The Adequacy of International Law for Arms Control – Post Sept. 11: Arms Control and Nonproliferation

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Arms control was never an end in itself. Arms control and nonproliferation policy always had as their goals increasing international security. It may be worth recalling that, in response to having it called to his attention that he had changed his views on a matter, Lord Keynes is widely reported to have quipped, "When the facts change, what do you do?" Indeed, as Lord Keynes also once said, "There is no harm in sometimes being wrong—especially if one is promptly found out."1

The question for this panel is whether the sea change in strategic thinking reflected in the arms control and nonproliferation policies of the Bush administration are based on new facts and a better understanding of the relation between those policies and the international environment. In keeping with the theme of this conference, we need to explore whether long-established or emerging understandings of the role international law plays in this area provide the best platform for assuring international security from the risk of weapons of mass destruction. Are arms control and nonproliferation in fact a case of delegalization, or are they simply the beginnings of a relegalization on entirely new premises?

The current regime is largely one of multilateral institutions of a nearly legislative character established by formal treaty and lesser quasi-legal instruments, such as the Treaty on the Non-Proliferation of Nuclear Weapons (NPT),2 the Nuclear Suppliers' Group, the Missile Technology Control Regime, the Australia Group, the Chemical Weapons Convention,3 the Comprehensive Test Ban Treaty,4 and the Biological Weapons Convention.5 Bilateral commitments—such as, for example, START6 and the Anti-Ballistic Missile Treaty (ABM)7—largely fit into this multilateral structure through their linkage to the denuclearization obligations of nuclear weapons states under Article VI of the NPT, which was most recently reaffirmed, arguably even enhanced, by the Clinton administration at the NPT Review Conference held in 2000.

The central premise of this regime as a subsystem of international law is the right, based on sovereign equality, of all states—regardless of the character of their internal regimes—to have access to the necessary equipment, materials, and technology. Renunciation of the right to weapons of mass destruction accordingly entails a correlative commitment by those states that possess such capabilities to transfer materials, equipment, and technology so as not to deprive the international community as a whole of

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5 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on Their Destruction, 11 ILM 309 (1972).


the benefits of peaceful cooperation. In other words, the sovereign right of access, and thus nonproliferation policy, is premised on a state’s compliance with international legislation rather than on the character of its regime.

The breakdown of this seamless web of commitments promises a radically different approach, focusing instead on bilateral measures. Perhaps, as Henry Sokolski and others now in the Bush administration have argued, it is necessary to employ a kind of discriminate nonproliferation, that is to say, distinguishing among states that would acquire weapons of mass destruction in terms of the internal character of their regimes rather than of their compliance with international legislation.\(^8\) Why, in other words, should the United States oppose India’s possession of nuclear weapons and why should it be satisfied with essentially an atoms for peace approach to North Korean acquisition of sensitive nuclear technology and material?

Indeed, can the United States continue to adhere even to its NPT obligation not to transfer nuclear weapons technology to NPT non-nuclear weapon states such as India when the imperative of strategic discrimination dictates different approaches? In an era when democracy challenges despotism everywhere, is the former sovereign right to access to inherently dangerous materials, equipment, and technology now better conceived as an entitlement only for democratic states? Must national security policy be democratized so that only states whose political processes permit the question of possession or use of weapons of mass destruction to be subject to some degree of democratic political control may rightfully claim to participate in this dangerous trade? Should such a principle become a legitimate ground for discrimination in unilateral national policy?

We may have no choice. Al Qaeda’s origins in Saudi Arabia and Egypt suggest that nondemocratic states may well be breeding grounds for terrorism, and the support that Iraq and Iran have furnished international terrorism reinforces the link between the internal character of a state and the foreign policy means it can employ over time. The new global threat of terrorist use of weapons of mass destruction may well compel a focus on particulars and country-by-country policies. The U.S. administration specifically relied on this new circumstance as “the extraordinary event jeopardizing” the United States’s “supreme national interests” and thus warranting our withdrawal from the ABM.

Yet this precedent could serve as an argument for NPT non-nuclear-weapon states to assert that their “supreme national interests” have been compromised by the willingness of some states to harbor terrorists capable of using weapons of mass destruction. Much as the United States has claimed that new circumstances compel it to install a limited missile defense capability, NPT member non-nuclear-weapons states might well conclude that they now require the capacity, through the threat or use of nuclear weapons, to retaliate and thereby deter states from giving support to terrorists capable of using weapons of mass destruction.

