agency's inability to verify non-diversion of nuclear material. A strongly-worded Security Council resolution may well ensue. In addition, there has been a flurry of diplomacy.

The international dismay and activity which greeted North Korea's threatened withdrawal from the NPT, both in 1993 and in 2003, stands in marked contrast to the muted reaction to the U.S. withdrawal from the ABM Treaty. There are several reasons why North Korea's threatened withdrawal sparked greater anxiety. Most obviously, North Korea's announcement caused deep concern about the possible emergence of an additional state with nuclear weapons. Related to this is the central importance of the NPT and its withdrawal notifications; questioning the permissibility of unilateral modification of multilateral treaty obligations; and noting that Article 44(1) of the VCLT permits the exercise of a right of withdrawal only "with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree"). Sloss, supra note 137, at 766 n.51.


146. IAEA BOG Resolution of February 12, 2003, supra note 143.

147. It should be noted that North Korea's January 2003 NPT withdrawal announcement followed several months of often provocative statements and actions on its part, including: North Korean acknowledgment in October 2002 that it had a "programme to enrich uranium for nuclear weapons," (IAEA Fact Sheet on DPRK Nuclear Safeguards, January 8, 2003, at http://www.iaea.org/worldatom/Press/Focus/iaeaDprk); disagreement with the United States regarding the implementation status of the 1994 Agreed Framework; expulsion of IAEA inspectors; breaking of IAEA seals; and announcement of reopening of nuclear facilities able to produce weapons-grade plutonium. See, e.g., James Brooke, South Opposes Pressuring North Korea, Which Hints It Will Scrap Nuclear Pact, N.Y. TIMES, Jan. 1, 2003, at A9 [hereinafter Brooke, South Opposes Pressuring North Korea]; James Brooke, North Korea Says It Plans to Expel Nuclear Monitors, N.Y. TIMES, Dec. 28, 2002, at A1; Paul Kerr, North Korea Admits Secret Nuclear Weapons Program, ARMS CONTROL TODAY, Nov. 2002, at http://www.armscontrol.org/act/2002_99/nkoreanov02.asp?print; Paul Kerr, North Korea Quits NPT, Says It Will Restart Nuclear Facilities, ARMS CONTROL TODAY, Jan.-Feb. 2003 at http://www.armscontrols.org/act/2003_02-03. Had North Korea withdrawn from the NPT in 1993 as it threatened, there would have been more limited options now available to the international community in response to North Korea's 2003 NPT withdrawal and apparent proliferating activity, and North Korea would probably have argued that for years it had not been bound by NPT obligations.
nuclear nonproliferation norm, and consequent undesirability of any precedent for its desertion by non-nuclear weapon state parties. Also relevant were the factors outlined above that served to soften international reaction to the U.S. ABM Treaty withdrawal announcement.\textsuperscript{148} The fact that the ABM Treaty was bilateral (albeit highly significant within the broader nuclear non-proliferation regime) further distinguished the U.S. ABM Treaty withdrawal from North Korea’s announcements of NPT withdrawal.

Despite these differences between the U.S. ABM Treaty withdrawal and North Korea’s threatened NPT withdrawal, there are important similarities. In both the North Korean and the U.S. cases a party to an important arms control treaty unilaterally decided to renounce the treaty. In both cases, some degree of international concern was evident (even if, in the case of the U.S. ABM treaty withdrawal, this was more evident prior to rather than after the withdrawal announcement). Most importantly, both withdrawal announcements threatened to establish a precedent regarding the use of withdrawal provisions in arms control treaties. That precedent would signal that withdrawal clauses are there to be used, and to be used at the sole discretion of the withdrawing state irrespective of the weight of opinion of other treaty partners. Indeed, a case can be made that the precedential value of the U.S. ABM Treaty withdrawal, and the subdued international reaction to it, played a role at the margins of North Korea’s 2003 decision to announce its withdrawal from the NPT. As one recent study put it: “If the United States can withdraw unilaterally from a treaty that is regarded as a cornerstone of strategic stability, then what is to keep other states from withdrawing from treaties as they see fit?”\textsuperscript{149}

It seems early days indeed to conclude, as the Bush administration has, that U.S. missile defense plans and the unilateral U.S. withdrawal from the ABM Treaty have had positive rather than negative consequences for proliferation. The tenor of international reaction has been one of resigned tolerance following oft-stated and well-understood opposition. One commentator observed before the withdrawal announcement that the question is “whether the United States is able to convince the nuclear-weapon States that a BMD [ballistic missile defense] is in everyone’s interests, and that such a system will not lead to the same destabilization that nuclear weapons presented upon their introduction to the geopolitical landscape. The answer to that question will emerge in the years to come.”\textsuperscript{150} In short, the Bush administration’s assertions that the unilateral ABM treaty withdrawal precedent has been beneficial for the global non-proliferation regime have yet to be tested.

148. \textit{See supra} text accompanying notes 132-34.

149. \textit{Rule of Power or Rule of Law?}, \textit{supra} note 32, at 65; \textit{see also id.} at 65-66.

150. John H. Harrington, \textit{International Legal Developments in Review 2000: Arms Control and Disarmament}, 35 \textit{Int’l Law.} 579, 593 (2001). Similarly, Rebecca Johnson has argued that in the post-September 11 strategic environment the U.S. ABM Treaty withdrawal was done “without the feared destabilisation of East-West relations, but it should not be inferred from this that missile defenses can be deployed without risking further proliferation in certain kinds of weaponry.” Johnson, \textit{supra} note 110, at 6.
III.
REDUCTIONS IN UNITED STATES NUCLEAR ARSENAL

A. Pre-2001: U.S.-Russia Impasse Linked to U.S. Missile Defense Plans

1. Estimates of Current Nuclear Arsenals

Estimates of current nuclear arsenal levels vary. According to the Nuclear Notebook of the Natural Resources Defense Council, there are more than 30,000 intact nuclear warheads in the possession of eight states (the United States, Russia, China, France, the United Kingdom, India, Israel and Pakistan).\(^1\) Of these, 96 percent are held by the United States and Russia, and almost 60 percent are operational (with the rest in reserve or retired and awaiting dismantlement).\(^2\) The NRDC Nuclear Notebook estimates that the United States now has 10,600 intact warheads, of which almost 8,000 "are considered active or operational."\(^3\) By contrast, some administration sources cite a figure of 6,000 deployed U.S. warheads.\(^4\) The United States has dismantled over 12,000 warheads since 1990.\(^5\) Russia is estimated to have 18,600 intact warheads, of which around 8,600 are thought to be operational.\(^6\) In addition, both the United States and Russia maintain stockpiles of fissile material.\(^7\)

---

1. Robert S. Norris & Hans M. Kristensen, Natural Resources Defense Council Nuclear Notebook, BULL. ATOM. SCIENTISTS, NOV.-DEC. 2002, at 103-04, at http://www.thebulletin.org/issues/nukenotes/nd02nukenote.html [hereinafter NRDC Nuclear Notebook]. Some, including the U.S. government, believe that North Korea now possesses nuclear weapons. See, e.g., Defense Department Report, Rumsfeld Believes North Korea "Has Small Number of Nuclear Weapons" (Oct. 17, 2002), at http://usinfo.state.gov/topical/pol/arms/02101706.htm (citing Defense Secretary Rumsfeld as noting at a press briefing an unclassified assessment of the Central Intelligence Agency that the United States "has assessed, since the early 1990s, that the North may have one or two weapons").

2. NRDC Nuclear Notebook, supra note 151, at 103.

3. Id.


5. NRDC Nuclear Notebook, supra note 151, at 103-04.

6. Id. But see Dannheisser, supra note 66 (citing a figure of 6,000 Russian deployed warheads). The NRDC Nuclear Notebook estimates the nuclear arsenals of other states as follows: China: 400 warheads; France: 350 warheads; United Kingdom: 200 warheads; India and Pakistan combined: fewer than 100 warheads (with most not yet operationally deployed); Israel (which has neither confirmed nor denied possession of nuclear weapons): possibly as many as 200 warheads. NRDC Nuclear Notebook, supra note 151, at 103-04.

7. On one estimate, Russia has over 1,000 metric tons of weapon-grade uranium and about 140 metric tons of weapon-grade plutonium, with the comparable U.S. figures 750 and 85 respectively. Press Release, "Doomsday Clock" Moves Two Minutes Closer to Midnight, BULL. ATOM. SCIENTISTS, Feb. 27, 2002, at http://www.thebulletin.org/media/022702pr.htm. The same source suggests that 55 pounds (25 kilograms) of weapon-grade uranium or 17.6 pounds (8 kilograms) of plutonium would be sufficient for a rudimentary nuclear weapon.
2. Background on U.S.-Russian Nuclear Arms Control Agreements

The process of U.S.-USSR/Russia arms control negotiations commenced in 1969 with the Strategic Arms Limitation Talks (SALT), later complemented by the Strategic Arms Reduction Talks (START). SALT I of 1972 froze all missile delivery systems. SALT II of 1979 limited all long-range delivery systems. U.S. SALT II ratification efforts struck resistance and were eventually abandoned, but the parties declared their intention to observe the agreement on the basis of reciprocity (and largely did so). With START, the focus moved to warheads rather than delivery systems. START I (1991) limited warheads to 6,000 per side attributed to deployed delivery vehicles, and limited the number of strategic nuclear delivery vehicles to 1,600 per side. START I also restricted the number of warheads on ballistic missiles to 4,900 per side. In 1987, the U.S.-USSR Intermediate-Range Nuclear Forces (INF) Treaty provided for the elimination of all ground-based delivery systems with ranges between 500 and 5,500 kilometers. The INF Treaty also introduced a system of on-site inspections.

START II was signed in 1993 but never entered into force. It required that the number of deployed nuclear warheads on each side be limited to 3,500 by 2003. The START process was stalled for much of the 1990s, largely because of differences of opinion between the United States and Russia regarding missile defense and the ABM Treaty. This disagreement "derailed" the en-

158. Mendelsohn, supra note 8, at 612.
159. Mendelsohn, supra note 8, at 612.
161. Mendelsohn, supra note 8, at 612.
162. Thomas Bruha, Strategic Arms Limitation Talks (SALT), 4 Encyclopaedia of Public International Law 699, 702 (writing in 1986) [hereinafter Bruha, SALT]; Thomas Bruha, Strategic Offensive Arms, Treaties on Reduction and Limitation (START), 4 Encyclopaedia of Public International Law 704, 705 (writing in 1998) [hereinafter Bruha, START].
163. Mendelsohn, supra note 8, at 612.
164. Treaty on the Reduction and Limitation of Strategic Offensive Arms ("START I"), supra note 39.
165. Bruha, START, supra note 162, at 705.
167. Bruha, START, supra note 162, at 704; Mendelsohn, supra note 8, at 613.
168. Treaty With the Russian Federation on Further Reduction and Limitation of Strategic Offensive Arms (1991), supra note 97 ("START II").
try into force of START II. Because START II did not enter into force, negotiations towards a proposed START III never got off the ground.

B. Bush Administration Approach: The U.S.-Russia Moscow Treaty

This treaty liquidates the cold war legacy of nuclear hostility between our countries. (President George W. Bush)

Deep reductions in our deployed nuclear forces are in the U.S. interest. We would have made these cuts regardless of what Russia did with its arsenal. We are making them not because we signed a treaty in Moscow, but because the fundamental transformation in our relationship with Russia means we do not need so many deployed weapons. Russia has made a similar calculation. The agreement we reached in Moscow is the result of those determinations—not the cause of them. (Defense Secretary Donald H. Rumsfeld)

1. Terms of the Moscow Treaty

The U.S.-Russia Treaty on Strategic Offensive Reductions (the Moscow Treaty) was signed by Presidents Bush and Putin on May 24, 2002. Presidents Bush and Putin had each announced in late 2001 plans to reduce their respective national nuclear arsenals. Russia’s insistence on codifying the announced reductions in treaty form culminated in the Moscow Treaty. The

---

170. Burroughs & Wurst, supra note 127, at 9. Secretary of State Powell has sought to lay the entire responsibility for this outcome at Russia’s door, saying that the treaty: never entered into force because Russia placed unacceptable conditions on its own ratification of START II. Russia’s explicit linkage of START II to preservation of the ABM Treaty and entry into force of several agreements, signed in 1997, which related to ABM Treaty succession and ABM/TMD demarcation, made it impossible for START II to enter into force.

171. The U.S. and Russian Presidents agreed in Helsinki in 1997 that they would begin negotiating START III immediately upon the entry into force of START II, and that START III would include, inter alia, provisions on the following: Strategic nuclear warhead levels of 2,000-2,500 per side by December 31, 2007; measures on transparency of strategic nuclear warhead inventories and destruction of strategic nuclear warheads and any other jointly agreed measures “to promote the irreversibility of deep reductions including prevention of a rapid increase in the number of warheads;” the extension of START II; and tactical nuclear weapons. Joint Statement on Parameters on Future Reductions in Nuclear Forces Helsinki Summit 1997, reprinted in Joint Statements of the Helsinki Summit, ARMS CONTROL TODAY, Mar. 1997, at http://armscontrol.org/act/1997_03/js.asp.

172. The President’s News Conference with President Vladimir V. Putin of Russia in Moscow, 38 WEEKLY COMP. PRES. DOC. 887, 887 (May 24, 2002) [hereinafter Presidents’ News Conference in Moscow].

173. Rumsfeld, supra note 52. An unnamed “senior administration official” put this more succinctly: “What we have now agreed to do under the treaty is what we wanted to do anyway. That’s our kind of treaty.” Michael R. Gordon, Treaty Offers Pentagon New Flexibility for New Set of Nuclear Priorities, N.Y. TIMES, May 14, 2002, at A8.

174. See supra note 4.


Treaty was submitted to the Senate on June 20, 2002 for its advice and consent to ratification. \(^\text{177}\)

The central obligation of the Moscow Treaty is set out in Article I, which provides as follows:

Each party shall reduce and limit strategic nuclear warheads, as stated by the President of the United States of America on November 13, 2001 and as stated by the President of the Russian Federation on November 13, 2001 and December 13, 2001 respectively, so that by December 31, 2012 the aggregate number of such warheads does not exceed 1700-2200 for each Party. Each Party shall determine for itself the composition and structure of its strategic offensive arms, based on the established aggregate limit for the number of such warheads. \(^\text{178}\)

The Presidential statements incorporated by Article I were not annexed to the treaty. However, they were extracted in the “Article-by-Article Analysis” accompanying President Bush’s Letter of Transmittal to the Senate. President Bush said on November 13, 2001 that “the United States will reduce our operationally deployed strategic nuclear warheads to a level between 1,700 and 2,200 over the next decade.” \(^\text{179}\) President Putin said on December 13, 2001 that “a particularly important task in these conditions is to legally formalize the agreements that have been reached on further drastic, irreversible, and verifiable reductions in strategic offensive arms, which we believe should be at the level of 1,500-2,200 nuclear warheads for each side.” \(^\text{180}\)

The only other articles of substance in the Moscow Treaty provide that the START I Treaty is to remain in force in accordance with its terms, \(^\text{181}\) and that the Parties shall hold twice-yearly meetings of a Bilateral Implementation Commission for the purposes of implementing the Treaty. \(^\text{182}\)
The Moscow Treaty does not require the destruction of strategic warheads in excess of the stipulated range, so additional warheads may simply be stored. The treaty does not limit, nor require destruction of, delivery platforms. It has a ten-year implementation timetable which enables temporary increases in deployed warheads in the interim. That is, it stipulates no timetable for intermediate reductions but merely an end date of December 31, 2012. Nor does the Moscow Treaty prescribe force structure and composition. The treaty makes no provision for verification. Moreover, the withdrawal provision in the Moscow Treaty requires a party to give only three months notice of withdrawal, does not require the perceived existence of “extraordinary”
events or circumstances as grounds for withdrawal; and does not require any statement of reasons for withdrawal. 190

2. Implementation by the United States and by Russia

The Bush administration has stressed that the referencing in Article I of statements by Presidents Bush and Putin "makes clear that the Parties need not implement their reductions in an identical manner." 191 Secretary of State Powell has indicated that no agreement proved possible on the detailed definition sought by the United States of "operationally deployed strategic nuclear warheads." 192 This may explain the resort to the device of incorporating by reference differing Presidential statements.

The lower end of the numerical range in President Putin's statement (1,500) is lower than that of President Bush's statement (1,700). However, this is of little significance because the upper limit is identical for both (2,200), and the range 1,700-2,200 is explicitly written into Article I as the range to be reached by December 31, 2012. President Bush's statement focuses on how many "operationally deployed strategic nuclear warheads" the United States will have in a decade's time. By contrast, President Putin gives no timeframe and speaks of formalizing agreements on "irreversible, and verifiable reductions in strategic offensive arms, which we believe should be at the level of 1,500-2,200 nuclear warheads for each side." Article I indicates that each party "shall reduce and limit strategic nuclear warheads, as stated" in the Presidential statements, "so that by December 31, 2012 the aggregate number of such warheads does not exceed 1,700-2,200 for each party." 193 In fact, neither president had expressed that precise intention. Bush's statement concerns only the United States; Putin's both sides. Bush's reference to "operationally deployed strategic nuclear warheads" contrasts with Putin's use of the term "strategic offensive arms," and with the usage in Article I of the term "strategic nuclear warheads." According to the Article-by-Article Analysis of the Moscow Treaty which accompanied President Bush's Letter of Transmittal to the Senate, the treaty's title reflects its focus "on reductions in strategic nuclear warheads, rather than on 'strategic offensive arms,' which traditionally have been considered to be delivery vehicles and launchers." 194

190. According to the analysis accompanying President Bush's Letter of Transmittal: "Unlike some other arms control agreements, this withdrawal clause is not tied to a Party's determination that extraordinary circumstances jeopardizing its supreme national interests exist. Rather, the Moscow Treaty includes a more general formulation that allows greater flexibility for each Party to respond to unforeseen circumstances." See Article-by-Article Analysis, supra note 175.

191. See, e.g., id.; Powell, supra note 95.

192. Powell, supra note 95.

193. Moscow Treaty, supra note 4, art. 1 (emphasis added).

194. Article-by-Article Analysis, supra note 175.
Despite occasional slippage in language,\textsuperscript{195} the United States has made clear its intention to apply the Moscow Treaty limit to "operationally deployed strategic nuclear warheads.”\textsuperscript{196} According to Secretary of State Colin Powell, "[t]his is a departure from the way in which warheads are counted under the START Treaty, but one that more accurately represents the real number of warheads available for use immediately or within days."\textsuperscript{197} Warheads undergoing maintenance or held in reserve in what the United States terms a "responsive force" are excluded from the count. While Russia has not loudly contested the clear public statements of the United States regarding the U.S. understanding of the operation of Article I, it may nevertheless disagree with the U.S. interpretation.\textsuperscript{198}

President Putin’s statements did not identify how Russia would implement reductions.\textsuperscript{199} Russia indicated during the negotiation of the Moscow Treaty that it intended to use counting concepts similar to those used in the START Treaties,\textsuperscript{200} but “did not state conclusively during the negotiations how it intends to carry out its reductions.”\textsuperscript{201}

Come December 31, 2012, the United States may have any number of strategic nuclear warheads in excess of 2,200—provided that those in excess of 2,200 are not “operationally deployed strategic nuclear warheads” within the stated U.S. meaning of that term. Russia, on the other hand, does not appear to have placed any qualifications on the type of "strategic nuclear warheads" it is bound to reduce in number. According to the United States, “Russia, like the

\textsuperscript{195} For example, President Bush omitted the “operationally deployed” qualification when describing the treaty on the day it was signed: “President Putin and I have signed a treaty that will substantially reduce our nuclear—strategic nuclear warhead arsenals to the range of 1,700 to 2,200.” Presidents’ News Conference in Moscow, supra note 172, at 887.

\textsuperscript{196} According to the Article-by-Article Analysis that accompanied Bush’s Letter of Transmittal, U.S. negotiators made it clear to their Russian counterparts that by the term “operationally deployed strategic nuclear warheads” the United States meant:

- reentry vehicles on ICBMs [Intercontinental Ballistic Missiles] in their launchers,
- reentry vehicles on SLBMs [Submarine-Launched Ballistic Missiles] in their launchers onboard submarines, and
- nuclear armaments loaded on heavy bombers or stored in weapons storage areas of heavy bomber bases. The United States also made clear [during negotiations] that a small number of spare strategic nuclear warheads (including spare ICBM warheads) would be located at heavy bomber bases and that the United States would not consider these warheads to be operationally deployed strategic nuclear warheads.”

Article-by-Article Analysis, supra note 175.

