

# Controlled Maintenance

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Iran has a strong case when it maintains that it has an internationally recognized right to develop dual-use nuclear technologies (which can be used to make nuclear bombs), enrich uranium (the fissile material of choice for making bombs, especially by terrorists), and keep all the plutonium it wants (suited for making more sophisticated nuclear bombs). In making this claim Iran appealed to a deeply entrenched international norm, embodied in a treaty, and long adhered to by many nations: if a country forgoes making or acquiring nuclear weapons, it is entitled to proceed as Iran claims it is doing. (At the time of this writing, Iran has not been found by the United Nations Security Council to be in violation of the Non-Proliferation Treaty, despite U.S. and EU claims that its secret nuclear work negates its right to such technology and materials.) I shall refer to this regime as "controlled maintenance" because it legitimates maintaining dual-use nuclear assets (a term for dual-use plants, technologies, and fissile materials that can be used for both peaceful and military purposes) under controlled conditions. Submitting to inspection to verify that these assets are used only for non-military purposes is the most important of these conditions.

At the same time, indeed for decades, specific policies have been in place that reflect another norm, albeit one that is much less well articulated, a norm that favors destroying or blending down dual-use nuclear as-

sets (and not just nuclear arms), moving them to what are considered safe havens, and banning the acquisition of such assets. I refer to these policies as promoting "deproliferation." The difference between controlled maintenance and deproliferation is akin to the difference between gun registration (practiced in the United States) and outlawing the private possession of guns (as done in most free societies).

Historically deproliferation policies have dealt mainly with nuclear arms; however, over the years, several key studies (see Graham Allison's *Nuclear Terrorism*, and works by Ashton Carter, George Perkovich, William C. Potter, and Charles Ferguson) and some public figures have called for extending these policies to dual-use nuclear assets as well. Japan's strictly civilian and closely inspected nuclear power industry is the poster child for the controlled maintenance approach; Libya's decision not only to forswear nuclear weapons, but also to give up all nuclear-related technologies and material, is a prime example of fuller deproliferation. This article suggests that there is good reason to rely even more on the deproliferation policies and foster the norms that support them, leading to the formation of a different regime, to the extent that this is practical. I add the last phrase to recognize that in several situations continued reliance on controlled maintenance may well be the best that can be achieved; that a mix of

policies and norms of both kinds is very likely to persist into the foreseeable future; and that the best one can aspire to is to shift to a greater reliance on deproliferation. Still there is merit in having a clearer vision of the desired-end state, even if it cannot be fully realized. It can serve, as it does in the following situations, as a yardstick by which to evaluate various policies.

## Changes in Historical Conditions

Ever since the advent of nuclear arms, their danger has been widely understood and considerable efforts have been made to prevent their spread. However, for decades, nations were allowed, indeed encouraged and subsidized, to acquire nuclear plants that used HEU (highly enriched uranium) and generated plutonium, in order to provide energy, research and medical treatment. Under President Eisenhower's "Atoms for Peace" program, and similar programs in the Soviet Union and China, nuclear research reactors, HEU fuel, and the technical training needed to operate them were widely dispensed to states, including Iran, Ghana, Bulgaria, Syria, and Jamaica. Indeed, nations that would later develop their own nuclear arsenals, such as India, Pakistan, and Israel, received such aid. The post-World War II approach to nuclear arms and assets was embodied in the 1968 Nuclear Non-Proliferation Treaty (NPT), whose endorsers gradually

increased to include most nations in the world, currently 187.

In the terms used here, the NPT did and does apply a deproliferation strategy *as far as nuclear arms are concerned*, prohibiting states that did not previously possess nuclear arms from acquiring them, and requiring the five who did, gradually to give them up. At the same time, the NPT applies the controlled maintenance strategy to nuclear assets. The treaty implicitly assumed that the governments signing it were responsible actors, who would live up to their international obligations and be good citizens, and that limited inspections would therefore suffice to verify that they were trustworthy.

Since the inception of the NPT, the deproliferation part of the treaty has been quite successful. Few nations newly acquired nuclear *weapons* and those that did were mainly the small number that had never subscribed to the treaty (India, Pakistan, and Israel). Several states were discouraged from advancing their weapons programs, including Argentina, Brazil, South Korea, and Taiwan. Other nations concluded on their own that their interests were best served by not acquiring nuclear arms. The five "club" members (US, UK, France, Russia, and China) reduced their arsenals, thus arguably living up to the letter of the treaty but not, many observers hold, to its spirit, which called for full elimination.

