



Stanford Law Review

MODERN THREATS AND THE UNITED NATIONS
SECURITY COUNCIL: NO TIME FOR
COMPLACENCY (A RESPONSE TO PROFESSOR
ALLEN WEINER)

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NOTES

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INTRODUCTION.....	1396
I. INTERNATIONAL LAW GOVERNING THE USE OF FORCE.....	1397
A. <i>General Prohibition on the Use of Force</i>	1398
B. <i>Exceptions to the General Prohibition on the Use of Force</i>	1398
1. <i>Use of force in self-defense</i>	1398
2. <i>Use of force collectively authorized by the Security Council</i>	1399
II. PROFESSOR WEINER'S ARGUMENT.....	1400
III. AMERICA CANNOT RELY ON THE SECURITY COUNCIL TO AUTHORIZE THE USE OF FORCE	1402
A. <i>International Relations Theory</i>	1403
1. <i>States make collective use-of-force decisions informed by balance of power calculations</i>	1403
2. <i>Targeted states assess the severity of threats differently than non-targeted states</i>	1410
3. <i>Powerful states react to threats differently than weak states</i>	1412
4. <i>Russia and China view sovereignty differently than the United States and its democratic allies</i>	1413
B. <i>Recent Examples of Security Council Gridlock</i>	1415
1. <i>North Korea</i>	1415
a. <i>UNSCR 1695</i>	1418
b. <i>UNSCR 1718</i>	1419
c. <i>North Korea violates UNSCR 1718</i>	1421
2. <i>Iran</i>	1426
a. <i>IAEA and Security Council resolutions</i>	1427
b. <i>Russian support for an Iranian nuclear reactor at Bushehr</i>	1429
3. <i>Missile defense in Eastern Europe and East Asia</i>	1431
IV. ALTERNATIVES TO COLLECTIVE AUTHORIZATION	1434
A. <i>Article 51 Reform</i>	1434

B. <i>Security Council Reform</i>	1436
1. <i>Security Council expansion</i>	1437
2. <i>Veto reform</i>	1438
C. <i>Making Use-of-Force Decisions Outside of the U.N.</i>	1439
CONCLUSION.....	1443

INTRODUCTION

In a recent Article, Stanford Law School Professor Allen Weiner argues that the existing United Nations (U.N.) framework for authorizing the use of force adequately empowers the United States to deal with challenges presented by international terrorism and the proliferation of weapons of mass destruction (WMD).¹ According to Professor Weiner, “the interests of the Permanent Members [of the Security Council (P5)] do not clash with respect to the goals of countering terrorism and WMD proliferation”² Consequently, when the United States needs to use force to respond to either of these threats, it can rely on the U.N. Security Council to provide collective authorization.³ Professor Weiner thus concludes that there is no need to reform how the use of force is authorized under the U.N. Charter (Charter).⁴

Professor Weiner’s argument, if correct, would have important consequences. A world in which the P5 see eye to eye on terrorism and WMD nonproliferation would provide powerful opportunities for the United States to effectively deal with threats emanating from countries like Iran and North Korea, and would also allow for a more integrated approach to non-state actors like Al Qaeda and Hezbollah. Furthermore, the idea that the U.N. is capable of dealing with modern threats without reforming its process for authorizing the use of force has inherent appeal because there is still widespread disagreement

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1. See Allen S. Weiner, *The Use of Force and Contemporary Security Threats: Old Medicine for New Ills?*, 59 STAN. L. REV. 415, 419-20 (2006). Professor Weiner’s argument applies only to terrorist and WMD threats (which we call “modern” or “new” threats throughout the Note). He does not argue that the Security Council will function effectively in the face of other challenges, such as genocide.

2. *Id.* at 420.

3. See *id.* at 455 (arguing that collective authorization under the U.N. Charter is possibly “well-suited” to confronting terrorist and WMD threats).

4. See *id.* at 415-16.

on exactly what shape such reform would take and whether executing an agreed upon plan would be politically viable. Any meaningful reform is therefore still a long way from implementation.

Unfortunately, however, Professor Weiner's argument is overly optimistic about the prospects of agreement in the Security Council. China and Russia, both P5 members with veto power in the Security Council, maintain strong economic and security ties with regimes that sponsor terrorism and engage in illegal WMD proliferation. Indeed, one recent bipartisan report on this issue concluded that among the P5, no consensus exists "on what constitutes a threat to international peace and security and [there is] no agreement on how to respond even to those threats on which it does agree."⁵ This Note therefore argues that, contrary to Professor Weiner's thesis, the risk of gridlock remains unacceptably high, with today's Security Council almost as divided on critical foreign policy issues as it was during the Cold War. Any argument to the contrary conflicts with both international relations theory and recent Security Council debates surrounding Iran and North Korea, among others. As a result, this Note concludes that scholars and policymakers must continue to think of ways to reform the international law that governs the use of force and proposes a few ideas on what shape such reform could take.

Part II of this Note describes the U.N.'s legal regime that governs the use of force. Part III presents a more detailed review of Professor Weiner's thesis, focusing on his arguments for why the P5 members' views towards "new security threats are essentially in alignment."⁶ Part IV establishes that America cannot rely on the Security Council to provide collective authorization, even in the face of terrorist and WMD threats. We counter Professor Weiner's thesis with international relations theory and then offer recent examples of Security Council gridlock, including North Korea, Iran, and missile defense shields in Eastern Europe and East Asia. Part V discusses the merits of several alternatives to collective authorization: Article 51 reform, Security Council reform, and making use-of-force decisions outside the U.N. framework. Finally, Part VI offers a brief conclusion.

I. INTERNATIONAL LAW GOVERNING THE USE OF FORCE

Determining whether the current international legal regime adequately addresses the threats posed by terrorism and WMD requires an understanding of the existing system. In essence, the Charter prohibits the use of force except in two circumstances: self-defense or collective authorization by the Security Council.

5. Ivo H. Daalder & Robert Kagan, *America and the Use of Force: Sources of Legitimacy*, in BRIDGING THE FOREIGN POLICY DIVIDE 7, 14 (Derek Chollet et al. eds., 2008).

6. Weiner, *supra* note 1, at 420.

A. *General Prohibition on the Use of Force*

Article 2(4) of the Charter establishes a general prohibition on the use of force: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”⁷

B. *Exceptions to the General Prohibition on the Use of Force*

1. *Use of force in self-defense*

The right to use force in self-defense is articulated in Article 51 of the Charter.⁸ Professor Weiner points out several important features of Article 51.⁹ Most importantly, “it is a *unilateral* right,”¹⁰ meaning a state requires no approval from the U.N. before making use of its “inherent right”¹¹ to defend itself. Second, Article 51 permits a member to join other members in collectively responding to a threat. Third, states are entitled to use force only until the Security Council responds to the armed attack.¹² Finally, the right of self-defense arises only if an “armed attack” has occurred.¹³ These limitations

7. U.N. Charter art. 2, para. 4.

8. *Id.* art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”).

9. *See* Weiner, *supra* note 1, at 422-23.

10. *Id.* at 422. “Unilateral” means “the *source* of legal authority upon which states act.” Use of force is unilateral if a state makes its own calculation that it may use force, rather than relying on Security Council authorization. Therefore, a coalition of states uses force unilaterally if the group acts without Security Council authorization. *See id.* at 420 n.9.

11. U.N. Charter art. 51.

12. *Id.*

13. Legal scholars disagree on this point. Under a literal reading of Article 51, the right of self-defense exists only after an armed attack has occurred. Under this logic, a state may never legally use preemptive force in the face of an imminent threat. Other scholars, however, maintain that Article 51 permits the use of force before an imminent armed attack has occurred, but only if the action is exercised pursuant to the *Caroline* requirements of necessity (the need to use force in self-defense must be “instant, overwhelming, leaving no choice of means, and no moment for deliberation”) and proportionality (the use of force must not be “unreasonable or excessive[,] since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it”). John Yoo, *Using Force*, 71 U. CHI. L. REV. 729, 740-41 (2004) (quoting Daniel Webster, Letter to Henry Fox, British Minister in Washington (Apr. 24, 1841)), in 1 BRITISH DOCUMENTS ON FOREIGN AFFAIRS: REPORTS AND PAPERS FROM THE FOREIGN OFFICE CONFIDENTIAL PRINT (PART I,

on the use of force apply only to actions taken outside the Charter's collective security system, which is discussed below.

2. *Use of force collectively authorized by the Security Council*

The second exception to Article 2(4) arises when the Security Council collectively authorizes the use of force. The Security Council has fifteen members: the five permanent members (the P5)—the United States, the United Kingdom, France, Russia, and China—and ten non-permanent members elected for two-year terms.¹⁴ Authorizing the use of force requires the supporting vote of at least nine Security Council members, “including the concurring votes of the [P5] members”¹⁵ This latter requirement arms each P5 member with a veto that allows it to single-handedly block the Security Council from collectively authorizing other states to use force.

The Security Council has the “primary responsibility for the maintenance of international peace and security.”¹⁶ Pursuant to this authority, it may “determine the existence of any threat to the peace, breach of the peace, or act of aggression”¹⁷ and then “decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”¹⁸ Article 41 permits measures “not involving the use of armed force.”¹⁹ If the Security Council considers these non-forcible measures inadequate, it may “take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security” under Article 42, including “demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.”²⁰

U.N. members have “agree[d] to accept and carry out the decisions of the Security Council in accordance with the present Charter.”²¹ If a conflict arises between members' Charter obligations “and their obligations under any other international agreement, their obligations under the present Charter shall

SERES C) 153, 159 (Kenneth Bourne & D. Cameron Watt eds., 1986)). These scholars argue that the Charter does not limit the preexisting “customary right of anticipatory self-defense.” See generally Anthony Clark Arend, *International Law and the Preemptive Use of Military Force*, 26 WASH. Q. 89, 92 (2003) (summarizing scholars' arguments from both camps). This issue remains unresolved. See *id.* at 93. In this Note, we adopt the broader reading of Article 51.

14. See U.N. Charter art. 23, paras. 1-2.

15. *Id.* art. 27, para. 3.

16. *Id.* art. 24, para. 1.

17. *Id.* art. 39.

18. *Id.*

19. *Id.* art. 41. Such measures include “complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.” *Id.*

20. *Id.* art. 42.

21. *Id.* art. 25.

prevail.”²²

Professor Weiner highlights several differences between collective authorization and self-defense.²³ Most important, collective authorization is “not a unilateral right.”²⁴ Since all P5 members may single-handedly block the Security Council from authorizing the use of force, “collective security measures are available only when there is unanimity among the [P5] in favor of such measures.”²⁵ Second, the collective use of force may be exercised without an “armed attack” having occurred in advance. The Security Council, then, can authorize the use of force “merely in the face of ‘threats’ to international peace and security, including threats that may not yet be imminent. The Security Council, moreover, has largely unfettered power to determine what events and developments constitute such a threat.”²⁶

II. PROFESSOR WEINER’S ARGUMENT

Some scholars have argued that Article 51, the Charter’s self-defense rule, needs to be updated to reflect the realities of modern warfare.²⁷ Their rationale is that the threat posed to civilian populations by WMD and terrorism warrants a broadened self-defense rule that permits the use of force even before a threat is imminent. Implicit in this argument is the belief that the Charter’s alternative to use of force in self-defense—collective authorization from the Security Council—does not work because competing states are armed with Security Council veto powers.

Professor Weiner argues that Article 51 reform can be avoided because collective authorization from the Security Council will in most instances provide a viable means of dealing with terrorist and WMD threats.²⁸ These threats are not conflicts among the P5, but “matters that increasingly present common challenges to the interests of the [P5].”²⁹ With respect to terrorism, all P5 members are targets.³⁰ Moreover, “Islamist terrorism in particular threatens to unleash turmoil in . . . the Middle East, where most if not all of the [P5] have a strong interest in stability because of their dependence on oil exports from the region.”³¹ Finally, terrorism “undermines a stable global order favored by the [P5] in which issues of power and security are determined by sovereign

22. *Id.* art. 103.