\textsuperscript{197} Powell, supra note 95. General Myers, Chairman of the Joint Chiefs of Staff, has told the Senate Armed Services Committee that, for Moscow Treaty purposes, the U.S. military “will derive the total number of warheads from the number of warheads on Intercontinental Ballistic Missiles (ICBMs) deployed in their launchers, the number on Submarine-Launched Ballistic Missiles in their launch tubes onboard submarines, and nuclear weapons loaded on heavy bombers or stored in weapons storage areas at heavy bomber bases.” Myers Statement, supra note 184.

\textsuperscript{198} See, e.g., Bleek, supra note 188 (citing a May 22, 2002 statement from the Russian Foreign Ministry which noted the omission from the Moscow Treaty of the term “operationally deployed warheads” and stated that implementation of the Treaty would be “tackled” in the forum of the bilateral commission established under the Treaty).

\textsuperscript{199} Article-by-Article Analysis, supra note 175.

\textsuperscript{200} Powell, supra note 95. See also infra note 226.

\textsuperscript{201} Article-by-Article Analysis, supra note 175.
United States, may reduce its strategic nuclear warheads by any method it chooses. Can the method of implementing reductions entail a re-definition of that which is being reduced? Might Russia elect at any time between now and 2012 to impose an “operationally deployed” qualification comparable to that used by the United States? Or is Russia bound already to limit the number of its strategic warheads irrespective of their deployment status, so that it would be in breach of the Moscow Treaty if on December 31, 2012 it had more than 2,200 strategic warheads? If this last question is answered in the affirmative, then the effect of incorporating differing Presidential statements into Article I is the imposition of asymmetrical obligations: of different end points rather than merely different methods of implementation. The tone of administration commentary suggests that Russia is considered to have as much flexibility as the United States, but it is not easy to see the basis for this in the Moscow Treaty and the Presidential statements it incorporates.

3. The “Flexibility” Inherent in the Moscow Treaty

President Bush and others have indicated that the United States intended to make the reductions announced in November 2001 unilaterally, irrespective of any action by Russia and independently of the Moscow Treaty. The administration has also signaled that it does not regard the Moscow Treaty as imposing significant constraints on U.S. nuclear options. In the words of the Chairman of the Joint Chiefs of Staff, Air Force General Richard Myers, “[t]he Moscow Treaty allows the U.S. to make deep reductions in strategic nuclear warheads while preserving our flexibility to meet unpredictable strategic changes.” The Moscow Treaty allows this “flexibility to hedge against future uncertainty” in several ways. First, there is the narrow scope of the treaty: Being confined to regulating the number of strategic warheads, it makes no provision for non-strategic nuclear warheads or delivery vehicles. Then, for Moscow Treaty counting purposes the U.S. side will include only “operationally deployed” strategic warheads. As General Myers puts it, each side may “store spare warheads rather than destroy them.” Other aspects of the treaty’s “flexibility” include the absence of provisions on force structure, verification and an

202. Id.
203. At least as far as those statements are extracted in the Article-by-Article Analysis accompanying President Bush’s Letter of Transmittal. See id.
204. See, e.g., supra text accompanying note 173 (citing remarks by Defense Secretary Rumsfeld).
205. Myers Statement, supra note 184.
206. Id.
207. As Holum notes, “[a]lso, from the number of warheads and delivery vehicles each side actually mates up and deploys, the treaty essentially regards each side’s nuclear posture as its own business.” John Holum, Assessing the New U.S.-Russian Pact, ARMS CONTROL TODAY, June 2002, at http://armscontrol.org/act/2002_06/holumjune02.asp. The Moscow Treaty does, as a corollary of restricting the number of deployed warheads, limit the number of delivery vehicles which may be deployed.
208. General Myers highlighted this point in his statement to the Senate Armed Services Committee, adding that this “will provide a hedge against future strategic changes . . . [and] a hedge in case warhead safety or reliability becomes a concern.” Myers Statement, supra note 184.
interim timetable for reductions. Finally, the withdrawal provision makes even fewer demands on a withdrawing state than the very few normally imposed by such provisions in arms control agreements.

For some time prior to President Putin’s December 2001 announcement, Russia had sought reductions to 1,500 strategic warheads per side. Russia had also sought the destruction of strategic warheads in excess of this number. The Russian Defense Minister noted before the Treaty was signed that the treaty did not mean that Russia had “lifted its objections to the U.S. plans to store and not to destroy a part of the warheads.” The fact that Russia simply cannot afford its nuclear arsenal gave the United States considerable bargaining power in negotiating the terms of reductions. The entrenchment of the agreement in treaty form at Russian insistence may well have resulted from a Bush administration assessment not only that the agreed terms suited the United States, but that the restrictions they imposed on U.S. policy-making were so few and so avoidable as to make the treaty form acceptable.

C. Evaluation: Illusory Reassurance With All Options Retained

The Bush administration does not so much object to arms control per se (although it does that as well) as it does to placing any constraints on America’s freedom of action. It believes that as the most powerful nation on earth, the United States

209. See, e.g., Philipp C. Bleek, Russia Ready to Reduce to 1,500 Warheads: Addressing Dispute Over Strategic Forces’ Fate, ARMS CONTROL TODAY, Sept. 2000, at http://armscontrol.org/act/2000_09/startsept00.asp; see also Holum, supra note 207 (“It has long been obvious that Russia cannot afford to maintain its existing forces and, in fact, Moscow has for years been pushing for a lower number than the United States would accept.”). Holum adds that Russia’s main leverage had been its ability to withhold agreement on ABM Treaty amendments, but that “that card evaporated” with the U.S. withdrawal from the ABM Treaty. Id. A U.S. National Intelligence Estimate of January 2002 assessed that, in the absence of significant funding increases, the Russian nuclear arsenal would decline to under 2,000 warheads by 2015, “with or without arms control.” Foreign Missile Developments: Unclassified Summary, supra note 125.


211. President Bush and other key administration figures have tended to characterize the more traditional approach to arms control treaties as belonging to a bygone era of Cold War hostility. For example, when testifying before the Senate Foreign Relations Committee in July 2002, Defense Secretary Rumsfeld took pains to contrast the length of the three-page Moscow Treaty with the 700 pages of START I, as well as the amount of time taken to negotiate the two treaties. Rumsfeld, supra note 52. He also argued that the administration had, by treating Russia as a friendly power rather than an adversary, preserved benefits attributed to arms control (e.g. dialogue, lower force levels, predictability and transparency) but without the drawbacks, including “the legalistic and adversarial process that, more often than not, becomes a source of bitterness between the participants; and the extended, embittered debates over compliance and enforcement of agreements.” Id. At a news conference with President Putin on November 13, 2001, where President Bush announced planned U.S. nuclear reductions, President Bush said, “I looked the man in the eye and shook his hand, but if we need to write it down on a piece of paper, I’ll be glad to . . . . And we don’t need an arms control agreement or an arms control—let me say this—we don’t need arms control negotiations to reduce our weaponry in a significant way.” The President’s News Conference With President Vladimir Putin of Russia, 37 WEEKLY COMP. PRES. DOC. 1652, 1656 (Nov. 13, 2001). Daalder and Lindsay have accurately summarized the tone of the administration officials’ remarks about the Moscow Treaty in the slogan: “Friends don’t do treaties.” Ivo H. Daalder & James M. Lindsay, One-Day Wonder: The Dangerous Absurdity of the Bush-Putin Arms Treaty, AM. PROSPECT, Aug. 2, 2002, at http://www.prospect.org /print/V13/15/daalder-i.html.
should not and cannot be constrained in ways that other lesser powers can . . . The Moscow Treaty elevates this flexibility fetish into the law of the land.

The Moscow Treaty envisages substantial reductions in the number of operationally deployed warheads, and represents a move forward from the impasse that beset the START process over missile defense. For these reasons, the Moscow Treaty has been welcomed. However, its qualifications and “flexibility” are such that it does not provide assurance to the majority of the world that the United States is committed to genuine and verifiable long-term reductions in, let alone the eventual elimination of, its nuclear arsenal. In one assessment, the Moscow Treaty “makes the world no safer than it was before, and much the worse for failing to achieve a genuine reduction in nuclear weapons . . . the United States and Russia are free—except for a single day a decade from now—to deploy as many (or as few) warheads on operationally deployed systems as they like.”

The major criticism of the Moscow Treaty concerns its omission of any requirement to destroy non-operational warheads. The Bush administration has not made public just what proportion of retired U.S. warheads it intends to destroy. In response to this criticism, Defense Secretary Rumsfeld has observed that the SALT, START and INF Treaties did not require destruction of warheads and has argued that:

This charge is based on a flawed premise—that irreversible reductions in nuclear weapons are possible. In point of fact, there is no such thing as an irreversible reduction in nuclear weapons. The knowledge of how to build nuclear weapons exists . . . Every reduction is reversible, given enough time and money.

One wonders how this view can be reconciled with the disarmament obligation of the United States under Article VI of the Nuclear Non-Proliferation

212. Daalder & Lindsay, supra note 211.

213. Id. While describing the treaty as “a step in the right direction,” Senator Russell Feingold (D-Wis.) also voiced concern “[that] it does not address the vital issues of compliance and verification, that it does not include a timetable for those reductions, and that it does not require that any nuclear warheads actually be destroyed.” Dannheisser, supra note 66.

214. Secretary of State Powell told the Senate Foreign Relations Committee on July 9, 2002 that the administration planned to cut the total number of strategic nuclear warheads (both deployed and in storage) to about 4,600—but stressed that it was up to Defense Secretary Rumsfeld to state the official administration figure. Dannheisser, supra note 66. The Bush administration has indicated that it will aim for 3,800 deployed strategic warheads by 2007. Bleek, supra note 188. It will “convert four of the current 18 Trident submarines to carry only conventional cruise missiles, retire all 50 10-warhead MX missiles, and eliminate the B-1B bomber’s nuclear role.” Id. These measures are expected to remove 1,300 warheads from service, and additional warheads will be withdrawn from multiple-warhead Intercontinental Ballistic Missiles and Submarine-Launched Ballistic Missiles. Id. Bleek assesses from administration sources that by 2012 the U.S. will deploy 2,200 strategic nuclear warheads while keeping 2,400 others in a “responsive capability” (some of which could be re-deployed within weeks or months, and all of which could be re-deployed within three years). Id.

215. Rumsfeld, supra note 52. See also Powell, supra note 95.

216. Rumsfeld, supra note 52. President Bush was no more reassuring in his response to a question as to why 1,700 nuclear warheads were still needed: “You know, friends really don’t need weapons pointed at each other . . . But it’s a realistic assessment of where we’ve been. And who knows what will happen 10 years from now? Who knows what future Presidents will say and how they react?” Presidents’ News Conference in Moscow, supra note 172, at 889.
Treaty. In particular, it appears incompatible with the 2000 NPT Review Conference Final Document, which was agreed to by consensus. The Final Document includes the following as one of thirteen “practical steps” towards the implementation of Article VI of the NPT: “The principle of irreversibility to apply to nuclear disarmament, nuclear and other related arms control and reduction measures.” As argued elsewhere in this article, the Final Document itself is not legally binding, but carries significant weight as an authoritative interpretation of the requirements of Article VI—serving as a subsequent statement and/or practice by NPT parties. The United States has committed itself to the very principle of irreversibility which Defense Secretary Rumsfeld denies.

President Putin has made a better case for the Moscow Treaty: “Any man who has at least once in his career dealt with arms . . . at least to hunt or a rifle or whatever, he knows that it’s much better, much safer to have it in stock disarmed, disassembled perhaps, rather than to have it in your arms and charged with bullets in it and with your finger on the trigger.” On this reasoning, though, destruction must surely be a safer outcome still. As for Secretary of Defense Rumsfeld’s argument that all nuclear reductions are reversible, of course it would be theoretically possible to produce additional weapons to replace any destroyed nuclear warheads. But there is a vast difference between the hypothetical future acquisition of additional warheads from scratch on the one hand, and on the other the maintenance of existing warheads with the avowed purpose of deploying them should ill-specified contingencies arise.

---

217. See infra text accompanying note 405 and surrounding discussion.
219. See infra text accompanying paragraph containing notes 430-432.
220. Secretary of Defense Rumsfeld’s rejection of the irreversibility principle is also at odds with E.U. views: “The EU is convinced that the application of the principle of irreversibility to nuclear disarmament, nuclear and other related arms control and reduction measure [sic], contributes to the maintenance and reinforcement of international peace, security and stability.” Douglas Roche, The NPT: Crisis and Challenge: Report and Assessment of the Nuclear Non-Proliferation Treaty Preparatory Committee Meeting (Apr. 8-19, 2002), at http://gsinstitute.org/archives/000095.shtml (citing E.U. delegation to the first meeting of the Preparatory Committee for the 2005 NPT Review Conference held in April 2002).
221. Presidents’ News Conference in Moscow, supra note 172, at 889-90. The authors of a recent study of U.S. security treaties suggest that the “responsive force” envisaged by the U.S. “essentially is in a de-alerted status.” Rule of Power or Rule of Law?, supra note 32, at 32. A similar point was made by a participant, Ms. Gottemoeller, in April 2002 discussions arranged by the Middle Powers Initiative. See Middle Powers Initiative Strategy Consultation Report, Apr. 8, 2002, at http://www.gsinstitute.org/archives/000093.shtml. In both cases, the commentators query the need for such “de-alerting” to be spanned out over a decade.
222. Secretary of State Powell refers to “contingencies” as follows: “Given the uncertainties we face, and the fact that we, unlike Russia, do not manufacture new warheads, the United States needs the flexibility to retain warheads removed from operational deployment to meet unforeseen future contingencies and possible technical problems with the stockpile.” Powell, supra note 95. Secretary of Defense Rumsfeld argues, similarly, that because the U.S., unlike Russia, is not currently producing warheads and therefore does not have “a warm production line,” it would be “simply mindless for us to destroy all those warheads, and then not have them for backup in the event we run into safety and reliability problems—or a sudden, unexpected change in the global security environment.” Rumsfeld, supra note 52.
To develop further President Putin’s analogy, it is the difference between having an unused extra rifle undergoing repair or in bits in the shed, and having no extra rifle on hand but knowing how to make one.

It is questionable whether the global nuclear nonproliferation regime is better served by the Moscow Treaty than it would have been by the entry into force of START II and the conclusion of a START III along the lines foreshadowed by the U.S. and Russian leaders in Helsinki in 1997.\textsuperscript{223} By December 2001, both the United States and Russia had achieved the reductions provided for by START I.\textsuperscript{224} Now a dead letter, START II could perhaps have brought the number of deployed strategic warheads to 2,000-2,500 per side.\textsuperscript{225} When the different “counting” used for the Moscow Treaty is taken into account,\textsuperscript{226} the bottom line may be that the Moscow Treaty provides for reductions on a scale roughly comparable with START II, but in a less verifiable, less permanent and more avoidable fashion.\textsuperscript{227} START II did not require the destruction of any warheads. However, it did require destruction of delivery systems—which are not addressed by the Moscow Treaty. It would also have prevented Russia, for example, from putting multiple warheads on its new land-based missile forces.\textsuperscript{228} Moreover, the intention agreed to at Helsinki in 1997 was for the

\begin{itemize}
  \item \textsuperscript{223} On the Helsinki discussions, see \textit{ supra} note 171.
  \item \textsuperscript{224} \textit{Achievement of START I Reductions}, \textit{ supra} note 154. \textit{See also} Daalder & Lindsay, \textit{ supra} note 211.
  \item \textsuperscript{225} Burroughs & Wurst, \textit{ supra} note 127, at 9.
  \item \textsuperscript{226} In the view of one critic: “With an accounting flourish worthy of an Enron executive, the claim of reducing the arsenal to about 2,200 by 2012 proves deceptive.” Jonathan Granoff, \textit{Pentagon Report Reveals Dangerous Shift in U.S. Nuclear Doctrine}, Mar. 12, 2002, at http://gsinstitute.org/archives/000086.shtml. As for the START counting system: “START I does not count most missiles, nor does it count actual warheads. Instead, it counts each SNDV [strategic nuclear delivery vehicle] as carrying its full declared capacity.” Bruha, \textit{START}, \textit{ supra} note 162, at 705. Put simply, for the Moscow Treaty “Russia had sought a START-I style approach that would have counted the maximum number of warheads that deployed missiles and bombers can carry, while the United States had insisted on counting only those warheads ready for immediate use.” Bleek, \textit{ supra} note 188.
  \item \textsuperscript{227} Holum notes that the numbers of warheads deployed during the period prior to 2012 are “likely to be higher than they would have been under START II.” He observes that, even as extended in 1997, START II would have brought the numbers to 3,500 warheads by 2007 with the deactivation by 2003 of relevant delivery vehicles, while the planned U.S. implementation timetable under the Moscow Treaty will leave it with 3,800 warheads in 2008. Holum, \textit{ supra} note 207. \textit{See also} RULE OF POWER OR RULE OF LAW?, \textit{ supra} note 32, at 31.
  \item \textsuperscript{228} Daalder & Lindsay, \textit{ supra} note 211. START II “would have eliminated all remaining land-based missiles with multiple warheads, most significantly more than 150 Russian SS-18 heavy missiles with 10 warheads each, long considered a potential first-strike weapon.” Holum, \textit{ supra} note 189. Holum adds that, with the Moscow Treaty, the Bush administration is “effectively abandoning START II and this key limit on multiple-warheaded ICBMs.” Id. \textit{See also} RULE OF POWER OR RULE OF LAW?, \textit{ supra} note 32, at 32-33. Secretary of State Powell made the following comment on this issue: “the Moscow Treaty does not place restrictions on Russia’s potential to restructure its strategic forces by using MIRVs [Multiple, Independently Targetable Re-entry Vehicles]. We are convinced that this will not adversely impact U.S. national security. Since neither the United States nor Russia has any incentive to launch nuclear weapons at each other, we no longer view Russian deployment of MIRVed ICBMs as destabilizing to our strategic relationship.” Powell, \textit{ supra} note 95.
\end{itemize}
envisaged START III to cover tactical nuclear weapons and the destruction of strategic nuclear warheads.  

Some have pointed out that the flexibility provided for by the Moscow Treaty leaves Russia as well as the United States a great deal of room to maneuver: "Maximum flexibility is a two-way street." The international reassurance value of the Moscow Treaty reductions, and the likelihood of a "flow-on" effect in the form of cuts in the nuclear arsenals of other states, will be limited both by the Bush administration's linkage of its reductions to missile defense and by the intrinsically qualified nature of the Moscow Treaty. It is scarcely reassuring that promised reductions exclude warheads undergoing maintenance or in storage; that the bottom-line U.S. figure used relates only to, in Secretary Powell's terms, the "number of warheads available for use immediately or within days;" and that the United States has foreshadowed from the outset its determination to change the number of operationally deployed strategic nuclear warheads at will in accordance with its changing perceptions of national security threats. Any arms control treaty will be entered into only where each party considers it to be in its national interests, and after careful consideration of national security strategies. However, the Bush administration has depicted the Moscow Treaty as incidental to previously decided and eminently retractable policy regarding the optimal number of operationally deployed strategic warheads in the U.S. nuclear arsenal. This depiction, in conjunction with the Moscow Treaty's extreme "flexibility" and the U.S. withdrawal from the ABM Treaty, cast doubt on the permanence of the U.S. commitment to reduce deployed strategic warheads to the 1,700-2,200 range. The tenor of the Bush administration approach to the issue of nuclear arsenal reductions has thus been uncompromisingly unilateralist.

229. See supra note 171. On tactical nuclear weapons, which are not addressed by the Moscow Treaty, Secretary of State Powell has said that: "We continue to be concerned about the uncertainties surrounding Russian non-strategic nuclear weapons (NSNW), and I believe we should discuss inventory levels... and press Moscow to complete the reductions it pledged to make in 1991 and 1992." Powell, supra note 95.

230. Gordon, supra note 173, at A8 (quoting Ivo Daalder). Daalder and Lindsay, observing that Russian policy might in certain circumstances return to antagonism towards the West, also note that "[r]emarkably, an administration that prides itself on its hard-nosed realism is ignoring the first rule of international politics: Hope for the best, but guard against the worst." Daalder & Lindsay, supra note 211. They conclude that, instead of continuing with "treaties that are all form and no substance," the United States and Russia should agree on "a compact that truly makes major, enduring reductions in nuclear weapons. Yes, the United States would have to sacrifice some flexibility. But it would get something more important in return: enhanced security." Id.