As far as dual-use nuclear *assets* are concerned, where controlled maintenance was practiced, inspection turned out to be inadequate to ensure that these assets were used only for non-military purposes. In several key instances the international community discovered that despite inspections, activities banned under the NPT took place on a small scale in South Korea and Egypt, and on a larger scale in Iraq (prior

to 1991), Iran, Libya, and North Korea. The discovery following the first Gulf War that Iraq had secretly accumulated nuclear assets prompted efforts to strengthen inspections by developing additional protocols to the NPT. These protocols, which signatories of the NPT were encouraged but not required to sign, allowed inspectors greater access to declared and suspected nuclear sites.

Most importantly, international conditions have gradually changed, especially following the end of the Cold War. These changes include (a) the rise of non-state actors, especially terrorists who actively seek to acquire nuclear arms or the material from which they can be made; (b) the emergence of a nuclear "Wal-Mart" in which private parties as well as some governments illicitly trade in dual-use nuclear assets materials, exemplified by A.Q. Khan's dealings with North Korea, Iran, and Libya; and (c) a substantial increase in the number of failed and failing states that are unable to control effectively the nuclear assets and arms in their territories, especially the fifteen former Soviet republics. Unstable governments also gained power in states that have HEU and other nuclear assets including Pakistan, Ghana, Congo, and Nigeria, according to the Office of Defense Nuclear Nonproliferation, National Nuclear Security Administration.

These developments have led major scholars such as Graham Allison, Ashton Carter, and George Perkovich, and several public figures to call for various policies that, if combined, would amount to *deproliferation not just for nuclear arms, but also for dual-use nuclear assets*. (The lists are not "pure" deproliferation lists; they also contain measures to improve controlled maintenance, such as calls for a vastly strengthened IAEA [International Atomic Energy Agency] inspection regime.)

### Key Elements of Deproliferation

The major policies that jointly constitute the principal elements of a deproliferation strategy include:

1. Instead of upgrading security around nuclear weapons (as the United States and its allies are encouraging Pakistan and Russia to do), these arms should be destroyed or moved *whenever possible* to safer havens.
2. Instead of inspecting HEU-based facilities to ensure that they are used only for non-military purposes, these plants should be converted to use low-enriched uranium (LEU), from which nuclear arms are much more difficult to make, or better yet the nations involved should be offered other sources of energy. The nations involved would be compensated by the United States and its allies for the change-over and for costs that might result from using less efficient plants.
3. Instead of allowing the construction of additional nuclear reactors that use HEU, all such construction should be banned.
4. Instead of leaving spent fuel (from which plutonium can be extracted) in place and relying on inspections to ensure proper storage and security, it should be removed and consolidated in an internationally recognized, secure location.
5. Diplomatic measures, mobilization of public opinion, economic incentives and sanctions, and when prudent, all other means necessary should be employed (a) to discourage additional nations from acquiring nuclear arms and the resources from which they can be made; (b) to

ensure that nations and private parties that have these resources not sell them to others; (c) to strongly encourage nations not to allow nuclear shipments through their territories; (d) and to ensure such shipments are not transported through international spaces. (None of this should be construed to mean that preemptive war is called for or justified.)

6. Instead of relying merely on an intergovernmental architecture to prevent nuclear proliferation, a more robust yet legitimate architecture should be introduced.

### Assessment of Current Policy

Given the new international conditions already cited, several steps have been taken in the direction of deproliferation. I will list the places where additional adaptations are to be made. However, to reiterate, the main issue is not whether one adds this or that item to the policy mix, but whether one accepts that one needs to change the over-arching norm that guides policy from controlled maintenance to deproliferation.

*The current state of the NPT.* New international conditions have not led to significant changes in the NPT. It continues to uphold its deproliferation policies as far as nuclear arms are concerned (for instance, in the demand that if North Korea is to be accepted back into the community of nations it must first relinquish its nuclear arsenal and re-join the NPT) and to encourage the five Nuclear Weapon States to live up to their disarmament commitments (exhibited by broad international pressure and criticism on the part of the Non-Nuclear Weapon States at the 2005 NPT Review Conference). And NPT supporters are trying to get non-members such as Israel, Pakistan,

and India into the tent, which would require these nations to give up their nuclear arsenals.

