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Changing Direction on Non-Nuclear Arms Control? American Exceptionalism, Power, and Constancy

By
Jeremy Ostrander*

Is Washington's will to lead diminishing even as many around the globe look to it for leadership? Is it no longer convinced of the myriad benefits to be had from multilateral cooperation even as it seeks multilateral cooperation in Iraq? Is it prepared to step away from the world of expanding freedom, democracy, growth, and opportunity that it did so much to bring about?

—Kofi Annan¹

• Tis our true policy to steer clear of permanent Alliances, with any portion of the foreign World—So far, I mean, as we are now at liberty to do it . . .

—George Washington.²

I.

PREFACE

In the atmosphere of post-September 11, 2001 America, many perceived a wellspring of support, at both the popular and political levels, for global multilateral cooperation to confront the international problem of terrorism. But this well seems to have run dry, or as one commentator phrased it, “[i]t was as if there had been a bolt of lightning that brilliantly and briefly illuminated the landscape without changing it.”³ Indeed, there is a growing undercurrent of belief amongst political leaders in both Congress and the Executive that the United States has ceded too much of its sovereignty to international treaty regimes and organizations.⁴ For them, withdrawal from the Biological Weapons

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1. Quoted in David L. Marcus, *Allies, Foes, See Lack of U.S. Leadership; On Land Mines, Global Warming, Washington Called Indecisive*, BOSTON GLOBE, Dec. 21, 1997, at A37.

2. President George Washington, *Farewell Address to the People of the United States*, AMER. DAILY ADVERT. (PHIL.), Sept. 19, 1796.

3. *Night Fell on a Different World—A Year On*, THE ECONOMIST, Sept. 7, 2002, at 22.

4. See Bob Barr, *Protecting National Sovereignty in an Era of International Meddling: An Increasingly Difficult Task*, 39 HARV. J. ON LEGIS. 299 (2002); *In the Words of Helms: “A Lack of Gratitude,”* N.Y. TIMES, Jan. 21, 2000, at A8 (quoting Jesse Helms speaking before the U.N. Security Council).

Convention Protocol (“BWC”),⁵ rejection of the Kyoto Protocol, and refusal to ratify the International Criminal Court are necessary measures to maintain national sovereignty.⁶

To some extent, the events of September 11 “shifted the tectonic plates in international politics”⁷ away from these concerns of sovereignty, but those movements have been glacial in pace. The Bush administration liberally engaged in multilateral rhetoric after the attacks, but since that time there has been a reversion to a thought process of “American exceptionalism” in foreign policy. Certainly this belief in the supremacy of American policy is not unique in the history of the United States,⁸ but it has arisen with new strength from the surge in patriotism after September 11.⁹ This exceptionalism brings with it a dichotomy of forces; on one hand “a crusading zeal to recast international society” in the domestic image of the United States, and on the other, a desire to preserve American ideals from foreign corruption.¹⁰ This dichotomy not only leads the United States to act unilaterally, as with its approach to small arms control, but also to attach to the activities of any international organization of which it is a member an expectation of the satisfaction of American ideals and requirements, as with its recent interactions with the governing body of the Chemical Weapons Convention (“CWC”)¹¹ and its counterproposal to the BWC protocol. Both of these events marked a refusal by the United States to participate on any terms but its own.

Is the Bush administration’s action unique in American history?¹² Consider first, as others have suggested, that “hegemonic powers are loath to submit to international regimes they do not dominate.”¹³ Indeed, the United States might be as close to hegemony as possible in the modern world; the current government is buoyed by ample political capital, military superiority, and disproportionate economic strength. Many parallel this situation to that existing after WWII, drawing hope from U.S. global engagement in that time period. Multilateralism in that context functioned so as to “lock in” a set of international rules that would still serve U.S. interests in stability and economic growth after

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

6. See, e.g., Barr, *supra* note 4.

7. Condoleezza Rice, quoted in *Night Fell on a Different World*, *supra* note 3, at 23.

8. The idea of American exceptionalism has been well explored. See e.g., SEYMOUR MARTIN LIPSET, AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD 31 (1996) (arguing that the nation’s ideology of exceptionalism relies on a history of liberty, egalitarianism, individualism, populism, and laissez-faire governance).

9. *Night Fell on a Different World*, *supra* note 3, at 24.

10. Stewart Patrick, *Multilateralism and Its Discontents: The Causes and Consequences of U.S. Ambivalence*, in MULTILATERALISM & U.S. FOREIGN POLICY 1, 7 (Stewart Patrick & Shepard Forman eds., 2002).

11. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 1974 U.N.T.S. 45 [hereinafter CWC].

12. Of course, perspective on how “unilateral” the United States can be is necessary. The United States has propounded and enlisted in hundreds of multilateral regimes over the last half-century. See Patrick, *supra* note 10, at 11.

13. Josef Joffe, *Who’s Afraid of Mr. Big?*, THE NAT’L INTEREST, Summer 2001, at 43, 48.

its dominance faded.¹⁴ Some labeled this an “institutional bargain,”¹⁵ wherein the United States agreed to institutional constraints to promote order and America’s paramount economic interests. This idea can be paralleled to the contemporary climate of arms control, where containment of elusive dangers like chemical and biological weapons might require an institutional order to be successful.

Yet such a compromise of power seems antithetical to an administration that aspires to “self-defense by acting preemptively,” and “to dissuade potential adversaries from pursuing a military buildup in hopes of surpassing . . . the power of the United States.”¹⁶ Coupling this national security strategy with the denunciation of the “axis of evil” in his 2002 State of the Union Address, President Bush gave notice to certain states that violations of the various arms control regimes would be punished.¹⁷ This tack has been not so much a break from the substance of past policy, i.e., that of the Clinton era, but a growing sense of American exceptionalist and power-based rhetoric within much of the same framework.

For instance, the U.S. decision to withdraw from the review process of the BWC Protocol, criticized almost universally by the member states of the BWC, was based on a viewpoint colored by strong domestic bioterrorism laws and lobbying by private biotechnology interests. In the eyes of the administration, the Protocol would bring no extra benefits, in the guise of added security and inspections, but would entail significant threat to proprietary information in domestic industry. Yet these concerns have existed since the inception of the review process during the Clinton administration in 1996. It was not until Bush’s ascension that the possibility of scrapping the entire process in favor of a system that relies on the world conforming to U.S. domestic policies arose. Coupled with a willingness to utilize force as a preemptive tool, this emphasis on domestic legislation, which may be impossible or, at best, ineffectual in the most relevant states, does little for the maintenance of order. In that sense, the United States has eschewed any institutional bargain in favor of suggesting conformance with U.S. policies and, in the absence of such conformance, promising the use of force. This policy of containment through domestic action, deterrence, and projection of force rests on ideas held over from a Cold War legacy of thought that seems somewhat inapposite to a world where the proliferation threat comes not from a monolithic enemy but from a plethora of unpredictable, “rogue” states.

With the goal of examining the impact of this ideology on non-nuclear arms control, Section I of this review will discuss the status quo in non-nuclear arms control at the time of President Bush’s election to office. Section I will

14. Patrick, *supra* note 10, at 10.

15. G. John Ikenberry, *Multilateralism and U.S. Grand Strategy*, in *MULTILATERALISM & U.S. FOREIGN POLICY*, *supra* note 10, at 121.

16. THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES, Sept. 2002, at <http://www.whitehouse.gov/nsc/nss.pdf> (last visited Nov. 25, 2002).

17. President George Bush, Address Before a Joint Session of Congress on the State of the Union, 38 WEEKLY COMP. PRES. DOC. 133 (Jan. 29, 2002).

pay special attention to the role of the United States in constructing various arms control regimes, particularly the BWC and the CWC. In the realm of conventional arms control, the section will focus on U.S. contributions to and viewpoints on land-mine removal and the trade in small arms. Section II will reconsider these areas through the lens of the Bush administration's activities, paying special attention to the paradigm of U.S. multilateralism, which, in homage to our colonial heritage, is perhaps best summarized as "make the world America."

II.

HISTORICAL BACKGROUND AND THE INHERITANCE OF EXCEPTIONALISM

A. *Chemical and Biological Weapons*

1. *The Geneva Protocol*

The use of biological and chemical weapons was originally prohibited by the 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare ("Geneva Protocol").¹⁸ The Geneva Protocol arose out of the destruction and terror that poisonous chemical gases had sown on the battlefields of World War I.¹⁹ The text of the Protocol states that:

[w]hereas the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices, has been justly condemned by the general opinion of the civilized world . . . the High Contracting Parties . . . agree to extend this prohibition to the use of bacteriological methods of warfare and agree to be bound as between themselves according to the terms of this declaration.²⁰

Although the United States had been one of the proponents of the passage of the Protocol, it was never ratified due to extensive isolationist debate in the Senate in the post-war era.²¹ However, most of the other major powers, including the USSR, Great Britain, and France, ratified the convention.²² Presently, there are 132 states parties to the convention and one signatory state.²³

Despite its general acceptance in terms of international law, there were many structural problems with the Geneva Protocol. It was aimed primarily at a ban on the use of chemical weapons, and indeed, makes no mention of biological weapons in its preamble.²⁴ Although the Protocol outlawed the use of poisonous gases, it did not prohibit the research, development, creation, and

18. Protocol on the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65 [hereinafter Geneva Protocol].

19. U.S. State Department Fact Sheet: Geneva Protocol, at <http://www.state.gov/tac/trty/4784.htm> (last visited Nov. 25, 2002) [hereinafter Geneva Protocol Fact Sheet].

