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# *The Permanent Five as Enforcers of Controls on Weapons of Mass Destruction: Building on the Iraq 'Precedent'?*

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## **Abstract**

*The five permanent members of the Security Council form the core of an enforcement system against proliferation of weapons of mass destruction. The sanctions regime against Iraq shows commonality of interest among the five declared nuclear-weapons states to block the spread of WMD. This article first establishes the normative framework under which restraint of WMD is not simply a policy preference but a legal obligation rooted in widely-ratified treaties and general international law. After surveying multilateral non-proliferation regimes, the paper turns to the aspects of US law relevant to the imposition of non-proliferation sanctions, not just against Iraq but also against other violators. The Iraq sanctions are then compared to other proliferation cases (Libya; North Korea; India/Pakistan) where unilateral (US) or concerted multilateral sanctions have been an available enforcement tool in the decade of the Iraq sanctions. Sanctions practice concerning actual or potential proliferators suggests an incipient pattern of potential Security Council enforcement. The Iraq case is unique because of Iraq's violations from within the relevant legal regimes, and precedential because of the Security Council's response in signalling to potential violators that serious sanctions can follow the breach of non-proliferation obligations. Arguably, non-proliferation regimes are stronger and more credible because the Council stayed the course on Iraq.*

The principal justification for the perpetuation of economic sanctions against Iraq in 2001 remains no less important than it was in 1991: the elimination of the threat to

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peace from Iraq's capabilities in respect of weapons of mass destruction (WMD).<sup>1</sup> We can begin with the proposition that the five permanent members of the Security Council form the core of an enforcement system to apply significant power against the threat to peace represented by the proliferation of weapons of mass destruction.<sup>2</sup> We can then ask whether the application of sanctions against Iraq for non-proliferation purposes has strengthened or weakened the systemic foundations of international law, in both normative and enforcement aspects.

Even though several of the Permanent Five had close security or economic links with Iraq in the 1980s, their unity in 1990–1991 extended to the adoption of the ceasefire resolution (Resolution 687, 3 April 1991), with its ambitious programme of disarmament and demilitarization. In respect of determination to eradicate weapons of mass destruction in Iraq, as 'steps towards the goal of establishing in the Middle East a zone free from weapons of mass destruction and all missiles for their delivery and the objective of a global ban on chemical weapons' (Resolution 687, para. 14), the sanctions regime against Iraq is one piece of a larger pattern of commonality of interest among the five declared nuclear-weapons states to block the spread of weapons of mass destruction. Those five states, despite their rivalries and divergent security imperatives, have transcended their differences in order to create and consolidate a set of overlapping non-proliferation regimes, and they must continue to do so.

The place for the United States in the non-proliferation system is unique. Alone among the Permanent Five, the United States has the leverage and the commitment to attach serious negative consequences to deviations from non-proliferation norms, or to reward compliance. Other permanent members (or indeed other states or non-state actors) may practise corresponding policies of applying sanctions or inducements for non-proliferation purposes; but no other international actor compares to the United States in the degree of economic power at its disposal or in the willingness to use it. US policies within the Security Council reflect an overriding imperative to make non-proliferation a cornerstone of security policy. Although the application of this policy may not always appear to be perfectly consistent, non-proliferation is at the

<sup>1</sup> Although eradication of weapons of mass destruction is the main reason for perpetuating the sanctions, other objectives have also been stated in the Security Council's sanctions resolutions (e.g., compensating those injured by Iraq's attack on Kuwait). The goals of ending repression of minorities within Iraq and opening channels for political dialogue are not mentioned in the sanctions resolutions but are found elsewhere (Resolution 688 of 5 April 1991). High-level US officials during the 1990s affirmed an objective of achieving a regime change within Iraq, but the Security Council never endorsed this goal. On the multiple objectives of the Iraq sanctions, see generally L. F. Damrosch, 'Enforcing International Law through Non-Forcible Measures', 269 *RdC* (1997) 9, at 108–121. In the author's opinion, the objectives with respect to weapons of mass destruction are the only real justification for maintaining major sanctions a decade later.

<sup>2</sup> A terminological note: I will use the phrase 'weapons of mass destruction' in the sense of Resolution 687, namely nuclear, chemical and biological weapons. The term may have different meanings elsewhere. I will use the term 'non-proliferation' in respect of efforts to restrain the spread of nuclear, chemical and biological weapons and technologically advanced delivery systems.

very least a strong factor in the shaping of US decisions with respect to both unilateral sanctions and multilateral decision-making in the Security Council and other bodies.

In a symposium on international law, our focus should include somewhat different issues from those that may preoccupy other gatherings about Iraq, or about sanctions, or about non-proliferation. Many authors view the problem of the sanctions against Iraq as a matter of devising the proper mix of strategies to achieve a given set of policy objectives, which include non-proliferation goals as well as others (security in the Middle East, alleviation of the plight of vulnerable populations within Iraq, and so on). Much discourse about sanctions addresses whether measures of economic denial can be effective in achieving specified objectives, such as non-proliferation, or whether other policy tools might be preferable. In these merely instrumental terms, many have characterized the decade of measures against Iraq as a 'failed policy', since weapons of mass destruction have not been completely extirpated from Iraq and Saddam Hussein still retains the potential to unleash germ warfare or some other horrible threat.<sup>3</sup> There are also those who would find in the Iraq experience corroboration for a hypothesis that rewards ('carrots') are more suitable than punishments ('sticks') for achieving a difficult and complex purpose like reining in the military uses of nuclear or chemical technology.<sup>4</sup> To be sure, international lawyers are concerned with all these problems no less than our colleagues in other disciplines. But we need to add a concern for the systemic implications if lawbreaking is *not* punished or if lawbreakers can wait out the community's patience and perhaps even benefit from international responses to violations.

This paper focuses on the law enforcement dimension of the Iraq sanctions, with special attention to the interface between international law and institutions on the one hand, and US domestic law on the other, in respect of economic sanctions against Iraq for non-proliferation purposes. A key question to ask about any legal system is whether it functions in a principled manner, in the dual sense of corresponding to fundamental normative principles and of treating like cases alike.<sup>5</sup> The principle of restraining the spread of weapons of mass destruction is a fundamental norm in the first of these senses; it is affirmed in multilateral treaties of widespread adherence, in the case law of the International Court of Justice, and in the national law of the United States. (See text at notes 13–54 below.) But has the international community applied

<sup>3</sup> Even in these instrumental terms, I would join with those who perceive the Iraq sanctions as effective rather than ineffective. US officials have stated that without the Resolution 687 regime, Iraq would almost surely have acquired operational nuclear weapons in the 1990s. The denial to Iraq of this capacity would seem to warrant characterization of the sanctions programme as at least a partial success and a significant gain for regional and global security. See also *infra* note 11.