At the same time, the NPT basically has not changed its controlled maintenance approach as far as dual-use nuclear assets are concerned. Thus, under the treaty it is still possible for a failing or rogue state to acquire dual-use nuclear assets with the full blessing of the NPT as long as it submits to IAEA inspections. For instance, in 2004, Greg Webb reported in *Global Security News-wire* that Nigeria commissioned a nuclear research reactor, purchased from China, that operates on uranium enriched to 90 percent which is considered "weapons grade." Russia is building a nuclear power reactor for Iran at Bushehr. The IAEA referred Iran to the UN Security Council for NPT violations, but continues to support dual-use nuclear-based projects there.

More generally, the IAEA still stated that "three main pillars underpin the IAEA's mission: Safety and Security—The IAEA spearheads global efforts to review and upgrade levels for safety and security for nuclear and radioactive materials in civilian use; Science and Technology—The IAEA helps countries mobilize applications of nuclear science and technology to serve critical needs of the world's developing countries; Safeguards and Verification—The IAEA keeps track of nuclear materials at more than 900 civilian facilities worldwide to verify their peaceful use."

For inspectors to review the nuclear activities in those nations that are signatories to the treaty, these states have to agree to formulate a protocol with the IAEA. To date, 121 states do not yet have these protocols in force, and 91 have not yet signed such a protocol.

Those nations that have formulated protocols can still greatly limit

and otherwise encumber the inspections involved, as Iraq did. Inspectors have been misled or otherwise thwarted from their objectives in states including Iran, Egypt, North Korea, Libya, Iraq, and South Korea, and most likely others as well.

Any system that relies on inspections, however fortified with new technologies, gives a strategic advantage to those who are inspected over those who rely on the validity of the inspections. Indeed, inspections clearly constitute a case of information asymmetry. Those who conceal the production of arms or the arms themselves have an almost unlimited number of sites to place or disperse their wares and a great variety of methods and ways to conceal them, often in very sizable territories, including high mountain ranges, extensive natural caves, and so on. Arms-producing nations also enjoy a wide variety of ways to lead inspectors to peruse misleading and diverting clues. In contrast, the inspectors, mostly from other nations and cultures, are limited in numbers, resources, capacity, and access. To the extent that they rely on information provided by rare defectors, it often turns out to be unreliable, as was the case in Iraq.

The odds are stacked against inspectors and in favor of those who violate the NPT in letter and in spirit. Hence, the NPT's attempts to deal with dual-use assets via controlled maintenance continue to be unreliable.

Above all, it is still fully legal for a signatory to the treaty that has built a full-scale nuclear facility, tested its uranium enrichment plants, and developed plutonium separation facilities, to withdraw from the treaty three months after notifying the IAEA as did North Korea in 2003 to keep all said resources and plans, and then apply them to making nuclear arms.

Another major difficulty that is built into the NPT's architecture is the way decisions are made and enforced (if and when consensus can be reached and if and when it can be enforced). To refer a treaty violation to the UN Security Council, the NPT relies on the board of the IAEA. For 2004-2005, the board's thirty-five members include, China, Russia, Pakistan, Nigeria, Sri Lanka, Venezuela, Vietnam, and Yemen. The composition and procedures of the IAEA architecture make it difficult for the IAEA to rule that the NPT has been breached. And when it does, it has no enforcement mechanism; it must rely on the UN Security Council for action, in which veto powers have often been exercised. If and when the Council votes in favor of enforcement action, it depends on forces that the United Nations does not command. Indeed, numerous United Nations resolutions have been largely ignored. In those cases in which the UN was able to enforce its will, it was typically only after one or more national powers were willing to commit their own forces.

Given the number and diversity of the nations involved in the NPT it is hard to imagine that it could be much reformulated, above all to extend its deproliferation approach for nuclear arms and also to encompass dual-use nuclear assets. The severe limitations imposed by the NPT architecture were highlighted at the May 2005 NPT Review Conference, a meeting of the 188 signatories to the treaty that takes place every five years. During the meeting Iran opposed U.S. suggestions, Arab nations focused on the nuclear threat they saw in the weapons that Israel possesses and on the U.S.' refusal to run down its nuclear arsenal. Any reference to the thirteen steps toward disarmament that were agreed upon in the 2000 NPT Review Conference were

deemed not even discussable—and it took almost two weeks merely to agree on an agenda. The meeting closed without reaching any agreement of significance.