That logic no doubt extends to the acquisition of other types of retaliatory capabilities. It opens the door to dissolution of the existing multilateral arms control regime. Moreover, the increasing risk of horizontal proliferation calls into question the trend over the last generation toward decreasing vertical proliferation. Arguably, as the volume of surplus nuclear materials, particularly in Russia, increases (even with the best possible effort toward physical protection and recycling through peaceful nuclear activities), the risks associated with horizontal proliferation, including that these weapons fall into the hands of terrorists, will increase.

In sum, are we now embarked on an era of retrenchment of international legislation in arms control and nonproliferation policy, an era of unilateral and bilateral U.S. efforts to maximize its leverage—case by case, problem by problem, state by state? Should

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we be? (Retrenchment might parallel a similar Bush administration move toward regional and bilateral trade policy, where avoiding multilateral negotiations facilitates the exercise of relative U.S. power in securing deeper trade integration and the leverage to secure better terms of trade in nonweapons-sensitive market sectors.) I raise these questions about the continued utility of existing multilateral regimes in the spirit of Lord Keynes, who also said, “Words ought to be a little wild, for they are the assault of thoughts on the unthinking.” If there were ever any doubt, the death of more than three thousand American and foreign nationals on September 11th now clearly establishes the need to think through arms control and nonproliferation policy from the ground up, so that law follows good policy and the shackles of international law do not prevent us from getting things right.

Let us now look at the real world gains in international security to be achieved in arms control and nonproliferation policies as we grapple with these larger questions of legal strategy. Department of Defense Associate Deputy General Counsel Jack Beard will now address the bilateral efforts of the Bush administration to address the threat of chemical and biological weapons proliferation, particularly in the soft underbelly of Russia, the region of greatest strategic interest today.

A New Urgency About Anthrax: Recent Efforts to Prevent the Proliferation of Biological Weapons in the Former Soviet Union

by Jack M. Beard

The threat of biological weapons, once an obscure topic to most Americans, achieved new prominence and urgency in the United States with the anthrax letter attacks that followed the terrorist attacks of September 11, 2001. A number of infections traced to a handful of anthrax-laced letters focused unprecedented attention in America on the danger of biological weapons (BW). Coupled with continuing reports of attempts by terrorists to acquire weapons of mass destruction, this has made efforts to prevent BW proliferation a high priority for the U.S. government.

Notwithstanding the new prominence of the BW threat, the U.S. government recently withdrew its support of a seven-year effort to create a new protocol to improve monitoring and inspections under the 1972 Biological Weapons Convention (BWC). Concerned that the protocol’s approach would compromise sensitive biological defense and confidential business information and would do nothing to increase compliance with the BWC, U.S. Under Secretary of State for Arms Control and International Security John Bolton, told a UN Conference on the Biological Weapons Convention that “the United States will simply not enter into agreements that allow rogue states or others to develop and deploy biological weapons,” stating that the draft biological weapons protocol “is dead in our view and not to be resurrected.” The United States also sought

9 BARTLETT, supra note 1, at 783.

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1 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 UST 583, 1015 UNTS 165 (entered into force March 26, 1975) [hereinafter BWC] (there are currently 144 states that are parties to the BWC).

2 John Zarocostas, U.S. Names Five Biological Weapons States, UNITED PRESS INT’L, Nov. 19, 2001; Steven Mufson, U.S. Says Iraq, Other, Pursue Germ Warfare, WASH. POST, Nov. 20, 2001, at A8 (noting that Mr. Bolton also said that “the time for ‘better than nothing’ protocols is over” and that “we will continue to reject flawed texts like the BWC draft protocol, recommended to us simply because they are the product of lengthy negotiations or arbitrary deadlines, if such texts are not in the best interests of the United States”).
to focus attention on the number of BWC member countries with offensive BW programs. In response, domestic and foreign commentators strongly criticized the U.S. position, questioning America's commitment to this and other multilateral efforts.\(^3\)