20. Geneva Protocol, *supra* note 18.

21. *Id.*

22. *Id.*

23. *Id.*

24. Kristen Paris, *The Expansion of the Biological Weapons Convention: The History and Problems of a Verification Regime*, 24 HOUST. J. INT'L L. 509, 516 (2002).

stockpiling of new chemical agents.²⁵ Many states, including the United States, also reserved the right to make use of chemical weapons even in times of war if their opponent made first use of such weapons.²⁶

It was not until 1969 that the United States renounced the use of biological and chemical weapons and not until 1975 that the United States ratified the Geneva Protocol.²⁷ Still, there were obvious holes in the Geneva Protocol regime that would be filled first by the BWC and then the CWC.

2. *The Biological Weapons Convention*

The BWC arose from a sense within the international community that the development of a lethal arsenal of chemical and biological weapons was a growing risk.²⁸ After several years of preparatory work, the BWC was opened for signature in April 1972 and entered into force in March of 1975.²⁹ As of October 2001, there were 144 states parties and eighteen signatory states to the convention.³⁰ Article I of the BWC states:

Each State Party to this Convention undertakes never in any circumstances to develop, produce, stockpile or otherwise acquire or retain:

- (1) Microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes;
- (2) Weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.

Obviously, the BWC contains stronger language than the Geneva Protocol, proscribing the use of biological weapons “under any circumstances” and prohibiting the development and stockpiling of such weapons. Article II of the BWC requires that all state parties destroy or divert to peaceful purposes their existing stockpiles of “all agents, toxins, weapons, equipment, and means of delivery.”³¹ This article has proven extremely difficult to enforce or verify, a problem that remains one of the major concerns of the United States. Although the United States nominally destroyed its biological weapons stores in 1969 prior to the effect of this article, the Soviet Union embarked on a massive escalation of its biological weapons programs after the passage of the BWC.³² These expansive programs remained hidden from public view, despite events like the 1979 release of anthrax from a Soviet military facility near the city of

25. OFFICE OF TECHNOLOGY ASSESSMENT, 103rd CONG., *THE CHEMICAL WEAPONS CONVENTION: EFFECTS ON THE U.S. CHEMICAL INDUSTRY* (1993), at <http://www.wws.princeton.edu/cgi-bin/byteserv.prl/~ota/disk1/1993/9346/9346.pdf> (last visited Nov. 25, 2002) [hereinafter OTA Report].

26. See Geneva Protocol Fact Sheet, *supra* note 19. The United States has rescinded this reservation. See Heather A. Dagen, *Bioterrorism: Perfectly Legal*, 49 CATH. U. L. REV. 535 (2000).

27. See Geneva Protocol Fact Sheet, *supra* note 19.

28. MALCOLM DANDO, *THE NEW BIOLOGICAL WEAPONS: THREAT, PROLIFERATION, AND CONTROL* 34 (2001).

29. BWC, *supra* note 5, at 1.

30. List of States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, BWC Doc. BWC/CONF.V/INF.1, at <http://www.opbw.org/> (last visited Nov. 25, 2002).

31. BWC, *supra* note 5, art. II, 26 U.S.T. at 587, 1015 U.N.T.S. at 166.

32. DANDO, *supra* note 28, at 58.

Sverdlovsk.³³ These Soviet-era weapons remain one of the major concerns of the BWC system.

To address those concerns, Article IV of the BWC requires that all states parties “shall, in accordance with its constitutional processes, take any necessary measures to prohibit and prevent the development, production, stockpiling, acquisition or retention of the agents, toxins, weapons, equipment” within their territory.³⁴ This article envisions that all member parties will implement legislation criminalizing the use, development or possession of biological agents. In the United States, this legislation took the form of the Biological Weapons Anti-Terrorism Act of 1989.³⁵ In this, however, the United States is an exception, as only a small number of states have implemented such legislation.

Article V sets out the consultative process that governs conflict resolution under the BWC; resolution may be reached between the two member parties or “may also be undertaken through appropriate international procedures within the framework of the United Nations.”³⁶ In the event of the failure of negotiation, Article VI sets out the procedure by which a member nation may take a complaint to the U.N. Security Council, at which point the Council may pursue the investigation and the investigated country is bound by the BWC to cooperate.³⁷

Articles VII and X address, respectively, the assistance of victims and technical and scientific cooperation. Article VII requires member states to provide support and assistance “if the Security Council decides that such Party has been exposed to danger as a result of violation of the Convention.”³⁸ Article X encourages cooperation in the transfer of biological technologies for peaceful purposes and to prevent disease so as “to avoid hampering the economic or technological development of States Parties to the Convention or international cooperation in the field of peaceful bacteriological (biological) activities.”³⁹

Trepidations about the growing lethality of biological agents resonate strongly in the modern era, particularly with the perceived increase in the probability of terrorist attacks. With advancements like the Human Genome Project, the potential for terrible new biological weapons is growing.⁴⁰ Thus, the establishment of a verification regime was at the center of the BWC review conferences of 1980, 1986, 1991, 1996, and 2001. The United States took an active role in the first two review conferences, though it grew frustrated with the Eastern Bloc’s refusal to submit to any sort of verification regime at the 1986 review conference.⁴¹ In order to develop a workable verification system, the 1991 Conference set up an Ad Hoc Group of Governmental Experts to consider potential verification regimes. This group presented its findings to the 1996

33. *Id.* at 83-84.

34. BWC, *supra* note 5, art. III, 26 U.S.T. at 587, 1015 U.N.T.S. at 167.

35. Biological Weapons Anti-Terror Act, 18 U.S.C. § 175 (1989).

36. BWC, *supra* note 5, art. V, 26 U.S.T. at 588, 1015 U.N.T.S. at 167.

37. *Id.*, art. VI, 26 U.S.T. at 588, 1015 U.N.T.S. at 167.

38. *Id.*, art. VII, 26 U.S.T. at 589, 1015 U.N.T.S. at 167.

39. *Id.*, art. X, 26 U.S.T. at 590, 1015 U.N.T.S. at 167.

40. DANDO, *supra* note 28, at 38.

41. Paris, *supra* note 24, at 524.

Conference, which asked the Ad Hoc Group to draft a verification protocol for consideration at the 2001 Conference.⁴² The United States was supportive of the development of a verification regime, but also expressed concern with an emerging trend in the interpretation of article X's technology-sharing provisions that threatened to "obliterate intellectual property rights" and with the breadth of inspections that would be required under the Protocol.⁴³ Further, the U.S. delegation urged that member states work to implement the legislation called for under article IV, in addition to continuing the expansion of confidence-building measures between the state parties.

In March 2001, the Ad Hoc Group propounded the Draft Protocol.⁴⁴ The Protocol verification system follows a similar path to that of the CWC. Article 16 of the Protocol establishes the Organization for the Prohibition of Biological Weapons ("OPBW").⁴⁵ Under article 1, the OPBW must fulfill its duties in "the least intrusive manner" possible.⁴⁶ The OPBW is responsible for managing the verification measures of the Protocol, which include extensive weapons declarations and on-site visits to declared facilities. Under article 4 of the Protocol, full declarations of biological weapons programs are required at the time of entry into force of the Protocol and annually thereafter.⁴⁷ All manner of facilities, including those that work with listed agents or toxins and those with high-security biological containment areas, must be declared under the Protocol.⁴⁸

There are three types of verification visits under the Protocol regime: randomly selected transparency visits, voluntary assistance visits, and voluntary clarification visits.⁴⁹ Of these three, random transparency visits are the most contentious.⁵⁰ They are intended to instill confidence in the accuracy of declarations, but would be limited to seven such visits to any one state in a year.⁵¹ These random visits raise serious questions about the protection of proprietary information within the inspected facilities. Thus, fourteen days before the visit, the hosting state will receive notice of the visit, including the visiting team's

42. *Id.* at 527.

43. John D. Holum, Remarks to the Fourth Review Conference of the Biological Weapons Convention, Nov. 26, 1996, at <http://www.state.gov/www/global/arms/speeches/holum/bwcrev.html> (last visited Nov. 22, 2002).

44. Protocol to the Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on Their destruction, BWC Doc. BWC/AD HOC GROUP/CRP.8, at <http://www.opbw.org/> (last visited Nov. 22, 2002) [hereinafter BWC Protocol].

45. *Id.*, art. 16, at 86.

46. *Id.*, art. 1, at 7.

47. *Id.*, art. 4, at 17.

48. *Id.*

49. *Id.*, art. 6(15), at 28; art. 6(49), at 36; art. 6(55), at 38.