*The Nunn-Lugar Program.* The U.S. government's Cooperative Threat Reduction Program, initiated by Senator Richard Lugar and former Senator Sam Nunn, was created to reduce the vast stocks of weapons of mass destruction (WMD), the materials that can be used to produce them, and to provide civilian projects to unemployed weapon scientists that remained after the collapse of the Soviet regime. The state of the program reflects both the issues at hand and what must be done if deproliferation is to become the governing regime rather than a policy that is occasionally served.

The budget of the Nunn-Lugar program is about the same as it was before 9/11. In 2005, it was five times smaller than the budget available to the Transportation Security Authority (TSA) to protect airliners. The program was originally designed to dismantle the machinery of the Cold War, especially intercontinental ballistic missiles (ICBMs). It hence ignored the fact that when these missiles and warheads in their submarine launchers were destroyed, the HEU contained was neither blended down nor expatriated. Moreover, the continued destruction of ICBMs remains a high deproliferation priority. Rather than moving nuclear materials to a safer haven to be blended down or stored, the program by and large relies on Russia to take charge of the materials, despite serious security problems there, as reported by Matthew Bunn and Anthony Wier in "Securing the Bomb 2005," a study commissioned by the Nuclear Threat Initiative. Thus, the Nunn-Lugar program could yield many more deproliferation benefits if the various

restrictions on it were lifted and if it were redesigned with deproliferation in mind and its resources increased.

*Global Threat Reduction Initiative (GTRI).* At first it might seem that the GTRI announced by the Bush administration in 2004 represents a major new deproliferation initiative. The initiative seeks to retrieve fresh and spent nuclear fuel of Russian and U.S. origin from research reactors around the world and to convert reactors that use High Energy into Low Energy. However, this project was accorded such a small budget (\$20 million over 18 months—not all of it new money, reported the *Washington Post*), that it constitutes a mere public relations gesture rather than a serious deproliferation measure.

*Brazil and India: Exemptions for "Good" Governments.* When in 2004 Brazil at first barred IAEA inspectors from its new uranium enrichment plant, and then later only grudgingly provided access, the U.S. government not only did not object but gave its blessings to what amounted to a restarting of dual-use technology. Secretary of State Colin Powell remarked on Brazilian television, "The United States understands that Brazil has no interest in a nuclear weapon, no desire and no plans, no programs, no intention of moving toward a nuclear weapon."

In 2005, the Bush administration announced an agreement with India whereby India could purchase American nuclear technology if India placed its civilian nuclear industry under IAEA supervision. This reversed decades of nonproliferation policy that prohibited the sale of any nuclear-related technology to nations not party to the NPT. (In fact, the Nuclear Supplier Group was created to police such sales after India's 1974 nuclear test).

Both cases reflect the old notion that "good" governments can

be trusted to use properly dual-use assets, and both undermine the deproliferation evolving regime that no nation should have such assets.

### Robust Yet Legitimate Architecture

Instead of relying on an intergovernmental architecture, as is the case for the NPT, deproliferation requires a more robust one. It is on this point that the analysis provided here differs most from those that favor various specific deproliferation measures (although often not as an over-arching norm) but pay much less attention to which agents are going to foster it. Such deproliferation advocates often implicitly rely on the IAEA, the United Nations or some other multilateral body such as the Nuclear Supplier Group or G-8.

I turn now to the question of how the new architecture may be both robust and legitimate. Note that the new deproliferation architecture would not seek to replace the NPT, but rather would provide an additional, clearly distinct and vigorous way of proceeding in this vital matter. Whether this more robust approach should be carried out by the Nuclear Supplier Group, the G-8, a "coalition of the willing," or some other group is discussed below. However, one should not presume that a more robust architecture could not command the approval of the United Nations, or would necessarily ignore international laws and norms.

*Threat assessment.* The discussion so far has focused on the differences between controlled maintenance and deproliferation. Yet one may favor a greater reliance on deproliferation and still not see the merit of a more robust international regime. In deliberating on the merits of such a regime, one is logically affected by how high one ranks the threat of nuclear attacks by terrorists. I am not

implying that if the threat of nuclear attacks is high then those nations most likely to be attacked should be free to invade or bomb other nations, as Robert Galluci advocates in *Harvard International Review*, nor do I seek to recapture here the well-covered debate about preemptive and preventative strikes. I am merely pointing out that how far one is going to go in promoting and enforcing deproliferation measures and how robust one is willing to be is affected by how highly one ranks the threat of nuclear terrorism and an attack by rogue states.