231. Powell, supra note 95.
IV. THE UNITED STATES AND THE COMPREHENSIVE TEST BAN TREATY

A. Pre-2001: Clinton Administration Support Stymied by Senate Rejection of CTBT

1. Background on the Comprehensive Test Ban Treaty

The notion of a comprehensive nuclear test ban treaty has played a central role in the history of international efforts to stem the proliferation of nuclear weapons. Such a treaty is regarded by many as “the litmus test of commitment” to the disarmament obligation undertaken by the five nuclear weapon states party to the Nuclear Non-Proliferation Treaty. Aspirations toward a CTBT pre-date the NPT. Modest steps taken by the negotiation of three other treaties fell far short of the goal of a Comprehensive Test Ban Treaty. When the NPT was negotiated in the late 1960s, a comprehensive test ban treaty was at the top of the international disarmament agenda and had the avowed approval of the United States. A future CTBT was referred to in the preamble to the NPT. In connection with their 1995 decision to extend the NPT indefinitely, NPT parties agreed that a CTBT should be negotiated by the end of 1996. This deadline was met with the successful conclusion of negotiations in the Conference.

232. Jayantha Dhanapala, U.N. Under-Secretary-General for Disarmament Affairs, Statement on the Occasion of the Launching of the Joint Ministerial Statement on the CTBT (Sept. 14, 2002), at http://disarmament.un.org/speech/14sept2002.htm. Koplow wrote in 1993 that the CTBT idea “has stood for decades in the eyes of many other countries as the primary litmus test of superpower sincerity and achievement in disarmament.” Koplow, supra note 8, at 303. Similarly, Graham writes that “non-nuclear weapon states have long regarded the CTBT as a litmus test of the nuclear weapon states’ willingness to live up to their half of the basic NPT bargain.” Graham, supra note 8, at 59. On the nuclear disarmament commitment of Article VI of the NPT, see infra text accompanying notes 405-32.


234. The 10th preambular paragraph of the NPT is as follows: “Recalling the determination expressed by the Parties to the 1963 Treaty banning nuclear weapons tests in the atmosphere, in outer space and underwater in its Preamble to seek to achieve the discontinuance of all test explosions of nuclear weapons for all time and to continue negotiations to this end.” NPT, supra note 6.

ence on Disarmament, and the CTBT was opened for signature on September 24, 1996.

The CTBT prohibits parties from carrying out any nuclear explosion.\footnote{CTBT, supra note 5, art. I. The CTBT does not prohibit subcritical nuclear tests (involving no nuclear explosion), and the U.S. conducted eighteen such tests in Nevada between July 1997 and August 2002. See News Review: New CTBT Initiative as Treaty Marks 6th Anniversary, DISARMAMENT DIPLOMACY, Oct.-Nov. 2002, at http://www.acronym.org.uk/dd/dd67/67nr06.htm. See also RULE OF POWER OR RULE OF LAW?, supra note 32, at 44. In this article, the terms "nuclear testing" and "nuclear tests" refer only to testing of the kind prohibited by the CTBT.} It establishes a global verification regime to monitor compliance with the CTBT.\footnote{CTBT, supra note 5, art. IV.} This consists of an International Monitoring System (a global network of monitoring stations supported by an International Data Center), a consultation and clarification process, on-site inspections and confidence-building measures.\footnote{Id., art. V.} The treaty also sets out measures to deal with non-compliance with the CTBT,\footnote{Id., art. II.} establishes the Vienna-based Comprehensive Nuclear Test Ban Treaty Organization,\footnote{See Signature and Ratification Process, at http://www.ctbto.org.} and provides for national implementation measures.\footnote{CTBT supra note 5, art. III.} Article XIV provides that the CTBT will enter into force 180 days after the 44 states listed in Annex 2 have all ratified. The Annex 2 states are those which had nuclear power reactors and participated in the work of the Conference on Disarmament in 1995 or 1996.\footnote{Id., annex 2.} By January 2003, 166 countries had signed the CTBT and 97 had ratified it. Of the 44 states whose signature and ratification is required for entry into force, 31 had ratified it. Ten had signed but not ratified, including China, Egypt, Indonesia, Iran, Israel and the United States. The remaining three—India, North Korea and Pakistan—had not signed.\footnote{The 44 states are as follows, with signature/ratification status shown as of December 4, 2002: Have signed and ratified: Argentina, Australia, Austria, Bangladesh, Belgium, Brazil, Bulgaria, Canada, Chile, Finland, France, Germany, Hungary, Italy, Japan, Mexico, the Netherlands, Norway, Peru, Poland, Republic of Korea, Romania, Russian Federation, Slovakia, South Africa, Spain, Sweden, Switzerland, Turkey, Ukraine and United Kingdom. Have signed but not ratified: Algeria, China, Colombia, Democratic Republic of the Congo, Egypt, Indonesia, Iran, Israel, United States of America, Vietnam. Have not signed: Democratic People’s Republic of Korea, India and Pakistan. See Status of Signature and Ratification, at http://www.ctbto.org.}

2. U.S. Signature of the CTBT and Its Rejection by the U.S. Senate

The United States has observed a unilateral moratorium on nuclear testing since 1992.\footnote{See Angelique R. Kuchta, Comment, A Closer Look: The U.S. Senate’s Failure to Ratify the Comprehensive Test Ban Treaty, 19 DICK. J. INT’L L. 333, 339 (2001); Koplow, supra note 8, at 328; Rubner, supra note 39 at 272.} The CTBT was signed by the United States on September 24, 1996.\footnote{President Clinton was the first world leader to sign the CTBT. At the time, he described the CTBT as the “longest-sought, hardest-fought” prize in arms control history. See Ambassador...} One year later, President Clinton submitted the CTBT, with six “safe-
guards,” to the Senate for advice and consent on ratification.\(^{247}\) The treaty was not put to a vote for a further two years, largely because of the stance of Senate Foreign Relations Committee Chairman Jesse Helms.\(^{248}\) It was evident before the vote in late 1999 that the Senate would reject ratification, which would preclude the Treaty’s entry into force, at least until after any subsequent Senate vote to the contrary. Against the backdrop of the convening of the Conference on Facilitating the Entry into Force of the CTBT on October 6-8, 1999,\(^{249}\) the British, French and German leaders issued an unusual joint appeal urging U.S. ratification. They wrote that failure to ratify would be “a failure in our struggle

---

\(^{247}\) President Clinton’s Letter of Transmittal referred to “concrete, specific safeguards that define the conditions under which the United States can enter into a CTBT.” The safeguards concerned: (1) conduct of a Stockpile Stewardship Program; (2) maintenance of nuclear laboratories; (3) maintenance of capability to resume testing prohibited by CTBT; (4) continuing research and development on U.S. treaty monitoring capabilities; (5) continuing development of intelligence capabilities; and (6) the understanding that the President, in consultation with Congress, would be prepared to withdraw from CTBT should the Secretaries of Defense and Energy inform the President that confidence in the safety and reliability of nuclear weapons considered critical to the U.S. nuclear deterrent could no longer be certified. Petter W. Mason, International Legal Developments in Review 1999: Arms Control and Disarmament, 34 INT’L L. 609, 616-17 (2000).

\(^{248}\) Helms tied the Senate’s consideration of the CTBT to its consideration of the ABM Treaty amendment agreements which the U.S. had signed in 1997, see supra note 39, and of the Kyoto Protocol to the U.N. Framework Convention on Climate Change. For example, Helms wrote to President Clinton in January 1998 as follows: “I will be prepared to schedule [Senate Foreign Relations] Committee consideration of the CTBT only after the Senate has had the opportunity to consider and vote on the Kyoto Protocol and the amendments to the ABM Treaty.” Letter to President Bill Clinton from Senator Jesse Helms on the CTBT, Jan. 21, 1998, at http://clw.org/pub/clw/coalition/helm0121.htm. One year later, Helms wrote in the Wall Street Journal that: “Not until the administration has submitted the ABM protocols and the Kyoto global-warming treaty, and the Senate has completed its consideration of them, will the Foreign Relations Committee turn its attention to other treaties on the president’s agenda.” Helms, supra note 33.

\(^{249}\) This Conference was held under Article XIV of the CTBT. See CTBT, supra note 5, art. XIV. Article XIV provides that, if the CTBT has not entered into force within three years of its opening for signature, a conference of ratifying states shall be convened (with signatory states invited as observers) to consider the extent of progress towards entry into force and to “decide by consensus 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.” Id. Article XIV further provides that such conferences shall be held annually until the CTBT’s entry into force, unless otherwise decided by such conferences. Id. The 1999 Conference was attended by ninety-two ratifying and signatory states. Press Release, CTBTO Prepcom, Final Declaration Unanimously Adopted at CTBT Conference (Oct. 8, 1999), at http://www.ctbto.org. The Final Declaration of the 1999 Conference noted that two of the five (NPT) nuclear weapon states (meaning France and the United Kingdom) had ratified the CTBT, and called upon the remaining three (meaning China, Russia and the U.S.) to “accelerate their ratification processes with a view toward their successful conclusion.” Final Declaration, 1999 Conference on Facilitating the Entry into Force of the Comprehensive Nuclear-Test-Ban Treaty, para. 7(e), at http://www.ctbto.org [hereinafter Final Declaration, 1999 CTBT Entry Into Force Conference]. In his statement to that Conference, the U.S. Permanent Representative to the CTBTO Prepcom said that “I would prefer today to represent an American Administration that had not only signed the CTBT but also ratified it. That goal has eluded us thus far, but not for want of effort. CTBT ratification is, and will remain, a preeminent foreign policy and security priority of the Clinton Administration.” U.S. Statement to 1999 CTBT Entry Into Force Conference, supra note 246.
against proliferation" and would cause disarmament negotiations to suffer.250
Sixty-two Senators and President Clinton urged postponement of the Senate vote, but to no avail.251

On October 13, 1999, the Senate voted to reject CTBT ratification.252
CTBT opponent Senator Jon Kyl has described the reasons for the Senate’s re-
jection of CTBT ratification as follows: “(1) it would have jeopardized the safety and reliability of our nuclear arsenal; (2) it would not have curbed nuclear proliferation; and (3) it would be neither verifiable nor enforceable.”253

The Senate rejection of the CTBT gave rise to a barrage of negative international comment. China expressed “profound regret.”254 A statement issued by the Russian Ministry of Foreign Affairs expressed “disappointment and serious concern,” and said that the vote had “delivered a serious blow to the entire system of agreements in the field of nuclear disarmament and nonproliferation, and particularly to the prospects for the Treaty on the NonProliferation of Nuclear Weapons.”255 The Senate decision was described by German Defense Minister Rudolf Scharping as “absolutely wrong,” and by French President

250. The three leaders wrote that “nuclear proliferation remains the major threat to world safety.” They warned that a U.S. failure to ratify the CTBT would undermine the stabilizing effect of the NPT, remove pressure on other states to ratify the CTBT, “give great encouragement to proliferators,” and “expose a fundamental divergence within NATO.” Jacques Chirac, Tony Blair & Gerhard Schroeder, A Treaty We All Need, N.Y. Times, Oct. 8, 1999, at A27 [hereinafter A Treaty We All Need].

251. Mason, supra note 247, at 618.

252. The vote was 48 in favor of ratification and 51 against, with one abstention—a two-thirds majority vote is the constitutional requirement for ratification. Senator John Kyl (R.-Ariz.), Maintaining “Peace Through Strength”: A Rejection of the Comprehensive Test Ban Treaty, 37 Harv. J. on Legis. 325, 325 (2000); see also Mason, supra note 247, at 618. Although President Clinton had submitted the CTBT for the Senate’s advice and consent with six “safeguards,” these did not go to the Senate floor with the CTBT. Kuchta, supra note 245, at 349-50. On this point, Senator Biden (D.-Del.) commented that “the very essential safeguards the chairman indicated all military guys want, I find it fascinating that the Republican leadership would not allow the Senate to include those in the treaty. That indicates what a stacked deck this is and how outrageous is this approach.” Id. at 350 n.135. Harrington has noted that the Senate allowed the CTBT substantially less time than other comparable treaties, and that “the Clinton impeachment issue and NATO bombings in Yugoslavia hampered serious Senate debate.” Harrington, supra note 150, at 592. Another observer has referred to the “spectacularly uninformed and abbreviated ‘debate.’” Jim Wurst, A Call to Arms Control: Coalitions Crucial to Nonproliferation, Wash. Times, Nov. 12, 2001, at A19. Several commentators have suggested that the issue became unduly politicized, and the U.S. Permanent Representative to the CTBTO Prepcm told the 1999 Conference on the CTBT’s entry into force on October 7, 1999 that “in recent hours, the Treaty’s future has become . . . a political football.” U.S. Statement to 1999 CTBT Entry Into Force Conference, supra note 246. The CTBT is one of only 21 treaties rejected by the Senate throughout U.S. history, as compared to 1,523 ratified. Sean D. Murphy, Contemporary Practice of the United States Relating to International Law, 94 Am. J. Int’l L. 102, 139 (2000). Its rejection has been described as “an important triumph for unilateralism” which “may have been a watershed in the politics of American foreign policy.” Terry L. Deibel, The Death of a Treaty, Foreign Aff., Sept.-Oct. 2002, at 142, 143.

253. Kyl, supra note 252, at 326.


255. Mason, supra note 247, at 619. A November 23, 1999 statement by the Russian Ministry of Foreign Affairs noted, somewhat ominously, that “Russia has not carried out nuclear tests since October 1990 and does not intend to resume such tests provided, of course, that the other nuclear States also follow this path.” Id. Russia ratified the CTBT on June 30, 2000.
Chirac as “a setback to the process of nonproliferation and disarmament.” The Japanese Foreign Minister, Yohei Kono, said: “We had hoped for the U.S.’s leadership in nuclear disarmament and in preventing nuclear proliferation, and so the result is very regrettable.” The Canadian Foreign Minister, Lloyd Axworthy, said: “A world accustomed to U.S. leadership in the cause of non-proliferation and disarmament can only be deeply disturbed by this turn of events, which will be welcomed by those who remain uncommitted to that cause.” Even a U.S. representative in Vienna voiced criticism: “Not only has the Senate said no to an added line of defense against proliferation; it has also weakened a potent defense barrier we had already constructed.”

President Clinton indicated immediately after the Senate vote that his administration would nonetheless maintain the U.S. nuclear testing moratorium and continue to work towards CTBT ratification: “When all is said and done, the United States will ratify the test ban treaty.” President Clinton spoke of signs among American CTBT opponents of a “new isolationism.” His Secretary of State, Madeleine Albright, wrote soon after the Senate vote to her foreign counterparts that “as more states ratify . . . I believe that this will positively influence future Senate deliberations.” The Clinton administration acted as if it considered the United States bound to refrain from acting to defeat the object and purpose of the CTBT, in accordance with Article 18 of the Vienna Convention on the Law of Treaties. For example, Secretary of State Albright wrote to her counterparts following the Senate rejection of CTBT ratification that the United States would “continue to act in accordance with its obligations under international law.” In March 2000, Albright launched a task force on the

---

256. Crossette, supra note 254.
257. Id.
259. Crossette, supra note 254. Vienna is the location of the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization.
260. Remarks on Senate Action on the Comprehensive Nuclear-Test-Ban Treaty and an Exchange With Reporters (Oct. 13, 1999), 35 WEEKLY COMP. PRES. DOC. 2026, available at http://www.access.gpo.gov/nara/nara003.html. John R. Bolton, now Under Secretary of State for Arms Control and International Security, in 2000 described the CTBT ratification that President Clinton said he continued to seek as “a political event which would truly be the equivalent of Hell freezing over.” Bolton, Is There Really ‘Law’, supra note 11, at 47. It was clear that President Clinton did not intend to seek Senate ratification again during the remainder of his term in office. This point was stressed in a March 2000 State Department briefing. Administration Launches CTBT Effort, ARMS CONTROL TODAY, Apr. 2000, at http://armscontrol.org/act/2000_04/briefs.asp#ctbt [hereinafter Administration Launches CTBT Effort].
261. The President’s News Conference (Oct. 14, 1999), 35 WEEKLY COMP. PRES. DOC. 2035, available at http://www.access.gpo.gov/nara/nara003.html [hereinafter President’s News Conference]. President Clinton also said he had told foreign Ambassadors that “we were in a battle with the new isolationists in the Republican Party.” Id. at 2036.
263. For a discussion of Article 18 of the VCLT, see infra text accompanying notes 309-23. Mason, supra note 247, at 618. President Clinton said that “we will not—we will not—abandon the commitments in the treaty and resume testing ourselves.” President’s News Conference, supra note 261. By contrast, then Senate Majority Leader Trent Lott (R.-Miss.) said on November
CTBT led by a former Chairman of the Joint Chiefs of Staff, retired General John Shalikashvili.\textsuperscript{265} Shalikashvili's report, presented to President Clinton in January 2001, concluded that "the advantages of the Test Ban Treaty outweigh any disadvantages, and thus that ratification would increase national security."\textsuperscript{266}

B. Bush Administration Approach: Opposition to CTBT and Doubt on Future of U.S. Nuclear Testing Moratorium

1. Bush Administration's Adamant Opposition to the CTBT

The Bush administration has been very public about its opposition to the CTBT. During the 2000 election campaign, Bush said that the United States should maintain its nuclear testing moratorium, but that he opposed the CTBT because it "does not stop proliferation. . . . It is not verifiable. It is not enforceable. And it would stop us from ensuring the safety and reliability of our nation's deterrent, should the need arise."\textsuperscript{267} President Bush's preferred policy has in a sense held sway since the 1999 Senate rejection of the CTBT ratification. Writing at the outset of the Bush administration, former U.S. diplomat Jack Mendelsohn identified three options for its approach to the CTBT: to renounce any intention of ratifying; to ignore the ratification issue while continuing to make U.S. contributions to CTBT implementation costs; and to reverse its opposition to the CTBT.\textsuperscript{268} Of these three, the administration has trodden the middle course. The U.S. isolation from the rest of the international community on this issue is well illustrated by the pattern of voting on a recent U.N. General Assembly Resolution on the CTBT: 164 in favor, one against (United States) and five abstaining.\textsuperscript{269}

\begin{footnotes}
\item The current Under Secretary of State for Arms Control and International Security, John R. Bolton, wrote in 2000 that "[President Clinton's] Administration's zeal to find authority [to continue the testing moratorium] in an unratified international convention must surely be the high-watermark of Globalist achievements in the United States, truly snatching a victory out of the CTBT's ashes. The unrepentant Americanists in the Senate, however, did take due note of the President's preference for the Vienna Convention over the Constitution." Bolton, \textit{Global Governance}, supra note 16, at 212. On Bolton's characterizations of "Globalists" and "Americanists," see supra note 16.
\item 265. \textit{Administration Launches CTBT Effort}, supra note 260.
\item 267. Mendelsohn, supra note 262. This is the standard set of reasons proffered by U.S. opponents of the CTBT.
\item 268. Id. at 1-2.
\item 269. G.A. Res. 57/100, U.N. Doc. A/Res/57/100 (adopted Nov. 22, 2002), \textit{to be reissued in U.N. GAOR, 57th Sess., Supp. No. 49}. The abstaining states were Colombia, India, Lebanon, Mauritius and Syria. The Resolution stressed the importance and urgency of unconditional signature and ratification to achieve the earliest entry into force of the CTBT; urged the maintenance of national moratoria on nuclear weapons testing; urged states which had not signed the treaty to sign and ratify it as soon as possible; and urged states which had signed but not ratified it, "in particular those whose ratification is needed for its entry into force, to accelerate their ratification processes with a view to their earliest successful conclusion." \textit{Id.}
\end{footnotes}
The administration has reportedly contemplated formally renouncing the CTBT. In oral testimony to Senators regarding his nomination as Secretary of State, General Colin Powell said in January 2001 that the Bush administration would not seek Senate ratification of the CTBT in that Congressional session. During its first six months, the Bush administration considered the possibility of withdrawing the CTBT from the Senate, but was advised by State Department lawyers that the president lacked power to do so. It appears that such withdrawal from the Senate may well have been followed by an announcement that the United States would not ratify the treaty. The Pentagon reportedly put forth three CTBT options in December 2001: (1) renounce the CTBT and cease funding the CTBT verification system, (2) renounce the CTBT but continue partial funding of verification system, and (3) maintain the status quo (with the latter clearly not the Pentagon’s preferred option). National Security Council “moderates” are reported to have blocked high-level debate of the options raised

270. This differed slightly from Powell’s prepared testimony, which indicated that the Bush administration would not seek passage of the CTBT at all. Jane Perlez, Softball for Powell, and with No Sweat, N.Y. TIMES, Jan. 18, 2001, at A17.

