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Kittrie, Orde F.

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Professor Orde F. Kittrie
Arizona State University

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About the Author

Orde F. Kittrie is a tenured professor of law at Arizona State University's Sandra Day O'Connor College of Law, and director of its Washington, DC Semester Program. He is also a senior fellow at the Foundation for Defense of Democracies, a nonpartisan Washington, DC think tank. Prior to entering academia, he served in the U.S. Department of State for over a decade in several key legal and policy positions, including as lead attorney for nuclear affairs, lead attorney for strategic trade controls, director of the Office of International Anti-Crime Programs, and special assistant to the Under Secretary for Economic and Business Affairs.

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The publication was informed by a full day not-for-attribution workshop held in March 2016 at the James Martin Center for Nonproliferation Studies in Washington, DC. Participants included three dozen leading officials and experts specializing in cooperative threat reduction and related issues. The publication was also informed by a not-for-attribution workshop held in August 2015 in Europe which included leading nonproliferation officials and experts from a dozen countries in the Middle East and North Africa. These workshops were supplemented with numerous interviews of leading officials and experts from the U.S., Europe, and the Middle East and North Africa region.

Table of Contents

Introduction and Executive Summary

Since World War II, more WMD attacks have occurred in the Middle East and North Africa (MENA) region[1] than in any other region of the world.[2] Egypt used chemical weapons against Yemen from 1963 to 1967,[3] Iraq used chemical weapons against Iran during the Iran-Iraq War,[4] Iran reportedly used chemical weapons against Iraq during that same war,[5] and Libya used chemical weapons against Chad in 1987.[6] In addition to these uses of chemical weapons against neighbors, Iraq used chemical weapons on Kurds within its territory in 1988,[7] al Qaeda in Iraq has used chlorine gas,[8] and chemical weapons have been repeatedly used during the Syrian civil war.[9]

The most recent notable new user of chemical weapons in the Middle East is the Islamic State,[10] which is reportedly also pursuing biological and nuclear weapons. The director of NATO's WMD Non-Proliferation Center recently published an article in which he warned that "there is a very real - but not yet fully identified risk - of foreign fighters in ISIL's ranks using chemical, biological, radiological or nuclear (CBRN) materials as 'weapons of terror' against the West."[11]

In addition, at least four MENA region member states of the Nuclear Nonproliferation Treaty (NPT) have violated their NPT-related obligations: Iran, Iraq, Libya, and Syria. Each has reportedly done so in pursuit of the capacity to build nuclear weapons.

Over its first fifteen years, the Department of Defense Cooperative Threat Reduction program (DOD/CTR) focused its work to combat weapons of mass destruction (WMD) almost entirely on the Former Soviet Union (FSU). Since 2010, however, DOD/CTR has begun to expand into the Middle East and North Africa (MENA) region, undertaking peaceful cooperative projects to combat WMD proliferation in that region.

Law-related issues had a pivotal impact on cooperative threat reduction work in the FSU. These included especially the difficulty of reaching and maintaining agreement on how to protect U.S. assistance and providers from host country domestic law risks (such as lawsuits for accidental damage).

Both this and other law-related issues have already begun to have a significant impact on CTR work in the MENA region. This report is designed to analyze these issues and provide recommendations for more effectively addressing law-related challenges and opportunities that could play a pivotal role in the success of CTR work in the MENA region.

In researching this report, it became evident that the long term effectiveness and sustainability of expanded cooperative threat reduction with the MENA region depends in considerable part on successful management of three major areas of law-related challenges and opportunities: the need to manage the domestic law risks posed to assistance providers by MENA host country governments, the importance of improving MENA governments' poor record of implementing the nonproliferation obligations imposed on them by international law, and the challenges posed to WMD disposition by several provisions of international law. Each is the subject of one chapter of this report.

The second chapter draws in part from the more detailed paper at Annex I, by Victor Comras, titled "How to More Effectively Encourage and Assist MENA Governments to Implement their International Legal Obligations Relating to Nonproliferation." The third chapter draws in part from the more detailed paper at Annex II, by Guy Roberts, titled "International Law Challenges to WMD Disposition Options: Legal Options to WMD Disposition in a Conflicting Law and Policy Environment." Both papers were commissioned as part of this study.

I. Striking a New Balance in Managing Host Country Domestic Law Risks

Chapter One addresses the challenge of managing the domestic law risks posed to assistance providers by MENA host country governments. CTR projects can be severely hindered or even halted when assistance providers face excessive host country domestic law risks. The following have long been the CTR program's principal host country domestic legal concerns:

- How can U.S. assistance be protected from being diminished and diverted by host country taxes and customs duties?
- How can U.S. government employees and contractors be protected from being arrested or otherwise detained on trumped up charges?
- How can the U.S. government, its employees, and its contractors be protected from lawsuits in case of harm caused by project-supplied equipment or other assistance?
- What sorts of audit and examination rights and end use assurances will the U.S. government receive to ensure that assistance is used for the purposes provided?
- How can the U.S. government ensure that contracts are awarded pursuant to the Federal Acquisition Regulations and not on the basis of host country laws and procedures which might select on bases other than merit?

The difficulty of reaching and maintaining agreement on how to protect U.S. assistance and providers from domestic law risks stalled several FSU CTR projects and reportedly contributed to halting the CTR program's ability to continue achieving its objectives in Russia beyond the 20-year mark. During the program's first fifteen years, as it undertook large scale, high risk projects in the FSU, DOD almost invariably insisted that work not proceed in the absence of legally binding "one-size-fits-all" protective "umbrella agreements" between the United States and the host country government.

Over the last several years, as the DOD CTR program has expanded into MENA and other countries outside the FSU and undertaken smaller scale and less risky projects, the program has begun to adopt a more tailored approach, including a willingness to sometimes proceed with lesser or no protections against host country domestic legal risks. However, few MENA countries are known for the fairness, predictability, and smooth functioning of their legal systems. Chapter One provides recommendations for how the U.S. can more effectively balance the need to mitigate domestic law risks posed by MENA host governments against the dangers of delaying or halting CTR projects designed to counter WMD threats.

Key recommendations include the following:

- The benefits of avoiding the initial investment in painstaking negotiation of bilateral country-by-country "umbrella agreements" need to be balanced against the probability that, in the long term, a CTR program will likely be more successful (and more agile, flexible, and responsive) if the inherent legal risks posed by operating in a particular environment are mitigated or eliminated altogether at the outset of the implementation through the conclusion of a sufficiently comprehensive legally binding agreement. The negotiation of such an agreement clears the field so a specific program can operate efficiently and effectively, and be protected from potentially severe legal consequences resulting from unanticipated incidents and accidents. Such protection can help the program survive scrutiny from Congressional and other overseers for years to come.

- It can be difficult or impossible to anticipate all of the different types of cooperative threat reduction projects that the U.S. might wish to undertake in a particular country as new threats arise. It can also be difficult or impossible to anticipate how a country's operational environment and/or legal system might over time come to pose greater risks or provide lesser protections than at the time the need for a protective agreement was initially assessed. Because it typically becomes much more difficult to persuade the host country government of the need to increase protections once DOD CTR activity begins in a particular host country, there is value in prioritizing initial investment in negotiating protections that are as expansive as possible.

- To maximize protections by prioritizing investment in negotiating them means, in part, to involve in the negotiations U.S. government officials at the political level (Deputy Assistant Secretary of Defense and above). Foreign governments are typically as or more hierarchical than is the U.S. government, with only political level officials authorized to make significant concessions. Foreign political level officials typically become personally engaged in negotiations only when a U.S. official of a similar level becomes involved. DOD CTR umbrella agreement negotiations with FSU governments typically involved senior officials, including at times cabinet secretaries and even the U.S. president. Over the past eight years, there has reportedly been a significant reduction in political level U.S. Defense Department officials engaging their foreign counterparts to address the need for legal protections for CTR efforts in host countries.

- Some types of CTR program work do not necessitate the protections of a full traditional DOD CTR umbrella agreement. The CTR program should be prepared to proceed with an activity in a particular country, in the absence of a full traditional umbrella agreement, when the program has carefully and systematically determined that the urgency and magnitude of the particular threat to be reduced by that activity outweighs the particular risks to the United States and its personnel of engaging in that activity in that individual partner nation. In order to ensure that such determinations are sufficiently rigorous and tailored, they should be the subject of decision memoranda signed by an appropriately senior official. While it makes sense for low risk activities in a particular country to be approved on a categorical basis (e.g., "all classroom training of Saudi customs officials on commodity identification is hereby approved even in the absence of liability

protection"), medium and high-risk activities in a particular country should be approved only on a case by case basis.

- It is essential that risk analysis be conducted systematically, with input from legal and other relevant professional specialists (e.g., engineers with regard to potential liability for equipment malfunction or architects with regard to construction failure). It is also essential that risk analysis of a particular activity per se (in and of itself) be seen as merely a starting point for risk analysis of that particular activity within the context of each particular host country's legal system. Given the variability of host country legal systems, all but the least risky activity per se should be analyzed for risk in light of how that risk might play out in the legal system of the particular host country.

- Congress has imposed draconian restrictions in response to foreign taxation of assistance provided by other U.S. government programs. The DOD CTR Program should derive lessons learned from the controversies that contributed to enactment of these laws, and take the several specific prophylactic measures recommended in the body of this report to ensure that similar controversies do not impact the DOD CTR Program. For example, ensure that protective agreements clearly specify tax exemption for all relevant companies (both prime contractors and subcontractors) supporting U.S. government efforts.

- The purview of the Office of Foreign Litigation in the U.S. Department of Justice includes providing "legal advice to federal agencies, departments, and government officials regarding litigation risks abroad," an undertaking which it achieves in part by retaining foreign attorneys to advise and represent the U.S. with regard to foreign legal systems. Surprisingly, the DOD CTR Program seems to have rarely if ever drawn on the OFL's expertise in assessing and mitigating the legal risks to its personnel in potential host countries. The DOD CTR program should immediately begin to systematically confer with the OFL about the DOD CTR program's host country domestic law risks and how to address them.

- The DOD CTR Program has in recent years unduly relied on sovereign immunity to protect U.S. government employees from potential liability risks. The program should take the several specific steps to correct this and develop more effective protections that are recommended in the body of this report.

- In assessing its ability to ensure that contracts are not awarded other than pursuant to U.S. federal contracting laws, the DOD CTR program should study, and draw prophylactic recommendations from, the USAID Inspector General and GAO investigations which in July 2016 revealed extensive fraud in USAID's Syria aid programs.

II. Options for Increasing MENA Implementation of International Nonproliferation Law

Chapter Two examines how the United States and the international community can more effectively encourage and assist MENA governments to meet and implement their international legal obligations relating to nonproliferation. Many governments in the Middle East and North Africa (MENA) region have a weak record of implementing their legally binding nonproliferation obligations. For example, as reflected in the chart on page 39,[12] only three (Iraq, Jordan, and the UAE) of seventeen Arab League member states studied have implemented even 40 percent of the measures required by UN Security Council Resolution 1540, which is binding on all UN member states.

They also include obligations, pursuant to the Biological Weapons Convention (BWC) and the Chemical Weapons Convention (CWC), which are binding on all states which have chosen to adhere to those treaties. For example, amongst those MENA countries which are parties to the BWC, relatively few have complied with the requirement that each State Party submit an annual Confidence-Building Measures (CBMs) report. For example, according to the most recent annual report of the BWC Implementation Support Unit, dated November 3, 2015, the following MENA States Parties had not submitted a CBMs report covering the calendar year 2014: Bahrain, Iran, Kuwait, Lebanon, Libya, Oman, Saudi Arabia, Tunisia, United Arab Emirates, and Yemen.

Amongst those MENA countries which are parties to the CWC, several have a poor record of implementation of it. For example, according to the most recent report of the Organisation for the Prohibition of Chemical Weapons, the following MENA states parties have not yet adopted the national laws necessary to implement their CWC obligations: Bahrain, Jordan, Kuwait, Lebanon, Libya, and Syria. In other cases, such as that of Iraq and the UAE, the basic national laws were in place but the necessary implementing regulations were still in "draft" form or "under development."

In addition, a significant number of MENA countries have thus far failed to adhere to key nonproliferation agreements which are not obligatory but nevertheless foundational elements of the international nonproliferation system. These include the BWC, the CWC, the Convention on the Physical Protection of Nuclear Materials (CPPNM), the Amendment to the CPPNM, the Convention for the Suppression of Acts of Nuclear Terrorism (CSANT), and the Additional Protocol of the International Atomic Energy Agency.

The following MENA countries have not yet chosen to become party to the CPPNM: Egypt, Iran, and Syria. The following MENA countries have not yet chosen to become party to the CPPNM Amendment: Egypt, Iran, Iraq, Lebanon, Oman, Syria, and Yemen. The following MENA countries have not yet chosen to become party to the Convention for the Suppression of Acts of Nuclear Terrorism: Egypt, Iran, Israel, Oman, and Syria. In addition, the following countries which are NPT member states have not yet chosen to become party to the IAEA Additional Protocol: Algeria, Egypt, Lebanon, Oman, Qatar, Saudi Arabia, Syria, Tunisia, and Yemen.

In the context of U.S. DOD Cooperative Threat Reduction programs, achieving host country implementation of an international legal instrument to which the country is a party should be easier than, for example, achieving implementation of a request by the U.S. government to take an action which is not already an internationally binding obligation on the host country government. Similarly, persuading a host country to join a nonproliferation agreement which its neighbors have already joined should be easier than, for example, achieving host country commitment to take an action which is not already an internationally binding obligation on its neighbors. U.S. government officials involved with CTR who participated in a workshop convened as part of this project confirmed that Security Council Resolution 1540 and other international obligations provide significant traction with at least some countries in the MENA region. Similarly, a retired U.S. government official who participated in the workshop emphasized that "we can often do things through international organizations that we can't do ourselves – the international organizations have convening power and legitimacy and their mandates can make it easier for the target countries politically."

Key recommendations for how the United States and the international community can more effectively encourage and assist MENA governments to meet and implement their international legal obligations relating to nonproliferation include the following:

- Several officials and experts from the MENA region told the author it was possible that fear of the Islamic State, and news of its use of chemical weapons and pursuit of biological and nuclear weapons, may lead Arab governments to be more willing than in the past to implement Resolution 1540, which includes specific legal obligations designed to prevent non-state actors from acquiring WMD and their means of delivery. The U.S. government clearly needs to place increased, results-oriented emphasis on encouraging and assisting MENA governments to implement Resolution 1540.

- Another factor that could help inspire MENA governments to implement Resolution 1540, and especially enhanced strategic trade controls, is increased antipathy towards Iran. Increased tensions between the Gulf states and Iran (as a result of Iran stirring up trouble in the region) may lead their governments to be more willing than in the past to crack down on diversions to Iran that could strengthen its nuclear or other military programs. Gulf Arab governments are now more afraid of Iran and more determined to keep it from acquiring nuclear weapons. This could provide incentive for these governments to adopt and implement controls on dual-use exports to Iran more vigorously than they have in the past. The regional officials and experts with whom this author spoke emphasized the importance of the U.S. and international community undertaking a systematic campaign to help the region understand the very complicated and confusing Joint Comprehensive Plan of Action and especially its remaining restrictions on trade with Iran.

- U.S. and international policymakers need to develop and effectively present the case that rigorous implementation of strategic trade controls will in fact strengthen their countries, including by making Western companies more comfortable exporting dual-use technologies to them. This case could be developed with input from experts and practitioners, such as: economists who can empirically demonstrate that countries which

have adopted strategic trade controls have not harmed but rather boosted their economies; leading high technology manufacturers explaining why and how they are more comfortable exporting dual-use technologies to countries with comprehensive strategic trade controls and security and safety standards; and Economic development experts who can explain the importance of such dual-use imports to the economic development of countries in the MENA region.

- The *Linde* case judgment holding Arab Bank PLC liable for terrorist attacks conducted with conventional munitions sets a precedent that could be used by victims of WMD attacks to sue banks that knowingly provided financial services to the national governments or terrorist groups that engaged in the WMD attacks. In August 2015, Arab Bank PLC settled the case for an estimated $1 billion. Because the U.S. dollar is the preferred currency of international trade, and most significant dollar transactions transit the United States, the U.S. government has enormous leverage over foreign banks. The international financial sector as a whole has strong incentives to avoid involvement in illicit transactions, vast amounts of data that can be analyzed to detect and understand such transactions, and significant influence over those foreign governments which are interested in economic development. Policymakers and legislators should carefully analyze whether and how the international financial sector can and should be harnessed to encourage MENA governments to implement strategic trade control and other obligations that would reduce illicit proliferation-related transactions and thus the international financial sector's exposure to them.

- Another set of multinational companies with a large stake in avoiding lawsuits and with considerable leverage over industry are risk insurers and reinsurers. One expert who participated in a workshop convened as part of this project suggested that with regard to large scale nuclear, chemical, and biological projects funded by governments in the MENA region, it might make sense for the U.S. government to reach out to relevant insurers and reinsurers as they could use the incentive of lower risk premiums to build compliance and other security and safety requirements into loan applications at the beginning of the process.

- Two recent developments could be harnessed to build political will for enhanced implementation of the BWC and related requirements: increased regional interest in diversification into biotechnology and increased regional fear of biological weapons use by non-state actors. The governments of the U.S. and other key leading biotechnology industry hubs should take the opportunity to work with their industries to persuade UAE and other MENA country stakeholders that their investments in projects such as the Dubai Biotechnology & Research Park are more likely to pay off if the UAE and other MENA governments with such projects more rigorously implement their biotechnology-related Resolution 1540 and BWC-connected obligations, including by developing robust export controls and biosecurity and biosafety standards and by submitting robust CBMs.

- A growing regional interest in economic diversification, including into the chemical sector, is another factor that will increase the importance of, and could increase the

political will for, adoption and rigorous enforcement of CWC and other nonproliferation-related implementing legislation.

- The U.S. should strongly encourage each of the countries that have not yet done so – and especially Egypt, Iran, Iraq, and Syria in light of their current and past nuclear programs – to adhere to the CPPNM Amendment (as well as the CPPNM itself in the case of Egypt, Iran, and Syria). It was difficult for the U.S. to make a compelling case for ratification of the CPPNM Amendment until the U.S. deposited its own instrument of ratification in July 2015. Now that the U.S. is itself a party to the Amendment, it can and should mount a vigorous campaign to encourage additional ratifications.

- It was difficult for the U.S. to make a compelling case for ratification of the CSANT until the U.S. deposited its own instrument of ratification in September 2015. Now that the U.S. is itself a party to the CSANT, it can and should mount a vigorous campaign to encourage additional ratifications.

- Iran's commitment to provisionally apply, and eventually seek ratification of, the Additional Protocol could be useful in encouraging other MENA countries to accede to the Protocol. An even more important inducement to encourage other MENA countries -- and especially those with burgeoning nuclear programs -- to accede to the Protocol could be achieved by member states of the Nuclear Suppliers Group (NSG) deciding to permit the export of controlled items only to those countries that have applied the Additional Protocol.

III. Options for Addressing International Law Obstacles to WMD Disposition

Chapter Three addresses the challenges posed to WMD disposition by several provisions of international law. International law restrictions have posed in the Iraq and Syria chemical weapons destruction cases, and could potentially pose in other cases, significant hurdles to initiatives by the international community to dispose of newly discovered weapons of mass destruction (WMD) stocks and programs. For example, transfers of biological and chemical weapons to third parties, and acquisition of such weapons by States Parties -- whether for elimination, secure storage or any other purpose -- are prohibited, in all circumstances, by the Biological Weapons Convention (BWC) and the Chemical Weapons Convention (CWC) respectively. In addition, the Nuclear Non-Proliferation Treaty (NPT) contains narrower restrictions on transfers of nuclear weapons.

Furthermore, international law can restrict the party's options for eliminating WMD. For example, the CWC provides that chemical weapons may only be destroyed consistent with procedures specified in the CWC and its Verification Annex.

The CWC transfer prohibition and CWC elimination restrictions posed significant hurdles in the Iraq and Syria chemical weapons destruction cases. Similar hurdles could occur with regard to elimination of one or more other MENA WMD arsenals. For example, Algeria, Egypt, Iran, Iraq, Saudi Arabia, and Sudan are other potentially unstable MENA countries which reportedly are

suspected or known to have some CW capability. In addition, the Islamic State is known to possess chemical weapons.

Key recommendations for how the United States and the international community can exempt WMD disposition operations from international law restrictions include the following:

- Article 103 of the UN Charter empowers the Security Council to override UN member states' obligations under any other international agreement. UN Security Council Resolution 2118 overrode the CWC's transfer and acquisition prohibitions with a categorical authorization to acquire, control, transport, transfer and destroy the specified Syrian chemical weapons. Such a categorical authorization might, in theory, be subject to abuse by a Member State that had its own ideas as to appropriate implementation.

- Another option for overriding such transfer and acquisition prohibitions, which would maintain more control over implementation, would be to establish a committee of the UN Security Council that would approve specific transfers and acquisitions on a case-by-case basis.

- In a sufficiently exigent situation, such as the need to destroy Iraqi chemical weapons, the U.S. could plausibly justify its failure to conform to CWC obligations by asserting *force majeure;* for example, an occurrence of an "unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation" of compliance with the CWC during this destruction operation. However, it is important to use the *force majeure* exception sparingly, as it is relatively ambiguous and thus particularly subject to abuse by foreign governments who might try to argue *force majeure* when it is in fact not "materially impossible in the circumstances" for them to comply with the relevant international legal obligation. It is thus far preferable to, if possible, override the relevant international legal obligation with a Security Council resolution.

- The right of a nation to suspend its treaty obligations under certain conditions is well established and codified in the Vienna Convention on the Law of Treaties (Vienna Convention). The Vienna Convention allows for five potential alternative reasons or justifications, one of which ("temporary impossibility") is particularly relevant in scenarios such as those discussed in this chapter, to credibly and legally justify one or more State Parties to suspend their obligations under a treaty such as the CWC. As with the *force majeure* exception, it is important to use the temporary impossibility grounds for breach sparingly, as it is relatively ambiguous and thus particularly subject to abuse by foreign governments who might try to argue temporary impossibility when it is in fact not "temporarily impossible" for them to comply with the relevant international legal obligation. It is thus far preferable to, if possible, override the relevant international legal obligation with a Security Council resolution.

Chapter One: Striking a New Balance in Managing Host Country Domestic Law Risks

One of the key challenges faced by the DOD CTR program from its beginning in the early 1990s has been how to protect U.S. government employees and contractors from various host country domestic legal risks. During the program's first fifteen years, as it undertook large scale, high risk projects in the former Soviet Union (FSU), DOD almost invariably insisted that work not proceed in the absence of legally binding "one-size-fits-all" protective "umbrella agreements" between the United States and the host country government. Over the last several years, as the DOD CTR program has expanded into MENA and other countries outside the FSU and undertaken smaller scale and less risky projects, the program has begun to adopt a more tailored approach, including a willingness to sometimes proceed with lesser or no protections against host country domestic legal risks. This chapter analyzes these developments and provides recommendations for how to analyze and mitigate host country domestic legal risks so as to most effectively balance them against the risks of delaying CTR projects designed to counter WMD and related threats to U.S. and allied security.

The following have long been the CTR program's principal host country domestic legal concerns:

- How can U.S. assistance be protected from being diminished and diverted by host country taxes and customs duties?
- How can U.S. government employees and contractors be protected from being arrested or otherwise detained on trumped up charges?
- How can the U.S. government, its employees, and its contractors be protected from lawsuits in case of harm caused by project-supplied equipment or other assistance?
- What sorts of audit and examination rights and end use assurances will the U.S. government receive to ensure that assistance is used for the purposes provided?
- How can the U.S. government ensure that contracts are awarded pursuant to the Federal Acquisition Regulations and not on the basis of host country laws and procedures which might select on bases other than merit?

Section I of this chapter discusses how host country domestic legal risks were protected against during the DOD CTR program's first decade and a half, as the program conditioned work in the former Soviet Union on the negotiation of legally binding "one-size-fits-all" protective "umbrella agreements" between the United States and the host country government. Section II of this chapter discusses how the DOD CTR program has in recent years begun to adopt a more tailored approach to protecting against host country domestic legal risks as it has undertaken projects, typically (but not always) smaller in scale and less risky, in the MENA and other regions outside the former Soviet Union. Section II of this chapter provides recommendations for how the DOD CTR program can on a case-by-base basis analyze and cost-effectively protect against the host country domestic legal risks to the United States and its personnel of engaging in a particular CTR activity in a particular partner nation. It emphasizes that the benefits of obtaining various types of such protection for a particular project must be carefully balanced against the risks that delaying the project could harm U.S. and allied security.

I. "Umbrella Agreements" and DOD CTR Projects in the Former Soviet Union

In the FSU context, risks to U.S. government employees and contractors from host country domestic legal issues were almost invariably mitigated by legally binding "umbrella agreements" between the United States and the host country government, which often required protracted negotiations. Such bilateral government-to-government protective agreements were entered into with countries including Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Russia, Ukraine, and Uzbekistan.[13] The agreements were typically written to expire after a fixed term of years, after which they could be extended. The umbrella agreements were typically designed to cover all of a U.S. government agency's CTR work in the host country.

The umbrella agreements were typically negotiated between the U.S. government and the host country government as a whole. Thus, agreements were typically entered into by the host country foreign ministry, in a form understood to legally bind the entirety of the host country government, rather than by, for example, the defense ministry in a form understood to bind only the defense ministry. Getting the entire host country government on the hook was considered important because an individual government agency, committing only itself and not its government as a whole, does not typically bind other agencies of that government. Thus, a defense ministry would not typically be capable of legally binding, for example, the host country government's tax authorities (e.g., finance ministry) to not tax CTR assistance or its law enforcement authorities to respect CTR providers' privileges and immunities.

The umbrella agreements typically designated "executive agents," for example the U.S. Defense Department and the foreign government's Ministry of Defense. These "executive agents" were authorized to enter into implementing agreements with each other for particular projects within the scope of the umbrella agreement.

The FSU umbrella agreements typically obligated the host country government to provide:

- exemption from imposition of host country customs duties and internal taxes on foreign assistance resources related to the cooperation;
- privileges and immunities for U.S. government employees engaged in the cooperative work;
- protection from liability in the case of lawsuits claiming death or injury or property damage caused by the assistance (the host country committed not to itself bring suit and also assumed responsibility for third party claims);
- audit and examination rights, and end use assurances, to ensure that assistance was used for the purposes provided; and
- the right to award contracts pursuant to the Federal Acquisition Regulations.

In the FSU context, the DOD CTR program typically was willing to halt work on major programs rather than accept liability, access, or other protection provisions only moderately less strong than those in the prototypical U.S.-Russia CTR agreement of 1992. The difficulty of reaching agreement on umbrella agreements and extending them stalled several FSU projects and reportedly contributed to the CTR program's closure in Russia.[14] For example, Russia's

insistence on modifying the U.S.-Russia CTR agreement when it came up for renewal in 2013 contributed to cancellation of U.S. CTR work with the Russian Ministry of Defense, including on the dismantling of ballistic missiles and chemical weapons and the transportation and securing of nuclear warheads.[15]

However, proceeding with insufficiently rigorous protections also sometimes significantly delayed or otherwise complicated cooperative threat reduction work in the FSU. Weak protections in the FSU context contributed to distracting disputes between the U.S. and recipient governments, as well as Congressional and GAO inquiries. For example, a February 2007 report by the U.S. Government Accountability Office (GAO) warned of continuing restrictions on U.S. access to facilities that store, manufacture, or dismantle Russian nuclear weapons.[16] The GAO report noted that "access difficulties at some Russian nuclear warhead sites may… prohibit DOE and DOD from ensuring that U.S.-funded security upgrades are being properly sustained."[17] For example, "Russia has denied DOE access at some sites after the completion of security upgrades, making it difficult for the department to ensure that funds intended for sustainability of U.S.-funded upgrades are being properly spent."[18] Specifically, neither DOE nor DOD has "reached an agreement with the Russian MOD [Ministry of Defense] on access procedures for sustainability visits to 44 permanent warhead storage sites where the agencies are installing security upgrades."[19] GAO warned that absent such agreement, DOE and DOD "will be unable to determine if U.S.-funded security upgrades are being properly sustained and may not be able to spend funds allotted for these efforts."[20]

Weak protections also contributed to private U.S. firms refusing to serve as contractors. For example, eight private U.S. firms reportedly declined, due to weak liability protections, to participate in the DOE program to improve the safety of Russian nuclear power plants under the International Nuclear Safety Program agreement. Largely because of the companies' refusal, the program had to be refocused to concentrate on training rather than the provision of equipment.

II. Current DOD CTR Policy Regarding Host Country Domestic Legal Risk Protection and Work Outside the FSU

The National Defense Authorization Act for Fiscal Year 2008 lifted restrictions on the Department of Defense expanding the longstanding Cooperative Threat Reduction (CTR) program to states outside the FSU. In the years since the restrictions were lifted, DOD CTR has begun activities in over 20 non-FSU countries in Southeast Asia, Africa, and the Middle East and North Africa (MENA) region.

DOD CTR work in the MENA region began with a 2010 Determination that authorized the DOD CTR program to cooperate with Iraq on biological safety and security efforts.[21] In October 2012, the Secretary of Defense, with the concurrence of the Secretary of State, authorized the DOD CTR program to undertake activities in the MENA region to assist several of the United States' partners in addressing a critical emerging proliferation threat.[22] The DOD CTR program currently has authority to engage with the following countries in the MENA region: Algeria, Bahrain, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, Oman, Qatar, Saudi Arabia, Tunisia, Turkey, United Arab Emirates, and Yemen.[23] To date, highlights of the DOD CTR program's work in the MENA region have included:

- The DOD CTR Program provided transport, material handling equipment, and packaging materials to the Organization for the Prohibition of Chemical Weapons (OPCW)-United Nations (UN) Joint Mission to remove the declared chemical agent stockpile from Syria.[24] The DOD CTR Program also provided all of the equipment, personnel, and expertise necessary to neutralize the most dangerous Syrian chemicals in international waters.[25]

- The DOD CTR Program played a pivotal role in the destruction of Libya's chemical weapons stockpile.[26] This included providing the destruction technology, training, site upgrades, and expertise for the destruction.[27]

- DOD CTR's Cooperative Biological Engagement Program has been partnering with Iraqi entities since 2010, including with projects of the following types: (1) biosafety and biosecurity to enhance standards and procedures related to handling and storage of pathogens of security concern; and (2) disease surveillance, detection, diagnosis, and reporting to develop an integrated, secure, and sustainable network to detect and respond to deliberate or accidental release of select agents.[28]

- Since October 2012, the DOD CTR Program has also worked with Jordan, Turkey, and Iraq through the Proliferation Prevention Program. The goal has been to enhance these partners' capacity to prevent proliferation across their borders through equipment and/or training focused on enhancing border security at the points of entry and across the border; interdiction; detection, characterization, and isolation of suspicious materials; and consequence management.[29]

- In Jordan, the DOD CTR Program has helped built the capacity of relevant Jordanian military and civilian ministries to interdict, secure, identify, and manage the consequences of chemical weapons through the provision of training and equipment.[30]

The DOS CTR Program has operated in the MENA region since 2003.[31] Its key objectives in the region have included strengthening the security of dangerous biological and chemical materials; engaging scientists with weapons-applicable expertise to decrease the likelihood that terrorists will gain the technical capability to develop a WMD attack capability; and bolstering partner government ability to detect, disrupt, and respond to potential WMD events.[32] To date, highlights of the DOS CTR program's work in the MENA region have included:

- The DOS CTR program led the U.S. effort to secure Iraqi WMD scientist expertise after the fall of Saddam Hussein.[33]

- The DOD CTR program spearheaded the U.S. government's biological nonproliferation efforts in Yemen in response to threat posed by Al Qaeda in the Arabian Peninsula.[34]

As the CTR program has expanded beyond the FSU, work in new countries has faced the same question which CTR has confronted since its origins: How can the program most sensibly

balance the need for quick action against the challenge of protecting provider government employees and contractors against host country liability, tax, and other domestic law risks?

In contrast with its insistence upon having legally binding government-to-government umbrella agreements, containing the full classic set of protections, in place before commencing work in FSU countries, the DOD CTR program has taken a different approach to work outside the FSU. It has in practice done away with the "one size fits all" approach and instead adopted a case-by-case approach, involving a balancing of the particular threats to be reduced by an activity against the perceived particular risks to personnel and to the U.S. taxpayer of operating in that individual partner nation.

With regard to countries outside the FSU, reliance upon the traditional legal tools -- including painstaking negotiation of bilateral country-by-country legally binding full "umbrella agreements," supplemented by project-specific implementing agreements – is often perceived as unnecessarily time-consuming, insisting upon legal niceties of secondary importance, and imposing an unwarranted "obstacle" to CTR program activities. More specifically, the decision to proceed without the protection of a traditional umbrella agreement has typically been driven by reasons including the following:

- In many cases, threat reduction projects have been deemed urgent, with delay posing an unacceptable risk of harm to U.S. and allied security. In light of the fact that negotiation of CTR umbrella agreements or other legally binding protections against host country domestic law risks has repeatedly taken years of resource-intensive engagement with host governments, a decision has sometimes been made to proceed with lesser or no protections rather than wait for negotiations to proceed.
- The DOD CTR program has insufficient policy-focused staff to negotiate agreements with all of the new countries in which the far larger number of implementation-focused staff are prepared to do work.
- CTR projects outside the FSU are typically of a nature that poses lesser liability risks than did the large-scale nuclear weapons and other WMD dismantlement initiatives in the FSU. Even in the FSU context, there was reportedly never a need to deploy the umbrella agreement liability protections to defend against a lawsuit.
- Due to the nature (including smaller budget amounts) of its activities in countries outside the FSU, the DOD CTR program in those countries is also perceived by some not to require special customs, tax, access, and privileges and immunities protections beyond those available to other U.S. government programs operating in the same countries.

The decision to proceed without first securing maximal protection has often been accompanied by a decision to request, or continue to request, consent to greater protection from the host country government while the work continues. However, once DOD CTR activity begins in a particular host country, it typically becomes much more difficult to persuade the host country government of the need to increase protections.

The case-by-case approach has involved two principal types of changes from the prior insistence that all DOD CTR work be protected by a legally binding government to government umbrella agreement containing the full classic set of protections. First, while some of the traditional types

of protection (privileges and immunities and customs duty/tax exemptions) have been deemed essential to receive on a government-to-government basis where possible, the rest have been deemed less essential and accordingly deemphasized. Second, even with regard to the "essential" types of protections, DOD has expanded its menu of options by which those protections may be considered to be satisfactorily achieved.

A. A New Hierarchy of Protections

1. Prioritized Protections

The DOD CTR FY 2016 report to Congress states that "before significant project work begins, the DOD CTR Program seeks to use new or existing bilateral agreements with partner governments to obtain privileges and immunities for DOD CTR Program personnel; the right to use U.S. contracting laws for DOD CTR Program projects; the right to conduct formal audits and examinations (A&Es) of assistance provided; and exemptions from internal taxation on DOD CTR Program assistance by partner countries."[35] This list contained in the FY 2016 report to Congress includes all but the liability protections typically included in FSU umbrella agreements. The policy's flexibility is reflected in the phrase "seeks to use" (as opposed to the categorical "uses").

In practice, DOD CTR has chosen to prioritize the following where possible:

a. Exemptions from Taxes, Customs Duties, and Similar Charges

Interviews with DOD CTR program personnel make it clear that of all the traditional umbrella agreement protections, the program is currently placing the greatest emphasis on, where feasible, obtaining exemptions from taxes, customs duties, and similar charges. This emphasis reportedly results at least in part from Congressional opposition to foreign taxation of U.S. assistance. As discussed in Section III, no current U.S. law specifically prohibits foreign taxation of assistance provided by the DOD CTR program. However, Congress, the GAO, and various executive branch inspector generals have repeatedly shown considerable concern about foreign taxation of assistance provided by other U.S. government programs. For example, two recent federal laws have prohibited foreign taxation of assistance provided by other U.S. government programs.

b. Privileges and Immunities for U.S. Government Employees

The DOD CTR program has also placed a relatively high priority on obtaining privileges and immunities for U.S. government employees engaged in program activity in the host country. In practice, this prioritization means that if other DOD officials, or officials from other agencies who are involved in analogous activities, enjoy privileges and immunities in the host country, the DOD CTR program will place significant emphasis on obtaining them also for DOD CTR program officials.

As discussed in more detail below, U.S. status of forces agreements with foreign governments typically provide privileges and immunities for DOD military and civilian personnel engaged in "mutually agreed activities." If the U.S. has such a status of forces agreement with the host

country of a DOD CTR program, the process of obtaining privileges and immunities for DOD CTR officials is relatively simple. The U.S. will seek formal acknowledgment from the host government that the DOD CTR program is a mutually agreed activity that falls within the protection of the status of forces agreement. Even in the absence of such a formal acknowledgment, there is an argument that DOD CTR activities within the host country are mutually agreed, by virtue of the fact that the host government is permitting the activities to take place in their country.

Privileges and immunities have been prioritized because these protections are difficult or impossible to obtain in the absence of legally binding government-to-government agreements. However, in light of the fact that federal employees associated with the DOD CTR program typically travel to the host countries only for one week visits, the risk to them is considered to be relatively low (and comparable to the risk posed to other U.S. government employees engaged in one week visits to the host country). Thus, if other DOD officials, or officials from other agencies who are involved in analogous activities, do not enjoy privileges and immunities in the host country, the DOD CTR program does not place significant emphasis on obtaining them also for DOD CTR program officials.

It is worth noting that there has been at least one public documented example of a major DOD program outside of the FSU context that the U.S. was willing to shut down rather than accept privileges and immunities that were deemed insufficient. The U.S. Naval Medical Research 2 (NAMRU-2) facility in Indonesia opened in 1970 under a thirty-year agreement.[36] It conducted scientific research on infectious diseases including plague, malaria, and avian influenza.[37] Negotiations over a new agreement began in 2000, "but they stalled when the United States insisted that technical and administrative staff at NAMRU-2 have some of the legal protections accorded by the Vienna Convention on Diplomatic Relations."[38] Although Indonesia had reportedly provided protection to these administrative and technical staff in the past, it refused to do so as part of a new agreement.[39] In a scholarly article about the incident, Frank Smith wrote as follows: "Ultimately, Indonesia only offered diplomatic immunity to a few officials. This was 'a showstopper for the embassy', which insisted that all American staff have some diplomatic protection."[40] "In the end," says Smith, "NAMRU-2 shut down operations in Indonesia. . . and the last American staff left the country in June 2010."[41]

While the NAMRU-2 dispute revolved around privileges and immunities for U.S. government employees resident in the host country, recent events in Afghanistan have underlined the value of protections for contractors. A report by the U.S. Special Inspector General for Afghan Reconstruction asserted that a dispute between Afghanistan and the United States over the scope of a tax exemption for U.S. contractors had resulted in the Afghan government arresting some contractor personnel.[42]

2. Protections Deemed Less Critical

The remaining types of protections typically contained in FSU umbrella agreements have for various reasons been deemed less critical in the non-FSU context.

a. Liability Protections

Liability protections have reportedly been dropped from the must have list because CTR projects outside the FSU are typically of a nature that poses lesser liability risks than did the large-scale nuclear weapons and other WMD dismantlement initiatives in the FSU. Even in the FSU context, there was reportedly never a need to deploy the umbrella agreement liability protections to defend against a lawsuit.

Therefore, the DOD CTR Program has determined that it is sufficient to rely on the customary international law of sovereign immunity to protect U.S. government employees and on instructing contractors to protect themselves by purchasing liability insurance for themselves. As discussed in section III.C.3 below, because customary international law is not embodied in treaties, there are significant risks in relying on sovereign immunity to protect U.S. government employees from potential liability risks.

b. Audit and Examination Rights and End Use Assurances

DOD contracting rules obligate the recipient to allow DOD access to confirm that provided equipment is used correctly and operating properly.[43] The DOD CTR program has determined that sufficient assurance of DTRA's right to perform audits and examinations, and sufficient protection against unauthorized end use, can be achieved by having the host country's recipient agency sign on to appropriate language in DTRA's Transfer of Custody or other contractual documents. The FY 2016 report's description of SLBM/SSBN work at Zvezda Shipyard in Russia alluded to one way in which the program hoped to create some measure of access even in the absence of government to government agreements. The report stated that although "the lack of a signed access agreement under the MNEPR Framework Agreement… may hinder work verification in the future," a contract was negotiated with Russian counterparts at the shipyard "to ensure full accountability" and "the contract calls for access and visual verification that work is complete prior to payment."[44]

c. Right to Award Contracts Pursuant to Federal Acquisition Regulations

The DOD CTR program has assessed that DOD could ensure this right by refusing to award contracts other than pursuant to the Federal Acquisition Regulations.

B. New Options for Achieving Protections

The DOD CTR program has thus far managed to negotiate new full government-to-government protective umbrella agreements, specifically tailored to CTR Program needs, with only a few countries outside the FSU. For example, in September 2013, a legally binding CTR agreement was entered into by the U.S. and Libya regarding elimination of the remaining stock of chemical weapons there.[45] In September 2014, a legally binding agreement was entered into with Jordan that "provides essential protections for DOD CTR program activities."[46] In July 2015, the United States and Kenya "signed a Cooperative Threat Reduction Agreement" to facilitate joint efforts related to "potential biological threats."[47]

In a number of other countries outside the FSU, work has proceeded pursuant to existing legally binding bilateral agreements which had been originally negotiated for other purposes. In other countries where the program seeks to work, there is as of yet no legally binding agreement in place, even with regard to protections deemed essential to receive on a government to government basis where possible.