23. Weiner, *supra* note 1, at 425.

24. *Id.*

25. *Id.*

26. *Id.* (citations omitted).

27. *See id.* at 418-19 & nn.1-7 (listing sources).

28. *See id.* at 455 (arguing that the Charter’s collective security mechanism is “well-suited” to confronting terrorist and WMD threats).

29. *Id.*

30. *See id.*

31. *Id.*

states.”³² Professor Weiner similarly argues that the P5 have “a common interest in preventing” WMD proliferation.³³ The P5 do not want to dilute their geopolitical influence, which “stems in part from their military power States that could never threaten [P5 members] through conventional military means can do so—or can at least resist . . . intimidation—if they acquire [WMD].”³⁴ P5 members even realize the danger of supplying WMD to their allies, because “[t]here are no guarantees that a friendly regime that acquires [WMD] today will not be replaced by a hostile regime tomorrow.”³⁵ Moreover, P5 members recognize the risk of onward proliferation in light of the international proliferation syndicate set up by A.Q. Khan in Pakistan.³⁶ Finally, WMD proliferation may encourage regional arms races.³⁷

Professor Weiner cites three distinct types of evidence to support his thesis. First, he examines official government documents issued by the P5. For example, a policy paper produced by the Russian Foreign Ministry states that the country regards combating international terrorism as “its most important foreign policy task,” since terrorism creates instability “not only in individual states, but in entire regions.”³⁸ Similarly, a Chinese government policy paper states that it has always been China’s policy to condemn “all forms of terrorism,” and that it has “adopted effective measures” to combat terrorism.³⁹ Professor Weiner argues that these official documents signal that countries such as China and Russia are increasingly willing to assist the United States in dealing with terrorism and WMD nonproliferation.

Second, Professor Weiner points to the direct experience of all P5 members with terrorist threats. In Russia, Chechen separatists engage in terrorist attacks that claim the lives of many civilians each year.⁴⁰ The Chinese government has labeled a group of Muslim separatists in the western part of its country “part of international terrorism.”⁴¹ Therefore, Professor Weiner argues, all P5 members fully understand the nature and extent of the threat and have strong reasons to help combat it.

Third, Professor Weiner provides post-September 11 examples of P5

32. *Id.* at 455-56.

33. *Id.* at 464.

34. *Id.*

35. *Id.*

36. *See id.*

37. *See id.*

38. *Id.* at 460 (quoting RUSSIAN FEDERATION, THE FOREIGN POLICY CONCEPT OF THE RUSSIAN FEDERATION (2000), available at <http://www.fas.org/nuke/guide/russia/doctrine/econcept.htm>).

39. *Id.* at 461-62 (quoting INFO. OFFICE OF THE STATE COUNCIL OF THE P.R.C., CHINA’S NATIONAL DEFENSE IN 2002 (2002), available at <http://www.china.org/cn/e-white/20021209/index.htm>).

40. *Id.* at 458-59.

41. *Id.* at 462 (quoting U.N. SCOR, 56th Sess., 4413th mtg. at 5, U.N. Doc. S/PV.4413 (Nov. 12, 2001) (statement of Chinese representative)).

members taking steps to cooperate with the United States on the issues of terrorism and WMD nonproliferation. For instance, China offered \$150 million to rebuild Afghanistan, joined the Container Security Initiative, which “prescreen[s] cargo shipped from China to the United States,”⁴² and told Pakistan to cooperate with America vis-à-vis Afghanistan.⁴³ Russia has agreed to expand intelligence-sharing with the U.S. with respect to Afghanistan and Al Qaeda and “acquiesced in the establishment of temporary U.S. military bases” in central Asian nations used to support American forces in Afghanistan.⁴⁴ Both countries voted in favor of terrorism- and WMD-related resolutions.⁴⁵ UNSCR 1373, which deals with terrorism, goes “beyond declarations and has mandated important new substantive legal requirements to meet the threat of terrorism,” including requiring states to “‘refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts,’ to take ‘necessary steps to prevent the commission of terrorist acts,’ . . . to ‘deny safe haven’ to persons involved in terrorism,” and “to freeze the financial assets” of such persons.⁴⁶ Additionally, the resolution created the Counterterrorism Committee “to collect and review reports from states on implementation of their obligations under [UNSCR] 1373.”⁴⁷ The resolution related to WMD—UNSCR 1540—declares that WMD proliferation “constitutes a threat to international peace and security;” stresses the Security Council’s resolve to “take appropriate and effective actions against any threat to international peace and security” stemming from WMD proliferation; and requires states to refrain from supporting nonstate actors in the development, acquisition, and “use [of] [WMD] and to adopt and enforce laws to prohibit such activities by nonstate actors.”⁴⁸ The resolution also created a committee to oversee states’ execution of UNSCR 1540.⁴⁹

III. AMERICA CANNOT RELY ON THE SECURITY COUNCIL TO AUTHORIZE THE USE OF FORCE

Professor Weiner’s argument is highly thought-provoking, but ultimately

42. *See id.* at 463 (citing *U.S.-China Relations: Hearing Before the S. Comm. on Foreign Relations*, 108th Cong. 2-3 (2003)).

43. *Id.* (citing Brendan Taylor, *U.S.-China Relations After 11 September: A Long Engagement or Marriage of Convenience?*, 59 *AUSTL. J. INT’L AFF.* 179, 181 (2005)).

44. *Id.* at 460 (citing COUNCIL ON FOREIGN RELATIONS, *TERRORISM: QUESTIONS AND ANSWERS: RUSSIA* (2004) (copy on file with Allen S. Weiner)).

45. *See id.* at 469-70 (noting that China and Russia voted in favor of UNSCR 1373 (terrorism) and UNSCR 1540 (WMD)).

46. *Id.* at 469 (quoting S.C. Res. 1373, ¶¶ 1(c), 2, U.N. Doc S/RES/1373 (Sept. 28, 2001)).

47. *Id.* at 469-70.

48. *Id.* at 470 (internal quotation marks omitted) (quoting S.C. Res. 1540, pmb. ¶¶ 1, 4, ¶¶ 1, 2, U.N. Doc. S/RES/1540 (Apr. 28, 2004)).

49. *See id.* (citing S.C. Res. 1540, ¶ 4, U.N. Doc. S/RES/1540 (Apr. 28, 2004)).

not altogether convincing. Although some of the statements made by Chinese and Russian officials have indeed been encouraging, it would be naïve to rely upon such statements in predicting those countries' behavior in the future. Instead, we must examine international relations theory as well as China and Russia's actions in real world situations. This analysis suggests that China and Russia have played, and will continue to play, an obstructionist role, derailing efforts to counter WMD proliferation and isolate countries that sponsor terrorism. While Security Council gridlock regarding collective authorization for the use of force is not entirely inevitable, the probability of impasse remains unacceptably high.

A. *International Relations Theory*

1. *States make collective use-of-force decisions informed by balance of power calculations*

China, Russia, and the United States are powerful players with a variety of different foreign policy priorities and considerations, one of which is maintaining a favorable balance of power. The strongest version of this argument is that the "overriding goal of each state is to maximize its share of world power, which means gaining power at the expense of other states."⁵⁰ To those who do not consider themselves foreign policy "realists," this argument may seem an overstatement. Most would agree, however, that states "live in a fundamentally competitive world where they view each other as real, or at least potential, enemies, and they therefore look to gain power at each other's expense. Any two states contemplating cooperation must consider how profits or gains will be distributed between them."⁵¹ P5 nations like China, Russia, and the United States might, therefore, in certain circumstances choose to cooperate in addressing threats like terrorism, but they will do so against a backdrop of economic, political, and military competition.

Indeed, Chinese and Russian leaders have frequently used combative language when discussing the distribution of world power, supporting the argument that both countries view the United States as a threat competing for power and influence. China recently called America "an untrustworthy,

50. JOHN J. MEARSHEIMER, *THE TRAGEDY OF GREAT POWER POLITICS 2* (2001); *see also* STEPHEN M. WALT, *THE ORIGINS OF ALLIANCES* 18 (1987) (stating that balance of power theory starts from the premise that "states form alliances in order to prevent stronger powers from dominating them"); KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* 113 (1979) ("International politics is the realm of power, of struggle, and of accommodation. . . . Whether or not by force, each state plots the course it thinks will best serve its interests.").

51. MEARSHEIMER, *supra* note 50, at 52; *see also* KENNETH N. WALTZ, *MAN, THE STATE AND WAR: A THEORETICAL ANALYSIS* 238 (1954) ("Each state pursues its own interests, however defined, in ways it judges best.").

duplicitous superpower.”⁵² More alarming, China and Russia recently affirmed their desire for “a multipolar world,” meaning a world in which the United States is less dominant.⁵³ Former presidents from Russia and China—Vladimir Putin and Jiang Zemin, respectively—have said that a unipolar system is unacceptable.⁵⁴

To advance this goal of multipolarity, China and Russia have sought to counter America’s increasing reach in the Middle East and Central Asia by deepening their relationships with a number of rogue states that are capable of acting as a check on U.S. influence. Both countries have invested heavily in Iran’s military and economic infrastructure.⁵⁵ They have been active in Sudan, which in spite of its reprehensible government has become China’s biggest foreign oil venture.⁵⁶ “China was [also] the ‘principal supplier’ to Pakistan’s nuclear weapons program”⁵⁷—a fact that contradicts China and Russia’s claims that they do not want nuclear states on their borders. Indeed, most regimes that the U.S. government considers at best questionable—and many which are directly involved with harboring or even funding terrorists—are rapidly becoming an integral part of China and Russia’s economic network, providing China and Russia with access to new markets and important raw materials.

This pattern of behavior extends beyond the Middle East and Central Asia, even into America’s regional sphere of influence. For example, Venezuela’s president, Hugo Chavez, has formed a “strategic alliance” with Latin American terrorists (the FARC) “renowned for kidnapping, drug trafficking and massacres of civilians.”⁵⁸ Indeed, there would be “more than enough [evidence] to justify a State Department decision to cite Venezuela as a state sponsor of terrorism.”⁵⁹ Still, China and Russia maintain close ties with Chavez. Venezuela is China’s principal strategic partner in Latin America due to Venezuela’s vast oil reserves, which China relies upon because it has the

52. Willy Lam, *The End of the Sino-American Honeymoon?*, 4 CHINA BRIEF (2004), available at [http://www.jamestown.org/single/?no_cache=1&tx_ttnews\[tt_news\]=30006](http://www.jamestown.org/single/?no_cache=1&tx_ttnews[tt_news]=30006).

53. See Michael J. Glennon, *Why the Security Council Failed*, FOREIGN AFF., May-June 2003, at 2, 19.

54. *Id.* at 19-20.

55. See JAMES PHILLIPS & PETER BROOKES, HERITAGE FOUND., IRAN’S FRIENDS FEND OFF ACTION AT THE U.N. SECURITY COUNCIL: HERE’S WHY, WebMemo No. 1071 (2006), <http://www.heritage.org/Research/Iran/wm1071.cfm>.

56. Peter S. Goodman, *China Invests Heavily in Sudan’s Oil Industry; Beijing Supplies Arms Used on Villagers*, WASH. POST, Dec. 23, 2004, at A1, available at <http://www.washingtonpost.com/wp-dyn/articles/A21143-2004Dec22.html>; see also Andrew McGregor, *Russia’s Arms Sales to Sudan a First Step in Return to Africa: Part One*, EURASIA DAILY MONITOR, Feb. 11, 2009, available at [http://www.jamestown.org/single/?no_cache=1&tx_ttnews\[tt_news\]=34488](http://www.jamestown.org/single/?no_cache=1&tx_ttnews[tt_news]=34488).