271. Thom Shanker & David E. Sanger, White House Wants to Bury Pact Banning Tests of Nuclear Arms, N.Y. TIMES, July 7, 2001 at A1. For a contrary view on the powers of the President, see David C. Scott, Comment, Presidential Power to “Un-sign” Treaties, 69 U. Chi. L. Rev. 1447 (2002). One September 2001 report cites a “government document” as saying (1) that the State Department had concluded that “once a treaty has been presented to the Senate . . . an affirmative vote to return the treaty to the executive is required to remove it from the Senate calendar,” and (2) that the “administration has no plans to ask the Senate to do anything with the treaty.” Philipp C. Bleek, White House to Partially Fund Test Ban Implementing Body, ARMS CONTROL TODAY, Sept. 2001, at http://armscontrol.org/act/ 2001_09/ctbtsept01.asp [hereinafter White House to Partially Fund Test Ban Implementing Body].

272. The Bush administration has shown its readiness to renounce a multilateral treaty previously signed by the United States. It announced on May 6, 2002 that the United States did not intend to ratify the Rome Statute of the International Criminal Court. Although this announcement is consistent with treaty law, there appears to be no precedent for it. For example, the head of the United Nations treaty section, Palitha Kohona, reportedly said that it was unheard of for a state which had signed a treaty to withdraw its signature. Neil A. Lewis, U.S. Is Set to Renounce Its Role in Pact for World Tribunal, N.Y. TIMES, May 5, 2002, at A18. Hans Blix, who currently holds the position of Executive Chairman of the U.N. Monitoring, Verification and Inspection Commission (UNMOVIC) and who is well-experienced in treaty law and practice, remarked prior to the U.S. announcement that he thought reports that the United States contemplated this action marked the first time a government had done so. Hans Blix, Developing International Law and Inducing Compliance, 41 Colum. J. Transnat’l L. 1, 5 (2002). In a letter to U.N. Secretary-General Kofi Annan, John R. Bolton, Under Secretary of State for Arms Control and International Security, wrote that “the United States does not intend to become a party to the treaty,” and that “[a]ccordingly, the United States has no legal obligations arising from its signature on December 31, 2000.” Curtis A. Bradley, U.S. Announces Intent Not to Ratify International Criminal Court Treaty, ASIL INSCRRS, May 2002, at http://www.asil.org/insights/insigh87.htm. Bradley notes that Bolton’s contention that the United States “has no legal obligations arising from its signature” appears to be an implicit reference to Article 18 of the VCLT. Bradley adds that “it is open to question whether Mr. Bolton’s statement reflected an acceptance of Article 18 or merely an abundance of caution on the part of the Administration.” Id. It might be argued that the very fact of a formal U.S. announcement that it would not ratify the Rome Statute indicates a concern not to fall foul of Article 18 of the VCLT. For a discussion of the Bush administration and the International Criminal Court, see Galbraith, supra note 18.

by the Pentagon, in view of the potential diplomatic consequences of any renunciation of the CTBT by the United States.274

The United States has continued to participate in the work of the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO Prepcom), which is tasked with establishing the CTBT verification regime prior to the treaty's entry into force.275 The United States has also, for the most part, continued to fund its share of payments to the CTBTO Prepcom.276 The administration announced in August 2001 that it would not fund certain areas of the CTBTO Prepcom's work, notably those relating to on-site inspections.277 This stance drew criticism from Russia.278 In apparent pro-

274. Id. On differences of opinion within the Bush Administration concerning CTBT policy, see infra note 457.


277. White House to Partially Fund Test Ban Implementing Body, supra note 271. The administration's 2003 budget request included $18.2 million for the U.S. contribution to the CTBTO Prepcom, which excluded funding for Prepcom activities other than the International Monitoring System, such as those related to on-site inspections. Bush Requests Funds for CTBT Monitoring, ARMS CONTROL TODAY, Mar. 2002, at www.armscontrol.org/act/2002_03/briefsmarch02.asp#ctbt [hereinafter Bush Requests Funds for CTBT Monitoring].

278. According to a statement issued by the Russian Ministry of Foreign Affairs on August 27, 2001: "In the international community it is believed that such a move does not correspond to the obligations assumed upon signing the Treaty by all states, including the USA." See White House to Partially Fund Test Ban Implementing Body, supra note 271.
test at the U.S. approach, China and Iran are reported to have restricted their contributions to the CTBT’s International Monitoring System (IMS). The value of the IMS in monitoring possible nuclear tests explains the Bush administration’s political willingness to fund the IMS despite the administration’s opposition to the CTBT.

International pressure on the United States to ratify the CTBT has continued. The United States chose not to attend the November 2001 conference of CTBT ratifying and signatory states on entry into force. Like its 1999 counterpart, that Conference called on nuclear weapon states which had not yet ratified the CTBT (meaning, in 2001, the United States and China) to do so. In view of the Bush administration’s ambivalence about the future of the U.S. testing moratorium, see infra text accompanying notes 285-90, one reason for U.S. non-attendance in 2001 may have been the following statement in the Final Declaration of the 1999 entry-into-force Conference (agreed by all attending ratifying and signatory states): “We reaffirm our commitment to the Treaty’s basic obligations and our undertaking to refrain from acts which would defeat the object and purpose of the Treaty pending its entry into force.” Final Declaration, 1999 CTBT Entry Into Force Conference, supra note 249, para. 8. In fact, identical wording did appear in the Final Declaration of the 2001 entry-into-force Conference, which was again agreed by consensus by attending ratifying and signatory states. See Conference on Facilitating the Entry into Force of the Comprehensive Nuclear-Test-Ban Treaty, Report of the Conference Final Declaration, Annex, at 6 para. 13 (Nov. 15 2001), at http://www.ctbto.org/reference/article_xiv/final_declaration.pdf [hereinafter Final Declaration, 2001 CTBT Entry Into Force Conference].

National statements at the Conference illustrated some of the themes preoccupying many CTBT ratifying and signatory states. The main emphasis was on the importance of the early entry into force and universality of the CTBT. Several statements referred to the role of the CTBT in complementing the NPT (e.g. Singapore and Denmark), the need to address vertical as well as horizontal proliferation (e.g. South Africa and Singapore), the need for a multilateral approach to global security (e.g. Kazakhstan and South Africa), and the existence of a special responsibility on the part of nuclear weapon states (e.g. Costa Rica and Ecuador). U.N. Press Release, Conference on Facilitating Entry into Force of the Comprehensive Nuclear-Test-Ban Treaty, France’s Foreign Minister Urges States Crucial to Nuclear-Test-Ban Treaty’s Success to Ratify It Without Delay, As Headquarters Conference Continues (Nov. 12, 2001), U.N. Doc. DC/2819 at http://www.un.org/News/Press/docs/2001/DC2819.doc.htm (paraphrasing national statements). In some cases, comments were quite specifically directed towards U.S. policies. For example, Singapore spoke of troubling signs of inclinations towards repudiation or abrogation of the CTBT, or a lapse in the global moratorium on nuclear testing. Id. South Africa noted a “rising unilateralist paradigm shift” in the nuclear non-proliferation and disarmament field which could seriously undermine agreed international treaty re-
September 2002, eighteen Foreign Ministers representing France, Russia, the United Kingdom and a range of middle and small powers issued a joint statement calling upon all states which had not signed and ratified the CTBT—especially those whose ratification is required for entry into force—to do so as soon as possible. The statement also called for the continuation of nuclear testing moratoria, adding that “[v]oluntary adherence to such a moratorium is of the highest importance, but cannot serve as a substitute for entry into force of the Treaty.”

2. Uncertain Future of the U.S. Nuclear Testing Moratorium

The administration has so far maintained the unilateral U.S. nuclear testing moratorium in place since 1992, but has indicated its preparedness to test in the future. As White House spokesperson Ari Fleischer put it in January 9, 2002: The President has said that we will continue to adhere to the no-testing policy. If that would change in the future, we would never rule out the possible need to test to make certain that the stockpile, particularly as it’s reduced, is reliable and safe. So he has not ruled out testing in the future, but there are no plans to do so.

The Bush administration’s Nuclear Posture Review states that the United States might resume testing to develop new nuclear weapons and to ensure the reliability of existing weapons: “While the United States is making every effort to maintain the nuclear stockpile without additional nuclear testing, this may not be possible in the indefinite future.”

Id. Colombia said that doctrines of first-use and pre-emptive use of nuclear weapons had been coupled with a marked decline in mechanisms to control nuclear weapons, particularly in the context of the ABM Treaty and START II. Id. The concern about “multilateralism” echoed in a statement delivered by Indonesia on behalf of the 115-member Non-Aligned Movement to the first Preparatory Committee meeting for the 2005 NPT Review Conference: “We are also deeply concerned about the progressive erosion of multilateralism, and emphasize the importance of collective international efforts to enhance and maintain international peace and security.” See Roche, supra note 220. The same theme featured at the U.N. General Assembly in November 2002, with the adoption of a resolution put forward by South Africa on behalf of the Non-Aligned Movement, entitled “Promotion of Multilateralism in the Area of Disarmament and Non-Proliferation.” G.A. Res. 57/63, to be reissued in U.N. GAOR, 57th Sess., Supp. No. 49, A/Res/57/63, available at http://www.un.org/Depts/dhl/resguide/r57.htm.


284. Id.

285. News Review: Speculation over Possible Return to US Nuclear Testing, DISARMAMENT DIPLOMACY, Jan.-Feb. 2002, at http://www.acronym.org.uk/dd/dd62/62nr03.htm. Defense Secretary Rumsfeld said on January 8, 2002 that countries with nuclear weapons had “a responsibility to see that they are safe and reliable. To the extent that can be done without testing, clearly that is the preference. And that is why the President has concluded, thus far, that is the case.” Id. (emphasis added).

286. See supra text accompanying notes 361-95.

287. NPR Extracts, supra note 154 (citing NPR at 55). The NPR added that: “Increasingly, objective judgments about capability in a non-testing environment will become far more difficult. Each year the DoD [Department of Defense] and DOE [Department of Energy] will reassess the need to resume nuclear testing and will make recommendations to the President.” Id.; see also Michael R. Gordon, U.S. Nuclear Plan Sees New Targets and New Weapons, N.Y. TIMES, Mar. 10,
Additionally, the United States is moving to reduce the readiness period required for testing from 24-36 months to one year or perhaps less. Under Secretary of State for Arms Control and International Security John R. Bolton has referred to the Nuclear Posture Review decision "to try and upgrade our testing infrastructure so as to make it possible to test in a relatively earlier time if a decision [to test] were made." Arguing that this "decision" had been "widely misunderstood," Bolton said that the United States would continue to observe the testing moratorium announced by the first President Bush. He described the new approach as

simply one way of being able to reduce the level of operational nuclear warheads with some feeling of assurance that if the strategic circumstances in the world change dramatically and a decision were made sometime down the road we'd be in a better position in terms of our testing and research infrastructure than we are now.

These developments indicate that there is little prospect that the Bush administration might warm towards ratification of the CTBT. Indeed, all indications are to the contrary.

C. Evaluation: U.S. Policy Precludes CTBT's Entry into Force and Encourages Proliferation

The CTBT provides a particularly striking example of an administration determined to eschew multilateral efforts to address global problems in favor of unilateral, not to say exceptionalist, responses. The entire international community will be deprived of the benefits of the CTBT until such time as the United States ratifies it. No serious political pressure can be levied on India and Paki-

288. Since 1993, the U.S. Energy Department has been required to be ready to resume testing within 24-36 months. Christine Kucia, Pentagon Memo Raises Possibility of Nuclear Testing, ARMS CONTROL TODAY, Dec. 2002, at http://www.armscontrol.org/act/2002_12/nuctesting_dec02.asp. The Defense Authorization Act for fiscal 2003 which was passed by Congress in November 2003 calls for a report on plans and costings calculations for nuclear testing readiness periods of 6, 12, 18 and 24 months. Id. A report by the Office of Inspector General in the U.S. Department of Energy, which was released in September 2002, said that the Department's ability to resume full-scale nuclear testing within 36 months was at risk because of personnel losses, the dismantling of facilities, and unusable equipment. Christine Kucia, Nuclear Test Readiness at Risk, DOE Reports, ARMS CONTROL TODAY, Oct. 2002, at http://www.armscontrol.org/act/2002_10/nucleartest_oct02.asp. The Panel to Assess the Reliability, Safety and Security of the United States Nuclear Stockpile, a panel established by Congress, recommended in March 2002 that testing readiness should be reduced to between three months and one year. Philipp C. Bleek, Foster Panel Calls for Reducing Nuclear Test Preparation Time, ARMS CONTROL TODAY, April 2002, at http://www.armscontrol.org/act/2002_04/fosterapril02.asp. The Nuclear Posture Review foreshadowed an enhancement of test readiness over the next three years, arguing that this was needed because of the retirement of experienced personnel and because "the 2-3 year posture may be too long to address any serious defect that might be discovered in the future." NPR Extracts, supra note 154 (citing NPR at 35-36).


290. Id.
stan to sign and ratify the CTBT while its fate hangs in the balance because of the poor prospects for its ratification by the United States. To many outside observers, the stated rationale blocking U.S. ratification is at best narrow and misjudged—and at worst provides disturbing evidence that the United States is not committed to fulfilling its obligations under Article VI of the NPT.

1. Policy Debate on the United States and CTBT Ratification

The contribution the CTBT can make to U.S. national security has been well summarized as follows: codifying an international norm against nuclear testing; preserving the U.S. advantage in nuclear weapons technology; reducing the likelihood of significant new proliferation threats; enhancing U.S. monitoring capability; and strengthening the U.S. ability to persuade others to comply with the nuclear nonproliferation regime. 291 As for what the CTBT has to offer not just the United States but the entire world, in the words of U.N. Secretary-General Kofi Annan, the CTBT “is a crucial element in the nonproliferation regime. The longer we delay the entry into force of the CTBT, the greater the risk that nuclear testing will resume and that, in turn, would make nonproliferation much harder to sustain.” 292

Against these perceived advantages must be set the criticisms leveled against the CTBT by its Bush administration opponents: that it would undermine confidence about the safety and reliability of the U.S. nuclear stockpile, would be neither verifiable nor enforceable, and would not impede proliferation. While there is not space here to enter fully into the debate, a few examples follow of points rebutting the administration’s key criticisms.

On the first alleged shortcoming of the CTBT, the leaders of France, the United Kingdom and Germany wrote in late 1999 that all nuclear powers, including the United States, had carefully examined whether it would be possible to guarantee the safety and reliability of the U.S. nuclear stockpile, and that: “All reached the same conclusion. With the right investment and modern technology, the necessary assurance of safety and reliability can be maintained without further nuclear tests.” 293 Moreover, a committee of nuclear scientists operating under the auspices of the U.S. National Academy of Scientists concluded that the United States “has the technical capabilities to maintain confidence in the existing nuclear-weapon stockpile under the CTBT, provided that adequate resources are made available . . . and are properly focused on this task.” 294

291. Mendelsohn, supra note 262.
292. See Dhanapala, supra note 232 (quoting U.N. Secretary-General Kofi Annan, Address to the Conference on Facilitating the Entry into Force of the CTBT (Nov. 2001)).
293. A Treaty We All Need, supra note 250.
Another key administration criticism of the CTBT relates to verification. In view of expert technical commentary, it is difficult to see how this criticism can be sustained. As noted in the Joint Statement issued by eighteen Foreign Ministers in September 2002, the "[CTBT] verification system will be unprecedented in its global reach." The report of an "Independent Commission on the Verifiability of the CTBT" concluded that, when fully in place, the verification resources of the CTBT would "be capable of meeting the international community's expectation that relevant events will be detected, located and identified with high probability," that verification resources would improve further over time, and that "these global capabilities constitute a complex and constantly evolving verification gauntlet, which . . . will serve as a powerful deterrent." The report of the National Academy of Sciences committee of nuclear scientists mentioned above also casts doubt on claims that the CTBT is "unverifiable." That report noted that nuclear explosions with a yield of 1 kiloton or more could be detected and identified "with high confidence in all environments" in the absence of evasion efforts. The committee felt that evasion attempts in the atmosphere or at the ocean surface would probably not escape detection, but that attribution could be difficult. The committee also concluded that, with the CTBT's International Monitoring System operational, an underground nuclear explosion could not be confidently hidden if its yield were larger than one or two kilotons. The committee's report noted that most nuclear testing purposes require multiple rather than single tests (increasing the prospects for detection); and that states with little testing experience were "much less likely to succeed in concealing significant tests." Indeed, any tests they conducted would not enable them to "cross any of the thresholds in nuclear-weapon development that would matter in terms of the threat they could pose to the United States." The committee concluded that "very little of the benefit of a scrupulously observed CTBT regime would be lost in the case of clandestine testing within the considerable constraints" of monitoring capabilities, and that the "worst-case scenario under a no-CTBT regime poses far bigger threats to US security—sophisticated nuclear weapons in the hands of many more adversaries—than the worst-case scenario of clandestine testing in a CTBT regime, within the constraints posed by the monitoring system." Finally, there is the assertion that once in force the CTBT would not impede proliferation. Those asserting this have not demonstrated why making it harder to conduct nuclear tests would fail to curb proliferation. No one contends that the CTBT alone will constitute the solution to the problem of nuclear non-


295. Joint Ministerial Statement on the CTBT, supra note 283.


298. Id.

299. Id.

300. Id.

301. Id.
proliferation. However, as shown by the overwhelming international support for the CTBT, it is widely considered to be a very powerful tool in the nuclear nonproliferation regime.\textsuperscript{302} The long-term failure of the CTBT to enter into force, especially having come so close to fruition, would mean one less tool was available to guard against proliferation and would weaken the global nuclear nonproliferation norm.

As Mendelsohn has observed, the potential problems of the administration's current "do nothing" approach to the CTBT will arise in the longer term. The United States is effectively "abiding by the treaty without being able to take advantage of its verification and normative benefits," and the unilateral nuclear testing moratoria of other nuclear weapon states may not survive indefinitely without the entry into force of the CTBT.\textsuperscript{303}

2. Incompatibility of Current Approach with U.S. Disarmament Commitments

The disarmament commitments undertaken by the United States in Article VI of the NPT and in the course of the NPT review process are outlined in Part V.C of this article. Koplow argued in 1993 that the earlier refusal of the United States to countenance CTBT negotiations gave rise to an argument that it was thereby in "material breach" of its NPT Article VI obligations.\textsuperscript{304} The same argument is likely to be applied to continuing U.S. non-ratification of the CTBT, particularly if U.S. nuclear policy is seen as operating to defeat the object and purpose of the CTBT.\textsuperscript{305} In 2000, the United States agreed to 13 "practical steps" on the implementation of Article VI of the NPT, the first of which called for the early entry into force of the CTBT.\textsuperscript{306} The United States informed NPT parties in May 2002 that it no longer supported this step.\textsuperscript{307} The Bush administration seems to regard the CTBT as a disarmament measure with negligible, if any, nonproliferation value which would undesirably constrain U.S. options. However, such a characterization of the CTBT does not alter the longstanding view of most other states that a CTBT is a valuable nonproliferation tool.

In conjunction with the administration's ambivalence about resuming nuclear testing and its reported inclination towards developing new nuclear weapons, the apparent U.S. disregard of its commitments under Article VI and under the NPT review process can only harm the cause of nonproliferation. It gives an open invitation to other states to follow the U.S. example by choosing not to subscribe to or abide by those parts of the nonproliferation regime they find valuable.

\textsuperscript{302} The CTBT Preamble includes recognition that "the cessation of all nuclear weapon test explosions and all other nuclear explosions, by constraining the development and qualitative improvement of nuclear weapons and ending the development of advanced new types of nuclear weapons, constitutes an effective measure of nuclear disarmament and non-proliferation in all its aspects." CTBT, supra note 5.

\textsuperscript{303} Mendelsohn, supra note 262.

\textsuperscript{304} Koplow, supra note 8, at 303, 384.

\textsuperscript{305} See infra text accompanying notes 309-23 (discussing Article 18 of the Vienna Convention on the Law of Treaties).


\textsuperscript{307} See infra text accompanying notes 446-47.
most irksome. It also undermines the capacity of the United States to succeed in those areas where it does choose to engage internationally—such as export controls, “nuclear threat reduction” and strengthening the IAEA safeguards system.308

3. U.S. Obligation Not to Defeat the Object and Purpose of the CTBT

As indicated above, it appears that the Bush administration plans to maintain the U.S. nuclear testing moratorium only until such time as it chooses otherwise, and is indeed moving towards a shorter preparation lead time for any resumption of testing. There is little indication that the administration considers that the United States signature of the CTBT imposes any constraints in this respect. The only such indication is very oblique: the inference one might draw from President Bush’s reported interest in withdrawing the CTBT from the Senate. The idea may have been to announce, as with the Rome Statute on the International Criminal Court, that the United States does not intend to ratify the CTBT. It is still possible, although unlikely, that the administration will take this course.