With regard to the "essential" protections, DOD has added the following to its menu of options by which those protections may be satisfactorily achieved:

1. "Piggyback" on Existing Bilateral U.S. Agreement with Host Country

a. "Piggyback" on USAID Agreements

The DOD CTR FY 2016 report to Congress stated that "as project urgency or other circumstances require, the DOD CTR Program has… worked with DOS and the U.S. Agency for International Development to develop arrangements providing political assurances that provisions in existing bilateral agreements will be applied to DOD CTR Program activities and personnel."[48] The report asserts that "the DOD CTR Program tailors these frameworks to the operating environment and planned threat reduction activities in each partner country to ensure appropriate mitigation of program risk."[49] USAID agreements typically provide many of the same protections as umbrella agreements, including two types of protections not typically included in status of forces agreements: 1) the right to audit and examine the use of assistance and 2) guarantees against unauthorized use, or retransfer to third parties, of U.S.-furnished assistance.

However, since the FY 2016 report was published, USAID has reportedly been reluctant to allow its agreements to be used for DOD CTR purposes. Thus, only in the case of Tanzania and Vietnam has the DOD CTR Program "piggybacked" on a USAID agreement.

b. "Piggyback" on Status of Forces Agreements

As a result, DOD CTR has focused on using existing status of forces agreements to provide protections. The relationship between the DOD CTR program and a typical existing status of forces agreement is different than that between the DOD CTR program and a typical existing USAID agreement. Status of forces agreements typically apply to all DOD military and civilian personnel engaged in activities within a foreign country that have been "mutually agreed" to by the U.S. government and the foreign country government.

If the U.S. has such a status of forces agreement with the host country of a DOD CTR program, the process of obtaining privileges and immunities for DOD CTR officials can be relatively straightforward. The U.S. will seek formal acknowledgment from the host government that the DOD CTR program is a mutually agreed activity that falls within the protection of the status of forces agreement. It typically does so by requesting from the host country a diplomatic note in which the host country government requests that DOD CTR undertake the agreed scope of work and acknowledges that the work falls within the ambit of the status of forces agreement.

It can take months or even years to obtain such a diplomatic note from the host country government. However, even in the absence of such a formal acknowledgment, there is an

argument that DOD CTR activities within the host country are mutually agreed, by virtue of the fact that the host government is permitting the activities to take place in their country.

Status of forces agreements are legally binding. They typically contain some but not all of the traditional umbrella agreement protections. Status of forces agreements typically:

- Apply to DOD military and civilian personnel engaged in activities mutually agreed to by the U.S. and partner nations
- Apply to DOD activities mutually agreed to by the U.S. and partner nations
- Provide tax and customs duty exemptions for such activities
- Provide privileges and immunities for DOD military and civilian personnel engaged in activities mutually agreed to by the U.S. and foreign government

However, status of forces agreements typically do not provide the following which were typically included in umbrella agreements:

- Do not provide rights to audit and examine the use of assistance
- Do not provide guarantees against unauthorized use, or retransfer to third parties, of U.S.-furnished assistance
- Do not protect U.S. government personnel or contractors against third party lawsuits

DOD CTR has used existing status of forces agreements to provide protections, and received acknowledgment from the host government of their applicability, in countries including the following: Guinea, Liberia, the Philippines, and Senegal. DOD CTR has identified potentially applicable existing status of forces agreements, and is seeking formal acknowledgment from the host government of their applicability, in several other countries (all outside of the MENA region). It can take months or even years to receive a diplomatic note containing such an acknowledgement.

As discussed above, one downside of relying on status of forces agreements is that they do not typically provide all of the protections included in the FSU umbrella agreements. Consequently, when the DOD CTR program chooses to rely on a status of forces agreement, it works to minimize the liability, audit and examination, and end use risks in various ways discussed earlier in this report. For example, with regard to liability, the DOD CTR program relies on the customary international law principle of sovereign immunity to protect U.S. government employees from third party lawsuits and instructs contractors to protect themselves through the purchase of liability insurance. As discussed in section III.C.3 below, because customary international law is not embodied in treaties, there are significant risks in relying on sovereign immunity to protect U.S. government employees from potential liability risks. With regard to audit and examination (and proper end use), the DOD CTR Program insists on receiving before the transfer of equipment a document signed by a cognizant host country official.

In addition to seeking to "piggyback" on USAID and status of forces agreements, the DOD CTR program should seek to identify other government to government assistance agreements on which it might piggyback or at least draw for negotiating precedent. For example, assistance agreements designed to protect Federal Aviation Administration (FAA) activities involving

equipment provision and Centers for Disease Control (CDC) activities involving dangerous diseases might also be useful. The FAA, CDC, and other non-military agencies might turn out to share USAID's reluctance to allow their agreements to be used for DOD CTR purposes. However, if "piggybacking" on their agreements would enable the DOD CTR program to obtain important protections, the idea is certainly worth exploring.

Another alternative means which the DOD CTR program has explored for obtaining protections deemed essential is entry into a new legally binding government to government umbrella agreement containing only those protections (and any less essential protections that are readily obtained). However, piggybacking on a status of forces agreement (when one exists with the host country government) should, in theory, be quicker than negotiating a new agreement.

Regardless of the form that a legally binding government to government agreement takes, it is important to take into account that in many foreign legal systems, some or all protection provisions may not become applicable in local courts absent parliamentary action such as ratification and/or implementation into local law. In other words, a signed agreement can bind the foreign government yet not be valid law within the country absent legislative action. As discussed in Section III, it is important to determine whether this is the case in a particular host country and, if so, ensure that the appropriate legislative action is taken.

2. Unilateral written commitment by host government to grant protections

The DOD CTR program has, when faced with a host country government unwilling to enter into a new bilateral agreement or use an existing one, considered relying on the host country government providing a unilateral written commitment to protect against host country domestic law risks. Under international law, legally binding obligations typically are embodied in bilateral agreements rather than unilateral commitments.[50] While there is some precedent for unilateral statements creating legally binding obligations,[51] it seems substantially more reliable for CTR protections to be contained in legally binding bilateral agreements.

3. Nonbinding memorandum of understanding in which host country government provides political commitment to provide protections

The DOD CTR FY 2016 report to Congress indicated that the DOD CTR program was "assessing options for both binding and non-binding frameworks to cover DOD CTR Program work" with various countries. Outside of the MENA region, the specified countries in this status included Gabon, India, Indonesia, Sierra Leone, and Tanzania. One MENA country (Iraq) was also described as being in this status: "The DOD CTR Program is assessing options for both binding and non-binding frameworks to cover DOD CTR Program work with Iraq."[52] As of July 2016, there was no agreement in place with Iraq.

While the desire to negotiate binding legal frameworks is understandable, it is unclear how non-binding frameworks could effectively protect U.S. government employees or contractors from host country domestic legal issues.

C. New Willingness to Consider Working Without Protections in Place

The DOD CTR FY 2016 report to Congress stated as a general matter that "where CTR-specific agreements or arrangements are not yet in place, the DOD CTR Program avoids or minimizes activities that would incur taxes, identifies tax reimbursement mechanisms available to the U.S. Government, and establishes the right to examine the use of any material, training or service provided through less formal transfer of custody arrangements."[53] Activities which have been deemed "low risk" and thus approved to be conducted without legally binding protections in place include:

- development of joint plans
- conducting needs assessments
- providing classroom training
- reviewing designs and providing technical advice for construction
- transferring equipment when the host country government has committed to protections in the DTRA Transfer of Custody documents

In the absence of special protections in place, the DOD CTR program attempts to mitigate risks through existing U.S. government mechanisms. These can include, for example, avoiding customs duties by shipping through the U.S. embassy located in the host country.

"Medium" risk activities are considered for approval when "essential" protections (e.g., tax exemptions) are in place and other risks (such as a lack of liability protection for contractors) can be mitigated (e.g., by the contractors successfully acquiring insurance coverage for the activity). Activities which have been deemed "medium risk" include:

- provision of equipment which is of relatively high value but poses a low liability risk
- performing low cost, simple facility refurbishments

Activities which are considered to be of "high risk" and thus relatively more in need of traditional government to government protections include laboratory construction and the provision of some sensitive equipment. The DOD CTR program is reportedly willing to consider proceeding with such "high risk" activities absent critical protections in light of factors including sufficient significance and imminence of the threat to U.S. national security.

The decision as to whether a particular activity in a particular country should not proceed absent a particular level of protection is made by the program on a case by case basis. As of July 2016, there was no policy memo that authoritatively and systematically provided guidance on these matters.

The lack of a protective agreement has reportedly contributed to slowed CBEP and Proliferation Prevention Program work in Iraq. As mentioned previously, the DOD CTR FY 2016 report to Congress stated that "the DOD CTR Program is assessing options for both legal and non-binding frameworks to cover Program work with Iraq."[54] It also stated that "the DOD CTR Program is assessing the WMD-proliferation threat against the risk of performing activities in the absence of a legal framework and identifying options the CBEP can use to mitigate legal risks."[55]

III. Analysis and Recommendations

A. Traditional "Umbrella Agreements" Remain Desirable Where Obtainable and CTR Work Poses Significant Risk

The benefits of avoiding the initial investment in painstaking negotiation of bilateral country-by-country "umbrella agreements" need to be balanced against the probability that, in the long term, a CTR program will likely be more successful (and more agile, flexible, and responsive) if the inherent legal risks posed by operating in a particular environment are mitigated or eliminated altogether at the outset of the implementation through the conclusion of a sufficiently comprehensive legally binding agreement. The negotiation of such an agreement clears the field so a specific program can operate efficiently and effectively, and be protected from potentially severe legal consequences resulting from unanticipated incidents and accidents. Such protection can help the program survive scrutiny from Congressional and other overseers for years to come.

It can be difficult or impossible to anticipate all of the different types of cooperative threat reduction projects that the U.S. might wish to undertake in a particular country as new threats arise. It can also be difficult or impossible to anticipate how a country's operational environment and/or legal system might over time come to pose greater risks or provide lesser protections than at the time the need for a protective agreement was initially assessed. Because it typically becomes much more difficult to persuade the host country government of the need to increase protections once DOD CTR activity begins in a particular host country, there is value in prioritizing initial investment in negotiating protections that are expansive as possible.

To maximize protections by prioritizing investment in negotiating them means, in part, to involve in the negotiations U.S. government officials at the political level (Deputy Assistant Secretary of Defense and above). Foreign governments are typically as or more hierarchical than is the U.S. government, with only political level officials authorized to make significant concessions. Foreign political level officials typically become personally engaged in negotiations only when a U.S. official of a similar level becomes involved. DOD CTR umbrella agreement negotiations with FSU governments typically involved senior officials, including at times cabinet secretaries and even the U.S. president. Over the past eight years, there has reportedly been a significant reduction in political level U.S. Defense Department officials engaging their foreign counterparts to address the need for legal protections for CTR efforts in host countries.

That said, some types of CTR program work do not necessitate the protections of a full traditional DOD CTR umbrella agreement. The CTR program should be prepared to proceed with an activity in a particular country, in the absence of a full traditional umbrella agreement, when the program has carefully and systematically determined that the urgency and magnitude of the particular threat to be reduced by that activity outweighs the particular risks to the United States and its personnel of engaging in that activity in that individual partner nation. In order to ensure that such determinations are sufficiently rigorous and tailored, they should be the subject of decision memoranda signed by an appropriately senior official. While it makes sense for low risk activities in a particular country to be approved on a categorical basis (e.g., "all classroom training of Saudi customs officials on commodity identification is hereby approved even in the

absence of liability protection"), medium and high risk activities in a particular country should be approved only on a case by case basis.

B. Overall Criteria Relevant to Assessing Risk

According to the Government Accountability Office, effective risk assessment with regard to federal programs "involves comprehensively identifying risks associated with achieving program objectives; analyzing those risks to determine their significance, likelihood of occurrence, and impact; and determining actions or controls to mitigate the risk."[56]

The value of particular protections to mitigate host country domestic legal risk depend in part on a project's particular type and the specific country for which it is planned. The magnitude of the host country domestic legal risk posed by a given type of project in a particular country will depend on a combination of two major factors: a) the inherent riskiness of the type of project (e.g., what can go wrong with the project from a practical perspective that might foreseeably intersect with a host country legal system); and b) the characteristics of the particular host country's legal system.

1. Different Types of Activities Vary in Risk

As discussed above, the DOD CTR program has begun to divide types of program activities into "high risk," "medium risk," and "low risk" categories. The risk category into which an activity falls helps inform decisions as to whether that activity should proceed absent a particular level of protection.

It is essential that such risk analysis be conducted systematically, with input from legal and other relevant professional specialists (e.g., engineers with regard to potential liability for equipment malfunction or architects with regard to construction failure). It is also essential that risk analysis of a particular activity per se (in and of itself) be seen as merely a starting point for risk analysis of that particular activity within the context of each particular host country's legal system. Given the variability of host country legal systems, all but the least risky activity per se should be analyzed for risk in light of how that risk might play out in the legal system of the particular host country.

2. Risk Depends on Characteristics of Host Country's Legal System

While subsequent subsections of this chapter focus on host country legal systems as they relate specifically to particular risks such as liability, it is important to note that there are also several overall characteristics of host country legal systems that should be taken into account. These include the following:

a. To what extent does the host country legal system operate in an arbitrary, unpredictable, inefficiently protracted, or otherwise unfair manner?

The more a particular host country's legal system operates in an arbitrary, inefficiently protracted, or otherwise unfair manner, especially with regard to legal issues directly relevant to

DOD CTR program operations, the more important it is that the program obtain strong protections from host country domestic legal risks. Many developing countries, including in the MENA region, have large gaps between relatively fair laws on the books and a legal system that in practice operates in an arbitrary, unpredictable, inefficiently protracted, or otherwise unfair manner.

One indicator of how countries' legal systems work in practice is the World Bank's Doing Business Project, which annually "provides objective measures of business regulations and their enforcement across 189 economies" worldwide.[57] For the overall ease of doing business, most MENA countries are ranked at or below the world average.[58] In light of the CTR program's particular risks regarding taxation and the need to import equipment efficiently and without payment of customs duties, the World Bank ratings for ease of "paying taxes" and "trading across borders" are of particular interest. Several relevant MENA countries are ranked particularly low on these measures. For example, Egypt is 151th on ease of paying taxes and 157th on ease of trading across borders, Yemen is 135th on ease of paying taxes and 189th on ease of trading across borders, Syria is 119th on ease of paying taxes and 173rd on ease of trading across borders, and Libya is 160th on ease of paying taxes and 107th on ease of trading across borders.[59]

b. What is the level of corruption in the host country?

One major contributor to unfair implementation of legal systems worldwide is of course corruption. The higher the level of corruption in a host country, the more important it is to obtain legally binding protections prior to engaging in risky activities. Officials in corrupt legal systems are more likely to have a personal incentive to engage in the behaviors against which umbrella agreements are designed to protect. For example, officials in a corrupt system are more likely to:

- insist on imposition of taxes and customs duties when they are able to keep such payments for themselves
- wrongly detain program employees when the local practice is that such detentions are resolved through bribery
- retransfer provided equipment to unauthorized uses when the local practice is to steal and sell government assets

In addition, at a systemic level, corruption in a legal system typically makes it harder to assess risk, including by making it harder to predict how a specific law will be applied to a particular set of facts.

U.S. companies are bound by a U.S. law, the Foreign Corrupt Practices Act, which prohibits all U.S. persons from paying bribes to foreign government officials[60] and is aggressively enforced by the U.S. government. U.S. government contractors engaged in DOD CTR activities in a host country therefore cannot address a corruption-caused problem (e.g., a wrongful detention) by taking the same steps (e.g., paying a bribe) that host country companies take to address such problems. The Transparency International Corruption Perceptions Index 2015 includes the following rankings of relevant MENA countries (number 1 is the least corrupt country and number 167 is the most corrupt country on their list): Qatar (22), UAE (23), Jordan (45), Saudi

Arabia (48), Bahrain (50), Kuwait (55), Oman (60), Tunisia (76), Algeria (88), Egypt (88), Morocco (88), Lebanon (123), Iran (130), Syria (154), Iraq (161), Libya (161).[61]

High level foreign officials who have a constructive relationship with, and understanding of, the U.S. government are sometimes willing to override bribe requests from lower level officials. The DOD CTR program should consider specifying in its agreements with a host country government the high level official or officials to which U.S. government personnel and contractors can escalate issues associated with petty bribes demanded by lower level officials.

c. Do protective international agreements require ratification? Are they self-executing?

In many legal systems, some or all protection provisions may not become applicable in local courts absent parliamentary action such as ratification and/or implementation into local law. In other words, a signed agreement can bind the foreign government yet not be valid law within the country.

It is essential that DOD CTR program leadership ensure that protective provisions are valid law within the host country, including by determining whether an existing or potential protective international agreement with a host country a) requires parliamentary ratification prior to entry into force as an agreement legally binding upon the host country, and b) has automatic domestic effect upon ratification (is "self-executing") or instead is not applicable in domestic courts absent implementing legislation amending existing law. The term for an international agreement that becomes judicially enforceable only through implementing legislation is "non-self-executing."

C. Specific Protections Traditionally Provided by Umbrella Agreements

1. Exemption from Taxes and Customs Duties

No current U.S. law specifically prohibits foreign taxation of assistance provided by the DOD CTR Program. Nor does DOD's department-wide policy rule out the payment of such taxes. However, Congress has imposed draconian restrictions in response to foreign taxation of assistance provided by other U.S. government programs. The DOD CTR Program should derive lessons learned from the controversies that contributed to enactment of these laws, and take prophylactic measures to ensure that similar controversies do not impact the DOD CTR Program.

DOD's department-wide policy to seek relief from foreign taxes to the maximum extent practicable is set forth as follows in DOD Instruction 5100.64:

It is DOD policy to secure, to the maximum extent practicable, effective relief from all foreign taxes. This policy applies wherever the ultimate economic burden of those taxes would, in the absence of such relief, be borne by funds appropriated or allocated to the DOD (including security assistance and related appropriations) or under the control of its nonappropriated fund activities. However, in situations where the economic burden of a tax is so small that it may be considered a *de minimis* matter, or when the administrative burden of securing effective relief from a tax in a particular instance is greater than the amount of the relief likely to be obtained,

tax relief will be considered impractical and will not be sought under the provisions of this issuance.[62]

This policy is far from an order to never pay foreign taxes under any circumstances. Indeed, this policy is far more flexible than DOD's traditional insistence that CTR program work not begin in a particular country until the U.S. and the host country have entered into a legally binding government to government agreement exempting program assistance from all taxes, customs duties, and similar charges.

However, Congress, the GAO, and various executive branch inspector generals have repeatedly shown considerable concern about foreign taxation of assistance provided by other U.S. government programs. For example, two recent federal laws have prohibited foreign taxation of assistance provided by other U.S. government programs. The DOD CTR Program should derive lessons learned from the controversies that led to enactment of these laws, and take measures to ensure that similar controversies do not impact the DOD CTR Program.

Section 7013(a) of the Foreign Operations Appropriations Act 2016, which is not applicable to the DOD CTR program, provides as follows:

> SEC. 7013. (a) PROHIBITION ON TAXATION.—None of the funds appropriated under titles III through VI of this Act may be made available to provide assistance for a foreign country under a new bilateral agreement governing the terms and conditions under which such assistance is to be provided unless such agreement includes a provision stating that assistance provided by the United States shall be exempt from taxation, or reimbursed, by the foreign government, and the Secretary of State shall expeditiously seek to negotiate amendments to existing bilateral agreements, as necessary, to conform with this requirement.
>
> (b) REIMBURSEMENT OF FOREIGN TAXES.—An amount equivalent to 200 percent of the total taxes assessed during fiscal year 2016 on funds appropriated by this Act by a foreign government or entity against United States assistance programs for which funds are appropriated by this Act, either directly or through grantees, contractors, and subcontractors shall be withheld from obligation from funds appropriated for assistance for fiscal year 2017 and allocated for the central government of such country… to the extent that the Secretary of State certifies and reports in writing to the Committees on Appropriations, not later than September 30, 2017, that such taxes have not been reimbursed to the Government of the United States.[63]

This provision requires that if a foreign government imposes taxes on U.S. foreign assistance and refuses to reimburse the taxes, assistance to that country for the subsequent fiscal year will be reduced by 200 percent of the imposed tax. This requirement was first included in the 2003 Consolidated Appropriations Resolution. It applies to foreign assistance programs funded by select titles in the Department of State, Foreign Operations, and Related Programs Appropriations Acts, but not to the DOD CTR program.

This foreign operations taxation prohibition was spurred by Congress learning in 2002 that the Palestinian Authority and various other foreign governments were taxing U.S. assistance and especially assistance provided through USAID.[64] This "raised concerns in Congress that U.S. assistance funds for programs to help developing country populations were instead being diverted to the treasuries of foreign governments."[65] The problem arose despite the fact that USAID had protective agreements with almost all of the countries or other entities (e.g., the Palestinian Authority) to which it provided assistance. Of the 90 countries or entities to which USAID provided assistance in fiscal year 2003, it had with 77 of them "bilateral framework agreements that include some type of prohibition on taxation," and had with 6 others of them "other agreements that include such prohibitions."[66] In only 7 of the 90 assistance relationships did USAID "not have agreements that include such prohibitions."[67]

The foreign taxation of U.S. assistance which received the most attention was the $6.8 million which the Palestinian Authority had collected in "taxes on U.S. humanitarian assistance meant for the people of the West Bank and Gaza."[68] The Palestinian Authority was one of the entities with which the U.S. government did not have a legally binding protective agreement regarding taxation of assistance. Instead, the U.S. government was relying on a letter in which the Palestinian Authority stated that it would not assess VAT for any U.S. assistance activities.[69] USAID's misplaced reliance on a non-binding letter from the Palestinian Authority, and the ensuing controversy, should serve as a warning to the DOD CTR program of the risks of relying on a non-binding commitment to protect the program from foreign taxes.

Separately, the National Defense Authorization Act for Fiscal Year 2014 included a requirement that DOD withhold fiscal year 2014 assistance to Afghanistan in an amount equivalent to 100 percent of all taxes assessed by the Afghan government on DOD assistance during fiscal year 2013, to the extent such taxes were not reimbursed by the Afghan government.[70] The requirement applied to all "funds provided during fiscal year 2013 to Afghanistan by the Department of Defense, either directly or through grantees, contractors, or subcontractors."[71]

The requirement was imposed in the wake of a 2013 report, by the U.S. Special Inspector for Afghan Reconstruction (SIGAR), that found that between 2008 and 2013, the Afghan Ministry of Finance had "levied over $921 million in business taxes, and associated penalties, on 43 contractors that support U.S. government efforts in Afghanistan."[72] This occurred notwithstanding U.S. contracting agencies – including the Defense Department, State Department Bureau of International Narcotics and Law Enforcement Affairs (INL), and USAID – having "negotiated agreements with the Afghan government that exempt their contracts from certain Afghan business taxes."[73]

For example, SIGAR found that "$93 million of the $921 million represented taxes levied on business receipts and annual corporate income – a tax category that both the U.S. and Afghan governments have agreed should be exempt for contractors operating under" protective agreements.[74] "Agreements put in place to ensure that contractors supporting U.S. agencies' contracts are not taxed appear to be failing in their purpose," said SIGAR.[75] SIGAR expressed concern that the Afghan government's assessment of taxes on DOD assistance was increasing "the cost of projects to the American taxpayer."[76] Disputes relating to the Afghan government's attempted enforcement of tax assessments also "resulted in arrests and arrest warrants for

contractor personnel and freezing of company bank accounts."[77] In addition, SIGAR reported that "at least nine of the contractors we interviewed had shipments of goods critical to U.S. and coalition operations delayed as a result of unresolved tax assessments."[78]

In the case of DOD, the protective agreement in place was a status of forces agreement that stated as follows: "the Government of the United States of America, its military and civilian personnel, contractors and contractor personnel shall not be liable to pay any tax or similar charge assessed within Afghanistan."[79] The status of forces agreement further stated that the acquisition of goods and services in Afghanistan by or on behalf of the U.S. government are not subject to any taxes, customs duties, or other similar charges.[80]

SIGAR noted that part of the problem stemmed from a disagreement between U.S. and Afghan Ministry of Finance (MOF) officials "about the tax-exempt status of subcontractors."[81] "MOF officials," explained SIGAR, "assert that the DOD and State INL agreements provide tax-exempt status only to prime contractors, and not subcontractors, whereas U.S. government officials contend that the agreements provide tax exemption for all non-Afghan companies (both prime and subcontractors) supporting U.S. government efforts."[82] In implementation of its position, the Afghan Ministry of Finance required "prime contractors to withhold a portion of subcontractor payments to meet tax obligations."[83]

SIGAR also "found that INL and DOD contracting officers do not fully understand Afghanistan's tax laws and, as a result, they have improperly reimbursed contractors for taxes paid to the Afghan government."[84] SIGAR also concluded that DOD and INL did not take "sufficient steps to ensure that their subcontractors obtain required tax exemption certificates."[85]

In light of the Afghanistan taxation dispute and SIGAR's recommendations for addressing it,[86] the DOD CTR Program should consider taking the following prophylactic measures:

- Ensure that protective agreements clearly specify tax exemption for all relevant companies (both prime contractors and subcontractors) supporting U.S. government efforts. SIGAR found that Afghan Ministry of Finance officials stated that the SOFA agreement provided tax-exempt status only to prime contractors and not subcontractors, "because subcontractors are not mentioned in the agreements."[87] U.S. government officials told SIGAR they "disagree with this position" and stated the SOFA agreement provides "tax exemption for all non-Afghan companies (both prime contractors and subcontractors) supporting U.S. government contracts."[88] As SIGAR noted, the SOFA agreement used the term "contractors" but indeed did not specifically mention "subcontractors." Based on this experience, the DOD CTR program should ensure that protective agreements clearly specify that their scope includes subcontractors and subcontractor personnel. To the extent that the DOD CTR program "piggybacks" on an existing SOFA or other agreement that does not so specify, it should strongly consider a supplementary agreement that does so.
- Ensure that U.S. government agencies providing CTR and other assistance in the host country develop as consistent and unified a position as possible on host country taxation of assistance provided, including by contractors and subcontractors. SIGAR concluded that "the U.S. government has created a tax environment for contractors that differs from

agency to agency and allows the Afghan government to take advantage of differences in the application of the various agreements."[89]

- Ensure that DOD CTR program contracting officers understand that part of their responsibilities include providing advice to contractors on exemption from local taxes. SIGAR noted that with regard to Afghanistan, the DOD's CENTCOM Joint Theater Support Contracting Command asserted that "tax issues are beyond the contracting officers' responsibility" while at the same time, DOD's Office of General Counsel, whose view on this issue is more authoritative, "stated that its policy is to resist providing advice to contractors because that is the responsibility of the contracting officers."[90]
- Ensure that DOD CTR program contracting officers have a sufficient understanding both of host country tax laws and how they are implemented in practice.
- Ensure that DOD CTR program officials, to the extent necessary, work with the host country government to develop and clarify procedures for contractors and subcontractors to obtain appropriate documentation of tax-exempt status with the host country government.
- Ensure that DOD CTR program officials provide sufficient guidance and training to contractors and subcontractors on how to obtain any required tax exemption certificates from the host country government.
- Ensure that appropriate steps are taken to prevent the program from improperly reimbursing taxes to contractors.

2. Privileges and Immunities

In order to accurately assess the need for privileges and immunities with regard to a particular project in a particular country, it is essential to have a sophisticated understanding of the level of risk that U.S. government employees or contractors might be arrested or otherwise detained on trumped up charges in that country. The Office of Foreign Litigation (OFL) in the U.S. Department of Justice typically "represents the United States' interests in foreign criminal proceedings involving prosecutions for criminal activity directed against the United States, its officers, and employees."[91] As noted above, the OFL's mission is to protect "U.S. interests in all litigation pending in foreign courts, whether civil or criminal, affirmative or defensive."[92]

The OFL's purview includes providing "legal advice to federal agencies, departments, and government officials regarding litigation risks abroad," [93] an undertaking which it achieves in part by retaining foreign attorneys to advise and represent the U.S. with regard to foreign legal systems. [94] Surprisingly, the DOD CTR Program seems to have rarely if ever drawn on the OFL's expertise in assessing and mitigating the legal risks to its personnel in potential host countries. The DOD CTR program should immediately begin to systematically confer with the OFL about the DOD CTR program's host country domestic law risks and how to address them.

The DOD CTR Program's need to obtain privileges and immunities protection in a legally binding agreement has increased in recent years, at least on its face. While DOD employees travelling to CTR host countries were previously issued diplomatic passports, they are now

merely issued official passports. While DOD contractors travelling to CTR host countries were previously issued official passports, that practice has been discontinued in favor of the use of standard passports. As discussed below, simply carrying even a diplomatic passport, without formally being accredited as a diplomat to the host government, is not sufficient, in the U.S. and many other countries, to have a right to privileges and immunities. However, as a political matter, the DOD CTR program might find it easier to persuade a host country government to, for example, not prosecute a DOD CTR employee bearing a diplomatic passport.

In contrast with sovereign immunity, which is largely governed by customary international law, diplomatic immunity is largely enshrined in treaties, most notably the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations.[95]
The Vienna Convention on Diplomatic Relations, which entered into force for the United States in 1972, provides diplomats with strong protections against criminal prosecution. Various categories of diplomatic mission personnel receive different protections.[96] "Diplomatic agents," including ambassadors and the other diplomatic officers who deal directly with host country officials, enjoy the highest level of privileges and immunities.[97] They enjoy complete personal inviolability, which means that they cannot be arrested or detained.[98] Nor may their property (including vehicles) or residences be entered or searched.

Diplomatic agents "also enjoy complete immunity from the criminal jurisdiction of the host country's courts and thus cannot be prosecuted no matter how serious the offense unless their immunity is waived by the sending state."[99] They also have immunity from civil suits except in very limited circumstances.[100]

The next highest category is "members of the administrative and technical staff" of the mission, which includes those persons who support the activities of diplomatic agents.[101] This category includes various clerical personnel, office managers, and certain professional security personnel.[102] Members of the administrative and technical staff "enjoy privileges and immunities identical to those of diplomatic agents in respect of personal inviolability and immunity from criminal jurisdiction.[103] However, their immunity from civil jurisdiction (lawsuits) is significantly reduced. They enjoy immunity from civil jurisdiction only in connection with the performance of their official duties.[104] This is commonly known as "official acts or functional immunity."[105]

It is important to note that persons "sent to the United States on short-term official duty with diplomatic missions ordinarily do not enjoy any privileges and immunities."[106] This is the case even if the persons carry a foreign diplomatic passport.[107] Privileges and immunities are extended only to persons eligible for special identity cards issued by the U.S. Department of State to persons accredited to the United States or to designated international organizations located in the United States.[108]

Even for diplomatic agents who have been formally notified to the host country government, diplomatic immunity can be unreliable. As a result, when a diplomat is even merely rumored to be the potential subject of a prosecution, he or she is typically counseled to immediately return to his home country.

The vast majority of federal employees travelling to host countries to work on the DOD CTR program do so on short-term (also known as temporary) official duty. Assuming the host country is similar to the United States in denying privileges and immunities to even those persons on short-term official duty who carry diplomatic passports, federal employees (let alone contractors) temporarily working in host countries in connection with the DOD CTR program would typically have no privileges and immunities absent such being clearly specified in an umbrella, status of forces, or other government to government agreement.

The DOD CTR Program should work closely with the OFL to:

- assess the inherent riskiness, from a practical perspective, of the various major types of DOD CTR program activities (e.g., what can go wrong with project personnel from a practical perspective that might intersect with a host country legal system)

- assess how the level of risk posed by these DOD CTR personnel acts could be impacted by the characteristics of the particular host country's legal system (e.g., does this country have a particular tendency to arrest foreign government employees who engage in particular acts, etc.)

- assess the relative efficacy of various types of agreements and other options for mitigating these risks

- develop a systematic methodology for determining when and if a particular type of activity by U.S. personnel in a particular country should proceed with various types of higher or lower levels of protection or other options for mitigating risk

3. Liability

In order to accurately assess the need for liability protection of a particular project in a particular country, it is necessary to have a sophisticated understanding of how liability issues are handled by the host country's legal system. The Office of Foreign Litigation (OFL) in the U.S. Department of Justice is the leading source of U.S. government expertise regarding lawsuits in foreign courts. The OFL's mission is to protect "U.S. interests in all litigation pending in foreign courts, whether civil or criminal, affirmative or defensive."[109] Its purview includes defense against "litigation arising from U.S. agency or military activities in foreign countries" and providing "legal advice to federal agencies, departments, and government officials regarding litigation risks abroad."[110] The OFL fulfils its mission in part by retaining foreign attorneys to advise and represent the U.S. with regard to foreign legal systems.[111] According to the OFL, "at any given time, foreign lawyers under OFL's direct supervision represent the United States in approximately 1,000 lawsuits pending in the courts of over 100 countries."[112]

Surprisingly, the DOD CTR Program seems to have rarely if ever drawn on the OFL's expertise in assessing and mitigating the litigation risk in potential host countries. As a result, the DOD CTR Program has in recent years unduly relied on sovereign immunity to protect U.S. government employees from potential liability risks. In interviews with this author, attorneys

from the OFL cautioned that sovereign immunity is customary international law (i.e., not reflected in a treaty but rather in state practice accepted as law)[113] and that many developing country courts, including in the MENA region, don't fully understand and implement customary international law. Thus, while sovereign immunity can be relied upon to protect the U.S. government against lawsuits in U.S. courts in a manner predictably consistent with U.S. law, sovereign immunity is a much less reliable defense for the U.S. government in foreign courts, especially in the developing world.

The risks of undue reliance on sovereign immunity are reflected in the literature. As one commentator put it, "most countries have not domestically codified state immunity principles and instead rely upon interpretation of customary international law… the lack of domestic legislation has sometimes resulted in inconsistent application of state immunity principles."[114]

The risk of reliance on sovereign immunity is exemplified by Italy's recent willingness to defy an International Court of Justice ruling specifically ordering Italy to provide sovereign immunity in a particular circumstance. The International Court of Justice, in a 2012 case titled *Jurisdictional Immunities of the State (Germany v. Italy)*, upheld the principle of sovereign immunity from civil suits, rejecting Italy's attempt to create an exception to sovereign immunity in civil cases brought in response to grave human rights abuses by Germany during World War II.[115] However, the Italian Constitutional Court subsequently defied the ICJ's ruling and authorized such lawsuits to go forward.[116] Anne Peters, director of the Max Planck Institute for Public Law and International Comparative Law, predicted in December 2015 that the Italian Constitutional Court's ruling would have "systemic significance," with other constitutional courts around the world giving less deference to sovereign immunity in light of the Italian court's refusal to defer to sovereign immunity even in the face of a specifically applicable ICJ decision.[117]

Advocates of reduced liability protection may also be overlying relying on the reported lack of a need, over the course of twenty years of FSU programs, to deploy the umbrella agreement liability protections to defend against a lawsuit. The existence of such protections may, of course, have served to deter such lawsuits from even commencing. With OFL defending hundreds of foreign lawsuits against the U.S. at any one time, the possibility of a lawsuit relating to a DOD CTR Program is far from theoretical. As one federal attorney involved with the DOD CTR Program said, liability protection is "like insurance, you hope you never need it but you get it anyway."

DOD CTR umbrella agreements traditionally protected against third party lawsuits not only U.S. government personnel but also contractors. One risk to the U.S. government of proceeding without such protection for contractors is that contractors might refuse to do some types of work in the absence of such protection.

In a not-for-attribution discussion with the author, a key official at a potential contractor cautioned that "pursuing bio work in some… countries might be viewed as too risky no matter what," and especially in the absence of something like the traditional liability protection provision. He explained that "the 'traditional' blanket exemption/indemnification found in UA language has been critical to my being able to receive permission from senior corporate

executive leadership and from corporate legal to bid certain jobs." "Commercial risk insurance," he said, "is not available in all areas, or for all activities… insurance companies tend to get spooked (sometimes irrationally) when words like 'pathogens' are part of the description of the project for which one is seeking coverage." He added the following:

"My job addressing the risks and getting approval to bid is made considerably easier when I can point to the absolute protections on the Umbrella Agreement language (especially when the UA has been ratified by the country in question). I will have a much more uphill battle trying to convince our folks to let me bid… without a UA or… something that offers similar protection."

This is not the only major contractor who has indicated that they might be unwilling to do certain types of biological or chemical threat reduction work in the absence of sufficient liability protections.

The DOD CTR Program should work closely with the OFL to:

- assess the inherent riskiness, from a practical perspective, of the various major types of DOD CTR program activities (e.g., what can go wrong with project activities from a practical perspective that might intersect with a host country legal system)

- assess how the level of risk posed by these DOD CTR program activities could be impacted by the characteristics of the particular host country's legal system (e.g., does this country have a particular tendency to ignore sovereign immunity or award massive judgments in lawsuits against foreign entities, etc.)

- assess the relative efficacy of various types of agreements and other options for mitigating these risks (e.g., is this a country regarding which the liability provisions in an applicable status of forces agreement are classified and this country's legal system requires that agreement provisions can only be introduced in local courts if they have previously been published)

- develop a systematic methodology for determining when and if a particular program activity in a particular country should proceed with various types of higher or lower levels of protection or other options for mitigating risk

4. Audit and Examination Rights and End Use Assurances

The principal objective of audit and examination rights, and end use assurances, is to ensure that assistance is used for the purposes provided and not diverted. The DOD CTR program has determined that sufficient assurance of DTRA's right to perform audits and examinations, and sufficient protection against unauthorized end use, can be achieved by having the host country's recipient agency sign on to appropriate language in DTRA's Transfer of Custody or other contractual documents. As discussed previously, legally binding government to defense protections are particularly important in cases where the foreign government agency (e.g., the defense ministry) which is partnering with the U.S. assistance provider would not typically be

capable of legally binding (or perhaps even have much policy leverage over), for example, the host country government's tax authorities (e.g., finance ministry) to not tax CTR assistance or its law enforcement authorities to respect CTR providers' personal freedoms.

In cases where the host country's recipient agency is also going to be the end user of equipment provided to it by the United States, government to government assurances of audit and examination rights and of end uses are relatively less important. Yet it is still much better to have them, as they enhance DOD's ability to escalate to a dispute with a recalcitrant partner agency.

At least in theory, host country practical concerns about providing access to U.S. officials should be less in countries, such as several in the MENA region, that do not have nuclear or other highly-sensitive WMD programs as did Russia. To the extent the concern about providing access is political and exacerbated by the involvement of the U.S. Defense Department, it may make sense to consider whether another federal agency – such as DOE or HHS – should take the lead in having the right to audit and examine or otherwise engage in end use verification activity with the host country.

5. Right to Award Contracts Pursuant to U.S. Government Contracting Laws

The DOD CTR program needs to be able to ensure that contracts are awarded pursuant to U.S. federal contracting laws and not on the basis of host country laws and procedures which might select on bases other than merit. The program has assessed that it could ensure this right by refusing to award contracts other than pursuant to U.S. federal contracting laws. This seems like a reasonable assessment, so long as the program retains direct control over subcontracts.