<sup>4</sup> Cf. D. Cortright (ed.), *The Price of Peace: Incentives and International Conflict Prevention* (1997). See especially the three essays in the Cortwright collection on preventing weapons proliferation: Foran and Spector, 'The Application of Incentives to Nuclear Proliferation' (at 21–53); Snyder, 'North Korea's Nuclear Program: The Role of Incentives in Preventing Deadly Conflict' (at 55–81); and Long, 'Trade and Technology Incentives and Bilateral Cooperation' (at 83–121).

<sup>5</sup> See generally T. M. Franck, *The Power of Legitimacy among Nations* (1990), at 143–144 ('consistency requires that "likes be treated alike" while coherence requires that distinctions in the treatment of "likes" be justifiable in principled terms') (emphasis in original).

this norm in a principled manner, in the second sense of responding consistently when violations occur?<sup>6</sup> Is the prolonged application of sanctions to Iraq out of line with the responses to other proliferation episodes? Has the United States itself applied a coherent policy with respect to serious proliferation threats?

To address these questions, we may first establish the normative framework under which restraint of weapons of mass destruction is not simply a policy preference but a legal obligation rooted in widely-ratified treaties and in general international law. The Permanent Members should be more than passive parties to the non-proliferation regimes: they should actively enforce the norms by sanctioning violators and should work collaboratively to do so through the Security Council and other multilateral processes. After surveying the general framework of multilateral non-proliferation regimes, the paper turns to the aspects of US law relevant to the imposition of non-proliferation sanctions, not just against Iraq but also against other violators. The Iraq sanctions are then compared to other proliferation cases where unilateral (US) or concerted multilateral sanctions have been an available enforcement tool (whether or not actually applied) in the decade of the Iraq sanctions.

My stance is in favour of an ‘enforcement perspective’ on the non-proliferation aspect of the Iraq sanctions. We may distinguish this perspective from the ‘compliance perspective’ elaborated in the leading work of Abram and Antonia Chayes.<sup>7</sup> The Chayeses have contended that efforts to devise and implement international enforcement regimes are typically ineffectual or even counter-productive, and that resources misallocated to coercive sanctions would be better spent on attempting to change behaviour through supportive, ‘managerial’ strategies.<sup>8</sup> With non-proliferation regimes as one illustration of their compliance theory, they point out both the strengths and the weaknesses of the inspection programmes of the International Atomic Energy Agency (IAEA). They acknowledge that Iraq was able to circumvent the IAEA’s inspection procedure before 1991 and thereby mount an extensive nuclear weapons programme. This programme was uncovered and interrupted not by the

<sup>6</sup> Compare Sick, ‘Rethinking Dual Containment’, 40 *Survival* (Spring 1998) 5. Sick, who is concerned with setting optimal directions for US policies towards Iraq and its region, writes critically of the pitfalls of overemphasis on consistency:

Consistency in foreign policy is often deemed a virtue. It provides clearly articulated and reliable signposts for friends and foes alike in the formation of their own policies; . . . and it creates a dependable set of rules for government officials who must apply those rules in a variety of circumstances. Consistency creates an image of steadfastness and constancy that is prized both by statemen and editorial writers. Consistency, however, is not to be valued when it perpetuates a failing policy, when it inhibits policy-makers from recognising and acknowledging changed circumstances, when it obscures a turning-point as policy costs begin to outweigh benefits or when it stifles creativity and thereby leads to missed opportunities. In these conditions, consistency is merely another word for obstinate denial, and the price for being consistent can be high. (*Ibid.*, at 5).

In Sick’s view, the United States should have shifted some years ago to a more flexible and subtle approach toward the Persian Gulf states.

<sup>7</sup> See A. Chayes and A. H. Chayes, *The New Sovereignty* (1995).

<sup>8</sup> The Chayeses have asserted: ‘If we are correct that the principal source of noncompliance is not willful disobedience but the lack of capability or clarity or priority, then coercive enforcement is as misguided as it is costly.’ *Ibid.*, at 22.

IAEA but by the UN Special Commission (UNSCOM) under Resolution 687. Although one lesson from the Iraq experience might be to propose improvements in arms control compliance regimes (as the Chayeses do),<sup>9</sup> another and perhaps more telling lesson is that when violations of international norms are wilful, as is clearly the case with Iraq's violations of non-proliferation norms, sanctions have to be maintained as a necessary component of the international response.

Another contribution to our understanding of the systemic implications of the Iraq measures is the elaboration of a 'bargaining model' as contrasted to a 'punishment model' of international sanctions.<sup>10</sup> In a study of a dozen UN sanctions programmes of the 1990s, including the Iraq case, David Cortwright and George Lopez conclude that sanctions work best when the target can expect a reciprocal easing of sanctions as a reward for making progress toward international demands. Their study estimates that Iraq has complied fully or partly with seven out of eight of the Security Council demands under Resolution 687, and thus they contend that at least a partial easing of sanctions pressure would have been warranted.<sup>11</sup> The 'unyielding position of the United States' thwarted a serious dialogue with Iraq, removed any incentive for Iraq to make further concessions, split the Permanent Five, and 'generat[ed] a political backlash not only against the policy in Iraq but against sanctions in general'.<sup>12</sup> As with the Chayes' compliance model, the bargaining model offers important insights but does not resolve the problem at the heart of the Iraq case. Arguably, there should be little or no room for bargaining over the terms of ending a violation of fundamental international norms, such as restraints on weapons of mass destruction.

As other contributions to this symposium deal with arms control and the UNSCOM experience, it is not necessary to elaborate those aspects here. My concerns are to establish (1) that the principle of non-proliferation of weapons of mass destruction is well-grounded in international law, applicable in general and to Iraq in particular, with a special role for Security Council enforcement, (2) that United States law on

<sup>9</sup> *Ibid.*, at 180–183.

<sup>10</sup> See D. Cortwright and G. Lopez (eds.), *The Sanctions Decade: Assessing UN Strategies in the 1990s* (2000), at 27–29.

<sup>11</sup> *Ibid.*, at 54–57. Of the eight demands, two relate to weapons of mass destruction. Concerning elimination of nuclear weapons capabilities, the study asserts that that objective was fully achieved (citing the IAEA's certification of no remaining nuclear weapons capabilities). Concerning monitoring and dismantlement of chemical and biological weapons of mass destruction and ballistic missiles, the study finds partial compliance through UNSCOM's efforts, though 'unanswered questions remain on biological capabilities and other issues.' *Ibid.*, at 55. The source for this 'Scorecard of Iraqi Compliance with Resolution 687' is a 1997 article (Hoskins, 'The Humanitarian Impact of Economic Sanctions and War in Iraq', in T. G. Weiss *et al.*, *Political Gain and Civilian Pain: Humanitarian Impacts of Economic Sanctions* (1997)), which does not take account of post-1997 compliance problems and later intelligence, casting even the IAEA certification into doubt.