Nuclear terrorism has been said by many scholars to be the gravest threat to national security. Ashton Carter writes, "The worst potential WMD problem is nuclear terrorism." Charles Ferguson and William C. Potter of the Center for Nonproliferation Studies observe that "[n]uclear weapons offer terrorists the ultimate means of inflicting mass destruction." Graham Allison sees a nuclear attack by terrorists as inevitable unless we act on a large scale to prevent it. Senator Richard Lugar notes that "[t]he minimum standard for victory in this war [against terrorism] is the prevention of any terrorist cell from obtaining weapons or materials of mass destruction." One cannot "harden" targets to protect cities from being incinerated; one cannot "eliminate" all the terrorists before they strike; and one cannot deter them, through a balance of terror, from using nuclear bombs. One can work hard on limiting the terrorists' ability to obtain nuclear arms and the materials from which they are made, thus reducing the threat. The level of threat seems to justify not only significantly greater efforts to deproliferate but also a robust regime to foster it.

*New measures, old regime.* Numerous measures to deal with the

problem at hand have been outlined in several first-class reports. Particularly detailed is a 2005 report by George Perkovich and colleagues of the Carnegie Endowment for International Peace, which is full of excellent proposals, some eighty in all. Another strong report, by Matthew Bunn and Anthony Wier, includes numerous sound recommendations. A resource guidebook by Claire Applegarth and Rhianna Tyson outlines scores of recommendations that have been made by many different governments and heads of state. These reports differ from the position advanced here in the extent to which they rely on international institutions (mainly the United Nations) or multilateral action (such as by the G-8 or the 44 members of the Nuclear Supplier Group) versus recognizing the need for an even significantly more robust architecture. To proceed along their lines requires the cooperation of nations that are likely to oppose the implementation of the sound recommendations made by these and other such reports; such nations would at the very least greatly delay and dilute the necessary actions. For instance, the G-8 includes Russia, France, and Germany, who have not been willing to act forcefully on this front, as the protracted negotiations with Iran demonstrate.

Indeed, the Brookings Institution, together with the Fondation pour la Recherche Stratégique, King's College London, and Stiftung Wissenschaft und Politik, conducted an exercise in Tremezzo, Italy, in 2004 in which the participants were presented with a scenario in which it appeared that Iran was "increasingly acting as if it was bent on acquiring nuclear weapons." With each escalation, the Europeans rejected the use of force, even in the face of fully reliable reports that Iran was about to acquire nuclear weapons.

Similarly problematic is drawing on the Nuclear Supplier Group, which is made up of nations that reap economic benefits from selling dual-use assets (and which often do not see themselves as the targets of terrorists). Trying to impose stringent controls through such a group is a bit like asking the producers of handguns to greatly limit their sales lest criminals buy their guns, an approach that has proven to be a disaster when tried.

Aside from the fact that most of the suggested approaches involve the cooperation of nations that have a *de jure* or *de facto* veto power, the sheer number of nations involved makes progress in this way cumbersome, slow, and often inconsequential. We have already seen this from the key examples of the NPT 2005 conference, which did not find a way to act even on the recommendations made by the United Nation's own body, the IAEA.

An appealing idea, favored by the director of the IAEA Mohammed ElBaradei, Ashton Carter, authors of the Carnegie Endowment for International Peace's report "Universal Compliance," and others is guaranteeing the supply of LEU fuel to civilian nuclear reactors in exchange for guaranteed compliance with the NPT rules. Recipient nations would agree to submit to vigorous inspections, using new technologies, and expatriating all spent fuel to prevent the extraction of plutonium. This attractive idea raises some questions, such as whether one can rely on inspections and whether the new technologies can be trusted. (In the past, security technologies were sooner or later, often rather quickly, overcome by various challenges. Note the frequency with which Microsoft must issue new security "patches.") However, the main hindrance is the same that has cast a pall over many

multilateral endeavors: it requires the cooperation of scores of nations including nations that have shown little inclination to agree to such a regime. Meanwhile, nuclear arms are spreading and terrorists are spinning their webs.

### Hierarchical Multilateralism

I try to show next that a more robust architecture, which deproliferation requires, finds its forerunners in what sometimes is referred to as international coalitions or partnerships, but what are actually hierarchical multilateral structures. While thus far these structures have been ad hoc and transitional, the authority worldwide deproliferation needs will have to be lasting. The most direct antecedent, the U.S.-led war against terrorism, is especially robust because it works directly with the security forces of various nations rather than through their governments. The main shortcomings of these robust architectures are that they lack legitimacy, accountability, and soft power (despite the fact that the war against terrorism, albeit not all the means used, has been considered more legitimate than the 2003 invasion of Iraq). These deficiencies could be remedied in the case of deproliferation.