50. Voluntary assistance visits occur only upon a state's request and are intended to assist in declarations or other "relevant technical assistance and information." *Id.*, art. 6(49), at 36. Voluntary clarification visits involve a state party allowing an OPBW inspection to clarify an "ambiguity, uncertainty, anomaly or omission" in that state's declaration. *Id.*, art. 6(55), at 38. See generally, Seth Brugger, *Executive Summary of the Chairman's Text*, ARMS CONTROL TODAY, May 2001, available at http://www.armscontrol.org/act/2001_05/brugger.asp (last visited Apr. 15, 2003).

51. Brugger, *supra* note 50.

estimated time of arrival in the country and the facility to be visited.⁵² During the visit, the hosting party will “have the right to take measures to protect national security and commercial proprietary information.”⁵³

Finally, the Protocol allows for two types of investigations to inspect possible violations of the BWC.⁵⁴ Field investigations can be launched in areas where the release or suspected use of biological agents has caused concern about a possible violation of the BWC. Facility investigations can be conducted if there is concern that a particular facility is violating the convention. These investigations, known as “challenge visits” under the CWC regime, can be requested by any state party to the BWC.⁵⁵ To initiate an investigation, a state-party must submit a request to the director-general, who then determines whether the request provides required information, such as the approximate time and location of the alleged illicit activity. Although the compositions of the teams in field and facility visits differ, neither situation requires notice of a planned facility investigation of more than twelve hours before the arrival of an investigating team in the country.⁵⁶

The Protocol text contains a number of measures to protect an investigated state. For example, as a rule, an investigating team would start its investigation with the least intrusive measures and progress to more intrusive measures “only as required to fulfill its mandate.”⁵⁷ In addition, the investigated state would have the right to protect national security and confidential information by using “managed access” techniques, such as shrouding sensitive equipment or limiting the time the investigation team could spend in any area.⁵⁸

The draft Protocol also contains provisions concerning the strengthening of export controls and encouraging the implementation of legislation criminalizing violations of the BWC by private actors. The export controls, which call for legislation to regulate the transfer of dual use items, are especially controversial among state parties.⁵⁹

It was with these guidelines that the state parties entered the fifth Review Conference. However, as will be discussed in Part II, the Bush administration rejected the Protocol in June 2001, and then the entire Ad Hoc Group review structure in November 2002.

52. BWC Protocol, *supra* note 44, art. 6(22), at 29.

53. *Id.*, art. 6(30), at 31.

54. *Id.*, art. 6(5), at 25.

55. *Id.*, art. 9(1), at 55.

56. *Id.*, art. 9(27), at 60.

57. *Id.*, art. 9(35), at 62.

58. Brugger, *supra* note 50.

59. These export controls are especially concerning to members of the Australia group, a multinational group aimed at collective export control of chemical and biological weapons. Barbara Hatch Rosenberg, *Allergic Reaction: Washington's Response to the BWC Protocol*, ARMS CONTROL TODAY, July-Aug. 2001, available at http://www.armscontrol.org/act/2001_07-08/rosenbergjul_aug01.asp (last visited Nov. 23, 2002).

3. *The Chemical Weapons Convention*

The CWC represents the most intrusive arms control scheme ever constructed, with the stated purpose of “achieving effective progress towards general and complete disarmament under strict and effective international control, including the prohibition and elimination of all types of weapons of mass destruction” and of “exclude[ing] completely the possibility of the use of chemical weapons.”⁶⁰ The convention was opened for signature on January 13, 1993, and entered into force on April 28, 1997, four days after the United States deposited its ratification.⁶¹ As of October 2002, there are 146 states parties.⁶² Thirty signatories have yet to ratify the convention, including Israel. Key non-signatories include Iraq, Libya, North Korea, and Syria, all of which CIA Director George Tenet identified in March 2000 as countries that “now either possess or are actively pursuing” chemical weapons capabilities.⁶³

The convention’s most ambitious provisions call for a three-tiered destruction plan intended to eliminate all state parties’ chemical weapons supplies within ten years of the convention’s entry into force, i.e., by 2007.⁶⁴ The convention also creates a supra-national entity, the Organization for the Prohibition of Chemical Weapons (“OPCW”), with a technical secretariat that is intended to monitor the requirements of the convention.⁶⁵ The OPCW must verify that all parties cease production and stockpiling of weapons,⁶⁶ declare all facilities that produce restricted chemicals for non-prohibited uses,⁶⁷ submit to verification inspections,⁶⁸ and pass legislation implementing the CWC.⁶⁹ The OPCW technical secretariat also chooses the targets of inspections and monitors the destruction of state parties’ weapons stockpiles. It is intended to be the operative wing of the OPCW but is subject to the will of the Conference of the States Parties, which consists of all state parties and is the ultimate policy-making organ, and of the Executive Council, a rotating body of 41 members that makes executive decisions on OPCW inspection issues.⁷⁰

The CWC’s inspection regime was the model for the BWC Protocol. The CWC provides for three basic types of verification for sites that produce or store chemical weapons or designated chemicals. First, state parties are required to

60. CWC, *supra* note 11, pmb., 1974 U.N.T.S. at 317.

61. See States Parties to the Chemical Weapons Convention, at <http://www.opcw.org/html/db> (last visited Nov. 22, 2002).

62. *Id.*

63. Arms Control Association Fact Sheet: The Chemical Weapons Convention at a Glance, at <http://www.armscontrol.org/factsheets/cwcunderstanding.asp> (last visited Nov. 22, 2002).

64. CWC, *supra* note 11, pt. IV(A)(17)(a)(iv), 1974 U.N.T.S. at 391. The CWC adopts a multi-tiered destruction schedule. Twenty percent of category I weapons are to be destroyed by 2002 (within five years of entry into force). *Id.*, pt. IV(A)(17)(a)(ii), at 391. Forty-five percent of category I weapons are to be destroyed by 2005 (within seven years of entry into force). *Id.*, pt. IV(A)(17)(a)(iii), at 391.

65. *Id.*, art. VIII, at 332.

66. *Id.*, art. IV, at 325.

67. *Id.*, art. III, at 322.

68. *Id.*, art. V, at 327.

69. *Id.*, art. VII, at 331.

70. *Id.*, art. VIII, at 332.

provide detailed annual reports on facilities that could produce chemical weapons.⁷¹ Second, chemical production facilities are subject to on-site inspections.⁷² Third, any state party can initiate a “challenge” inspection of any facility within the territory of any other state party.⁷³

The level of scrutiny placed on any facility is tied to a schedule of chemicals included within the convention. For example, a facility producing a schedule 1 substance, a chemical that has been used as a chemical weapon before or has high potential of being so used,⁷⁴ is subject to production limits and annual on-site searches.⁷⁵ Schedule 2 and 3 substances are those that are precursors to chemicals in schedule 1, or those that are not normally produced in large quantities for purposes not prohibited under the convention.⁷⁶ The last category of chemicals, “Other,” includes any items that are not included in the CWC schedules. Facilities that make use of these chemicals are subject to minimal random inspection.⁷⁷ It is this category that makes the inspection regime of the CWC particularly intrusive. The U.S. Congress Office of Technology Assessment estimated that there were more than 10,000 sites in the United States that fell within the “Other” category in the mid 1990s.⁷⁸

The “challenge” inspection structure is significantly more burdensome on the sovereignty of party states. First, there is no limit on the number of challenge inspections to which a state may be subjected in a single year. Second, any facility that has chemical weapons capacity is subject to inspection,⁷⁹ which may occur at any time subject only to a minimal notice of twelve hours before the arrival of the inspection team.⁸⁰ Although another twelve hours are allotted before the inspection begins, the mandate of a challenge inspection is quite broad. Inspectors in these cases will closely monitor the facility for violations.

In terms of domestic responsibilities, the CWC requires that the implementing legislation (1) designate a national authority to coordinate the verification activities of the OPCW,⁸¹ and (2) criminalize all activities prohibited under the CWC.⁸² The United States passed such legislation in the form of the Chemical Weapons Implementation Act of 1998 (“Implementation Act”).⁸³ Given these rather intrusive obligations, it is not surprising that the ratification process of the CWC was contentious. Indeed, many scholars pointed out that the provisions of the convention that call for inspection by the OPCW under color of federal law

71. *Id.*, art. VI, at 330.

72. *Id.*

73. *Id.*, pt. X, at 445.

74. *Id.*, A(1), at 356.

75. *Id.*, pt. VI, at 330.

76. *Id.*, A(2), at 356.

77. *Id.*, pt. IX, at 441.

78. OTA Report, *supra* note 25, at 15.

79. CWC, *supra* note 11, part X(B)(6), 1974 U.N.T.S. at 446.

80. *Id.*, pt. X(B)(23), at 449.

81. *Id.*, art. VII(4), at 332.

82. *Id.*, art. VII(1)(a), at 332; art. VII(1)(c), at 332.