In assessing its ability to ensure that contracts are not awarded other than pursuant to U.S. federal contracting laws, the DOD CTR program should study, and draw prophylactic recommendations from, the USAID Inspector General and GAO investigations which in July 2016 revealed extensive fraud in USAID's Syria aid programs. The "most common fraud involved… staff of USAID's local partners who accepted bribes or kickbacks in exchange for help in winning a contract."[118]

An investigation by the USAID Inspector General found that "some of USAID's implementers used less than full and open competition to carry out large-scale procurements."[119] For example, the Inspector General's "investigations in Turkey identified a network of implementer staff colluding with vendors who provide food and non-food items for Syria cross-border programming."[120] The Inspector General found that "procurement staff accepted vendor bribes or kickbacks to provide competitive bidding data or manipulate the bid evaluation process, giving vendors an unfair advantage."[121]

Some of the contract steering was facilitated by the particular difficulty of operating in Syria. Nevertheless, the Inspector General said its findings "raised serious concerns" about the contracting and oversight mechanisms relied upon by USAID.[122] This included a contracting practice which the DOD CTR program might also be tempted to engage in while addressing security threats in the MENA region: "the extended use of emergency waivers to bypass

established procurement policies and procedures—including full and open competition—in an effort to expedite procurements."[123]

The identified "internal control deficiencies and potentially illegal acts committed by implementer staff and commercial vendors… have had a large-scale effect on the Syria assistance program."[124] In addition to fraud-related losses of taxpayer dollars, USAID has had to take drastic action. For example, "in December 2015, USAID imposed programmatic suspensions on activities under six Syrian humanitarian response awards valued at $305.8 million."[125] According to the Inspector General, "with investigations ongoing, there is the potential for further referrals, show cause letters, employee terminations, and vendor suspensions and debarments." [126]

A Government Accountability Office investigation of the Syria aid program found that its problems stemmed in significant part from a failure to assess "the risk of fraud" adequately (or in some cases at all).[127] "Without documented risk assessments," said GAO, program implementing agencies and their partners "may not have all of the information needed to design appropriate" protections.[128]

The Inspector General concluded as follows her testimony on the Syria program fraud:

> Providing aid in war-ravaged regions frequently calls for flexible contracting… to expedite the delivery of goods and services… However, as our investigations demonstrate, flexibility cannot eclipse rigor. [Insufficient rigor] put taxpayer dollars at risk and, in the case of Syria, have delayed the delivery of millions of dollars of assistance.[129]

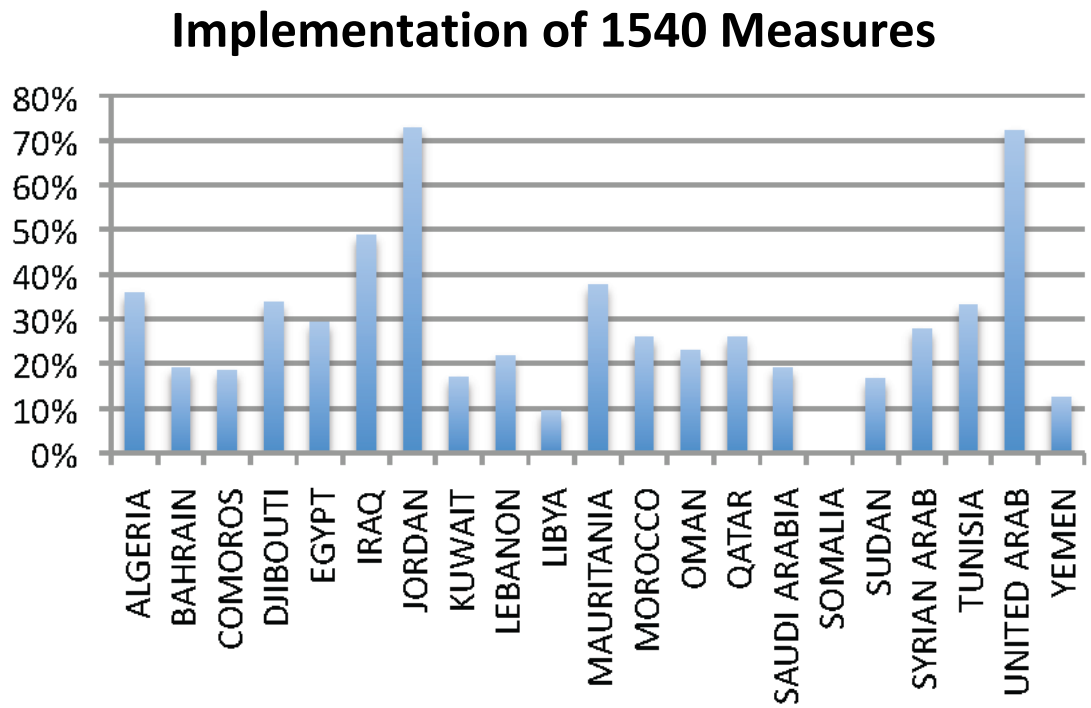
The DOD CTR program should heed the lessons of the USAID Syria program and develop and implement a rigorous and systematic methodology, consistent with this chapter's specific recommendations, for analyzing and mitigating each of the host country domestic legal risks. Such a rigorous and systematic methodology would enable the program to more effectively balance such host country domestic law risks against the risks of delaying CTR projects designed to counter WMD and related threats to U.S. and allied security.

The program could thus operate more efficiently and effectively, and be better protected from potentially severe legal consequences resulting from unanticipated incidents and accidents. Such protection could also help protect the program in case of scrutiny by Congressional and other overseers.

Chapter Two: Options for Increasing MENA Implementation of International Nonproliferation Law

Many governments in the Middle East and North Africa (MENA) region have a weak record of implementing their legally binding nonproliferation obligations. These include obligations pursuant to UN Security Council Resolution 1540, which are binding on all UN member states. They also include obligations pursuant to the Biological Weapons Convention (BWC) and the Chemical Weapons Convention (CWC), which are binding on all states which have chosen to adhere to those treaties. In addition, a significant number of MENA countries have thus far failed to adhere to key nonproliferation agreements which are not obligatory but nevertheless foundational elements of the international nonproliferation system. These include the BWC, the CWC, the Convention on the Physical Protection of Nuclear Materials (CPPNM), the Amendment to the CPPNM, the Convention for the Suppression of Acts of Nuclear Terrorism (CSANT), and the Additional Protocol of the International Atomic Energy Agency.

The most comprehensive source of international nonproliferation obligations is UN Security Council Resolution 1540, which imposes binding obligations on all UN member states to adopt legislation to prevent the proliferation of nuclear, chemical, and biological weapons, and their means of delivery, and establish appropriate domestic controls over related materials to prevent their illicit trafficking. Only three (Iraq, Jordan, and the UAE) of the seventeen Arab League member states studied have implemented even 40 percent of the measures required by UN Security Council Resolution 1540 (see chart below). Amongst all Arab League member states, only the UAE (and nearly Jordan) have comprehensive strategic trade control laws, despite the fact that such a law is both a fundamental part of an effective export control system and essential to compliance with Resolution 1540.



This chart was provided to the author by Michael Rosenthal, the U.S. member of the Group of Experts for the UN Security Council Resolution 1540 Committee.

Three MENA countries (Egypt, Israel, and Syria) are not parties to the BWC. Amongst those MENA countries which are parties to the BWC, relatively few have complied with the requirement that each State Party submit an annual Confidence-Building Measures (CBMs) report. For example, according to the most recent annual report of the BWC Implementation Support Unit, dated November 3, 2015, the following MENA States Parties had not submitted a CBMs report covering the calendar year 2014: Bahrain, Iran, Kuwait, Lebanon, Libya, Oman, Saudi Arabia, Tunisia, United Arab Emirates, and Yemen.[130]

Two MENA countries (Egypt and Israel) are not parties to the CWC. Amongst those MENA countries which are parties to the CWC, several have a poor record of implementation of it. For example, according to the most recent report of the Organisation for the Prohibition of Chemical Weapons, the following MENA states parties have not yet adopted the national laws necessary to implement their CWC obligations: Bahrain, Jordan, Kuwait, Lebanon, Libya, and Syria.[131] In other cases, such as that of Iraq and the UAE, the basic national laws were in place but the necessary implementing regulations were still in "draft" form or "under development."[132]

The following MENA countries have not yet chosen to become party to the CPPNM: Egypt, Iran, and Syria. The following MENA countries have not yet chosen to become party to the CPPNM Amendment: Egypt, Iran, Iraq, Lebanon, Oman, Syria, and Yemen. The following MENA countries have not yet chosen to become party to the Convention for the Suppression of Acts of Nuclear Terrorism: Egypt, Iran, Israel, Oman, and Syria. In addition, the following countries which are NPT member states have not yet chosen to become party to the IAEA Additional Protocol: Algeria, Egypt, Lebanon, Oman, Qatar, Saudi Arabia, Syria, Tunisia, and Yemen.

International obligations are, at least in some cases, a powerful tool for encouraging host country governments to upgrade their nonproliferation laws and policies. UN members are required, as a function of their membership, to implement all legally binding Security Council resolutions, which have included not only Resolution 1540 but also Security Council resolutions prohibiting transfer of WMD-related items to Iran and North Korea. Any state which has ratified an international treaty such as the Biological Weapons Convention (BWC), the CWC, and the Nuclear Nonproliferation Treaty (NPT) is legally bound to implement its obligations under the treaty. A government may be more likely to join a nonproliferation agreement if many of its neighbors have already chosen to join that agreement.

In the context of U.S. DOD Cooperative Threat Reduction programs, achieving host country implementation of an international legal instrument to which the country is a party should be easier than, for example, achieving implementation of a request by the U.S. government to take an action which is not already an internationally binding obligation on the host country government. Similarly, persuading a host country to join a nonproliferation agreement which its neighbors have already joined should be easier than, for example, achieving host country commitment to take an action which is not already an internationally binding obligation on its neighbors. U.S. government officials involved with CTR who participated in a workshop convened as part of this project confirmed that Security Council Resolution 1540 and other international obligations provide significant traction with at least some countries in the MENA region. Similarly, a retired U.S. government official who participated in the workshop

emphasized that "we can often do things through international organizations that we can't do ourselves – the international organizations have convening power and legitimacy and their mandates can make it easier for the target countries politically."

This chapter will examine how the United States and the international community can more effectively encourage and assist MENA governments to meet and implement their international legal obligations relating to nonproliferation.

I. Enhanced Implementation by MENA States of Resolution 1540 and Strategic Trade Controls

MENA governments have a remarkably poor record of implementation of UN Security Council Resolution 1540, passed in 2004, which imposes various binding obligations on UN member states with regard to biological, chemical, and nuclear weapons. The required reports on implementation of the resolution which have been submitted to the UN's 1540 Committee by MENA governments "vary dramatically in terms of quality and comprehensiveness. . . many reports were merely diplomatic statements supporting the spirit of the resolution, and did not serve to build any confidence that implementation and enforcement were taking place."[133] Writing in 2008, Lars Olberg of Sandia Laboratories assessed:

Middle Eastern countries have had a poor start when it comes to the implementation of UNSC Resolution 1540. Their general reporting behavior is significantly behind that of countries in other regions.[134]

Of course, states' engagement with the reporting process does not necessarily correlate with timely and effective implementation of the resolution's substantive obligations. Even those states which have submitted relatively detailed reports may not be enacting effective legislation, let alone implementing it with rigor.

Eight years after Olberg's negative assessment of MENA implementation of Resolution 1540, both implementation reporting and substantive implementation of the resolution remains lacking in the MENA region. As indicated by the chart on page 39, only three (Iraq, Jordan, and the UAE) of the seventeen Arab League member states studied have implemented even 40 percent of the measures required by UN Security Council Resolution 1540.

One of the most important elements of compliance with Resolution 1540 is enactment of a comprehensive strategic trade control law. Such a law is essential to meeting the Resolution 1540 requirement that all UN member states shall – with regard to materials related to "the proliferation of nuclear, chemical, or biological weapons and their means of delivery" – establish and maintain "appropriate laws and regulations to control export, transit, transshipment and reexport" as well as establish and enforce "appropriate criminal or civil penalties for violations of such export control laws and regulations." Unfortunately, only one Arab League member state (the United Arab Emirates) has a comprehensive strategic trade control law. Jordan is the only other Arab League member state that has a major portion of the elements in place, although Jordanian law still has some important gaps.

Based on this author's discussions with officials and experts, it appears that several factors *could,* if harnessed effectively, provide an impetus for enhanced strategic trade controls, implementation of other Resolution 1540 obligations, and other law-related efforts to deter and hinder the illicit acquisition of WMD by Iran, ISIL, and other Middle East actors.

A. Fear of Islamic State

Several officials and experts from the MENA region told the author it was possible that fear of the Islamic State, and news of its use of chemical weapons and pursuit of biological and nuclear weapons, may lead Arab governments to be more willing than in the past to implement Resolution 1540, which includes specific legal obligations designed to prevent non-state actors from acquiring WMD and their means of delivery. To these interlocutors, the Islamic State threat seemed particularly resonant with regard to both the CWC and also the need for a comprehensive strategic trade control law, as such a law could help MENA governments prevent Islamic State WMD and its precursors from crossing their borders.

The U.S. government clearly needs to place increased, results-oriented emphasis on encouraging and assisting MENA governments to implement Resolution 1540. According to a U.S. official the author interviewed, there are signs that Jordan in particular has been motivated by the Islamic State threat to enhance both its CWC implementation and also its implementation of Resolution 1540. The rise of the Islamic State appears to provide an opportunity to increase MENA governments' political will to implement Resolution 1540.

B. Increased Antipathy Towards Iran

Another factor that could help inspire MENA governments to implement Resolution 1540, and especially enhanced strategic trade controls, is increased antipathy towards Iran. Increased tensions between the Gulf states and Iran (as a result of Iran stirring up trouble in the region) may lead their governments to be more willing than in the past to crack down on diversions to Iran that could strengthen its nuclear or other military programs. Gulf Arab governments are now more afraid of Iran and more determined to keep it from acquiring nuclear weapons. This could provide incentive for these governments to adopt and implement controls on dual-use exports to Iran more vigorously than they have in the past.

Since efforts to combat nuclear trafficking to Iran were relatively ineffective at the height of UN sanctions on Iran, there is reason for concern that in the absence of enhanced MENA implementation of strategic trade controls, it will be even harder in the wake of the nuclear deal with Iran (the Joint Comprehensive Plan of Action or JCPOA) to prevent illicit Iranian procurement. As a result of the JCPOA, most international sanctions on Iran have been lifted, overall international trade with Iran is increasing dramatically, and it has become legal for Iran to procure some items for its known nuclear facilities. This danger is heightened by the fact that, based on this author's discussions with officials and experts from the region, there is tremendous confusion as to the content of the JCPOA and little to no understanding of the procurement channel and other fine points of how it is meant to impact trade with Iran. The regional officials

and experts with whom this author spoke emphasized the importance of the U.S. and international community undertaking a systematic campaign to help the region understand the very complicated and confusing JCPOA and especially its remaining restrictions on trade with Iran. Several noted that it tends to be very easy for traders to evade trade controls on dual-use goods which are authorized for export to some end uses but not others. Businessmen find it very easy and tempting to look the other way.

In light of confusion about the JCPOA and its procurement channel, and the increase in overall trade with Iran, a U.S. campaign to help the region understand the remaining restrictions on trade with Iran should be at least as vigorous as was the U.S. initiative to explain and evangelize Iran sanctions at their peak.

C. Examine and Address Why MENA Governments Have Poor Implementation

Separately, and as part of any initiative to encourage MENA implementation of Resolution 1540, the U.S. and international community need to examine and address head-on the reasons why MENA governments have a relatively poor record of implementing their strategic trade control and other 1540 obligations. For example, some Gulf Arab diplomats have expressed concern to this author that rigorous strategic trade controls would slow overall trade, thus hindering their economies. The website of the U.S.-Saudi Arabian Business Council makes this point explicitly, stating: "The Saudi Arabian Government places great importance on the promotion of national exports, so very few export controls have been imposed."[135]

U.S. and international policymakers need to develop and effectively present the case that rigorous implementation of strategic trade controls will in fact strengthen their countries, including by making Western companies more comfortable exporting dual-use technologies to them. This case could be developed with input from experts and practitioners, such as:

- Economists who can empirically demonstrate that countries which have adopted strategic trade controls have not harmed but rather boosted their economies. A U.S. government nonproliferation official who participated in a workshop convened as part of this project asserted that with several MENA countries, in particular the trading states of the GCC, "you need to be able to explain to them what is in it for them from a business point of view. . . if you can make the business case to them, and they can see it through that lens, you will be more persuasive."

- Leading high technology manufacturers explaining why and how they are more comfortable exporting dual-use technologies to countries with comprehensive strategic trade controls and security and safety standards. A retired U.S. government official who participated in a workshop convened as part of this project emphasized that major companies such as Dow in the chemical arena have sufficient leverage to significantly influence the establishment of more robust standards for the chemical industry in countries where they operate.

- Economic development experts who can explain the importance of such dual-use imports

to the economic development of countries in the MENA region.

In addition, consideration should be given as to whether regional concerns that rigorous strategic trade controls would be economically costly could be countered by the U.S. and others in the international community adopting trade incentives or other rewards for countries that effectively implement their strategic trade control and other nonproliferation obligations.

However, it is important to note that the reasons why MENA governments have a relatively poor record of implementing their strategic trade control and other 1540 obligations do not begin and end with senior level MENA policymakers having concerns that rigorous strategic trade controls would slow overall trade, thus hindering their economies. It appears that even when the political decisions have been made by senior government officials, the mid-level and junior-level government officials charged with carrying out such measures are simply unwilling to change the way they do things. In many cases, this is because they lack the incentives and the resources to draft and implement such controls effectively.

U.S. policymakers should consider whether it may be possible to experiment with a new cooperative assistance project that would involve the placement to work side by side with local officials of Western officials and experts experienced with drafting and implementing strategic trade control laws. Such an approach reportedly worked well in the case of the cooperative Sanctions Assistance Mission (SAM) teams which administered United Nations sanctions on Serbia during the Bosnia War. [136] Seasoned customs and border control officers were recruited from participating member countries of the Conference on Security and Cooperation in Europe and stationed alongside local officials at key border crossings in Romania, Bulgaria, Macedonia, Albania, Hungary, Ukraine, and Croatia.[137] The SAM teams were "charged with monitoring commercial traffic and identifying and stopping contraband moving in and out of Serbia." [138] Such an approach reportedly also worked well with regard to Malaysia's adoption and implementation of a comprehensive strategic trade control law, a process which is said to have been greatly facilitated by the U.S. government loaning an expert to the Malaysian government for an extended period.

In the case of MENA enactment and implementation of strategic trade control laws, Western legal experts could be loaned to relevant MENA government ministries or parliamentary bodies. Consideration should also be given to the possibility of arranging for licensing, customs, and border control experts -- recruited and financed by international organizations or Western governments – to work alongside local licensing, customs and border authorities to advise concerning proliferation related concerns. Local officials on the front lines of strategic trade controls might be tempted to resist such an approach, particularly if it would complicate their ability to solicit bribes from traders, but perhaps a way could be found to incentivize their cooperation.

In addition, the United States should consider joining with other NSG countries to establish a program of financial or other personal incentives to motivate local officials to themselves engage in effective implementation of WMD-related export and border controls.

D. Harness Bankers' Fears of U.S. Penalties

MENA bankers with whom this author spoke have emphasized that they remain very spooked by the magnitude of the fines that the U.S. government imposed on major banks for processing proscribed transactions with Iran, and their relatively sophisticated compliance experts understand that many U.S. financial sanctions on Iran remain in place. The fines included hundreds of millions of dollars each in penalties against Lloyds TSB, Credit Suisse, Barclays PLC, ING, and Standard Chartered banks, and billions of dollars each in penalties against HSBC and BNP Paribas.[139] The single largest penalty was against BNP Paribas, the world's fourth biggest bank, which agreed to plead guilty and pay $8.9736 billion in fines for helping Iran, Sudan, and Cuba gain illegal access to the U.S. financial system.[140] In addition to the financial penalty, BNP Paribas agreed with the New York State Department of Financial Services to "terminate or separate from the bank" thirteen senior employees and "suspend U.S. dollar clearing operations… for one year for business lines on which the misconduct centered."[141]

MENA bankers are also spooked by the U.S. federal court judgment in 2014 which held Arab Bank PLC liable for damages suffered by victims killed or injured in terrorist attacks by Hamas. Arab Bank PLC is a major global bank, with over six hundred branches in thirty countries and $35 billion in deposits.[142] In September 2014, a federal jury in the case of *Linde v. Arab Bank,* applying the Anti-Terrorism Act, found Arab Bank PLC liable for damages suffered by victims and family members of victims killed or injured in twenty-four terrorist attacks by Hamas and similar terrorist organizations.[143] The *Linde* jury found Arab Bank liable principally on the grounds that the Bank had knowingly provided Hamas with material support in the form of financial services.[144] In April 2015, U.S. federal district court judge Brian Cogan dismissed claims against Arab Bank PLC arising from two of the attacks, but found "ample" evidence to support the rest of the verdict.[145] In his *Linde* case Memorandum and Order of April 8, 2015, Judge Cogan rejected "defendant's argument that plaintiffs were required to trade specific dollars to specific terrorist attacks."[146]

The attacks for which Arab Bank PLC was found liable had occurred in Israel, Gaza, and the West Bank from 2001 to 2004. Those attacks included a March 2002 suicide attack on a Passover seder celebration at the Park Hotel in Netanya, Israel, which killed thirty people and wounded one hundred more.[147] They also included the August 9, 2001 suicide bombing of the Sbarro pizzeria in Jerusalem, Israel, which killed or injured 130 people.[148]
In August 2015, Arab Bank PLC settled the case for an estimated $1 billion.[149]

The *Linde* case judgment holding Arab Bank PLC liable for terrorist attacks conducted with conventional munitions sets a precedent that could be used by victims of WMD attacks to sue banks that knowingly provided financial services to the national governments or terrorist groups that engaged in the WMD attacks. The *Linde* verdict and settlement are expected to have a powerful impact on other banks, causing them to more scrupulously avoid providing financial services to terrorist groups and their state sponsors.

Major U.S. and foreign banks have become so cognizant of the risks posed to them by the infiltration of illicit money that they have hired large numbers of staff dedicated to protecting against such infiltration. For example, HSBC reportedly had seven thousand people, about ten

percent of its employees worldwide, working on risk and compliance issues at the end of 2014 (a fourfold increase from before its $1.9 billion settlement with Treasury in 2012 for illicit transactions with Iranian and other proscribed entities).[150] Citigroup, which had also been penalized for illicit transactions with Iran, had nearly 30,000 employees working on regulatory and compliance issues at the end of 2014, 13 percent of the bank's total 244,000 employees.[151] Meanwhile, J.P. Morgan Chase & Co. said that it would hire 13,000 new staff in compliance, audit and other areas from 2012 to 2014, after being the subject of fines for various non-Iran-related compliance problems.[152]

Because the U.S. dollar is the preferred currency of international trade, and most significant dollar transactions transit the United States, the U.S. government has enormous leverage over foreign banks. The international financial sector as a whole has strong incentives to avoid involvement in illicit transactions, vast amounts of data that can be analyzed to detect and understand such transactions, and significant influence over those foreign governments which are interested in economic development. Policymakers and legislators should carefully analyze whether and how the international financial sector can and should be harnessed to encourage MENA governments to implement strategic trade control and other obligations that would reduce illicit proliferation-related transactions and thus the international financial sector's exposure to them.

Another set of multinational companies with a large stake in avoiding lawsuits and with considerable leverage over industry are risk insurers and reinsurers. One expert who participated in a workshop convened as part of this project suggested that with regard to large scale nuclear, chemical, and biological projects funded by governments in the MENA region, it might make sense for the U.S. government to reach out to relevant insurers and reinsurers as they could use the incentive of lower risk premiums to build compliance and other security and safety requirements into loan applications at the beginning of the process.

E. Strengthening Mandate and Procedures of Security Council's 1540 Committee

During the first dozen years since the Security Council passed Resolution 1540 in 2004, the 1540 Committee created by the Security Council to oversee implementation of the resolution has lacked a mandate that would permit it to meaningfully establish norms and assess compliance, let alone impose sanctions for noncompliance.[153] For example, in contrast with the UN Security Council's Iran, DPRK, and Al Qaeda and Taliban Committees, the 1540 Committee lacks any power to identify and designate those individuals and entities engaged in illicit WMD proliferation activities, and thus has refrained from doing so.

During 2016, the 1540 Committee has been conducting a "comprehensive review on the status of implementation of resolution 1540… including, if necessary, recommendations on adjustments to the mandate."[154] The outcome of the Comprehensive Review may result in adjustments to the 1540 Committee's mandate which will provide the Committee and other actors with new tools to encourage and assist countries with implementation of their Resolution 1540 obligations.

According to a modalities paper prepared by the 1540 Committee, "the 2016 Comprehensive Review… should draw on an analysis of implementation of resolution 1540 (2004) since the 2009 Review, with a view to improving the implementation of the resolution by Member States, by identifying and recommending specific, practical, and appropriate actions to this end, and to analyze the operation of the Committee in the conduct of its tasks and recommend any changes considered necessary."[155]

The first draft of the report on the Comprehensive Review is due to the Committee by September 1, 2016 for its consideration.[156] The report is due to be ready for submission to the Security Council by October 31, 2016.[157] Since this study will be published late in the process of the Comprehensive Review, the author has decided it would not make sense to develop and include specific recommendations aimed at influencing the Review.

However, from a broad brush perspective, it is hoped that the Comprehensive Review will result in a process for assessing 1540 compliance that is much closer to the rigorous and systematic processes of the Financial Action Task Force (FATF). FATF regularly undertakes so-called "mutual evaluations" of a country's compliance with FATF anti-money-laundering and counter-terrorism financing norms. These mutual evaluations, while voluntary, engage both FATF and local country experts in a very rigorous and systematic evaluation of local laws, regulations and procedures.

Egypt provides one illustrative example of the vast difference in rigor between the 1540 and FATF processes. Egypt's three reports to the 1540 committee have totaled ten pages, in which the Egyptian government has itself briefly listed laws it has enacted and other steps it has taken to implement Resolution 1540.[158] In contrast, Egypt's 2009 "Mutual Evaluation Report" for the Financial Action Task Force contains 220 pages of detailed facts about the Egyptian financial system; includes detailed analysis of the system, its laws, and their implementation; sets out Egypt's levels of compliance with FATF recommendations; and provides specific recommendations for improvement.[159] Egypt's FATF "Mutual Evaluation Report" was prepared by an assessment team composed of staff of the World Bank and two experts acting under the supervision of the World Bank.[160] The assessment team reviewed various documents and spent two weeks in Egypt, during which it "met with officials and representatives of all relevant government agencies and the private sector."[161]

II. Enhanced Implementation of Biological Weapons Convention and Related Obligations by MENA Member States

The Biological Weapons Convention (BWC) bans the development, production, stockpiling, or other acquisition or retention of microbial or other biological agents, or toxins… "of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes."[162] It also bans "equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict."[163] Each State Party is obligated to destroy, or to divert to peaceful purposes, all covered agents, toxins, weapons, equipment, and means of delivery, which are in its possession or under its jurisdiction or control.[164] Each State Party is also obligated to take any necessary measures to prohibit and prevent the development, production, stockpiling, or other

acquisition or retention of covered items, within its territory, or under its jurisdiction or control anywhere.[165]

Through successive review conferences, BWC States Parties have reached a series of additional agreements on how they will meet their obligations under the BWC.[166] According to the BWC's Implementation Support Unit, "these agreements are binding and each and every State Party has committed themselves to complying with them."[167] In addition, "through Meetings of States Parties… the BWC has added a number of common understandings on the tools and approaches that might be useful" in implementing the BWC.[168]

The BWC was opened for signature in 1972 and entered into force in March 1975.[169] Also in March 1975, the U.S. deposited its instrument of ratification for the BWC.[170] The BWC currently has 174 States Parties.[171] Only three MENA states are not parties to the BWC – Egypt, Israel, and Syria. The United States should urge Egypt, Israel, and Syria to join the BWC.

Unlike the Chemical Weapons Convention and the Nuclear Nonproliferation Treaty, the BWC does not contain or otherwise provide for verification or enforcement measures. In addition, the BWC does not have an associated major implementing body such as the IAEA or the OPCW. The BWC's Implementation Support Unit has a total of three staff members, located within the Geneva Branch of the United Nations Office for Disarmament Affairs.[172] In comparison, the OPCW has a staff of approximately 500 persons,[173] and the IAEA has a staff of some 2,560 persons.[174]

The U.S. government, under both the George W. Bush and Barack Obama administrations, has opposed efforts by other States Parties to develop a verification protocol.[175] For example, Under Secretary for Arms Control and International Security Ellen Tauscher announced in 2009 that the Obama Administration had "determined that a legally binding protocol would not achieve meaningful verification or greater security," explaining:

The ease with which a biological weapons program could be disguised within legitimate activities and the rapid advances in biological research make it very difficult to detect violations. We believe that a protocol would not be able to keep pace with the rapidly changing nature of the biological weapons threat.[176]

Instead, Tauscher stated, the United States believes that confidence in BWC compliance should be promoted by "increasing transparency, improving confidence building measures and engaging in more robust bilateral compliance discussions."[177]

As a result of the BWC's lack of verification and enforcement measures, and tiny infrastructure, it is particularly difficult to assess parties' level of implementation of their BWC obligations. One basic indicator of commitment is whether or not a State Party has complied with the request, issued by the Sixth BWC Review Conference, to "designate a national focal point for coordinating national implementation of the Convention and communicating with other States Parties and relevant international organizations."[178] According to the most recent annual report of the BWC Implementation Support Unit, dated November 3, 2015, three MENA States Parties had not yet designated a national point of contact: Saudi Arabia, Tunisia, and the UAE.[179]

The United States should urge Saudi Arabia, Tunisia, and the UAE to designate a national point of contact for the BWC.

Another basic indicator of BWC commitment is whether or not a State Party has complied with the requirement that each State Party submit an annual Confidence-Building Measures (CBMs) report.[180] According to the United Nations Office of Disarmament Affairs:

Although the CBMs are not derived directly from the text of the Convention itself, the Second Review Conference decided by consensus that "the States Parties are to implement, on the basis of mutual co-operation, the following measures." This means that participation in the CBMs is a requirement for all States Parties to the Convention.[181]

The annual CBMs report is to include a declaration of legislation, regulations, and other measures relevant to the BWC's requirements and to additional requirements imposed by the BWC Review Conferences.[182] The annual CBMs report is also to include: data on relevant research centers and laboratories; information on national biological defense research and development programmes; information on outbreaks of infectious diseases and similar occurrences caused by toxins; declaration of vaccine production facilities; and declaration of past activities in offensive and/or defensive biological research development programs.[183] With regard to legislation, regulations, or other measures implementing the BWC, each State Party is to indicate in their annual CBMs report any amendment to those laws.[184] The CBMs report is to be provided to the BWC Implementation Support Unit in the United Nations Office of Disarmament Affairs no later than April 15 each year and is to cover the previous calendar year.[185]

The annual declaration of relevant legislation, regulations, and other measures is crucial for several reasons. As the United Nations Office of Disarmament Affairs explained in its guide to the CBMs requirement, "improving information sharing on BWC legal implementation increases confidence and transparency" as well as allowing comparison of existing tools "in a spirit of sharing best practices."[186]

MENA States Parties have an exceptionally poor record of submitting CBMs to the BWC. According to the most recent annual report of the BWC Implementation Support Unit, dated November 3, 2015, the following MENA States Parties had not submitted a CBMs report covering the calendar year 2014: Bahrain, Iran, Kuwait, Lebanon, Libya, Oman, Saudi Arabia, Tunisia, United Arab Emirates, Yemen.**[187]** According to the prior annual report of the BWC Implementation Support Unit, dated November 28, 2014, the following MENA States Parties had not submitted a CBMs report covering the calendar year 2013: Algeria, Bahrain, Jordan, Kuwait, Lebanon, Libya, Oman, Saudi Arabia, UAE, Yemen.**[188]**

The United States should urge these MENA States Parties to submit CBMs reports to the BWC. Biological threat reduction accounted for nearly 60 percent of the DOD CTR program's budget request for fiscal year 2016.**[189]** The program has evolved from a focus on dismantling Russia's vast biological weapons complex into a tool used to promote "best practices" at biological laboratories with dangerous pathogens and to develop disease surveillance systems.**[190]** The mandatory content of the required CBMs reports is potentially very supportive of existing biological threat reduction program objectives. This is particularly the case with regard to the required submission of: a declaration of legislation, regulations, and other measures relevant to

the BWC's requirements and to additional requirements imposed by the BWC Review Conferences; data on relevant research centers and laboratories; information on outbreaks of infectious diseases and similar occurrences caused by toxins; and declaration of vaccine production facilities. The DOD CTR program should look for ways in which encouraging these MENA States Parties to submit CBMs reports can specifically be used to support existing biological threat reduction program objectives and vice versa.

Two recent developments could be harnessed to build political will for enhanced implementation of the BWC and related requirements: increased regional interest in diversification into biotechnology and increased regional fear of biological weapons use by non-state actors. For example, according to NTI, "the UAE is taking a regional leadership role in biotechnology issues, and will therefore need to develop robust export controls, biosecurity, and biosafety standards in order to mitigate the dual-use risks inherent to a large-scale biotechnology sector."[191] The Dubai Biotechnology & Research Park, construction of which was completed in 2010, has attracted dozens of major Western biotechnology companies, including Pfizer, Amgen, Genzyme, and Merck.[192]

The governments of the U.S. and other key leading biotechnology industry hubs should take the opportunity to work with their industries to persuade UAE and other MENA country stakeholders that their investments in projects such as the Dubai Biotechnology & Research Park are more likely to pay off if the UAE and other MENA governments with such projects more rigorously implement their biotechnology-related Resolution 1540 and BWC-connected obligations, including by developing robust export controls and biosecurity and biosafety standards and by submitting robust CBMs. For example, relevant Western companies can be encouraged to emphasize to the UAE and other MENA countries with such projects that they will be more comfortable exporting sensitive dual-use biotechnology items to them once they have further upgraded their controls and standards.

Increased regional fear of biological weapons use by non-state actors, including especially the Islamic State, may lead Arab governments to be more willing than in the past to implement their biological weapons-related obligations. The director of NATO's WMD Non-Proliferation Center recently published an article in which he warned that which he warned that "there is a very real - but not yet fully identified risk - of foreign fighters in ISIL's ranks using chemical, biological, radiological or nuclear (CBRN) materials as 'weapons of terror' against the West."[193] In addition, a laptop recovered by moderate Syrian rebels during a 2014 raid on an Islamic State stronghold reportedly contained files on the preparation and use of biological weapons.[194] Some analysts doubt the Islamic State's capacity to successfully deploy biological weapons as a mass casualty tool.[195] However, according to Stephen Rademaker, who previously served as Assistant Secretary of State for International Security and Nonproliferation, "if a single scientist acting alone could perpetrate the 2001 anthrax attack in the United States, as FBI tells us was the case, then it is certainly plausible that a terrorist group could launch a biological attack without the active assistance of a state."[196]

III. Enhanced Implementation of Chemical Weapons Convention by MENA Member States

The Chemical Weapons Convention (CWC) is a multilateral international agreement which prohibits the development, production, acquisition, stockpiling, retention, transfer and use of chemical weapons by States Parties. States Parties are, in turn, obligated to enforce those prohibitions with regard to persons (natural or legal) within their jurisdiction. The CWC requires all States Parties to destroy any stockpiles of chemical weapons they may hold and any facilities which produced them. States Parties are also required to create a verification regime for certain toxic chemicals and their precursors in order to ensure that such chemicals are only used for purposes not prohibited.

The CWC was opened for signature in 1993, and entered into force in April 1997. Also in April 1997, the U.S. deposited its instrument of ratification to the CWC. As of the most recent (October 2015) participation status report of the Organisation for the Prohibition of Chemical Weapons, the CWC had 192 States Parties.[197]

Only two MENA states, Egypt and Israel, are not yet parties to the CWC. The question of how to encourage their accession is addressed in section IV below.

Article VII of the CWC requires that each State Party "adopt the necessary measures to implement its obligations" under the CWC. Key State Party obligations under the CWC which may require implementing legislation include, inter alia, the following:

- prohibit any natural and legal person anywhere under its jurisdiction from acquiring or retaining chemical weapons, and acquiring or retaining specified chemicals except for specified purposes;
- report various chemical transfers, chemicals, and facilities; and
- provide access to enable and facilitate the conduct of international inspections.

According to the most recent report of the Organisation for the Prohibition of Chemical Weapons, the following MENA states parties have not yet adopted the basic national laws necessary to implement their CWC obligations: Bahrain, Jordan, Kuwait, Lebanon, Libya, and Syria.[198] In other cases, such as that of Iraq and the UAE, the basic national laws were in place but the necessary implementing regulations were still in "draft" form or "under development."[199]

The officials and experts from the MENA region with whom the author has spoken as part of research on this project are all unnerved by the Islamic State. Several of them told the author it was possible that fear of the Islamic State, and news of its use of chemical weapons, may lead Arab governments to be more willing than in the past to implement the CWC. According to a U.S. official the author interviewed, there are signs that this is already occurring, particularly with, for example, Jordan. The U.S. government clearly needs to place increased, results-oriented emphasis on encouraging and assisting MENA governments to adopt and enforce comprehensive CWC implementing legislation. The rise of the Islamic State appears to provide an opportunity to increase the political will to do so.

A growing regional interest in economic diversification,[200] including into the chemical sector, is another factor that will increase the importance of, and could increase the political will for, adoption and rigorous enforcement of CWC and other nonproliferation-related implementing legislation. For example, the UAE has plans to invest $20 billion in developing a new Chemicals Industrial City in Abu Dhabi.[201] The plans envision the Chemicals Industrial City becoming the largest chemical industry complex in the world.[202] According to NTI, this development will confront the UAE with "increasing dual-use challenges" requiring the development of more robust export controls, chemical safety, and chemical security standards.[203]

The governments of the U.S. and other key leading chemical industry hubs such as Germany should take the opportunity to work with their industries to persuade UAE stakeholders that their investment in the Chemicals Industrial City is more likely to pay off if the UAE more rigorously implements its CWC and related obligations, including by promulgating the necessary regulations. For example, relevant Western companies can be encouraged to emphasize to the UAE that they will be more comfortable exporting dual-use items to it once it has further upgraded its controls.

IV. Encouraging Chemical Weapons Convention Accession by Egypt and Israel

As noted above, only two Middle Eastern states, Egypt and Israel, are not yet parties to the CWC. Egypt has long refused to join the CWC on the grounds that Israel has a nuclear weapons program and refuses to join the Nuclear Nonproliferation Treaty.[204] There are currently several factors giving rise to optimism that the situation could change. First, the current Egyptian government has, under President Abdel Fattah al-Sisi, been notably warmer towards Israel than was its predecessor Muslim Brotherhood government and, at least in some ways, warmer towards Israel than had been the Egyptian government presided over by President Hosni Mubarak from 1981 to 2011.[205] For example, Sisi has cooperated with Israel in fighting Hamas.[206] Second, following Syria's accession to the CWC, Egypt's boycott of the CWC in an effort to gain leverage vis a vis Israel's nuclear arsenal arguably seems petty. Third, Egypt is increasingly incentivized to protect itself against chemical weapons, and render them taboo, in the wake of their use by the Islamic State. The most active insurgent group in Egypt is Sinai Province, which pledged allegiance to the Islamic State and is thought to be aiming to take control of the Sinai in order to turn it into a province of the Islamic State.[207]

Fourth, Israel has repeatedly expressed its intention to ratify the CWC provided its Arab counterparts do the same (Israel signed the CWC in 1993 but has not ratified it).[208] Israel's President, Shimon Peres, stated in September 2013 that Israel's government would seriously consider joining the CWC in the wake of developments in Syria.[209] In addition, two of Israel's leading nonproliferation experts suggested in October 2013 that "once Syria's chemical weapons have been verifiably destroyed," Israel should consider initiating "a regional dialogue with the goal of creating a Chemical-Weapons-Free-Zone in the Middle East."[210] They explained that "the Syrian chemical crisis presents an opportunity for launching a process which otherwise would not have been conceivable."[211] Fifth, the collapse of the effort, generated by the 2010 NPT review conference, to establish the Middle East as a zone free of all WMDs at least arguably creates a vacuum that could be filled by a Chemical Weapons Free Zone.[212]

Egypt has for so many years refused to participate in the CWC until Israel joins the NPT that any change from that position will likely be gradual. Rather than addressing the issue through formal channels, it makes sense to first explore it in the Track II channels where Egyptian and Israeli diplomats sometimes meet to informally discuss new ideas for cooperation. In light of the several factors giving rise to optimism that Egypt and Israel could decide to join the CWC, the U.S. government should invest in such Track II exploration of the idea.

V. Encourage Accession to and Implementation of Key Nuclear Legal Instruments

While most MENA countries, until recently, have eschewed nuclear power,[213] there have been four major clandestine nuclear-weapons related programs uncovered in the MENA region during the past 20 years – in Iran, Iraq, Libya, and Syria.[214] Iran has been the most active in seeking and developing nuclear power and is, at present, the only MENA country with an operating nuclear power reactor.[215] Iran has also been very active in developing and pursuing uranium enrichment. However, these activities are now subject to the restrictions contained in the Joint Comprehensive Plan of Action (JCPOA).[216] Several other MENA countries have announced plans to construct nuclear power reactors over the next several years.[217] For example, Saudi officials have announced plans to develop as many as 16 nuclear power plants by 2040 and Saudi Arabia has since January 2015 entered into separate nuclear cooperation agreements with Argentina, China, Russia, and South Korea.[218] This has made it all the more imperative that steps are taken urgently to better secure and protect nuclear and other WMD-related material, precursors, equipment and technology in the MENA region.