The Cortwright & Lopez study, *supra* note 10, went to press just after the Security Council approved an easing of sanctions, conditioned upon Iraq's acceptance of the UN Monitoring, Verification and Inspection Commission (UNMOVIC) to replace UNSCOM. See SC Res. 1284 (17 December 1999), discussed in *ibid.*, p. 58. The fact that Iraq has not allowed UNMOVIC to function does not bode well for the bargaining model as applied to this case.

<sup>12</sup> Cortwright and Lopez, *supra* note 10, at 56–57.

non-proliferation sets a framework for applying sanctions in response to violations, with a preference for acting through the Security Council and other multilateral processes (but if necessary on a unilateral basis), and with a presumption that such sanctions should indeed be applied, and (3) that sanctions practice concerning actual or potential proliferators suggests an incipient pattern of potential Security Council enforcement against violations. The Iraq case is thus both unique and precedential — unique because of the nature of Iraq's violations from within the relevant legal regimes, and precedential because of the significance of the Security Council's response in signalling to all potential violators that serious collective sanctions will follow the breach of non-proliferation obligations.

## 1 Norms Restricting Weapons of Mass Destruction and the Security Council's Enforcement Role

Resolution 687 (3 April 1991, preamble and paragraphs 7–14) takes note of the treaty norms that Iraq had already accepted as of the time that the Security Council mandated specific obligations of demilitarization and disarmament unique to Iraq. Relevant treaties and treaty partners include:

- Treaty on the Non-Proliferation of Nuclear Weapons, 1 July 1968 (Non-Proliferation Treaty or NPT).<sup>13</sup> Iraq has been a party since 1970 (as a non-nuclear-weapons state). All five Permanent Members are parties (as nuclear-weapons states); there are 189 parties as of 2001.
- Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 17 June 1925 (Geneva Poison Gas Protocol).<sup>14</sup> Iraq has been a party since 1931, with a reservation.<sup>15</sup> All five Permanent Members are parties; there are more than 140 parties as of 2001.
- Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 10 April 1972 (Biological Weapons Convention).<sup>16</sup> Iraq signed on 11 May 1972 but did not

<sup>13</sup> 729 U.N.T.S. 161; 21 U.S.T. 483; TIAS 6839. The NPT had an initial duration of 25 years from its 1970 entry into force. A 1995 review conference resulted in its extension for an indefinite term.

<sup>14</sup> 94 L.N.T.S. 65; 26 U.S.T. 571; TIAS 8061.

<sup>15</sup> Iraq's reservation made on accession states: 'Subject to the reservations that the Government of Iraq is bound by the said Protocol only towards those Powers and States which have both signed and ratified the Protocol or have acceded thereto, and that the Government of Iraq shall cease to be bound by the Protocol towards any Power at enmity with him whose armed forces, or the armed forces of whose allies, do not respect the Protocol.' The text of the reservation was obtained from the treaty database of the International Committee of the Red Cross at <<http://www.icrc.org/ihl>> (visited 7 September 2001), which in turn cites D. Schindler and J. Toman, *The Laws of Armed Conflicts* (1988), at 123.

<sup>16</sup> 1015 U.N.T.S. 163; 26 U.S.T. 583; TIAS 8062.

ratify until 19 June 1991, under the pressure of the sanctions regime.<sup>17</sup> All five Permanent Members are parties; there are more than 140 parties as of 2001.

As of the time of Resolution 687, the project for a treaty to ban chemical weapons had not yet come to fruition, but Resolution 687 anticipated it by noting that Iraq's actions under the resolution would constitute steps towards 'the objective of a global ban on chemical weapons' (para. 14). The Chemical Weapons Convention was indeed completed shortly thereafter and opened for signature in 1993;<sup>18</sup> it entered into force in 1997. All five Permanent Members are parties. The Chemical Weapons Convention has 143 parties as of 2001. Regrettably, Iraq is not among them.<sup>19</sup> Even more regrettably, although an international norm against use of chemical weapons came into being in the interwar period because of the revulsion against poison gas use in World War I, Iraq is one of the few states known to have used those terrible weapons since World War I, and the only state known to have used them against its own people.<sup>20</sup>

In view of the widespread participation in these normative multilateral treaties, including in each case all the Permanent Members, it is fair to say that they reflect a norm of general international law restraining weapons of mass destruction and requiring cooperation in restricting their proliferation. The normative framework is

<sup>17</sup> Resolution 687, para. 7, '[i]nvite[d] Iraq . . . to ratify' the Biological Weapons Convention. Iraq did so with effect from 19 June 1991, by depositing its instrument of ratification with the Government of the Union of Soviet Socialist Republics, as one of the three treaty depositaries. (See UNTS database, which cites a certified statement registered by the USSR on 11 July 1991.)

As Professor Fassbender's contribution to this symposium recalls, some international lawyers have doubted the authority of the Security Council to make such an 'invitation' effectively compulsory. I share Professor Fassbender's sense that over the decade in question, such doubts have largely faded. I would add that the overwhelming evidence of Iraq's falsification of its biological weapons capabilities may have helped clarify the need for the Security Council to insist on both the creation and the implementation of the obligation in question. See generally R. Butler, *The Greatest Threat* (2000); K. Hamza, *Saddam's Bombmaker: The Terrifying Inside Story of the Iraqi Nuclear and Biological Weapons Agenda* (2000).

<sup>18</sup> See Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, done at Paris, 13 January 1993, 32 ILM (1993) 800, entered into force 29 April 1997.

<sup>19</sup> From Iraq's region, Yemen, Jordan and Sudan are parties, but Egypt, Syria, Libya, Lebanon and the United Arab Emirates are not. Israel has signed but not ratified. See 'Mideast States Urged to Use an Arms Pact to Build Trust', *New York Times*, 21 October 2000.

<sup>20</sup> The eighth preambular paragraph of Resolution 687 refers to 'statements by Iraq threatening to use weapons in violation of its obligations under [the Geneva Gas Protocol] and [Iraq's] prior use of chemical weapons', and 'affirm[s] that grave consequences would follow any further use by Iraq of such weapons'. Iraq's use of chemical weapons in the Iran-Iraq war is well-documented. Cf. SC Res. 598 (20 July 1987), which deplored the parties' use of chemical weapons in violation of the 1925 Geneva Protocol but did not impose sanctions on either party. On Iraq's use of chemical weapons against the Kurds in the *Anfal* campaign of 1987–1988, see Human Rights Watch, *Iraq's Crime of Genocide: The Anfal Campaign against the Kurds* (1995).