83. Chemical Weapons Convention Implementation Act of 1998, 22 U.S.C. § 6701 (1998), 18 U.S.C. § 229 (1998).

through the Implementation Act might run afoul of the protections of the Fourth Amendment.⁸⁴ Others argued that the allocation of federal authority to members of the OPCW technical secretariat amounted to a violation of the Appointments Clause of Article II, paragraph 2.⁸⁵

There was significant concern about the implications of the convention during the Senate discussion prior to ratification.⁸⁶ As a result of this, the Senate's advice and consent contained twenty-eight separate conditions qualifying U.S. participation in the CWC.⁸⁷ Although the CWC proscribes any reservations,⁸⁸ the Senate still passed the ratification subject to these conditions, including one that asserted a Congressional right to make reservations to the convention.⁸⁹ Other conditions established a maximum amount of funding that the United States will supply on a per annum basis, provided the president with the power to refuse an inspection on the grounds of protecting national security, and required that all challenge inspections be conducted pursuant to a criminal search warrant and that all routine inspections be conducted subject to an administrative search warrant.⁹⁰ A final condition, and perhaps the one most at odds with the OPCW's mission, requires that all samples collected on American soil be analyzed by laboratories in the United States.⁹¹ It is not clear what legal role these "conditions" play, but any condition construed as a reservation that places the United States in conflict with its duties of declaration and verification would be a breach of the Convention.

Some critics of the United States and the CWC say that this congressional action undercut much of the application of the convention in the United States.⁹² Several of these conditions, particularly the funding restrictions and limits on inspections, were seen as potential threats to the OPCW's effectiveness. In addition to constructing a set of rules to which only the United States would be bound, congress held up declarations of chemical factories within the country that would be eligible for inspection for three years. They also failed to allocate any funds at all for the operational expenses of the OPCW in fiscal years 1999 or 2000.⁹³

84. See Ronald D. Rotunda, *The Chemical Weapons Convention: Political and Constitutional Issues*, 15 CONST. COMM. 131 (1998); Edward A. Tanzman, *Constitutionality of Warrantless On-Site Arms Control Inspections in the United States*, 63 N.Y.U. L. REV. 229 (1988).

85. See John C. Yoo, *The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 CONST. COMM. 87 (1998).

86. Erik J. Leklem, *Senate Gives Advice and Consent; U.S. Becomes Original CWC Party*, ARMS CONTROL TODAY, Apr. 1997, available at http://www.armscontrol.org/act/1997_04/CWC-APR.asp (last visited Nov. 23, 2002).

87. S. Res. 75, 104th Cong. (1997) (enacted).

88. CWC, *supra* note 11, art. XXII, 1974 U.N.T.S. at 354.

89. See S. Res. 72, 104th Cong. (1997) (enacted).

90. *Id.*

91. *Id.*

92. See generally, MONTEREY INSTITUTE OF INTERNATIONAL STUDIES, *THE CHEMICAL WEAPONS CONVENTION: IMPLEMENTATION CHALLENGES AND SOLUTIONS* 25 (2001).

93. Judith Miller, *Chemical Weapons Ban May Suffer for Lack of Dues from Treaty's Parties*, Apr. 27, 2001, N.Y. TIMES, at A7.

Despite these hurdles, the OPCW came into existence in 1997 with Jose M. Bustani, a Brazilian diplomat, at its head. Since that time, the OPCW has received declarations of 5237 sites, 33 on schedule 1, and has conducted 1257 total inspections, including three inspections each for the schedule 1 facilities.⁹⁴ However, some state parties, notably Russia, have been unable to meet the destruction requirements of Article IV, which has raised red flags in the Bush administration. In addition, the inspection and destruction duties of the OPCW have been strained by funding difficulties that stem partially from a conflict between the United States and Bustani that came to the fore in early 2001.

B. Conventional Arms

1. International Regimes Regulating Land Mines

Under the Clinton administration, the United States chose to stay outside of the Ottawa Landmine Convention,⁹⁵ citing requirements in Korea and the need for effective anti-tank mine systems.⁹⁶ The United States currently uses a “mixed system” employing both anti-personnel and anti-tank mines, in order to create an effective protective barrier against enemy armed forces.⁹⁷ The Ottawa Convention, while permitting anti-vehicle mines, does not allow “mixed systems” of anti-personnel and anti-tank mines.⁹⁸ In the opinion of President Clinton and the Defense Department, the prohibition of “mixed systems” created an unacceptable risk to U.S. forces.⁹⁹ Nonetheless, Clinton was dedicated to signing the United States onto the Convention.

Pursuant to these concerns, President Clinton issued a Presidential Decision Directive requiring the Pentagon to take the steps necessary to halt the use of anti-personnel land mines by 2006.¹⁰⁰ Furthermore, Clinton pledged that the United States would become a party to the Ottawa treaty by 2006.¹⁰¹ However, this would only take place if the United States could successfully identify and field suitable alternatives to its anti-personnel mines and mixed anti-tank systems—a combination of anti-vehicle and anti-personnel devices.¹⁰²

Despite these misgivings about the Ottawa Convention, the United States has signed on to the land-mine protocol amended to the Convention on Certain

94. Organization for the Prohibition of Chemical Weapons, Inspection Activity, at <http://www.opcw.org/ib> (last visited, Nov. 22, 2002).

95. President William Clinton, Remarks on International Efforts to Eliminate Landmines and an Exchange with Reporters, 2 PUB. PAPERS 1183 (Sept. 17, 1997), available at <http://www.defense.gov/speeches/1997/di1247.html> (last visited Nov. 22, 2002).

96. *Id.*

97. *Id.*

98. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, art. I, 2056 U.N.T.S. 211.

99. See Clinton, *supra* note 95.

100. *Id.*

101. *Id.*

102. Wade Boese, *U.S. Wants Strengthened CCW Landmines Protocol*, ARMS CONTROL TODAY, Jan.-Feb. 2001, available at http://www.armscontrol.org/act/2000_01-02/ccwjf00.asp (last visited Nov. 22, 2002).

Conventional Weapons.¹⁰³ The amended protocol outlaws non-detectable anti-personnel mines,¹⁰⁴ and prohibits non-self-destructing and non-self-deactivating anti-personnel mines unless planted in monitored, perimeter-marked areas.¹⁰⁵ Mines that detonate in response to mine detectors and those that have anti-handling devices that remain active after the mine itself deactivates are also proscribed.¹⁰⁶ Most importantly, the Protocol does not prohibit the mixed anti-personnel/anti-vehicle mines that held up United States entry into the Ottawa convention.

Outside of this treaty commitment, the U.S. State Department operates the Office of Humanitarian Demining Programs (“OHDP”). The OHDP coordinates, develops, and implements country-specific humanitarian demining programs and oversees all U.S. agencies involved in international demining initiatives. Since 1993, the United States has provided more than \$600 million to support humanitarian mine action.¹⁰⁷ Other major donors include the EU (\$151 million); twelve European countries, including Norway (\$107 million) and the U.K. (\$79 million); Canada; and Australia.¹⁰⁸ The United States provides funds to all five countries that are the largest recipients of humanitarian mine action from the international community: Cambodia (\$98 million); Afghanistan (\$96 million); Bosnia (\$95 million); Mozambique (\$70 million); and Laos (\$35 million).¹⁰⁹

Although the Bush administration’s land-mine policy has been relegated to a minor foreign policy position since September 11, several developments indicate a possible backtracking from the Clinton promise to submit the United States to the Ottawa Convention.

2. *Small Arms*

Unlike the international regimes that govern chemical and biological arms control, and to some extent landmines and major conventional arms, there is no overarching regime specifically prohibiting or regulating the traffic in small arms.¹¹⁰ Such traffic in arms is seen as a destabilizing force throughout the world. In a 1999 address to the U.N. Security Council, Secretary General Kofi

103. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (with Protocols), Apr. 10, 1981, 1342 U.N.T.S. 137 [hereinafter CCW].

104. *Id.*, Protocol II, art. 4, at 169.

105. *Id.*, Protocol II, art. 5, at 169.

106. Amendment to the CCW, U.N. Doc. CCW/CONF.II/2, available at http://www3.sympatico.ca/lothcol/erw/Final_Doc_CCW.pdf (last visited Nov. 22, 2002).

107. U.S. State Department Fact Sheet: Humanitarian Mine Action, at <http://www.state.gov/t/pm/rls/fs/2002/11729.htm> (last visited Nov. 22, 2002).

108. *Id.*

109. *Id.*

110. *But see* Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 383, U.N. GAOR, 55th Sess., U.N. Doc. A/55/383/Add.2 (2001). Forty-six states have signed this protocol, with three ratifications. The United States has not signed this protocol, but has signed, though not yet ratified, the underlying convention.