A. Convention on the Physical Protection of Nuclear Materials

The Convention on the Physical Protection of Nuclear Materials and Nuclear Facilities (CPPNM), adopted in 1987, imposes an obligation on its 153 member states to meet defined standards of physical protection during international transport of nuclear material used for peaceful purposes. It also establishes a general framework for cooperation among states in the protection, recovery, and return of stolen nuclear material. The CPPNM also requires states to impose prohibitions, and prosecute or extradite offenders. The United States deposited its instrument of ratification to the CPPNM in December 1982. Acceding to the CPPNM is not a requirement of international law. Nevertheless, all MENA countries except Egypt, Iran, and Syria are parties to this convention.[219] Egypt, Iran, and Syria should be strongly encouraged to join the CPPNM given their current and past nuclear programs.[220]

B. Amendment to the Convention on the Physical Protection of Nuclear Materials

The United States advocated strengthening the CPPNM by extending its requirements regarding domestic security of nuclear material.[221] In 2005, States Parties convened to extend the CPPNM's scope in an amendment requiring states to physically protect nuclear material in domestic use, storage, and transport.[222] The CPPNM Amendment entered into force in May 2016, following the deposit of the instrument of ratification by 102 States Parties.[223] The United States deposited its instrument of ratification of the CPPNM Amendment in July 2015.[224]

UN Security Council Resolution 1887, adopted unanimously in 2009, included a non-binding call for universal adherence to the CPPNM and CPPNM Amendment. However, international law does not require states to accede to either the CPPNM or the CPPNM Amendment. All MENA countries except Egypt, Iran, Iraq, Lebanon, Oman, Syria, and Yemen are parties to the Amendment to the CPPNM.[225] The U.S. should strongly encourage each of these countries – and especially Egypt, Iran, Iraq, and Syria in light of their current and past nuclear programs – to adhere to the CPPNM Amendment (as well as the CPPNM itself in the case of Egypt, Iran, and Syria). It was difficult for the U.S. to make a compelling case for ratification of the CPPNM Amendment until the U.S. deposited its own instrument of ratification in July 2015. Now that the U.S. is itself a party to the Amendment, it can and should mount a vigorous campaign to encourage additional ratifications.

C. Convention for the Suppression of Acts of Nuclear Terrorism

Another important nuclear-related legal instrument to which several MENA states are not parties is the International Convention for the Suppression of Acts of Nuclear Terrorism (CSANT), which was adopted by the UN General Assembly in 2005 and entered into force in 2007. The CSANT commits each party to adopt measures in its national law related to criminalizing and punishing the unlawful possession and use of nuclear or radioactive material or devices, and damage to nuclear facilities.[226] It also commits each party to exchange information and cooperate to "detect, prevent, suppress, and investigate" those suspected of committing nuclear terrorism.[227]

The United States deposited its instrument of ratification in September 2015.[228] International law does not require states to accede to the CSANT. Nevertheless, all MENA states except Egypt, Iran, Israel, Oman, and Syria are parties to the CSANT.[229] The U.S. should strongly encourage each of these countries to adhere to the CSANT. It was difficult for the U.S. to make a compelling case for ratification of the CSANT until the U.S. deposited its own instrument of ratification in September 2015. Now that the U.S. is itself a party to the CSANT, it can and should mount a vigorous campaign to encourage additional ratifications.

D. IAEA Additional Protocol

Another important nuclear-related legal instrument to which relatively few MENA countries have adhered is the "Additional Protocol" of the International Atomic Energy Agency (IAEA).[230] While countries are not obligated to adhere to the Additional Protocol, it is nevertheless important to encourage such adherence. The NPT's principal tool for detecting cheating by member states on their nonproliferation obligations is the safeguards agreement, which Article III requires each non-nuclear-weapons-state to conclude with the IAEA for the purpose of "verification of the fulfillment of its obligations assumed under this Treaty with a view to preventing diversion of nuclear energy from peaceful uses to nuclear weapons." The IAEA's model for this safeguards agreement is contained in an IAEA document usually referred to as INFCIRC/153.[231] The safeguards agreements for individual states, commonly known as "INFCIRC/153 safeguards agreements," have rarely deviated from the model.

Under INFCIRC/153 safeguards agreements, parties must report to the IAEA on their nuclear facilities and the nuclear material that moves through them.[232] The INFCIRC/153 agreements are significantly flawed, however, in that they contain no effective mechanism for the IAEA to assess whether the reports are complete.[233] The verification shortcomings prompted the IAEA to issue a model protocol in 1997 to be appended to the INFCIRC/153 agreements (the Additional Protocol).[234] The Additional Protocol expands the IAEA's access rights and requires parties to submit a broader range of information to the IAEA about their nuclear programs.[235] As the IAEA explained: "While the chief object of safeguards under INFCIRC/153 is to verify that declared nuclear material was not diverted, the chief object of the new measures… is to obtain assurance that the State has no undeclared activities."[236] The IAEA did not make adherence to the Additional Protocol mandatory for NPT members, however.

The following MENA countries which are NPT member states did not have the Additional Protocol in force as of February 2016: Algeria, Egypt, Lebanon, Oman, Qatar, Saudi Arabia, Syria, Tunisia, and Yemen.[237] With regard to Iran, the Joint Comprehensive Plan of Action (JCPOA) states that effective on Implementation Day: "Consistent with the respective roles of the President and Majlis (Parliament), Iran will provisionally apply the Additional Protocol to its Comprehensive Safeguards Agreement in accordance with Article 17(b) of the Additional Protocol [and] proceed with its ratification within the timeframe as detailed in Annex V."[238] Annex V states that "Iran will seek, consistent with the Constitutional roles of the President and Parliament, ratification of the Additional Protocol" on "Transition Day," which "will occur 8 years from Adoption Day or upon a report from the Director General of the IAEA to the IAEA Board of Governors and in parallel to the UN Security Council stating that the IAEA has reached the Broader Conclusion that all nuclear material in Iran remains in peaceful activities, whichever is earlier."[239]

Iran's commitment to provisionally apply, and eventually seek ratification of, the Additional Protocol could be useful in encouraging other MENA countries to accede to the Protocol. An even more important inducement to encourage other MENA countries -- and especially those with burgeoning nuclear programs -- to accede to the Protocol could be achieved by member states of the Nuclear Suppliers Group (NSG) deciding to permit the export of controlled items only to those countries that have applied the Additional Protocol. President Bush in 2004 called upon fellow NSG member states to impose such a restriction. However, this restriction has still not been widely adopted. The United States deposited its instrument of ratification for the Additional Protocol in January 2009.[240]

The United States should use its influence and leverage to encourage all MENA countries which are NPT members, and particularly those which have burgeoning nuclear programs, to apply the Additional Protocol to their safeguards agreement with the IAEA. The United States should also continue to press NSG members to export only to states that have applied the Additional Protocol to their safeguards agreement with the IAEA.

E. IAEA Code of Conduct, Guidance on Import and Export, and Self-Assessment

Another important IAEA tool for enhancing national legal controls over nuclear-related items is the IAEA's "Code of Conduct on the Safety and Security of Radioactive Sources"[241] and its

related "Guidance on The Import and Export of Radioactive Sources,"[242] which provides, inter alia, recommended assessment tools regarding the evaluation of transactions and the adequacy of the controls in place. Neither the Code of Conduct nor the Guidance is legally binding on IAEA member states. Nevertheless, the Code of Conduct and Guidance provide a valuable standard by which to judge the adequacy of current MENA country laws and regulations relating to radioactive sources.

For example, paragraphs 18 and 19 of the Code of Conduct recommend that "Every State should have in place legislation and regulations that" provide for the effective control of radioactive sources and specify requirements for the safety and security of radioactive sources and of the devices in which sources are incorporated.[243] Paragraphs 20-22 of the Code of Conduct recommend that every state ensure that a nuclear "regulatory body established by its legislation" has various specified authorities, systems, and procedures.[244] Paragraphs 23-29 recommend that every State regulate in specified ways the import and export of radioactive sources.[245] The Guidance provides more detailed recommendations as to how each State should regulate the import and export of radioactive sources.[246]

Accompanying the Code and Guidance is an IAEA agreed self-assessment questionnaire that is designed to help each country evaluate, and receive IAEA feedback on, its implementation of the Guidance. The following MENA countries have not submitted responses to the questionnaire: Algeria, Bahrain, Iran, Israel, Jordan, Kuwait, Lebanon, Oman, Qatar, Saudi Arabia, Tunisia, United Arab Emirates, and Yemen.[247] The United States should encourage all MENA countries to implement the IAEA Code of Conduct and Guidance, and should strongly encourage the remaining MENA countries -- including especially those with existing or burgeoning nuclear programs-- to submit responses to the IAEA Self-Assessment Questionnaire.

Chapter Three: Addressing International Law Obstacles to WMD Disposition

International law restrictions have posed in the Iraq and Syria chemical weapons destruction cases, and could potentially pose in other cases, significant hurdles to initiatives by the international community to dispose of newly discovered weapons of mass destruction (WMD) stocks and programs. For example, transfers of biological and chemical weapons to third parties, and acquisition of such weapons by States Parties -- whether for elimination, secure storage or any other purpose -- are prohibited, in all circumstances, by the Biological Weapons Convention (BWC) and the Chemical Weapons Convention (CWC) respectively.

Article I of the BWC provides that "each State Party to this Convention undertakes never in any circumstances to… acquire or retain" specified biological agents, toxins, weapons, equipment and means of delivery.[248] Article III of the BWC provides:

> Each State Party to this Convention undertakes not to transfer to any recipient whatsoever, directly or indirectly, and not in any way to assist, encourage or induce any State, group of States or international organizations to manufacture or otherwise acquire any of the agents, toxins, weapons, equipment or means of delivery specified in article I of this Convention.[249]

Similarly, Article I of the CWC provides:

> Each State Party to this Convention undertakes never under any circumstances:
> (a) To develop, produce, otherwise acquire, stockpile or retain chemical weapons or transfer, directly or indirectly, chemical weapons to anyone;…
> (d) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.[250]

In addition, the Nuclear Non-Proliferation Treaty (NPT) contains narrower restrictions on transfers of nuclear weapons. Article I commits each of the five nuclear-weapon State Parties to the NPT "not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly."[251] Article II commits each of the non-nuclear-weapon State Parties to the Treaty "not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly."[252] Thus, the only nuclear weapon transfers consistent with the NPT are transfers from non-nuclear-weapon State Parties to nuclear-weapon State Parties.

Furthermore, international law can restrict the party's options for eliminating WMD. For example, the CWC provides that chemical weapons may only be destroyed consistent with procedures specified in the CWC and its Verification Annex.[253]

As discussed below, the CWC transfer prohibition and CWC elimination restrictions posed significant hurdles in the Iraq and Syria chemical weapons destruction cases. Similar hurdles

could occur with regard to elimination of one or more other MENA WMD arsenals. For example, Algeria, Egypt, Iran, Iraq, Saudi Arabia, and Sudan are other potentially unstable MENA countries which reportedly are suspected or known to have some CW capability.

In addition, the Islamic State is known to possess chemical weapons. Director of National Intelligence James Clapper said in February 2016 that Islamic State had already used chemical weapons, including sulphur mustard, "numerous times" in Iraq and Syria.[254] Clapper added that: "Aspirationally, they would like to do more. It's a concern for us in the U.S., because the indications are they would like to use chemical weapons against us."[255] CIA Director John Brennan has said that Islamic State is believed to have access to the necessary precursor chemicals and the capability to "manufacture small quantities of chlorine and mustard gas."[256] It also seems possible that the Islamic State could develop biological weapons and perhaps even acquire a Pakistani nuclear weapon.[257]

There are several options available to exempt WMD disposition operations from international law restrictions. This chapter analyzes the various options, and provides recommendations as to when each is most useful and appropriate.

I. Security Council Resolution Overriding Treaty Commitment

In the Syria chemical weapons case, the CWC prohibition on transfer was overridden by adoption of a resolution of the Security Council. On 27 September 2013, the OPCW Executive Council adopted an implementation plan on the destruction of the Syrian chemical weapons program,[258] which was endorsed by the Security Council's unanimous adoption of UN Security Council Resolution 2118 (2013) on the same day.[259]

Article 103 of the UN Charter empowers the Security Council to override UN member states' obligations under any other international agreement. Article 103 provides that: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." Further, Article 25 of the Charter provides that:
"The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." The duties placed on Members in accordance with the Charter by binding decisions of the Security Council are also obligations under the Charter for the purposes of Article 103.[260]

The CWC's transfer prohibition was overridden by paragraph 10 of Security Council Resolution 2118, which specifies in relevant part as follows: "[The Security Council] *decides* to authorize Member States to acquire, control, transport, transfer and destroy chemical weapons identified by the Director-General of the OPCW, consistent with the objective of the Chemical Weapons Convention, to ensure the elimination of the Syrian Arab Republic's chemical weapons program in the soonest and safest manner." **Resolution 2118 thus overrode the CWC's transfer and acquisition prohibitions with a categorical authorization to acquire, control, transport, transfer and destroy the specified Syrian chemical weapons. Such a categorical authorization might, in theory, be subject to abuse by a Member State that had its own ideas as to appropriate implementation.**

Another option for overriding such transfer and acquisition prohibitions, which would maintain more control over implementation, would be to establish a committee of the UN Security Council that would approve specific transfers and acquisitions on a case-by-case basis. An example of the type of language that could be adapted for such a purpose is contained paragraph 23 of UN Security Council Resolution 2231 (2015), which endorsed the Joint Comprehensive Plan of Action on Iran's nuclear program. The relevant portion of paragraph 23 provides as follows:

> *Decides*, acting under Article 41 of the Charter of the United Nations, also that the measures imposed in [various Security Council] resolutions … shall not apply to the extent necessary to carry out transfers and activities, as approved on a case-by-case basis in advance by the Committee established pursuant to resolution 1737 (2006), that are [consistent with various specified criteria including the flexibility-providing "c) determined by the Committee to be consistent with the objectives of this resolution].[261]

A Security Council resolution – whether containing a categorical or a case by case override -- is, for the following reasons, the optimal means of overriding international law obstacles to WMD disposition:

- Article 103 of the UN Charter clearly empowers the Security Council to override UN member states' obligations under any other international agreement.

- The use of Security Council resolutions to override international law sets a relatively unproblematic precedent because the U.S. has the power under the UN Charter to veto any Security Council resolution of which it disapproves.

However, the use of a Security Council resolution to override international law is likely to be unavailable in many circumstances because other permanent members of the Security Council, including China and Russia, also have the power under the UN Charter to veto any Security Council resolution of which they disapprove. Russia's ability and willingness to play the role of spoiler is exemplified by its blocking a French draft that would have included Syria's biological weapons program within the scope of Resolution 2118.[262]

II. Force Majeure

As mentioned above, the CWC provides that chemical weapons may only be destroyed consistent with procedures specified in the CWC and its Verification Annex.[263] Part IV(A) of the Annex on Implementation and Verification provides, for example, that "Each State Party shall determine how it shall destroy chemical weapons, except that the following processes may not be used: dumping in any body of water, land burial or open pit burning."

Jeffrey Lewis, a leading nonproliferation expert, criticized the U.S. destruction of Iraqi chemical weapons as follows: "The thing I take away from this is, 'God, they blew all of this up in open pits? 'There is a reason that is arguably incompatible with our treaty obligations. There is no universe where this is a safe and ecologically appropriate way to dispose of chemical weapons."[264]

The U.S. argued that the exigencies of war required that the weapons be destroyed hastily and in the open, and that it "acted in the spirit of the Convention."[265] The U.S. was actively engaged in combat operations or potentially under attack by terrorist groups that made it impossible to notify the Organization for the Prohibition of Chemical Weapons (OPCW) and protect OPCW inspectors who would, as required by the CWC, have to physically inspect and document the destruction. Likewise, there was no practical way to physically secure the chemical weapons once U.S. forces left the area. In this situation **the U.S. could plausibly justify its failure to conform to CWC obligations by asserting *force majeure;* specifically, an occurrence of an "unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation" of compliance with the CWC during this destruction operation.[266]**

The principle of *force majeure* is well recognized in international law and by international courts. **"**Force Majeure" is defined by the UN International Law Commission as follows:

> 1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to force majeure, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.
>
> Paragraph 1 does not apply if:
>
> *(a)* the situation of force majeure is due, either alone or in combination with other factors, to the conduct of the State invoking it; or
>
> *(b)* the State has assumed the risk of that situation occurring.[267]

The "defense" or "exception" of *force majeure* is recognized as a legally valid "justification" for not fully complying with one's contractual or international legal obligations. For example, the Permanent Court of Arbitration, in a 1912 judgment against a claim of *force majeure* by Turkey recognized that "the exception of force majeure ... may be raised in public international law" and the defense or exception of *force majeure* is frequently referred to as a "general principle of law."[268] Numerous subsequent cases have reaffirmed the principle in both municipal and international law.[269]

There is a strong argument that the *force majeure* exception is applicable to the U.S. destruction of Iraqi chemical weapons. As discussed in the attached essay by Guy Roberts, the *force majeure* exception might even arguably apply to a U.S. destruction of chemical weapons via aerial bombardment, in a manner inconsistent with CWC requirements, in a situation such as Libya's in which chemical weapons otherwise ended up in the hands of Libyan militiamen.**[270]** As Roberts puts it, "while obviously not the best of choices in cases where all other legal and practical steps are unavailable this option is available and legally justifiable under *force majeure* as a last resort." According to Roberts, the case for *force majeure* in this circumstance could be strengthened by arguing that its use would be consistent with the emerging norm of

"responsibility to protect" populations from genocide, war crimes, ethnic cleansing and crimes against humanity.[271]

However, it is important to use the *force majeure* exception sparingly, as it is relatively ambiguous and thus particularly subject to abuse by foreign governments who might try to argue *force majeure* when it is in fact not "materially impossible in the circumstances" for them to comply with the relevant international legal obligation. It is thus far preferable to, if possible, override the relevant international legal obligation with a Security Council resolution.

III. Exceptions in Treaty Law

The right of a nation to suspend its treaty obligations under certain conditions is well established and codified in the Vienna Convention on the Law of Treaties (Vienna Convention).[272] The Vienna Convention generally codified the preexisting customary law of treaties that existed between state actors.[273] As established by the Vienna Convention there are a number of ways and reasons a state can suspend its obligations under a treaty while maintaining the continued viability of the treaty and thus recognizing the explicit fundamental international law principle of *pacta sunt servanda* ("every treaty in force is binding upon the parties to it and must be performed by them in good faith.")[274]

During the suspension period, a treaty relationship continues to exist between the parties.[275] Moreover, the suspending party must "refrain from acts tending to obstruct the resumption of the operation of the treaty."[276] The Vienna Convention states that a party may suspend a treaty only through applying either the relevant provisions of the treaty itself or of the Vienna Convention.[277]

Article XVI of the CWC, which allows for withdrawal from the Convention, does not expressly address whether or not a state party can suspend its obligations.[278] The CWC's drafters may have intentionally excluded the right for a State Party to suspend its obligations if they viewed it as an invitation to a "temporally opportunistic exit."[279] In this case, however, the intent of suspending the transfer prohibition would be to effectuate the object and primary purpose of the CWC; i.e., to ensure the elimination of a CW program and the safe and secure destruction of all weapons, precursors and infrastructure related to the CW program.[280]

Absent a specific option to suspend under the CWC, we must look to the Vienna Convention for the reasons and justification for suspension. The Vienna Convention provides as follows in Article 57:

> The operation of a treaty in regard to all the parties or to a particular party may be suspended:
> *(a)* In conformity with the provisions of the treaty; or
> *(b)* At any time by consent of all the parties after consultation with the other contracting States.

If a State Party is justified in suspending a treaty's operation, Articles 57 and 65 provide the procedure to be employed. The State must first notify all of the other parties of the treaty of its

claim for suspension and wait three months.[281] However, in cases of "special urgency" the three-month notice requirement is waived.[282] Finally, if an objection is raised the parties are directed to resolve the dispute via Article 33 of the UN Charter.[283]

The Vienna Convention allows for five potential alternative reasons or justifications, one of which ("temporary impossibility") is particularly relevant here, to credibly and legally justify one or more State Parties to suspend the obligations of the CWC, employing the procedures set forth in Articles 57 and 65 of the Vienna Convention, and temporarily act in a manner inconsistent with one or more of their legal obligations under the CWC. During the course of the retrieval and disposition operations, facts on the ground in Syria--particularly the use of CW by Syrian government and rebel forces--adequately demonstrated the "special urgency" for the need to transfer these weapons and materials, under expedient procedures that were clearly inconsistent with the CWC in order to eliminate the Syrian CW threat.

As mentioned above, the most relevant potential justification is temporary impossibility. Vienna Convention Article 61, titled "Supervening Impossibility of Performance," provides in relevant part as follows: "A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it. . . If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty."[284]

Here one could plausibly argue that the civil war and the danger of terrorist groups acquiring these weapons makes it impossible for the Syrian government, other governments involved in the disposition, and the OPCW to follow the requirements of the CWC. Since this is a temporary condition, it may be invoked as a ground for suspending the operation of the CWC. In this context temporary impossibility of performance resembles *force majeure*, which if applicable would exonerate a state from liability for non-performance of its treaty obligations.

The moral justification for breaching the CWC on the ground of temporary impossibility is strengthened by the fact that the acts of non-compliance are nevertheless fully consistent with the object and purpose of the CWC, the elimination of chemical weapons. Once the weapons have been destroyed and the program eliminated, the justification for suspending obligations under the CWC cease and the affected states parties can return to full compliance with their CWC obligations.

As with the *force majeure* exception, it is important to use the temporary impossibility grounds for breach sparingly, as it is relatively ambiguous and thus particularly subject to abuse by foreign governments who might try to argue temporary impossibility when it is in fact not "temporarily impossible" for them to comply with the relevant international legal obligation. It is thus far preferable to, if possible, override the relevant international legal obligation with a Security Council resolution.

[1] This report defines the Middle East and North Africa region to include those countries within the purview of the State Department's Bureau of Near Eastern Affairs, namely: Algeria, Bahrain, Egypt, Iran, Iraq, Israel, Jordan, Kuwait, Lebanon, Libya, Morocco, Oman, Palestinian Territories, Qatar, Saudi Arabia, Syria, Tunisia, United Arab Emirates, and Yemen.

[2] See, e.g., Col. (Dr.) Jim A. Davis, USAF, *The Looming Biological Warfare Storm,* AIR & SPACE POWER JOURNAL, Spring 2003. (http://www.airpower.au.af.mil/airchronicles/apj/apj03/spr03/davis.html) Davis lists a dozen such instances.

[3] See, e.g., W. Andrew Terrill, *The Chemical Warfare Legacy of the Yemen War*, COMPARATIVE STRATEGY, 1991, pages 109-119 (noting that Egyptian use of chemical weapons was confirmed by the International Committee of the Red Cross); Jonathan Tucker, WAR OF NERVES: CHEMICAL WARFARE FROM WORLD WAR I TO AL QAEDA (New York: Random House 2007) ("British Prime Minister Harold Wilson told the House of Commons that he believed chemical weapons were being used in Yemen" and a then-secret memorandum prepared by the U.S. government for U.S. President Lyndon B. Johnson stated that "we know that UAR used lethal nerve gas in Yemen"); Richard L. Russell, WEAPONS PROLIFERATION AND WAR IN THE GREATER MIDDLE EAST (Routledge 2005), page 38; Shirley D. Tuorinsky, *Medical Aspects of Chemical Warfare* (U.S. Department of the Army, Office of the Surgeon General), pages 262, 341; Dany Shoham, Chemical and Biological Weapons in Egypt, THE NONPROLIFERATION REVIEW, Spring–Summer 1998, page 48. (http://cns.miis.edu/npr/pdfs/shoham53.pdf)

[4] See, e.g., Thomas L. McNaugher, *Ballistic Missiles and Chemical Weapons: The Legacy of the Iran-Iraq War*, INTERNATIONAL SECURITY, Autumn 1990, pages 5, 16.

[5] See, e.g., Jonathan Tucker, WAR OF NERVES: CHEMICAL WARFARE FROM WORLD WAR I TO AL QAEDA (New York: Random House 2007)("the Iranians employed chemical weapons sporadically in 1987 and 1988"); Thomas L. McNaugher, *Ballistic Missiles and Chemical Weapons: The Legacy of the Iran-Iraq War*, INTERNATIONAL SECURITY, Autumn 1990, pages 5, 16; David Segal, *The Iran-Iraq War: A Military Assessment*, FOREIGN AFFAIRS, Summer 1988, page 956 (reporting that Iran started using mustard gas and phosgene in 1987); Seth Carus, *Chemical Weapons in the Middle East*, Washington Institute for Near East Policy, December 1988, page 4 (asserting that the first documented use of CW by Iran occurred in 1988).

[6] See, e.g., Joshua Sinai, *Libya's Pursuit of Weapons of Mass Destruction*, THE NONPROLIFERATION REVIEW, Spring–Summer 1997, page 92 (http://cns.miis.edu/npr/pdfs/sinai43.pdf)

[7] See, e.g., Peter W. Galbraith & Christopher Van Hollen, Jr., *Chemical Weapons Use in Kurdistan: Iraq's Final Offensive*, United States Senate Committee on Foreign Relations, October 1988, page 4 (http://www.casi.org.uk/info/usdocs/senatecw8810a.pdf); Thomas L. McNaugher, *Ballistic Missiles and Chemical Weapons: The Legacy of the Iran-Iraq War*, INTERNATIONAL SECURITY, Autumn 1990, pages 21-22.

[8] Karin Brulliard, *Chlorine Blasts Kill 8; 6 Troops Also Die in Iraq*, THE WASHINGTON POST, March 18, 2007, (http://www.washingtonpost.com/wp-dyn/content/article/2007/03/17/AR2007031700432.html)

[9] See, e.g., Salma Abdelaziz, Hala Gorani, and Ana Bickford, *U.N. Confirms Use of Chemical Weapons in Syria*, CNN, December 12, 2013, http://www.cnn.com/2013/12/12/world/meast/syria-civil-war/ ; Ian Pannell, *Syria Civilians Still Under Chemical Attack*, BBC News, September 10, 2015, http://www.bbc.com/news/world-middle-east-34212324

[10] See, e.g., Damian Paletta and Julian E. Barnes, *Islamic State Wants to Use Chemical Weapons Against U.S., Intelligence Chief Says*, Wall Street Journal, February 12, 2016,

http://www.wsj.com/articles/islamic-state-wants-to-use-chemical-weapons-against-u-s-intelligence-chief-says-1455302469

[11] Wolfgang Rudischhauser, *Could ISIL Go Nuclear?*, NATO REVIEW MAGAZINE (2015), http://www.nato.int/docu/Review/2015/ISIL/ISIL-Nuclear-Chemical-Threat-Iraq-Syria/EN/index.htm

[12] The chart was provided to the author by Michael Rosenthal, the U.S. member of the Group of Experts for the UN Security Council Resolution 1540 Committee.

[13] A list of those government to government protective agreements which were in force as of September 30, 2014 is contained in *Cooperative Threat Reduction: Annual Report to Congress for Fiscal Year 2016*, U.S. Department of Defense (information cutoff date September 30, 2014), pp. 81-84. Jack Beard, the lead Defense Department attorney who participated in negotiating many of the early FSU agreements, wrote a law review article discussing the agreements and their negotiation processes. Jack M. Beard, *A New Legal Regime for Bilateral Assistance Programs: International Agreements Governing the "Nunn-Lugar" Demilitarization Program in the Former Soviet Union*, 35 Va. J. Int'l L. 895 (1994-1995), http://digitalcommons.unl.edu/lawfacpub/164/ .

[14] For example, the DOD CTR report to Congress for FY 2016 stated as follows with regard to programs to eliminate Russia submarine launched ballistic missiles and dismantle Russian ballistic missile submarines: "Russia has not established a mechanism to accredit U.S. military and DOD government personnel traveling to Russia with diplomatic privileges and immunities as administrative and technical personnel, as required by Article 12(2) of the Multilateral Nuclear Environment Programme in the Russian Federation (MNEPR) Framework Agreement. This issue, as well as the lack of a signed access agreement under the MNEPR Framework Agreement, may hinder work verification in the future." *Cooperative Threat Reduction: Annual Report to Congress for Fiscal Year 2016*, U.S. Department of Defense (information cutoff date September 30, 2014), p. 21.

[15] See, e.g., Daniel Horner and Tom Z. Collina, "Nunn-Lugar Program Scaled Back," *Arms Control Today*, July/August 2013, http://www.armscontrol.org/act/2013_0708/Nunn-Lugar-Program-Scaled-Back%20; Mary Beth D. Nikitin and Amy F. Woolf, *The Evolution of Cooperative Threat Reduction: Issues for Congress*, Congressional Research Service, November 23, 2015, p. 6 ("Russian officials seemed to be unwilling to allow U.S. contractors access to sensitive Russian military facilities, even if that meant that Russia would no longer have access to U.S. financial resources. As a result, in early October 2012, Russian officials indicated that they were prepared to allow the agreement to lapse and to conclude the programs. In a report for Congress prepared in March 2013, the Pentagon indicated that, without adequate legal protections in a new agreement, the United States would have to begin to shut down some of the ongoing projects.")

[16] Government Accountability Office, Progress Made in Improving Security at Russian Nuclear Sites, but the Long-term Sustainability of U.S.-Funded Security Upgrades is Uncertain (2007). Available at http://www.gao.gov/new.items/d07404.pdf.

[17] *Id.* at p. 22.

[18] *Id.* at p. 26.

[19] *Id.* at p. 29.

[20] *Id.* at p. 29.

[21] *Id.* at 3.

[22] Report Pursuant to Section 1304 of the National Defense Authorization Act for Fiscal Year 2014: Strategy to Modernize Cooperative Threat Reduction and Prevent the Proliferation of

Weapons of Mass Destruction and Related Materials in the Middle East and North Africa Region, p. 2, U.S. Department of Defense, March 2014.
[23] *Id.* at 2.
[24] *Id.* at 3.
[25] Id.
[26] *Id.* at 5.
[27] Id.
[28] *Id.* at 3.
[29] *Id.* at 4.
[30] Id.
[31] *Id.* at 5.
[32] Id.
[33] Id.
[34] Id.
[35] *Cooperative Threat Reduction: Annual Report to Congress for Fiscal Year 2016*, U.S. Department of Defense (information cutoff date September 30, 2014), p. 11.
[36] Frank L. Smith III, *Advancing Science Diplomacy: Indonesia and the US Naval Medical Research Unit*, Social Studies of Science, Vol. 44(6), pp. 825-847 (2014).
[37] Id.
[38] *Id.* at 833.
[39] Id.
[40] *Id.* at 835.
[41] Id.
[42] SIGAR Audit 13-8, TAXES: AFGHAN GOVERNMENT HAS LEVIED NEARLY A BILLION DOLLARS IN BUSINESS TAXES ON CONTRACTORS SUPPORTING U.S. GOVERNMENT EFFORTS IN AFGHANISTAN, MAY 2013, at 9, https://www.sigar.mil/pdf/audits/2013-05-14-audit-13-8.pdf
[43] Mary Beth D. Nikitin and Amy F. Woolf, *The Evolution of Cooperative Threat Reduction: Issues for Congress*, Congressional Research Service, November 23, 2015, p. 17.
[44] *Cooperative Threat Reduction: Annual Report to Congress for Fiscal Year 2016*, U.S. Department of Defense (information cutoff date September 30, 2014), p. 21.
[45] *Id.* at 83.
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[223] Id.
[224] Id.
[225] A list of parties to the Amendment to the Convention on the Physical Protection of Nuclear Material is available at https://www.iaea.org/Publications/Documents/Conventions/cppnm_amend_status.pdf

[226] Amy F. Woolf, Paul K. Kerr, and Mary Beth D. Nikitin, *Arms Control and Nonproliferation: A Catalog of Treaties and Agreements*, Congressional Research Service, April 13, 2016, http://fas.org/sgp/crs/nuke/RL33865.pdf
[227] Id.
[228] Id.
[229] A list of parties to the International Convention for the Suppression of Acts of Nuclear Terrorism is available at http://legal.un.org/avl/ha/icsant/icsant.html
[230] This section of this chapter draws heavily from Orde F. Kittrie, *Averting Catastrophe: Why the Nuclear Nonproliferation Treaty is Losing its Deterrence Capacity and How to Restore It*, 28 MICH. J. INT'L L. 337-430(2007). Available at http://ssrn.com/abstract=996953.

[231] IAEA, The Structure and Content of Agreements Between the Agency and States Required in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons, IAEA Doc. INFCIRC/153 (Corrected) (June 1972).

[232] *See* IAEA, *IAEA Safeguards: Stemming the Spread of Nuclear Weapons*, *available at* www.iaea.org/Publications/Factsheets/English/S1_Safeguards.pdf [hereinafter *IAEA Safeguards Fact Sheet*].

[233] Ephraim Asculai, *Rethinking the Nuclear Nonproliferation Regime*, 70 Jaffee Ctr. for Strategic Stud. 1, 30–31 (2004).

[234] IAEA, Model Protocol Addition to the Agreement(s) Between State(s) and the International Atomic Energy Agency for the Application of Safeguards, IAEA Doc. INFCIRC/540 (corrected) (Sept. 1997).

[235] IAEA Safeguards Fact Sheet.

[236] IAEA, International Nuclear Verification Series: The Evolution of IAEA Safe- guards, at 27, IAEA Doc. IAEA/NVS/2 (Nov. 1998).

[237] Status of the Additional Protocol, International Atomic Energy Agency, https://www.iaea.org/safeguards/safeguards-legal-framework/additional-protocol/status-of-additional-protocol
[238] Joint Comprehensive Plan of Action, paragraph C.13, page 8, https://eeas.europa.eu/statements-eeas/docs/iran_agreement/iran_joint-comprehensive-plan-of-action_en.pdf
[239] JCPOA Annex V, https://eeas.europa.eu/statements-eeas/docs/iran_agreement/annex_5_implementation_plan_en.pdf
[240] Amy F. Woolf, Paul K. Kerr, and Mary Beth D. Nikitin, *Arms Control and Nonproliferation: A Catalog of Treaties and Agreements*, Congressional Research Service, April 13, 2016, http://fas.org/sgp/crs/nuke/RL33865.pdf
[241] Code of Conduct on The Safety and Security of Radioactive Sources, IAEA Publication at http://www-pub.iaea.org/MTCD/publications/PDF/code-2004_web.pdf
[242] Guidance on the Import and Export of Radioactive Sources, IAEA Publication at http://www-pub.iaea.org/books/IAEABooks/8901/Guid.ance-on-the-Import-and-Export-of-Radioactive-Sources
[243] Code of Conduct on The Safety and Security of Radioactive Sources, IAEA Publication at http://www-pub.iaea.org/MTCD/publications/PDF/code-2004_web.pdf
[244] Id.

[245] Id.
[246] Guidance on the Import and Export of Radioactive Sources, IAEA Publication at http://www-pub.iaea.org/books/IAEABooks/8901/Guid.ance-on-the-Import-and-Export-of-Radioactive-Sources
[247] Status of State Responses to IAEA Questionnaire can be found at http://www-ns.iaea.org/downloads/rw/imp-export/status-list.pdf
[248] Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, entered into force on March 26, 1975, http://www.opbw.org
[249] Id.
[250] *Chemical Weapons Convention*, entered into force on April 29, 1997, https://www.opcw.org/chemical-weapons-convention/articles/article-i-general-obligations/
[251] *Treaty on the Non-Proliferation of Nuclear Weapons*, entered into force on March 5, 1970, https://www.iaea.org/sites/default/files/publications/documents/infcircs/1970/infcirc140.pdf
[252] Id.
[253] Article I.2. of the Chemical Weapons Convention provides: "Each State Party undertakes to destroy chemical weapons it owns or possesses, or that are located in any place under its jurisdiction or control, in accordance with the provisions of this Convention." Specific procedures for the destruction of chemical weapons are set forth in the CWC's Article IV and Annex on Implementation and Verification. For example, Part IV(A) of the Annex on Implementation and Verification provides that "Each State Party shall determine how it shall destroy chemical weapons
[254] Damian Paletta and Julian E. Barnes, *Islamic State Wants to Use Chemical Weapons Against U.S., Intelligence Chief Says*, Wall Street Journal, February 12, 2016, http://www.wsj.com/articles/islamic-state-wants-to-use-chemical-weapons-against-u-s-intelligence-chief-says-1455302469
[255] Id.
[256] *CIA Director John Brennan on 60 Minutes*, CBS News, February 14, 2016, http://www.cbsnews.com/news/cia-director-john-brennan-60-minutes-scott-pelley/
[257] The director of NATO's WMD Non-Proliferation Center published an article in which he warned that "there is a very real - but not yet fully identified risk - of foreign fighters in ISIL's ranks using chemical, biological, radiological or nuclear (CBRN) materials as 'weapons of terror' against the West." Wolfgang Rudischhauser, *Could ISIL Go Nuclear?*, NATO REVIEW MAGAZINE (2015), http://www.nato.int/docu/Review/2015/ISIL/ISIL-Nuclear-Chemical-Threat-Iraq-Syria/EN/index.htm . Instability in Pakistan, Pakistan's expanding nuclear arsenal, and the rise of ISIL have raised concerns that one or more Pakistani nuclear weapons or related material could end up in the hands of ISIL or other MENA state or non-state actors. Indeed, ISIL suggested in its magazine DABIQ that it could in Pakistan "purchase a nuclear device through weapons dealers with links to corrupt officials." Heather Saul, *ISIS Claims it Could Buy its First Nuclear Weapon from Pakistan within a Year*, THE INDEPENDENT (UK), May 22, 2015, http://www.independent.co.uk/news/world/middle-east/isis-claims-it-could-buy-its-first-nuclear-weapon-from-pakistan-within-12-months-10270525.html The history of al-Qaeda's efforts to acquire WMD shows that such an acquisition by ISIL may not be far-fetched. One of the most frightening episodes in al-Qaeda's efforts to acquire WMD began in June 2000, when the Pakistani non-governmental organization Umma Tameer e Nau (UTN) was formed. UTN's CEO was retired Pakistani nuclear scientist Sultan Bashiruddin Mahmood (former director general of the Pakistan Atomic Energy Commission and chief of Pakistan's Khushab plutonium reactor). Before UTN was shut down by Pakistani intelligence at U.S. request in late 2001, Mahmood reportedly offered to

construct chemical, biological, and nuclear weapons programs for al-Qaeda. Rolf Mowatt-Larssen, *Al Qaeda Weapons of Mass Destruction Threat: Hype or Reality?,* Belfer Center for Science and International Affairs*,* January 2010 (http://belfercenter.ksg.harvard.edu/files/al-qaeda-wmd-threat.pdf)

[258] OPCW Executive Council Decision EC-M-33/DEC.1, available at: *https://www.opcw.org/fileadmin/OPCW/EC/M-33/ecm33dec01_e_.pdf.*

[259] UN Security Council Resolution 2118, S/RES/2118, dated 27 September 2013; available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2118%282013%29.

[260] See, e.g., *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Libya v UK, Libya v US) (Provisional Measures) [1992] ICJ Reps 3 and 114, paras 39 and 42, respectively. Available at: http://www.icj-cij.org/docket/index.php?sum=460&p1=3&p2=3&case=89&p3=5 (the ICJ held that in accordance with Article 103 of the Charter, the obligations of the Parties in complying with a Chapter VII Security Council resolution prevail over their obligations under any other international agreement); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion) [1971] ICJ Rep 16, Separate Opinion of Vice-President Ammoun, para 18 (observing that obligations 'under the Charter', as contemplated by art 103, "clearly include obligations resulting from the provisions of the Charter and from its purposes, and also those laid down by the binding decisions of the organs of the United Nations"); see also Nigel D White and A Abass, 'Countermeasures and Sanctions' in Evans M., ed., International Law 4th. Oxford University Press. 537-562 (n 5) 509–32, 527 ("One effect of Article 103 of the UN Charter seems to be that mandatory sanctions resolutions adopted by the Security Council under Article 41 of the UN Charter result in obligations for member States that prevail over obligations arising under other international treaties*").*

[261] UN Security Council Resolution 2231, S/RES/2231, dated July 20, 2015; available at: http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/2231(2015)

[262] "TEXT-French U.N. Security Council draft on Syria chemical weapons," Reuters, 11 Sep 2013; available at: http://news.trust.org/item/20130911024721-0whzo/?source=shtw; Colum Lynch and Karen DeYoung, *Russia balks at French plan for U.N. Security Council resolution on Syrian chemical arms*, Washington Post, Sept. 10, 2013; available at: https://www.washingtonpost.com/world/middle_east/france-to-author-security-council-resolution-to-require-syria-to-give-up-chemical-weapons/2013/09/10/0d51a06c-19ff-11e3-a628-7e6dde8f889d_story.html

[263] Article I.2. of the Chemical Weapons Convention provides: "Each State Party undertakes to destroy chemical weapons it owns or possesses, or that are located in any place under its jurisdiction or control, in accordance with the provisions of this Convention." Specific procedures for the destruction of chemical weapons are set forth in the CWC's Article IV and Annex on Implementation and Verification. For example, Part IV(A) of the Annex on Implementation and Verification provides that "Each State Party shall determine how it shall destroy chemical weapons, except that the following processes may not be used: dumping in any body of water, land burial or open pit burning."

[264] C.J. Chivers, *Thousands of Iraq Chemical Weapons Destroyed in Open Air, Watchdog Says,* NY Times, Nov. 22, 2014 available at: http://www.nytimes.com/2014/11/23/world/middleeast/thousands-of-iraq-chemical-weapons-destroyed-in-open-air-watchdog-says-.html .

[265] OPCW Technical Secretariat Report on Chemical Weapons Recovery in Iraq (details the recovery and destruction of 4,530 aging chemical weapons by American forces in Iraq from May 2004 through February 2009) dated 14 November 2014 available at: http://www.nytimes.com/interactive/2014/11/24/world/middleeast/iraq-chemical-opcw.html.

[266] UN Yearbook of the International Law Commission 2001, *Articles on Responsibility of States for Wrongful Acts, GAOR A/56/10, Art. 23; available at:* http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf

[267] Id.