57. U.S.-CHINA ECON. & SEC. COMM’N, 2006 REPORT TO CONGRESS 87 (2006).

58. Jackson Diehl, Editorial, *The FARC’s Guardian Angel*, WASH. POST, Mar. 10, 2008, at A15.

59. *Id.*

world's second largest appetite for oil.⁶⁰ In August 2006, for instance, Venezuela and China agreed to work on \$5 billion worth of oil exploration and production deals.⁶¹ Additionally, Chavez plans to increase Venezuela's oil sales to China sixfold by 2012.⁶²

Russia is Venezuela's principal arms dealer. In 2007, Russia sold Chavez three billion dollars worth of arms, including twenty-four Sukhoi jet fighters, fifty-three attack helicopters, and 100,000 Kalashnikov assault rifles.⁶³ With Russian help, Venezuela plans to construct a factory to make its own assault rifles and ammunition.⁶⁴ More recently, Russia signed an arms contract with Venezuela worth \$2.2 billion.⁶⁵ Even more alarming, Russia is helping Venezuela develop a nuclear energy plant, ostensibly for civilian use.⁶⁶ But Venezuela's professed need for civilian nuclear power is questionable given its abundant oil reserves.

The balance of power considerations outlined above will manifest themselves in the Security Council for two important reasons. First, China and Russia will not want to authorize the use of force or harsh sanctions against rogue regimes because of their economic ties with those countries, many of which are openly hostile to the United States but allied with China and Russia. Second, China and Russia will want to wield their veto power simply as a way to return the world to a multipolar system in which America is less powerful relative to its competitors.⁶⁷ Indeed, the requirement that all P5 members agree before the Security Council may collectively authorize the use of force "has

60. See U.S.-CHINA ECON. & SEC. COMM'N, *supra* note 57, at 95.

61. See *id.* at 71.

62. *Id.*

63. Christopher Toothaker, *Chavez Warns of Resistance War With U.S.*, FOX NEWS, June 25, 2007, http://www.foxnews.com/printer_friendly_wires/2007Jun25/0,4675,VenezuelaUS,00.html.

64. C.J. Chivers, *Chavez's Bid for Russian Arms Pains U.S.*, N.Y. TIMES, Aug. 16, 2007, at A10.

65. Alexander Benard & Paul J. Leaf, "Smart Power" Diplomacy?, NAT'L REV. ONLINE, Oct. 8, 2009, <http://corner.nationalreview.com/post/?q=YWU3YmU2ZmRhNWI1NjAzNjY5ZjMyM2QyNjE0NGRINDE=>; see also JoAnne Allen, *U.S. Concerned Over Venezuela-Russia Arms Deal*, REUTERS, Sept. 14, 2009, <http://www.reuters.com/article/idUSTRE58E0TY20090915>; Tom A. Peter, *Venezuela's Chavez Touts \$2.2 Billion Arms Deal With Russia*, CHRISTIAN SCIENCE MONITOR, Sept. 14, 2009, <http://www.csmonitor.com/2009/0914/p99s01-duts.html>.

66. *Russia-Venezuela Nuclear Accord*, BBC NEWS, Nov. 27, 2008, <http://news.bbc.co.uk/2/hi/7751562.stm>.

67. Even America's ally France has sometimes had this goal. In 1998, France's former foreign minister, Hubert Vedrine, said: "We cannot accept . . . a politically unipolar world" and "that is why we are fighting for a multipolar" one. See Glennon, *supra* note 53, at 19. France's former president, Jacques Chirac, argues that "any community with only one dominant power is always a dangerous one and provokes reactions." *Id.*; see also JOHN BOLTON, SURRENDER IS NOT AN OPTION: DEFENDING AMERICA AT THE UNITED NATIONS AND ABROAD 130 (2007) (quoting Chirac as saying, "I have a simple principle in foreign affairs. I see what the Americans are doing and I do the opposite. That way I'm sure to be right").

provided a lever for France, Russia, and China to pry their way into a disproportionately powerful diplomatic position not otherwise afforded them by their economic or military power.”⁶⁸

A recent example of this is U.N. inaction in the face of Venezuela and Ecuador providing arms, financing, and safe haven to the FARC.⁶⁹ Despite the clear violation of UNSCR 1373, the U.N. has only offered a press release in which the U.N. Secretary General, Ban Ki-moon, fails to condemn Venezuela, Ecuador, and the FARC, but “fully support[s]” the Organization of American States’ rejection of Colombia’s use of force in self-defense against terrorists.⁷⁰ Given the deep ties and interdependencies summarized above that both China and Russia have with Venezuela, Beijing and Moscow know they could suffer severe economic consequences if they sanction Caracas.

Even when China and Russia do cooperate with the United States on the issues of terrorism and WMD nonproliferation, they will do so as a quid pro quo within the balance of power context. China and Russia view their limited cooperation with the United States as a means of securing more favorable treatment on matters that are more important to them, such as the Taiwan issue

68. Michael J. Glennon, *The New Interventionism: The Search for a Just International Law*, FOREIGN AFF., May-June 1999, at 2, 4; see also ROBERT KAGAN, OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER 54 (2004) (“[T]he Security Council is nevertheless the one place where a weaker nation such as France has at least the theoretical power to control American actions, if the United States can be persuaded to come to the Security Council and be bound by its decisions. For Europeans, the UN Security Council is a substitute for the power they lack.”); Radek Sikorski, *Cleaning Up the UN in an Age of U.S. Hegemony*, AM. ENTERPRISE INST., June 16, 2005, http://aei.org/publications/pubID.22696.filter.all/pub_detail.asp (“Because of the overwhelming strength of the United States, less powerful countries often try to offset its influence by working within international institutions, with the United Nations being the forum of choice.”); John C. Yoo & Will Trachman, *Less Than Bargained For: The Use of Force and the Declining Relevance of the United Nations*, 5 CHI. J. INT’L L. 379, 386 (2005) (“[P5 members] may be using their veto to frustrate the exercise of power by the United States. Some nations view the United States as a global hyperpower that threatens to establish a worldwide hegemony. They may seek to take measures to counteract the growth of the United States in classic balance of power fashion. One way such countries may seek to counterbalance the United States’ enhanced position is by preventing the Security Council from approving American interventions, thereby imposing some political costs on its use of military force.”).

69. See Diehl, *supra* note 58 (arguing that Chavez’s “strategic alliance” with the FARC violates UNSCR 1373 and stating that there “would be more than enough [evidence] to justify a State Department decision to cite Venezuela as a state sponsor of terrorism”); Juan Forero, *Venezuela Offered Aid to Colombian Rebels; Officials Served as Middlemen with Arms Dealers, Files Show*, WASH. POST, May 15, 2008, at A1; see also Alexander Benard & Eli Sugarman, *Fight the FARC: A Necessary OAS Priority*, NAT’L REV. ONLINE, Mar. 17, 2008, <http://article.nationalreview.com/351562/fight-the-farc/alexander-benard-eli-sugarman> (arguing that a resolution adopted by the Organization of American States that condemns Colombia’s surgical strike against FARC terrorists operating in Ecuador is “at odds with the reality of a post-9/11 world as well as with [UNSCR] 1373”).

70. Paul Leaf & Eli Sugarman, *Playing Diplomatic Hardball with FARC*, AM. THINKER, June 21, 2008, http://www.americanthinker.com/2008/06/playing_diplomatic_hardball_wi.html.

in the case of China or, in the case of both China and Russia, maintaining strong trade relations with the West.⁷¹ But this will not result in meaningful cooperation. Rather, China and Russia will cooperate only to the extent necessary to avoid needlessly jeopardizing relations with the United States or provoking America into devoting more attention to human rights abuses and other matters that the Chinese and Russian governments consider to be of purely domestic concern. China and Russia “may bend occasionally so as to avoid too-close association with what the West calls ‘rogue regimes.’ But the thrust of their foreign policies” will remain antagonistic to American interests.⁷²

China’s pledge of \$150 million to Afghan reconstruction, cited by Professor Weiner to demonstrate convergence of interests among the P5,⁷³ is really evidence that cooperation has been more cosmetic than actual. China’s contribution constitutes less than half of America’s weekly expenditure in that country, and neither China nor Russia contributed any troops.⁷⁴ Additionally, it is not known whether China or Russia would have vetoed the intervention in Afghanistan, since the United States used force pursuant to the Charter’s self-defense exception.⁷⁵

71. The practice of China tying its counter-proliferation efforts to a decrease in American arms sales to Taiwan is well-documented, and referred to as “linkage.” See, e.g., SHIRLEY A. KAN, CONG. RESEARCH SERV., CHINA AND PROLIFERATION OF WEAPONS OF MASS DESTRUCTION AND MISSILES: POLICY ISSUES, CRS Rep. No. RL31555, at 44-45 (2009) (noting that some China experts are “skeptical that China sees nonproliferation as in its national interest, since Beijing has made progress in nonproliferation commitments as part of improving relations with Washington (surrounding summits) and tried to use its sales as a form of leverage against Washington, especially on the issue of U.S. arms sales to Taiwan”); John Pomfret, *China Again Demands U.S. Drop Missile Defense Plan; Beijing Links Weapons Exports to American Verdict on System*, WASH. POST, July 12, 2000, at A16 (quoting a U.S. official as saying that China “would like to tie Taiwan arms sales into nonproliferation discussions” and reporting that Chinese officials have said that if the U.S. provides Taiwan with missile defense systems, China “will continue to sell missile technology to Pakistan, and possibly to countries in the Middle East”); see also KAN, *supra*, at 48 (reporting that during a 1998 summit in Beijing, President Clinton considered a Chinese “request for a U.S. pledge to deny missile defense sales to Taiwan, if China promised to stop missile sales to Iran”).

72. Robert Kagan, *End of Dreams, Return of History*, 144 POL’Y REV. 17, 33 (2007).

73. Weiner, *supra* note 1, at 463.

74. It is estimated that U.S. involvement in Iraq and Afghanistan will cost at least \$2.6 trillion and up to \$4.5 trillion. Lee Hudson Teslik, *Iraq, Afghanistan, and the U.S. Economy*, COUNCIL ON FOREIGN RELATIONS, Mar. 11, 2008, <http://www.cfr.org/publication/15404>. Maintaining troops in Afghanistan costs America alone approximately \$370 million per week. Brian Bender, *Cost of Iraq War Nearly \$2B a Week*, BOSTON GLOBE, Sept. 28, 2006, at A1. China’s nominal pledge to Afghan reconstruction is thus insufficient to fund the cost of America’s operations in the country for three days. It is likely that China offered these funds only to secure future reconstruction contracts in Afghanistan.

75. See Chien-peng Chung, *China’s “War on Terror”: September 11 and Uighur Separatism*, FOREIGN AFF., July-Aug. 2002, at 8, 10 (“It was fortunate for China that no UN resolution seeking to ratify the legality of the U.S.-led military campaign [in Afghanistan] was introduced.”).