In contrast to the Clinton administration, the Bush administration does not appear to be acting on the premise that the United States is bound by Article 18 of the Vienna Convention on the Law of Treaties (VCLT). 309 That article provides that a state which has signed a treaty “is obliged to refrain from acts which would defeat the object and purpose” of that treaty “until it shall have made its intention clear not to become a party to the treaty.” The United States has signed but not ratified the VCLT, but is bound by its provisions to the extent that they reflect customary international law. Opinion is divided on the extent to which Article 18 of the VCLT reflects customary international law. 310 The International Law Commission Commentary311 accompanying the provision stated: “That an obligation of good faith to refrain from acts calculated to frustrate the object of the treaty attached to a State which has signed a treaty subject to ratification appears to be generally accepted.”312 A number of writers have

308. See infra part V.A.

309. Curtis Bradley has observed that whether the administration considered the U.S. to be bound by Article 18 of the VCLT was not clear from the administration’s May 2002 announcement that the U.S. would not ratify the Rome Statute of the International Criminal Court. Bradley, supra note 272.

310. For example, Malanczuk says of Article 18: “There is some authority for this rule in customary law, but the matter is controversial.” Malanczuk, supra note 30, at 135. Curtis A. Bradley remarks that “it is not clear whether [Article 18] reflects customary international law.” Bradley, supra note 272.

311. The VCLT is based on Draft Articles produced by the International Law Commission which were supplemented by a Commentary. See Harris, supra note 15, at 563. Many of its provisions represent customary international law. See, e.g., id.; Malanczuk, supra note 30, at 40. The VCLT has been ratified by 93 countries.

concluded that Article 18 codifies customary international law. 313 Moreover, the Third Restatement of Foreign Relations Law incorporates the principle expressed in Article 18. 314

While there is not space here to enter into the debate in detail, this article proceeds on the basis that the weight of opinion suggests that Article 18 does reflect customary international law, and is therefore binding on non-parties including the United States. Even if Article 18 does go beyond codifying the obligation as understood in customary international law, the view adopted here is that such "progressive development" is irrelevant to the central content of the obligation which binds the United States in relation to the CTBT. The precise delineation of the customary rule is not necessary because our concern here is with the core of the relevant obligation rather than with its outer limits.

What are the implications of this "interim obligation" 315 for the United States in relation to the CTBT? The obligation is to refrain from acts which would defeat the "object and purpose" of the CTBT. The first step is to identify the treaty's object and purpose. The CTBT's object and purpose, as evidenced by its preamble and its central obligation, can be summarized as follows: achieving the cessation of all nuclear weapon test explosions and all other nuclear explosions, by means of a universal and verifiable comprehensive test ban treaty, as a valuable non-proliferation and disarmament tool.

313. For example, Michael J. Glennon has concluded that "[the better view appears to be that Article 18 codified international law as it existed at the time the Vienna Convention was adopted]." Scott, supra note 271, at 1455 n.68 (quoting Michael J. Glennon, Constitutional Diplomacy 171 (1990)). Similarly, Linehan suggests that the obligation on a signatory state to refrain from acts that would defeat the object and purpose of the treaty "is accepted as custom." Linehan, supra note 37, at 101. Scott cites both Joni S. Charme and Martin A. Rogoff to the effect that Article 18 codified existing customary international law. Scott, supra note 271, at 1455 n.68. In his study of the VCLT, Sinclair quotes O'Connell's view that, while Article 18 "goes further than customary international law would appear to go," it is also in one respect less rigid than the [customary] principle of good faith on which it is based (in relating the obligation only to the treaty's "object and purpose" and not to its incidents). Sinclair, supra note 37, at 19. Sinclair also cites Nisot as depicting Article 18 as a new regime amounting to a derogation of customary international law, id. at 19, but this view appears to have little support. Sinclair himself opines that Article 18 "in all probability constitutes at least a measure of progressive development, although there is some inchoate authority for the proposition that States which have signed a treaty subject to ratification must observe certain restraints on their activities during the period preceding entry into force, particularly if those activities would render the performance by any party of the obligations stipulated in the treaty impossible or more difficult." Id. at 43. By referring to "a measure of progressive development," Sinclair agrees with O'Connell that the provision goes beyond codifying customary international law. However, in observing that Article 18 does not derogate from the basic rule of the non-retroactivity of treaties, Sinclair highlights the provision's customary law basis by describing it as "an expression of what is an autonomous obligation imposed upon States by virtue of the principle of good faith, quite independently of the [signed] treaty." Id. at 86.

314. "Prior to the entry into force of an international agreement, a state that has signed the agreement or expressed its consent to be bound is obliged to refrain from acts that would defeat the object and purpose of the agreement." Restatement (Third) of Foreign Relations Law § 312(3) (1987) [hereinafter Restatement (Third)].

A range of tests have been proposed for determining which “acts” on the part of a signatory would defeat the object and purpose of a treaty.\textsuperscript{316} Klabbers has noted difficulties in using, as the sole test, either the legitimate expectations of other states or the subjective intent of the signatory state whose acts are in question.\textsuperscript{317} Instead, he favors a “manifest intent” test, where “what matters is the intent of an act’s author as it manifests itself to the outside world.”\textsuperscript{318} Considering these three tests might lead to the following conclusions about current or hypothetical U.S. acts: (a) The (hypothetical) resumption of U.S. testing by means of nuclear explosion would defeat the object and purpose on all tests;\textsuperscript{319} (b) Preparatory measures towards such resumption might (but probably would not) defeat the object and purpose if the legitimate expectations test alone were applied but would not defeat the object and purpose if either of the other tests were used; (c) Restriction of CTBTO Prepcom funding would be a minor restriction, not defeating the object and purpose regardless of the test applied; and (d) Statements indicating that the United States does not view its CTBT signature as having imposed any constraints on its nuclear testing policy would have the same results as (b). While none of these acts is in keeping with the spirit of the CTBT, it is the actual resumption of testing that would be beyond the pale in terms of Article 18 of the VCLT.

Apart from its implications for the CTBT, U.S. questioning of the “interim obligation” arguably itself constitutes unilateralist disengagement from the rules established by states to govern treaties. A related problem with the apparent U.S. approach to Article 18 is the potential “copycat” or ripple effect. The Bush administration may well argue that it is not bound by the rule expressed in Article 18 of the VCLT, or by the customary rule which many argue that provision codifies. However, a number of other countries are in the same position as the United States: They have not ratified the VCLT, and have signed but not ratified the CTBT. Examples include Iran, Indonesia and Israel. Any of these countries could, in theory, take a page out of the U.S. book. They could argue

\textsuperscript{316.} Aust describes the test as “objective,” and argues that “the state may not do an act which would (not merely might) invalidate the basic purpose of the treaty.” \textsc{Anthony Aust}, \textsc{Modern Treaty Law and Practice} 94 (2000). The test is sometimes framed as being whether the acts of the signatory state in question would render it impossible for the signatory state or other states to fulfill their treaty obligations. It is difficult to sustain the argument that resumption of nuclear testing by the United States would render it impossible for other states to fulfill their CTBT obligations. However, the associated change in the security environment would make it more difficult for other states to refrain from commencing or resuming testing themselves and could also affect decisions of states as to whether to become party to the CTBT. Moreover, the fact of continuing U.S. non-ratification of the CTBT would in itself preclude the treaty’s entry into force, thus hampering the achievement of the object and purpose of the treaty. The combined effect of these factors might be regarded as defeating the treaty’s object and purpose.

\textsuperscript{317.} Klabbers, \textit{supra} note 315, at 299-305.

\textsuperscript{318.} \textit{Id.} at 305.

\textsuperscript{319.} The American Law Institute commentary in the Third Restatement of Foreign Relations law notes that it is “often unclear what actions” would defeat the object and purpose of an agreement. Without attempting to formulate a general test, the commentary provides the following example: “Testing a weapon in contravention of a clause prohibiting such a test might violate the purpose of the agreement, since the consequences of the test might be irreversible.” \textsc{Restatement (Third)}, supra note 314, at 174 para. (i).
that they were not bound by Article 18 of the VCLT, and therefore not obliged to refrain from acts which would defeat the object and purpose of the CTBT. This outcome would not be in the interests of the global nuclear nonproliferation regime. Nor would it advance U.S. national security interests, however defined.

The 97 states which have already ratified the CTBT are obliged to refrain from acts which would defeat the treaty's object and purpose "pending the entry into force of the treaty and provided that such entry into force is not unduly delayed." Should the CTBT not have entered into force ten or fifteen years after being opened for signature, ratifying states (including Russia and France) could decide to commence or resume nuclear testing, invoking Article 18 and a claim of undue delay to legitimate such action. A country which had signed but not ratified the CTBT, such as China, could probably argue a fortiori that undue delay served to relieve it too of its interim obligation. So the United States cannot assume that other states will comply indefinitely with the CTBT's central provision—the prohibition on nuclear explosions—if the CTBT does not enter into force, despite widespread international acceptance of the existence of the interim obligation. The unraveling of the CTBT norm is all the more likely if the United States does in due course announce an intention not to ratify the CTBT. The effect would be to preclude the CTBT's entry into force, at least until any future U.S. administration chose to reverse the announced policy. Such formal renunciation of the treaty by the United States could be expected to result in claims that the treaty's entry into force had been "unduly delayed" (and indeed rendered impossible) so as to negate the interim obligation of all 166 signatory and ratifying states.

These examples highlight the major risk of the unilateralism inherent in the Bush administration's CTBT policy: By choosing to go its own way and to ignore the existence of the non-testing norm solidified by the CTBT, the United States will encourage others to follow suit.

320. VCLT, supra note 15, art. 18 (emphasis added).
321. Assuming here for purposes of example that no Chinese ratification eventuates.
322. On a literal reading of Article 18, the "unduly delayed" proviso appears to apply only to a state that has "expressed its consent to be bound by the treaty" (which, for most multilateral treaties including the CTBT, entails ratification). However, it would be incongruous if a state which only signs a treaty thereby incurs an "interim obligation" in any way more onerous than that of a state which has gone so far as to ratify the treaty. A state which has signed but not ratified the treaty may simply announce its intention not to ratify. Alternatively, it might prefer to try to keep its signature on foot during the period of "undue delay" while arguing that, for that period, it was not bound by the interim obligation.
323. Presumably the United States would then have to sign the CTBT again. As noted above, there appears to be no state practice in this area apart from the U.S. action regarding the Treaty of the International Criminal Court. See supra note 272.
V. U.S. NUCLEAR STRATEGY AND THE U.S. APPROACH TO THE NPT REGIME

A. U.S. POLICIES ON EXPORT CONTROLS, THREAT REDUCTION AND STRENGTHENING THE IAEA

This section considers three areas where the Bush administration has engaged in international nonproliferation efforts. The administration has supported export control regimes designed to reduce proliferation. It has also engaged in bilateral programs of assistance for nuclear threat reduction, and has supported efforts to strengthen the capacity of the International Atomic Energy Agency (IAEA) to monitor states’ compliance with nuclear nonproliferation obligations. Stressing the role of the United States in export control regimes in particular, Assistant Secretary for Nonproliferation John S. Wolf has said that: “Stopping proliferation is the ultimate multilateral activity.”

Export control regimes are intended to control the supply of sensitive technology, equipment or materials for weapons of mass destruction or missiles as a means of limiting proliferation. Such regimes are regarded by the Bush administration as “a key component” of the “struggle against proliferation and terrorism.” The export control regimes are voluntary groupings which have been criticized for many years, particularly by some Non-Aligned Movement states, as “exclusionary and elitist.” The regimes represent only a limited form of multilateral engagement, but despite the “exclusionary” taint they perform a crucial function. In recent years there have been some deliberate outreach and transparency efforts by regime members. The Bush administration is moving towards comprehensive export controls legislation to enhance na-

324. Assistant Secretary of State for Nonproliferation John Wolf has described the main emphases of the administration’s nonproliferation policy as: threat reduction in the former Soviet Union; preventing the acquisition of weapons of mass destruction and missiles by Iran; addressing the risk of nuclear and missile proliferation “in and from South Asia;” strengthening export controls; and strengthening the IAEA. Wolf, supra note 7.

325. Id. Wolf went on to say that the United States would use many tools in pursuit of its goal of forging “an effective global partnership against the nexus of proliferation and terror . . . . We will build international partnerships where we can, involve the private sector where we can but we will act wherever and whenever we must.” Id. Echoing a key theme of the administration, Wolf also said that the events of September 11, 2001 had “spurred a new sense of urgency in the fight against proliferation.” Id.

326. The key export control regimes are as follows: (1) the Missile Technology Control Regime, established in 1987 and now having thirty-three members, on missiles and missile technologies; (2) the Nuclear Suppliers Group, established in 1975, on nuclear and nuclear-related exports; (3) the Australia Group, established in 1985, focusing on chemical and biological weapon materials; and (4) the Wassenaar Arrangement, on conventional weapons and related dual-use technologies. See, e.g., Ambassador Norman Wulf, Remarks at Transshipment Enforcement Conference for Middle East States, Meeting the Nonproliferation Challenge, Export Controls Key to Curbing Proliferation (May 20, 2002), at http://usinfo.state.gov/topics/pol/arms/02052901.htm [hereinafter Export Controls Key]; News Review: MTCR Plenary Meeting, DISARMAMENT DIPLOMACY, Oct.-Nov. 2002, at http://www.acronym.org.uk/dd/dd67/67nr10.html [hereinafter MTCR Plenary Meeting].

327. Export Controls Key, supra note 326.

328. MTCR Plenary Meeting, supra note 326.

329. Id.
tional enforcement capabilities, as well as assisting other states to improve their export control systems. A recent report of Congress's General Accounting Office recommended the development of a U.S. strategy to strengthen the regimes. The report recommended that the strategy include consultation with other regime members, U.S. compliance with regime requirements to report U.S. denials of export licenses for regime-controlled items, and criteria for assessing the effectiveness of regimes. While the report identified a number of perceived shortcomings of the regimes (notably their inability to enforce Russian compliance with regime commitments), the State Department's view was that the report "revealed no significant shortcomings about nonproliferation." Active U.S. involvement in export control regimes is positive. However, the degree to which the United States achieves its goals in relevant export control regimes will be affected by the level of credibility it commands as a result of its wider nuclear-related policies.

Another positive direction of the Bush administration has been its approach to strengthening IAEA capacities.

First, the administration has moved towards U.S. ratification of the Additional Protocol to the 1980 Safeguards Agreement between the United States and the International Atomic Energy Agency (IAEA). In May 2002, President Bush sent the Additional Protocol to the Senate for its advice and consent to ratification. Based on the IAEA's Model Additional Protocol, which is designed to improve the capacity of the IAEA to detect clandestine nuclear weapons programs, the U.S. Additional Protocol differs from that accepted by non-nuclear weapon states in one respect: By not requiring its application to activities and locations of national security significance. U.S. ratification of the Protocol will set a good example and will enable the United States to call more credibly for widespread ratification of the Protocol.

Second, the administration is seeking an increase in the IAEA budget for safeguards activities. The functions of the IAEA include "[verifying] through its inspection system that States comply with their commitments under the Non-Proliferation Treaty and other nonproliferation agreements, to use nuclear mate-

330. Export Controls Key, supra note 326.
332. Id.
333. The State Department view given here is as paraphrased in the GAO Report. See GAO Report, supra note 331.
335. Id. The U.S. Additional Protocol was signed in June 1998.
336. Id. A major catalyst for the introduction by the IAEA of its model Additional Protocol was the discovery in 1991 that Iraq had been operating a clandestine nuclear weapons program. See, e.g., Sloss, supra note 137, at 842-44, 862-64.
337. See, e.g., Wulf, supra note 7.
rial and facilities only for peaceful purposes." The IAEA’s regular budget for 2001 was $230 million. By contrast, maintenance of the U.S. nuclear arsenal alone in 1998 has been estimated at around $96 million per day. In view of the critical role played by the IAEA in the global nonproliferation regime, the U.S. goal of achieving a significant increase in IAEA funding is very welcome.

The U.S. program of nuclear "threat reduction" has focused on minimizing proliferation risks attaching to nuclear material in the former Soviet Union. The United States has had a bilateral program dealing with nuclear materials in Russia since 1993. The program has deactivated over 6,000 nuclear warheads. An "11th-hour" Clinton administration report called for a significant expansion in U.S. threat reduction programs in Russia. The Bush administration was not initially favorably disposed towards all threat reduction programs and cut some relevant funding. However, the administration later became more enthusiastic. Current spending on nuclear threat reduction programs is about $1.1 billion per year. In late 2002, some Republicans were blocking efforts

---


341. See Secretary of Energy Spencer Abraham, Opening Statement at Press Conference with Russian Federation Minister of Atomic Energy Alexander Rumyantsev (May 9, 2002), at http://usinfo.state.gov/topical/pol/arms/02050905.htm. For the period 1999-2002, the U.S. Departments of State, Defense and Energy provided Russia with over $4.9 billion for "nonproliferation and threat reduction assistance." U.S. Department of State, Fact Sheet: U.S. Threat Reduction Assistance to Russia (May 24, 2002), at http://usinfo.state.gov/topical/pol/arms/02052420.htm. Holum has pointed to a link between "formal" arms control and the threat reduction program: "although they do not have to be interdependent, formal arms control has been an important channel to press Russia in the threat reduction area." Holum, supra note 207.


345. In 2002, however, President Bush delayed for some months before signing the waiver necessary to release threat reduction funding (because of concern about the completeness of Russian disclosures in relation to chemical and biological weapons). This marked the first time since the program's inception in 1991 that a president had not signed the waiver in the first instance. See Lugar, supra note 342, at 4; Kerry Boyd, Bush Signs Waiver, Freeing Threat Reduction Funding, ARMS CONTROL TODAY, Sept. 2002, at http://www.armscontrol.org/act/2002_09/threatreduc_sept 02.asp.

to prevent the expansion of the threat reduction program to states beyond those of the former Soviet Union.\textsuperscript{347} A G-8 initiative agreed upon on June 27, 2002 aims to raise $20 billion over ten years for nuclear threat reduction, with an initial focus on Russia.\textsuperscript{348} The United States played a major role in the launching of this initiative, and plans to contribute half of the total raised.\textsuperscript{349} If fully implemented, the G-8 program will double current expenditures on threat reduction.\textsuperscript{350}

The U.S. role in threat reduction programs is a practical and effective means of contributing towards nonproliferation goals. One of the originators of the U.S. program, Senator Lugar, advocates a “global coalition” on threat reduction.\textsuperscript{351} The G-8 program marks a step towards a broader international approach to this important issue. The Bush administration’s enthusiastic backing of this step demonstrates its conviction of the advantages of international cooperation in this area.

The Bush administration’s efforts in the areas of export controls, strengthening the IAEA, and threat reduction can be described as “selective multilateralism”: i.e., it involves very targeted areas, mostly with a limited number of partners, where the administration is particularly keen to engage internationally. They provide examples of how the United States can act to bolster nonproliferation norms in practical ways. However, the capacity of the United States to succeed in its goals in such programs will be limited by any international perception that the United States itself is not honoring its nonproliferation and disarmament commitments.

\section*{B. The Bush Administration’s Nuclear Posture}

I don’t want to speculate about the more distant future; but as far out as I can see, nuclear weapons will continue to play an important role in U.S. and allied security. (Secretary of State Colin Powell)\textsuperscript{352}

The end of the Soviet threat does not mean we no longer need nuclear weapons. To the contrary, the U.S. nuclear arsenal remains an important part of our deterrence strategy, and helps us to dissuade the emergence of potential or would-be peer competitors, by underscoring the futility of trying to reach parity with us. (Defense Secretary Donald H. Rumsfeld)\textsuperscript{353}

The gravest danger to freedom lies at the perilous crossroads of radicalism and technology... new threats also require new thinking. Deterrence—the promise of massive retaliation against nations—means nothing against shadowy terrorist networks with no nation or citizens to defend. Containment is not possible when

\textsuperscript{347} See id.; Lugar, \textit{supra} note 311, at 5.
\textsuperscript{348} U.S. Department of State, \textit{Fact Sheet: U.S. Outlines G-8 Agreement on Non-Proliferation} (June 27, 2002), at \texttt{http://usinfo.state.gov/topical/pol/arms/02062708.htm}.
\textsuperscript{349} Id.
\textsuperscript{350} Lugar, \textit{supra} note 342, at 2.
\textsuperscript{351} Id. at 6.
\textsuperscript{352} Powell, \textit{supra} note 95.
\textsuperscript{353} Rumsfeld, \textit{supra} note 52.
unbalanced dictators with weapons of mass destruction can deliver those weapons . . . We are in a conflict between good and evil.”