It is remarkable that some writers ignore the known use of chemical weapons against Iraqi Kurds, when asserting that the damage caused by the sanctions is disproportionate to the threat of weapons of mass destruction. Cf. Mueller and Mueller, 'Sanctions of Mass Destruction', 78 *Foreign Affairs* (May/June 1999), at 43, 47 (single sentence on Iraq's use of chemical weapons in Iran-Iraq war, acknowledging 262 reported Iranian deaths, without mention of genocidal use against Iraqi Kurds).

still incomplete and the systems for implementation and enforcement still imperfect, especially with respect to biological weapons.<sup>21</sup> But the Security Council has frequently affirmed the centrality of its own role in addressing threats to peace from weapons of mass destruction.<sup>22</sup>

In the context of the Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, issued by the International Court of Justice,<sup>23</sup> as well as in connection with the Indian and Pakistani nuclear tests of 1998, it has been debated whether a nuclear non-proliferation norm could be a rule of general international law. The differential position of the nuclear-weapons and non-nuclear-weapons states under the Non-Proliferation Treaty and in state practice arguably undercuts the idea that any norm of general applicability could have come into existence.<sup>24</sup> This debate need not be resolved here; it is enough to invoke the pattern of treaty participation as indicative of general acceptance of an obligation on the part of the overwhelming majority of states of the world — including Iraq — not to acquire weapons of mass destruction, and on the part of the five declared nuclear-weapons states to cooperate in enforcing non-proliferation norms. This enforcement obligation is especially pertinent in the case of states like Iraq that have clearly accepted non-proliferation norms by treaty and have never signalled formal renunciation.<sup>25</sup>

The sanctioning system under the regimes to restrain weapons of mass destruction is imperfect but not irrelevant. The Permanent Five ought to be the leaders in promoting compliance with non-proliferation obligations and in enforcing the norms when compliance fails. The regimes differ in the details of their mechanisms for

<sup>21</sup> Negotiations for a protocol to strengthen compliance mechanisms for the Biological Weapons Convention foundered in summer 2001, in the face of US objections. The Bush Administration promised to come forward with new proposals. See 'U.S. Rejects New Accord Covering Germ Warfare', *New York Times*, 26 July 2001. For the suggestion to make it a criminal offence subject to universal jurisdiction for any scientist, businessman or technician to render substantial assistance to the development, production, acquisition, or use of biological or chemical weapons that are banned by international treaty, see Meselson, 'The Problem of Biological Weapons', 52 *Bull. Am. Acad. Arts & Sciences* (1999) 57, cited in Ignatieff, 'Bush's First Strike', *New York Review of Books*, 29 March 2001, at 6, 8 n. 17.

<sup>22</sup> See, e.g., Presidential Statement of 31 January 1992 (S/23500); SC Res. 1172 (6 June 1998) (reaffirming that proliferation of all weapons of mass destruction constitutes a threat to international peace and security); S/PRST/1999/34 (30 November 1999) (emphasizing 'the crucial importance of disarmament and non-proliferation of weapons of mass destruction and the means of their delivery for the maintenance of international peace and security').

<sup>23</sup> ICJ Reports (1996) 7.

<sup>24</sup> It is also debated whether the nuclear-weapons states have carried out in good faith their part of the NPT 'bargain', namely to negotiate in good faith and bring to a conclusion negotiations for complete nuclear disarmament. (NPT, Art. VI.) See, e.g., Thakur, 'Envisioning Nuclear Futures', 31 *Security Dialogue* (2000) 25, at 27–28, 31, 35 (arguing that an anti-nuclear norm should be universal but that the nuclear-weapons states are hypocritical in insisting that others comply with it while not relinquishing their own nuclear weapons).

<sup>25</sup> Cf. the responses to the Indian and Pakistani tests of 1998 (see below): neither of those states had ever become party to the NPT. In the case of North Korea (see below), a 'bargaining model' or a preference of inducements over sanctions could be justifiable to alter the calculus of a state party that was prepared to invoke its treaty right to withdraw from the NPT and the IAEA safeguards system.



implementation and enforcement, but they converge on the proposition that non-compliance should entail consequences, sometimes quite serious ones.

A first-order obligation is, of course, that each party should ensure its own compliance with the primary norm. Unfortunately, some of the Permanent Five have serious compliance problems of their own — not because of rejection of the basic norm or a lack of good faith in endeavouring to carry it out, but arguably because of the inability of the central authorities to control conduct emanating from their territories or carried on by their nationals.<sup>26</sup> In the decade since the Iraq sanctions went into effect, Russia has become a proliferation nightmare.<sup>27</sup> Important objectives of US policy include supporting Russia in controlling ‘loose nukes’;<sup>28</sup> indeed, the United States has devoted substantial material resources toward this end.<sup>29</sup> Preventing the transfer of nuclear material from Russia (or other ex-Soviet states) to Iraq is a high priority.<sup>30</sup> In the case of China, there is concern that prohibited items under the UN sanctions regime may have reached Iraq from Chinese sources.<sup>31</sup> China has insisted that it is in full compliance with the sanctions. The problems may be ones of ambiguity in the coverage of the regime, or inability to control ultimate use of Chinese-origin goods or technology, rather than of deliberate activities on China’s part. These difficulties affect the extent of some Permanent Members’ compliance with their own non-proliferation obligations, wholly apart from other considerations bearing on their willingness to participate in enforcing other states’ obligations (such as their economic interests in Iraq).

The United States has a multifaceted approach to supporting and enforcing

<sup>26</sup> The Chayes compliance model is helpful here. The Chayeses point out that compliance failures are often attributable not to wilful misconduct, but to shortcomings in the capabilities of parties to carry out their obligations. If this is the correct diagnosis, the Chayeses would prescribe not coercive sanctions, but rather supportive measures to facilitate compliance.

<sup>27</sup> But Moscow has taken strenuous objection to the assertion by the Secretary and Deputy Secretary of Defense in the new Bush Administration that Russia is an ‘active proliferator’. See ‘Moscow Says Remarks by U.S. Resurrect “Spirit of Cold War”’, *New York Times*, 21 March 2001.

<sup>28</sup> See Graham Allison, *et al.*, *Avoiding Nuclear Anarchy: Containing the Threat of Loose Russian Nuclear Weapons and Fissile Material* (1996); Matlock, ‘Russia’s Leaking Nukes’, *New York Review of Books*, 5 February 1998, 15.

<sup>29</sup> See, e.g., Soviet Nuclear Threat Reduction Act of 1991, codified at 22 U.S.C. § 2551 note (on assistance to Soviet Union and successor republics in destroying nuclear and other weapons); provisions on non-proliferation and disarmament programmes and activities for the former Soviet Union, codified at 22 U.S.C. §§ 5851–5874, and on demilitarization of the former Soviet Union and cooperative threat reduction, codified at 22 U.S.C. §§ 5901–5958. The assistance is popularly known as the Nunn-Lugar programme, after its principal sponsors in the US Senate.