Professor Weiner further argues that the “converging interests of the [P5] have led to significant new developments in the sphere of collective action to counter the threat of WMD proliferation.”⁷⁶ As support, he cites UNSCR 1540.⁷⁷ China did indeed take one step in the right direction by voting in favor of this resolution, which declares that WMD proliferation “constitutes a threat to international peace and security” and affirms the resolve of the P5 to “take appropriate and effective actions against any threat to international peace and security caused by” WMD proliferation.⁷⁸ But China has not lived up to its commitment, in part because it has failed to participate in several international nonproliferation agreements. China has not joined the Proliferation Security Initiative (“PSI”),⁷⁹ a multinational initiative that the United States uses to interdict shipments of WMD-related cargo at sea, in the air, and on land.⁸⁰ In particular, PSI countries permit other states to board and search their own vessels.⁸¹ With more than two thousand ships, only two countries have a bigger merchant fleet than China. But Beijing will not permit them to be searched for illicit materials.⁸² Moreover, China is not a member of the Missile Technology Control Regime (“MTCR”).⁸³ The MTCR is meant to “slow the proliferation of ballistic and cruise missiles, rockets, and unmanned air vehicles . . . capable of delivering [WMD].”⁸⁴ The MTCR requests that signatories “exercise restraint when considering transfers of equipment or technology that would provide or help a recipient country build a missile capable of delivering” a nuclear warhead.⁸⁵ Naturally, China has not joined the International Code of Conduct Against Ballistic Missile Proliferation, which aims to slow the distribution of ballistic missiles and to reinforce the MTCR.⁸⁶

To make matters worse, “China has not even fulfilled the nonproliferation obligations it has agreed to accept.”⁸⁷ Indeed, “Chinese companies and government organizations continue to proliferate weapons, weapons

76. Weiner, *supra* note 1, at 470.

77. *Id.*

78. S.C. Res. 1540, pmb. ¶¶ 1, 4, U.N. Doc. S/RES/1540 (Apr. 28, 2004).

79. See U.S.-CHINA ECON. & SEC. COMM’N, *supra* note 57, at 84.

80. See “Proliferation Security Initiative” for Searching Potential WMD Vessels, 98 AM. J. INT’L L. 355 (2004).

81. *Id.*

82. William R. Hawkins, *Seeking a UN Permission Slip*, FRONTPAGEMAG.COM, Jan. 31, 2007, <http://www.frontpagemag.com/Articles/Read.aspx?GUID=677B8B44-B28A-4F7C-A75F-3C5E89B9DE05>.

83. See U.S.-CHINA ECON. & SEC. COMM’N, *supra* note 57, at 84.

84. ANDREW FEICKERT, CONG. RESEARCH SERV., MISSILE SURVEY: BALLISTIC AND CRUISE MISSILES OF SELECTED FOREIGN COUNTRIES, CRS Rep. No. RL30427, at 6 (2005).

85. ANDREW FEICKERT, CONG. RESEARCH SERV., MISSILE TECHNOLOGY CONTROL REGIME (MTCR) AND INTERNATIONAL CODE OF CONDUCT AGAINST BALLISTIC MISSILE PROLIFERATION (ICOC): BACKGROUND AND ISSUES FOR CONGRESS, CRS Rep. No. RL31848, at 1 (2003).

86. See U.S.-CHINA ECON. & SEC. COMM’N, *supra* note 57, at 84.

87. *Id.*

components, and weapons technology. Some of these transfers violate China's international nonproliferation agreements [and] harm regional security in East Asia and the Middle East"⁸⁸ In one year (2005-2006), for instance, the United States imposed sanctions on eleven Chinese companies and organizations in response to their illegal proliferation activities (including proliferation of WMD and "contributing to the development of missiles capable of delivering WMD").⁸⁹ That same year, the U.S. Assistant Secretary of Defense for International Security reported to a Congressional advisory panel that China was willing to transfer "a wide variety of technologies" to customers including Iran, Sudan, Myanmar, Zimbabwe, Cuba and Venezuela.⁹⁰ This derelict behavior explains why James A. Kelly, Assistant Secretary of State for East Asian and Pacific Affairs, concluded that "full implementation and effective enforcement" of China's export control regulations "are still lacking."⁹¹

Russia, meanwhile, has attempted to limit "U.S. access to bases in Central Asia that support military operations in Afghanistan."⁹² Indeed, for the last few years Russia has been obstructing U.S. efforts to fight terrorism in Afghanistan because of the "geopolitical concern" of "revers[ing] the growing American presence in the region."⁹³ This geopolitical concern explains why Russia opposes NATO enlargement, despite its importance to the war on terror. NATO expansion can increase the number of NATO troops in Afghanistan, which frees up U.S. troops for work in Iraq and the most dangerous parts of

88. *Id.* at 82.

89. Press Release, U.S. Dep't of the Treasury, Treasury Designates U.S. and Chinese Companies Supporting Iranian Missile Proliferation (June 13, 2006), <http://www.treas.gov/press/releases/js4317.htm>; see also FEICKERT, *supra* note 85, at 85 (listing, *inter alia*, sanctions imposed "on four Chinese companies . . . because the U.S. government determined that they provided, or attempted to provide, support for Iran's Aerospace Industries Organization (AIO), a key actor in developing Iran's missile program," and noting that "[a]ll of the firms subjected to sanctions in this round had been sanctioned previously").

90. *China's Proliferation to North Korea and Iran, and its Role in Addressing the Nuclear and Missile Situations in Both Nations: Hearing Before the U.S.-China Economic and Sec. Review Comm.*, 109th Cong. 13 (2006) (testimony of Hon. Peter W. Rodman).

91. *U.S.-China Relations: Hearing Before the S. Comm. on Foreign Relations*, 108th Cong. 6, 9 (2003) (testimony of Hon. James A. Kelly).

92. COUNCIL ON FOREIGN RELATIONS, *RUSSIA'S WRONG DIRECTION: WHAT THE UNITED STATES CAN AND SHOULD DO* 4 (2006) [Hereinafter *RUSSIA'S WRONG DIRECTION*]; see also LIONEL BEEHNER, COUNCIL ON FOREIGN RELATIONS, *ASIA: U.S. MILITARY BASES IN CENTRAL ASIA* (2005), <http://www.cfr.org/publication/8440/#3> ("A regional group led by Russia and China has pressured the United States to remove its forces from Central Asia."); Richard Weitz, *U.S. Military Strives to Maintain Presence in Central Asia*, 9 CENT. ASIA-CAUCASUS ANALYST 9, 11 (2007) (noting that "it is widely assumed that Russian and Chinese representatives . . . encouraged Uzbekistan to expel U.S. military forces from its territory . . . and that Moscow and Beijing are now pressuring Kyrgyzstan to end U.S. access to Manas").

93. *RUSSIA'S WRONG DIRECTION*, *supra* note 92, at 26.

Afghanistan. But Moscow is “bitterly opposed” to the eastward expansion of NATO.⁹⁴ Indeed, “Putin has threatened to aim nuclear weapons at Ukraine”—a former Soviet republic trying to escape Moscow’s orbit—if it joins NATO.⁹⁵ If Russia valued fighting terrorists more than protecting its sphere of influence, then Putin would not view the addition of Ukraine and Georgia to NATO “‘as a direct threat’ to Russian security.”⁹⁶

2. *Targeted states assess the severity of threats differently than non-targeted states*

The United States takes international terrorism and WMD-related threats more seriously than other countries do because it is more likely to be the target of such threats. For instance, after Iran shot missiles following the revelation of Iran’s new uranium enrichment facility at Qom, “Russia balked at sanctioning Iran, a country the Kremlin views as ‘a partner that has never harmed [it] in any way.’”⁹⁷ This view “might explain Russia’s anticipated delivery to Iran of sophisticated anti-aircraft missiles, which will allow Tehran to further fortify its nuclear facilities against a military strike.”⁹⁸ China, meanwhile, recently signed lucrative commercial deals with North Korea and agreed to provide financial assistance to Pyongyang worth at least \$200 million.⁹⁹ China’s conduct “undoubtedly violated [UNSCR] 1874 by giving Kim [Jong Il] the means to keep his nuclear arsenal in the face of intense international pressure.”¹⁰⁰ China’s derelict behavior was predictable given that it “only reluctantly” voted in favor of UNSCR 1874—which was passed after North Korea detonated its second nuclear device—even after diluting it.¹⁰¹

With respect to international terrorist threats, Al Qaeda’s main target is the United States, not other P5 members. Osama Bin Laden wrote a letter titled “To the Americans,” not to the Chinese or the Russians, outlining why Al

94. Paul Ames, *Georgia Warns About Impact of NATO Snub*, USA TODAY, Mar. 26, 2008, http://www.usatoday.com/news/world/2008-03-26-413858084_x.htm.

95. *Id.*

96. James Gerstenzang, *Bush Pledges to Send More U.S. Troops to Afghanistan*, L.A. TIMES, Apr. 5, 2008, at A10.

97. Benard & Leaf, *supra* note 65 (quoting Russian Foreign Minister Sergey V. Lavrov); see also Alexander Benard & Paul J. Leaf, *North Korea: Dangerous Model for Iran*, N.Y. POST, Oct. 23, 2009, http://www.nypost.com/p/news/opinion/opedcolumnists/korea_dangerous_model_for_iran_AAiEJ2x9o3I4Zc8rDIwtZN.

98. Benard & Leaf, *supra* note 65.

99. See Gordon G. Chang, Editorial, *Beijing Is Violating North Korean Sanctions*, WALL ST. J., Oct. 15, 2009, <http://online.wsj.com/article/SB10001424052748704107204574474424116638040.html>.

100. *Id.*

101. *Id.*; see also Alexander Benard & Paul Leaf, *Last Chance*, NAT’L REV. ONLINE, June 16, 2009, <http://corner.nationalreview.com/post/?q=MThkOGU1MDU1MDNkODUzNjU3ZGJiNDgyOTBkNGU1ZjU=> (describing how China weakened UNSCR 1874).

Qaeda is attacking America.¹⁰² Bin Laden calls on all Muslims to “kill the *Americans* and seize their money wherever and whenever they find them”¹⁰³ because he believes that American troops are invading the Arabian peninsula,¹⁰⁴ that the United States props up oppressive regimes in Islamic countries,¹⁰⁵ that America uses its military power to ensure a steady flow of cheap Middle Eastern oil,¹⁰⁶ and the United States is Israel’s primary supporter.¹⁰⁷ As long as America is the only country with troops on the Arabian peninsula and is Israel’s closest ally, no other P5 member will assess the threat posed by Al Qaeda the same way as the United States, because, *at most*, other P5 members will merely be secondary targets *inasmuch as they fight alongside the United States*.¹⁰⁸

Professor Weiner argues that China and Russia have faced the same kind of international terrorist threats as the United States, but the parallel is exaggerated.¹⁰⁹ Although a group of Uighur separatists operate in China’s western province, these separatists have questionable connections to international terrorist networks.¹¹⁰ Many claim that the Chinese government has only labeled them terrorists to justify human rights abuses against the Uighur and other ethnic minorities.¹¹¹ The same is true for Russia, which has

102. See MESSAGES TO THE WORLD: THE STATEMENTS OF OSAMA BIN LADEN 160 (Bruce Lawrence ed., James Howarth trans., 2005).

103. *Id.* at 61 (emphasis added).

104. *Id.* at 163 (“[American] forces occupy our countries; [America] spread[s] its military bases throughout them.”).

105. *Id.* (“Under [American] supervision, consent, and orders, the governments of our countries which act as [America’s] collaborators, attack us on a daily basis.”).

106. *Id.* (“[America] steal[s] our wealth and oil at paltry prices because of [its] international influence and military threats.”).

107. *Id.* at 162 (“The creation and continuation of Israel is one of the greatest crimes, and [Americans are] the leaders of its criminals. And of course there is no need to explain and prove the degree of American support for Israel.”).

108. See, e.g., *id.* at 173 (containing Bin Laden’s letter titled “To the Allies of America”).

109. Weiner, *supra* note 1, at 455, 459 & 461.

110. See HOLLY FLETCHER & JAYSHREE BAJORIA, COUNCIL ON FOREIGN RELATIONS, EAST TURKISTAN ISLAMIC MOVEMENT (ETIM) (2008), <http://www.cfr.org/publication/9179> (noting that “some China specialists doubt” ties between Al Qaeda and Muslim separatists in China because “Beijing has a long history of falsifying data” and that “[t]he United States accused China of using terrorism concerns as an excuse to suppress political dissent in Xinjiang”); Chung, *supra* note 75, at 11 (“The Bush administration . . . has been reluctant to equate [its] fight against ‘terrorists with global reach’ with domestic crackdowns against separatists in China and elsewhere. Rather, Washington has made it clear to the Chinese that nonviolent separatist activities cannot be classified as terrorism.”); Gaye Christoffersen, *Constituting the Uyghur in U.S.-China Relations: The Geopolitics of Identity Formation in the War on Terrorism*, STRATEGIC INSIGHTS, Sept. 2, 2002, <http://www.nps.edu/Academics/centers/ccp/publications/OnlineJournal/2002/sept02/eastAsia.html> (stating that China “overstate[s]” the amount of al Qaeda influence).