(President George W. Bush)\textsuperscript{354}

While the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting pre-emptively against . . . terrorists. . . . We must be prepared to stop rogue states and their terrorist clients before they are able to threaten or use weapons of mass destruction against the United States and our allies and friends.

(U.S. National Security Strategy)\textsuperscript{355}

During his campaign for election, President Bush indicated that if elected he would “rethink the requirements for nuclear deterrence in a new security environment.”\textsuperscript{356} The Clinton administration had initiated a “Nuclear Posture Review” in 1993 to examine how the nuclear force posture could best fulfill strategic and political objectives.\textsuperscript{357} The resultant report “essentially rejected any significant changes in the nuclear weapons policies pursued by the [George H. W.] Bush administration,”\textsuperscript{358} so that “the status quo was essentially reaffirmed by default.”\textsuperscript{359} It proposed that strategic force levels should not fall below the 3,000-3,500 warheads agreed in the START II Treaty signed in 1993, that the United States maintain nuclear weapons in Europe at existing levels, and that the United States reject a no-first-use policy.\textsuperscript{360}

The Bush administration’s Nuclear Posture Review (NPR) was submitted to Congress on January 8, 2002, and an unclassified version was publicized by the administration around the same time.\textsuperscript{361} In his foreword to the NPR, Defense Secretary Rumsfeld said that the NPR established a “New Triad,” composed of nuclear and non-nuclear offensive strike systems, active and passive defenses, and a revitalized defense infrastructure.\textsuperscript{362}

Information leaked in March 2002 about classified portions of the Nuclear Posture Review raised alarm in the United States and abroad,\textsuperscript{363} despite being at

\textsuperscript{354}. Commencement Address at the United States Military Academy in West Point, 38 WEEKLY COMP. PRES. DOC. 944, 946-47 (June 1, 2002) [hereinafter President Bush at West Point].


\textsuperscript{357}. Rubner, supra note 39, at 274.

\textsuperscript{358}. Id. at 274-75.


\textsuperscript{360}. Id. On START II, see infra at text accompanying note 97 and notes 168-71.


\textsuperscript{363}. See, e.g., infra note 391 and text accompanying notes 391-95.
least partially disclaimed by the administration. The reports sparked concern on three particular aspects of reported Bush administration policy, including (1) contemplating the use of nuclear weapons against non-nuclear states party to the NPT; (2) developing new nuclear weapons; and (3) regarding nuclear weapons as being for use rather than for deterrence.

The first ground for concern arose from indications in the leaked NPR material of contingency plans for using nuclear weapons against seven named countries, which included five non-nuclear weapon state parties to the NPT (Iran, Iraq, Libya, North Korea and Syria) as well as China and Russia. That material suggested that nuclear weapons could be used by the United States in three situations: (1) against targets able to withstand non-nuclear attack; (2) in retaliation for attack with nuclear, biological or chemical weapons; or (3) “in the event of surprising military developments.” The NPR reportedly discussed contingencies to be considered in “setting requirements for nuclear strike capabilities,” stating that “North Korea, Iraq, Iran, Syria and Libya are among the countries that could be involved in immediate, potential or unexpected contingencies.” The NPR has been quoted as saying that “a contingency involving Russia, while plausible, is not expected.” It is also quoted as describing China as “a country that could be involved in an immediate or potential contingency.” The NPR reportedly includes the following as “current examples of immediate contingencies,” where U.S. nuclear weapons apparently could be em-

364. See, e.g., Ralph Dannheisser, Powell Rejects Reports U.S. is Boosting Reliance on Nuclear Weapons: He Says Nuclear Threshold Has Not Been Lowered (Mar. 12, 2002), at http://usinfo.state.gov/topical/pol/arms/02031203.htm (reporting that Secretary of State Powell told a Senate Appropriations subcommittee on March 12, 2002 that press reports based on the leaked material “did not comport with [his] understanding of the report”) [hereinafter Dannheisser, Powell Rejects Reports]. For its part, the Department of Defense stressed that the NPR was not an operational plan, and declined to comment in any detail:

We will not discuss the classified details of military planning or contingencies, nor will we comment on selective and misleading leaks. . . . This review of the U.S. nuclear posture is the latest in a long series of reviews since the development of nuclear weapons. It does not provide operational guidance on nuclear targeting or planning.


365. NPR Extracts, supra note 154 (quoting NPR at 16-17); see also Dannheisser, Powell Rejects Reports, supra note 364.


367. NPR Extracts, supra note 154 (quoting NPR at 16 (emphasis added)); see also U.S. Nuclear Plan Sees New Targets, supra note 287. In his State of the Union Address of January 2002, President Bush said that “States like” North Korea, Iran and Iraq “and their terrorist allies constitute an axis of evil” and that their regimes, by seeking weapons of mass destruction, posed “a grave and growing danger.” Address Before a Joint Session of the Congress on the State of the Union, 38 WEEKLY COMP. PRES. DOC. 133, 135 (Jan. 29, 2002) [hereinafter, 2002 State of the Union Address].


369. NPR Extracts, supra note 154 (quoting NPR at 17). China reportedly protested that the Nuclear Posture Review breached an agreement between the United States and China on “mutual non-targeting of nuclear weapons.” Borger & Gittings, supra note 279.
ployed: "an Iraqi attack on Israel or its neighbors, a North Korean attack on South Korea, or a military confrontation over the status of Taiwan." 370

Asked in March 2002 about a policy "that might go after a country like Libya or Syria," President Bush replied that "we've got all options on the table, because we want to make it very clear to nations that you will not threaten the United States or use weapons of mass destruction against us or our allies or friends." 371 At the same time, President Bush said that "I view our nuclear arsenal as a deterrent... And the President must have all options available to make that deterrent have meaning. That's how I view the [Nuclear Posture] review." 372 In an apparent clarification of President Bush's reference to "all options," Deputy Defense Secretary Wolfowitz said a few days later that "what the president said about nuclear options is something that every president has said. No president has ever forsworn our ability to use nuclear weapons. But the essence of it... is not to use nuclear weapons but to deter other people from using weapons of mass destruction against us." 373

The United States provided a negative security assurance in 1978, declaring that it would not use nuclear weapons against any non-nuclear weapon state party to the NPT, "except in the case of an attack on the United States, its territories or armed forces, or its allies, by such state allied to a nuclear-weapon state or associated with a nuclear-weapons state in carrying out or sustaining the attack." 374 The United States reaffirmed this long-standing undertaking in 1995, and in that year the negative security assurances of all five NPT nuclear weapon states were acknowledged in Security Council Resolution 984. 375 The

370. NPR Extracts, supra note 154 (quoting NPR at 16). See also U.S. Nuclear Plan Sees New Targets, supra note 287.


372. Id. at 414.


375. Id at 24. The 1995 U.S. assurance was as follows:

The United States reaffirms that it will not use nuclear weapons against non-nuclear-weapon [NPT parties] except in the case of an invasion or any other attack on the United States, its territories, its armed forces or other troops, its allies, or on a State toward which it has a security commitment, carried out or sustained by such a non-nuclear-weapon State in association or alliance with a nuclear-weapon State.

five nuclear weapon states reaffirmed their commitment to that Resolution in 2000.376 As Graham has noted, the NPT-related commitments of the United States to negative security assurances “do not include any exceptions that would allow the first use of nuclear weapons in response to a chemical or biological weapon attack.”377 Negative security assurances play an important role in the nuclear nonproliferation regime: By protecting non-nuclear weapon states against nuclear attack, they lessen proliferation incentives.378 However, both the Nuclear Posture Review and subsequent administration statements indicate that the United States is not committed to maintaining the U.S. negative security assurance as it stands.379


377. Graham, supra note 8, at 63. There was for some time ambiguity as to the nature of an attack on the United States that would cause the non-application of the U.S. negative security assurance: whether an attack needed to be nuclear-capable or whether chemical or biological weapon capability on the part of an attacking state or states would cause the United States to ignore its negative security assurance, despite the fact that the assurance’s exception is in its terms confined to nuclear weapon capability. See Paula B. McCarron & Cynthia A. Holt, A Faustian Bargain? Nuclear Weapons, Negative Security Assurances, and Belligerent Reprisal, 25 FLETCHER F. WORLD AFF. 203, 204 (describing U.S. policy as “purposely vague”), 217-218 (2001). See also Graham, supra note 8, at 63-64. There appears to be no doubt, however, about the preparedness of the current U.S. administration at least to threaten the use of nuclear weapons against non-nuclear weapon state NPT parties even in the absence of any alliance with a nuclear-capable power—and, if the NPR is to be believed, even in the absence of any form of WMD-capable attack. See RULE OF POWER OR RULE OF LAW?, supra note 32, at 34-35; infra note 379.

378. In relation to the U.S. negative security assurance, McNamara and Graham have argued that the Nuclear Posture Review “undermines the credibility of that pledge, which underpins the nonproliferation treaty.” Robert S. McNamara & Thomas Graham, Jr., A Pretty Poor Posture for a Superpower, L.A. TIMES, Mar. 13, 2002, at 13. While not provided for in the NPT itself, security assurances are viewed by many as an indispensable part of the NPT regime. North Korea’s Ambassador to Russia claimed on December 31, 2002 that the United States had “threatened us with a preemptive nuclear strike.” He also said that: “In these circumstances, we also cannot fulfill the nonproliferation treaty, the basic clause of which is the obligation of nuclear states not to use the nuclear weapon against states which do not possess it.” Brooke, South Opposes Pressuring North Korea, supra note 147.

379. A State Department spokesman said in early March 2002 that “if a weapon of mass destruction is used against the United States or its allies, we will not rule out any specific type of response.” U.S. Nuclear Plan Sees New Targets, supra note 287 (quoting Richard Boucher). National Security Adviser Rice said on March 10, 2002 that the Bush administration wanted to “send a very strong signal to anyone who might try to use weapons of mass destruction against the United States . . . . The only way to deter such use is to be clear it would be met with a devastating response.” David G. Savage, Nuclear Plan Meant to Deter: Defense: Newly revealed contingencies are designed to make clear that biological or chemical attacks ‘would be met with a devastating response,’ Rice says, L.A. TIMES, Mar. 11, 2002, at A1. The Joint Chiefs of Staff Chairman, Gen-
The second main ground for concern arising from the NPR stems from its emphasis on developing new nuclear weapons. Possibilities are being explored for new or modified nuclear weapon capabilities, particularly low-yield, earth-penetrating weapons for hard and deeply-buried targets such as underground bunkers. In commenting to a Senate Subcommittee on leaked material from the Nuclear Posture Review, Secretary of State Powell is reported to have confirmed that “we are examining whether . . . within our inventory (of nuclear weapons) improvements can be made or there are new things that we should be looking at.” Defense funding authorized by Congress in November 2002 included an item of $15 million for studying the modification of nuclear weapons for use in destroying underground facilities. Real levels of administration funding of nuclear laboratories for nuclear weapons maintenance, research, 

380. There are several nuclear weapon options that might provide important advantages for enhancing the nation’s deterrence posture: possible modifications to existing weapons to provide additional yield flexibility in the stockpile; improved earth penetrating weapons (EPWs) to counter the increased use by potential adversaries of hardened and deeply buried facilities; and warheads that reduce collateral damage. NPR Extracts, supra note 154 (quoting NPR at 344-45).

381. Dannheisser, Powell Rejects Reports, supra note 364. This issue also raises testing considerations. See supra text accompanying notes 288-90.

382. Dao, Nuclear Study Raises Fears, supra note 287.
sign and development were higher in 2000 than for the average Cold War year, and have increased further still under the Bush administration.

This move toward developing new weapons, or modifying old weapons for a specific military purpose, is not in keeping with the object and purpose of the NPT or of the CTBT, nor with the U.S. commitment in the NPT review process to move in the direction of both diminishing the role of nuclear weapons in security policies and eliminating its nuclear arsenal. Refining and enhancing the U.S. nuclear arsenal while fulminating against the development of nuclear weapons by others is so contradictory as to undermine the effect of U.S. calls for nonproliferation.

The third major concern raised by the NPR is that the United States is emphasizing nuclear weapons “not as devices of deterrence, but as weapons of war, and thus [eroding] the norms against nuclear use.” The argument that the new concept of deterrence entails “reduced reliance on nuclear weapons” has been uppermost in Bush administration rhetoric. Yet this argument is difficult to reconcile with the Nuclear Posture Review, especially in light of the National Security Strategy. In particular, the interest in developing new nuclear weapons for specific military purposes evinces a degree of determination to use nuclear weapons which is at odds with the “taboo” on use which has held sway since 1945. Similar concerns are raised by the naming of non-nuclear weapon states as possible nuclear targets even in the absence of attacks on the United States or its allies by such states acting in alliance with nuclear weapon states. Together, these developments represent a fundamental policy shift which is made all the more disturbing by the broader context of the assertion of a U.S. right to make “preemptive strikes” and the Bush administration’s emphasis on


386. Granoff, supra note 226. See also William M. Arkin, The Nuclear Option in Iraq: The U.S. Has Lowered the Bar for Using the Ultimate Weapon, L.A. TIMES, Jan. 26, 2003 at M1 (reporting that the United States contemplated the possible use of nuclear weapons in military action against Iraq; and cautioning about the risks attaching to any U.S. decision to “lower the nuclear threshold and break down the firewall separating nuclear weapons from everything else”).

387. For example, in May 2002 U.S. Ambassador Wulf told the first meeting of the Preparatory Committee for the 2005 NPT Review Conference that the United States was “implementing a new concept of deterrence . . . . This means a reduced reliance on nuclear weapons, and an increased emphasis on the role of advanced conventional forces, active and passive defenses, intelligence capabilities and a revitalized defense infrastructure.” Wulf, supra note 7.

388. A former White House National Security Science Advisor, Frank von Hippel, has been quoted as saying that with any U.S. use of nuclear weapons, “we would have violated a taboo that we’ve had in place since Nagasaki. With our enormous conventional superiority, that would be the ultimate in stupidity and destructiveness. By using nuclear weapons, we would make it permissible for others to use them against us.” Granoff, supra note 226.
As well as stimulating proliferation by making nuclear weapons more apparently desirable, lowering the "threshold" for the use of nuclear weapons "increases the likelihood of their use against the US and undermines US ability to criticize such immoral activity by others."390

Following is a sampling of concerns expressed in various quarters about the directions adopted in the Bush administration's nuclear posture. There was a great deal of negative editorial comment.391 A statement issued in October 2002 by a gathering of Nobel Peace Laureates said they were "concerned about the new military doctrines that contemplate the use, even pre-emptive, of nu-

389. As one example of President Bush's "preemptive strike" doctrine: "We cannot put our faith in the word of tyrants who solemnly sign nonproliferation treaties and then systematically break them. If we wait for threats to fully materialize, we will have waited too long." President Bush at West Point, supra note 354, at 946. In his 2002 State of the Union Address, President Bush said "I will not wait on events while dangers gather .... The United States of America will not permit the world's most dangerous regimes to threaten us with the world's most destructive weapons." 2002 State of the Union Address, supra note 367, at 135; see also supra text accompanying note 355 (quoting extract from the National Security Strategy). An important example of the Bush Administration's emphasis on "counterproliferation" is the National Strategy to Combat Weapons of Mass Destruction of December 2002. That document contains three "pillars," described as "seamless elements of a comprehensive approach": counterproliferation ("to combat WMD use"), nonproliferation ("to combat WMD proliferation"), and consequence management ("to respond to WMD use"). The counterproliferation segment of the document lists the following as necessary capabilities: "interdiction," "deterrence," and "defense and mitigation"—with the latter including "capacities to detect and destroy an adversary's WMD assets before those weapons are used." National Strategy to Combat Weapons of Mass Destruction, supra note 379.

390. Granoff, supra note 226.

391. For example:

[The NPR] reveals a Bush administration that has drawn only military conclusions from Sept. 11 ... . It uproots the principle of atomic non-proliferation. Why sign, or remain signatory to, a treaty which, in exchange for your absolute renunciation of nuclear arms, does not guarantee that they will not be used against you? In invoking the possibility of a first strike, it accepts as normal the idea of putting to use a weapon that was originally conceived as a deterrent. The Pentagon document is worthy of a state in the grip of panic; not of a world power conscious of its responsibilities. It is frightening.

Diplomatic niceties have never been George W. Bush's strong suit .... But [the NPR] toppled everything that came before it. In a 56-page secret report, Bush's military developed sweeping plans for a future nuclear war .... The new plans ... are creating unease in the entire world.

President Bush and his nuclear strategists must not brush aside the deeply perturbed voices of those who advise them to throw out highly dangerous ideas. Their 'posture' is not only imprudent but also menacing in a manner least becoming their unchallenged status as the world's only superpower.

"What does [the NPR] say to the rest of the international community? It says that nonproliferation of nuclear weapons is a mug's game, and that we should all get our hands on the damnable things." Andy Butfoy, The Age (Australia), cited in id.
clear weapons."\(^{392}\) The U.N. Under-Secretary-General for Disarmament Affairs has bemoaned what he perceives as "an overzealous reaction" to September 11, 2001:

There is a continued reliance on nuclear weapons, for example, with even doctrines of the pre-emptive use of nuclear weapons being propounded. We have new nuclear weapons, such as the RNEP, the robust nuclear earth penetrator, or a bunker-buster being designed as one of the new uses for nuclear weapons \ldots and there is erosion of nuclear security assurances which have hitherto protected non-nuclear weapon states.\(^{393}\)

The Chairman's Factual Summary of the first Preparatory Committee meeting for the 2005 NPT Review Conference reported that "[c]oncern and anxiety was expressed about existing nuclear arsenals, new approaches to the future role of nuclear weapons, and possible development of new generations of nuclear weapons."\(^{394}\) In this climate, U.N. Secretary-General Kofi Annan may well have had the nuclear weapons policies of the United States, among others, in mind when he said in early February 2003 that "the United Nations has long maintained that peace and security is only sustainable if the rule of law prevails, including in the field of disarmament and arms control. There has been a disturbing gradual erosion of the established international norms on weapons of mass destruction."\(^{395}\)

The concerns expressed by many in reaction to the Nuclear Posture Review appear well-founded. The directions of the NPR make unilateral U.S. flexibility in nuclear options the be-all and end-all, despite the risks of fostering nuclear proliferation by others, undermining critical elements of the global nonproliferation regime, and actually increasing the possibility that nuclear weapons will be used against the United States.

---

392. The statement continued: "Nuclear weapons continue to pose a real threat due to a renewed tendency toward proliferation \ldots Nuclear weapons are immoral and their use is illegal." Final Statement of the Third Global Summit of Nobel Peace Laureates (Oct. 21, 2002), at http://www.gsinstitute.org/archives/000141.shtml.


394. Roche, supra note 220 (quoting Chairman's Factual Summary, NPT Preparatory Committee Meeting (April 2002)). Despite disagreement concerning the status of that document, it clearly reflects sentiments expressed by at least some NPT parties. See infra text accompanying note 448.

395. The Secretary-General continued:

At the same time, rising military expenditures suggest that an ever-growing challenge still exists. It is, therefore, vital for us all to help preserve and consolidate existing multilateral norms through adherence to treaties and fulfillment of legal obligations. As this board knows well—and the wider public is beginning to learn—there are serious challenges posed to international security and non-proliferation regimes. The Democratic People's Republic of Korea and Iraq are only the tip of the iceberg.

C. U.S. Nuclear Disarmament Commitments

1. Background on the NPT Regime and U.S. NPT Disarmament Commitments

The United States has undertaken nonproliferation and disarmament obligations through its adherence to the NPT. The very first resolution adopted by the United Nations General Assembly evidenced a desire for the elimination of atomic weapons from national arsenals.396 That same desire has been expressed countless times since in, for example, treaty preambles, U.N. General Assembly Resolutions and—in its most concrete form—in Article VI of the Nuclear Non-Proliferation Treaty. The NPT forms the centerpiece of the international nuclear nonproliferation regime and has had remarkable success in stemming the proliferation of nuclear weapons.397 The NPT has more parties than any treaty other than the United Nations Charter. With Cuba’s recent decision to accede, the only countries to remain outside the NPT regime are India, Israel and Pakistan.398

The obligations of an NPT party vary according to whether a party is a “nuclear weapon state Party” (NWS party) or a “non-nuclear weapon State Party” (NNWS party). The NWS parties are those which had “manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January, 1967.”399 There are five countries in this category: the United States, Russia (as successor to the U.S.S.R), the United Kingdom, France and China—i.e., the same five countries as are permanent members of the United Nations Security Council.