[268] UN Yearbook of the International Law Commission 1978, "Force majeure" and "Fortuitous event" as circumstances precluding wrongfulness: Survey of State practice, international judicial decisions and doctrine, GAOR A/CN.4/315, p. 68: available at: http://legal.un.org/ilc/documentation/english/a_cn4_315.pdf.

[269] Id.

[270] Abdul Sattar Hatita, *Libya militias capture chemical weapons: army official,* Asharq Al-Awsat, 21 February 2015; available at: http://english.aawsat.com/2015/02/article55341700/libya-militias-capture-chemical-weapons-army-official. From an international law perspective, such a bombardment, assuming it was not authorized by a UN Security Council resolution, would also need to consistent with the prohibition on the use of force, except in self-defense or with the authority of the UN Security Council, which is set forth at Articles 2 and 51 of the UN Charter.

[271] During a gathering of world leaders in New York for the High-level Plenary Meeting of the General Assembly (World Summit) in 2005, heads of state and government agreed to a Responsibility to Protect (R2P) populations from genocide, war crimes, crimes against humanity and ethnic cleansing. See paragraphs 138 and 139 of the 2005 World Summit Outcome Document (WSOD) at http://responsibilitytoprotect.org/index.php/component/content/article/35-r2pcs-topics/398-general-assembly-r2p-excerpt-from-outcome-document. The WSOD – including the paragraphs that define the Responsibility to Protect – was unanimously adopted by all UN member states at the 2005 World Summit; available at: http://www.cscap.org/index.php?page=responsibility-to-protect.

[272] *Vienna Convention on the Law of Treaties*, May 23, 1969, Article 57, 1155 U.N.T.S. 331; available at: http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXIII/treaty1.asp.

[273] The Vienna Convention entered into force in 1980. There are currently 114 states parties with another 45 states which have signed but have not yet ratified. A copy of the treaty is available at: https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&lang=en. The U.S. has signed but not ratified the Vienna Convention. However, the U.S. considers many of the provisions of the Vienna Convention to constitute customary international law. See Department of State website at http://www.state.gov/s/l/treaty/faqs/70139.htm.

[274] Vienna Convention on the Law of Treaties, Art. 26.

[275] *Id.* at Art. 72(1)(b).

[276] *Id.* at Art. 72(2).

[277] *Id.* at Art. 42(2) and Art. 57.

[278] Under CWC Article XII, the Conference of States Parties, however, upon the recommendation of the Executive Council, may "restrict or suspend the State Party's rights and privileges under the Convention until it undertakes the necessary action to conform with its obligations under this convention."

[279] *See* Laurence R. Helfer, *Exiting Treaties*, 91 Va. L. Rev. 1579, 1625 (2005).
[280] *See* David S. Jonas & Thomas N. Saunders, *The Object and Purpose of a Treaty: Three Interpretive Methods*, 43 VAND. J. TRANSNAT'L L. 565 (2010).
[281] Vienna Convention on the Law of Treaties, Art. 65.
[282] Id.
[283] *Id.* Article 33 of the UN Charter calls on parties to an international dispute that risks global peace and security to engage in some type of dispute resolution such as negotiation, arbitration, mediation, judicial settlement, or other peaceful means. U.N. Charter, Art. 33, para. 1. If necessary, the UN Security Council can step in to request that the parties engage in this type of peaceful settlement process.
[284] *Vienna Convention on the Law of Treaties*, Art. 61. A state may not cite its own conduct as a fundamental change warranting suspension.

Annex I:
How to More Effectively Encourage and Assist MENA Governments to Implement Their International Legal Obligations Relating to Nonproliferation

By
Victor D. Comras[1]
24 June 2016

[1] Victor Comras is a consultant and practicing attorney specializing in issues related to U.S and international economic and financial sanctions, anti-money-laundering, and counter-terrorism financing (AML/CTF) issues. He is the author of Flawed Diplomacy: The United Nations and the War on Terrorism (Potomac Books, 2010), co-author of Pressure: Coercive Economic Statecraft and U.S. National Security (CNAS 2011), and a contributing author to Terrorism Financing and State Responses (Stanford Univ. Press 2007). He is also the author of numerous articles and blog posts, and has testified before congressional committees on these issues.

After retiring from the State Department with the grade of Minister Counselor, Mr. Comras served as one of five international monitors appointed by the UN Security Counsel to oversee the implementation of Security Council measures against al Qaeda and the Taliban. And, in 2009 he was appointed to serve as the US member of the UN Security Council's Special Panel of Experts on UN sanctions imposed on North Korea.

Mr. Comras is a partner of the Comras and Comras Law Firm in Fort Lauderdale. He also serves as special counsel to the Eren Law Firm in Washington DC. He received his LLM from Harvard University in 1975 and his J.D. (with honors) from the University of Florida Law Center in 1966, where he was on the Law Review. He earned his B.S. from Georgetown University in 1964.

The purpose of this paper is to explore MENA regional countries' compliance with non-proliferation norms and the steps the United States and the international community can take to more effectively encourage and assist these governments to meet, respect and carry out these international obligations.[2] This includes strengthening their commitment and their ability to impede the illicit acquisition and transfer of WMD proliferation-related technology, commodities, equipment, and components. Emphasis is placed on the international conventions, UN resolutions, and other international agreements, and the tools they provide, to support such an endeavor. Particular attention is focused on those high risk MENA countries in which the DOD Cooperative Threat Reduction Program is currently, or hopes to be soon, working.

EXECUTIVE SUMMARY

The turmoil now prevalent in large parts of the Middle East, and the lax export and financial controls being exercised by many of these countries, pose grave risks that rogue states and non-state actors will gain access to nuclear materials, dirty bombs and /or chemical or biological weapons. Many of these countries lack the resources and/or political will to tighten controls, and fear the consequences of their relationship with Iran and other predator countries that have taken advantage of these control lacunae. Fortunately, there may now be special opportunities to convince these countries to tighten controls in their own security interest. Likewise, the desire of several of these countries to pursue peaceful nuclear power programs and to develop their own bio-chemical industries provides new leverage to convince these governments to act.

Most MENA countries are already parties to conventions that ban the proliferation of nuclear and other weapons of mass destructions. And, all UN member states are obligated under UN Security Council Resolution 1540 (2004) to institute controls to prevent the acquisition of such items by non state actors. There are also some very valuable other international organization tools that can be used to help these countries strengthen their control programs. Examples of such tools include the IAEA's Code of Conduct guidelines and self assessment questionnaire; the Chemical Weapons Convention Technical Secretariat support programs; and the World Health Organization programs in support of the International Health Regulations. These international organization resources can be used alongside our own, and in conjunction with those of our allies, to assist MENA countries with their own WMD proliferation prevention programs.

The Financial Action Task Force (FATF) Working Group on Terrorist Financing and Money Laundering (WGTM) has also published a very useful typologies report and policy options for combating proliferation financing. This includes a number of recommendations to improve local banking oversight and compliance, and to increase public and private awareness of proliferation costs and risks.

There are also a number of steps that the United States and other like-minded countries can take to enhance the prevention of spread of weapons of mass destruction in the MENA region. For example, the Nuclear Suppliers Group (NSG) can strengthen its own export guidelines, expand the use of end-user checks, and improve information sharing regarding problematic transactions.

[2] Recommendations contained herein are marked in bold.

The United States and other like-minded countries should also use the upcoming "Comprehensive 1540 Review," scheduled to be completed in late 2016, to strengthen the mandate and procedures of the Security Council's 1540 Committee charged with overseeing the implementation of the control measures contained in UN Security Council Resolution 1540. This includes expanding the committee's mandate to allow its experts to conduct "mutual evaluations" with member states and to publish a list of entities and individuals known to engage in illicit proliferation transactions.

Below are some of this report's key recommendations for strengthening US programs and strategies for enhancing non-proliferation control norms throughout the MENA region. Additional recommendations (in bold) are also contained throughout the body of this paper.

- **The international non-proliferation conventions provide useful tools and resources that should be more effectively used for assisting and strengthening WMD proliferation prevention programs, and their use should be better incorporated in the U.S. approach to improving MENA country WMD controls.**

- **The United States should press for the Nuclear Suppliers Group (NSG) to adopt expanded end-user checks and establish a central data base where export denials, reports of past diversions, and risky companies and entities, along with denial justifications, can be viewed by all participating members.**

- **Sensitive dual use exports should be permitted only for countries that have signed the IAEA "Additional Protocol" for expanded safeguards. MENA countries that have not yet done so should be encouraged to sign an IAEA Additional Protocol.**

- **The NSG should consider the adoption of direct export requirements for highly sensitive dual use items which would reduce the risks of diversion by eliminating the use of off-shore brokers and middlemen.**

- **The United States should incorporate in its WMD proliferation prevention strategy the option of invoking the Chemical Weapons Convention's "challenge inspection" procedure in cases where it believes stockpiles of chemical weapons exist in violation of the convention.**

- **MENA countries should be more energetically encouraged to take advantage of the World Health Organization (WHO) programs of assistance in carrying out their International Health Regulations (IHR) obligations.**

- **The United States should work closely with MENA country financial regulatory authorities to ensure their understanding, adoption and implementation of the FATF recommendations for addressing proliferation financing.**

- **The United States should take advantage of the upcoming UN Security Council's "Comprehensive 1540 Review" to press for authorizing the 1540 Committee to identify, list and publish the names of entities and individuals known to engage in illicit proliferation transactions. The 1540 Committee Group of Experts should also**

be authorized to undertake a series of "mutual evaluations" of state compliance with Resolution 1540 norms.

- **Where possible the United States should encourage the use of private consultants in helping MENA countries draft new laws and implementing regulations. Consideration should also be given to sponsoring business to business workshops on the importance of adequate export controls and the risks and costs of diversions.**

- **U.S. authorities should consider the adoption of financial rewards and other incentives for effective local monitoring, reporting, enforcement and prosecution of WMD-related export and border control violations.**

- **The GCC countries should be encouraged to align their export, transit, and border and financial controls to assure against diversions. Their export and border control authorities, and their financial regulators, should be encouraged to cooperate more closely and to share information particularly with regard to suspect transactions.**

- **The United States should focus attention on, and provide technical support for, strengthening the UAE's capacity to provide chemical security standards necessary to assure against the diversion of sector-related material, equipment and technology.**

- **The United States should apply increased military assistance leverage to press Qatar to crack down on private sector financial support for terrorist groups -- including ISIL, Al Qaeda, Hamas and Hezbollah – that pose WMD risks.**

- **The United States should re-engage Jordan on concluding a 123 Agreement as a pre-condition to realizing its nuclear ambitions. This agreement should include provisions postponing possible uranium enrichment in Jordan until such time as such activity is commercially viable and subject to strict limitations and oversights.**

- **The United States should continue to engage in depth, and seek increased international support, for Iraq's efforts to establish and administer effective domestic and export controls, and financial regulations to protect against the diversion of WMD sensitive material, equipment and technology, and to keep WMD items out of the hands of ISIL and other terrorist groups.**

- **The United States should continue to press Lebanon to strengthen its regulation and oversight over financial institutions and exchange houses, increase its investigation and prosecution of violations of financial regulation, and strengthen the penalties attached to such violations. The United States should also encourage international assistance and support to Lebanon directed at strengthening its export and border controls.**

BACKGROUND

Unrest, instability, and sectarian violence have plagued much of the Middle East and North Africa (MENA) region for the past decade. This turmoil has been marked by growing tensions between Sunni and Shiite factions across the region, civil war in Syria and Yemen, and the virulent spread of international terrorism tied largely to ISIL, Al Qaeda, Hezbollah, Hamas, and other extremist jihadist groups. Several MENA countries have knowingly or unwittingly engaged in, or tolerated, illicit funding for terrorism. Lax controls over financial transactions and the transfer of sensitive dual use items have also raised the specter that rogue states and non-state actors will gain access to nuclear materials, dirty bombs and /or chemical or biological weapons.

The region is also torn by new competition and conflict between the Shi'ite and Sunni wings of Islam. Iran has played a major role in fermenting and exacerbating this conflict. And, this is having an important impact on the geo-political calculations of several of the MENA countries' political leaders. Some have been eager to placate Iran while others have sought to align themselves more closely with those, like Saudi Arabia, that have sought to oppose Iran's growing influence in the region.

At the same time, regional fears have been exacerbated by Iran's advanced nuclear and ballistic missile programs and risks that the Joint Comprehensive Plan of Action (JCPOA) limiting Iran's quest for nuclear weapons will lack effectiveness or come undone. This has given new impetus for some MENA government leaders to consider, commence or enhance their own nuclear-related development projects which could pose serious challenges to well established international non-proliferation norms and legal obligations. It has also given MENA states, in the interest of their own security, further motivation to tighten up on the use of their territory for illicit transactions that could spread weapons of mass destruction to those countries or non-state actors that might threaten them.

It has been estimated that nearly one-third of the countries in the MENA region have developed chemical or biological weapons capabilities or are undertaking related research programs.[3] The recent use of chemical weapons by the Syrian government and the chaos surrounding the Syrian civil war underscore the risk that such chemical weapon agents have fallen or might well fall into the hands of ISIL and other terrorist organizations operating in the region. Of these groups, Al Qaeda and ISIL are most often cited as attempting to obtain and use chemical, biological, radiological, and nuclear weapons.[4]

While most MENA countries, until recently, have eschewed nuclear power,[5] there have been at least four major clandestine nuclear-weapons related programs uncovered in the MENA region

[3] See NTI, "Middle East and North Africa 1540 Reporting Regional Overview" at http://www.nti.org/analysis/reports/mid.dle-east-and-north-africa-1540-reporting/

[4] See Richelson, Jeffrey, "Nuclear Terrorism: Threat and Response," George Washington University National Security Archive, Sept 12, 2012, at http://nsarchive.gwu.edu/nukevault/ebb388/

[5] See Renewable Energy Potential of the Middle East, North Africa vs. The Nuclear Development Option, Global Energy Network Institute, Oct 2007 at http://www.geni.org/globalenergy/research/mid.dle-east-energy-alternatives/MENA-renewable-vs-nuclear.pdf

during the past 20 years.[6] Iran has been the most active in seeking and developing nuclear power and is, at present, the only MENA country with an operating nuclear power reactor.[7] Iran has also been very active in developing and pursuing uranium enrichment. However, these activities are now subject to the restrictions contained in the Joint Comprehensive Plan of Action (JCPOA).[8] Several other MENA countries have now announced plans to construct nuclear power reactors over the next several years.[9] This has made it all the more imperative that steps are taken urgently to better secure and protect nuclear and other WMD-related material, precursors, equipment and technology.

Most MENA countries are parties to the conventions that ban the proliferation of nuclear, chemical and biological weapons of mass destruction, and are obliged by these conventions to institute adequate controls to prevent their spread. All countries are obligated under UN Security Council Resolution 1540 (2004) [10] to institute such controls to prevent the acquisition of such items by non state actors. Yet, a majority of these countries continue to lack the framework and resources, and some continue to lack the political will, to mount an effective anti-WMD proliferation program.

THE OBLIGATIONS

The Nuclear Non-Proliferation Treaty (NPT)

International efforts have been underway since the beginning of the atomic age to stem the proliferation of nuclear weapons and to limit access to other weapons of mass destruction. The keystone of this effort has been the 1968 Nuclear Non-Proliferation Treaty (NPT)[11] which was intended to ban all states except the United Kingdom, China, France, Russia and the United States[12] (the so-called Nuclear Weapons States (NWS)) from acquiring nuclear weapons. The trade-off for non-Nuclear Weapons States complying with its provisions is the possibility of obtaining equipment, technology and assistance for safeguarded peaceful nuclear energy purposes. The NPT now has some 191 member countries. Only India, Israel, Pakistan, and South Sudan remain outside the treaty. [13]

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[6] Clandestine nuclear weapons programs were uncovered in Iran, Iraq, Libya, and Syria. See Proliferation: Threat and Response Report- Middle East and North Africa, Dept of Defense, 1997 at http://fas.org/irp/threat/prolif97/meafrica.html#mid.dle

[7] The Bushehr 1 reactor became commercially operational in September 2013.

[8] The text of the JCPOA can be found at http://www.state.gov/documents/organization/245317.pdf

[9] The United Arab Emirates, Saudi Arabia, Jordan, and Egypt all have contracted for nuclear power reactors to be built in their countries over the next decade. Yemen, Tunisia, Libya, Algeria, Morocco, and Sudan have also stated intentions to acquire nuclear power plants during the next two decades. Kuwait, which had originally planned to acquire nuclear power reactors, made a strategic decision in 2010 to forswear nuclear power production.

[10] The text of UN Security Council Resolution 1540 (2004) can be found at http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1540(2004)

[11] The Treaty on the Non-Proliferation of Weapons (NPT) entered into force on 5 March 1970. See text at https://www.iaea.org/sites/default/files/publications/documents/infcircs/1970/infcirc140.pdf

[12] The So-called Nuclear Weapons States (NWS).

[13] North Korea (DPRK), which adhered to the NPT in 1985, but which has never been in compliance, announced its withdrawal from the treaty in 2003. However, the NPT contains no withdrawal provisions and the DPRK's withdrawal has been widly disputed.

Since the NPT's adoption, India, Pakistan, and North Korea have acquired and openly tested nuclear weapons. Israel, which is also believed to possess nuclear weapons, has adopted an opaque policy of neither announcing nor acknowledging such possession. All MENA countries except Israel are NPT parties.

Article I of the NPT places a clear obligation on the designated Nuclear Weapons States (NWS) "not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices … (nor) to assist, encourage or induce any non- nuclear weapons state (NNWS) to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices."[14] Article 2 obligates all NNWS "not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices… (Nor) to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices."[15]

Article III of the NPT empowers the International Atomic Energy Agency (IAEA) to administer safeguard and verification procedures to prevent "diversion of nuclear energy from peaceful uses to nuclear weapons."[16] Article III (2) specifies that "Each State Party to the Treaty undertakes not to provide: (a) source or special fissionable material, or (b) equipment or material especially designed or prepared for the processing, use or production of special fissionable material, to any non-nuclear-weapon State for peaceful purposes, unless the source or special fissionable material shall be subject to the safeguards required by this article."[17]

In order to carry out these obligations, some 48 countries came together in the Nuclear Suppliers Group (NSG) to adopt uniform principles for controlling the export or other transfer of nuclear and nuclear-related dual use equipment and technology.[18] This includes two specific sets of guidelines covering: (1) a special trigger list of sensitive exports related to enrichment, facilities or material usable for nuclear weapons or in support of the use or development of such items;[19] and (2) other nuclear-related dual-use equipment, materials, software, and related technology.[20] These lists represent an informal agreement about what items need to be subject to national controls. The NSG Guidelines are implemented by each Participating Government (PG) in accordance with its national laws and practices. And, decisions on export applications are taken at the national level in accordance with national export licensing requirements. Participating countries are also called upon to take all necessary steps to assure that the items will not be used or diverted for research or development of nuclear explosives.

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[14] https://www.iaea.org/sites/default/files/publications/documents/infcircs/1970/infcirc140.pdf
[15] id.
[16] id.
[17] id.
[18] Another smaller group, the so-called Zangger Committee composed of supplier countries of nuclear materials, maintains a trigger list of materials subject to IAEA safeguards. The Zangger Committee requirements for exports of trigger list items are that they 1) not be used for nuclear explosives 2) are subject to IAEA safeguards in the recipient non-nuclear weapon state, and 3) not be re-exported unless they are subject to safeguards in the new recipient state.
[19] The NSG Guidelines are published by the IAEA in its Information Circular series. INFCIRC/254 Part 1 contains the Guidelines for Nuclear Transfers, and INFCIRC/254 Part 2 contains the Guidelines for Transfers of Nuclear-Related Dual-Use Equipment, Material and Related Technology.
[20] id.

The NSG can and must play a primary role in controlling sensitive nuclear-related dual use items to countries and entities posing serious risks of diversion. However, the NSG has been slow to adopt new procedures to strengthen its export control requirements. In 2004, President Bush called upon fellow NSG countries only to permit controlled items to be exported to countries that can secure such items and that have put in force an "Additional Protocol"[21] to their safeguards agreement with the IAEA. This principle has not yet been widely adopted.

The United States should continue to press the NSG to expand its guidelines and to export only to states that have signed an Additional Protocol to their safeguards agreement with the IAEA.

The current NSG guidelines call on participating national authorities to undertake end user checks to reduce the risk that sensitive dual-use items will be diverted from their authorized end-use or end-user after transfer. This includes obtaining from the acquiring entity an end-user statement specifying the uses and location of the items. It also requires an explicit assurance that the items will not be used in ways inconsistent with the announced purpose. The dual-use guidelines also require the supplier to obtain assurances from the recipient that the items will not be re-transferred to a third country without prior consent from the responsible national authorities of the original supplier. However, this paper process is frequently subject to fraud and misuse. In the absence of secure sources of information concerning the prior conduct or risks posed by importing entities, and the lack of systematic end-use verification checks, licensing officers are often blind to the true risks involved. Sharing of information between NSG participating states with regard to prior export approvals and denials, and the maintenance of a central data base where information about potential problem companies or entities can be viewed by all participants would go far to tightening up this process.[22]

The United States should press for a NSG central data base where export denials, reports of past diversions, and risky companies and entities, along with denial justifications, can be viewed by all participating members. NSG member states should also be encouraged to establish regular post-shipment end user verification procedures.

After the 1991 Gulf War and the discovery of an advanced Iraqi clandestine nuclear weapons program, it became clear that the existing IAEA safeguard regime needed more teeth. Although the IAEA had been granted authority to conduct "special inspections" if undeclared nuclear facilities were suspected, it had never conducted such probes.[23] So, an "Additional Protocol" was negotiated and put in place in 1997, designed to strengthen the IAEA's ability to "investigate" potential non-compliance with IAEA obligations. This Additional Protocol expands the declaration a State must make to the IAEA and broadens the agency's right of access to any facility to verify that declaration.[24] As of June 2015, some 127 "Additional Protocols" were in

[21] The "Additional Protocol" expands the declaration a State must make to the IAEA and broadens the agency's right of access to any facility to verify that declaration. See infra.
[22] See Anthony, Ian, "Reforming Nuclear Export Controls: The Future of the Nuclear Suppliers Group," SIPRI Research Report No. 22 at http://books.sipri.org/files/RR/SIPRIRR22.pdf
[23] See Hirsch, Theodore, "The IAEA Additional Protocol, What It Is and Why It Matters," The Nonproliferation Review, Fall-Winter 2004, pp 142-43.
[24] Id.

force covering 126 States and EURATOM.[25] Another 20 States have signed an Additional Protocol with the IAEA but have not yet brought it into force.[26] Unfortunately, Additional Protocols are only in force so far with 8 MENA countries - Bahrain, Djibouti, Iraq, Jordan, Kuwait, Libya, Morocco, and the United Arab Emirates.[27]

The United States should use its influence and leverage to encourage all MENA countries, and particularly Saudi Arabia, Tunisia and Egypt, all of which have expressed interest in developing a nuclear energy option, to negotiate and sign an "Additional Protocol."

Another important IAEA tool for improving controls over sensitive nuclear-related items is the IAEA's "Code of Conduct"[28] and its "Guidance on The Import and Export of Radioactive Sources,"[29] which provides, inter alia, recommended assessment tools regarding the evaluation of transactions and the adequacy of the safeguard controls in place. The Code of Conduct and Guidelines can serve as useful aids in the drafting and establishment of operational export control manuals for MENA and other countries. They also provide a standard by which to judge the adequacy of current MENA country export control laws, regulations and implementation. Accompanying the Code and Guidance is an IAEA agreed self assessment questionnaire that can help each country evaluate, and receive IAEA feedback on, its current safeguard and control programs. In the MENA region only Egypt, Iraq, Libya, and Morocco have responded to the questionnaire.[30]

The United States should encourage all MENA countries to adopt and circulate the IAEA Code of Conduct and Guidance, and should press the remaining MENA countries including Jordan, Kuwait, Lebanon, Oman, Qatar, Saudi Arabia, Tunisia, UAE, and Yemen to respond to the IAEA Self Assessment Questionnaire.

Revelations about the activities of the A.Q. Khan Network, as well as increasing evidence that non-state actors were seeking to acquire nuclear and other weapons of mass destruction, underscored the need for firmer international measures to combat the risks of further proliferation. In response, the United Nations Security Council adopted Resolution 1540 (2004).[31] Declaring that "the proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, constitutes a threat to international peace and security,"[32] UN Security Resolution 1540 places an internationally binding legal obligation on all countries to "take and enforce effective… domestic controls to prevent the proliferation of nuclear, chemical,

[25] The status of the "Additional Protocol" as of 3 July 2015 can be found at https://www.iaea.org/safeguards/safeguards-legal-framework/additional-protocol/status-of-additional-protocol
[26] id.
[27] id.
[28] Code of Conduct on The Safety and Security of Radioactive Sources, IAEA Publication at http://www-pub.iaea.org/MTCD/publications/PDF/code-2004_web.pdf
[29] Guidance on the Import and Export of Radioactive Sources, IAEA Publication at http://www-pub.iaea.org/books/IAEABooks/8901/Guid.ance-on-the-Import-and-Export-of-Radioactive-Sources
[30] Status of State Responses to IAEA Questionnaire can be found at http://www-ns.iaea.org/downloads/rw/imp-export/status-list.pdf
[31] The full text of UNSCR 1540 (2004) can be found at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1540%20(2004)
[32] id.

or biological weapons and their means of delivery, including by establishing appropriate controls over related materials."[33] To this end all states are required to:

- Develop and maintain appropriate effective measures to account for and secure such items in production, use, storage or transport;
- Develop and maintain appropriate effective physical protection measures;
- Develop and maintain appropriate effective border controls and law enforcement efforts to detect, deter, prevent and combat, including through international cooperation when necessary, the illicit trafficking and brokering in such items;
- Establish, develop, review and maintain appropriate effective national export and trans-shipment and end use controls over such items;
- Establish appropriate laws, regulations and controls on providing funds for transactions that would contribute to proliferation; and
- Establish appropriate criminal or civil penalties for violations.[34]

The Security Council has also established a special committee to oversee the implementation of these measures and required all states to report to the committee within six month on the steps taken to implement the resolution.[35] This has been followed up with additional Security Council resolutions establishing a group of experts to monitor compliance[36] and calling for a comprehensive review of compliance.[37]

The key findings and recommendations of the first comprehensive review were published by the 1540 Committee on January 29, 2010.[38] While that report noted serious deficiencies in the aggregate in the implementation of resolution 1540, it provided little insight into what specific states were doing, or failing to do, in carry out their 1540 obligations. A second "comprehensive review" has been scheduled to be completed by late 2016.[39]

The United States should take advantage of the upcoming "comprehensive review" to push for much greater specificity concerning deficiencies in the implementation of Resolution 1540 and failures of compliance.

A series of other international legal instruments have also come into force to inhibit the illicit acquisition, transfer, or smuggling of commodities, equipment and technology related to nuclear, chemical and biological weapons or their agents. This includes, inter alia, the Convention on the

[33] UNSCR 1540 (2004) para. 3.
[34] id.
[35] UNSCR 1540 (2004) para. 4
[36] UNSCR 1810 (2008) at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1810%20(2008)
[37] Id.
[38] The 2009 Comprehensive Review findings and recommendations can be found at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2010/52
[39] The agree modalities for the second comprehensive review can be found at http://www.un.org/en/sc/1540/comprehensive-review/pdf/2016%20CR%20Modalities%20Paper.pdf

Physical Protection of Nuclear Material and Nuclear Facilities;[40] the Biological Weapons Convention;[41] the International Health Regulations;[42] and the Chemical Weapons Convention.[43] Several other regional and international agreements also impose obligations on various MENA countries to prohibit and prevent the acquisition or transfer of items and materials related to the production of nuclear, biological or chemical weapons.[44]

The Convention on the Physical Protection of Nuclear Materials and Nuclear Facilities imposes a duty on its 157 member states to provide physical protection during international transport of nuclear material. It also establishes a general framework for cooperation among states in the protection, recovery, and return of stolen nuclear material. The Convention also requires states to impose prohibitions, and prosecute or extradite offenders. Most MENA countries, with the notable exception of Egypt, Iran, and Syria, are parties to this convention.[45]

Egypt should be especially encouraged to join this convention given its stated desire to expand its own nascent nuclear program.[46]

Other international conventions such as the Chemical Weapons Convention (CWC) and the Biological Weapons Convention (BWC) ban the production, transfer, acquisition and retention of chemical weapons and biological agents and toxins "of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes."[47] Specific monitoring, reporting, and control responsibilities over these items are also imposed by the International Health Regulations (IHR).[48]

The tools provided for in the Chemical Weapons Convention have been notably underused for improving overall compliance with the Convention's provisions.

Article VIII (D) of the Convention provides for a Technical Secretariat charged by paragraph 38 (e) to "provide technical assistance and technical evaluation to States Parties in the implementation of the provisions of this Convention, including evaluation of scheduled and unscheduled chemicals." And, paragraph 40 directs that "the Technical Secretariat shall inform

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[40] The full text of the Convention can be found at https://www.iaea.org/publications/documents/infcircs/convention-physical-protection-nuclear-material

[41] The full text of the Convention can be found at http://www.un.org/disarmament/WMD/Bio/pdf/Text_of_the_Convention.pdf

[42] See Gostin, Lawrence, "The International Health Regulations 10 Years On: The Governing Framework for Global Health Security," 2015 at http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2544&context=facpub

[43] The full text of the Convention can be found at https://www.opcw.org/chemical-weapons-convention/

[44] For a more in depth view of the status of international WMD-related conventions vis a vis the MENA countries see Santoro, David., "Status of Non-Proliferation Treaties, Agreements and Other Related Instruments in the Middle East, July 2011 at http://www.nonproliferation.eu/web/documents/backgroundpapers/santoro.pdf

[45] A list of parties to the Physical Protection Convention can be found at https://www.iaea.org/Publications/Documents/Conventions/cppnm_status.pdf

[46] According to a Reuters Nov. 19, 2015 report Moscow and Cairo have signed an agreement for Russia to build a nuclear power plant in Dabaa, Egypt, with construction to be completed by 2022. Egyptian President al-Sisi also announced that the project would involve four reactors.

[47] The CWC and the BWC provide a list of legal and control measures member states are required to enact to comply with the conventions' obligations.

[48] An explanation of the International Health Regulations and guidance on their implementation can be found at http://www.who.int/ihr/en/

the Executive Council of any problem that has arisen with regard to the discharge of its functions, including doubts, ambiguities or uncertainties about compliance with this Convention that have come to its notice in the performance of its verification activities and that it has been unable to resolve or clarify through its consultations with the State Party concerned."

Another unique feature of the CWC is its incorporation of procedures to inquire concerning the possibility of the presence of chemical weapons and to ask for a "challenge inspection", whereby any State Party in doubt about another State Party's compliance can request the Director General to send an inspection team. Under the CWC's challenge inspection procedure, States Parties are committed to the principle of "any time, anywhere" inspections with no right of refusal.[49] However, these provisions have remained dormant since the Convention came into force.

The United States should incorporate the possibility of invoking challenge inspections and other underutilized provisions of the Chemical Weapons Convention as part of its non-proliferation strategy to address the challenge of WMD-related proliferation in the MENA region.

The International Health Regulations (2005) (IHR) require State Parties to meet specific core capacity requirements for surveillance and response in order to detect, investigate and respond to all public health risks including those raised by radiation and toxic chemical and biological agents. This mechanism, known as Early Warning and Response (EWAR), requires the collection, dissemination and sharing of pertinent information with competent authorities. The first step in this process is monitoring and collecting pertinent information at points of entry including ports, airports and ground crossings. Likewise points of entry should receive all pertinent information generated elsewhere.

The World Health Organization (WHO) has developed a number of programs to assist countries in the implementation of the International Health Regulations, and many of these same measures are directly applicable to monitoring and preventing the spread of weapons of mass destruction. This includes guidance and training modules, and facilitating collaboration among early warning surveillance systems, laboratory-based surveillance systems, and points of entry.[50]

The United States should encourage a more active engagement between MENA countries and the WHO to ensure they are taking full advantage of the assistance offered by the WHO in carrying out their IHR obligations.

The Financial Action Task Force (FATF) Working Group on Terrorist Financing and Money Laundering (WGTM) began in October 2008 to develop policy options for combating proliferation financing. Working with the private sector, export control experts, and other relevant stakeholders, the group prepared a very useful typologies report and set of policy options related to preventive measures, investigations, and prosecutions. The group also

[49] The procedures for a "challenge inspection" are outlined in Article IX of the Convention.
[50] The IHR handbook and guidelines are at http://www.who.int/ihr/en/

developed a number of recommendations to increase public and private awareness of proliferation costs and risks.[51]

The working group on proliferation financing concluded that proliferators were finding it easy to exploit the uneven implementation of international obligations by locating themselves or routing funds through jurisdictions with weak export and financial controls and/or insufficient resources to launch successful investigations and prosecutions.[52]

Among the key recommendations in their report are:

- Proliferation financing should be treated as a serious criminal offence and supported by adequate resources to investigate and prosecute;
- Jurisdictions should consider confiscation of the proceeds and instrumentalities of proliferation financing acts;
- To avoid safe havens for proliferators, it is essential to ensure that jurisdictions render mutual legal assistance in support of relevant investigation and prosecution and, where possible, extradite individuals charged with such offences;
- Jurisdictions should encourage financial institutions to incorporate the risk of proliferation financing as part of their established preventive measures and internal controls;
- Jurisdictions should consider establishing regimes for applying preventative targeted financial sanctions to individuals and entities involved in proliferation and proliferation financing;
- FATF members should also apply such targeted financial sanctions against those individuals and entities involved in proliferation and proliferation financing.[53]

These and the other FATF recommendations for addressing proliferation financing should be incorporated in the U.S. strategy to evaluate and improve MENA compliance with UN resolution 1540 norms

A number of private consulting and non-governmental organizations, such as VERTIC,[54] have also developed Resolution 1540 implementation kits which include model draft laws and regulations, as well as organizational and operational material to improve implementation and

[51] See FATF, Combating Proliferation Financing: A Status Report on Policy Development and Consultation, February 2010 at http://www.fatf-gafi.org/media/fatf/documents/reports/Status-report-proliferation-financing.pdf
[52] id.
[53] id.
[54] VERTIC's home page can be found at http://www.vertic.org/pages/homepage/programmes/national-implementation-measures/un-security-council-resolution-1540/legislation-drafting-tools.php

enforcement. Iraq, for example, has relied heavily on VERTIC to put in place its 1540 implementation measures.[55]

Given national sovereignty sensibilities it often proves less onerous for government officials to work with private consultants when drafting new laws and implementing regulations than with officials representing other governments.

MENA COUNTRY LAX PROLIFERATION CONTROLS

The Middle East and North African area is a relatively poor region plagued with corruption and government, economic, and technical inefficiency. There is a great disparity of income between senior government and business leadership and normal working cadre. This has long hampered the efficient administration of the government's regulatory authority and has long been a very serious problem throughout the region in the administration of trade controls. These problems have been further exacerbated by the chaos that has accompanied the so-called "Arab Spring."

While none of the MENA countries except for Iran are considered to be potential producers and direct suppliers of controlled nuclear-related material, equipment or technology, illicit trafficking in these items remains a significant issue.[56] Several MENA countries are also known to have the capability to produce, and some may now even possess chemical and biological weapons.[57] In addition, many of the MENA countries serve as important storage and transit points for both licit and illicit international cargos.[58] Many of these countries lack the physical and human resources necessary to closely monitor and control this trade. The task is further complicated by the absence of meaningful regional cooperation and the existence of numerous lengthy and porous shared borders. "Terrorist organizations and other transnational criminal networks regularly take advantage of these porous borders and poorly regulated financial institutions across the Middle East to engage in activities such as illicit financing, drug trafficking, and transport of dual-use items."[59]

Regulatory authorities in the United States and in other principal nuclear-related and dual use equipment supplier countries have long been aware of the trafficking risks posed by several MENA countries. They are already taking steps to closely monitor the movement of sensitive nuclear and dual use items goods to the region. Still, they must rely heavily on the capabilities and cooperation of countries in the region to seize trafficked goods and hold those responsible accountable. The United States and several other supplier countries have undertaken a variety of programs to encourage and assist the control efforts of these governments. Much of this effort is now conducted within the context of bilateral or multilateral arrangements. Nevertheless,

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[55] See Iraq's Submission to the 1540 Committee dated February 4, 2014 at http://www.un.org/en/sc/1540/pdf/Iraq%20Letter%20re%20effective%20practices%202014.pdf

[56] See Nikitin, Mary Beth, The Evolution of Cooperative Threat Reduction: Issues for Congress CRS Report , June 13, 2014, p 9 at https://www.fas.org/sgp/crs/nuke/R43143.pdf

[57] See Mills, Pamela, "Preventing Chemical Warfare and Terrorism: The CWC and the Middle East," in Disarmament Diplomacy Issue No. 65, July - August 2002 at http://www.acronym.org.uk/dd/dd65/65op3.htm

[58] The MENA region is home to 7 of the top 50 maritime container terminals, with Dubai serving as one of the world's busiest transit maritime ports.

[59] See See NTI, "Middle East and North Africa 1540 Reporting Regional Overview" at http://www.nti.org/analysis/reports/mid.dle-east-and-north-africa-1540-reporting/

progress has been slow. The basic assessment is that, perhaps with the exception of the UAE and Jordan, there still remains little evidence that effective control measures are in place.[60]

The U.S. Senate Armed Services Committee Report accompanying the National Defense Authorization Act for Fiscal Year 2014 called special attention to the severe WMD proliferation risks still existing in the MENA region, noting that:

"The Middle East and North Africa (MENA) region represents a new generation of immediate and growing WMD-related proliferation challenges. Factors lending urgency to regional threat dynamics in this region include Syria's chemical weapons program, Iran's nuclear program and the influence of terrorist groups operating in the region. The Committee believes that it is critical that the United States develop a comprehensive, effective and efficient cooperative threat reduction (CTR) and nonproliferation strategy to address the challenge of WMD- related proliferation in the MENA region."[61]

While such a strategy has been submitted to Congress, it has not been made public. However, one can surmise that the steps posited by such a plan would include the broader application of the measures contained in UN Security Council Resolution 1540 and the increased provision of legal and technical assistance to the governments concerned, particularly within the context of existing counter-terrorism cooperation with these countries. It should also include the adoption of a more intense "carrot and stick" approach in the approving of dual use equipment and military assistance and sales to these countries; and the threat of more stringent application of Sections 311, 312, and 313 of the USA Patriot Act[62] to scrutinize their international financial transactions to evaluate their susceptibility to money laundering, terrorism financing, or other illicit financial purposes. In addition, it should build leverage on the increased desire by several countries in the region to acquire nuclear power plants.[63]

The first step in this process is to work with MENA countries to put in place improved control legislation and mechanisms. UN Security Council Resolution 1540 (2004), and the Chapter VII obligations[64] the resolution imposes on all countries,[65] could, if fortified, provide new

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[60] See NTI, "Middle East and North Africa 1540 Reporting Regional Overview" at http://www.nti.org/analysis/reports/mid.dle-east-and-north-africa-1540-reporting/

[61] Senate Armed Services Committee Report 113-44, June 20, 2013, p 201 at https://www.gpo.gov/fdsys/pkg/CRPT-113srpt44/pdf/CRPT-113srpt44.pdf

[62] The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act, Public Law 107-56.

[63] As noted above, the United Arab Emirates, Saudi Arabia, Jordan and Egypt all have contracted for nuclear power reactors to be built in their countries over the next decade.

[64] Resolutions adopted by the Security Council acting under Chapter VII of the Charter that **direct or decide,** that measures are to be taken, as opposed to "recommends" or "calls upon member countries," are considered binding on all states pursuant to Articles 39, 41 and 25 of the Charter.

[65] UNSCR 1540 paragraph 3 directs that "all States shall …establish domestic controls to prevent the proliferation of nuclear, chemical, or biological weapons and their means of delivery, including by establishing appropriate controls over related materials and to this end shall… (d) Establish, develop, review and maintain appropriate effective national export and trans-shipment controls over such items, including appropriate laws and regulations to control export, transit, trans-shipment and re-export and controls on providing funds and services related to such export and trans-shipment such as financing, and transporting that would contribute to proliferation, as well as establishing end-user controls; and establishing and enforcing appropriate criminal or civil penalties for violations of such export control laws and regulations."

opportunities to press for expanded and strengthened controls throughout the MENA region. Unfortunately, the resolution, as currently administered by the 1540 Committee, lacks any real teeth. The 1540 Committee continues to lack a mandate that would permit it to establish norms, assess compliance, or impose sanctions. Its reports to the Security Council avoid evaluation. Rather, it provides data only in aggregate terms. No mention is made of individual states or even regions. Unlike the UN Security Council's Iran, DPRK, and Al Qaeda and Taliban Committees, the 1540 Committee lacks any power to identify and designate those individuals and entities engaged in illicit WMD proliferation activities.

Many of the MENA countries, as is true with many other countries around the world, appear to comply with the 1540 resolution merely by submitting written reports to the 1540 Committee. These reports vary considerably in terms of their quality and comprehensiveness. Many lack any real substance and contain little more than statements of support for the objectives of the UN resolution and/or intentions to enact new control measures.[66] And, even where specific legislation is noted, the 1540 Committee has provided no real feedback on the quality of the measures adopted.[67]

The United States should use the opportunity of the 1540 Committee's second "comprehensive review," scheduled to be held no later than 30 November 2016, to press for 1540 Committee reforms aimed at correcting these deficiencies.