After the 2003 invasion of Iraq many scholars and public leaders have called for more multilateralism and actions taken under UN auspices. However, the fact that many of unilateralism's problems have been pointed out by its critics does not ensure that multilateralism—as this term is commonly understood—will work. Particularly telling is the fact that when the U.S. government has insisted on multilateral dealings with North Korea and with Iran, the results so far have hardly been reassuring. North Korea reports to have and to plan to increase its nuclear arsenal and Iran may be developing one also.

Yet in spite of these threats, there are few signs that the European Union, Russia, and China are willing to support military action against these nations or even the imposition of economic sanctions. Indeed, it seems that the multilateral negotiations suck out the air needed for action as the participating nations await the results of the next round of multilateral negotiations, and the ones to come after that.

Unilateralism and multilateralism seem to exhaust the alternatives. Actually, a third approach hides behind terms such as "coalition of the willing" and "partnership" of the kind employed in Iraq 1991. The terms imply a more or less equal say of the nations involved in determining the goals, strategy, and policies of the collective actions and that the various participants make similar contributions in terms of forces and budgetary allocations. However, in practice these international regimes entail a *concerted action of several nations led by one power*, which provides a lion's share of the decision making, forces, and resources. In contrast to the relatively flat form of multilateralism that the terms "coalition" and "partnership" imply, these regimes actually constitute *hierarchal multilateralism*. Thus, despite the fact that Britain was the major ally of the United States during the 2003 invasion of Iraq and the following occupation, Blair had little say in what the "coalition" forces were doing in Iraq.

True, each member of the "coalition" has some say over the use of its own forces and can quit, but Iraq's occupation was run basically by one power. The same is true of the 1991 "coalition" that rolled Saddam out of Kuwait. The contrast between hierarchical multilateralism, led by one power, and the Security Council is particularly telling as in the Coun-

cil any permanent member can veto each and every endeavor. In short, hierarchical multilateral regimes are much more robust (albeit often much less accountable and lacking in soft power) compared to the flat ones.

Since 9/11, the United States has developed what amounts to a global anti-terrorism agency that has the features of a hierarchical multilateral architecture. The U.S.-led anti-terrorism drive is nominally working within broad mandates approved by the various governments involved; however, many of its concrete actions entail directly working together with the forces of the various nations, as if they were parts of one army, one intelligence operation, one command of Special Forces. Examples include the ways intelligence is directly transmitted from the MI5, the Mossad, similar institutions in Syria, Sudan, and Yemen, and scores of other intelligence services to the CIA, and the ways the United States, working with Britain and Australia, scrutinizes most global communications as described by Patrick Keefe in *Chatter*. These features are highlighted by the extraordinary and controversial rendition program in which citizens of one nation, such as Canada, have been surreptitiously transported by the CIA to nations such as Syria and Uzbekistan, where they have been interrogated.

In many ways this architecture is akin to the conglomerates in the corporate world: although conglomerates are composed of several semi-independent entities, they are run jointly from one central power point, and many functional activities readily cross the lines that separate one entity from the other.

Prevention of genocide is widely considered a legitimate reason for intervention. If bird flu, Ebola, or some other such pandemic were to break out in one country and spread

to others, most people would be likely to consider it legitimate for concentrated transnational interventions to take place to stop the spread of the pandemic. Preventing nuclear attacks—if and when there is strong, hard evidence that the assets for such attacks have been lined up or made available to terrorists—belongs, as Lee Feinstein and Anne-Marie Slaughter argue in *Foreign Affairs*, to the small category of purposes that seem to justify robust transnational actions and authorities.

Moreover, hierarchal multilateral structures, whose scope of purpose is limited, can be rendered legitimate by making them accountable and compatible with evolving international law and norms. These steps turn them into transnational or “supranational” authorities. (Authorities are commonly defined as legitimate power structures. See *From Empire to Community*.) The U.S.-led Proliferation Security Initiative (PSI), in which some sixty nations participate, is next used as a brief case study of the formation of such an authority that is both robust and gaining in legitimacy.