111. See FLETCHER & BAJORIA, *supra* note 110 (stating that some China specialists believe that “the Chinese have repeatedly tried to paint their own campaign against Uighur

rhetorically embraced terrorism as a major threat to world stability only because of its domestic struggle against Chechen separatists. The separatists in Chechnya have some connections with the international terrorism that threatens the West.¹¹² The United States, however, has stated that Russia exaggerates the connection between these separatists and international terrorists to justify harsh measures against Chechen fighters.¹¹³

The distinction between international terrorists and domestic separatist groups is important. Rogue regimes like Iran and North Korea would be reluctant to pass WMD on to groups that might target their patrons in Moscow and Beijing. The appearance of a common evaluation of the severity of international terrorist threats between China and Russia on the one hand and the United States on the other is therefore not genuine—it has been manufactured by the Chinese and Russian governments to promote their particular domestic agendas.

When Professor Weiner states that Security Council authorization will be forthcoming “at least in cases where there is a shared assessment of the severity of a threat,”¹¹⁴ then, he is describing a scenario that will rarely occur. The uniqueness of the threat posed to the United States by international terrorism and WMD proliferation all but guarantees that the U.S. will have a greater willingness to resort to force than other P5 countries.

3. *Powerful states react to threats differently than weak states*

States with a greater capacity to address problems through force are more likely to do so than are those without such capability. America’s large investments in new military weaponry allow it to attack with “deadly accuracy from great distances with lower risk to [its] forces.”¹¹⁵ Other P5 members, on the other hand, have less sophisticated military tools, forcing them to rely more on ground troops fighting in close proximity to the enemy, which raises the risk to their forces. Because of this technological asymmetry, Americans feel more comfortable using force than other P5 members. This is so because the “incapacity to respond to threats leads not only to tolerance. It can also lead to denial. It is normal to try to put out of one’s mind that which one can do nothing about.”¹¹⁶ Thus, Americans see threats sooner, because they have the

separatists in Xinjiang as a flank of the U.S.-led war on terrorism—and to get Washington to drop its long-standing protests over Chinese human rights abuses in its crackdowns in Xinjiang”).

112. See PREETI BHATTACHARJI, COUNCIL ON FOREIGN RELATIONS, CHECHEN TERRORISM (RUSSIA, CHECHNYA, SEPARATIST) (2008), <http://www.cfr.org/publication/9181>.

113. See *id.*

114. Weiner, *supra* note 1, at 481.

115. KAGAN, *supra* note 68, at 23.

116. *Id.* at 32.

capability to counter them.¹¹⁷

Kagan provides a useful illustration of this dynamic:

A man armed only with a knife may decide that a bear prowling the forest is a tolerable danger, inasmuch as the alternative—hunting the bear armed only with a knife—is actually riskier than lying low and hoping the bear never attacks[, or at most, only attacks a different man]. The same man armed with a rifle, however, will likely make a different calculation of what constitutes a tolerable risk. Why should he risk being mauled to death if he doesn't have to [since his rifle allows him to kill the bear from a safe distance]?¹¹⁸

America looks at terrorists and rogue regimes as the man armed with a rifle views the bear. As such, the U.S. has repeatedly declared that it will take “all necessary measures” to protect its national and economic security against threats emanating from countries like Iran.¹¹⁹ This approach is not limited to the Bush Administration. Even President Barack Obama has stated as far back as 2004 that the United States should consider surgical missile strikes to prevent Iran from developing WMD capabilities.¹²⁰ More recently, President Obama stated that he would send troops to Pakistan without U.N. approval if that country failed to act against terrorists in its territory near Afghanistan.¹²¹

4. *Russia and China view sovereignty differently than the United States and its democratic allies*

On 9/11, the United States was reminded that some of the most serious threats to global stability “increasingly come from actors operating within states, not from states themselves.”¹²² The U.S. promptly responded by announcing that it will share information and technical capabilities with states that are willing to fight terrorists operating within their territory. But if those states either cannot or choose not to take the necessary measures, the United States has stated repeatedly that it reserves the right to use its military assets to strike at the terrorists, their training camps, and, in some cases, the government of the state that harbors them.¹²³ This policy “rejects the unbending rule that

117. *Id.* at 33.

118. *Id.* at 31.

119. WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 20 (2006), <http://www.strategicstudiesinstitute.army.mil/pdffiles/nss.pdf> [hereinafter NATIONAL SECURITY STRATEGY].

120. See David Mendell, *Obama Would Consider Missile Strikes on Iran*, CHI. TRIB., Sept. 25, 2004, at C1.

121. See Dan Balz, *Obama Says He Would Take Fight to Pakistan*, WASH. POST, Aug. 2, 2007, at A1.

122. See Leaf & Sugarman, *supra* note 70. This has remained true since 9/11. See Daalder & Kagan, *supra* note 5, at 15 (noting that America's past three wars were “provoked by internal conditions and actions”—genocide in the Balkans, the Taliban providing safe haven for Al Qaeda, and Saddam Hussein's perceived possession of WMD).

123. Leaf & Sugarman, *supra* note 70; see NATIONAL SECURITY STRATEGY, *supra* note 119, at 5-6.

the territory of a state is *always* inviolable and thus may *never* be the object of force taken by another state.”¹²⁴ The United States has recently taken numerous actions consistent with this view. In 2002, for example, it deployed a Predator drone to strike a group of terrorists traveling through Yemen after determining that the Yemeni government did not itself have the capability to control its territory and was allowing terrorists to regroup.¹²⁵ In Afghanistan, the United States dismantled training camps and overthrew the Taliban government. Most recently, the U.S. stated that it could not rule out the use of force in the tribal areas of Pakistan along its border with Afghanistan if the Pakistani government proves incapable of dealing with the resurgence of Taliban and al Qaeda in those areas.¹²⁶

Parallel to these efforts, the United States has sought to prevent rogue regimes that sponsor terrorists from developing WMD capabilities, and has pushed for democratic reforms, particularly in the Middle East, to counter the extremism that creates fertile ground for terrorist organizations to recruit new members.¹²⁷ The U.S. has stated repeatedly that it is keeping “all options” on the table in terms of dealing with rogue states that violate their nonproliferation obligations. In a recent National Security Strategy, the United States singled out Syria and Iran as rogue states and called upon the international community to hold those and similar states to account.¹²⁸ It also said that it would take “all necessary measures” to protect its national and economic security against threats emanating from countries like Syria, Iran, and North Korea.¹²⁹ These positions are subscribed to even outside the Bush Administration. Other democracies, like Israel, Turkey, and Colombia have shown “a similar willingness to conduct . . . cross-border strikes.”¹³⁰

In contrast, Russia and China are among the strongest supporters of the principle that states are the “exclusive masters of their internal affairs.”¹³¹ They oppose doctrines such as the Responsibility to Protect¹³² as well as other

124. Leaf & Sugarman, *supra* note 70.

125. Walter Pincus, *U.S. Strike Kills Six in Al Qaeda*, WASH. POST, Nov. 5, 2002, at A1.

126. John Donnelly, *U.S. Won't Rule Out Force in Pakistan—Push Against Al Qaeda May Backfire, Some Say*, BOSTON GLOBE, July 23, 2007, at A1.

127. NATIONAL SECURITY STRATEGY, *supra* note 119, at 1.

128. *Id.* at 38.

129. *Id.* at 20-21.

130. *See* Leaf & Sugarman, *supra* note 70.

131. Ivo Daalder & James Lindsay, *Democracies of the World, Unite*, AM. INT., Jan.-Feb. 2007, available at <http://www.the-american-interest.com/article.cfm?piece=220>.

132. JOHN IKENBERRY & ANNE-MARIE SLAUGHTER, PRINCETON PROJECT ON NAT'L SEC., FORGING A WORLD OF LIBERTY UNDER LAW: U.S. NATIONAL SECURITY IN THE 21ST CENTURY 24 (2006). The Responsibility to Protect requires states to do everything in their power to protect citizens from “avoidable catastrophe—mass murder and rape, ethnic cleansing by forcible expulsion and terror, and deliberate starvation and exposure to disease.” Secretary-General’s High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, 65, U.N. Doc. DPI/2367 (2004). When states are

related measures—including passing resolutions that challenge a state’s capacity to control its territory or authorizing the use of force against a rogue regime—because they fear that these doctrines and measures could serve as a pretext for democratic countries to question repressive practices in China and Russia and in other autocracies. Indeed, Russia and China have obstructed all U.S.-led actions “that would interfere in the domestic circumstances of other states,” including actions in Kosovo, Darfur, and Burma.¹³³

China’s and Russia’s near absolutist stance that borders are inviolable frequently enables rogue regimes to use territorial sovereignty as a shield while they fund, harbor, and arm terrorists. This puts both countries at odds with the United States and its democratic allies, and makes it difficult for the Security Council to deal effectively with modern threats.

B. *Recent Examples of Security Council Gridlock*

The following Subparts present three concrete examples that demonstrate the continued divergence of interests between the United States and other P5 members (particularly China and Russia). The examples—North Korea, Iran, and missile defense in Eastern Europe and East Asia—each serve as vivid, real-world illustrations of the theoretical grounds for Security Council gridlock described in the preceding Part.¹³⁴ In all three cases, other P5 members’ behavior demonstrates a focus on economic interests and preventing the United States from extending its influence rather than on concern about terrorism and WMD proliferation.

1. *North Korea*

On July 4, 2006, North Korea test-fired multiple missiles¹³⁵ in violation of its 1999 moratorium on long-range missile launches.¹³⁶ Each missile splashed

unwilling or unable to fulfill this requirement, the Responsibility to Protect grants the international community the right (or, in its strong form, even imposes on the international community the obligation) to take action—even if that action is in violation of a country’s sovereignty.

133. Daalder & Lindsay, *supra* note 131. Of course, China and Russia are willing to ignore territorial sovereignty when it benefits them. *See, e.g.*, Philip P. Pan, *Biden Offers Georgia Solidarity*, WASH. POST, July 24, 2009, at A12.

134. The Iraq case would seem to be a natural fourth example, since it is a case in which disagreements among the P5 did in fact result in Security Council gridlock—the very point that we attempt to make in this Note. Nonetheless, we have decided not to discuss Iraq because the issue has become a source of controversy, and the differing accounts of what happened, and why, remain highly politicized. We thus believe that a discussion of Iraq would distract more than it would clarify.

135. Colum Lynch, *China to Block Vote Condemning N. Korea*, WASH. POST, July 13, 2006, at A20.

136. Dana Priest & Anthony Faiola, *North Korea Tests Long-Range Missile*, WASH. POST, July 5, 2006, at A1.

down in the Sea of Japan less than 400 miles from Japan.¹³⁷ One of the missiles, a Taepodong-2, can reach American soil.¹³⁸ More alarming, the missile can carry a nuclear warhead.¹³⁹ Unlike China and Russia, the United States, Japan, Great Britain, and France jointly called for a tough response to Pyongyang's provocative behavior.¹⁴⁰

Professor Weiner asserts that, since that time, China has played a constructive role in helping the United States and its allies resolve this crisis. China, he posits, has determined that "the acquisition of nuclear weapons by [North Korea] threatens its interests."¹⁴¹ Because there is no guarantee that North Korean WMD will always be in the hands of a friendly regime, China fears that North Korea will proliferate its nuclear technology, and Pyongyang going nuclear could encourage China's regional adversaries to develop their own nuclear arsenals.¹⁴² Professor Weiner cites evidence of Chinese cooperation since 1993, including the fact that Chinese diplomats have "delivered 'an explicit message that North Korea must put an end to its nuclear weapons program.'"¹⁴³ Furthermore, China has helped negotiate an agreement between the United States, North Korea, and four other parties, including China;¹⁴⁴ voted to support an International Atomic Energy Agency (IAEA) resolution that declared North Korea in violation of its Nuclear Non-Proliferation Treaty (NPT) Safeguards Agreement;¹⁴⁵ and stopped oil shipments to North Korea for three days.¹⁴⁶ Professor Weiner concludes, therefore, that the North Korea case evinces China's "changing attitude towards the dangers of WMD proliferation" and hails that country's "increasingly assertive and constructive role in encouraging North Korea to abandon its

137. *Id.*

138. See Dan Blumenthal, Presentation at the Institute for Korean-American Studies Fall Symposium: Facing a Nuclear North Korea and the Future of U.S.-ROK Relations (Oct. 11, 2005); see also KAN, *supra* note 71, at 21 (stating that Vice Admiral Lowell Jacoby, the Director of the Defense Intelligence Agency, testified that the Taepodong-2 can "deliver a nuclear warhead to parts of the United States in a two-stage variant and target all of North America with a three-stage variant").