Annan stated that "small arms have become the instrument of choice for the killers of our time. We must do our part to deny them that means of murder."¹¹¹

The United Nations general assembly has been calling on member states to address the traffic in small arms since 1999.¹¹² In December of that year, in order to combat the "excessive and destabilizing accumulation and transfer of small arms,"¹¹³ the U.N. General Assembly convened the U.N. Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects.¹¹⁴ According to an expert report produced before the conference:

[t]he primary focus of attention should be on small arms and light weapons that are manufactured to military specifications. Other types of firearms used in conflicts may, however, also have to be considered in dealing with the problems in the most affected regions of the world. In this overall context, ammunition should also be considered.¹¹⁵

The expert group further advised that the conference should (1) strengthen or develop norms at the global, regional, and national levels that would reinforce and further coordinate efforts to prevent and combat the illicit trade in small arms and light weapons in all its aspects; (2) develop agreed international measures to prevent and combat illicit arms trafficking so as to prevent transfers of such weapons throughout the world, particularly in regions prone to conflict where the proliferation of small arms and light weapons has to be dealt with urgently; and (3) promote responsibility by states with regard to the export, import, transit and retransfer of small arms and light weapons.¹¹⁶

In the two years leading up to the conference, three preparatory meetings were held. U.S. statements at these meetings espoused support for the agenda of the conference, but refused to compromise the U.S. position on the "legitimate international trade in arms, or the sale of weapons to law-abiding citizens."¹¹⁷ The United States actively participated in all three of the preparatory meetings and submitted a draft proposal for the revised program of action at the final meeting in March 2001. However, the Bush administration took a strong stance against the main ideals that developed out of the conference itself.

111. U.N. SCOR, 54th Sess., 4048th mtg. at 2, U.N. Doc. S/PV.4048 (1999).

112. U.N. GAOR, 54th Sess., U.N. Doc. A/RES/54/54R (1999); U.N. GAOR, 54th Sess., U.N. Doc. A/RES/54/54V (1999).

113. United Nations, About the Conference, at <http://disarmament.un.org/cab/smallarms/about.htm> (last visited Nov. 22, 2002).

114. U.N. GAOR, 54th Sess., U.N. Doc. A/RES/54/54V (1999).

115. *Small Arms: Report of the Group of Governmental Experts*, U.N. GAOR, 54th Sess., U.N. Doc. A/CONF.192/2 (1999).

116. *Id.* This synopsis is taken from the executive summary, at <http://disarmament.un.org/cab/smallarms/about.htm> (last visited Nov. 22, 2002).

117. *Convening of an International Conference on Illicit Arms Trade in All Its Aspects: Report of the Secretary-General*, Statement of the United States, U.N. GAOR, 54th Sess., U.N. Doc. A/54/250 (1999).

III.

THE BUSH ADMINISTRATION AND NON-NUCLEAR ARMS CONTROL

A. *Chemical and Biological Weapons*1. *The Ouster of the OPCW Chairman and OPCW Funding*

Early in 2001, the OPCW was in the midst of a financial crisis. It ran a deficit of \$4 million in 2000 and, at the time, expected a \$5.5 million shortfall for 2001.¹¹⁸ The management of the organization attributed this shortfall to the failure of the United States, Russia, and other member states to pay their dues on time and to reimburse the OCPW for its inspection activities.¹¹⁹ This was particularly true in the case of the United States, considering that Congress allocated no funds for the organization in the two fiscal years preceding this financial crisis. In early 2001, an official of the OPCW estimated that the organization would only be able to conduct 60 to 80 of the 140 planned inspections for that year.

Although not a public issue at the time, this financial shortfall was just one of many contentious issues that arose between the United States and Bustani's technical secretariat. Bustani had been appointed director-general in 1997 and had been reappointed by the member states, including the United States, in 2001. However, by early 2002, the United States had become extremely frustrated with his conduct and issued a lengthy statement calling for his removal.¹²⁰ That statement alleged that Bustani "engaged in polarizing and confrontational conduct," including refusal to work with the Executive Council; embarrassed the OPCW by his conduct at the United Nations; and, most seriously, threatened to retaliate against states that objected to his policies with retributive inspections.¹²¹ Further, the statement accused him of "mismanagement issues" in allowing the financial crisis detailed above to develop, and of "advocacy of inappropriate roles for the OPCW" in attempting to expand the organization's mandate to manage the verification activities of the CWC, including his push for a larger role for the OPCW in verification activities in Iraq.¹²²

The United States pressed its case against Bustani, calling for and then tabling a vote of no confidence in the executive council in March 2002. The United States then proposed a special session of the Conference of States Parties in April 2002.¹²³ At that special session, the United States again pressed its contentions and further added that Bustani had attempted to placate—or bribe—

118. Judith Miller, *White House Wants Chief of Chemical Arms Group to Resign*, N.Y. TIMES, Apr. 27, 2002, at A15.

119. *Id.*

120. U.S. State Department Fact Sheet: Preserving the Chemical Weapons Convention: The Need for a New Organization for the Prohibition of Chemical Weapons (OPCW) Director-General, at <http://www.state.gov/t/ac/rls/fs/9120pf.htm> (last visited Nov. 23, 2002).

121. *Id.*

122. *Id.*

123. Seth Brugger, *Chemical Weapons Chief Removed at U.S. Initiative*, ARMS CONTROL TODAY, May 2002, available at http://www.armscontrol.org/act/2002_05/opcwmay02.asp (last visited Nov. 22, 2002). There is no provision anywhere in the CWC that authorizes such a special conference of states parties.

the United States by offering a high-ranking position in the OPCW to a U.S. official.¹²⁴ The United States had reportedly threatened to withhold half of its OPCW dues if Bustani was not removed from office.¹²⁵

Bustani refused to resign at the opening of the convention, and declared as part of his remarks that he was being accused of bringing Iraq into the CWC without consulting the executive council, a confusing accusation given his directive to achieve universal application of the Convention.¹²⁶ The OPCW legal advisor further argued that there was no legal basis for removing a sitting director-general under the CWC.¹²⁷ In fact, there is no provision in the CWC allowing for the removal of the director-general, although article VIII, paragraph 19 does allow the Conference of States Parties to “consider any questions, matters or issues within the scope of the Convention, including those relating to the powers and functions of the Executive Council and the Technical Secretariat.”¹²⁸ However, as the legal advisor argued, the same article of the CWC also establishes that the “Director-General enjoys such privileges and immunities as are necessary in the independent exercise of his functions,”¹²⁹ and cannot “act upon instructions from any government.”¹³⁰ The legal advisor concluded that there was no basis for removing the director-general before the end of his four-year term.¹³¹

Nonetheless, the Special Conference of States Parties voted to remove Bustani by a vote of 48 to 7, 43 delegations abstaining.¹³² He was replaced by Rogelio Pflirter, an Argentine diplomat, in September 2002. The outcome of this saga reflects the general influence of the United States in international organizations. Although the Bush administration is nominally “not trying to undermine the treaty,” it pursued a path in removing Bustani that had dubious legal credibility under the CWC and threatened to discontinue funding as a means of leverage. The U.S. position was further called into doubt by allusions in Bustani’s address at the special conference and some contemporary news reports that the

124. Donald A. Mahley, Opening Statement to the Special Conference of States Parties to the Organization for the Prohibition of Chemical Weapons (OPCW), Apr. 21, 2002, at <http://www.state.gov/t/ac/rls/rm/10007.htm> (last visited Nov. 22, 2002). Bustani denied this claim of bribery the next day. See Jose Bustani, Statement by the Director-General at the Special Session of the States Parties, Apr. 22, 2002, OPCW Doc. C-SS-1/DG.8, at http://www.opcw.org/html/global/docs_frameset.html (last visited Nov. 23, 2002).

125. Colum Lynch, *Disarmament Agency Director Is Ousted; U.S. Assails Record on Chemical Arms*, WASH. POST, Apr. 23, 2002, at A13.

126. Jose Bustani, Statement by the Director-General at the Special Session of the States Parties, Apr. 21, 2002, OPCW Doc. C-SS-1/DG.7, at http://www.opcw.org/html/global/docs_frameset.html (last visited Nov. 23, 2002).

127. Note by the Director-General, Forwarding the Legal Adviser’s Opinion Presented for Information to the Director-General on 15 March 2002, and Orally Presented by the Legal Adviser at the Seventeenth Meeting of the Executive Council on Whether or Not the Director-General May Be Removed from Office Before the End of His Term, Apr. 21, 2002, OPCW Doc. C-SS-1/DG.6, at http://www.opcw.org/html/global/c_series/ss1csp/css1_dg6.html [hereinafter Advisory Opinion].

128. CWC, *supra* note 11, art. VIII(19), 1974 U.N.T.S. at 335.

129. *Id.*, art. VIII(49), at 340.

130. *Id.*, art. VIII(43), at 341.

131. Advisory Opinion, *supra* note 127.

132. Marlise Simmons, *U.S. Forces Out Head of Chemical Arms Agency*, N.Y. TIMES, Apr. 23, 2002, at A4.

administration's opposition to Bustani's activities was galvanized by his attempts to bring Iraq into the OPCW.¹³³ How should we view these accusations in terms of U.S. power? Iraq considered the OPCW to be a more even-handed organization than the U.N. Security Council or its verification agency, UNSCOM. Indeed, when UNSCOM was thrown out of Iraq in 1998, the OPCW was allowed in to complete the destruction of the weapons it had found.¹³⁴ Yet if the United States had allowed Iraq to accede to the convention, the stringent verification procedures to which it would have submitted might have prevented preemptive action by the United States. Even discounting these possibilities concerning Iraq, U.S. actions have destabilized much of the process and autonomy of the OPCW. The CWC is the most stringent institutional bargain in the area of non-nuclear arms control, and the Bush administration's actions convey a portrait of a country champing at the bit to get loose.