<sup>30</sup> On reports of the inability of Russia’s central government to control the outflow of contraband to Iraq, and allegations of Iraqi corruption of Russia’s former foreign minister (Yevgeny Primakov), see Hersh, ‘Saddam’s Best Friend’, *The New Yorker*, 5 April 1999, at 32, 41. See also S. Ritter, *Endgame: Solving the Iraq Problem Once and for All* (1999).

<sup>31</sup> For recent reports, see, e.g., ‘Chinese Fiber-Optic Work Linked to Raided Iraqi Sites’, *New York Times*, 21 February 2001; ‘Bush Faults China on Its Aid to Iraq for Radar System’, *New York Times*, 23 February 2001. These reports do not directly touch on Iraq’s capacity for weapons of mass destruction, but rather concern a fiber-optic communications network linked to Iraqi anti-aircraft radar. If dual-use items aiding the Iraqi military are involved, they would fall under the sanctions regime.

compliance with non-proliferation obligations. The following section will survey some of the provisions of US law concerning application of economic sanctions for non-proliferation purposes. It is beyond the scope of this paper to consider techniques other than sanctions, such as the offering of substantial material inducements to enable foreign partners to eliminate weapons of mass destruction. It is also beyond the scope to explore the divisions within the US body politic over future directions for participation in arms control regimes. The US Senate's rejection of the Comprehensive Test Ban Treaty in October 1999 has inevitably undercut US influence for non-proliferation objectives. Similarly, the new Bush Administration's intention to push forward with anti-missile defences has jeopardized the Anti-Ballistic Missile Treaty and potentially the entire edifice of bilateral and multilateral arms control treaties. Russia, China, and the other permanent members find little comfort in US assurances that the reason for avoiding the treaty frameworks is self-protection against 'rogue states' like Iraq. The United States has likewise left itself open to criticism for failing to implement in full its obligations under the Chemical Weapons Convention.<sup>32</sup> Though there is room for debate over whether the United States has chosen the optimum path for advancing non-proliferation goals, sanctions practices are a critical element of non-proliferation strategies.

## 2 Provisions on WMD Sanctions in US Law

In the provisions of US law concerning weapons of mass destruction, we see the gradual evolution of a system for applying sanctions against violators. Iraq is not an isolated object of some US vendetta but is one of a series of targets of non-proliferation sanctions. We also see the contours of an emergent structure of principle, under which US actors are instructed to pursue non-proliferation objectives through a variety of multilateral avenues, including pursuit of collective sanctions. US actions in the Security Council, and particularly US support for imposition and continuation of economic sanctions against 'countries of proliferation concern', need to be understood in this light.

This section highlights some of the main provisions of US law for applying non-proliferation sanctions. Certain laws set general policy directions and describe conditions under which sanctions must or should be imposed against any violator. Most of these laws leave some measure of discretion to the President to determine whether the triggering conditions have occurred, and most of them also have specified exceptions (e.g., to facilitate coordination with foreign governments having primary jurisdiction over a foreign person) or waiver authority (so that, for example, the President could avoid imposing sanctions that would impair essential national

<sup>32</sup> See 'Chemical Weapons Ban May Suffer for Lack of Dues from Treaty's Parties', *New York Times*, 27 April 2001 (criticizing both US and Russia for failing to pay assessment on time and for other shortcomings; Russia is said to lack the resources to carry out its treaty obligation to destroy a percentage of its chemical weapons stockpile on schedule).

security interests). Apart from these general framework statutes, Congress has sometimes singled out a particular state or states for a special sanctions regime, either to send its own message or to press the President to take more vigorous actions. After identifying the main general statutes, we turn to those that have addressed specific countries, including Iraq.

An early law on non-proliferation policy, still in force, is the Nuclear Non-Proliferation Act of 1978.<sup>33</sup> One of the basic policies of this statute is that the 'United States shall seek to negotiate with other nations and groups of nations' to

adopt general principles and procedures, *including common international sanctions*, to be followed in the event that a nation violates any material obligation with respect to the peaceful use of nuclear materials and equipment or nuclear technology, or in the event that any nation violates the principles of the [Non-Proliferation] Treaty, including the detonation by a non-nuclear-weapon state of a nuclear explosive device . . . .<sup>34</sup>

A more recent framework statute for non-proliferation sanctions was enacted in the Nuclear Proliferation Prevention Act of 1994.<sup>35</sup> This act contains the following statement of general policy (adopted in the context of the crisis over North Korean NPT compliance in spring 1994, which will be discussed below):

It is the sense of the Congress that the President should instruct the United States Permanent Representative to the United Nations to enhance the role of that institution in the enforcement of nonproliferation treaties through the passage of a United Nations Security Council resolution which would state that, any non-nuclear weapon state that is found by the United Nations Security Council, in consultation with the International Atomic Energy Agency (IAEA), to have terminated, abrogated, or materially violated an IAEA full-scope safeguards agreement would be subjected to international economic sanctions, the scope of which to be determined by the United Nations Security Council.<sup>36</sup>

The 1994 act prohibits US foreign assistance to any non-nuclear-weapon state found to have terminated, abrogated, or materially violated an IAEA full-scope safeguard agreement or materially violated a bilateral US nuclear cooperation agreement.<sup>37</sup> It also requires the President to impose certain sanctions if the President determines that a person has materially and knowingly contributed through exports from the United States or any other country 'to the efforts by any individual, group, or non-nuclear-weapon state to acquire unsafeguarded special nuclear material or to

<sup>33</sup> Nuclear Non-Proliferation Act of 1978, Pub. L. 95-242, 92 Stat. 120 (1978), codified at 22 U.S.C. §§ 3201-3282.

<sup>34</sup> 22 U.S.C. § 3243(1) (emphasis added); see also 22 U.S.C. § 3223 (President is authorized to negotiate with nations and groups of nations 'with a view toward the timely establishment of binding international undertakings providing for . . . (6) sanctions for violation of the provisions of or for abrogation of such binding international undertakings').

<sup>35</sup> Pub. L. 103-236, 108 Stat. 507 (1994), codified at various sections of 22 U.S.C.; see especially 22 U.S.C. § 2429a-2 on enforcement of nonproliferation treaties (quoted in this paragraph in text); 22 U.S.C. §§ 6301-6305 for the title on Sanctions for Nuclear Proliferation; see also 22 U.S.C. § 2799aa-1(b) (requiring imposition of certain non-proliferation sanctions).

<sup>36</sup> 22 U.S.C. § 2429a-2(a).