In assessing compliance with the various provisions of resolution 1540, the 1540 Committee and its experts should take a lesson from the practices of FATF which regularly undertakes so-called "mutual evaluations" of a country's compliance with FATF anti money laundering and counter-terrorism financing norms. These mutual evaluations, while voluntary, engage both FATF and local country experts in an in-depth evaluation of local laws, regulations and procedures. It is precisely this type of evaluation that the US and the other members of the Security Council should seek from the 1540 Committee and its experts.

The United States should press for an expanded mandate for the 1540 Committee to maintain and publish a list of entities and individuals known to engage in illicit proliferation transactions.

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[66] "Middle Eastern countries have had a poor start when it comes to the implementation of UNSC Resolution 1540. Their general reporting behavior is significantly behind that of countries in other regions." See Lars Olberg, "The Implementation of Resolution 1540 in the Middle East," Sandia Report SAND2007-7938, Sandia National Laboratories, February 2008, p. 28.

[67] "In June 2005, the congressionally mandated bipartisan Task Force on the United Nations concluded that the UN Security Council, in adopting Resolution 1540, 'created a potentially powerful tool for countering the non-state proliferation threat'….In particular, the task force wondered what standards the 1540 Committee, as it is known, would use to evaluate how well states were implementing the resolution; how much the committee would press states to comply with the legally binding obligations of the resolution; and whether the work could be done with only seven committee experts. By 2012, the answers to those questions are none, very little, and no, respectively. The committee does not evaluate states; it uses the lightest of touches to encourage them to comply with the resolution, and it has far too few resources to do the work envisioned by the task force." See Cupitt, Richard, "Nearly at the Brink: The Tasks and Capacity of the 1540 Committee," Arms Control Association, August 30, 2012 at https://www.armscontrol.org/act/2012_09/Nearly-at-the-Brink-The-Tasks-and-Capacity-Of-the-1540-Committee

The United States should also press for an expanded mandate directing the 1540 Committee and its Group of Experts to undertake a series of "mutual evaluations" of state compliance with Resolution 1540 norms.

There are also a number of programs and initiatives underway under the auspices of the 1540 Committee and/or bilateral arrangements to assist MENA countries in strengthening their control and monitoring of WMD-related items. These include programs supporting the drafting of new laws and regulations, as well as training sessions for government officials charged with administering the export control laws or protecting the borders. There has also been the provision of control equipment and technology. Yet, it is still proving difficult to motivate local officials to provide the impetus, authority and priority necessary to make things work. Even when the political decisions have been made by senior government officials, the mid-level and junior-level government officials charged with carrying out such measures are simply unwilling to change the way they do things. In many cases, this is because they lack the incentives and the resources to administer such controls effectively.

It may prove more effective to adopt a new cooperative assistance approach teaming experienced export control and customs officials from donor countries working side by side with local officials.[68]

The United States should also consider joining with other NSG countries to establish a program of incentives for local officials to engage in effective implementation of WMD-related export and border controls. This should include, inter alia, the provision of financial reward incentives, and the provision of state-of-the-art resources to carry out their functions.

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Many of the programs sponsored by the 1540 committee involve inter-governmental workshops and set-piece presentations on best practices. Unfortunately, and as many of the participants already know, most of these sessions provide little return in terms of improved control implementation.

A much better return for such resources would be achieved by targeting workshops to the private sector entities actually engaged in doing business involving controlled items, materials and technology. Such entities should be apprised directly of the consequences attached to engaging in illicit financing or trade with regard to such items, including possible designation cutting them off from suppliers and other financial and other penalties. Consideration should also be given to sponsoring business to business workshops which engage supplier country business entities in the exchange.

[68] Perhaps the best model of this approach to-date was the cooperative international and local customs and border control teams developed to administer United Nations sanctions on Serbia during the Bosnia War. Former western licensing, customs, and border control officials could be recruited and financed by donor organizations or countries who would work along side local licensing, customs and border authorities to advise concerning proliferation related concerns. This would enhance local capability and provide a degree of transparency to such activities. The author believes that such assistance would be more effective than providing training or best practices conferences alone.

MENA COUNTRY EVALUATIONS

This section provides more specific evaluation of the prevailing situation in certain MENA countries targeted for possible U.S. non-proliferation-related assistance.

The Cooperation Council for the Arab States of the Gulf (GCC)

The GCC consists of six independent Arab states – Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates – that cooperate together on economic and political issues of joint concern. The GCC also operates as a customs union. There are no tariffs between the six states and citizens can move freely across borders. While goods come in at the same tariffs and can move freely between the six countries, common export controls are lacking. This poses additional risks for diversion of sensitive items.

The GCC countries individually also have mixed records when it comes to the establishment of effective export, transit and border controls, and with respect to identifying, preventing or prosecuting illicit financial transactions.

Both the United Arab Emirates and Qatar have served as important transactional and transit points for the diversion of sensitive nuclear and dual use technology -- including to Iran, Libya, India, Pakistan and North Korea. Saudi Arabia, on the other hand, is challenged by its loosely regulated financial and business sectors, and a latent public sympathy for certain radical Sunni groups.

All of the GCC countries are parties to the NPT, the Chemical Weapons Convention, the Biological and Toxic Weapons Convention, the Convention for the Physical Protection of Nuclear Material, and, except for Oman, the International Convention on the Suppression of Acts of Nuclear Terrorism (NTC).[69] All six countries are also participants in NATO's Istanbul Cooperation Initiative (ICI),[70] and the U.S.-sponsored Proliferation Security Initiative.[71]

So far, the United Arab Emirates (UAE) and Saudi Arabia have the most advanced nuclear power production plans, with Abu Dhabi having begun construction of the Barakah-1 reactor in 2012 with plans to follow with three further reactors by 2020. Saudi Arabia has posited plans to become the Middle East's largest nuclear power producer over the next 20 years. In addition, all six GCC countries have active chemical and petro-chemical industries with the potential to produce chemical weapon precursors.

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[69] Article 7 of the NTC requires that States Parties take all practical measures to "prohibit illegal activities of persons, groups and organizations that encourage, instigate, organize, **knowingly finance or knowingly provide technical assistance or information** or engage in the perpetration of acts" of nuclear terrorism. (emphasis added)

[70] The Istanbul Cooperation Initiative, launched in June 2004, provides assistance – including to Bahrain, Kuwait, Qatar and the UAE -- in areas such as border security, counter-terrorism and counter-WMD proliferation. See The NATO ICI Fact Sheet, April 2014 at http://www.nato.int/nato_static/assets/pdf/pdf_2014_04/20140331_140401-factsheet-ICI_en.pdf

[71] The Proliferation Security Initiative (PSI) is a multinational response to the threat of WMD proliferation. It serves to coordinate participating states' efforts, consistent with UNSCR 1540 and other international measures to stop proliferation related trade in WMDs, related materials and delivery systems. See http://www.psi-online.info/Vertretung/psi/en/01-about-psi/0-about-us.html

The GCC countries should be encouraged to align their export, transit, and border and financial controls to assure against diversions. Their export and border control authorities, and their financial regulators, should be encouraged to cooperate more closely and to share information particularly with regard to suspect transactions.

The United Arab Emirates

The United Arab Emirates (UAE) had a long history of serving as one of the most active transit points for illicit nuclear and other WMD –related transactions. The UAE, for example, had served as the principal transfer hub for A.Q. Khan's acquisition and shipment of nuclear components to Iran, North Korea and Libya.[72]

The UAE has one of the most diversified economies in the Gulf Cooperation Council, with Dubai emerging as a major international aviation and maritime transshipment hub. The Dubai port of Jebel Ali is by far the busiest port in the Middle East. Over its history, and perhaps until very recently, UAE ports have served as major transit points for Iran's and other Middle Eastern countries' illicit acquisition of sensitive nuclear and dual use items.[73]

Under strong pressure and threatened sanctions from the United States,[74] the UAE began, in September 2007, to strengthen its export and transit controls. The UAE Federal Council passed the emirate's first ever export control statute and created a control body known as the National Commission for Commodities Subject to Import, Export, and Re-export Controls.[75] The UAE also shut down 40 foreign and UAE firms allegedly involved in dual use exports to Iran and other countries. In September 2012, the UAE (and Bahrain) acted to impound shipments to Iran of items that Iran purportedly sought for use in its nuclear program. The United States has also stationed two export control officers at its embassy in Abu Dhabi to cooperate with local officials, to conduct end-use and post-shipment checks, and to investigate possible violations.

This crackdown may be due, in part, to the UAE's growing concerns over the threats posed by Iran and the spread of terrorism throughout the region, as well as its expanding defense relationship with the United States. Also, as part of its negotiations with the United States for a

[72] See Katzman, Kenneth, CRS Report "The United Arab Emirates (UAE): Issues for U.S. Policy, Sept 14, 2015 at https://www.fas.org/sgp/crs/mid.east/RS21852.pdf

[73] See "Nukes 'R' Us – Twenty Five Years of Transshipments Through the United Arab Emirates, "Wisconsin Project on Nuclear Arms Control, June 2009 at http://www.wisconsinproject.org/countries/dubai/uaedangerousretransfers-060209.html

[74] "In February 2007 the Administration threatened to create a new category of countries called "Destinations of Diversion Control"—countries for which there is determined to be re-exportation of controlled technology to Iran and other countries forbidden from receiving such U.S. goods. A June 2010 Iran sanctions law, the Comprehensive Iran Sanctions, Accountability, and Divestment Act (CISADA, P.L. 111-195) formally authorizes countries to be designated as Destinations of Diversion Control and subjected to sanctions. That law appear[ed to be] directed against the UAE, but it has to date avoided that designation because of some of its actions to strengthen its export control regime." See Katzman, Kenneth, CRS Report "The United Arab Emirates (UAE): Issues for U.S. Policy, Sept 14, 2015 at https://www.fas.org/sgp/crs/mid.east/RS21852.pdf

[75] Reportedly, the law's structure and control lists were modeled after the export control regime of Singapore. See Katzman, Kenneth, United Arab Emirates: Political Background and Export Control Issues. CRS Memorandum For Senate Homeland Security Committee, April 21, 2008

"123 Nuclear Cooperation Agreement"[76] allowing it to receive nuclear related equipment from the United States, the UAE reassured the United States that it would implement enhanced export and import control rules for nuclear and nuclear-related equipment and technology in strict accordance with the Nuclear Suppliers Group Guidelines for nuclear transfers.[77] Nevertheless, there are lingering doubts as to the extent UAE export control laws will actually be administered and enforced. [78]

The UAE has been a party to the NPT since 1995, concluded a safeguards agreement with the International Atomic Agency (IAEA) in 2003, and acceded to the IAEA Additional Protocol in 2010. The UAE has also committed to permanently renouncing the acquisition of uranium enrichment and plutonium reprocessing capabilities.[79] The UAE is also a signatory to the Proliferation Security Initiative (PSI) aimed at stopping shipments of weapons of mass destruction, their delivery systems and related materials worldwide and is now receiving help from the U.S. State Department's Export Control and Related Border Security Assistance program to improve its enforcement and licensing capabilities aimed at curbing the transshipment of illicit materials.[80]

The UAE is also a party to both the Chemical Weapons Convention and the Biological and Toxic Weapons Convention.[81] Recently, the UAE stated its intention to develop and expand its commercial activities in both the chemical and biological sectors. This includes maintaining a free-trade zone dedicated to biotechnology, with the intention of becoming the Middle East's regional biotechnology hub and a venue for international collaboration.[82] In addition, the Abu Dhabi Investment Council is working with two major chemical companies to establish "the largest and most integrated chemical industry complex in the world."[83] The danger here is that the UAE continues to lack the robust export controls, chemical safety, and chemical security standards necessary to assure against the diversion of sector-related material, equipment and technology.[84]

The United States should focus attention on, and provide technical support for, strengthening the UAE's capacity to provide chemical security standards necessary to assure against the diversion of sector-related material, equipment and technology.

Despite the pledged improvements in the UAE's export control program, the UAE remains deficient in the monitoring and prevention of money laundering and illicit financial transactions which could support proliferation-related diversions. The 2015 U.S. Department of State International Narcotics Control Strategy Report (INCSR) deemed the UAE a "Jurisdiction of

[76] Agreement for Cooperation Between the Government of the United States of America and the Government of the United Arab Emirates Concerning Peaceful Uses of Nuclear Energy which entered into force in December 2009.
[77] See Testimony of Ellen Tauscher, Under Secretary for Arms Control and International Security, before the House Foreign Affairs Committee, July 8, 2009 at http://www.state.gov/t/us/125782.htm
[78] id.
[79] See NTI Country Profiles, United Arab Emirates at http://www.nti.org/country-profiles/united-arab-emirates/
[80] id.
[81] See NTI Country Profiles, United Arab Emirates at http://www.nti.org/country-profiles/united-arab-emirates/
[82] id.
[83] id.
[84] id.

Primary Concern."[85] The most recent FATF evaluation of the UAE noted that while the UAE has recognized, and was responding to, the continuing challenges posed by increasingly well-resourced and well-organized transnational crime networks, "the extent to which its systems, processes, and legislation can keep pace with criminal exploitation of a financial sector experiencing exponential growth remains a challenge at both strategic and implementation levels."[86] Also problematic is the degree to which money launderers continue to be able to take advantage of bulk cash transactions, local hawaladars, and cash couriers.[87]

The United States should place a high priority on its assistance and support aimed at improving the UAE's ability to comply fully with FATF's AML/CTF and counter proliferation financial standards.

Qatar

Qatar has long been a party to the NPT, Chemical Weapons Convention, Biological and Toxic Weapons Convention and International Convention on the Suppression of Acts of Nuclear Terrorism (NTC). However, it has been slow to put in place specific export and transit control legislation.

Following the adoption of UNSC Resolution 1540, Qatar acted quickly to establish a National Arms Control Committee charged with proposing export control and related legislation, but there was little movement towards putting the laws and control institutions in place. In July 2013, Qatar reported to the UN General Assembly that it was acting to strengthen its 2007 chemical weapons control law,[88] and that it had prepared new laws related to the control and monitoring of nuclear and biological weapons. However, there is no indication that these laws have yet been adopted. Qatar did, however, in 2010 adopt laws to combat money-laundering and the financing of terrorism. These rules are ostensibly being enforced by a new National Committee on Combating Money Laundering and the Financing of Terrorism.[89]

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[85] "There are some indications that trade-based money laundering occurs in the UAE - including through commodities used as counter-valuation in hawala transactions or through trading companies - and that such activity might support sanctions evasion networks and terrorist groups in Afghanistan, Pakistan, and Somalia. Money laundering associated with terrorist and extremist groups includes both fund-raising and transferring funds. Bulk cash smuggling is also a significant problem." 2015 International Narcotics Control Strategy Report (INCSR) at http://www.state.gov/j/inl/rls/nrcrpt/2015/vol2/239111.htm

[86] "The UAE authorities have not undertaken a structured assessment of the vulnerability to, and risks of, money laundering and terrorist financing through the financial system in the country. Consequently, they do not apply a risk-based approach to the application of the preventive measures, and no sectors have been specifically exempted from the provisions under the AML/CFT legislation and regulations. In addition, the central bank regulations have not been structured so as to recognize the possibility of a risk-based approach to the implementation of the preventive measures at institutional level." See FATF-MENA Mutual Evaluation Report, Anti-Money Laundering and Combating the Financing of Terrorism, United Arab Emirates, 9 April 2008 at http://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20UAE%20full.pdf

[87] id.

[88] Law No. (16) or 2013 on Chemical Weapons at http://www.almeezan.qa/LawPage.aspx?id.=5151&language=en

[89] Law No. (4) of Year 2010 on Combating Money Laundering and Terrorism Financing at https://www.unodc.org/tldb/pdf/Qatar/QAT_AML_2004_EN.pdf

While FATF in its latest (2012) report found Qatar now largely compliant with core FATF recommendations and removed Qatar from its annual review list,[90] the report noted that "no judgments were passed with regard to the financing of terrorism….(T) the Secretariat could not fully judge the effectiveness with regard to the adequate implementation of preventive measures."[91] In March and October 2014, David Cohen, U.S. Treasury Under Secretary for Terrorism and Financial Intelligence, referred to Qatar as a "permissive" terrorist financing jurisdiction.[92]

Qatar is a listed participant in the Proliferation Security Initiative (PSI) and in March 2015, hosted the annual NATO Conference on Proliferation Challenges. PSI participants commit themselves to "undertake effective measures, either alone or in concert with other states, for interdicting the transfer or transport of WMD, their delivery systems, and related materials to and from states and non-state actors of proliferation concern."[93] However, little is known as to any steps Qatar has taken to act on this commitment.

While trade with Qatar in sensitive WMD-related precursors, materials and equipment by Western supplier countries continues to be closely monitored, the greatest risk posed appears to be Qatar's ambivalence with regard to local support for Hamas and other Jihad related groups. The U.S. government has refrained from designating Qatar for providing material support to terrorist organizations, but recent U.S. government statements allege that private Qatari citizens and individuals based in Qatar are providing support to several designated terrorist organizations including ISIL and the Taliban.[94]

Amongst the GCC partners, Qatar maintains the closest trading relations with Iran. And, since the promulgation of the JCPOA, Qatar has further broadened this relationship, giving rise to concerns on the part of some that Qatar may replace UAE as Iran's backdoor to obtaining illicit dual use equipment and technology.[95]

Under the reign of Qatar's new Emir, Tamim bin Hamad, the Emirate has increasingly become dependent on U.S. military assistance and force presence for its defense and security. A massive $11 billion U.S. – Qatar arms deal was announced in July 2014 including the sale of Patriot Missile Batteries, Apache Attack Helicopters and Javelin Anti-Tank Missiles.[96] Transactions such as these should serve to increase U.S. and international leverage on Qatar to crack down on any illicit trade with Iran and on those continuing to fund ISIL terrorist organizations.

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[90] FATF placed Qatar in a regular follow-up process pursuant to FATF's mutual evaluation procedures following its 2008 assessment that Qatar was non-compliant or only partially compliant with 37 core FATF recommendations.

[91] See FATF, Mutual Evaluation Report, Fourth Follow-up, Qatar, 28 April 2012 at http://www.menafatf.org/images/UploadFiles/4th_FYR_of_Qatar_Removal.pdf

[92] See Blanchard, Christopher, CRS Report "Qatar: Background and U.S. Relations at https://www.fas.org/sgp/crs/mid.east/RL31718.pdf

[93] Statement of PSI Interdiction Principles at http://www.state.gov/t/isn/c27726.htm

[94] Boghardt, Lori, "Qatar and ISIS Funding," Washington Institute, Aug 2014 at http://www.washingtoninstitute.org/policy-analysis/view/qatar-and-isis-funding-the-u.s.-approach

[95] See "Iran, Qatar Trade 'Posed to Grow'" Trade Arabia News Agency, July 30, 2015 at http://www.tradearabia.com/news/IND_287318.html

[96] See Blanchard, Christopher, CRS Report "Qatar: Background and U.S. Relations, p 6 at https://www.fas.org/sgp/crs/mid.east/RL31718.pdf

The United States should apply increased military assistance leverage to press Qatar to crack down on private sector financial support for terrorist groups, including ISIL, Al Qaeda, Hamas and Hezbollah.

Saudi Arabia

As noted above, Saudi Arabia is a party to the NPT, CWC, and BWC Conventions. While in the past Saudi Arabia had largely eschewed nuclear energy, this is evidently about to change. Saudi officials at the King Abdullah City for Atomic and Renewable Energy (KA CARE) have announced plans to develop as many as 16 nuclear power plants by 2040.[97] In early 2014, Saudi Arabia signed agreements with two French companies, Areva and EDF, to help develop nuclear expertise, including a nuclear safety training program at the National Institute of Technology in Jeddah. In May 2014, Finland agreed to train personnel and help establish a Saudi nuclear regulatory framework. In addition, in March 2015, an Argentine-Saudi state joint venture was established to develop suitable technology for the kingdom's nuclear energy program. Later that month, King Salman and South Korean President Park Geun-hye signed bilateral agreements on "mutual nuclear co-operation for peaceful uses." This included a memorandum of understanding on the construction of two small South Korean SMART reactors to power Saudi water desalination plants.[98] Former Saudi Director of General Intelligence Prince Turki al-Faisal also warned, in May 2015, that Saudi Arabia intended to match Iran's nuclear program, stating that: "Whatever the Iranians have, we will have too."[99] There has been speculation that in the wake of the Iran nuclear deal Saudi Arabia has begun to explore possible future Saudi – Pakistani nuclear cooperation.[100] This is consistent with earlier unconfirmed reports that Saudi Arabia played an important role in financing, and perhaps assisted in the acquisition of controlled dual use items in support of Pakistan's own nuclear weapons program.[101] However, there have been no published reports that Saudi Arabia is engaged in such conduct today.

Following the adoption of UN Security Council Resolution 1540, the Saudi government took a number of steps, at least on paper, to comply with the resolution's operative provisions. This included measures to strengthen the government's ability to "monitor the transport and smuggling of radioactive, nuclear and other hazardous materials across its borders (and) to combat the illegal trade in such materials.[102] Advanced radiological detection systems were also installed in Saudi ports nationwide.

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[97] Blanchard, Christopher, Saudi Arabia Background and U.S. Relations, CRS Report February 5, 2016 at http://www.fas.org/sgp/crs/mid.east/RL33533.pdf

[98] Sukin, Lauren, "In Saudi Arabia, Nuclear Energy For Nuclear Energy's Sake," 28 July 2015, at http://thebulletin.org/saudi-arabia-nuclear-energy-nuclear-energy%E2%80%99s-sake8570

[99] See Sanger, David., "Saudi Arabia Promises to Match Iran in Nuclear Capability" NY Times, May 13, 2015 at http://www.nytimes.com/2015/05/14/world/mid.dleeast/saudi-arabia-promises-to-match-iran-in-nuclear-capability.html?_r=0

[100] Heinonen, Olli, "Nuclear Kingdom: Saudi Arabia's Atomic Ambitions," Washington Institute, March 27, 2014 at http://www.washingtoninstitute.org/policy-analysis/view/nuclear-kingdom-saudi-arabias-atomic-ambitions

[101] id.

[102] See Note verbale dated 24 March 2011 from the Permanent Mission of Saudi Arabia to the United Nations addressed to the Chair of the Committee S/AC.44/2007/29 at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/631/35/PDF/N1163135.pdf?OpenElement

While not yet in conformity with Resolution 1540 norms, the Saudi government has been particularly active in lending its support to the work of the 1540 Committee. This has included sponsoring several workshops and expert gatherings to promote compliance with the resolution's norms.[103]

The Saudi government has informed the 1540 Committee that it has assigned responsibility to the Ministry of the Interior, liaising with the Ministry of Foreign Affairs, to regulate and license material, equipment and technology covered by the various counter-proliferation conventions. However, there are no concrete provisions yet in place describing the actual items to be controlled.[104]

Concerns also remain with Saudi Arabia's lax financial transaction controls. This is particularly problematic given well-established sympathies many Saudi nationals hold for various radical Sunni groups.[105] According to the June 2015 State Department Country Reports on Terrorism:

"Bulk cash smuggling and money transfers from individual donors and Saudi-based charities have reportedly been a significant source of financing for extremist and terrorist groups over the past 25 years. Despite serious and effective efforts to counter the funding of terrorism originating within the Kingdom, a small number of individuals and entities in Saudi Arabia continue to serve as sources of financial support for Sunni-based extremist groups."[106]

Jordan

Jordan is often cited as a model for countries moving to implement the provisions of UN Security Council Resolution 1540. In its October 22, 2014 submission to the 1540 Committee the Jordanian government indicated that it had become a party to "numerous relevant international and regional instruments," "worked to implement all of (resolution 1540's) provisions," and that "a range of pertinent laws have been enacted, and effective procedures have been introduced at the national level in order to prevent the proliferation of nuclear, chemical and biological weapons and their means of delivery."[107]

Jordan is not known to have engaged in any nuclear, chemical or biological weapons development program, and is not known to possess any of the precursors for such programs.[108]

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[103] The Saudi government has also contributed $.5 million to support the Committee's work. See NTI, "Middle East and North Africa 1540 Reporting Regional Overview," at http://www.nti.org/analysis/reports/mid.dle-east-and-north-africa-1540-reporting/

[104] See Saudi Export Regulations at http://www.us-sabc.org/i4a/pages/index.cfm?pageid.=3318%20 which declares "The Saudi Arabian Government places great importance on the promotion of national exports, so very few export controls have been imposed."

[105] In May 2014, the Saudi Interior Ministry estimated that at least 1,200 Saudis had travelled to fight in Syria, and some independent estimates suggest the figure may be more than 2,500 Saudis. See Richard Barrett, *Foreign Fighters in Syria*, The Soufan Group, June 2014 at http://soufangroup.com/foreign-fighters-in-syria/

[106] See 2015 International Narcotics Control Strategy Report (INCSR) at http://www.state.gov/j/inl/rls/nrcrpt/2015/supplemental/239294.htm

[107] See National Report of Jordan to the 1540 Committee dated October 22, 2014 at http://www.un.org/en/sc/1540/pdf/JordanReport22Oct2014.pdf

[108] See NTI Country Profile: Jordan, July 2015 at http://www.nti.org/learn/countries/jordan/

However, Jordan has expressed aspirations to develop peaceful nuclear and uranium enrichment programs. It also has a nascent bio-chemical industry.[109]

In January 2007, King Abdullah II announced Jordan's intention to develop a civilian nuclear power program, and in 2009 an agreement was reached with South Korea to build a 5MW research and training reactor at the Jordan University of Science and Technology. The reactor is expected to be operational in June 2016. A full power reactor is also contemplated by 2030.

Jordan has also concluded nuclear cooperation agreements with Argentina, Canada, China, France, Italy, Japan, Romania, Russia, Spain, South Korea, Turkey, and the United Kingdom. However, negotiations on a possible 123 agreement with the United States for nuclear cooperation were put on hold due to "regional instability."[110] A possible stumbling block is the fact that Jordan wishes to keep open the option of one day engaging in uranium mining and enrichment to supply regional nuclear energy development.[111] Jordan is believed to have approximately 2% of the world's uranium-ore deposits and has already signed an exploration agreement with the French company, AREVA, to determine if these deposits are "mineable." [112]

Despite the strides that Jordan has made in tightening its export control laws and administration, some shortcomings remain. For example, Jordan's strategic trade control system still does not explicitly regulate transshipment, brokering, and financing of proliferation-sensitive materials and activities. In addition, while Jordanian law prescribes criminal penalties for the transport of WMD-related materials "in the execution of terrorist acts," the penal code does not impose such penalties for more general offenses involving the diversion of dual-use items.[113]

Jordan's 235-mile porous border with Syria also poses serious concerns of the potential diversion of sensitive nuclear and chemical-related items and that such items could fall into the hands of the Syrian government or of terrorist organizations operating in Syria. The U.S. has invested heavily in supporting Jordan's border control and counter-terrorism efforts. In April 2013, the U.S. Defense Threat Reduction Agency (DTRA) awarded Raytheon a border security contract worth $35.9 million to establish a surveillance system and provide training along the Jordanian border. Additionally, Jordan has asked the U.S. to supply surveillance aircraft and training for Jordanian Special Operations forces to defend against chemical weapons.[114]

The United States should re-engage Jordan on concluding a 123 Agreement as a pre-condition to realizing its nuclear ambitions. This agreement should include provisions postponing possible uranium enrichment in Jordan until such time as such activity is commercially viable and subject to strict limitations and oversights.

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[109] id.
[110] See Kerr, Paul, Nuclear Energy Cooperation with Foreign Countries: Issues for Congress, CRS Report, December 2014, p3 at https://www.fas.org/sgp/crs/nuke/R41910.pdf
[111] See Schenker, David., "The Middle East's Next Nuclear Power?," Politico Magazine, January 28, 2015, at http://www.politico.com/magazine/story/2015/01/jordan-nuclear-power-114712
[112] See "Areva granted uranium mining rights in Jordan," World Nuclear News, February 22, 2010 at http://www.world-nuclear-news.org/ENF-Areva_granted_uranium_mining_rights_in_Jordan-2202104.html
[113] See NTI Country Profile Jordan at http://www.nti.org/learn/countries/jordan/
[114] id.

Iraq

Iraq carries a harsh WMD legacy dating back to its use of chemical weapons in the Iraq-Iran war and its clandestine nuclear weapons program. Its nuclear weapons program and most of its chemical weapons were destroyed or degraded during the first Gulf War. Post-Saddam governments have worked assiduously with the United States and others to eliminate chemical weapons and put in place measures to keep these items out of the hands of ISIL and other terrorist organizations. Nevertheless, ISIL is believed to have captured and used a portion of the pre-war chemical weapons.[115] This remains a serious challenge for the current Iraqi government.

Iraq has made a number of recent efforts to improve its lax controls over illicit trade and financial transactions that may be supporting WMD-related proliferation and diversions. Iraq is now a party to most of the international counter-proliferation conventions including the NPT, CWC and BWC. It is also a party to the International Convention on the Suppression of Acts of Nuclear Terrorism (NTC) and the Convention for the Physical Protection of Nuclear Material (CPPNM). Iraq has also signed an "Additional Protocol" with the IAEA.[116] But, while the current government has adopted a broad range of new strategic and WMD-related control measures it continues to rely heavily on international assistance to implement these measures. Despite these efforts there is still considerable leakage into areas controlled by ISIL and across the border into Iran.[117]

Iraq admits that it lacks the capability on its own to control the movement of sensitive contraband or to comply fully with Security Council Resolution 1540. It continues to seek international assistance in almost all aspects of its licensing and customs border control activities,[118] and it has asked for help in updating and maintaining its national control list for dual-use items. Both the United States and European Union have responded to some of these requests,[119] but much still remains to be done.

Another area of structural weakness is Iraq's loose control over domestic banking and financial institutions. Iraq was deemed a Jurisdiction of Primary Concern by the US Department of State 2015 International Narcotics Control Strategy Report (INCSR).[120] The November 2012 FATF mutual evaluation of Iraq also noted serious deficiencies in Iraq's banking regulations and found it compliant or partially compliant with only six of FATF's 40+9 recommendations.[121]

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[115] Rudischhauser, Wolfgang, "Could ISIL Go Nuclear?," NATO Review Magazine, 2015 at http://www.nato.int/docu/Review/2015/ISIL/ISIL-Nuclear-Chemical-Threat-Iraq-Syria/EN/index.htm

[116] Iraq Ratifies Additional Protocol, IAEA Press Release, October 24, 2012 at https://www.iaea.org/newscenter/news/iraq-ratifies-additional-protocol

[117] Rudischhauser, Wolfgang, "Could ISIL Go Nuclear?," NATO Review Magazine, 2015

[118] This includes specific requests for border control equipment, container and cargo inspection equipment, radioactive materials detectors, and chemical testing and investigation equipment.

[119] See Iraq's Submission to the 1540 Committee dated February 4, 2014 at http://www.un.org/en/sc/1540/pdf/Iraq%20Letter%20re%20effective%20practices%202014.pdf

[120] The 2015 INCSR report on Iraq can be seen at http://www.state.gov/j/inl/rls/nrcrpt/2015/vol2/239082.htm

[121] MENA/FATF Mutual Evaluation Report, Iraq, 28 November 2012 at http://www.menafatf.org/images/UploadFiles/Final_Iraq_MER_En_31_12.pdf

Iraq adopted a new anti-money laundering/terrorism financing law in 2015 and has pledged to work to address other deficiencies. However, in a February 19, 2016 statement[122]FATF noted that several strategic deficiencies remained and called on Iraq to take further steps to: (1) adequately penalize money laundering and terrorist financing; (2) establish and implement an adequate legal framework and appropriate procedures for identifying and freezing terrorist assets; (3) ensure that all financial institutions are subject to adequate customer due diligence requirements; (4) ensure that all financial institutions are subject to adequate suspicious transaction reporting requirements; (5) ensure a fully operational and effectively functioning financial intelligence unit; and (6) establish and implement an adequate AML/CFT supervisory and oversight program for all financial sectors. Iraq will also need serious help in making these improvements.

The United States should continue to lend its own, and international support, to Iraq's efforts to establish and administer effective domestic and export controls and financial regulations to protect against the diversion of WMD sensitive material, equipment and technology.

Lebanon

Lebanon's strategic location, long-brewing internal conflicts, and weak legal authorities and institutions have drawn international attention to the risks that Lebanon poses as a key transit point for the diversion of weapons of mass destruction-related items to Hezbollah, ISIL and other terrorist organizations operating in the region. Reports surfaced in 2009 that Hezbollah may have stockpiled chemical weapons coming from Syria in southern Lebanon.[123] While these reports remain unconfirmed, they serve to highlight the risks involved, and the Lebanese government's lack of control over large parts of the country.

Lebanon became a party to the Chemical Weapons Convention in November 2008.[124] As a State Party, Lebanon can obtain assistance from the CWC's Organization for the Prevention of Chemical Weapons (OPCW) in the drafting and implementation of laws banning chemical weapons on its territory. In addition, the OPCW provides support in the practical implementation of the Convention's stipulations, in particular, establishing an effective national authority to facilitate annual declarations and OPCW inspections, as well as to monitor chemical transfers and to maintain relevant chemical transfer restrictions. States Parties also receive training and may draw upon the OPCW's expertise to enhance their national civil protection in the event of a chemical weapons attack or the threat of such an attack.[125]

Lebanon has also become a party to the Nuclear Non-Proliferation and Biological Weapons Conventions.

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[122] See FATF, Improving Global AML/CFT Compliance: on-going process – 19 February 2016 at http://www.fatf-gafi.org/publications/high-riskandnon-cooperativejurisdictions/documents/fatf-compliance-february-2016.html#iraq

[123] See Blanford, Nicholar, "Does Hezbollah Have Chemical Weapons?" The Daily Star, December 14, 2012 at http://www.lebanonwire.com/1212MLN/12121407DS.asp

[124] See Lebanon Joins the Chemical Weapons Convention, OPCW Press Release, 28 November 2008 at https://www.opcw.org/news/article/lebanon-joins-the-chemical-weapons-convention/

[125] See OPCW homepage at https://www.opcw.org/

In September 2015, the U.S. Congress approved a $150 million border security assistance program for the Lebanese army to counter Hezbollah and off-set an increased ISIL threat.[126] The United States and the European Union have also provided radiation detection equipment for installation at the port of Beirut and along Lebanon's border with Syria. A joint force has also been established with German and Italian support to monitor and control the northern borders of Lebanon to combat illicit trafficking in nuclear, biological, and chemical weapons.[127]

In its reports to the 1540 Committee, the government of Lebanon indicated strong support for the measures contained in the 1540 resolution. It indicated that its territory was WMD-weapons-free and stated also that "the requisite legislation is in place, together with strict regulations and deterrents, for the monitoring and control of all suspect operations and for the monitoring, arrest and prosecution of those who finance such operations."[128] Nevertheless, it appears that Lebanon continues to lack the capability and resources to actually carry out these measures effectively.[129]

Concerns also remain that the government of Lebanon lacks firm control over the financial institutions operating on its territory and that Lebanese institutions remain vulnerable to financing transactions involving the illicit acquisition of WMD related items and precursors.

Lebanon continues to be designated as a Jurisdiction of Primary Concern by the US Department of State 2015 International Narcotics Control Strategy Report (INCSR).[130] That report indicates that Lebanese financial institutions are being used to launder proceeds from foreign criminal activity and organized crime, and from Hezbollah, and to support illicit black market operations. Lebanese exchange houses are also used to facilitate money laundering and terrorism financing.[131]

The United States should encourage international assistance and support to Lebanon directed at strengthening its export and border controls.

The United States should continue to press Lebanon to strengthen its regulation and oversight over financial institutions and exchange houses, increase its investigation and prosecution of violations of financial regulation violations, and strengthen the penalties attached to such violations.

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[126] Pecquet, Julian, "Lebanon Reaps Windfall From Congress, " US News Online Magazine, October 1, 2015, http://www.usnews.com/news/articles/2015/10/01/lebanon-reaps-windfall-from-congress

[127] See Lebanon Submission to the 1540 Committee dated 11 September 2007 at http://www.un.org/en/sc/1540/national-implementation/pdf/LebanonReport11Dec2007.pdf

[128] See Lebanon Submission to the 1540 Committee dated 19 June 2006 at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N06/406/23/PDF/N0640623.pdf?OpenElement

[129] "The Lebanese government does not exercise complete control over all regions in the country or its borders with Syria and Israel. Hezbollah militias controlled access to parts of the country, limiting access by Lebanon's security services, including the police and army, which allowed terrorists to operate in these areas with relative impunity…. The primary concern regarding weapons of mass destruction is that Lebanon's porous borders will make the country vulnerable for use as a transit and transshipment hub for proliferation-sensitive transfers. The conflict in Syria increases the risk of illicit transfers of items of proliferation concern across the Lebanese border." See State Department Country Reports on Terrorism, Chapter V Safe-Havens, 2013 at http://www.state.gov/j/ct/rls/crt/2013/224828.htm

[130] The 2015 INCSR report on Lebanon can be seen at http://www.state.gov/j/inl/rls/nrcrpt/2015/vol2/239090.htm

[131] id.

Yemen

Yemen is a country in crisis. Intense fighting between Houthi rebels and government forces has brought a halt to almost all regular government functions. At the same time, Al Qaeda (AQAP) has taken control of large swaths of territory in the central provinces of Al Bayda and Hadhramaut.[132] Under such circumstances, it is highly unlikely that any meaningful action can be taken internally to strengthen protections against the diversion of weapons of mass destruction and related material, equipment and technology. Rather, it has become imperative that external actions be strengthened to halt the flow of sensitive items to Yemen. Yemen's implementation of 1540-related controls is also in suspension.

If, and when, stability is re-established in Yemen, special efforts will be necessary to strengthen the central government's resolve and capacity to establish and implement the necessary strategic controls.

Yemen is a party to several non-proliferation conventions including the Nuclear Nonproliferation Treaty (NPT), the Biological and Toxin Weapons Convention (BTWC), the Chemical Weapons Convention (CWC), the Convention for the Physical Protection of Nuclear Material (CPPNM), the Convention for the Suppression of Terrorism Financing (TFC), and the International Convention on the Suppression of Acts of Nuclear Terrorism (NTC).[133] Once stability is restored, Yemen should turn to the various institutions and secretariats to take advantage of the assistance they offer in support of nonproliferation laws, measures, equipment and resources.

Yemen will also have to start from scratch with regard to its implementation of Resolution 1540. Its only national report to the 1540 Committee was submitted on December 29, 2004 and states: "The Permanent Mission of the Republic of Yemen to the United Nations presents its compliments to the Chairman of the Committee and, in reference to the Committee's letter dated 9 December 2004, has the honour to inform the Committee that the Republic of Yemen does not possess nuclear, biological or chemical weapons."[134]

CONCLUDING OBSERVATIONS

International obligations are a powerful tool for encouraging host country governments to upgrade their nonproliferation laws and policies. However, many of the most vulnerable countries lack the wherewithal and/or political will to implement effectively or carry out the functions necessary to prevent their territory from serving as transit points for items of proliferation concern. One must, therefore, go beyond the conventions, resolutions and obligations to assist and hold accountable, those states that promote, or have failed to prevent such activities.

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[132] See Zimmerman, Katherine, "AQAP: A Resurgent Threat," Counter-Terrorism Center, West Point, September 11, 2015, at https://www.ctc.usma.edu/posts/aqap-a-resurgent-threat

[133] NTI Analysis: Yemen 1540 Reporting at http://www.nti.org/analysis/articles/yemen-1540-reporting/

[134] See Yemen Submission to 1540 Committee dated 29 December 2004 at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/215/98/PDF/N0521598.pdf?OpenElement

The countries cited above offer among the most serious challenges and opportunities for strengthening controls on such sensitive nuclear, chemical and biological weapons related items. These countries deserve special attention - not only because of their history and proximity to Iran which used them so effectively in the past to build its own covert nuclear weapons program, but also because of the risks posed for the future. Their strategic location makes them an obvious turntable for transit trade for the region and the world, and their economies rely heavily on these trading activities. They have touted lax controls and easy transit procedures as incentives for others to use their ports, terminals and free-trade areas for such commerce.

We must now draw upon their self-interest as much as possible to mitigate these factors by drawing attention to the security risks posed by such conduct. This includes the dangers posed of ISIL acquiring access to nuclear and other weapons of mass destruction and more broadly of the spread of WMD so close to home. We must also convince these countries that such lax controls will stand in the way of their own acquisition of key items and technology to modernize their own energy and industrial base.

As demonstrated above, many of the applicable international conventions and U.N. Security Council resolutions provide tools that can be used by these countries to obtain assistance for strengthening their control programs. But, the burden of actually implementing these tools will continue to reside also with the countries that are the original providers of sensitive items and who remain most concerned as to where such items remain and how they are used. This means that the burden of strengthening compliance with international non-proliferation control norms must be shared. The supplier countries must be willing to work with the MENA region countries to provide the knowledge, resources, and incentives to protect sensitive commodities. They must also be willing to hold these transit countries accountable for their failures by cutting them off from such trade.