The basic obligations of the NPT can be summarized quite briefly. NNWS parties agree to forego the acquisition of nuclear weapons400 and accept IAEA safe-
guards to verify this commitment. NWS parties agree to refrain from assisting any non-nuclear weapon state to develop nuclear weapons, and to refrain from transferring nuclear weapons to "any recipient whatsoever." All parties agree not to provide relevant nuclear material to non-nuclear weapon states except within the framework of IAEA safeguards agreements, and also to facilitate technical cooperation concerning the peaceful uses of nuclear energy. Most of the above-mentioned provisions are aimed at preventing "horizontal" proliferation—the spread of nuclear weapons to additional states. By contrast, Article VI addresses nuclear disarmament and the prevention of "vertical" proliferation—quantitative and qualitative enhancements of the nuclear arsenals of NWS parties. Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.

The NPT can be viewed as a bargain: "non-proliferation in exchange for eventual nuclear disarmament." This bargain entailed acceptance of the continuing possession of nuclear weapons by the few existing nuclear weapon states as the price of protection against proliferation by additional states. However, this acceptance was neither unconditional nor indefinite, as is clear from Article VI and from the preambular language of the NPT. The NPT was based on a draft put forward by the United States and the U.S.S.R., but Article VI was

---

401. Id., arts. III.1, III.4.
402. Id., art. I.
403. Id., art. III.2.
404. Id., art. IV.
405. For all the obvious elasticity in the language of Article VI, "a vague and aspirational obligation is not necessarily a void and meaningless one." Koplow, supra note 8, at 304. The International Court of Justice has stressed the significance of the obligation set out in Article VI. See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8), paras. 99; 105(2)(F) (further discussed infra text accompanying notes 413-15) [hereinafter Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons].
406. The 11th preambular paragraph of the NPT is as follows:

"Desiring to further the easing of international tension and the strengthening of trust between States in order to facilitate the cessation of the manufacture of nuclear weapons, the liquidation of all their existing stockpiles, and the elimination from national arsenals of nuclear weapons and the means of their delivery pursuant to a Treaty on general and complete disarmament under strict and effective international control."

NPT, supra note 6. Throughout the history of the NPT, many Non-Aligned Movement states have criticized what they perceive as its "discriminatory" nature. For example, both India and Cuba cited this factor as key in their decisions not to accede to the NPT. In announcing on September 14, 2002 Cuba's decision to accede to the NPT, the Cuban Foreign Minister stated that Cuba had not been party "for it is an insufficient and discriminatory instrument allowing the establishment of a club of nuclear powers without any concrete disarmament-oriented commitments." Cuban Foreign Minister Felipe Perez Roque, Statement to the United Nations General Assembly (Sept. 14, 2002), at http://www.acronym.org.uk/docs/0209/doc08.htm. Eric Stein cautioned in 1972 that the NPT:

"as it is written, with its unequal restrictions and controls, is not likely to endure unless the super-Powers make substantial progress toward ending 'vertical proliferation' of their own nuclear arsenals. . . . While complete equality in law (as in fact) is not and has never been feasible, legitimate security, economic and political interests of other states must be taken into account if the treaty is to achieve its purpose."

Eric Stein, Legal Restraints in Modern Arms Control Agreements, 66 AM. J. INT'L L. 255, 279-80 (1972). The indefinite extension of the NPT has not removed the force of his argument.
407. Koplow, supra note 8, at 343.
included at the insistence of non-nuclear weapon states.\textsuperscript{408} Over the years, there has been some debate as to whether Article VI is intended to achieve the elimination of nuclear weapons at the same time as, or earlier than, the broader goal of "a treaty on general and complete disarmament."\textsuperscript{409}

The history of nuclear nonproliferation and disarmament efforts is that of non-nuclear weapon states seeking, in exchange for their own renunciation of nuclear weapons, to engage nuclear weapon states in binding multilateral disarmament and nonproliferation commitments. The most obvious example is Article VI of the NPT, but also relevant are calls for legally binding treaties on negative security assurances and for a nuclear disarmament convention. The United States and other nuclear weapon states have tended to resist entering into such commitments. They have also contested the interpretation of Article VI of the NPT, generally pleading unilateral national security imperatives as impediments to nuclear disarmament while simultaneously urging non-nuclear weapon states to accept and abide by an obligation not to acquire nuclear weapons. The irony inherent in this situation was encapsulated in the Statement of the Canberra Commission on the Elimination of Nuclear Weapons:

Nuclear weapons are held by a handful of states which insist that these weapons provide unique security benefits, and yet reserve uniquely to themselves the right to own them . . . . The possession of nuclear weapons by any state is a constant

\textsuperscript{408} Id. at 335-38. U.S. ambassadors described the notion of a \textit{quid pro quo} as inappropriate because the NPT would enhance the security of all nations. \textit{Id.} at 336 n.152 (citing a 1969 NPT negotiating history issued by the U.S. Arms Control and Disarmament Agency). However, Koplow notes that the notion of a \textit{quid pro quo} has nevertheless endured. He also cites President Johnson as "later" using language which seemed to accept the \textit{quid pro quo} notion, and as saying that the United States and the U.S.S.R. had “jointly pledged our nations to negotiate towards the cessation of the nuclear arms race . . . . The obligations of the nonproliferation treaty will reinforce our will to bring an end to the nuclear arms race. The world will judge us by our performance.” \textit{Id.}

\textsuperscript{409} This debate is reflected, for example, in a Working Paper submitted by Canada in the course of preparations for the 2000 NPT Review Conference. The purpose of the Working Paper was:

\textit{Position Paper Re Article VI: Working Paper Submitted by Canada, 2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, NPT/CONF.2000/PC.11/10 (May 12, 1999), at \url{http://www.dfait-maeci.gc.ca/arms/PrepCom3-Art6-en.asp} (emphasis added).} The Working Paper was prompted by Canada’s “deep concerns” regarding some language put forward in a Working Paper by the Chairman. \textit{Id. See also infra} text accompanying notes 427-29. The International Court of Justice concluded in its 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons that: “There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.” \textit{See infra} text accompanying note 413. In one view, the omission from this formulation of any reference to general and complete disarmament affirms “that the obligation to eliminate nuclear weapons is not conditional on concurrent progress on conventional disarmament or on any other conditions.” \textit{See Ved P. Nanda & David Krieger, Nuclear Weapons and the World Court} 113-14 (1998).
stimulus to other states to acquire them . . . . [A] central reality is that nuclear weapons diminish the security of all states.410

The degree of implementation of Article VI of the NPT by nuclear weapon state parties has long been highly contentious. Many non-nuclear weapon state parties have repeatedly alleged insufficient compliance on the part of nuclear weapon state parties.411 The claim has been that the nuclear weapon states have not fulfilled their side of the NPT bargain. While the vast majority of non-nuclear weapon state parties have abided by their commitment to renounce nuclear weapons in a verifiable manner, the argument runs, there is little evidence

410. Statement of the Canberra Commission on the Elimination of Nuclear Weapons, in Re-
port of the Canberra Commission on the Elimination of Nuclear Weapons 7 (1996). Many others have made similar arguments. For example, Joseph Rotblat, who served on the Canberra Commission, commented upon accepting the 1995 Nobel Peace Prize that "[i]f the militarily most powerful—and (therefore) least threatened—states need nuclear weapons for their security, how can one deny such security to countries that are truly insecure?" Joseph Rotblat, Speech on accepting Nobel Peace Prize, Remember Your Humanity (Dec. 10, 1995), at http://www.pugwash.org/award/ Rotblatnobel.htm. More recently, Rotblat has observed that: "According to the current counter-proliferation policy, nuclear weapons are bad, but only if in the possession of some states or groups. In the possession of the US, they are good, and must be kept for the sake of world security." Joseph Rotblat, Speech to a Conference on Nuclear Policy and Proliferation, Arms Control is as Good as Dead (Jan. 8, 2002), at http://www.acronym.org.uk/docs/0301/ doc11.htm. According to Hans Blix, "[t]here is something paradoxical about nuclear-weapon States desperately urging non-nuclear-weapon States not to do what they, themselves, find it indispensable to do: namely to continue developing nuclear weapons." Koplow, supra note 8, at 301 n.31 (quoting Hans Blix, The Role of the IAEA and the Existing NPT Regime, in Nuclear War, Nuclear Proliferation and Their Consequences 56 (Sadruddin Aga Khan ed., 1986)). (Blix was Director-General of the International Atomic Energy Agency and is now Executive Chairman of the U.N. Monitoring, Verification and Inspection Commission (UNMOVIC) which is undertaking inspections in Iraq.) Graham, in discussing resistance to the no-first-use concept, notes that:

For the NATO Alliance, the most powerful conventional force in history, to insist that it needs the threat of retaliation with nuclear weapons to deter, for example, the biological weapons of Saddam Hussein, raises the question why Iran or Egypt or virtually anyone else does not need them as well. Retaining a first-use of nuclear weapons option directly undermines efforts to persuade non-nuclear weapon states to continue to refrain from developing nuclear weapons.

Graham, supra note 8, at 63. Retired U.S. Air Force General Charles Horner has said that: We must understand that the United States is as much a part of the problem as any other country. As long as we hold large nuclear arsenals, we set an example for others to follow. We cannot eliminate nuclear weapons alone. . . . But we cannot tolerate nuclear weapons anywhere in the world. . . ."


411. The 1980 and 1990 five-yearly NPT Review Conferences (convened under Article VIII.3 of the NPT) were unable to reach consensus on a final document because of disagreement on the degree of progress made by nuclear weapon states in implementing Article VI. The 1985 Conference saw resort to a "Janus-faced formulation" to achieve a final document despite disagreement on the same issue. Koplow, supra note 8, at 315, 354-61. At the 1995 NPT Review and Extension Conference, conflict: surrounding Article VI [was] the single most important explanation behind the failure to reach agreement on a Final Document. The issue of whether the [non-nuclear weapon states] had honored their part of the bargain by complying with Article II was hardly questioned or discussed, other than in the case of countries such as Iraq and North Korea.

Cecilia Albin, Justice and Fairness in International Negotiation 191, 195 (2001) (noting also that the "focus remained on the [nuclear weapon states], and on nuclear-capable states outside the NPT regime").
that nuclear weapon states are committed to nuclear disarmament. Those advancing this argument now draw support from the unanimous conclusion of the International Court of Justice in its Advisory Opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons* that: "There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control."\footnote{Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, supra note 405, para. 105(2)(F) (emphasis added). The majority opinion stated that: The legal import of that obligation goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result—nuclear disarmament in all its aspects—by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith.} Reactions to this formulation varied. One commentator interpreted it as sharp criticism of nuclear weapon states for having abandoned "any serious pursuit of disarmament goals in recent decades."\footnote{Richard A. Falk, Nuclear Weapons, *International Law and the World Court: A Historic Encounter*, 91 Am. J. Int'l L. 64, 65-66 (1997).} On the other hand, a senior State Department legal adviser, writing in his personal capacity in 1997, argued that the finding did not necessitate any change in the prevailing U.S. approach to nuclear arms control negotiations.\footnote{Michael J. Matheson, *The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons*, 91 Am. J. Int'l L. 417, 434 (1997).}

The NPT provided for a decision by parties twenty-five years after its entry into force (i.e. in 1995) as to whether it should “continue in force indefinitely, or . . . be extended for an additional fixed period or periods.”\footnote{NPT, supra note 6, art. X.2.} Many non-nuclear weapon states party to the NPT viewed the extension decision as a rare opportunity to exert influence over the five nuclear weapon state parties. In this context, there was renewed emphasis on the question of the degree to which the five nuclear weapon state parties to the NPT had fulfilled their obligations under Article VI.\footnote{For a discussion of how this issue affected extension negotiations, see Albin, supra note 412, at 194-96, 203-05.} NPT parties decided by consensus in 1995 to extend the NPT indefinitely.\footnote{1995 Principles and Objectives, supra note 236; Strengthening the Review Process for the Treaty (Decision 1), Annex to the Final Document of the 1995 Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Part I, NPT/CONF.1995/32 (Part 1) (adopted May 11, 1995) at http://disarmament.un.org/wmd/npt/1995decl.htm. The “Principles and Objectives” included the following elements:}

---

the time by the Canadian Ambassador as amounting to "permanence with accountability." 419

By the time of the 2000 NPT Review Conference, the Comprehensive Test Ban Treaty had been concluded but its prospects for entry into force appeared remote, and there had been little other progress on the 1995 Principles and Objectives. 420 At the beginning of the 2000 NPT Review Conference, the five nuclear weapon states issued a joint statement which said that "we remain unequivocally committed to fulfilling all of our obligations under the treaty" and that "we reiterate our unequivocal commitment to the ultimate goals of a complete elimination of nuclear weapons and a treaty on general and complete disarmament under strict and effective international control." 421 The "New Agenda" coalition, a group of seven states seeking progress towards the elimina-

(1) Reaffirmation of Article VI commitment to pursue in good faith negotiations on nuclear disarmament (1995 Principles and Objectives, supra note 236, at para. 3);
(2) A "programme of action" for the implementation of Article VI:
   (2a) Completion of CTBT negotiations "no later than 1996" (id., para. 4(a)—see also infra note 236),
   (2b) Immediate commencement and early conclusion of negotiations on a convention banning the production of fissile material for nuclear weapons (id., para. 4(b)—there has been no progress on this objective, which has U.S. support, in light of the impasse of recent years in the work program of the Conference on Disarmament), and
   (2c) "The determined pursuit by the nuclear-weapon States of systematic and progressive efforts to reduce nuclear weapons globally, with the ultimate goals of eliminating those weapons" (id., para. 4(c));
(3) Emphasis on the need for the cooperation of all nuclear weapon states on nuclear weapon free zones, and on the need for the "respect and support" of those states for relevant treaty protocols (id., para. 7—see infra note 375); and
(4) Call for consideration of further steps on security assurances (id., para. 8—adding that such steps "could take the form of an internationally legally binding instrument").

On the strengthened review process, see Jayantha Dhanapala, A Strengthened Review Process for the NPT, 20 FORDHAM INT'L. J. 1532 (1997). A fourth component of the extension package was the "Resolution on the Middle East," available at http://disarmament.un.org/wmd/npt/1995RESME.htm. Like the Principles and Objectives and the strengthened review process, this resolution was politically linked to the extension decision. See, e.g., ALBiN, supra note 412, at 198.


420. See also RULE OF POWER OR RULE OF LAW?, supra note 32, at 26. Writing before the 2000 NPT Review Conference, Tom Graham described the NPT regime as being in a "perilous condition," citing inter alia the U.S. Senate's rejection of the CTBT, efforts to amend the ABM Treaty, and the "stalled START process." Graham warned of "a real threat that the NPT could begin to unravel" because of NNWS party dissatisfaction regarding progress on Article VI. Graham, supra note 8, at 57, 66-67.

421. 2000 P5 Statement, supra note 376, at paras. 1, 5. The statement described the NPT as "the cornerstone of the international nuclear non-proliferation regime" and as providing "an indispensable framework for future efforts against nuclear proliferation and towards nuclear disarmament." Id., at paras. 1, 22. The same statement declared that "none of our nuclear weapons are targeted at any state." Id., at para. 10. The Final Document of the Review Conference stated that: "The Conference notes the nuclear-weapon States' declaration that none of their nuclear weapons are targeted at any State." Final Document, 2000 NPT Review Conference, supra note 39, at 14, para. 14.
tion of nuclear weapons, had successfully sponsored U.N. General Assembly resolutions on nuclear disarmament in 1998 and 1999. This new grouping was widely regarded as playing a major role in the shaping of the 2000 Final Document of the NPT Review Conference, which included agreement on thirteen “practical steps” for efforts to implement Article VI of the NPT. The Final Document was welcomed, with U.S. support, in a U.N. General Assembly Resolution later in 2000.

One of the most important of the “practical steps” agreed upon at the 2000 NPT Review Conference included the strongest language ever agreed to by nuclear weapon states in relation to nuclear disarmament: “An unequivocal undertaking by the nuclear-weapon States to accomplish the total elimination of their nuclear arsenals leading to nuclear disarmament, to which all States parties are committed under article VI.” Another significant aspect of the 2000 NPT Review Conference Final Document concerns the debate mentioned earlier as to whether the elimination of nuclear weapons should precede or coincide with the “treaty on complete and general disarmament” called for by Article VI of the NPT. The 2000 Final Document makes separate references to the elimination of nuclear weapons and to general and complete disarmament. According to a senior South African official who was involved in the negotiation of the 2000 Final Document, the effect of splitting these two elements was that the “agreed approach of the 2000 document is now that nuclear disarmament should be undertaken on the way to (i.e., before) the achievement of general and complete disarmament.”

Final documents of treaty review conferences “are not legally binding in and of themselves, but they may have juridical significance especially as a source of authoritative interpretations of the treaty.” Article 31.3 of the Vienna Convention on the Law of Treaties provides as a general rule of interpret-

---

422. The members of the New Agenda group are Brazil, Egypt, Ireland, Mexico, New Zealand, South Africa and Sweden. See Burroughs & Wurtz, supra note 127, at 1-2.

423. Id. at 2 (noting for example the “pragmatic” approach of the New Agenda group, and the fact that its membership cuts across North-South boundaries and includes nuclear capable countries). See also Rule of Power or Rule of Law?, supra note 32, at 27.


426. See supra note 410 and accompanying text.

427. Further to the sixth practical step (quoted supra at text accompanying note 426), the ninth practical step calls for, inter alia: “The engagement as soon as appropriate of all the nuclear-weapon States in the process leading to the total elimination of their nuclear weapons.” The eleventh step reaffirms “that the ultimate objective of the efforts of States in the disarmament process is general and complete disarmament under effective international control.” Final Document, 2000 NPT Review Conference, supra note 39, at 15, paras. 15(9), 15(11).

428. E-mail from Peter Goosen, Chief Director, Peace and Security, South African Department of Foreign Affairs, to the author (Jan. 10, 2003) (on file with author) (also stating that the nuclear weapon states “agreed to forego their previously held position that the final elimination of nuclear weapons would not be the ultimate step but needed to await general and complete [disarmament]”).

429. Burrus M. Carnahan, Current Development: Treaty Review Conferences, 81 Am. J. Int'l L. 226, 229-30 (1987). Indeed, Carnahan suggests that subsequent agreement and subsequent practice each warrant higher status in treaty interpretation than does the treaty’s negotiating history. Id.
ing treaties that there "shall" be taken into account, as well as the context: "(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; [and] (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its application." Consensus documents of NPT Review Conferences constitute "subsequent agreement" and/or "subsequent practice" by parties, and therefore must be taken into account in assessing U.S. obligations under Article VI of the NPT. In relation to Article VI, the 1995 Principles and Objectives document should be accorded particular juridical significance because it formed part of a package of resolutions on which the indefinite extension of the NPT, and consent thereto, was based. The "practical steps" in the 2000 NPT Review Conference Final Document also partake of that significance because they flowed from the 1995 Principles and Objectives.

2. Bush Administration Approach and its Implications

President Putin and I agree also that the greatest danger in this war [against terrorism] is the prospect of terrorists acquiring weapons of mass destruction. Our nations must spare no effort at preventing all forms of proliferation.

(2003] NONPROLIFERATION & REDUCTION OF NUCLEAR WEAPONS 485)

[T]he NPT is the centerpice of the global nuclear nonproliferation regime. It plays a critical role in efforts to prevent the spread of nuclear weapons, including to terrorists and states that support them. The NPT's value depends on all parties honoring their obligations. The United States places great importance on fulfilling its NPT undertakings, including those in Article VI related to nuclear disarmament.

(Secretary of State Colin Powell)

This section will focus on the U.S. approach to its NPT Article VI commitments as expressed in the 2000 Final Document's thirteen "practical steps" on efforts to implement Article VI of the NPT. That document represents the most recent authoritative interpretation of what NPT nuclear weapon states and others should be doing now towards fulfillment of their obligations under Article VI. The United States joined in the consensus in favor of the Final Document of the 2000 NPT Review Conference, and supported its affirmation in the form of a

430. VCLT, supra note 15, art. 31.3.
431. Indeed, NPT parties included language in the extension decision itself "emphasizing" the two accompanying decisions on "principles and objectives" and on strengthening the NPT's review process. NPT Extension Decision, supra note 418.
432. Presidents' News Conference in Moscow, supra note 172, at 887.
433. Powell, supra note 95. Powell continued:

The elimination of nuclear weapons is a key goal of the NPT, but one that will not be reached quickly or without enormous effort. All states have a responsibility to work toward this goal. It can be achieved only through a step-by-step process. Article VI of the NPT reflects this reality and sets no timelines or specific milestones. The Moscow Treaty represents an historic step in that process. It is an important achievement and the actions called for under the Moscow Treaty represent significant progress in meeting the obligations set forth in Article VI of the NPT.