<sup>37</sup> 22 U.S.C. § 2429a-2(b). This sanction may be waived upon presidential determination that termination of assistance 'would be seriously prejudicial to the achievement of United States nonproliferation objectives or otherwise jeopardize the common defense and security', § 2429a-2(c).

use, develop, produce, stockpile, or otherwise acquire any nuclear explosive device'.<sup>38</sup> The statute further instructs Executive Branch officials to pursue non-proliferation policies within multilateral institutions, for example by using the 'voice and vote' of the United States in international financial institutions<sup>39</sup> and by negotiating to enhance the effectiveness of the International Atomic Energy Agency and its safeguards.<sup>40</sup>

As regards chemical weapons, the Chemical Weapons Convention contemplates 'collective measures' as one technique for ensuring compliance.<sup>41</sup> US legislation treats chemical and biological weapons proliferation as a serious concern to which economic sanctions are an appropriate — indeed necessary — response.<sup>42</sup> US law calls for the imposition of sanctions against any foreign person who has materially contributed through exports from the United States or any other country 'to the efforts by any foreign country, project, or entity . . . to use, develop, produce, stockpile, or otherwise acquire chemical or biological weapons'.<sup>43</sup> One provision of this law makes it 'the policy of the United States to seek multilaterally coordinated efforts with other countries to control the proliferation of chemical and biological weapons', and in furtherance of that policy to 'pursue and give full support to multilateral sanctions pursuant to United Nations Security Council Resolution 620, which declared the intention of the Security Council to give immediate consideration to imposing "appropriate and effective" sanctions against any country which uses chemical weapons in violation of international law'.<sup>44</sup> In connection with ratification of the Chemical Weapons Convention, Congress enacted the Chemical Weapons Convention Implementation Act of 1998, which both establishes the domestic legal

<sup>38</sup> 22 U.S.C. §§ 6301(a), (c); 6303(d). Certain exceptions and waiver authority are specified (22 U.S.C. §§ 6301(c)(2), (f); 6303(g)).

<sup>39</sup> 22 U.S.C. § 6302 ('to oppose any use of the institution's funds to promote the acquisition of unsafeguarded special nuclear material or the development, stockpiling, or use of any nuclear explosive device by any non-nuclear-weapon state').

<sup>40</sup> 22 U.S.C. §§ 6321–6324.

<sup>41</sup> Chemical Weapons Convention, Art. XII (Measures to Redress a Situation and to Ensure Compliance, Including Sanctions), para. 3 (Conference of States Parties 'may recommend collective measures to States Parties in conformity with international law'), and para. 4 (Conference 'shall, in cases of particular gravity, bring the issues, including relevant information and conclusions, to the attention of . . . the United Nations Security Council'). As Iraq is not a party to the Chemical Weapons Convention, collective measures against Iraq in respect of chemical weapons capability derive from Resolution 687 rather than from Article XII. The Chemical Weapons Convention in no way precludes the application of unilateral sanctions against either a party or a non-party. Obligations under the Chemical Weapons Convention include prohibitions on exporting scheduled chemicals to non-parties.

<sup>42</sup> Chemical and Biological Weapons Control and Warfare Elimination Act of 1991, 22 U.S.C. § 5601 *et seq.*; Exec. Order 12,735 (16 November 1990) (invoking presidential emergency authorities in relation to chemical and biological weapons); Exec. Order 12,938 (14 November 1994) (imposing sanctions in relation to nuclear, biological and chemical weapons, with reference to international law).

<sup>43</sup> 22 U.S.C. § 2798. Certain exceptions and waiver authority are provided in this section.

<sup>44</sup> 22 U.S.C. § 5602(a)(4). For unilateral sanctions provisions, see 22 U.S.C. § 5605.

framework for US participation in the Convention and provides for specified sanctions.<sup>45</sup>

General US policies against proliferation of weapons of mass destruction are further set out in executive orders issued by Presidents George Bush and William Clinton, the first of which came at the height of the Iraq-Kuwait crisis.<sup>46</sup> The currently operative order, promulgated by President Clinton in 1994 and amended in 1998 (still in effect), specifies *inter alia* that 'It is the policy of the United States to lead and seek multilaterally coordinated efforts with other countries to control the proliferation of weapons of mass destruction and the means of delivering such weapons.'<sup>47</sup> The executive order further enumerates sanctions to be imposed on any foreign country that has 'developed, produced, stockpiled, or otherwise acquired chemical or biological weapons in violation of international law'.<sup>48</sup>

In addition to these laws and executive orders of general applicability, US laws also specifically identify Iraq and certain other countries as proliferation threats and require the imposition and maintenance of sanctions against those countries, preferably within a multilateral framework. The Iran-Iraq Arms Non-Proliferation Act of 1992 affirmed the policy of the United States to oppose transfer to either of the named countries of any goods or technology, 'wherever that transfer could materially contribute to either country's acquiring chemical, biological, nuclear or destabilizing numbers and types of advanced conventional weapons'.<sup>49</sup> This act likewise extended to Iran certain of the sanctions that had been imposed against Iraq in 1990, including denial of export licences and prohibitions on US government sales.<sup>50</sup> From the perspective of policy-makers rather than lawyers, the Iran-Iraq Act could be understood as a step in support of 'dual containment' of Iran and Iraq, so that Iran would be hampered in occupying the vacuum from Iraq's disabilities under the Security Council sanctions regime.<sup>51</sup> From a legal perspective, however, the Iran-Iraq Act represents a further action to ensure principled enforcement of non-proliferation norms against two worrisome countries. The same can be said of the extension of non-proliferation sanctions a few years later under the Iran and Libya Sanctions

<sup>45</sup> Chemical Weapons Convention Implementation Act of 1998, 22 U.S.C. §§ 6701–6762. The Implementation Act also requires sanctions against persons who breach confidentiality requirements in connection with inspections under the Convention.

<sup>46</sup> Exec. Order No. 12,735 (16 November 1990).

<sup>47</sup> Exec. Order No. 12,938, 59 Fed. Reg. 59,099 (14 November 1994), as amended by Exec. Order No. 13,094, 63 Fed. Reg. 40,803 (28 July 1998), § 1.

<sup>48</sup> *Ibid.* § 5. The sanctions include denial of foreign assistance, opposition to multilateral development bank assistance, denial of credit or other financial assistance, prohibition of arms sales, denial of exports of national security-sensitive goods and technology, further export restrictions, import restrictions, and termination of landing rights of air carriers. These sanctions are supplementary to those provided in the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991.

<sup>49</sup> Iran-Iraq Arms Non-Proliferation Act of 1992, § 1602(a), Pub. L. 102–484, Div. A, Title XVI, 106 Stat. 2571 (1992), as amended by Pub. L. 104–106, Div. D, Title XIV, 110 Stat. 494 (1996). On the denial of licences for exports to countries assisting Iraq's weapons capability, see 50 U.S.C. § 1701 note.

<sup>50</sup> *Ibid.* § 1603.

<sup>51</sup> On the dual containment policy of the Clinton Administration, see Sick, *supra* note 6.