2. *Russian Failure to Meet 2002 CWC Requirements*

The complement of chemical weapons maintained by Russia is seen as a serious, potentially destabilizing threat by the OPCW. Although Russia was among the nations that made initial declarations of their chemical weapons, Russia failed to meet the three year deadline under article IV¹³⁵ for destruction of 1 percent of its chemical weapons stockpile in 2000.¹³⁶ In 2002, Russia again failed to meet the convention-mandated deadline for the destruction of twenty percent of its chemical weapons stockpiles. Indeed, it has not yet met its obligations to destroy 1 percent of its chemical arms. Russia did not finish construction on its first chemical weapons destruction facility until August 2002, and there were no plans to put it to use before December 2002.¹³⁷ Further, Russia applied for an extension of the deadline for the total destruction of its stockpile of chemical weapons, scheduled under the CWC for 2007, to 2012.¹³⁸ The United States has blocked action on the request in the Executive Council, despite general willingness among other states to approve it.¹³⁹

133. See Judith Miller, *Argentine to Head Group Seeking Ban on Chemical Weapons*, N.Y. TIMES, July 26, 2002, at A4; George Monbiot, *Chemical Coup D'Eiat*, THE GUARDIAN, Apr. 16, 2002, at <http://www.guardian.co.uk/comment/story/0,3604,685123,00.html> (last visited Nov. 23, 2002).

134. OPCW Press Release: OPCW Mission in Baghdad Completed Successfully, July 29, 1999, at http://www.opcw.org/html/global/docs_frameset.html (last visited Nov. 23, 2002).

135. CWC, *supra* note 11, at 325.

136. Seth Brugger, *Russia to Miss CWC Deadline*, ARMS CONTROL TODAY, May 2000, available at http://www.armscontrol.org/act/2000_05/cwcma00.asp (last visited Nov. 23, 2002).

137. News Briefs, *Russia Opens Chemical Weapons Destruction Plant*, ARMS CONTROL TODAY, Sept. 2002, available at http://www.armscontrol.org/act/2002_09/briefsept02.asp#gorny (last visited Nov. 23, 2002).

138. Michael Wines, *Russia: Chemical Weapons Delay*, N.Y. TIMES, Dec. 12, 2001, at A12. The U.S. has also announced that it will likely fall short of the 2007 deadline for full destruction of its chemical arsenal. See Seth Brugger, *U.S. to Miss Chemical Weapons Convention Deadline*, ARMS CONTROL TODAY, Nov. 2001, available at http://www.armscontrol.org/act/2001_11/cwcnov01.aspx (last visited Nov. 23, 2002).

139. Jean du Preez, *Issues and Analysis: The Seventh Conference of States Parties to the Chemical Weapons Convention*, NUCLEAR THREAT INITIATIVE, Oct. 2002, at http://www.nti.org/e_research/e3_18b.html (last visited Nov. 23, 2002).

The reason for doing so can be seen in the Bush administration's own policies. In April of 2002, the administration announced that it was cutting back much of the disarmament aid to the former Soviet republics due to the failure of Russia to meet these requirements of the CWC and to disclose all of its biological weapons facilities. Under the Cooperative Threat Reduction Act of 1993,¹⁴⁰ the president is required to verify that those former states of the Soviet Union that receive U.S. aid are "making substantial investment of its resources for dismantling or destroying its weapons of mass destruction,"¹⁴¹ and are "complying with all relevant arms control agreements."¹⁴² The Bush administration refused to provide the requisite verification, purportedly due to Russia's failings under the CWC, and thus it placed in doubt about \$450 million in programs run by the Defense Department and about \$70 million in programs run by the State Department.¹⁴³

Claiming Washington had ulterior motives for the non-certification, Russian representatives said the U.S. move was intended "to distract attention from the actions of the U.S. itself," in light of U.S. renunciation of the BWC protocol and the ousting of Bustani.¹⁴⁴ However, it is not clear that the Bush administration had such intentions, as the administration also requested the ability to waive the certification requirements in the interests of "national security."¹⁴⁵ Congress eventually granted this request, and President Bush signed a waiver in early August 2002 that freed up the Defense and State funds.¹⁴⁶

Eventually, the Seventh Conference of States Parties to the CWC, meeting in October 2002, accepted the Russian petition, subject to extensive progress reports by Russia and a new appeal to member states to aid Russia financially in its efforts.¹⁴⁷ The issue of Russian noncompliance is a serious one, but the Bush reaction to it inside and outside of the OPCW potentially destabilizes the order for which the CWC aims.

3. *Repudiation of the BWC Protocol*

The United States rejected the Draft Protocol of the BWC at the twenty-third meeting of the Ad Hoc Group in July 2001. Ambassador Donald Mahley, the head of the U.S. Ad Hoc delegation, stated that the United States did not believe that the Protocol could meet the mandate set forth for the Ad Hoc

140. 22 U.S.C. § 5956 (1993) (enacted).

141. *Id.*, § 5956(d)(1).

142. *Id.*, § 5956(d)(5).

143. Judith Miller, *U.S. Warns Russia of Need to Verify Treaty Compliance*, N.Y. TIMES, Apr. 8, 2002, at A1. About \$500 million in programs run by the Department of Energy do not require this verification and continue without interruption.

144. Phillip C. Bleek, *Bush Refuses to Certify Russian Chem-Bio Compliance*, ARMS CONTROL TODAY, May 2002, available at http://www.armscontrol.org/act/2002_05/threatredmay02.asp (last visited Nov. 23, 2002).

145. Miller, *supra* note 143.

146. Judith Miller, *U.S. to Help Reduce Threat of Russian Arms*, N.Y. TIMES, Aug. 9, 2002, at A8.

147. OPCW Press Release: Seventh Session of the Conference of the States Parties to the Chemical Weapons Convention Concludes, Oct. 15, 2002, at http://www.opcw.org/html/global/docs_frameset.html (last visited Nov. 23, 2002).

Group, which was “strengthening the confidence in compliance with the Biological Weapons Convention.”¹⁴⁸ Mahley discussed in detail the objections of the United States to the formation of the Protocol, most of which focused on the alleged impossibility of creating an effective inspection regime for biological weapons. As to the scale of the necessary inspections themselves, Mahley stated:

The provisions for on-site activity do not offer great promises of providing useful, accurate, and complete information to the international community. . . . Our assessment of the range of facilities potentially relevant to the Convention indicate that they number, at least in the case of the United States, in the thousands, if not tens of thousands. In addition, their number and locations change on an irregular but frequent basis. Thus, we had no hope that any attempt at a comprehensive declaration inventory would be accurate, timely, or enduringly comprehensive.¹⁴⁹

Along the same lines, Mahley also articulated a potential difficulty in identifying and declaring which facilities would be subject to verification. As with the production of chemical weapons, the production of biological weapons often requires the use of precursors that are not without peaceful, commercial application. However, under the CWC, the facilities that could produce weaponized chemical agents had to be sizable, and hence easily identifiable, due to the toxicity of many precursors. According to the U.S. argument, this scale is not necessary in the production of biological weapons, and cataloging all of the facilities capable of such production “would be tantamount to impossible.”¹⁵⁰ The approach used by the Protocol, similar to that used in other arms control regimes such as the CWC, “simply does not apply to biology,” and a new format for inspections is required.

The United States had additional concerns about the impact that the inspection regime would have on proprietary and national security information. Indeed, the American biotechnology industry had expressed significant concern about intellectual property protections under the compliance regime. These concerns included the loss of proprietary live microorganisms, the revelation of information about production processes, the real cost of visits and investigations to individual firms, the goodwill costs of non-challenge visits, and the possibility that the United States may fail to defend the industry’s rights.¹⁵¹ Mahley addressed these concerns in his speech, finding that the safeguards for proprietary information in the Protocol “were insufficient to eliminate unacceptable risks” of loss.¹⁵²

In addition to these two primary concerns, the United States also had difficulties with what it saw as attempts to morph the Protocol from an arms control treaty into a trade treaty by insisting on the transfer of biotechnological informa-

148. Donald A. Mahley, Statement by the United States to the Ad Hoc Group of Biological Weapons Convention States Parties, July 26, 2001, at <http://www.state.gov/t/ac/rls/rm/2001/5497.htm> (last visited Nov. 23, 2002).

149. *Id.*

150. *Id.*

151. Lynn C. Klotz, *Means for Protecting U.S. Industry Within an Effective Compliance Regime for the Biological Weapons Convention*, 12 DEPAUL BUS. L.J. 329, 339-42 (2000).