Id. As argued above, see supra text accompanying notes 204-31, although welcome, the nuclear reductions provided for in the Moscow Treaty are so heavily qualified and contingent that their reassurance value is somewhat illusory. The same point applies to Powell's characterization of the Moscow Treaty as "significant progress in meeting [NPT Article VI] obligations."
U.N. General Assembly Resolution. At the U.N. General Assembly in 2000, the U.S. delegation described the Final Document as "our guiding light for nuclear nonproliferation and disarmament efforts." Yet under the Bush administration the United States has since explicitly or tacitly rejected key "practical steps," as the following examples illustrate.

The first practical step concerned the early entry into force of the CTBT. As noted above, the Bush administration’s opposition to this treaty is not only preventing U.S. ratification but hampering the broader international process towards entry into force. In this case, the United States is actively opposing a step it undertook to support. The second practical step was for a moratorium on nuclear explosions pending the entry into force of the CTBT. As also noted earlier, the U.S. nuclear testing moratorium is now somewhat precarious.

The fifth practical step was the application of the “principle of irreversibility” to nuclear disarmament and other nuclear arms control and reduction measures. As outlined above, the major nuclear reductions codified in the Moscow Treaty are not irreversible, and indeed Defense Secretary Rumsfeld has explicitly rejected the application of the irreversibility principle to the reduction of nuclear weapons. The sixth practical step was the unequivocal undertaking by nuclear weapon states to accomplish the elimination of their nuclear arsenals. While partially offset by the “flexibility” of the Moscow Treaty, the planned reduction in the number of operationally deployed U.S. nuclear warheads is a welcome step in the right direction. However, both the Nuclear Posture Review and the tenor of administration statements (for example, in opposing the CTBT) suggest that the current administration assumes the retention of the U.S. nuclear arsenal into the indefinite future.

The seventh practical step concerned the early entry into force of START II and conclusion of START III, together with the preservation and strengthening of the ABM Treaty as “a cornerstone of strategic stability.” The unilateral U.S. withdrawal from the ABM Treaty flies in the face of this aspect of NPT parties’ understanding of the measures necessary for the implementation of Article VI. Moreover, as noted above, it is questionable whether the Moscow Treaty is preferable to what would have been achieved under a ratified START II and a START III concluded along the lines proposed at Helsinki in 1997.

The ninth practical step contains a cluster of steps to be accomplished by nuclear weapon states. These include: (1) Unilateral reductions in nuclear arsenals—for which the Bush administration can claim some credit under the

---

434. Burroughs & Wurst, supra note 127, at 8.
436. Id. at 14, para. 15(2). See also infra text accompanying notes 285-90.
437. Id. at 14, para 15(5).
438. See supra text accompanying notes 214-20.
441. See supra text accompanying notes 223-231.
Moscow Treaty, notwithstanding the limitations of that treaty; (2) Increased transparency by nuclear weapon States regarding "nuclear weapons capabilities and the implementation of agreements pursuant to article VI"—unfortunately, the definitional uncertainty and "flexibility" of the Moscow Treaty reflect decreased rather than increased transparency (relative to the START process); (3) "Concrete agreed measures" to reduce further the operational status of nuclear weapons systems—for which the Bush administration can claim full credit, given that the Moscow Treaty in effect provides for the "de-alerting" of a large number of U.S. nuclear warheads; and (4) "A diminishing role for nuclear weapons in security policies to minimize the risk that these weapons will ever be used and to facilitate the process of their total elimination." In this last regard, as argued above the real significance of the Nuclear Posture Review is that it accords enhanced strategic significance to nuclear weapons. This understanding of the Bush administration's nuclear posture appears to be widely shared, despite administration assertions to the contrary. This represents another area in which Bush administration policy is directly opposed to the "practical steps."

At the April 2002 meeting of the Preparatory Commission for the 2005 NPT Review Conference, U.S. Ambassador Wulf said in his opening statement that "[t]he United States generally agrees with the conclusions of the 2000 NPT Review Conference and will contribute to their implementation." He reportedly stated that the United States "no longer supports" the "practical steps" relating to the ABM Treaty and the CTBT. In challenging the content of the Chairman's Factual Summary for the April 2002 meeting, Wulf said that "any inference . . . that all States Parties at this PrepComm supported implementation of all the conclusions of the 2000 Final Document is incorrect."

The policy of withdrawing U.S. support for the "practical steps" agreed to among NPT parties damages the strengthened NPT review process—which was an integral component of the package enabling the indefinite extension of the NPT—and causes other states to query whether the United States is acting in good faith. If the United States wishes to avoid accountability under the NPT review process in the interests of unconstrained policy options (for example, in relation to the CTBT and the ABM Treaty), it should be prepared for others to reconsider their commitment to their undertakings under the NPT regime from a similarly unilateralist perspective.

443. See supra note 221.
444. See supra notes 385-95.
445. Wulf, supra note 7 (emphasis added).
446. Roche, supra note 220, para. 14.3.
D. Evaluation: Predominantly Unilateralist Approach Liable to Weaken the Global Nuclear Nonproliferation Regime

[W]e have to ensure that the existing disarmament agenda is not jettisoned. . .on the excuse that we have a new threat to contend with.

(Jayantha Dhanapala, U.N. Under-Secretary-General for Disarmament Affairs 448)

Perhaps more noticeably in this area than in any other, "Washington simply cannot afford the resentment and lack of cooperation that a unilateralist America engenders." 449

One of the most disturbing features of the unilateralist slant of current U.S. policies is the tendency to be dismissive of international legal arrangements, at least insofar as they might bind the United States. As Granoff argues: "Nothing could be more dangerous than a world without legal constraints on developing nuclear arsenals." 450 The fact that "tyrants" might sign and breach nonproliferation treaties 451 makes it no less important to ensure that those treaties and their verification regimes are as strong as possible. 452 Hirsh points out that raw power does not work to stop nations from passing on WMD [weapons of mass destruction] knowledge. Nor does it work well to stop other nations from seeking to obtain WMD, especially if they know the United States is working to enlarge and improve its own nuclear arsenal and that it renounces international law and organizations. 453

It is imperative that the United States do all in its power to shore up existing nonproliferation norms. As the world's foremost military power, the United States has a special responsibility to lead by example. 454

The administration's professed commitment to certain relevant treaties 455 rings somewhat hollow. First, there is the loud and unilateralist insistence on maintaining utmost "flexibility" in U.S. nuclear options. This insistence is scarcely compatible with the genuine acceptance of legally binding multilateral obligations, the very purpose of which is to restrict the nuclear options of individual states. Second, there is the administration's inclination to qualify its descriptions of treaties to which the United States should be committed: They

448. Dhanapala, Opening Remarks, supra note 393.
450. Granoff, supra note 226. Graham makes a similar point: "The alternative to a world in which security and nuclear non-proliferation are pursued through international legal structures is a world in which states seek security through a militaristic race to the top constituting a humanitarian race to the bottom." Graham, supra note 8, at 69.
451. See remark by President Bush quoted supra note 389.
454. President Bush has described the U.S. and Russia as "two states which are particularly responsible for international security and strategic stability." Presidents' News Conference in Moscow, supra note 172, at 888.
must meet "today's threats." The implication here is that any arms control treaty to which the United States is party will be subject to constant review, which may at any time result in a decision that a particular treaty no longer serves U.S. interests and no longer warrants U.S. adherence. The potential negative consequences of these U.S. policies for the global nonproliferation regime appear to go unheeded by the administration.

There is a serious risk that the Bush administration's provocative nuclear policies will dangerously tilt the delicate balance which has so far limited the proliferation of nuclear weapons to a very small number of states. The indefinite extension of the NPT in 1995 was by no means a foregone conclusion. If U.S. nuclear policies prevailing in 1995 had more closely resembled those of 2002, it is extremely doubtful that the treaty's indefinite extension would have been achieved. Non-nuclear weapon state parties may be forgiven for a degree of cynicism about future U.S. policy, particularly in view of the U.S. decision to renege on several of the "practical steps" agreed at the 2000 NPT Review Conference. Such cynicism cannot but affect the credibility of stern United States calls for other countries to observe the letter and spirit of their nonproliferation obligations.

The Bush administration has stressed time and again that its key concern in the field of nuclear nonproliferation is the prospect of nuclear weapons falling into the hands of terrorists. As Holum argues, in relation to nuclear, chemical and biological nonproliferation regimes, "to the extent that the regimes are weakened or undercut and the atmosphere is permissive, terrorists will have an easier time gaining access to weapons of mass destruction."
The United States has displayed an apparent disregard for voluntarily assumed obligations and for the balance underlying the NPT regime. In consequence, the United States has made the going much easier for states which would like to opt out of their international obligations concerning nuclear weapons.\footnote{458} Take the hitherto unprecedented case of a non-nuclear state party withdrawing from the NPT, as North Korea announced it would do in January 2003. As noted earlier, the NPT provides that each party "shall have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country."\footnote{459} Following is a sample of the kind of reasoning a withdrawing state might put forward (some of which has echoed in North Korean pronouncements):

(1) After three decades, the nuclear weapon states have failed to live up to their side of what was always an unequal bargain: the disarmament obligation set out in Article VI of the NPT. The withdrawing state joined the 1995 consensus of NPT parties favoring indefinite extension, but only because of the terms set out in the 1995 "Principles and Objectives" document and the existence of negative security assurances from all NPT nuclear weapon states. Insufficient compliance on the part of nuclear weapon state parties with the terms accompanying indefinite extension has vitiated the withdrawing state's agreement to the NPT indefinite duration of the NPT.

(2) The "supreme interests" of the withdrawing state would be best served by a world free of nuclear weapons. However, this seems unattainable in view of: (a) the ongoing unwillingness of nuclear weapon states to disarm, (b) indications that the United States plans to enhance rather than diminish the strategic role of nuclear weapons, and (c) the acknowledged problem of horizontal proliferation. In any case, arms control agreements cannot be relied upon (in view of both the continuing retention of nuclear arsenals by the nuclear weapon states and the nuclear weapon programs undertaken by certain states in violation of NPT commitments). In short: flawed treaties deserve no support, and if you can't beat them, join them.

(3) Compliance with NPT obligations amounts to an unjustifiable restriction of the withdrawing state's military and defense options. This restriction can no longer be tolerated in an increasingly dangerous and unpredictable world.

\footnote{458} Even in countries which are not generally regarded as proliferation risks, the acquisition of nuclear weapons is sometimes proposed by advocates of some influence (although governments have tended to distance themselves from such advocates). See, e.g., Larry Rohter, Brazil Needs A-Bomb Ability, Aide Says, Setting Off Furor, N.Y. TIMES, Jan. 9, 2003 at A8 (citing a suggestion from the Brazilian minister of science and technology that Brazil should acquire nuclear weapon capability, as well as a criticism of the NPT voiced by President da Silva in September 2002, while running for office: "If someone asks me to disarm and keep a slingshot while he comes at me with a cannon, what good does that do?"); Jonathan Watts, Japan 'Could Build 7,000 Nuclear Bombs', THE GUARDIAN, April 8, 2002, at 12 (quoting an influential Japanese opposition politician). Such arguments can only be expected to gain ground if the global nuclear nonproliferation norm loses force.

\footnote{459} NPT, supra note 6, art. X.1.
The NPT is a relic of the Cold War which, in the view of the withdrawing state, no longer promotes that state’s security interests in view of today’s threats.

(4) The uncertain post-September 11 climate, the threats posed by “nuclear terrorism” and (possibly) by so-called “rogue states” all constitute “extraordinary events” jeopardizing the “supreme interests” of the withdrawing state. This is all the more likely to be argued if (a) countries in the region of the withdrawing state have nuclear weapon programs, or (b) the withdrawing state believes that it is regarded by the United States as being “against” rather than “with” the United States. The U.S. withdrawal from the ABM Treaty in the absence of any pronounced international outcry demonstrated the right of parties to arms control treaties to invoke withdrawal clauses without sanction.

(5) As has been demonstrated in the case of North Korea, the following variant may be expected if the withdrawing state were one of the five NPT non-nuclear weapon states parties reportedly implicated in the Nuclear Posture Review as possible nuclear targets (i.e. North Korea, Iraq, Iran, Syria and Libya): Reports that the United States no longer intended to honor its long-standing negative security assurance vis-à-vis the withdrawing state constituted an “extraordinary event” jeopardizing that state’s “supreme interests.” Such reports are a warning that the United States is prepared to use nuclear weapons against the withdrawing state, despite its undertaking not to do so. The withdrawing state might argue that its “very survival” may be at stake, picking up on the language of the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons.

460. See supra note 378 for the December 31, 2002 remarks by North Korea’s Ambassador to Russia about the perceived threat from the U.S. of a pre-emptive nuclear strike. The Ambassador added that “North Korea is not currently able to meet its commitments under the [NPT]—this is the fault of the United States,” and hinted that North Korea might withdraw from the NPT. Brooke, South Opposes Pressuring North Korea, supra note 147. In its January 2003 NPT withdrawal announcement, North Korea described the withdrawal as “a legitimate self-defensive measure taken against the US moves to stifle the DPRK and the unreasonable behaviour of the IAEA following the US.” North Korean Statement of January 10, 2003, supra note 142. The statement also referred repeated to “hostile policy” and “nuclear threat” allegedly directed at North Korea by the United States. Id. See also infra text accompanying notes 135-47.

461. See, e.g., supra note 377 and text accompanying notes 365-79.

462. Another example of North Korean rhetoric is a statement broadcast on November 18, 2002 by the official North Korean broadcaster, which said that: “To safeguard our sovereignty and the right to exist we are entitled to have powerful military countermeasures, including nuclear weapons.” North Korea Clarifies Statement, supra note 101.

463. The International Court of Justice concluded (by seven votes to seven, by the President’s casting vote), that the threat or use of nuclear weapons would “generally” be contrary to international law, particularly international humanitarian law, but that in view of the current state of the law and the available facts, “the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a State would be at stake.” Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, supra note 405, para. 105(2)(E). This cryptic pronouncement must be considered in the context of the Court’s other conclusions, notably the following (the Court was unanimous unless otherwise stated):

(a) that no specific authorization of the threat or use of nuclear weapons exists in international law. Id., para. 105(2)(A);
However self-serving some of these arguments may be, and however spurious the motivations of those most likely to make them, many of these points have been made more tenable by the recent U.S. approach to nuclear issues. A counter-argument of "do as I say, not as I do" is unlikely to assist. Of course, a country seeking to develop a nuclear weapon program is unlikely to broadcast its intentions and may well choose to remain party to the NPT. By undermining the multilateral norm of nuclear nonproliferation, however, some U.S. policies are making it both more likely that other countries will renounce that norm (by NPT withdrawal and/or covert nuclear weapon development programs) and also easier for such countries to seek to justify their behavior.

VI.
CONCLUSION

The Bush administration perspective is that it is entirely justifiable to maintain utmost unilateral flexibility regarding proposed missile defense capabilities and all policies related to the U.S. nuclear arsenal: its size and structure; testing policy; use criteria; and possible development of new weapons and improvement of old ones. Especially at a time of insecurity generated by the September 11, 2001 attacks, this perspective can be expected to strike a chord with the U.S. public. It has driven U.S. policy on key issues highlighted in this article: missile defense and the ABM Treaty; reductions in U.S. nuclear warhead numbers; the CTBT; the maintenance and possible upgrading of the U.S. nuclear arsenal and the formulation of doctrines regarding its use; and U.S. nuclear disarmament commitments.

There is a pattern of avoidance or disavowal of U.S. adherence to multilateral or bilateral nuclear proliferation and arms control efforts, wherever it is suspected that such adherence might one day constrain unilateral U.S. action. As the constraint of proliferating national behavior is the very purpose of international nonproliferation obligations, the pattern of U.S. disavowal and avoid-

(b) (by a split vote) that international law contains no comprehensive and universal prohibition of the threat or use of nuclear weapons. Id., para. 105(2)(B);
(c) that a threat or use of nuclear weapons would be unlawful if contrary to Article 2(4) of the U.N. Charter without meeting the requirements of Article 51 of the Charter. Id., para. 105(2)(C). (Article 2(4) of the U.N. Charter prohibits "the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." By way of exception to this principle, Article 51 recognizes the right to individual or collective self-defense "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"); and
(d) that a threat or use of nuclear weapons "should also be compatible with the requirements of international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons." Id., para. 105(2)(D) (emphasis added).

A state announcing its withdrawal from the NPT might argue that the ICJ had sanctioned use of nuclear weapons in extreme circumstances—which must sanction possession—and that reports that the United States contemplated using nuclear weapons against the withdrawing state demonstrated that the state's "very survival" was at stake.
ance has given rise to consternation from countries and institutions concerned about its impact on the global regime. Examples of the U.S. unwillingness to be bound include the abandoned ABM Treaty, the ultra-flexible Moscow Treaty, the unratified CTBT and the ignored or dismissed aspects of consensus decisions of NPT Review Conferences regarding Article VI of the NPT. The United States has also pulled back from previously-stated assurances which formed part of a broader array of unilateral nuclear weapon state behavior with an important place in the global regime (notably negative security assurances and the nuclear testing moratorium). This predominantly unilateralist approach is only partially offset by the side theme of selective multilateralism, which has seen the United States take a lead in such international nonproliferation measures as export controls, nuclear threat reduction and strengthening the IAEA.

The major problem with the current U.S. approach is that it overlooks the realities of the delicate balancing of the global nuclear nonproliferation regime. By elevating the "flexibility fetish" to be the governing impulse of U.S. nuclear-related policies, the Bush administration sends a clear message about the ongoing strategic importance of nuclear weapons. That message is antithetical to the aims of nonproliferation. Current U.S. nuclear-related policy ruins prospects for the entry into force of an instrument of crucial nonproliferation significance, the CTBT. It invites concern that the United States reserves to itself the right to decide to increase its nuclear arsenal, to develop new weapons, to resume testing, to renege on important and long-standing negative security assurances, to dismiss as irrelevant multilaterally-agreed interpretations of the Article VI NPT disarmament obligation, and to break the post-World War II taboo on the use of nuclear weapons (possibly in the course of an inherently controversial "pre-emptive strike"). More generally, it casts serious doubt on the willingness of the United States to subscribe to collective rules, even where it has played a major role in shaping their content. In some respects, the U.S. policy is more exceptionalist than unilateralist. Implicit in much U.S. rhetoric is the idea that other states are not entitled to do as the United States is doing.

The foreseeable consequences of current U.S. policy are highly damaging to the global nuclear nonproliferation regime to which the United States professes commitment. At the very least, the current United States approach is liable both to weaken the support of non-nuclear weapon states for the multilateral nuclear nonproliferation regime, and to destroy any momentum towards significant progress on the nuclear disarmament and nonproliferation agenda. It is not helpful for simultaneous U.S. attempts to encourage international efforts on export controls, nuclear "threat reduction," and strengthening the International Atomic Energy Agency. It undercuts any momentum for nuclear weapon states party to the NPT to reduce their nuclear arsenals and, in the case of China especially, it is likely to encourage further vertical proliferation. It undermines efforts to deal with the challenges posed by the possession of nuclear weapons by India, Israel and Pakistan—let alone the problems presented by the "rogue states" of paramount concern in U.S. rhetoric. Most disturbingly, it may encourage some states to despair of the future potential of the NPT regime, to the
point that the powerful norm against proliferation loses much of its force and some non-nuclear weapon states—including some not perceived by the United States as “rogue states”—reconsider their past national decisions to eschew nuclear weapons.

The United States has it in its power to lead by example. Instead of undermining the crucial norm of nuclear nonproliferation, it could be entrenching it. The administration’s approach to nuclear threat reduction and to strengthening the IAEA provide examples of how this can be done. But such measures are only partial. More consideration is needed of the global impact of the decisions of the United States regarding its own nuclear arsenal and adherence to international nonproliferation and disarmament obligations. The unraveling of the NPT regime should figure in administration thinking as a nightmarish “worst-case” scenario, which would negate the strongest legal and political constraints on nuclear weapons and which should therefore be avoided at all costs. It is thus in the interests of the United States to make policy not only on the basis of its ideally preferred offensive and defensive options, but taking into account the likely ripple effects. U.S. conduct is only one of many factors contributing to the decisions of other countries regarding nuclear (non)proliferation, but it is significant. If even one additional country undertakes a nuclear weapons program and/or withdraws from the NPT, the nuclear nonproliferation regime will have been qualitatively weakened and the risk of “nuclear terrorism” increased, all to the detriment of U.S. objectives.

As a nuclear weapon state party to the NPT with unprecedented global military and political supremacy, the United States will best serve its own security objectives by doing all in its considerable power to promote the norm of nuclear nonproliferation and the NPT regime which underpins it. This end cannot be achieved by maintaining current unilateralist policies.