The UN Security Council has proved weak in overseeing the implementation of the various international conventions and its own 1540 non-proliferation resolution. It has rarely lived up to its potential to act as the ultimate authority to identify and attach consequences to serious acts of non compliance with international counter-proliferation norms. This has led the United States and other like-minded governments to develop alternative bilateral and multi-lateral arrangements to deal with proliferation related non-compliance, and with the illicit trade in proliferation-related controlled items. But, these measures must also be strengthened and countries of high proliferation risks should be made aware that such activities will incur serious consequences. The recommendations included in this paper are aimed at both assisting these countries and providing increased oversight and transparency to their proliferation control activities.

Annex II:

International Law Challenges to WMD Disposition Options

Legal Options to WMD Disposition in a Conflicting Law and Policy Environment

By

Guy B. Roberts

28 April 2016

Abstract

International law restrictions have posed, or could pose, significant hurdles to initiatives by the international community to dispose of newly discovered clandestine weapons of mass destruction (WMD) stocks and programs. Treaties and WMD control regimes have established global norms against various aspects of WMD proliferation. However, the legal and politically binding requirements and obligations of these agreements may pose constraints and restraints on effectively pursuing nonproliferation objectives in situations that weren't contemplated when drafted. Specifically, transfers of WMD to third parties for elimination or secure storage are prohibited by the three major treaties banning WMD proliferation (the Nuclear Nonproliferation Treaty, the Chemical Weapons Convention, and the Biological Weapons Convention). In cases of failed and failing states which no longer are able to effectively protect or control WMD stocks or storage sites, operations to achieve retrieval and disposition, with or without the agreement of the possessor state, are fully consistent with the objectives and spirit of the international legal norms against proliferation. There are a range of options available to render such operations consistent with the letter of international law, and vice versa. These include first and foremost actions under a UN Security Council resolution directing the transfer of WMD for these purposes where, per Article 103 of the UN Charter, the obligations of the parties in complying with a UN Chapter VII Security Council resolution prevails over their obligations under any other international agreement.

In the absence of UN actions, states could also undertake disposition actions supported or authorized by the treaty implementing organization; determine that a temporary suspension of legal obligations has occurred due to material breach, impossibility, force majeure or a fundamental change of circumstances, and, in imminent circumstances where WMD may fall into the hands of terrorist groups, deploy the use of force to eliminate the WMD. The cases examined here (primarily the disposition of Syria's chemical weapon stocks and program) illustrate the importance of modifying existing and future nonproliferation agreements to allow for any disposition or elimination actions fully consistent with our non-proliferation objectives and the spirit of international legal norms against proliferation.

I. Conflicting Legal Obligations Hindering Non-Proliferation Disposition

Recent events have posed a surprising challenge to treaties banning the proliferation of weapons of mass destruction (WMD). Disposition or retrieval initiatives and operations seek to secure or destroy vulnerable WMD stocks when a possessor state for whatever reason cannot. In doing so, however, such actions may run afoul of specific prohibitions contained within those conventions—including bans on transfers for destruction. As will be discussed, the prohibitions apply even in cases where such operations are undertaken to keep them out of the hands of extremist groups, terrorists or pose hazards to the general population. In such cases the possessor state is either unable or unwilling to undertake destroying WMD stocks and either acquiesces or agrees to one or more third parties undertaking the task of securing and disposing of such weapons.

Due to the turmoil in the Middle East and North Africa (MENA), several nations in the region, some with admitted or undisclosed WMD programs, have collapsed to the point where they can best be characterized as "failed" or "failing" states; i.e., they are unable to provide government services, particularly law enforcement. These situations raise the risk that WMD programs may be overrun by militant extremist groups, particularly those affiliated with al-Qaida or the so-called Islamic State, who have made it quite clear their willingness to use these weapons if they should acquire them. Indeed, while this paper was being prepared, the Islamic State (ISIS) launched two chemical attacks in Iraq killing or wounding over 600 people and causing hundreds more to flee.[1]

All three of the norm-establishing non-proliferation treaties prohibit proliferation by, among other proscriptions, banning the transfer of WMD to any recipient. The Nuclear Non-Proliferation Treaty (NPT)[2] bans any transfers "whatsoever" and all non-nuclear weapon states are prohibited from receiving any nuclear weapons from any source. The Biological and Toxin Weapons Convention (BWC)[3] and the Chemical Weapons Convention (CWC)[4] use similar language – "never in any circumstances" – in connection with banning the production, acquisition or transfer of weapons and materials with the intent to make such weapons.[5]

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[1] Associated Press, "1 dead, 600 hurt in IS attack," March 13, 2016, available at: http://www.journalgazette.net/news/world/1-dead--600-hurt-in-IS-attack-11998943.

[2] Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161.

[3] Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological and Toxin Weapons and on their Destruction, Apr. 10, 1972, 26 U.S.T. 583; 1015 U.N.T.S. 163.

[4] The Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction (Chemical Weapons Convention or CWC), 32 I.L.M 800 (1993); 1974 U.N.T.S 45; available at: http://www.state.gov/t/np/trty/16286.htm. The CWC was adopted by the UN Conference on Disarmament in Geneva on September 3, 1992, opened for signature in Paris on January 13, 1993, and entered into force on April 29, 1997.

[5] See Art. 1 of the BWC and CWC where the prohibition language is almost identical and both use the "never in any circumstances" language.

These treaties and control regimes have established global norms against the proliferation of WMD precursors, weapons, their means of delivery, dual-use goods, and weapons manufacturing equipment. In support of these norms, the US and its like-minded partners and allies have developed and participate in a variety of legally nonbinding collaborative working groups and activities to reduce, secure, or eliminate the threat of WMD. The legal requirements and obligations of these treaties, however, sometimes pose constraints and restraints on our ability to effectively pursue our nonproliferation objectives in situations that weren't contemplated by the drafters of these treaties.

Most prominently and recently, the Chemical Weapons Convention prohibitions posed a challenge to the agreement, further discussed below, which provided a pathway for Syria to give up its chemical arsenal and join the Chemical Weapons Convention. The agreement raised a number of issues with regard to failure to adhere to the CWC's prohibitions on transfer and the specific procedures or process for elimination of Syria's—or anyone else's-- chemical warfare capability.

This paper will examine the impact of potential "violations" of these WMD treaties with a focus on the CWC and the Syrian CW elimination program, briefly examine the relatively new phenomena of the international community engaging in disposition and/or retrieval operations of WMD, and the range of alternatives available to nations in these extraordinary circumstances where the legal obligations under a nonproliferation treaty need to be overcome in order to effectively achieve its primary object and purpose of eliminating a WMD proliferation or use threat.[6] As will be seen, these potential legal hurdles have, thus far, been overcome more easily than might have been expected.

II. The WMD Proliferation Challenge: Loose Nukes and the Terrorist Threat

After the end of the Cold War many states of the Former Soviet Union inherited significant quantities of WMD and/or their related materials. Largely through what became known as the Nunn-Lugar Cooperative Threat Reduction Initiative,[7] vast amounts of chemical weapons and their precursors, nuclear weapons and radiological materials, and other legacies from the Cold War were collected, inventoried, dismantled and eventually safely secured or destroyed.

In many of these cases, the United States and its allies contributed money, material and experts to properly secure these weapons and materials. To the extent practicable, dismantlement and destruction was carried out in situ. Nuclear materials discovered and collected in these countries were shipped in most cases to Russia for dismantlement and storage. More and more, however,

[6] As with all arms control or nonproliferation treaties, the CWC allows its parties to withdraw and escape its obligations by withdrawing from this Convention if it decides that extraordinary events, related to the subject-matter of this Convention, have jeopardized its supreme interests. See CWC, Art. 16.3.

[7] Kennette Benedict, "Nunn-Lugar: 20 years of Cooperative Threat Reduction," Bulletin of Atomic Scientists, Dec.19, 2011; available at: http://thebulletin.org/nunn-lugar-20-years-cooperative-threat-reduction.

in cases where states of the former Soviet Union (FSU) possessing these weapons were unable for a variety of reasons to properly store, secure or dispose of the materials -- resulting in a grave danger that such weapons might fall into the hands of terrorist groups -- the U.S. and its allies engaged with those states in a range of disposition and retrieval activities that were unprecedented and certainly not contemplated by the norm-establishing non-proliferation treaties. On occasion, these retrieval and/or destruction operations failed to follow or acted contrary to the specific prohibitions or procedures contained in these nonproliferation treaties raising questions about the legality of such operations.

Nuclear weapons and radiological materials have been the most concerning and have provided the most examples of retrieval and disposition operations. The Obama Administration created a series of nuclear security summits where world leaders discussed and committed to measures to prevent the trade and spread of illicit nuclear materials.[8] But the unexpected dissolution of the FSU, leaving thousands of nuclear weapons in the hands of successor states, was not contemplated when the transfer ban was agreed. Nevertheless, the U.S. and its allies and partners engaged in these nuclear retrieval operations arguing they are fully consistent with our non-proliferation objectives and the spirit of the international legal norms against proliferation.

1. Lisbon Protocol, Operation Sapphire and Project Olympus

In May 1992, Kazakhstan signed the Lisbon Protocol[9] to the START Treaty.[10] The Lisbon Protocol obligated Kazakhstan, along with Belarus and Ukraine, to eliminate all nuclear arms on their territory and accede to the NPT as a non-nuclear weapon state (NNWS), which Kazakhstan did in 1994.[11] Thousands of nuclear weapons had been abandoned to the successor governments of the former Soviet Union (FSU), arguably in violation of Article 1 (transfer prohibition) of the NPT. The U.S. and Russia conducted the first-of-its-kind retrieval operations moving these weapons from Ukraine, Kazakhstan and Belarus to Russia, thus reducing the number of "nuclear weapon states." Article I of the NPT provides that "Each nuclear-weapon State Party to the Treaty undertakes not to transfer to any recipient nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly." While arguably not in compliance with the NPT's transfer prohibition, the agreement to transfer all nuclear weapons out of these countries was fully consistent with the NPT's non-proliferation goals and resulted in converting ostensible "nuclear weapon states" into non-nuclear weapon members of the NPT.

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[8] The last such Nuclear Security Summit was held in late March, 2016. See Nuclear Security Summit website at: http://www.nss2016.org.

[9] See Arms Control Association Website, "The Lisbon Protocol at a Glance," available at: http://www.armscontrol.org/node/3289.

[10] Treaty Between the United States of America and the Union of Soviet Socialist Republics on Strategic Offensive Reduction Treaty (1991), entered into force 1994, expired in 2009; Available at: http://www.acq.osd.mil/tc/treaties/start1/index.htm.

[11] The list of states parties can be found at https://en.wikipedia.org/wiki/List_of_parties_to_the_Treaty_on_the_Non-Proliferation_of_Nuclear_Weapons.

The Lisbon Protocol was followed by an agreement that allowed for the implementation of the Nunn-Lugar Cooperative Threat Reduction (CTR) program for the elimination of nuclear weapons systems and dismantlement of nuclear weapons infrastructure, as well as other WMD programs, in Kazakhstan and other states of the FSU.

Subsequently, U.S. officials learned that 600 kilograms of highly enriched uranium (HEU) was left essentially unguarded in a city in northern Kazakhstan. The HEU—along with plutonium the essential ingredient for making nuclear weapons—could have been sufficient to fabricate dozens of nuclear weapons.[12]

The Government of Kazakhstan had neither the resources nor the expertise to properly secure these materials and they were not allowed to do so in any event under the NPT as a non-nuclear weapon state.[13] Consequently, the U.S. negotiated an agreement that paid Kazakhstan for the removal of the HEU as well as related equipment. In an operation code-named Project Sapphire, the materials were packed and flown to the U.S.'s Y-12 Nuclear Security facility in Oak Ridge, Tennessee for storage and eventual processing down to low grade uranium.[14]

In 1998, the U.S. carried out a similar retrieval operation in Tbilisi, Georgia code-named Project Olympus. The project consisted of removing fuel from an unsecured Georgian research reactor which had been shut down. It still housed spent fuel assemblies made of HEU along with fresh fuel rods. The radioactive material was sent to the UK for reprocessing. The UK violated its own regulations prohibiting accepting nuclear weapon materials but decided to "make an exception" for a worthy non-proliferation purpose. In both cases no objections to these disposition activities were registered either by the IAEA or other NPT states parties.[15]

Based on the growing realization that there were thousands of unsecured radioactive sources, and as a result of the lessons learned from Projects Sapphire and Olympus, the Department of Energy's National Nuclear Security Administration (NNSA), in collaboration with the Department of Defense and other U.S. agencies, established in 2004 the Global Threat Reduction Initiative (GTRI).[16] GTRI's mission is to prevent the acquisition of nuclear and radiological

[12] Dena Sholk, "Project Sapphire: 20 years Later, and Still Relevant, November 17, 2014; available at http://thediplomat.com/2014/11/project-sapphire-20-years-later-and-still-relevant.
[13] As a newly minted member of the NPT Kazakhstan was prohibited under Art. 1 of the NPT from transferring nuclear weapons. Arguably, NPT watchdog, the International Atomic Energy Agency (IAEA) should have been charged with dismantling and safeguarding/destroying these weapons and nuclear material.
[14] "From Project Sapphire to Today" Y-12 Report, Vol. 9, Issue 2, February 7, 2013; available at: http://www.y12.doe.gov/news/report/project-sapphire-today.
[15] T.A. Shelton, J.M. Viebrock, et.al. "Multilateral Nonproliferation Cooperation: US-Led effort to Remove HEU/LEU Fresh and Spent Fuel From the Republic of Georgia to Dounreay, Scotland (Auburn Endeavor/Project Olympus," J. Nuclear Materials Management, Vol. 27:4 (2004); available at: http://www.osti.gov/scitech/biblio/6457073. See also The Nuclear Threat Institute's website on Georgia and Project Olympus; available at: http://www.nti.org/learn/countries/georgia/.
[16] Department of Energy NNSA, Global Threat Reduction Initiative Review (2015); available at: http://energy.gov/sites/prod/files/em/GlobalThreatReductionInitiative.pdf.

materials for use in weapons of mass destruction and other acts of terrorism, and reduce and protect vulnerable nuclear and radiological material located at civilian sites worldwide. Under GTRI the NNSA has conducted removal operations in 21 additional countries, including Iraq, gaining valuable experience in conducting such operations in oftentimes less than benign environments.[17]

2. The Iraqi Nuclear Weapons Program

Most if not all of these retrieval operations were conducted under tight security and secrecy. The U.S., for example, in 2008 secretly removed over 550 metric tons of uranium "yellow cake" from Iraq after Iraqi authorities admitted they could not safely secure the material and feared that terrorists or criminal groups would find and steal the material. Yellow cake is of proliferation concern because it can be enriched for use both in nuclear reactors and, at higher levels, nuclear weapons. The Iraqi material was then shipped to Canada, via British territory, where a private firm processed it into fuel for primarily U.S. reactors.[18] This was done with the full cooperation of the possessing, transfer and disposition nations, and fully consistent—therefore no sound of protest—with the object and purpose of the NPT to ensure that terrorists do not acquire these materials for use in a radiological weapon, and to stop the potential nuclear weapons proliferation. Although there is no legal impediment in this case, it exemplifies the capabilities and willingness of the U.S., her allies and partners to undertake WMD retrieval and disposition operations in cases where the possessor state is unwilling or cannot properly secure such materials.

III. The Chemical Weapons Convention (CWC) Proliferation Legal Challenges

The CWC commits States Parties to destroy all stockpiles of chemical weapons by 2007[19] with a five-year extension granted under compelling circumstances.[20] Article 1 of the Convention requires each State Party to "never under any circumstances" develop, produce, otherwise acquire, stockpile, retain, transfer, or, of course, use chemical weapons. Created upon entry into force of the CWC in 1997, the raison d'etre of the Organization for the Prohibition of Chemical Weapons is the implementation and enforcement[21] of the obligations and procedures under the Chemical Weapons Convention to monitor and ensure that all countries that join the Convention eliminate their chemical weapons stocks and related facilities as required under the Convention.[22]

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[17] Id.
[18] Associated Press, "Secret U.S. mission hauls uranium from Iraq," July 5, 2008; available at: http://www.nbcnews.com/id/25546334/ns/world_news-mideast_n_africa/t/secret-us-mission-hauls-uranium-iraq/#.VuYBzPkrLIU.
[19] CWC, *supra* note 4, Art. IV.6.
[20] Id., Verification Annex, Part IV(c) (26).
[21] The OPCW is independent of the UN, but, although it has powers to enforce compliance, it is authorized to bring grave violations of the treaty to the attention of the UN Security Council and the General Assembly.
[22] OPCW, Our Work: Demilitarization (Oct. 4, 2012), available at http://www.opcw.org/our-work/demilitarisation; see also OPCW, Conference of the States Parties, Report of the 2nd Special Session of the Conference of the States

OPCW inspectors verify treaty compliance at facilities identified by nations. Except in rare instances, they are not investigators. They don't ferret out secret chemical weapons sites, or even actually destroy chemical weapons. They monitor and certify the CW program elimination process under the CWC's Verification Annex, Part IV(A), and investigate alleged violations of the CWC under a robust "go anywhere, any place" challenge inspection regime,[23] although no OPCW Member State has to date requested a challenge inspection.[24]

As of the end of 2015, the CWC had 192 States Parties, including all of the states of the FSU and the former Yugoslavia. Only Egypt, North Korea, and South Sudan have not signed or ratified the Convention.[25] Syria, as part of the agreement for disposing of its chemical warfare arsenal, became a party to the CWC in October 2013.

Also of relevance in the Syrian case, the OPCW, although it is not a United Nations (UN) organization, has a working relationship with the UN and is authorized to bring grave violations of the Convention to the attention of the Security Council and/or the General Assembly. For instance, if requested to do so by the UN Secretary-General, the OPCW has a mandate in accordance with paragraph 27 of Part XI of the Verification Annex of the Convention to closely cooperate with the UN, by placing its resources at the disposal of the Secretary General in order to conduct an investigation of alleged use of chemical weapons in a State Not Party to the CWC or "in territory not controlled by a State Party."

1. Iraqi Chemical Weapons Disposal – Force Majeure?

In order to ensure abandoned chemical weapons did not fall into the wrong hands, disposition activities (destruction) were carried out in Iraq. This was done without following the disposal/destruction guidance in the CWC. In 2014 the OPCW reported that the U.S. destroyed thousands of chemical weapons by open air burning and the use of high explosives. The U.S.

Parties to Review the Operation of the CWC, ¶9.4 (2008); available at: http://www.opcw.org/index.php?eIDdam_frontend_push&docID1837. (Review Conference reaffirms that "complete de- struction of chemical weapons . . . is essential for the realisation of the object and purpose of the Convention").

[23] See CWC, *supra* note 4. While it is not as expansive as the mandate of the U.N. inspectors who oversaw the destruction of Iraq's weapons after the first Gulf War, it is more intrusive and comprehensive than any other multilateral inspection regime.

[24] See OPCW Website on Challenge Inspections at https://www.opcw.org/special-sections/challenge-inspection-exercise/.

[25] Israel has signed but not ratified. A comprehensive listing of states parties to the CWC can be found at: https://en.wikipedia.org/wiki/List_of_parties_to_the_Chemical_Weapons_Convention.

asserted that it had "acted in the spirit of the Convention."[26] However, U.S. practices on Iraqi CW destruction were widely criticized. For example, Jeffrey Lewis, a nonproliferation analyst at the Monterey Institute of International Studies, criticized American destruction operations as unsafe for American troops and Iraqis alike. "The thing I take away from this is, 'God, they blew all of this up in open pits? 'There is a reason that is arguably incompatible with our treaty obligations. There is no universe where this is a safe and ecologically appropriate way to dispose of chemical weapons."[27]

Indeed, the procedures used by the U.S. in destroying Iraq's chemical weapon stockpiles arguably violated CWC Art III, paragraph 1 (a)(v) by not submitting a detailed plan for the destruction of Iraqi CW in its possession and taking into account safety and environmental concerns. Part IV (C) (13) of the CWC Verification Annex prohibits open air burning which arguably is what occurred when the chemicals were blown up in situ.

The U.S. argued that the exigencies of war required that the weapons be destroyed hastily and in the open. The U.S. was actively engaged in combat operations or potentially under attack by terrorist groups that made it impossible to notify the OPCW and protect OPCW inspectors who would, as required by the CWC, have to physically inspect and document the destruction. Likewise, there was no practical way to physically secure the chemical weapons once U.S. forces left the area. In this situation the U.S. could plausibly justify its failure to conform to CWC obligations by asserting *force majeure;* specifically, an occurrence of an "unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation" of compliance with CWC during this destruction operation.[28]

The principle of *force majeure* is well recognized in international law and by international courts. **"**Force Majeure" is defined by the UN International Law Commission as follows:

> "1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to force majeure, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.
>
> 2. Paragraph 1 does not apply if:

[26] C.J. Chivers, "*Thousands of Iraq Chemical Weapons Destroyed in Open Air, Watchdog Says,"* NY Times, Nov. 22, 2014 available at: http://www.nytimes.com/2014/11/23/world/middleeast/thousands-of-iraq-chemical-weapons-destroyed-in-open-air-watchdog-says-.html; OPCW Technical Secretariat Report on Chemical Weapons Recovery in Iraq (details the recovery and destruction of 4,530 aging chemical weapons by American forces in Iraq from May 2004 through February 2009) dated 14 November 2014 available at: http://www.nytimes.com/interactive/2014/11/24/world/middleeast/iraq-chemical-opcw.html.

[27] Id.

[28] UN Yearbook of the International Law Commission 2001, "Articles on Responsibility of States for Wrongful Acts," GAOR A/56/10, Art. 23; available at: http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf

(a) the situation of force majeure is due, either alone or in combination with other factors, to the conduct of the State invoking it; or

(*b*) the State has assumed the risk of that situation occurring."[29]

The "defense" or "exception" of *force majeure* is recognized as a legally valid "justification" for not fully complying with one's contractual or international legal obligations. For example, the Permanent Court of Arbitration, in a 1912 judgment against a claim of *force majeure* by Turkey recognized that "the exception of force majeure ... may be raised in public international law" and the defense or exception of *force majeure* is frequently referred to as a "general principle of law".[30] Numerous subsequent cases have reaffirmed the principle in both municipal and international law.[31]

2. The United States and Russia Failure to Meet Chemical Weapon Destruction Deadline—Force Majeure?

The United States and Russia promised, but failed, to destroy their chemical weapons stocks by 2012, the deadline established in and agreed to in the CWC. The earliest projected date for destruction and elimination of U.S. chemical weapons is 2023, some 11 years after the final deadline for destruction allowed under the CWC.[32] By missing its deadlines, the U.S. and Russia have breached a founding principle of the CWC; i.e., destroying all chemical weapons within 10 years of entry into force with a five-year subsequent grace period. [33] The U.S. has not admitted that it is in breach of its legal obligations but clearly there is no way to color it than as a material breach of the CWC. Obviously, when the leading world powers fail to comply with a demonstrable legal obligation the entire fabric of the legal and moral norm banishing these weapons is called into question.

The U.S. continues to strive to come into compliance utilizing "best efforts" to finish destroying its CW stocks. The U.S. could claim *force majeure* but those opposing such a justification would point out that major reasons for noncompliance were due to internal factors involving the conduct of the U.S. and therefore such a justification would be inapplicable.[34] Specifically, the delays in destroying U.S. stocks were due primarily to legal and regulatory issues arguably within the control of the U.S. and consequently wouldn't fit the definition for asserting a *force*

[29] Id.
[30] UN Yearbook of the International Law Commission 1978, "Force majeure" and "Fortuitous event" as circumstances precluding wrongfulness: Survey of State practice, international judicial decisions and doctrine," GAOR A/CN.4/315, p. 68: available at: http://legal.un.org/ilc/documentation/english/a_cn4_315.pdf.
[31] Id.
[32] David A. Koplow, "Train Wreck: The U.S. Violation of the Chemical Weapons Convention," J. National Security L & Policy, Vol. VI, No. 2 (2013)
[33] CWC, Art. IV, s*upra*, note 4.
[34] *Supra*, note 27.

majeure defense. So far, there's been only a muted and non-punitive response to U.S. non-compliance. No state party has proposed to restrict or suspend any of the United States' rights and privileges under the Convention or otherwise refer the issue to the United Nations.[35] Notwithstanding U.S. "best efforts," non-compliance with this important non-proliferation legal norm challenges U.S. credibility as the leading advocate of the rule of law and advancing international law.

3. The Libya WMD Possession Case—Force Majeure?

The Libyan case parallels the WMD material security challenge in Iraq, discussed *supra*, and Syria, discussed *infra*. Ensuring against theft or unauthorized transfer of chemical weapons and related materials during the lengthy disarmament process has been challenging in the Libyan case due to the ongoing civil war resulting in an ineffective government with no control over large parts of the country including locations where chemical weapons or chemicals for such weapons may be located.

Libya acceded to the CWC on 5 February 2004[36] and began destroying its chemical munitions later that year, but missed the deadlines for converting one chemical weapons production facility to peaceful use and for destroying its stockpile of mustard agent.[37] The OPCW supervised the destruction of Libya's chemical weapons caches through February 2011, when it was forced to suspend its operations due to the uprising against Gaddafi and the resulting deterioration of the country's stability. In October 2014, Libya asked for assistance to transport its 850 ton stockpile of precursor chemicals for making nerve gas out of Libya for destruction.[38] However, the chaos in Libya prevented the OPCW from launching a retrieval and destruction mission. Subsequently, in February 2015, Libyan military sources told media that unidentified armed men had captured large amounts of Libya's chemical weapons, including mustard gas and sarin.[39]

Given the chaotic nature of the Libyan situation, it is unlikely that the OPCW or any nation could under CWC procedures either secure or destroy these chemical weapons and agents in situ or conduct a removal operation. Given the obvious danger of extremist groups acquiring these weapons the U.S. could, using *force majeure* as the justification, use military force to destroy known CW sites. One weapon uniquely suited to this type of mission is the "thermobaric"

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[35] CWC, Art. XII, supra, note 4, CWC, Article XII.
[36] The Chemical Weapons Convention Entered Into Force in Libya, Organization for the Prohibition of Chemical Weapons, 2 February 2004; available at: https://www.opcw.org/news/article/the-chemical-weapons-convention-enters-into-force-in-libya/.
[37] Zanders, Jean Pascal (May 19, 2011). "Uprising in Libya: The False Specter of Chemical Warfare". James Martin Center for Nonproliferation Studies (CNS); available at: http://wmdjunction.com/110519_destroying_libya_cw.htm.
[38] Strategy Page, "NBC Weapons: Libya Needs Help To Be Gas Free," Oct. 14, 2014, available at: http://www.strategypage.com/htmw/htchem/articles/20141030.aspx.
[39] Abdul Sattar Hatita, "Libya militias capture chemical weapons: army official" Asharq Al-Awsat, 21 February 2015; available at: http://english.aawsat.com/2015/02/article55341700/libya-militias-capture-chemical-weapons-army-official.

bomb[40] which uses intense heat to destroy a target. While obviously not the best of choices in cases where all other legal and practical steps are unavailable this option is available and legally justifiable under *force majeure* as a last resort.

IV. The Legal Conundrum of Disposing of Syria's Chemical Weapons Program

1. The Syria Case

The Syria Case presented (and continues to present) legal challenges to a retrieval and destruction program that in important aspects was contrary to the legal requirements and obligations under the CWC.[41]

The Syrian chemical disarmament mission stems from several attacks, using chemical weapons, which culminated in an August 2013 attack on rebel-held suburbs of Damascus in which over 1400 people were killed.[42] The U.S. and Western allies accused Syria's government of being responsible.[43] Subsequently, the Obama administration threatened to launch punitive missile strikes against Syria, prompting frantic diplomatic efforts by Russia and the U.S. to forestall a U.S. kinetic response to these chemical attacks. Those efforts resulted in a "Framework Agreement" on the elimination of Syrian chemical weapons reached by Russia and the United States on 14 September 2013, which Syria agreed to. The conditions of the agreement included that Syria ratify the CWC which it did on 14 October 2013.[44]

Syria's acceptance of the Framework Agreement and becoming a state party to the CWC meant that it had to cooperate in the removal and destruction of its chemical weapons. The full chemical disarming of Syria is highly desirable for a number of obvious reasons. It would: completely terminate a major WMD program in the Middle East, i.e., Syria's CW capacities; prevent Syria from transferring CW to other states or non-state actors (particularly Hezbollah); and prevent the capture of CW by ISIS.

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[40] Jonathon Marcus, "Analysis: How thermobaric bombs (BLU-118B) work," BBC News, March 2, 2002; available at: http://news.bbc.co.uk/2/hi/south_asia/1854371.stm.

[41] The CWC, supra note 4. The CWC combines a ban on the acquisition and possession of chemical weapons (CW) with a stringent verification regime.

[42] See United Nations Report "Report on the Alleged Use of Chemical Weapons in the Ghouta area of Damascus on 21 August 2013," (S/2013/553, dated 16 September 2013); available at: Secretary_General_Report_of_CW_Investigation.pdf.

[43] Dana Hughes, Byron Wolf, Mary Bruce, "US Confirms Syrian Government Used Chemical Weapons," ABC News, June 13, 2013; available at: http://abcnews.go.com/Politics/us-confirms-syria-chemical-weapons/story?id=19395909.

[44] State Dept. Media Note, September 14, 2013, "Framework for Elimination of Syrian Chemical Weapons"; available at: http://www.state.gov/r/pa/prs/ps/2013/09/214247.htm.

However, since Syria had agreed to ratify the CWC it could have resisted OPCW – UN attempts to remove the chemical weapons to another country--as it did prior to the Framework Agreement,[45] --and make it difficult for OPCW personnel to monitor the removal and destruction by claiming to do so would be a violation of the transfer prohibition in Article I of the CWC. Syrian agreement to the removal of these weapons obviated the need to articulate a rationale that arguably would not run afoul of the "transfer" prohibition.

One "work around" could have simply been to define the movement of chemical weapons for purposes of destruction as something other than the "transfer" prohibited by the treaty. Another option would be to arrange to have the weapons removed by either the OPCW or the UN. The OPCW is responsible for promoting the object and purpose of the CWC, and as a representative body of its members carry out through its Executive Council acts as directed by the Conference of State Parties.[46] The UN Security Council, acting under Chapter VII of the UN Charter, as further discussed below, could direct the removal of these weapons as a threat to international peace and security. Ultimately, in the end the UN and the OPCW acting in concert agreed to have the removal and destruction mission conducted under the auspices of a Joint UN—OPCW mission.

Thus, on 27 September 2013, the OPCW Executive Council adopted an implementation plan on the destruction of the Syrian chemical weapons program,[47] which was endorsed by the Security Council's unanimous adoption of UN Security Council Resolution 2118 (2013) on the same day.[48]

The Executive Council decision set out an accelerated program for achieving the elimination of Syrian chemical weapons by mid-2014. It required inspections in Syria to commence from 1 October 2013 and called for ambitious milestones for the complete destruction of Syria's CW capabilities by 30 June 2014.[49] Pursuant to UNSCR 2118, the OPCW-UN Joint Mission in Syria was formally established[50] and tasked to oversee the timely elimination of the Syrian chemical weapons program in the safest and most secure manner possible even if it did not strictly comply with the procedures set forth in the CWC. There were, however, important differences between what the Security Council Resolution directed and what the CWC required, which set the stage for a potential conflict between what the OPCW is authorized to do and what the UN wants it to do.

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[45] Amy E. Smithson, "A Phony Farewell to Arms: Why Assad Won't Have to Part with Poison Gas," *Foreign Affairs,* October 1, 2013, www.foreignaffairs.com.
[46] CWC Article VIII(B) (19), Article VIII(C) (30), supra note 4.
[47] OPCW Executive Council Decision EC-M-33/DEC.1, available at: *https://www.opcw.org/fileadmin/OPCW/EC/M-33/ecm33dec01_e_.pdf.*
[48] UN Security Council Resolution 2118, S/RES/2118, dtd 27 September 2013; available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2118%282013%29.
[49] OPCW-UN Joint Mission Mandate and Timelines; available at: http://opcw.unmissions.org/AboutOPCWUNJointMission/MandateandTimelines.aspx
[50] Id.

For example, the Security Council Resolution obliged Syria to "accept personnel designated by the OPCW or the United Nations."[51] This suggests that Syria has no discretion to reject any of the persons slated to conduct inspections on its territory. But under the CWC the OPCW must inform Syria in advance which inspectors it will send and permits Syria an opportunity to object.[52] This is an important safeguard allowing nations to exclude people who they suspect may not be completely independent. Unsurprisingly, the OPCW adhered to its own rules in its own Syria resolution.[53] It authorizes emergency meetings of the OPCW's governing body if Syria refused to accept inspectors. The Syrians chose not to make this an issue and arguably absent Syrian objection no other state party would have "standing" to raise the issue. There remained, however, the larger issue of the disparity between the requirements of the CWC and the UN Security Council Resolution on how and where Syria's weapons will be eliminated.

Partly in order to bridge the gaps between UNSC Resolution 2118 and the OPCW implementation plan, The UN and OPCW Executive Council agreed to create a joint mission to undertake the removal and destruction of the Syrian chemical weapons. This Joint OPCW—UN mission supervised the destruction or removal of Syria's chemical arms. Its Director-General was charged with notifying the Executive Council regarding any delay in implementation and the Executive Council would decide whether any non-compliance with the implementation plan should be reported to the Security Council, which designated itself responsible for making certain Syria fulfills its commitments under Resolution 2118.[54]

Nations acting under the joint UN-OPCW agreement were authorized to "acquire, control, transport, transfer and destroy chemical weapons … to ensure the elimination of the Syrian Arab Republic's chemical weapons program."[55] The transfer was to the OPCW-UN Joint Mission and not to any particular state. Those national experts and resources engaged in the destruction mission arguably were only receiving the chemical weapons on behalf of the UN and OPCW mandated Joint Mission. Likewise, Syria was "transferring" its chemical weapons to the UN-OPCW and not another country since to do so would be clearly in direct violation of the "never under any circumstances" transfer prohibition of Article I. Since the treaty similarly bans countries from "acquiring" chemical weapons, any nation that received the weapons would also, absent Resolution 2118, violate Article I of the Convention. While not without controversy, as discussed *infra*, and absent objection by states parties to the CWC, an authorization by the Security Council for the UN and the OPCW to undertake retrieval and disposition operations on behalf of Syria was politically palatable and consistent with the object and purpose of the Convention especially after,

[51] UNSC R 2118, Operative Paragraph 7, supra note 48; available at: http://www.un.org/press/en/2013/sc11135.doc.htm.
[52] *Supra* note 4, CWC Verification Annex, Part II, A (2).
[53] OPCW Executive Council Decision, supra note 47.
[54] UNSC R 2118 *supra* note 48. Also see Michael Gordon, "*U.N. Deal on Syrian Arms Is Milestone After Years of Inertia,"* NY Times, Sep. 26, 2013; available at: http://www.nytimes.com/2013/09/27/world/middleeast/security-council-agrees-on-resolution-to-rid-syria-of-chemical-arms.html?pagewanted=all&_r=1.
[55] UNSC R 2118, Operative Paragraph 10, *supra* note 48.

despite UNSC encouragement, no nation was willing to accept the "transfer" of Syrian chemical weapons for disposal on their territory.[56]

No doubt the framers of the Chemical Weapons Convention did not foresee trying to acquire, secure, transport and destroy chemical weapons in the middle of a war, a situation which could provide a legal justification for temporarily "suspending" the CWC's transfer prohibition as discussed *infra*. A certain amount of flexibility is woven into the Convention. For example, the OPCW can develop—and has developed—special measures for nations with chemical weapons that join late.[57] But can such special measures violate a foundational article of the treaty? Unlike the Security Council Resolution,[58] the OPCW's decision makes no mention of the possibility of transferring weapons out of Syria suggesting that the parameters of the "transfer" prohibition have not been settled. Indeed to the extent that disposition activities under the OPCW decision are carried out the decision clearly states it "does not create any precedent for the future."[59]

The mismatch between the UN's plan and that of the OPCW reflects the two organizations' differing priorities. The Security Council is concerned with solving the immediate problem of Syria's chemical weapons, while the OPCW is mindful of preserving practices and procedures that have served it well since its inception and under which it must continue to operate long after the Syrian case is resolved. Indeed, that is no doubt why the Executive Council decision on Syria states that "due to the extraordinary character of the situation posed by Syrian chemical weapons" actions undertaken to eliminate these weapons "does not create any precedent for the future."[60]

The differences between the two resolutions also highlight the important legal principle that the UN Security Council can obligate a country to violate its treaty obligations. Under the UN charter, the Security Council has broad authority to act to restore international peace and security. It has the greatest clout when it is acting under Chapter VII of the Charter which allows it to impose sanctions and other legally binding obligations on member states and authorize the use of military force. Given that Syria is embroiled in a civil war, it's not surprising that the Security Council

[56] Albania, Norway, Belgium and undisclosed others rejected requests by the UN and pressure from the U.S. See "Albania Rejects Request to Host Syrian Chemical-Arms Destruction" Nuclear Threat Initiative, November 13, 2013; available at: http://www.nti.org/gsn/article/albania-rejects-request-destroy-syrias-chemical-arms/; "Norway sees hurdles to helping destroy Syrian chemical arms," Reuters, October 23, 2013; available at: http://uk.reuters.com/article/uk-syria-crisis-norway-idUKBRE99M0L520131023.
[57] See e.g. CWC, Art. V (10), *supra* note 4.
[58] See UNSC R 2118, Operative Paragraph 7, *supra* note 48.
[59] OPCW Executive Council Decision on Destruction of Syrian Chemical Weapons, Operative Paragraph 3(d), EC-M-33/DEC.1 dtd Sept. 27, 2013; available at: https://www.opcw.org/fileadmin/OPCW/EC/M-33/ecm33dec01_e_.pdf.
[60] Id.

called for and authorized "member states to acquire, control, transport, transfer and destroy" Syria's chemical weapons "in the soonest and safest manner."[61]

Lessons from the Iraq and Libyan cases suggest that while verifying the correctness of a state's declarations is feasible, it is only possible for inspectors to have a limited degree of certainty in assessing the completeness of state declarations particularly when circumstances on the ground may prevent full access to potential or suspect storage sites. Inevitably, there was some risk, as occurred in the Libyan case, that the regime could successfully retain a secret CW capability. Consequently, the U.S. and its allies continued to express concerns about the completeness of Syria's disclosures, and argued that the OPCW mission should remain in place following the removal of all declared chemical weapons until verification tasks can be completed.

Various parties, including Western governments and humanitarian organizations, have subsequently accused the Syrian government of conducting illegal chlorine attacks in 2014 and 2015.[62] A late disclosure in 2014 regarding Syria's ricin program raised further doubts about the completeness of the government's declaration of its chemical weapons stockpile, and in early May 2015, OPCW announced that inspectors had found traces of sarin and VX nerve agent at a military research site in Syria that had not been declared previously by the Syrians.[63]

While completeness of declarations cannot be 100% confirmed, the OPCW verification regime could be strengthened to enable ongoing monitoring in cases where an unknown chemical weapon capability is uncovered. Likewise, in light of similar risks of lost or secret stockpiles of chemical weapons remaining in Syria after its CW program supposedly has been destroyed, an increased role, with appropriate powers, should be given to the OPCW to enable it to assume a "detective" role, similar to the role UNSCOM played in Iraq.[64] For example, at the conclusion of the civil war in Syria the Security Council could authorize the OPCW to conduct no or little notice "go anywhere, anytime challenge" inspections to confirm that Syria truly has given up its CW programs. In the event of a veto one or more state parties to the CWC could request an on-site challenge inspection to ensure the CW program was eliminated. Claims of lacking

[61] Id. On 23 June 2014, the last declared chemical weapons were shipped out of Syria for destruction. The chemical weapons were transported to a U.S. merchant chip, the Cape Ray, where a chemical destruction facility had been installed. It took 42 days aboard ship to destroy 600 metric tons of chemical agents that would have been used to make Sarin and Mustard gas. OPCW News, "U.S. Completes Destruction of Sarin Precursors from Syria on the Cape Ray, 13 August 2014; available at: https://www.opcw.org/news/article/us-completes-destruction-of-sarin-precursors-from-syria-on-the-cape-ray.

[62] Anthony Deutsch, "UK blames Assad regime after watchdog documents chlorine attacks," Reuters, Sept. 10, 2015; available at: http://uk.mobile.reuters.com/article/idUKKBN0H52A620140910?irpc=932.

[63] Anthony Deutsch, "Exclusive: Weapons inspectors find undeclared sarin and VX traces in Syria – diplomats" Reuters, May 8, 2015; available at: http://news.yahoo.com/exclusive-weapons-inspectors-undeclared-sarin-vx-traces-syria-170616455.html.

[64] For a review of the UN Special Commission in Iraq, charged with uncovering Iraq's clandestine WMD program see UNSCOM's final report, S/1998/11/72 dtd 15 December 1998; available at: http://www.un.org/Depts/unscom/s98-1172.htm.

precedential value and technical inconsistencies with the CWC notwithstanding, the joint UN—OPCW authorization and inspection team model with both organizations approval is an exceptionally strong legal mechanism. The extraordinary circumstances were such that ignoring obligatory language in the CWC could be forgiven in light of the destruction of most of Syria's chemical weapons and the exigent circumstances in which it was done.