Although the United States rejected the proposed BWC protocol, it continues to combat the threat posed by biological weapons by other means, including increased bilateral efforts to prevent the proliferation of biological weapons. In a recent meeting with the president of Russia, President Bush declared that "our highest priority is to keep terrorists from acquiring weapons of mass destruction" and that "we will strengthen our efforts to cut off every possible source of biological, chemical, and nuclear weapons, materials, and expertise."\(^4\) In this regard, there is no greater threat than that posed by the legacy of the Soviet Union's BW program. In addition to five military microbiological facilities under the control of the Soviet Ministry of Defense, it has been reported that as many as forty-seven other scientific institutes and production facilities worked on biological weapons under the cover of numerous other Soviet ministries and organizations. Many of these only recently came to light after Russian President Boris Yeltsin officially acknowledged the existence of an offensive BW program in April 1992.\(^5\)

The legacy of the Soviet BW Program, coupled with economic problems in the states of the former Soviet Union (FSU), has posed a serious threat of proliferation of BW-related expertise (the "brain drain" of former weapons scientists); smuggling or unauthorized transit of pathogenic agents; and export and diversion of BW-related equipment, including dual-use technology.\(^6\) While many of the Soviet BW complexes and production centers were located in Russia, two other former Soviet states, Kazakhstan and Uzbekistan, also have inherited substantial portions of this deadly BW infrastructure. The Scientific Experimental and Production Base at Stepnogorsk, Kazakhstan has been called by experts the Soviet Union's main facility for the manufacture of biological weapons and was in fact "one of the largest installations ever created for this purpose."\(^7\) It was at Stepnogorsk that research teams developed the Soviet Union's most deadly weapons-grade anthrax agents. Other facilities in Kazakhstan, such as the Scientific Research Agricultural Institute, developed agents harmful to livestock and plants.\(^8\) On an isolated island named Vozrozhdeniye in the Aral Sea, the government of Uzbekistan is now confronted with the vast infrastructure that supported the Soviet Union's major open-air BW testing range.\(^9\) In addition to being the site for testing pathogens such as tularemia, Q-fever, brucellosis, glanders and the plague, Vozrozhdeniye is also the world's largest anthrax burial ground.\(^10\)

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\(^3\) Bush Administration Irresponsible in Face of Bioweapons Threat: U.S. Kills Biological Weapons Conf., Puts U.S. at Risk, U.S. NEWSWIRE, Dec. 7, 2001 (noting that the U.S. position "so shocked delegates" that European Union representatives referred to the U.S. delegation as "liars"); Herve Kempf, \textit{Is US Power a Force for Good in the World?} MANCHESTER GUARDIAN WKLY., Jan. 23, 2002, at 29 (arguing that U.S. actions such as the opposition to the biological weapons protocol show that "the Americans have adopted a deliberately unilateral stance").


\(^6\) \textit{Id.} at 1.

\(^7\) Gulbarshyn Bozheyeva et al., \textit{Former Soviet Biological Weapons Facilities in Kazakhstan: Past, Present, Future}, in 8 OCCASIONAL PAPER No. 1, at 8 (Monterey Inst., Center for Nonproliferation Stud., June 1999). The BW facilities at Stepnogorsk occupied two square kilometers and consisted of 25 buildings; they were capable of producing up to 300 metric tons of weapons-grade anthrax over a 10-month period.

\(^8\) \textit{Id.} at 11.

\(^9\) Although both Kazakhstan and Uzbekistan own parts of Vozrozhdeniye Island, the BW-related infrastructure and testing range is located on the Uzbekistan portion of the island.

\(^10\) Judith Miller, \textit{Poison Island: a Special Report; At Bleak Asian Site, Killer Germs Survive}, N.Y. TIMES, June 2, 1999, at A1. In the spring of 1988, Soviet scientists secretly transferred hundreds of tons of militarized anthrax bacteria in giant steel canisters to Vozrozhdeniye Island, where they were dumped into huge pits and only partially destroyed.
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U.S. government agencies are actively working to prevent the proliferation of BW-related expertise in Russia, Kazakhstan, and Uzbekistan through a variety of mechanisms. For example, the Department of State has direct responsibility for several nonproliferation programs in these countries, helping establish or strengthen export control systems, providing better nonproliferation tools for export licensing and tracking, and overseeing U.S. participation in the International Science and Technology Center (ISTC) in Russia. The ISTC supports such activities as research projects that provide “incentives for weapons scientists to refrain from cooperating with terrorist groups or states” and redirects them to “sustainable careers in peaceful, transparent civilian endeavors.”