152. Mahley, *supra* note 148.

tion as a price for obtaining a higher level of international security.¹⁵³ Given these difficulties, Mahley stated that the Protocol would not “yield a result we would accept,” even with more drafting and modification.¹⁵⁴

However, the United States did not want to abandon the BWC altogether, and prior to the Fifth Review Conference in November 2001, the U.S. delegation propounded its own plan for modification.¹⁵⁵ The U.S. proposal revolves primarily around modifications to the BWC article IV requirement that nations implement legislation criminalizing violations of the BWC. As the Protocol did, the plan would make the requirement of legislation mandatory rather than suggestive as it is in the Convention itself.¹⁵⁶ According to a European official, about half of the BWC’s member states do not have such laws.¹⁵⁷ The United States would also like to strengthen the extradition regime regarding violators of the biological weapons regulations. This would take place primarily on the national level, particularly for the United States, by the inclusion of biological weapons violations in the list of extradition crimes.¹⁵⁸ Also on the national legislation level, the U.S. proposal encourages that states pass strict regulations on the possession and transfer of dangerous microorganisms, and that they report any adverse events or releases of pathogens.¹⁵⁹

The Bush administration’s proposal also attempts to strengthen the consultation and cooperation provisions of the BWC’s article V. Under the Bush plan, member states can request investigations to “resolve a concern regarding a suspicious outbreak of disease or alleged biological weapon use.”¹⁶⁰ The challenged party is required to provide access to the challenged site on a timely basis. These inspections would be conducted under the auspices of the U.N. Secretary-General’s mandate to investigate suspected biological weapons use, already listed in article V and in the Protocol. Furthermore, Washington’s proposal called for voluntary exchanges of information or visits to clarify any matter that may cause doubt.¹⁶¹ The Protocol, as noted above, included a much more intrusive inspection regime to verify such issues—i.e., the “challenge inspections.” However, the Bush administration’s package most notably ignores the provision that would have established the OPBW to pursue these objections and to accept declarations of biological weapons facilities.

The proposal also deals with minor concerns under article X (technical and scientific cooperation). It calls for states to implement a World Health Organi-

153. *Id.*

154. *Id.*

155. U.S. State Department Fact Sheet: New Ways to Strengthen the International Regime Against Biological Weapons, at <http://www.state.gov/tac/bw/fs/2001/7909pf.htm> (last visited Nov. 23, 2002) [hereinafter Biological Weapons Fact Sheet].

156. *Id.*

157. Seth Brugger, *U.S. Presents Alternatives to BWC Protocol at Review Conference*, ARMS CONTROL TODAY, Dec. 2001, available at http://www.armscontrol.org/act/2001_12/bwcrevcondec01.asp (last visited Nov. 23, 2002).

158. Biological Weapons Fact Sheet, *supra* note 155.

159. *Id.*

160. *Id.*

161. *Id.*

zation code of conduct for scientists working with pathogenic microorganisms and to implement "strict biosafety procedures." The proposal also calls for a plan "to commit states to provide appropriate assistance in dealing with serious outbreaks of disease" in the form of rapid response medical and investigative assistance.¹⁶²

While some believe that this extensive list of objections jeopardized the future of the BWC in general, the United States has been unwavering in its support for the BWC itself, notwithstanding its objections to the Protocol. The Fifth Review Conference of the BWC began on November 19, 2001, and had as its primary agenda item the review of the Protocol. In an opening speech, Under Secretary John Bolton restated the proposed modifications to the BWC and took the further step of calling out countries thought to be violating the BWC.¹⁶³ The violating states mentioned were Iraq, North Korea, Iran, Libya, and Syria. Bolton also listed Sudan as a country that was attempting to develop a biological weapons program. Bolton's speech represented a change in containment policy, as the United States had never before named suspected violators of the BWC. Bolton explained the change in tactics by saying, "[P]rior to September 11, some would have avoided this approach. The world has changed, however, and so must our business-as-usual approach."¹⁶⁴ Bolton finished his speech by calling for the inclusion of the U.S. proposals in a *non-binding* political document resulting from the conference.

After three weeks of discussions, the United States unilaterally proposed the termination of the Ad Hoc Group in charge of developing the Protocol on the last day of the conference.¹⁶⁵ Washington proposed alternatively that all of the member states meet annually to assess the implementation of the suggestions of the review conference. Bolton told reporters that he made the proposal so late in the conference because "this is the last day, and that's when you negotiate. We had foreshadowed for weeks that this was coming."¹⁶⁶ The conference was suspended until November 2002 amidst a great deal of confusion and acrimony from the other attendees.¹⁶⁷

Leading up to the resumption of the conference in November 2002, the Bush Administration was still calling for the end of the Ad Hoc Group.¹⁶⁸ The conference was scheduled to reconvene from November 11 to November 22, 2002. However, it ended by November 15, with only minimal discussions hav-

162. *Id.*

163. John R. Bolton, Remarks to the 5th Biological Weapons Conventions RevCon Meeting, Nov. 19, 2001, at <http://www.state.gov/t/us/rm/jan/july/6231pf.htm> (last visited Nov. 23, 2002).

164. Seth Brugger, *U.S. Names Countries Thought to Be Violating BWC*, ARMS CONTROL TODAY, Dec. 2001, available at http://www.armscontrol.org/act/2001_12/bwcdec01.asp (last visited Nov. 23, 2002).

165. Paris, *supra* note 24.

166. Seth Brugger, *BWC Conference Suspended After Controversial Ending*, ARMS CONTROL TODAY, Jan.-Feb. 2002, available at http://www.armscontrol.org/act/2002_01-02/bwcjanfeb02.asp (last visited Nov. 23, 2002).

167. *Id.*

168. Peter Slevin, *U.S. Drops Bid to Strengthen Germ Warfare Accord*, WASH. TIMES, Sept. 19, 2001, at A1.

ing taken place. The final report calls for annual meetings of the state parties to review issues such as the implementation of national legislation, the security of microorganisms and toxins, enhancing the ability of the international community to react to the use of biological weapons, and the creation of a code of conduct for scientists.¹⁶⁹ This outcome was unsatisfactory to many, as it did not “allow for the development of new, legally binding measures to prevent the development and production of biological weapons” in the foreseeable future.¹⁷⁰ The agenda for the annual meetings excludes the most urgent issues, such as non-compliance, transparency, the development of so-called nonlethal biological agents, and scientific developments that can lead to qualitatively new biological weapons. Instead, the states parties will only discuss ways to improve national measures and existing international mechanisms to combat biological weapons.

Thus, the Bush administration has taken a promising enforcement regime, one tremendously similar to the CWC, and scrapped it. In its place is offered a combination of national legislation, export control, and extradition regimes. Realistically, the Protocol was not perfect, and, there may indeed be fundamental difficulties with the detection and containment of biological weapons, but it seems unlikely that reliance on individual criminalization schemes backed by “preemptive” force will promote effective inspection to any extent. If anything, the U.S. paradigm of containment relies on individual states’ willingness to construct a legitimate and effective criminal scheme similar to that of the United States. In the final analysis, this may be least effective in the regions at highest risk for violation.

B. Conventional Weapons

1. Land mines: Working Outside of Ottawa

As President Clinton left office, he urged that the new administration honor his promise that the United States accede to the Ottawa Convention by 2006.¹⁷¹ However, the incoming administration shied away from committing to any course of action, with a State Department official stating in a summer 2001 letter to Congressional supporters of the Convention that the United States needed to “examine the need for landmines on the modern battlefields of the future.”¹⁷² The letter further stated that the “the United States bears unique security burdens and cannot undercut the effectiveness of [its] military on the way to that fu-

169. Final Document of the Fifth Review Conference of the Biological Weapons Convention, BWC Doc. BWC/CONF.V/17, at <http://www.opbw.org/> (last visited Nov. 25, 2002).

170. See Media Advisory: *Arms Control Experts Call Bioweapons Conference Outcome “Useful but Insufficient,”* ARMS CONTROL TODAY, Nov. 2002, available at <http://www.armscontrol.org/pressroom/2002/bwc2nov.asp> (last visited Nov. 25, 2002).

171. *News Briefs: Clinton Urges Bush to Sign Ottawa Convention*, ARMS CONTROL TODAY, Mar. 2001, available at http://www.armscontrol.org/act/2001_03/ottawaconvention (last visited Nov. 23, 2002).

172. Letter from Paul Kelly, U.S. State Department, to James McGovern, U.S. House of Representatives (July 26, 2001), available at <http://abcnews.go.com/sections/pdf/stateletter.pdf> (last visited Nov. 23, 2002).

ture.”¹⁷³ Thus, the basis of Bush land-mine policy continues to be abundant unilateral assistance for the removal of land mines from war-torn areas while remaining committed to the use of land mines for national security purposes. Nevertheless, the CCW and its amended Protocols, which allow anti-personnel land mines such as those used heavily in Korea, remains “equally important” as the Ottawa Convention in the eyes of the Bush administration.¹⁷⁴

The Congressional supporters of the Ottawa Convention wrote back to the president in early 2002, charging that the Pentagon was calling for an end to efforts eliminating all U.S. dumb mines by 2003, for ceasing efforts to find APL alternatives, and for a declaration of an “indefinite need” for anti-personnel landmines.¹⁷⁵ Describing the Pentagon plan as “alarming,” the letter stated that the plan conflicted with President Bush’s commitment to protect civilians and U.S. troops. Furthermore, the use of mines could possibly inhibit “combat mobility” and would represent a grave threat to U.S. servicemen. Along these lines, the representatives stated that one-third of all U.S. Army casualties in the Vietnam and Persian Gulf Wars resulted from land mines. They also noted that landmines currently pose a serious threat to U.S. and allied forces in Afghanistan, where the State Department estimates there are millions of mines still in the ground.