The inability of the inspectors to uncover the complete CW capacity of Syria is due to the ability of the Syrian regime to exploit, time and again, the civil war and the confrontations with ISIS and the rebels as an excuse for impeding inspections activities. Inspectors were unable (or unwilling) to reach a specific location when Syrian officials simply stated that it is too dangerous to proceed and there was evidence that some suspect sites were under the control of rebel or terrorist groups.[65] Obviously, under such circumstances, it is unlikely that any inspection team, not backed up with its own military forces, would at their own peril proceed. The team could easily be attacked "accidentally" by Syrian forces under the "fog" of the civil war.

2. Conflict of Laws: The Impact of The UN Charter on CWC Obligations

The directive nature of UNSC Resolution 2118 raises questions as to whether or not the UN Security Council has the legal authority to undo elements of a multilateral disarmament treaty painstakingly negotiated over decades. Is the UNSC legally empowered to amend, qualify or even nullify the application of international treaties? Does the UNSC have the power arbitrarily to amend the application of any international treaty, in the absence of consultation with the treaty signatories and the UN General Assembly?

Article 103 of the UN Charter provides that:

"In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

Further, Article 25 of the Charter provides that:

"The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

There is little doubt then that the duties placed on Members in accordance with the Charter by binding decisions of the Security Council are also obligations under the Charter for the purposes of Article 103.[66]

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[65] Reese Erlich, "Who Really Used Chemical Weapons in Syria", December 1, 2014, Who, What & Why; available at: http://whowhatwhy.org/2014/12/01/really-used-chemical-weapons-syria/

[66] See, e.g., Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion) [1971] ICJ Rep 16, Separate Opinion of Vice-President Ammoun, para 18 (observing that obligations 'under the Charter', as contemplated by art 103, "clearly include obligations resulting from the provisions of the Charter and from its purposes, and also those laid down by the binding decisions of the organs of the United Nations"); see also Nigel D White and A Abass,

This was the central issue in the Lockerbie case, one of the few cases where the effects of Article 103 have been specifically considered. As is well known, the case dealt with the question whether Libya was obliged to extradite two of its nationals who were accused of blowing up an aircraft over the Scottish village of Lockerbie. Libya relied on the 1971 Montreal Convention, arguing that it was only bound to extradite the suspects if it did not prosecute them domestically. The International Court of Justice (ICJ), however, came to the conclusion that whatever choice Libya might have had under the Montreal Convention, the Security Council resolution enjoyed priority. This was because all parties to the dispute were, "as Members of the United Nations ... obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter." The ICJ further held that in accordance with Article 103 of the Charter, the obligations of the Parties in complying with a Chapter VII Security Council resolution prevail over their obligations under any other international agreement, including the Montreal Convention.[67]

A few decades later, in Nicaragua vs. the USA, the Court further concluded that "all regional, bilateral, and even multilateral, arrangements that the Parties to this case may have made ... must be made always subject to the provisions of Article 103."[68]

With Articles 25 and 103 in mind, UNSC resolution 2118 requires the OPCW to act in violation of the CWC in several important respects. Article XII of the CWC states that only the Conference of the States Parties may, in consultation with the Executive Council, bring cases of particular gravity to the attention of the UNSC, whereas the UNSC resolution authorizes the Executive Council alone to do this. This disenfranchises the Conference of the States Parties, the only OPCW policy-making organ representing the views of all 192 member states.

Furthermore, the UN approached Norway, Albania and Belgium, inviting them to destroy large quantities of Syrian chemical weapons on their territory. This was in direct contravention of the "no transfer" prohibition of Article 1 (a) of the CWC. Likewise, Syrian transfers of its chemical weapons from its territory would be a further violation of Article 1(a) of the CWC. However, as demonstrated in the Syria case, a legally binding UN Security Council Resolution can supersede or suspend the obligations and requirements of the CWC without doing damage to the obligations of the rest of the states parties to the CWC. In the Syria case, the intent in thus

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'Countermeasures and Sanctions' in Evans M., ed., International Law 4th. Oxford University Press. 537-562 (n 5) 509–32, 527 ("One effect of Article 103 of the UN Charter seems to be that mandatory sanctions resolutions adopted by the Security Council under Article 41 of the UN Charter result in obligations for member States that prevail over obligations arising under other international treaties*").*

[67] *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Libya v UK, Libya v US) (Provisional Measures) [1992] ICJ Reps 3 and 114, paras 39 and 42, respectively.
Available at: http://www.icj-cij.org/docket/index.php?sum=460&p1=3&p2=3&case=89&p3=5.

[68] *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v USA) (Jurisdiction and Admissibility) [1984] ICJ Rep 392, para 107. Available at: http://www.icj-cij.org/docket/index.php?sum=367&p1=3&p2=3&case=70&p3=5.

modifying obligations under the CWC was to achieve the very purpose for which it is intended; i.e., the elimination of chemical weapons.

3. Legal Justifications for Evading Treaty Obligations Acting Without Security Council Mandate

In the absence of a legally binding UN Security Council resolution trumping the CWC's obligations, international law's justifications for non-performance of a treaty obligation (including impossibility, changed circumstances, and *force majeure*) are potentially available, particularly in this case of extraordinary circumstance where the primary purpose is to achieve the total elimination of chemical weapons from a particular country. In this situation if significant numbers of other states parties objected to the removal and destruction operations individual nations would have to justify its actions on another legal basis, discussed further *infra*, than on a legally binding obligation imposed by the Security Council.

One approach to the disconnect between CWC treaty obligations and the UN Security Council's imposed direction is for the OPCW to agree to temporarily suspend the technically specific legal requirements of the CWC, to include the prohibition against transfer while carrying out removal and destruction operations at the direction of the OPCW's Executive Committee. The right of a nation to suspend its treaty obligations under certain conditions is well established and codified in the Vienna Convention on the Law of Treaties (Vienna Convention).[69] The Vienna Convention generally codified the preexisting customary law of treaties that existed between State actors.[70] As established by the Vienna Convention there are a number of ways and reasons a state can suspend its obligations under a treaty while maintaining the continued viability of the treaty thus recognizing the explicit fundamental principle of *pacta sunt servanda* (agreements must be kept) in international law.[71]

Given the importance of the CWC as an almost universal mandate for an international nonproliferation norm, the notion of withdrawal by states parties involved in the disposition operations or termination of the CWC, while legally an option, is politically untenable and will not be discussed further here.[72] Suspension, on the other hand, is presumably temporary and

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[69] Vienna Convention on the Law of Treaties art. 2, May 23, 1969, 1155 U.N.T.S. 331; UN Org, Vienna Convention on the Law of Treaties; available at: http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXIII/treaty1.asp.

[70] The Vienna Convention entered into force in 1980. There are currently 114 states parties with another 45 states which have signed but have not yet ratified. A copy of the treaty is available at: https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&lang=en. The U.S. has signed but not ratified the Vienna Convention. However, the U.S. considers many of the provisions of the Vienna Convention to constitute customary international law. See Department of State website at http://www.state.gov/s/l/treaty/faqs/70139.htm.

[71] *Supra* note 70, Art. 26.

[72] When and how a treaty will end is a common issue addressed during the negotiation stage of any treaty. The event of termination or withdrawal effectively ends a state party's participation in a treaty. Withdrawal from the treaty would imply acceptance of the use of chemical weapons and could do irreparable harm to the CW nonproliferation

even during the suspension period a treaty relationship continues to exist between the parties.[73] Moreover, the suspending party must "refrain from acts tending to obstruct the resumption of the operation of the treaty."[74] The Vienna Convention states that a party may suspend a treaty only through applying either the exit provisions of the treaty, or in accordance with the explicit opt out provisions of the Vienna Convention.[75]

Article XVI of the CWC, which allows for withdrawal from the Convention, does not expressly address whether or not a state party can suspend its obligations.[76] The CWC's drafters may have intentionally excluded the right for a state party to suspend its obligations if they viewed it as an invitation to a "temporally opportunistic exit."[77] In this case, however, the intent of suspending the transfer prohibition is to effectuate the object and primary purpose of the CWC; i.e., to ensure the elimination of a CW program and the safe and secure destruction of all weapons, precursors and infrastructure related to the CW program.[78]

Absent a specific option to suspend under the CWC we must look to the Vienna Convention for the reasons and justification for suspension. Citing the Vienna Convention's rule on suspension, a party may suspend the CWC's operation with the consent of the parties.[79] However, for multilateral treaties, consultation is required with other "contracting States."[80] If a State Party is justified in suspending a treaty's operation, the Vienna Convention provides the procedure to be employed. The State must first notify all of the other parties of the treaty of its claim for suspension and wait three months. However, in cases of "special urgency" the three-month notice requirement is waived. Finally, if an objection is raised the parties are directed to resolve the dispute via Article 33 of the UN Charter.[81]

The Vienna Convention allows for five potential alternative reasons or justifications, three of which are relevant here, to credibly and legally justify one or more State Parties to be temporarily in violation of one or more legal obligations under the CWC as another more

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norm. It can only be undone or rectified through renewing consent to be bound, which usually entails the creation of an entirely new treaty. See Anthony Aust, Modern Treaty Law and Practice 225 (2000).

[73] *Supra* note 70, Art. 72(1)(b).

[74] Id., Art. 72(2).

[75] Id., Art. 42(2).

[76] Under CWC Article XII the Conference of States Parties, however, upon the recommendation of the Executive Council, may "restrict or suspend the State Party's rights and privileges under the Convention until it undertakes the necessary action to conform with its obligations under this convention."

[77] See Laurence R. Helfer, *Exiting Treaties*, 91 Va. L. Rev. 1579, 1625 (2005).

[78] See David S. Jonas & Thomas N. Saunders, "The Object and Purpose of a Treaty: Three Interpretive Methods, 43 Vand. J. Transnat'l L. 565 (2010).

[79] Id., Vienna Convention, *supra* note 70, Art. 57(b).

[80] Id., Art. 54(b) and 57(b); Aust, *supra* note 72, at 232.

[81] Article 33 of the UN Charter calls on parties to an international dispute that risks global peace and security to engage in some type of dispute resolution such as negotiation, arbitration, mediation, judicial settlement, or other peaceful means. U.N. Charter, art. 33, para. 1. If necessary, the UN Security Council can step in to request that the parties engage in this type of peaceful settlement process.

compelling legal obligation is pursued as directed by the UN Security Council or the Executive Council of the OPCW.[82] To invoke one of these justifications, the state party must notify all other treaty parties of its intent to suspend at least three months prior to acting "**except in cases of special urgency** (emphasis added)." During the course of the retrieval and disposition operations facts on the ground in Syria--particularly the use of CW by Syrian and rebel forces--adequately demonstrated the "special urgency" for the need to transfer these weapons and materials, under expedient procedures that were clearly inconsistent with the CWC's destruction process[83] in order to eliminate the Syrian CW threat.

First, a treaty may be suspended as a response to a "material" breach of the treaty.[84] A material breach is either a "repudiation of the treaty not sanctioned by the present Convention" or one which violates a provision "essential to the accomplishment of the object and purpose of the treaty."[85] If there is a material breach in a multilateral treaty, one of three scenarios may occur: 1) the other parties may suspend or terminate a treaty by unanimous agreement between themselves and the breaching State or between all parties; 2) a party "specially affected" by the breach may suspend its operation of the treaty between itself and the breaching State; or 3) if the breach "radically changes the position of every party with respect to the further performance of its obligations under the treaty," any non-breaching party may suspend the operation of the treaty.[86] This final situation is especially relevant to arms control or nonproliferation treaties, where one party's breach may endanger the whole group of treaty participants.[87]

In this case Syria's transfer of its chemical weapons to another party would be in violation of the CWC transfer ban and thus a material breach of the Convention. The Conference of States Parties could suspend the breaching state's rights and privileges under the Convention. Obviously this would have little effect on a state that has already declared its intent to suspend its obligations. Alternatively, under the CWC, in "cases of particular gravity" the breach could be referred to the UN for appropriate action.[88] However, given that the act of breach was a consequence of UN Security Council direction and OPCW collusion this recourse by an objecting State Party would be problematic. Hypothetically then, once the destruction operations were completed the State Party would return to the fold of compliant CWC states parties where, while unlikely, the Conference of States Parties could consider whether the disposition actions should be censored by the OPCW. Noteworthy, no State Party has subsequently objected to the destruction process and those states parties that participated it in it.

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[82] *Supra* note 70, Arts. 54-62.
[83] Id., Art. 65(2) and supra, note 4, CWC, Part IV(A), Destruction of Chemical Weapons and Its Verification Pursuant to Art. IV.
[84] Id.; See also Aust, supra note 72, at 235–36.
[85] Id., Art. 60(3). See Mohammed M. Gomaa, "Suspension or Termination of Treaties on Grounds of Breach 26-28, 123 (1996) (arguing that article 60 "does not accommodate preemptive or preventive measures." Consequently, only an actual breach, not a potential breach, is relevant).
[86] Id., Art. 60(2).
[87] See Aust, *supra* note 72, at 238.
[88] CWC, Art. XII (4), supra note 4.

Second, because of a temporary impossibility, a state party may also suspend its treaty operations.[89] Here one could plausibly argue that the civil war and the danger of terrorist groups acquiring these weapons makes it impossible for the Syrian Government and the OPCW to follow the procedural and verification requirements established under the CWC for chemical weapons disposition. Since this is a temporary condition, it may be invoked as a ground for suspending the operation of the Convention. In this context the contingencies of temporary impossibility of performance resembles *Force Majeure*, which if applicable would exonerate a state from liability for non-performance of one's treaty obligations.

Finally, a party may suspend its obligations under the treaty due to a fundamental change of circumstances (*rebus sic stantibus*) if the same criteria are met.[90] However, the threshold for impossibility and a change of circumstances warranting suspension of obligations under the convention is very high.[91] This justification for suspension is available where something fundamental has altered the feasibility of the original agreement. The Convention limits this justification to situations in which: (1) the change "was not foreseen by the parties"; (2) the circumstances "constituted an essential basis of the consent… to be bound by the treaty;" and (3) "the effect of the change is radically to transform the extent of the obligations still to be performed under the treaty."[92] Immersed in a civil war with the potential of rebel groups acquiring and using Syria's chemical weapons certainly qualifies as a fundamental change, particularly when added to the fact that the Syrian Government was using chemical weapons on its own people killing thousands.

In sum, in the event of objection to the procedures adopted by the Security Council for the destruction of these chemical weapons, the Vienna Convention characterizes "supervening impossibility of performance" as one valid basis for suspending one's obligation under a treaty whether or not the Security Council approves. Alternatively, the states parties involved in transferring Syria's CW out of the country for destruction could declare that they are temporarily suspending their obligations under the CWC on the basis of four other related doctrines: material breach, impossibility, changed circumstances and force majeure. While the circumstances for asserting one or more of these justifications for suspension were not contemplated by CWC states parties, the acts of non-compliance are nevertheless fully consistent with the object and purpose of the CWC, the elimination of chemical weapons. Once the weapons have been destroyed and the program eliminated the justification for suspending one's obligations under the CWC cease and the affected states parties will return to full compliance with their CWC obligations.

4. The Joint UN – OPCW Implementation Plan: The 80% Solution

[89] Vienna Convention, *supra* note 70, Art. 61. A state may not cite its own conduct as a fundamental change warranting suspension.
[90] Id. Art. 62
[91] Id.
[92] Id.

The Chemical Weapons Convention is meant to provide a lasting framework for destroying chemical weapons and controlling their proliferation. Departures from treaty requirements have costs for the integrity of that framework, even when they are explicitly described as not having precedential value. Indeed "hard cases make bad law." This caution applies equally to the development of international solutions for a situation like Syria.

As discussed *supra*, the states parties could have chosen to suspend their obligations under the CWC and justify their subsequent actions on the basis of emergency situations not contemplated by the CWC. Alternatively, the U.S. and her Allies could have conducted a strike on other suspected Syrian CW sites, which absent UN Security Council authorization would have likely been viewed as illegal and further complicated diplomatic efforts to stop the use of such weapons. Instead, with the Russia-US Framework agreement bringing a committed Syria to the table, recognizing the grave urgency of keeping these weapons from being used against civilians by either the Syrian Government or extremist groups, a number of more viable and politically and legally acceptable options to getting around the impractical and self-defeating CWC prohibitions against transferring chemical weapons and their precursors.

One way would be to categorize the movement of chemical weapons for purposes of destruction as something other than the "transfer" prohibited by the treaty. Another, possibly supplementary, option would be to arrange the removal of weapons from Syria so that it can be characterized as being undertaken by the OPCW or the UN—rather than a country. A third alternative is that the mission is conducted under the auspices of the UN, with the OPCW assisting—the option eventually chosen with the establishment of the Joint OPCW-UN Mission. However, in the absence of an overriding UN Security Council resolution, using the OPCW or UN would still be arguably inconsistent with CWC Article I, which prohibits the transfer of chemical weapons to "anyone."

The circumstances surrounding Syria's disarmament were unique and urgent. Not only has the Security Council, in an unprecedented move, authorized Member States to "acquire, control, transport, transfer and destroy chemical weapons identified by the Director-General of the OPCW, consistent with the objective of the Chemical Weapons Convention;" in addition, the OPCW Executive Council's decision also acknowledged that "this decision …does not create any precedent for the future."[93]

Happily, the political support for the Syria mission forged by UNSC Resolution 2118 was sufficiently constant to avoid subsequent challenges by potentially disgruntled states parties over failing to comply with procedures and obligations they were bound by. However, while it may

[93] OPCW Executive Council Decision on the "Destruction of Syrian Chemical Weapons," EC-M-33/DEC.1, September 27, 2013; available at https://www.opcw.org/fileadmin/OPCW/EC/M-33/ecm33dec01_e_.pdf.

not be precedent setting, this solution may signal a shift from a narrow reading of the CWC towards one that understands the Convention as providing a pragmatic regulatory and policy framework that can be adapted by Member States to open up legal and operational space for future disarmament and verification under unforeseen circumstances.[94]

The foregoing interpretation could certainly be limited to the present situation, without, as the OPCW Executive Council notes, creating "any precedent for the future." There is always a risk that one flexible interpretation could lead to another, but I believe, in order to avoid legal entanglements that would potentially stymie a retrieval or disposition initiative, the risk is worth it. In this case Syria had one of the world's last great caches of chemical weapons. The chance to destroy it could not be missed.

In the end, Syria was and continues to be obliged to comply with UNSC Resolution 2118 and CWC Executive Council guidance, which is backed by the full authority of a Security Council determination that Syria's chemical weapons is a threat to international peace and security.[95] Challenges to the procedures carried out by the Joint OPCW-UN Mission as being inconsistent with the CWC can be refuted since obligations under the UN Charter, per Article 103 of the Charter, would trump those under the CWC. This is an unprecedented issue, about which reasonable people may disagree. But there should be general agreement that nonproliferation law should not be cynically used by the Syrian government or anyone else to avoid their nonproliferation obligations.

The OPCW should fearlessly use its best technical judgment, including facilitating the removal of chemical weapons out of the country if that is the most prudent course, irrespective of whether or not it complies with the procedural provisions of the CWC. In the largest sense, enforcing nonproliferation norms is vitally important to ensure the transition from armed conflict to peace (i.e., jus post bellum). Continued use of such weapons or their proliferation will make peace that much harder to achieve, and the resulting peace less likely to be just and sustainable.

V. Impact of U.S. Domestic Law and Regulation

The nonproliferation treaties are non-self-executing and therefore a range of domestic laws and regulations were established to ensure the U.S. is in full compliance with its treaty obligations. In addition, each nonproliferation treaty has export control groups to share information and establish guidelines and control lists for treaty implementation. These include the Nuclear Suppliers Group for the NPT and the Australia Group for the CWC and BWC. These export control groups both share information and provide agreed lists of materials and agents that in

[94] R. Trapp, "Report: Lessons Learned From the OPCW Mission in Syria," 16 December 2015; available at: Lessons_learned_from_the_OPCW_Mission_in_Syria.pdf.
[95] See Ch. VII, Art. 39, UN Charter (The UNSC shall decide what measures will be taken "to maintain or restore international peace and security." UNSC R 2118, *supra*, note 48, states that Syrian CW is a threat to international peace and security).

terms of quality and quantity and purpose may be of proliferation concern and therefore subject to control. The U.S. has passed implementing legislation for the CWC[96] and BWC[97] which includes regulation of those items on the suppliers control list for each treaty.

These internal laws and regulations could possibly hinder retrieval and/or destruction operations, particularly when a State Party is acting under procedures contrary to the established plain language of the treaty and its implementing legislation even though such operations are fully consistent with and contributes to our overarching nonproliferation goals. For example, the Secretary of Commerce has issued strict guidelines regarding the import of CW or precursors and many state and local governments have objected to the shipment of CW through their jurisdictions.[98] However, in emergency circumstances these U.S. domestic legal requirements or restrictions can be waived by the President under the National Emergencies Act,[99] the Arms Export Control Act,[100] and the International Emergency Economic Powers Act (IEEPA).[101] Under these acts, when a national emergency has been declared the President has broad powers to regulate commerce, to include waiving or suspending export controls, in cases where there are abnormal threats to the United States with respect to its economy, foreign policy, or national security from a foreign source. Nevertheless, political sensitivities in the U.S. coupled with the failure to find one nation willing to take the materials prompted the use of a CW disposal system on board a U.S. cargo ship in international waters.

In 1994, President Clinton declared a national emergency to deal with the WMD threat, declaring that "the proliferation of nuclear, biological, and chemical weapons … and of the means of delivering such weapons, constitutes an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States…."[102] This executive order has been successively renewed by Presidents Bush and Obama.[103] The net effect with regard to the Syrian case is that any domestic impediments to U.S. participation in CW retrieval and destruction operations, to include transporting the materials to a U.S. destruction facility, can be waived under the emergency powers provided by law to the President.

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[96] The Chemical Weapons Implementation Act of 1998, 2 U.S.C. Section201 et. seq.; available at: http://www.cwc.gov/cwc_authority_legislation.html. See also Executive Order 13128 of June 25, 1999, Implementation of the Chemical Weapons Convention and the Chemical Weapons Convention Implementation Act; available at: http://www.cwc.gov/cwc_authority_executive.html.

[97] The Biological Anti-Terrorism Act of 1989, 18 U.S.C.§ 175 et seq.

[98] See for example EO 13128, supra note 98; Jon Harper, "MV Cape Ray gears up to destroy Syria's chemical weapons," Stars and Stripes, Jan. 4, 2014; available at: http://www.stripes.com/news/mv-cape-ray-gears-up-to-destroy-syria-s-chemical-weapons-1.260332.

[99] 50 U.S.C. Section 1601 et. seq.

[100] 22 U.S.C. Section 2751 et. Seq.

[101] 50 U.S.C. Section 1701 et. seq.

[102] Executive Order 12938 (November 14, 1994) Proliferation of Weapons of Mass Destruction; available at: http://www.presidency.ucsb.edu/ws/index.php?pid=49489.

[103] Executive Order 13224 (September 23, 2001) extended by President Obama through 2016. See https://www.whitehouse.gov/the-press-office/2015/09/18/notice-continuation-national-emergency-respect-persons-who-commit.

VI. The Use of Force Approach: Illegal but Legitimate?

"Sometimes you have to break the law to change it, act illegally to change the law, and you will see […] the change will follow you."

--Former French Minister of Foreign and European Affairs Bernard Kouchner[104]

In cases of extreme gravity, the unilateral or multilateral use of force to eliminate the threat to civilian populations is available as an option of last resort. While not fully accepted as a variation of the "responsibility to protect," a humanitarian intervention justification could be available to eliminate a CW production/storage facility. The proliferation and use of chemical weapons would certainly qualify under international law as a justification for using force in the event all other options are unsuccessful. Indeed, it was President Obama's threatened use of force unilaterally which eventually resulted in agreement by the Security Council, the OPCW and Syria on the process to eliminate all of Syria's declared CW facilities.

As previously mentioned, the U.S. suspected that the Syrian CW declaration failed to list all the locations of its chemical weapons facilities and storage sites. While nearly all of the chemical weapons (CW) capabilities declared by Syria have been destroyed in 2013 under the OPCW—UN implementation plan,[105] it is clear that the declared quantities, components, and facilities were but part of a much larger CW program.[106] Syria has unveiled the existence of additional facilities.[107] Further facilities were discovered by the inspectors;[108] significant gaps and inconsistencies remained unexplained regarding the data provided by Syria;[109] and access by inspectors to certain installations and to several production plants was obstructed. In addition, two years after Bashar al-Assad agreed to dismantle Syria's chemical weapons stockpile, his forces are dropping chlorine barrel bombs on rebel-held areas.[110] In light of overwhelming evidence of the continuing use of such weapons the UN Security Council condemned "any use of

[104] Rebecca Lowe, "Syria: Military intervention is illegal – but may be legitimate," Inter. Bar Assoc., Sept. 6, 2013; available at: http://www.ibanet.org/Article/Detail.aspx?ArticleUid=26cfd2b2-e6cf-4209-903c-9327c76c9bd4.
[105] L. Morris and M. Birnbaum, "Syria has destroyed chemical weapons facilities, international inspectors say," Washington Post, October 21, 2013; available at: https://www.washingtonpost.com/world/syria-has-destroyed-chemical-weapons-facilities-international-inspectors-say/2013/10/31/dc1ff6b8-4214-11e3-b028-de922d7a3f47_story.html.
[106] Adam Entous and Naftali Bendavid, "Mission to Purge Syria of Chemical Weapons Comes Up Short, Wall Street Journal, July 23, 2015; available at: http://www.wsj.com/articles/mission-to-purge-syria-of-chemical-weapons-comes-up-short-1437687744.
[107] "Syria declares new chemical weapons facilities," BBC News, 8 October 2014; available at: http://www.bbc.com/news/world-middle-east-29534926.
[108] A. Deutsch, Weapons Inspectors Find Undeclared Sarin and VX Traces in Syria," Reuters, May 8, 2015; available at: http://www.reuters.com/article/us-mideast-crisis-syria-chemicals-exclus-idUSKBN0NT1YR20150508.
[109] M. Nichols & L. Charbonneau, "UN Cites Concerns Over Possible Gaps in Syria's Declared Chemical Arms, Reuters, Sep 4, 2014; available at: http://www.reuters.com/article/us-syria-crisis-chemicalweapons-un-idUSKBN0GZ2MM20140904.
[110] A. Barnard & S. Senguptamay, "Syria Is Using Chemical Weapons Again, Rescue Workers Say," NY Times, May 6, 2015; available at: http://www.nytimes.com/2015/05/07/world/middleeast/syria-chemical-weapons.html.

any toxic chemical, such as chlorine gas," and warned that further use would warrant stronger measures under Chapter VII of the UN Charter.[111]

During the course of negotiations on UNSCR 2118 the French attempted to include Syria's biological weapons program.[112] This was opposed by the Russians.[113] Later the Syrians admitted to the OPCW that they had a ricin production facility at al-Maliha outside of Damascus but asserted that the city of al-Maliha was under the control of the rebels.[114] The OPCW developed and Syria ostensibly agreed to plans for destruction of the facility and ricin stocks but the Syrians continue to claim that it is unsafe for inspection and retrieval teams to go into the town and facility.

There continues to be overwhelming evidence that Syrian helicopters are dropping chlorine-filled barrels on Syria's civilian population as well as the rebels.[115] ISIS has also used chlorine in Syria and Iraq.[116] A chemical plant called the Syrian-Saudi Chemicals Company near Aleppo was recently taken over by rebels.[117] It produces chlorine as well as other chemicals and even Syria's ambassador to the UN stated that 200 tons of chlorine gas were taken from the plant by terrorist groups.[118]

Under the circumstances, these sites could be good cases to use force in order to deny access to these deadly materials by government, rebel, and terrorist forces.

Under international law, armed attack against another nation is illegal except in self-defense or with the authority of the UN Security Council (UNSC).[119] However, this would be the use of force for a humanitarian purpose – such as protecting civilians from their government gassing them. The purported norm, never cemented in law, allows for a last resort of military intervention under a series of strict conditions; i.e., if a state commits genocide, war crimes,

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[111] United Nations, Adopting Resolution 2209 (2015), Security Council Condemns Use of Chlorine Gas as Weapon in Syria, 6 March 2015; available at: http://www.un.org/press/en/2015/sc11810.doc.htm.
[112] "TEXT-French U.N. Security Council draft on Syria chemical weapons," Reuters, 11 Sep 2013; available at: http://news.trust.org/item/20130911024721-0whzo/?source=shtw.
[113] C. Lynch and K. Deyoung, "Russia balks at French plan for U.N. Security Council resolution on Syrian chemical arms," Washington Post, Sept. 10, 2013; available at: https://www.washingtonpost.com/world/middle_east/france-to-author-security-council-resolution-to-require-syria-to-give-up-chemical-weapons/2013/09/10/0d51a06c-19ff-11e3-a628-7e6dde8f889d_story.html.
[114] Catherine Dill, "Spotlight on Syria's Biological Weapons," Arms Control Wonk, Feb. 8, 2016; available at: http://www.armscontrolwonk.com/archive/1201010/guest-post-spotlight-on-syrias-biological-weapons/.
[115] Naftali Bendavid, "U.S. Accuses Syria of New Uses of Chemical Arms<" Wall Street Journal, May 8, 2015; available at: http://www.wsj.com/articles/u-s-diplomat-allegations-syria-still-using-chemical-weapons-credible-1431110923.
[116] Lizzie Dearden, "Isis 'manufacturing and using chemical weapons' in Iraq and Syria, US official claims," The Independent, 11 Sept. 2015; available at: http://www.independent.co.uk/news/world/middle-east/isis-manufacturing-and-using-chemical-weapons-in-iraq-and-syria-us-official-claims-10496094.html.
[117] Ilana, "Syria: Jihadist Al-Nusra Front Seizes Chemical Factory Near Allepo," Gerard Direct, December 9, 2012; available at: http://gerarddirect.com/2012/12/09/syria-jihadist-al-nusra-front-siezes-chemical-factory-in-allepo/.
[118] Syrian News Agency, "Al-Jaafari: Syria is committed to close cooperation with OPCW," Nov. 6, 2014; available at: http://sana.sy/en/?p=17034.
[119] See C Gray, International Law and the Use of Force (2000).

ethnic cleansing, use of weapons of mass destruction, or crimes against humanity against civilians.[120]

In such circumstances where force is considered the best of a bad set of choices, it is important, as with monitoring WMD destruction programs in general, to have a constant flow of updated intelligence. The required intelligence must cover a range of information about the types, location, contents and activities of facilities that are part of the chemical weapons production enterprise.

Alternatively, the use of force could be characterized as "illegal but justified" similar to the rationale provided for NATO's intervention in Kosovo in 1999.[121] One example would be Israel's destruction of Syria's Al Kibar nuclear reactor in 2007.[122] Both sides never acknowledged the destruction of the facility due primarily to the illicit nature of the program (Syria is a member of the NPT). Such a justification is not without its critics of course. The "illegal but justified" approach shifts the focus away from questions of legality and towards questions of legitimacy and morality divorcing the two which can, in effect, ossify the law and undermine its relevance. Doing so increases the risk of self-serving exceptionalism.[123] Nevertheless, in exigent circumstances such an approach or justification is morally if not legally supportable,[124] recognizing the political fallout that accompanies almost every one of these options, even those that are not precedent setting.

VII. Conclusion and Recommendations

As we have examined, since the end of the Cold War there is a long history of the U.S. and its allies and partners retrieving and disposing of WMD and its related materials. The international nonproliferation norms set forth in the NPT, BWC, and CWC are well established, and for the most part WMD elimination operations have been with the agreement of the possessing and

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[120] During a gathering of world leaders in New York for the High-level Plenary Meeting of the General Assembly (World Summit) in 2005, heads of state and government agreed to a Responsibility to Protect (R2P) populations from genocide, war crimes, crimes against humanity and ethnic cleansing. See paragraphs 138 and 139 of the 2005 World Summit Outcome Document (WSOD) at http://responsibilitytoprotect.org/index.php/component/content/article/35-r2pcs-topics/398-general-assembly-r2p-excerpt-from-outcome-document. The WSOD – including the paragraphs that define the Responsibility to Protect – was unanimously adopted by all UN member states at the 2005 World Summit; available at: http://www.cscap.org/index.php?page=responsibility-to-protect.

[121] Independent International Commission on Kosovo, "The Kosovo Report," 23 October 2000; available at: http://reliefweb.int/report/albania/kosovo-report.

[122] Syria's Al Kibar nuclear reactor complex in September 2007was destroyed by Israeli jets. Neither Syria or Israel have ever acknowledged that the strike occurred. For a detailed description of the operation see http://www.salon.com/2009/11/03/syria_israel/ accessed on 10 March 2016.

[123] A. Roberts, "*Legality vs Legitimacy: Can Uses of Force Be Illegal but Justified*?" in P. Alston & E. Macdonald, ed., Human Rights, Intervention, and the Use of Force, Oxford Scholarship Online (2009).

[124] Most legal experts would argue that the preventive—vice preemptive—use of force is not supportable under international law. However, in cases involving weapons of mass destruction proliferation a legal case can be made that no nation need be legally barred from responding to the threat. See Guy B. Roberts, "The Counter Proliferation Self-Help Paradigm: A Legal Regime for Enforcing the Norm Prohibiting the Proliferation of Weapons of Mass Destruction," 27 Denver J. Int'l L 483, Summer 1999.

receiving states and interested and relevant international governmental organizations tasked with overseeing or enforcing these nonproliferation prohibitions. However, there have also been cases where such operations have been carried out or attempted in a less than benign environment. In the primary case discussed here, Syria's agreement to give up its chemical weapons required new and novel procedures to acquire, transfer, transport and destroy these weapons, procedures that were not reasonably contemplated by the CWC.

Further, the reality on the ground of political instability and civil war severely impacted the OPCW's ability to carry out elimination operations which were further complicated by CWC's "never under any circumstances" prohibition on the transfer of chemical weapons. These kinds of situations were obviously not contemplated by the CWC and challenged the ability of the international community to craft a solution to eliminating Syria's chemical weapons program. In such an environment there, nevertheless, remains a range of legally justifiable options or measures available to the U.S. and other nations in cases where there may be a conflict between the legal obligations under a nonproliferation or other international agreement and obligations or actions mandated and imposed by the UN Security Council.

In the case of the CWC when for unforeseen circumstances it would be improvident to strictly comply with the prohibitions and technical procedures of the CWC, international law does offer a range of options. In this case, the strongest legal justification was a UNSC resolution issued contemporaneously with an OPCW Executive Council decision authorizing actions and processes allowing for the transfer of these weapons notwithstanding the CWC prohibition against doing so. As discussed, UN Security Council directives, under Article 103 of the Charter, take precedence over treaty obligations.

While the CWC reaffirms and advances the global norm against chemical weapons, the Syrian case is an excellent example of the uphill battle when it came to compliance with its fundamental prohibitions. More so than any other nonproliferation treaty, it is equipped with a broad and detailed array of arms control tools including declarations and short notice inspections. Despite these intrusive measures nations will continue to cheat and it will continue to be challenging to detect their cheating. So, for example, in order to verify the complete removal of Syria's stockpiles, OPCW needed to have high confidence that the Assad government truthfully declared what it had. Although since the CWC's entry into force there has never been a "challenge inspection," if there is an articulable doubt as to whether or not Syria may still has a CW program, any State Party that suspects Syria is hiding something could call for a "challenge inspection" that Syria as a member of the CWC would have no right to refuse. The fact that no State Party has so far done so after evidence surfaced that Syria had not disclosed all of its chemical weapons evidences the fear that to do so would jeopardize further "cooperation" by Syria. It also demonstrates the challenging nature of such verification measures and the importance of good intelligence. As it turned out the Syrians had more than they declared and they were actively dispersing and continuing to use their stockpiles of agents. They continued to claim that many alleged sites or facilities were in the hands of rebels or ISIS and that sending out

inspection/verification teams was too dangerous. Under these circumstances, with no way to peacefully eliminate these weapons the use of military force becomes a viable alternative to disposition/destruction operations.

In the absence of a Security Council mandate, the CWC prohibition against transfer and receipt of chemical weapons, along with the CWC's strict destruction instructions, poses a higher legal hurdle to navigate. Nevertheless, as discussed in detail, there are a number of alternative justifications that are available and supportable under international law to ensure that the transfer prohibition is at least temporarily overcome to rapidly and effectively eliminate Syria's CW program. These include:

1. Bi-lateral agreement between the possessor and receiving state under exigent circumstances to destroy CW stocks and argue that the "transfer prohibition" does not apply or temporarily suspended for purposes of destruction of a CW program. CWC procedures for destruction should be followed as practicable.

2. In order to effectuate compliance (e.g. retrieval and destruction of clandestine CW program) announce suspension of obligations under the CWC or other relevant agreements on the basis of one of four justifications:
    a. Material breach
    b. Impossibility
    c. Fundamental change of circumstances
    d. Force majeure

    So, in cases of military necessity or exigent circumstances, similar to the Iraqi CW disposition discussed supra, chemical weapons could be blown up to prevent future possession or use by terrorist groups.

3. Passage of a UN Security Council Resolution that would temporarily suspend the obligations to fully comply under the CWC in order to effectuate the object and purpose of the treaty; i.e. the non-proliferation or elimination of WMD. For example, UNSCR 2231 (2015) endorsing the **Joint Comprehensive Plan of Action (JCPOA) on Iran's Nuclear Program** included this operative paragraph:

    Decides, acting under Article 41 of the Charter of the United Nations, also that the measures imposed in [various Security Council] resolutions … shall not apply to the extent necessary to carry out transfers and activities, as approved on a case-by-case basis in advance by the Committee established pursuant to resolution 1737 (2006), ….

In order to give maximum flexibility to achieving nonproliferation goals and recognizing that not every situation can be contemplated or accommodated in these nonproliferation treaties a similar "opt out" provision should be included in all future such arms control agreements.

Indeed, it is the willingness of states parties to act in the face of noncompliance, more than the sophistication and comprehensiveness of its inspection provisions or the extent of data reporting requirements, that determines the CWC's effectiveness. It was the willingness of Russia to agree with the U.S. to force Syria to join the CWC and renounce chemical weapons that provided the environment for at least the partial destruction of its chemical weapon stocks. Absent the political will to make, enforce, and execute these agreements, they are not worth the paper on which they are written. If the political commitment to action is absent, authorities they provide will remain unimplemented. If the political strength to take on those who will not abide by the rules vanishes, as the reluctance to conduct "challenge inspections" even in the Syria case, the penalties have the impact of a mosquito – inconvenient and irritating perhaps, but no deterrent.

The Syria case (and to a lesser extent the Iraq and Libya cases) is a plausible scenario for future retrieval and disposition operations. As such it is a cautionary tale as to how challenging it is to understand and account for WMD programs. It is more likely than not that in the near future we may be facing countries of proliferation concern such as Iran, North Korea and Pakistan or a terrorist group like ISIS where the elimination of their WMD program becomes a critical mission. Such operations will likely be conducted under less-than-hospitable circumstances where local or rebel resistance, site contamination, and general instability reigns.

Also, as the Syria case demonstrates, WMD elimination is more than just the physical seizure, destruction, or removal of WMD. The Syrian government easily hid their CW program and infrastructure by limiting the scope of mission to declared sites only. Instead, the mission scope should have included the entire process of locating and characterizing the CW program, as well as destroying, removing or neutralizing the weapons and ensuring that they will not be reconstituted or transferred in the future. Elimination of the capability to produce and use WMD includes the attendant programs, infrastructure, and expertise. WMD retrieval and destruction/disposition operations obviously require highly trained personnel, specialized equipment and enabling capabilities such as security forces, transportation assets, linguistic support, intelligence assets, communications equipment and other logistics. This extensive capability was, of course, severely hampered by the brutal civil war in which suspect sites were inaccessible as a result of their being occupied by rebel forces.

Oftentimes in highly volatile situations, speed is crucial to the success of any WMD elimination mission. While fast by international diplomacy standards, the slow pace of the Syrian CW elimination negotiations allowed the Syrian Government to move and hide a significant portion of its CW capability which was subsequently used on the civilian population. Consequently, it would be useful to create a standing WMD elimination capability able to operate in all situations, deploying rapidly with the capability to find and secure or destroy all phases and aspects of a WMD program. No doubt, effective retrieval and disposition/destruction operations will require a unique fusion of a wide set of capabilities, subject matter expertise and good intelligence to be successful.

Ultimately, the primary concern is stopping and rolling back the proliferation of WMD. In such cases where the international community has agreed on a process to eliminate a weapons program it is better to adhere to the spirit of the relevant non-proliferation convention rather than be bogged down or stymied because of a failure to strictly abide by the terms of the non-proliferation norm concerned. On an almost daily basis we are reminded of the determination of terrorists and hostile states to pursue the acquisition and use of WMD. We must, therefore, have the capabilities to robustly conduct WMD retrieval and elimination operations under all circumstances in an expeditious manner. International law and our commitment to nonproliferation treaties are not barriers but rather enablers when it comes to the object and purpose of these norms: eliminating the world's most dangerous weapons in the hands of our most dangerous enemies.