139. *Current and Future Worldwide Threats to the United States: Hearing Before the S. Comm. on Armed Servs.*, 110th Cong. 30 (1983) (statement of Lieutenant General Michael D. Maples, Director, Defense Intelligence Agency).

140. The British and French initially were reluctant to support a tough resolution, "not as it might affect North Korea, but as it might affect their efforts to deal with Iran's nuclear program." BOLTON, *supra* note 67, at 295. They worried that pushing too hard on North Korea would make China and Russia less helpful on Iran. See *id.* The British and French soon shifted their positions so as to be in agreement with the U.S. and Japan. See *id.* at 296.

141. Weiner, *supra* note 1, at 475 (citing sources).

142. *Id.* at 476.

143. *Id.* at 475 (quoting Anne Wu, *What China Whispers to North Korea*, WASH. Q., Spring 2005, at 36).

144. *Id.* at 477.

145. *Id.* at 476.

146. *Id.* at 477 (citing a source that says the oil shipments were stopped for three days).

nuclear weapons program.”¹⁴⁷

But balance of power considerations make it much more likely than Professor Weiner asserts that China’s main concern on the Korean peninsula is guaranteeing that North Korea “remains intact and is governed by a friendly regime.”¹⁴⁸ Consequently, during the buildup to North Korea’s detonation of a nuclear weapon,¹⁴⁹ China was “reluctant” to put pressure on North Korea that could destabilize Pyongyang, even if the absence of such pressure increased the likelihood of that country going nuclear.¹⁵⁰ What little help China has offered may not result from agreement with the U.S. that a nuclear North Korea would threaten global stability. Rather, China may worry that a nuclear North Korea will force its regional adversaries—like Japan—to acquire nuclear weapons.¹⁵¹ A nuclear Japan—a close American ally—would alter the balance of power in that region and thus weaken China.

Because China sees “worse developments than a nuclear-armed North Korea” on the Korean peninsula, Washington and Beijing have inevitably disagreed about the appropriate measures needed to keep North Korea denuclearized.¹⁵² As evidenced in the following three Subparts, America and its allies were willing to use sanctions and at least the threat of force against North Korea, even if it meant a change in leadership in Pyongyang. China, on the other hand, was unwilling to take measures that would destabilize Kim’s regime.¹⁵³ On more than one occasion, this fundamental divergence forced the United States and its allies to make concessions to obtain China’s approval of a United Nations Security Council Resolution (UNSCR) in response to North Korean aggression.

147. *Id.* at 468.

148. U.S.-CHINA ECON. & SEC. COMM’N, *supra* note 57, at 90; *see also* Blumenthal, *supra* note 138 (“Beijing’s foremost concern—Kim’s survival—is illustrated by its increased trade with North Korea since [Pyongyang announced in 2002 that it had a highly enriched uranium program in violation of the 1994 Agreed Framework]: according to the *Washington Post*, bilateral trade between China and North Korea ‘nearly doubled between 2002 and 2004 to \$1.39 billion.’” (quoting Anthony Faiola, *Despite U.S. Attempts, N. Korea Anything but Isolated*, WASH. POST, May 12, 2005, at A18)).

149. On October 9, 2006, North Korea detonated a nuclear weapon. *See* Colum Lynch & Maureen Fan, *China Says It Will Back Sanctions on N. Korea*, WASH. POST, Oct. 11, 2006, at A1.

150. *See* U.S.-CHINA ECON. & SEC. COMM’N, *supra* note 57, at 90.

151. *See* Editorial, *Six-Party Fever*, WALL ST. J., Nov. 3, 2006, at A10.

152. *China’s Proliferation Policies and Practices: Hearing Before the U.S.-China Economic and Security Review Comm’n*, 108th Cong. 2 (2003) (statement of Robert J. Einhorn, Senior Adviser, Center for Strategic and International Studies), available at <http://www.csis.org/media/csis/congress/ts030724einhorn.pdf> [hereinafter Einhorn Statement].

153. *See* Dan Blumenthal, *Kim Jong Il, Rocket Man*, WKLY. STANDARD, July 17, 2006, at 9 (“[W]hile China may be annoyed that its ‘little brother’ does not do its bidding all the time, Beijing thinks that any type of punitive response is a far worse option, especially if it paves the road to sanctions, or even an American strike.”).

a. *UNSCR 1695*

Following North Korea's successful missile test, "the United States and its allies [were ready] to impose punitive measures" and demand that other states not assist Pyongyang in its development of ballistic missiles and WMD.¹⁵⁴ The group presented the Security Council with a draft resolution requiring Pyongyang to "immediately cease the development, deployment, testing and proliferation of ballistic missiles."¹⁵⁵ Additionally, the draft resolution required states "to prevent the transfer of money, material, or technology that could 'contribute' to Pyongyang's ballistic missile program or advance its" WMD capabilities.¹⁵⁶ Finally, and most importantly, it invoked Chapter VII of the Charter, a provision that makes a resolution that is not complied with "enforceable by armed action" and by expanded sanctions.¹⁵⁷

China and Russia had a muted response to Pyongyang's aggressive behavior. Rather than negotiating with Washington and its allies over the language of a binding Security Council resolution, Beijing and Moscow pushed for a "mild" press statement.¹⁵⁸ Such a statement was the "weakest possible response" because it is neither legally binding nor backed by the threat of sanctions.¹⁵⁹ Rather than *requiring* other states to prevent the transfer of technology that could aid Pyongyang's ballistic missile and WMD development, the proposed statement only "urge[d] countries to *voluntarily* impose a ban on trade in ballistic missiles and other technology to North Korea that could be used to produce nuclear arms and other weapons of mass destruction."¹⁶⁰ China rejected a subsequent resolution, which Japan introduced as a compromise. Beijing labeled it an "overreaction."¹⁶¹ Indeed, the following day China announced that it would veto any resolution that was not further modified.¹⁶²

On July 11, 2006, China and Russia presented the Security Council with a rival draft resolution that neither invoked Chapter VII nor contained the types of sanctions that America and its allies wanted.¹⁶³ Rather, it "endorse[d] only

154. Colum Lynch & Anthony Faiola, *U.S., Allies Seek Punitive Action Against N. Korea*, WASH. POST, July 6, 2006, at A1.

155. *Id.*

156. *See id.*

157. Warren Hoge, *U.N. Council, in Weakened Resolution, Demands End to North Korean Missile Program*, N.Y. TIMES, July 16, 2006, at A8.

158. Michael Abramowitz & Colum Lynch, *After Missiles, Calls Go Out*, WASH. POST, July 7, 2006, at A10.

159. BOLTON, *supra* note 67, at 294.

160. Edward Cody, *China Critical of UN Draft on N. Korea*, WASH. POST, July 12, 2006, at A11 (emphasis added).

161. *See id.*; Lynch, *supra* note 135; Colum Lynch, *Stronger Resolution Offered on N. Korea*, WASH. POST, July 8, 2006, at A8.

162. Lynch, *supra* note 135.

163. Hoge, *supra* note 157.

voluntary measures aimed at restraining Pyongyang's ballistic missile and nuclear weapons programs."¹⁶⁴ The action "threaten[ed] to head off a U.S.-backed effort to impose mandatory sanctions on North Korea, and place[d] the United States, Japan and their European allies in the difficult position of having to offer concessions to secure Beijing's and Moscow's support or face a certain veto of their tougher sanctions resolution."¹⁶⁵ The United States and its allies were finally forced to weaken their resolution in order to avoid a Chinese and Russian veto.¹⁶⁶ The result, UNSCR 1695, lacked any reference to Chapter VII, meaning sanctions and use of force to implement the resolution were off the table.¹⁶⁷ The resolution's demands and requirements had become toothless. Without enforcement mechanisms, UNSCR 1695 was little more than a polite invitation for Pyongyang to cease missile and WMD development. From Pyongyang's perspective, the worst consequence of noncompliance is waiting out another bout of Security Council gridlock as America and its allies unsuccessfully try to persuade China and Russia to punish North Korea more forcefully. Even worse, the process by which the resolution was passed emboldened Pyongyang. By threatening to exercise its veto in Pyongyang's favor, China signaled to North Korea that it could take at least one more step before being punished. North Korea did not let this message go unnoticed.

b. *UNSCR 1718*

On October 9, 2006, less than three months after the Security Council passed UNSCR 1695, North Korea detonated a nuclear weapon.¹⁶⁸ John Bolton, then the Permanent U.S. Representative to the U.N., called North Korea's nuclear test the "gravest threat to international peace and security that the Security Council ha[s] ever had to confront."¹⁶⁹ The United States, Japan, and European allies immediately pressed for a hard-hitting response to North Korea's reckless behavior, but China and Russia refused to cooperate.¹⁷⁰

America and its allies sought to impose economic and trade measures permitting international inspections of all North Korean cargo to search for weapons and to limit Pyongyang's ability to finance its nuclear program.¹⁷¹ The aim was to provide "broad powers to foreign governments to inspect all

164. Lynch, *supra* note 135.

165. *Id.*

166. Hoge, *supra* note 157.

167. S.C. Res. 1695, U.N. Doc. S/RES/1695 (July 15, 2006).

168. Lynch & Fan, *supra* note 149.

169. Press Release, Security Council, Security Council Condemns Nuclear Test by Democratic People's Republic of Korea, U.N. Doc. SC/8853 (Oct. 14, 2006) (statement of John Bolton, U.S. Ambassador to the United Nations).

170. Colum Lynch & Glenn Kessler, *At U.N., U.S. Pushes for Vote on N. Korea; Russia and China Raise Concerns*, WASH. POST, Oct. 14, 2006, at A14.

171. See Lynch & Fan, *supra* note 149.

trucks, trains, vessels and planes traveling in and out of the country.”¹⁷² Japan went so far as to offer revisions seeking to preclude North Korean exports and to prevent North Korean aircraft and vessels from docking in foreign ports.¹⁷³ UNSCR 1695 already prohibited other countries from trading missile and nuclear-related equipment with North Korea, but it contained no enforcement mechanism. Hence, the United States pushed for a response under Chapter VII, which would allow the Security Council to compel North Korean compliance through sanctions or military means.¹⁷⁴ Indeed, the American-proposed resolution threatened Pyongyang with a thirty-day deadline to cease its illicit activities or face “further action.”¹⁷⁵

On October 14, the Security Council passed UNSCR 1718 in response to North Korea’s nuclear test, but only after China and Russia forced the United States and its allies to weaken their draft resolution.¹⁷⁶ First, Beijing opposed the thirty-day deadline and Japan’s amendments, so both were excluded from UNSCR 1718.¹⁷⁷ Second, China insisted that “any resolution must exclude the possibility, however remote, that force could be used against North Korea.”¹⁷⁸ As a result, the resolution only permits sanctions, as it cites Article 41, but not Article 42, of Chapter VII.¹⁷⁹ Third, both China and Russia expressed concern over the resolution’s potential to permit the armed interception and detention of North Korean vessels passing through international sea lanes.¹⁸⁰ So, UNSCR 1718 calls upon U.N. member states to inspect cargo to and from North Korea, but not to intercept or interdict it.¹⁸¹ China restricted even this limited action by including the following language in the resolution: all inspections must be executed “in accordance with [the inspecting country’s] national authorities and legislation, and consistent with international law.”¹⁸² Notably, the Chinese maintain that international law prohibits inspections of North Korean ships

172. *Id.*

173. *Id.*

174. *Id.*

175. Colum Lynch & Glenn Kessler, *U.N. Votes to Impose Sanctions on N. Korea; Council Demands End to Nuclear Program*, WASH. POST, Oct. 15, 2006, at A1.