### PSI as a Building Block

The PSI was first formed in 2003 and was hailed by Prime Minister John Howard of Australia as “foremost among new approaches” in combating proliferation. More than sixty nations have voiced their support for the Initiative, agreeing to share intelligence and to stop all nuclear arms and materials shipments that pass through their territories, ports, and airspace, or are carried on ships flying their flags, as well as to stop and board ships on the high seas that are suspected of carrying WMD-related materials (or to have their own ships boarded). If banned materials are found they may be confiscated.

During September 2003, participating countries conducted joint military exercises in the Coral Sea near Australia to prepare for a wider implementation of these robust depolarization steps. The PSI, according to Condoleezza Rice on its second anniversary, has already been active on several fronts, including seizing material and equipment bound for ballistic missile programs for Iran. John Bolton, speaking at the American Enterprise Institute, credited the PSI with Libya’s decision to abandon its nuclear ambitions after a ship loaded with nuclear components headed its way was intercepted. In 2005, Rice reported that there had been eleven successes on the part of the PSI in stopping the shipment of dangerous material to “countries of concern.” Finally the PSI is playing a key role, as of 2006, in enforcing UN resolutions on sanctions against North Korea.

At first blush, the PSI may seem like a typical intergovernmental body, based on international agreements. However, the PSI does not draw on any treaties or multilateral agreements. The PSI has no independent bureaucracies, nor does it have a decision-making body in which representatives of various nations participate in setting its policies or commanding its forces, an equivalent to the NATO (North Atlantic Treaty Organization) Council or other standing multinational committees. Although technically the PSI is based on bilateral agreements between the United States and the various nations involved, and each nation can withdraw, member nations other than the United States (and arguably some of its 17 core allies) have limited say at best over the total operation of the PSI. For instance, because many ship owners prefer to register their ships in nations such as Panama and Liberia, the United

States has an agreement with several of these nations that it be permitted to board their vessels on the high seas, after "due notification." This does not mean, however, that Panama or Liberia has an effective voice as to how the PSI is run, expanded, and so on. True, several actions by the PSI have been implemented by one nation or another, but these actions are often based on intelligence and guidance provided by the United States. Moreover, if the role of the PSI were expanded, for instance if it were used to form a blockade of sorts in the seas adjacent to North Korea, as has been suggested, it is likely that it would increasingly reflect the hierarchal multilateral architecture of a one-power-led concerted action.

Given that the work of the PSI is not going to be done in a short while, and that it aims to curb not merely rogue nations but also terrorists and private traders, it can be expected that the PSI will become a permanent structure. Its task will continue to be to support deproliferation by in effect banning traffic in nuclear material and arms on a worldwide scale, working hand in hand with other global anti-terror endeavors by the United States and its allies and collaborating nations.

*Legitimizing the PSI.* Boarding ships in international waters (and other modes of transnational shipments of nuclear arms and materials, say requiring a cargo plane to land to be checked when it travels in international air space) is essential for deproliferation. However, this action is incompatible with existing international law, at least as it is widely understood. Trafficking in nuclear materials—and even bombs—does not have the same status as slavery or piracy, for which international treaties have allowed nations to board ships on the high seas. Hard-nosed realists such as Jeremy Rabkin argue

that international law is what weak states use to tie down superpowers, and hence should be ignored. Others hold that it is in the long-run interest of the United States to act in compliance with international law and the United Nations because the United States will not be able to remain the world's sole superpower in the long run and therefore would benefit by strengthening rather than undermining international laws and institutions. A hardcore idealist may hold that laws ought to be honored because they are duly enacted and are the expression of the shared norms of the international community. Finally, some argue that to violate these laws and norms, to act illegitimately, entails the loss of soft power, and thus fuels anti-Americanism, resistance to U.S. policies, loss of allies and their resources, and the breeding of terrorists to boot.

These considerations have an effect that can be gleaned from the fact that, so far, the PSI has gone a long way toward staying within established international law. Thus, in October 2003, *BBC China*, the ship that was found to carry parts for centrifuges that could be used to enrich uranium, bound for Libya, was coaxed to stop in an Italian port (by appealing to its German owner) and thus was boarded there and not in international waters. PSI exercises, the most recent of which was hosted by Portugal in April 2005, involve practice in ship-boarding and related inspections, and have taken place within the territorial waters of several participating nations. However, few doubt that sooner or later action in international waters will be required and perhaps even the use of force if boarding is resisted.