Act.<sup>52</sup> In other enactments, Congress has placed restrictions on the use of appropriated funds for foreign assistance to ‘any country that is not in compliance with the United Nations Security Council sanctions against Iraq’<sup>53</sup> and has instructed that the President ‘shall continue negotiations among the five permanent members of the United Nations Security Council and commit the United States to a multilateral arms transfer and control regime for the Middle East and Persian Gulf region’, which would include controls on conventional weapons as well as weapons of mass destruction.<sup>54</sup>

The last aspect of US non-proliferation policy of interest here is the Missile Technology Control Regime (MCTR). In contrast to the regimes on weapons of mass destruction, the MCTR is embodied in informal export control arrangements among more than 30 states, rather than in a formal international treaty.<sup>55</sup> The enforcement framework in the United States includes the Missile Technology Control Act of 1990 and export controls administered under the Arms Export Control Act and other statutory and regulatory authorities.<sup>56</sup> Sanctions against violators are an important part of US enforcement strategy.<sup>57</sup>

### 3 Non-proliferation Sanctions Practice in the Last Decade

The well-known expansion of UN sanctions practice over the last decade does not entail an abundance of non-proliferation sanctions. Of the dozen episodes discussed in the Cortwright and Lopez study, the Iraq case stands out as almost the only clear-cut non-proliferation case. But it is not the only relevant one. Not far in the background of the sanctions resolutions against Libya is a correlation between counter-terrorism and counter-proliferation concerns. Additionally, the Council proceeded part-way toward an imposition of sanctions against North Korea in 1994 and condemned the

<sup>52</sup> Iran and Libya Sanctions Act of 1996, Pub. L. 104–172, 110 Stat. 1541 (1996), 35 ILM (1996) 1273 (ILSA). ILSA, like the other non-proliferation sanctions laws, emphasizes the desirability of multilateral initiatives. Section 4(a) of ILSA urges the President ‘to commence immediately diplomatic efforts, both in appropriate international fora such as the United Nations, and bilaterally with allies of the United States, to establish a multilateral sanctions regime against Iran . . . .’ The provisions on sanctions against Libya are addressed both to support for terrorism and to ‘efforts to acquire weapons of mass destruction’. §§ 2(4), 3(b), 5(b)(1)(A). The requirement to impose sanctions on Libya would be lifted upon presidential determination of full compliance with Security Council Resolutions 731, 748 and 883. Though the Security Council suspended its own sanctions under those resolutions in 1999, most US sanctions against Libya remain in effect, for a combination of counter-terrorism and non-proliferation reasons. ILSA, which initially had a five-year term, was extended for a further five years by the ILSA Extension Act of 2001, Pub. L. 107–24, 115 Stat. 199 (3 August 2001).

<sup>53</sup> Pub. L. 101–513, § 586D, 104 Stat. 2047 (1990), and similar provisions in successive appropriations acts, as cited in 50 U.S.C.A. § 1701 note.

<sup>54</sup> Pub. L. 102–138, 105 Stat. 718 (28 October 1991).

<sup>55</sup> See MCTR: Agreement on Revised Guidelines for the Transfer of Equipment and Technology Related to Missiles, 32 ILM (1993) 1298. On the application of theories of compliance and enforcement to the MCTR, see Angelova, ‘Compelling Compliance with International Regimes: China and the Missile Technology Control Regime’, 38 *Colum. J. Transnat. L.* (1999) 419.

<sup>56</sup> For references, see Angelova, *supra* note 55 at 437–439.

<sup>57</sup> For provisions on mandatory and discretionary sanctions for violations of the Missile Technology Control Regime, see 22 U.S.C. § 2797a, 2797b.

Indian and Pakistani nuclear tests in 1998; in these instances, the non-imposition of compulsory Security Council sanctions needs to be understood in light of the aspects of US law and practice that structured the response of the dominant Security Council member.

*Libya.* Three of the five permanent members of the Security Council were victims of the terrorist bombings of Pan Am Flight 103 and UTA Flight 772 in which hundreds of persons died. Solidarity among the Permanent Five produced the Council's first significant sanctions programme with a counter-terrorist objective, in the form of Resolutions 748 (31 March 1992) and 883 (11 November 1993). The menu of sanctions was carefully chosen in light of the nature of the accusations against Libya: all three of the pressure points in Resolution 748 — aircraft and airlines, arms and military matters, and diplomatic and consular posts — had an identifiable connection with state support for air terrorism. In addition, it is not difficult to discern, in the adoption of the arms embargo, a sentiment within the Council that Libya had militarized to a degree not warranted by its own security needs. Already as of the mid-1980s the United States had applied unilateral sanctions against Libya, with non-proliferation as well as counter-terrorist objectives.<sup>58</sup> These were strengthened with the Iran and Libya Sanctions Act of 1996.<sup>59</sup> Recent analysis has credited the UN sanctions for slowing Libya's chemical and biological weapons programmes.<sup>60</sup>

*North Korea.* The non-proliferation crisis concerning the Democratic People's Republic of Korea erupted with North Korea's announcement in March 1993 of an intention to withdraw from the NPT on three months' notice, as permitted by the terms of the NPT. In the same period (1993–1994), the IAEA had encountered increasing problems with monitoring North Korea's compliance under its safeguards agreement, including denial of access to sites containing safeguarded material. The United States intensified bilateral and multilateral efforts to put pressure on North Korea to remain within the NPT system. These efforts included an initiative to apply Security Council sanctions if North Korea persisted with its refusal to permit IAEA inspection.<sup>61</sup> A complex mix of threatened sanctions, combined with initiatives for incentives, brought about a negotiated resolution in the Agreed Framework announced in October 1994.<sup>62</sup> Leverage through either unilateral or multilateral economic sanctions was limited, by virtue of North Korea's longstanding isolation and autarkic practices. While the North Korean crisis was in its most acute phase, the US

<sup>58</sup> Exec. Order No. 12,543, 51 Fed. Reg. 875 (7 January 1986). See Damrosch, *supra* note 1, at 133–139.

<sup>59</sup> *Supra* note 53. Subsequent enactments, not directly relevant to non-proliferation concerns, aim at providing remedies in US courts for the victims of the Pan Am 103 explosion and other terrorist acts. See Damrosch, *supra* note 1, at 172–176, and Murphy, 'Contemporary Practice of the United States Relating to International Law', 95 *AJIL* (2001) 132, at 134–139.

<sup>60</sup> Cortwright and Lopez, *supra* note 10, at 114 (citing analysis by the US Central Intelligence Agency).

<sup>61</sup> On the sanctions proposal, see R. Litwak, *Rogue States and U.S. Foreign Policy* (2000), at 214–218; see also M. Reiss, *Bridled Ambition: Why Countries Constrain Their Nuclear Capabilities* (1995), at Ch. 6; L. V. Sigal, *Disarming Strangers: Nuclear Diplomacy with North Korea* (1998).