176. *Id.* The Chinese had:

an exhaustive list of changes amounting pretty much to eliminating every important aspect of [America’s] proposed sanctions regime. . . . For all of [America’s] thanks to China for years of ‘effort’ in the Six-Party Talks, what China was really prepared to do—even in the face of a [North Korean] nuclear test, another slap in China’s face, in [President] Bush’s words—was precious little.

BOLTON, *supra* note 67, at 305.

177. Lynch & Kessler, *supra* note 175.

178. Lynch & Fan, *supra* note 149.

179. S.C. Res. 1718, U.N. Doc. S/RES/1718 (Oct. 14, 2006).

180. Lynch & Kessler, *supra* note 170.

181. S.C. Res. 1718, *supra* note 179, ¶ 8(f); *see also* KAN, *supra* note 71, at 32 (“China’s enforcement of [UNSCR 1718] was questionable, as it called for ‘cooperative action’ in ‘inspection’ (and not interception or interdiction) of cargo.”).

182. S.C. Res. 1718, *supra* note 179, ¶ 8(f).

believed to be carrying banned materials.¹⁸³ China even went so far as to declare after the vote on UNSCR 1718 that it would conduct no inspections.¹⁸⁴ Fourth, the Chinese only permitted the resolution to cover North Korea's proliferation efforts, thereby protecting its counterfeiting and narcotics activities.¹⁸⁵ Pyongyang uses funds derived from these illicit activities to keep the regime afloat and to feed its missile and nuclear weapons programs. Finally, Washington had difficulty convincing Beijing to accept a ban on the supply, sale, or transfer of luxury goods to North Korea.¹⁸⁶ Although UNSCR 1718 *does* contain such a provision,¹⁸⁷ the Chinese have not enforced it.¹⁸⁸

c. *North Korea violates UNSCR 1718*

Events on the Korean peninsula since Pyongyang detonated a nuclear device support the claim that the U.S. and China do not assess the North Korean threat in the same way. In March 2009, North Korea announced plans to launch a communications satellite into space.¹⁸⁹ The U.S., South Korea, Japan, the European Union, and the U.N. Secretary General, Ban Ki-moon, condemned the proposed launch, suspecting it was an attempt to test an intercontinental ballistic missile and advertise Pyongyang's missile technology to potential purchasers, such as Iran.¹⁹⁰ Secretary of State Hillary Clinton went so far as to argue that firing missiles, "*for any purpose*," would contravene UNSCR 1718.¹⁹¹ That resolution, passed after North Korea detonated a nuclear weapon in October 2006, demanded that Pyongyang cease launching ballistic

183. Lynch & Kessler, *supra* note 175.

184. *Id.* Beijing subsequently agreed to inspect North Korean cargo moving in and out of its territory, although it still would not interdict North Korean vessels passing through international sea lanes. See U.S.-CHINA ECON. & SEC. COMM'N, *supra* note 57, at 89. Even so, "reporters were soon sending back accounts of bustling trade at North Korea's border with China." Michael J. Mazarr, *The Long Road to Pyongyang: A Case Study in Policymaking Without Direction*, 86 FOREIGN AFF. 75, 91 (2007); see also KAN, *supra* note 71, at 33 (noting that Chinese and foreign reports portrayed "business as usual in [Chinese] trade with North Korea" shortly after passage of UNSCR 1718). Based on China's failure to participate in several international nonproliferation agreements, see *supra* Part III.A.1, the Bush administration should not have expected China to follow its duty to inspect goods entering and leaving North Korea.

185. See BOLTON, *supra* note 67, at 305.

186. Lynch & Kessler, *supra* note 170.

187. See S.C. Res. 1718, *supra* note 179, ¶ 8(a)(iii).

188. Because UNSCR 1718 does not define luxury goods, "North Korean elites have continued to enjoy shopping sprees in Dandong, China." KAN, *supra* note 71, at 32-33.

189. Kwang-Tae Kim, *Report: North Korea Launch Would Go Before UN*, WASH. TIMES, Mar. 28, 2009, <http://www.washingtontimes.com/news/2009/mar/28/report-north-korea-launch-would-go-before-un-1/>.

190. See *id.*

191. David Gollust, *Clinton Says North Korea Missile Launch Would Have Consequences*, GLOBALSECURITY, Mar. 25, 2009, <http://www.globalsecurity.org/wmd/library/news/dprk/2009/dprk-090325-voa02.htm> (emphasis added).

missiles and “suspend all activities related to its ballistic missile programme.”¹⁹² Secretary Clinton’s hard-line stance stemmed from the fact that Pyongyang had readied a Taepodong-2 for launch, the same long-range missile that North Korea fired in July 2006, giving rise to UNSCR 1695.¹⁹³ Even so, China and Russia contended that “Pyongyang was only interested in peaceful satellite communications.”¹⁹⁴

On April 5, 2009, North Korea fired a Taepodong-2 missile into Japanese airspace.¹⁹⁵ The U.S. and its allies denounced the move, arguing that it clearly breached UNSCR 1718.¹⁹⁶ President Obama called the rocket launch a provocation and proclaimed that rules like UNSCR 1718 “must be binding” and “[v]iolations must be punished.”¹⁹⁷ Secretary Clinton warned of the launch’s “grave implications” and declared that “coming out with a strong position in the United Nations is the first and important step” for the administration.¹⁹⁸ Hours later, amidst calls from the Chinese and Russians for all sides to exercise restraint, the Security Council met in an emergency session to address North Korea’s latest belligerent act.¹⁹⁹

The Security Council did nothing, because China and Russia maintained that Pyongyang breached no resolution.²⁰⁰ China and Russia thus forbade the Security Council from issuing a statement that merely pronounced concern over the launch.²⁰¹ “Every state has the right to the peaceful use of outer space,” said Russia’s deputy U.N. envoy.²⁰² Not to be outdone, China’s U.N. envoy demanded that the Security Council’s reaction be “cautious and proportionate.”²⁰³

After a week of gridlock between the U.S. and its allies on one hand, who were seeking a Security Council resolution and new sanctions against North Korea, and China and Russia on the other, who were flatly opposed to these

192. S.C. Res. 1718, *supra* note 179, ¶¶ 2, 5.

193. See John J. Kruzell, *North Korean Satellite Launch May Violate U.N. Rule*, *Mullen Says*, GLOBALSECURITY, Mar. 27, 2009, <http://www.globalsecurity.org/wmd/library/news/dprk/2009/dprk-090327-afps01.htm>.

194. John R. Bolton, *Obama’s NK Reaction: More Talks*, WALL ST. J., Apr. 6, 2009, at A15.

195. Michael D. Shear & Colum Lynch, *After Launch, Obama Focuses on Disarmament; N. Korea Complicates President’s Trip*, WASH. POST, Apr. 6, 2009, at A01.

196. *Defiant N Korea Launches Rocket*, BBC NEWS, Apr. 5, 2009, <http://news.bbc.co.uk/2/hi/asia-pacific/7982874.stm>.

197. Charles Krauthammer, *It’s Your Country Too, Mr. President*, WASH. POST, Apr. 10, 2009, at A17.

198. Walter Pincus & Mary Beth Sheridan, *After Launch, U.S. Stance Veers Between Tough and Dismissive; N. Korea’s Actions Draw Mixed Reactions from Officials*, WASH. POST, Apr. 7, 2009, at A10.

199. *Defiant N Korea Launches Rocket*, *supra* note 196.

200. Shear & Lynch, *supra* note 195.

201. Krauthammer, *supra* note 197.

202. Shear & Lynch, *supra* note 195.

203. *Id.*

measures, the Security Council finally responded to North Korea's provocation. On April 13, 2009, the Security Council issued a presidential statement (not a UNSCR) denouncing Pyongyang's rocket test.²⁰⁴ The presidential statement requests that the Six Party talks be renewed and orders North Korea to comply with UNSCR 1718,²⁰⁵ but the statement is non-binding and contains no enforcement mechanism.²⁰⁶ It also reactivates a U.N. committee previously created by UNSCR 1718.²⁰⁷ The committee is empowered to create a list of individuals and companies whose assets will be frozen for supporting North Korea's WMD and ballistic missile programs.²⁰⁸ The U.S. wanted eleven North Korean companies sanctioned, while Japan targeted fifteen.²⁰⁹ But the committee sanctioned only three.²¹⁰ These companies were already subject to American sanctions for trading WMD-related technology with Iran, Yemen, and Pakistan, underscoring the fact that the U.N. should have punished the companies long ago for threatening international peace and security.²¹¹

The presidential statement—a toothless gesture that North Korea recognizes as a symbol of fundamental divergence among the P5 regarding how to handle Pyongyang—emboldened North Korea. Just six weeks after the presidential statement was issued, North Korea violated UNSCR 1718 a second time by detonating a nuclear device on May 27, 2009.²¹² Over the following week, Pyongyang's aggression increased dramatically as it shot a volley of short-range missiles into the Sea of Japan, nullified the Korean War truce, threatened to attack South Korea if it participated in the U.S.-led PSI, and as of this writing appears to be preparing another Taepodong-2 for launch.²¹³

Some commentators are hopeful that China's swift and unusually sharp criticism of Pyongyang signals a willingness to respond meaningfully to the

204. *UN Condemns North Korea Rocket Launch*, GLOBALSECURITY, Apr. 13, 2009, <http://www.globalsecurity.org/wmd/library/news/dprk/2009/dprk-090413-voa01.htm>.

205. Press Release, Security Council, Security Council Condemns Launch by Democratic People's Republic of Korea, Agrees to Adjust Travel Ban, Assets Freeze, Arms Embargo Imposed in 2006, U.N. Doc. SC/9634 (Apr. 13, 2009) [hereinafter Security Council Press Release].

206. Editorial, *Spinning a U.N. Failure*, WALL ST. J., Apr. 20, 2009, at A14.

207. Security Council Press Release, *supra* note 205.

208. See S.C. Res. 1718, *supra* note 179, ¶ 8(d). Between the passage of UNSCR 1718 in October 2006 and the April 2009 presidential statement, the committee never submitted a list of sanctionable individuals or companies. See Colum Lynch, *Key U.N. Powers Agree on N. Korea Statement*, WASH. POST, Apr. 12, 2009, at A12.

209. David Gollust, *US Pursuing Sanctions at UN*, GLOBALSECURITY, Apr. 16, 2009, <http://www.globalsecurity.org/wmd/library/news/dprk/2009/dprk-090416-voa01.htm>.

210. Colum Lynch, *U.N. Sanctions 3 N. Korean Firms Over Missile Launch*, WASH. POST, Apr. 25, 2009, at A16.

211. See *id.*

212. Blaine Harden, *N. Korea Seen Moving Missile to Launchpad*, WASH. POST, May 31, 2009, at A10.

213. *Id.*

North Korean threat.²¹⁴ But Beijing's rhetoric does very little until it translates into action at the Security Council. As of this writing, the Security Council has issued no resolution in response to Pyongyang's most recent aggression. But if and when it does, China is still unlikely to limit its supply of oil to Pyongyang, impose the type of sweeping sanctions on North Korea that the Security Council authorized against Iraq after the first Gulf War, join PSI efforts to stop and inspect North Korean vessels suspected of carrying missiles or WMD, and support, or at least limit its criticism of, deployment of missile defense systems in East Asian countries targeted by Pyongyang.