Clearly, there is a third way between brazenly ignoring international law and norms and avoiding actions that are vital in order to

respect the law, namely seeking to modify the law, leading it to take into account the new and serious threats to the world's "international peace and stability." Indeed, the United Nations has moved in this direction; Security Council Resolution 1540 of 2004 calls for member states to criminalize WMD proliferation, secure sensitive materials in their own borders, and enact export controls. The PSI in effect serves to enforce that resolution, given that the United Nations has no relevant enforcement capacity of its own.

Furthermore, the UN General Assembly approved the "International Convention on the Suppression of Acts of Nuclear Terrorism" in April 2005. This convention obligates member states to criminalize activities related to nuclear terrorism. When it goes into force after the needed ratification, it will provide another layer of legitimacy to the PSI, as its calls for information sharing among nations and cooperation with nuclear terrorism investigations.

During their 2002 meeting in Kananaskis, Canada, the G-8 launched a Global Partnership Against the Spread of Weapons and Materials of Mass Destruction. In addition to pledging to raise \$20 billion dollars to support Nunn-Lugar-type programs, they called for international cooperation in fighting nuclear terrorism: "The G-8 calls on all countries to join them...to prevent terrorists or those that harbor them from acquiring or developing nuclear, chemical, radiological and biological weapons; missiles; and related materials, equipment and technology."

John Bolton, when he served as Under Secretary of State for Arms Control and International Security, is reported to have considered seeking to modify international law so that it would treat the shipment of nuclear

bombs and the material from which they are made as akin to the banned trade in slaves. He seems to have relented, however, out of concern that such changes would lead to the formulation of various specific rules under which ships could—and could not—be boarded in international waters, which would hobble PSI forces. Nevertheless, if one seeks to combine hard with soft power, and especially if one views the PSI as a building block of an evolving, robust global authority, then one will favor the full legalization of the PSI, while resisting its being tied in knots by undue regulations.

The fact that the PSI can be considered legitimate and further legitimated without excessive difficulties, has been laid out in considerable detail by Michael Byers, who writes in *The American Journal of International Law*:

The analysis [of his article] that follows focuses on the maritime aspects of PSI, measuring the initiative against existing international law and considering its potential as an impetus for legal change. It explains that much of PSI involves nothing more than the consistent and rigorous application of existing rights under national and international law. Concurrently, the initiative promotes the development of new legal authorities by way of bilateral and multilateral treaties. Finally, and less obviously, PSI may lead to new rights under customary law.

Other steps. The PSI constitutes at best one building block in a robust deproliferation strategy. Other pieces

of the needed approach are small but there is no reason in principle that they cannot be expanded once there is more shared understanding of the need to build up deproliferation regimes, such as the Global Threat Reduction Initiative. Still others can be added if and when political support for such measures is increased, for instance, according greater priority to deproliferation in dealing with Russia.

More challenging is the imposition of sanctions on corporations that continue to sell dual-use nuclear assets at all or at least to “nations of concern,” which should include all nations from which terrorists could readily acquire these materials. Such sanctions should include banning these corporations from doing business in all those nations that agree to participate in the deproliferation regime, wherever these corporations operate. Countries that receive economic assistance or credits from nations participating in the deproliferation program and from institutions to which these nations are major contributors such as the IMF (International Monetary Fund) and the World Bank, should be expected to commit themselves to refrain from acquiring dual-use assets or disgorge them if they have acquired them.

A deproliferation regime is likely to benefit from the fact that it will serve the interests of many nations other than the United States. Russia is keen on Chechen terrorists not obtaining nuclear arms and on preventing neighboring Muslim republics from acquiring them. Argentina would rather have the newly awakened

Brazilian interest in nuclear plans be squashed. Many Asian nations would much rather see Japan without nuclear weapons, which it might well seek if North Korea continues to expand its program. Still other nations can be reasonably expected to agree to trade-in their HEU reactors for other sources of energy if the incentives were sufficient.

Many of the suggested measures, providing nations incentives to convert their reactors do not violate any international laws or norms. Others, as has been illustrated in the case of PSI, could gain additional legitimacy if proper briefs were presented that showed that they were in line with international law; relied on proper UN resolutions, such as resolution 1540; or were shown to be in line with the UN charter’s Article 39, which concerns international peace and security. To reiterate: a robust deproliferation regime can draw on existing international law to gain legitimacy, and avoid both being held back by such law and brazenly ignoring it. All these steps assume that one must move beyond introducing a few more deproliferation measures while maintaining a basically controlled maintenance regime—and instead switch as soon as possible to a world in which not only is the number of nations that command nuclear arms curtailed but also those that have dual-use assets, from which these arms can be made.

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