<sup>62</sup> For analysis of the incentive components of this package as compared to coercive sanctions, see the several treatments in Cortwright, *supra* note 4, especially Foran and Spector, *supra* note 4, at 41–44, and Snyder, *supra* note 4, at 63–66, 70–75.

Congress enacted the Nuclear Proliferation Prevention Act of 1994, which stands as a warning to other potential proliferators (who may be more susceptible to economic pressure than North Korea was) of the very real likelihood of a sanctions response to acts of proliferation concern.

*India and Pakistan.* When India and Pakistan exploded their respective nuclear devices in May 1998, the Security Council promptly condemned the tests through presidential statements and a resolution.<sup>63</sup> Although sanctions under Chapter VII of the UN Charter were not adopted, the Council did '[e]ncourag[e] all States to prevent the export of equipment, materials or technology that could in any way assist programmes in India or Pakistan for nuclear weapons or for ballistic missiles capable of delivering such weapons, and welcome[d] national policies adopted and declared in this respect'.<sup>64</sup> The foreign ministers of the Permanent Five issued a joint communiqué at Geneva on 4 June 1998, in which they 'confirmed their respective policies to prevent the export of equipment, materials or technology that could in any way assist' such programmes. A few days later, the foreign ministers of the G-8 countries (eight major industrialized democracies) underscored their opposition to the tests and took note of certain planned sanctions, including agreement to work for a postponement of loans from international financial institutions to India and Pakistan, except for basic human needs.<sup>65</sup> As required by US law, Pakistan had already come under unilateral US sanctions as of October 1990, when President George Bush was unable to make the certification under the so-called Pressler Amendment that Pakistan did not possess a nuclear device.<sup>66</sup> In response to the May 1998 tests, the United States did indeed apply new sanctions to India and incremental sanctions to Pakistan.<sup>67</sup> Later, Congress enacted waiver authority to allow an easing of these measures.<sup>68</sup>

<sup>63</sup> S/PRST/1998/12 (14 May 1998) (India); S/PRST/1998/17 (29 May 1998) (Pakistan); SC Res. 1171 (6 June 1998) (condemning India's and Pakistan's nuclear tests).

<sup>64</sup> SC Res. 1172, para. 8.

<sup>65</sup> G-8 Foreign Ministers Communiqué on Indian and Pakistani Nuclear Tests, 12 June 1998.

<sup>66</sup> For a narrative of the difficulties in managing Pakistan's situation under the Glenn-Symington Amendments (which generally require suspension of assistance to countries providing or receiving reprocessing or uranium enrichment plants, but which were waived for Pakistan in the 1980s because of Cold War considerations concerning the war in Afghanistan) and the Pressler Amendment, see Kux, 'Pakistan', in R. N. Haass (ed.), *Economic Sanctions and American Diplomacy* (1998) 157, at 165–166. Further complications have arisen in connection with China's support for Pakistan: the United States sanctioned up to \$1 billion of Chinese exports in 1993–1994 because of violations of the Missile Technology Control Regime in respect of Pakistan. See *ibid.*, at 167; see also Ross, 'China', in Haass, *supra* this note, at 10, 21–30.

<sup>67</sup> See Presidential Determination No. 98–22, 63 Fed. Reg. 27665 (13 May 1998), 'Sanctions against India for Detonation of a Nuclear Explosive Device', and Presidential Determination No. 98–25, 63 Fed. Reg. 31881 (30 May 1998), 'Sanctions against Pakistan for Detonation of a Nuclear Explosive Device', both set forth as notes to 22 U.S.C. § 2799aa-1.

<sup>68</sup> See India-Pakistan Relief Act, Pub. L. 105–277, Div. A, § 101, Title IX, 112 Stat. 2681 (21 October 1998), codified at 22 U.S.C. § 2799aa-1 note. On recent steps to lift the remaining sanctions, see 'Rare Praise From India on U.S. Defense', *New York Times*, 6 May 2001; 'U.S. Ready to End Sanctions on India to Build Alliance', *New York Times*, 27 August 2001.



## 4 Conclusions

At the beginning of the 1990s, hopes were high that the Security Council could become an efficient organ for protection of international security and enforcement of international law. Its record over the last decade is mixed, and just as vulnerable to criticism for missed opportunities as for actions that backfired. There is no greater challenge for the Council than to prove its willingness to apply serious power to enforce the norms of non-proliferation of weapons of mass destruction.

With respect to nuclear non-proliferation, the fact that the Permanent Members of the Security Council have been the same five states as the declared nuclear powers was the effective reality for some three decades.<sup>69</sup> The significance of that fact has shifted somewhat with the Indian and Pakistani tests of May 1998, but the decisions of those states to test nuclear weapons may have harmed rather than helped their quest for permanent membership on the Security Council. Other contenders for permanent membership (in particular Japan) have emphasized their pacific contributions to international security rather than their explosive capabilities. Whether the Council is expanded or not, the existing Permanent Five ought to remain active in discouraging horizontal proliferation of weapons of mass destruction.

Finally, we return to our initial questions: Are the Iraq sanctions a 'precedent' or the opposite? Has their perpetuation helped or harmed the non-proliferation regimes overall? The long-running measures against Iraq, when compared to shorter and less drastic measures against other proliferation threats, may seem excessive. But Iraq alone of those targets has violated international obligations from inside the relevant legal regimes. Arguably, those regimes are now stronger and more credible because the Council stayed the course on Iraq. The paucity of other sanctions episodes could be a sign that other potential proliferators have taken the message seriously.

Adjustment of the Iraq sanctions on humanitarian grounds could well be warranted and overdue. But any such adjustment should keep intact the determination of the Permanent Five to use the authority of Chapter VII to enforce non-proliferation norms.

<sup>69</sup> According to Article IX(3) of the NPT, a nuclear-weapon state is 'one which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to January 1, 1967', i.e., the US, USSR, UK, France, and the People's Republic of China. The US, UK, and USSR were the NPT's depositaries and were among the initial group of states to sign (1 July 1968) and ratify the NPT, which entered into force in March 1970. The Republic of China on Taiwan (then holding China's permanent seat on the Security Council) signed and ratified in that initial group; France did not.

The People's Republic of China achieved UN representation, including permanent membership, in 1971. The People's Republic deposited an instrument of ratification of the NPT, with a declaration, in March 1992. See <<http://domino.un.org/TreatyStatus>> (visited 7 September 2001). (Taiwan continues to be listed in US depositary records as also having adhered to the NPT; see US Department of State, *Treaties in Force as of January 1, 2000*, at 434, note 1.)

France deposited its instrument of ratification of the NPT in August 1992.