With numerous countries reportedly seeking former Soviet weapons scientists to further their own BW programs, these efforts to prevent the proliferation of BW-related expertise enjoy substantial U.S. government support.

The Department of Defense (DoD), through the Cooperative Threat Reduction (CTR) Program, is particularly active in what the DoD refers to as “Biological Weapons Proliferation Prevention” (BWPP) projects. These BWPP projects help FSU states dismantle former Soviet BW research and production facilities; consolidate, secure, and eliminate pathogenic stocks; and conduct targeted collaborative research with FSU scientists. As a DoD official stated in testimony before Congress, “in our view, the Biological Weapons Proliferation Prevention aspect of the CTR program is of exceptional, and increasing, importance.”

Under the auspices of the ISTC, the DoD is collaborating on research projects at numerous Russian facilities and is also active in projects that improve the physical security of dangerous pathogens and biological materials. Additional ISTC projects designed by the DoD to support BWPP objectives are planned. Besides sponsoring ISTC projects in Russia, the DoD is working closely with counterpart agencies on BWPP activities in Kazakhstan under an agreement concerning weapons of mass destruction infrastructure elimination (WMDIE Agreement). These efforts include assistance in dismantling and demilitarizing BW facilities at Stepnogorsk, enhancing biological safety and security, and dismantling excess equipment and infrastructure at the Anti-Plague Institute in Almaty and the Scientific Research Agriculture Institute in Otar. Some of this assistance is provided under an annex to the WMDIE Agreement that is a framework for assistance related to “biological material protection, control, and accountability to conserve, characterize and protect strain collections of microorganisms and to prevent the proliferation of biological material that could contribute to the proliferation of weapons of mass destruction.”

1 Testimony of Vann Van Diepen, Deputy Assistant Secretary of State for Nonproliferation, Hearing Before the International Security, Proliferation and Federal Services Subcommittee of the Senate Governmental Affairs Committee on the Nonproliferation Assistance Coordination Act, FEDERAL NEWS SERVICE, Nov. 29, 2001. The ISTC, which began its work in 1994, is funded by private companies, the European Union, and the governments of Japan, Norway, Russia, South Korea, and the United States. A similar institution, the Science and Technology Center in Ukraine, began its work in 1995.
12 Id.
It is in Uzbekistan, however, that the DoD has made perhaps the most notable progress since September 11th. After years of analysis and preliminary talks, but within just weeks of the September terrorist attacks on the United States, the DoD and the Uzbekistan Ministry of Defense signed an agreement to dismantle and demilitarize the BW infrastructure on Vozrozhdeniye Island and to help Uzbekistan prevent proliferation of BW technology and dangerous pathogens. This agreement was viewed as particularly timely in light of the fact that some of the anthrax buried at Vozrozhdeniye was a highly virulent strain with thick protective capsules resistant to most common antibiotics, qualities that made it an ideal target for theft by terrorists: “Federal officials feared that al Qaeda terrorists from neighboring Afghanistan might be able to obtain viable anthrax spores from the soil of the island... avoiding some of the technical hurdles involved in developing a weaponized strain of anthrax.” Administration officials noted that this agreement and a number of other U.S. government efforts together “reflect President Bush’s determination to bolster the nation’s biological warfare defenses in the wake of a spate of letters containing anthrax spores.” Other commentators noted that although the focus in times of crisis tends to be on havoc and fear, the agreement with Uzbekistan could be viewed as a “collateral benefit.”

Moving quickly to begin dismantling the BW infrastructure and eliminate pathogens at Vozrozhdeniye, the DoD is now hoping to expand the BWPP program to Georgia and Ukraine.

Thus, while the United States has been criticized for rejecting the draft BWC protocol, the events of September 11 and the subsequent anthrax letter attacks in the United States have focused more attention on other effective measures the U.S. government is undertaking, including increased bilateral efforts to dismantle the BW legacy of the former Soviet Union. These accelerated efforts, which include assistance in dismantling and demilitarizing former production and research facilities, programs to consolidate, control and secure dangerous pathogens, and collaborative research to prevent the proliferation of BW-related expertise, are part of a growing, proactive, and targeted bilateral BW nonproliferation strategy. This proactive bilateral strategy, which is only part of the U.S. government’s efforts in this area, contrasts with the difficulties and frustrations experienced by the United States in its efforts to promote implementation of effective multilateral measures to counter the threat posed by biological weapons.