Although the State Department has allocated about \$10 million to mine relief in Afghanistan alone over the past two years, the future policies of the Bush administration on the issue are not clear. The Defense Department landmine policy review, originally slated for completion by the end of 2001, has no clear termination point at this time. Given this uncertainty, it is difficult to place President Bush’s land-mine policy within the current framework of multi-lateral action. The United States acts with a strategic interest in mind, principally in Korea, that demands different considerations and precludes any multilateral constraint on the deployment of land mines. However, continued U.S. abstinence from the Ottawa Convention would represent a denial of yet another regime designed to promote long-term order.

2. *United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects*

The U.N. small arms conference opened on June 9, 2001, in New York with 120 nations attending. On that first day, Under Secretary of State John Bolton gave a plenary address that set the tone for the discussion of the trade in small arms throughout the world.¹⁷⁶ Although the United States had already made up its mind concerning many of its positions on the domestic regulation of arms sales by any U.N. entity, Bolton’s speech was seen as “undiplomatic” in

173. *Id.*

174. *Id.*

175. Letter from James McGovern et al., U.S. House of Representatives, to President George Bush (Dec. 19, 2001), available at <http://abcnews.go.com/sections/pdf/mineletter.pdf> (last visited Nov. 23, 2002).

176. John R. Bolton, Remarks to the U.N. Session on Small Arms and Light Weapons, July 9, 2001, at <http://www.state.gov/t/us/rm/jan/july/4038.htm> (last visited Nov. 23, 2002).

some circles.¹⁷⁷ Bolton started by limiting U.S. involvement to the regulation of strictly military arms, e.g., automatic rifles and machine guns, and refusing to discuss the regulation of handguns or hunting rifles. He then went on to discuss the U.S. system of export controls, the cornerstones of which are the Arms Export Control Act, discussed above, and the International Traffic in Arms Regulations,¹⁷⁸ which govern the granting of export and training licenses. This arms control system is easily the most comprehensive in the world, and Bolton openly supported the part of the draft program calling for effective import and export controls and improving the security of arms stockpiles. Furthermore, Bolton mentioned that the U.S. State Department offers funds to any nation seeking to institute an effective small arms destruction program.¹⁷⁹

However, Bolton also made a clear statement of what the United States would not support under the draft program of action for the Conference.¹⁸⁰ First, the United States did not support any course of action that constrained the legal trade and manufacture of small arms. Bolton pointed to section 2, paragraph 4 of the draft program as being insufficiently deferential to the “principle of the legitimacy of the legal trade, manufacturing, and possession” of small arms, and noted that it failed to acknowledge that some countries, like the United States, already have sufficient export controls in place.¹⁸¹

Second, the United States also refused to allow “the promotion of international advocacy activity by international or non-governmental organizations, particularly when those political or policy views advocated are not consistent with the views of all member states.”¹⁸²

Third, the most contentious issue for the United States was the provision of the draft program that proposed domestic regulation of arms ownership, particularly registration. For instance, section 2, paragraph 20 calls for nations to “seriously consider” a full prohibition on the trade and ownership of small arms and light weapons “designed for military purposes.”¹⁸³ Section 2, paragraph 7 also calls for “comprehensive and accurate records” to be kept regarding the transfer and possession of small arms and light weapons within each participating nation. It was these positions that received significant comment in the domestic press

177. Rachel Stohl, *United States Weakens Outcome of U.N. Small Arms and Light Weapons Conference*, ARMS CONTROL TODAY, Sept. 2001, available at http://www.armscontrol.org/act/2001_09/stohlsept01.asp (last visited Nov. 23, 2002).

178. 22 C.F.R. §§ 120-30 (2001).

179. See U.S. State Department Fact Sheet: Financial Assistance for the Destruction of Small Arms and Light Weapons, at <http://www.state.gov/Upm/rls/fs/2001/3777.htm> (last visited Nov. 23, 2002).

180. *Draft Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects*, U.N. GAOR, 56th Sess., U.N. Doc. A/CONF.192/PC/L.4/Rev.1 (2001), available at <http://disarmament.un.org/cab/smallarms/files/2001confpc14rv1e.pdf> (last visited Nov. 23, 2002) [hereinafter SALW Draft Programme].

181. Bolton, *supra* note 176.

182. *Id.*

183. SALW Draft Programme, *supra* note 180.

from gun control opponents during the time leading up to the convention.¹⁸⁴ The United States objected to these provisions as outside the mandate set forth in General Assembly Resolution 54/54V and refused to join a final consensus that constrained the rights guaranteed under the Second Amendment.¹⁸⁵

Fourth, the United States did not support measures limiting trade in small arms to governments alone. The United States argued that those non-state groups that obtain arms do not do so through legitimate means and, thus, this proposal would not deter them. Moreover, Bolton argued, the proposal would prevent the transfer of arms to an oppressed non-state group fighting against a “genocidal government.”¹⁸⁶ In a press conference held immediately after delivering his address, Bolton did not clarify what he had meant by this statement, or in fact to which groups it would apply.¹⁸⁷ He finished by saying that “distinctions between governments and non-governments are irrelevant in determining responsible and irresponsible end-users of arms.”¹⁸⁸ Lastly, the United States refused to support a mandatory Review Conference, planned for no later than 2006 under section VI, “which serves only to institutionalize and bureaucratize this process.”¹⁸⁹ Again, the United States expressed its preference for decisions on the trafficking in small arms to be made by “member states as needed, responding not to an arbitrary timetable.”¹⁹⁰

Certainly, given these objections, the resulting document from the conference was much weaker than what the preparatory conferences and draft program had envisioned.¹⁹¹ In particular, many African nations had sought a ban on the transfer of weapons to non-state actors, which the U.S. position precluded.¹⁹² In addition, the document contains no discussion of the creation of a legally binding agreement at some time in the future and fails to encourage states to adopt legal measures to control small arms possession domestically. It is clear that the position of the United States shaped these outcomes, which reflects on the overall viewpoint of the Bush administration and indeed, that of the United States historically, on the issue of small arms control. There again seems to be an undercurrent of American exceptionalism in this viewpoint, particularly in terms of lawmaking and administration. The United States believes its export control programs and small arms policies are the most comprehensive in the world and, thus, argues that all other state actors should mimic those efforts. Implicit in this

184. Oliver North, *Global Gun Controllers*, WASH. TIMES, July 15, 2001, at B1. The conference program elicited protests from throughout the United States. See Barbara Crossette, *Effort by U.N. to Cut Traffic in Arms Meets U.S. Rebuff*, N.Y. TIMES, July 10, 2001, at A8.

185. Bolton, *supra* note 176.

186. *Id.*

187. John R. Bolton, Press Conference on the U.N. Conference on Illicit Trade in Small Arms and Light Weapons in All its Aspects, July 9, 2001, at <http://www.state.gov/t/us/prsr/2001/4307pf.htm> (last visited Nov. 23, 2002).

188. Bolton, *supra* note 176.

189. *Id.*

190. *Id.*

191. *Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects*, U.N. GAOR, 56th Sess., U.N. Doc. A/CONF/192/15 (2001), available at <http://disarmament.un.org/cab/poa.html> (last visited Nov. 23, 2002).

192. Stohl, *supra* note 177.

is a belief in the primacy of American protections of the right to own firearms and perhaps, ignorance of the conditions in other nations that preclude the institution of such a thorough control regime.

IV. CONCLUSION

The United States stands at the apex of economic and military power for a second time in the post World War II era, but it is not clear what will result this time around. In terms of chemical and biological weapons of mass destruction, the construction of an ordered system of control both through international law and institutions would spread the burden of enforcement. Thus, to the extent that the United States eschews the making of these “institutional bargains” for a plan of preemptive action and the projection of U.S. military force, it assumes the role of international policeman. The undermining of the BWC Protocol and a passive position in the CWC coupled with growing aggressiveness abroad—particularly in Iraq—highlight this attitude. On the conventional arms front, the Bush administration has maintained a belief, common throughout U.S. history, that the use of destructive landmines and transfers of conventional arms are necessary for the maintenance of U.S. security interests. This position is supported in defiance of all others, including any measure of multilateral restraint or abolition of the trade in small arms.

This willingness to become embroiled in any number of worldwide conflicts remains generally acceptable to Congress and the American people due to the freshness of the “national security” justification. While action in the face of the current imminent threat of an event on the scale of the attacks of September 11 seems proper, one has to wonder whether this acceptance will continue into the future, or how long the United States can maintain the scale of unilateral strength necessary to support its policies. A nation wishing to be free of the control of multilateral regimes must also bear the costs of acting without multilateral support. Eliminating a collective action structure may be appealing for contemporary political and strategic reasons, but in so doing, the United States may be compromising the long-term security structure of the world. This approach represents a lack of foresight about the long-term efficacy of world-wide security issues concerning biological, chemical, and conventional arms. It also represents a short-sighted refusal to envision the United States as a member of a greater global community instead of merely the country with the biggest stick.