* * *

China's performance on North Korea is particularly disappointing in light of its capacity to impact North Korea's behavior. Many experts recognize that China had the power to keep a dependent North Korea from going nuclear by ending its steady supply of food and oil to Kim's regime.²¹⁵ But in the two years following North Korea's revelation in 2002 that it had a highly enriched uranium program in violation of the 1994 Agreed Framework, "bilateral trade between China and North Korea 'nearly doubled . . . to \$1.39 billion.'"²¹⁶ Even after North Korea test-fired missiles in July 2006 and detonated a nuclear weapon later that year, China has kept the Kim regime in power by providing it with "approximately 90% of [its] oil, 80% of its consumer goods and 45% of its food."²¹⁷ With Pyongyang so dependent on Beijing, the Chinese could have "cut off the North Korean regime's lifeline, but they [were] unwilling to do so."²¹⁸

214. See, e.g., Ariana Eunjung Cha & Glenn Kessler, *Anger May Help Bring New U.N. Sanctions*, WASH. POST, May 28, 2009, at A8.

215. See, e.g., U.S.-CHINA ECON. & SEC. COMM'N, *supra* note 57, at 82 ("China possesses the unique ability to influence North Korea's actions, partly because of the great extent to which North Korea depends on it for consistent supplies of food and fuel."); KAN, *supra* note 71, at 24 (quoting former Secretary of State Colin Powell as saying that "China has considerable influence with North Korea" largely because "North Korea depends on China for 80 percent of its energy and economic activity"); *id.* at 28 (stating that Assistant Secretary of State Christopher Hill testified at a congressional hearing that "China has enough influence to convince North Korea to return to the [Six-Party] talks but has not done it"); Glenn Kessler, *U.S. Insists China Must Enforce Ban; Rice Faces Difficult Job of Persuading North Korea Ally*, CHI. TRIB., Oct. 16, 2006, at 10 ("U.S. officials continue to believe a fuel cutoff would be devastating to the Kim Jong Il regime. [John] Bolton said . . . that if China were to interrupt energy supplies or other aid to North Korea, 'it would be powerfully persuasive in Pyongyang.'"); Blumenthal, *supra* note 138.

216. See Blumenthal, *supra* note 138 (quoting Anthony Faiola, *Despite U.S. Attempts, N. Korea Anything but Isolated*, WASH. POST, May 12, 2005, at A18).

217. Gordon G. Chang, Op-Ed., *Northern Exposure*, WALL ST. J., Feb. 7, 2007, at A14; see also Michael Forsythe, *China May Test North Korea Sway After Nuclear Test*, BLOOMBERG, <http://www.bloomberg.com/apps/news?pid=20601087&sid=aiq8iNe42T3g>.

218. Blumenthal, *supra* note 138.

There are several reasons for China's unwillingness to exert greater pressure on North Korea. First, Beijing and Pyongyang are close allies, so China does not fear a nuclear attack from Pyongyang.²¹⁹ Were it otherwise, China would not have "a history of assisting the North Korean regime in the development of [its] weapons programs."²²⁰ Second, keeping Pyongyang intact provides Beijing with "a client state that buffers it from the U.S. military."²²¹ If North Korea were to collapse, China could face a unified, democratic Korea under Seoul's leadership. Even worse for China, a unified Korea would be allied with America and Japan, meaning China could face U.S. troops positioned even closer to its border.²²² Third, China can make its cooperation on the Korean peninsula contingent on the United States halting, or at least decreasing, its supply of weapons to Taiwan.²²³ This illustrates that China merely "considers nonproliferation as one point of leverage in bilateral [U.S.-China] relations (namely, as concessions before summits)."²²⁴ Fourth, "keeping the North Korean threat alive helps China by expending U.S. energy and giving China a card to play in case of a Taiwan conflict: It could draw U.S.

219. Professor Weiner counters that "uncertainty about the stability of North Korea's political system means that China cannot be certain North Korea's nuclear weapons will continue to be controlled by a friendly leadership." Weiner, *supra* note 1, at 476. It is true that China cannot be one hundred percent certain that a friendly regime will replace Kim's. But Beijing can be *sufficiently* certain that friendly leadership will replace the current regime in North Korea. First, North Korea is highly dependent on China for fuel, consumer goods, and food. See Chang, *supra* note 217 ("China supplies approximately 90% of [North Korea's] oil, 80% of its consumer goods and 45% of its food"). Indeed, "[s]ome North Korean officials are thought to be more loyal to the Chinese leadership than to Kim Jong Il. The little autocrat could 'neither bark nor bite' without China's assistance." *Id.* Second, North Korea relies on the promise of Chinese military assistance to deter the United States and South Korea from attacking it. These dynamics will persist after Kim's regime is gone, and so, the dependent relationship now in place between Beijing and Pyongyang will likely continue.

220. U.S.-CHINA ECON. & SEC. COMM'N, *supra* note 57, at 86; see also AMY F. WOOLF, CONG. RESEARCH SERV., ARMS CONTROL AND NONPROLIFERATION ACTIVITIES: A CATALOG OF RECENT EVENTS, CRS Rep. No. RL30033, at 64 (2005) ("Recipients of China's [WMD and missiles that could deliver them] reportedly include Pakistan and countries that the State Department says support terrorism, such as Iran and North Korea.").

221. Blumenthal, *supra* note 138.

222. David Frum, Editorial, *Realism Is Ugly in North Korea*, AM. ENTERPRISE INST., June 30, 2007, http://www.aei.org/publications/pubID.26421,filter.all/pub_detail.asp ("Chinese leaders know that [a North Korean] collapse would unify the peninsula under a democratic government based in Seoul and aligned with the U.S. and Japan—for them, a terrifying outcome."); see also David Kang, *Hierarchy and Stability in Asian International Relations*, in INTERNATIONAL RELATIONS THEORY AND THE ASIA-PACIFIC 163, 181. (G. John Ikenberry & Michael Mastanduno eds., 2003). But see Thomas P. Kim, *The Second Opening of Korea: U.S.-South Korea Free Trade Agreement*, KOREAN Q., June 14, 2007, available at <http://www.kpolicy.org/documents/policy/070614thomaskimsecondopening.html> (stating that the United States is not universally popular among South Koreans).

223. This practice, known as linkage, is discussed at length *supra* note 71.

224. WOOLF, *supra* note 220, at 64.

forces away from the [Taiwan] Strait if there were a crisis on the [Korean] Peninsula.”²²⁵ Fifth, Beijing fears a “massive flow of North Korean refugees to China” should Pyongyang become more unstable (e.g. due to the Security Council imposing harsher sanctions or using force against North Korea).²²⁶ Finally, by holding out the hope that it can solve the North Korean nuclear issue by bringing Pyongyang into the Six-Party Talks, Beijing “bolster[s] its credentials as Asia’s power broker.”²²⁷

2. Iran

Professor Weiner argues that China and Russia “have played a constructive role in attempting to prevent Iran from developing a nuclear weapons capability.”²²⁸ He cites China and Russia’s support for the February 2006 IAEA Resolution on Nuclear Safeguards in Iran,²²⁹ Russia’s statements that its nuclear assistance to Iran has been “solely for the purpose of civilian nuclear energy production,”²³⁰ and Russian efforts to ensure that sensitive technologies do not fall into the hands of the Iranian government.²³¹

These examples, however, present an incomplete and overly sanguine picture of Chinese and Russian policies towards Iran. China and Russia did support the February 2006 resolution, but they did so only in response to pressure from the United States, and both countries have subsequently opposed all Security Council resolutions that call for sanctions and other punitive measures in the event of Iranian noncompliance. Also, while it is true that Russian support for Iran’s nuclear ambitions is confined to civilian purposes, the U.S. has repeatedly argued that even civilian cooperation allows Iran to obtain dual-use technologies (i.e., materials that have both civilian and military applications). Far from demonstrating the “constructive” role of China and Russia, the Iran case serves rather as a textbook example of divergent interests and priorities among the P5, infused with balance-of-power considerations and vastly different assessments of the threat posed by a nuclear-armed Iran.

225. Blumenthal, *supra* note 153, at 9.

226. Einhorn Statement, *supra* note 152.

227. Blumenthal, *supra* note 138. The Six-Party Talks serve as a forum for the United States, North Korea, South Korea, Japan, China, and Russia to discuss North Korea’s nuclear weapons program. The talks started in 2003 after North Korea withdrew from the NPT. *See* Six-Party Talks, <http://www.globalsecurity.org/wmd/world/dprk/6-party.htm> (last visited Nov. 20, 2009).

228. Weiner, *supra* note 1, at 472.

229. *See id.* at 474.

230. *See id.* at 472.

231. *See id.* at 473.

a. *IAEA and Security Council resolutions*

In February 2006, the IAEA issued a resolution stating that Iran had failed to comply with its obligations under the NPT and referred the matter to the Security Council.²³² Issues cited by the IAEA included a lack of transparency on the part of the Iranian government with respect to its enrichment activities and a general “absence of confidence that Iran’s nuclear program[] is exclusively for peaceful purposes. . . .”²³³ The IAEA concluded that the Security Council should ensure that Iran suspend its enrichment and reprocessing and implement transparency measures that would allow closer monitoring of the country’s nuclear activities.²³⁴ The vote in favor of the Security Council referral was supported by a strong majority, including China and Russia.²³⁵

But as soon as the matter was before the Security Council—where, unlike at the IAEA Board of Governors, penalties may be imposed for Iranian non-compliance—the tone changed. Both countries immediately announced that they would not support any resolution opening the possibility for sanctions. This came as unwelcome news to the United States, Great Britain, and France, which together were drafting a resolution under Chapter VII of the Charter—meaning it kept open the possibility of enforcement by sanctions and force in the event that Iran did not comply with the Security Council’s demands.²³⁶ China and Russia pushed back. Ambassador Churkin, Russia’s representative at the U.N., said that he was “very skeptical about the sanctions” and hoped that a “political and diplomatic solution” could be found.²³⁷ Similarly, Ambassador Guangya, the Chinese representative, said he did not think the draft as introduced would “produce good results.”²³⁸ It was quite clear that Russia and China both sought a resolution that would have no binding effect and no genuinely negative consequences for Iran.

Only after five months of negotiation and cajoling did Russia and China acquiesce to a resolution with sanctions. UNSCR 1737’s bite, however, was

232. IAEA Res. U.N. Doc. GOV/2006/14 (Feb. 4, 2006), *available at* http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/04_02_06iranres.pdf.

233. *See id.*

234. *See id.*

235. The strong majority vote in favor of Security Council referral was initially noted as a positive development by Secretary of State Condoleezza Rice, who said that the vote “underscores the concern of the entire international community about Iran’s nuclear program.” *IAEA Referral Stokes Iranian Defiance*, CNN, Feb. 4, 2006, <http://www.cnn.com/2006/WORLD/meast/02/04/iran.wrap/index.html>.

236. *UN Issues Iran Nuclear Deadline*, BBC NEWS, July 31, 2006, http://news.bbc.co.uk/1/hi/world/middle_east/5232288.stm.

237. Colum Lynch, *Security Council Is Given Iran Resolution: Pressure Builds to End Tehran’s Nuclear Efforts*, WASH. POST, May 4, 2006, at A18.

238. *Id.*

severely limited.²³⁹ The resolution excluded the possibility that force could be used against Iran. The original draft provided for trade and travel sanctions as a punitive measure against Iran for its noncompliance with the NPT. It also called for sanctions specifically against Bushehr (discussed below), a nuclear plant that Iran is building with the help of Russian know-how and technology. The new resolution struck all of this language and imposed sanctions only on a list of specific items, all directly related to nuclear enrichment, which could not be exported to Iran.²⁴⁰ Even with these modifications, the limited sanctions that remained in the resolution prompted expressions of regret from the Russian and Chinese ambassadors.²⁴¹ Moreover, UNSCR 1737 did not target Iran's importation of refined gasoline, which accounted for forty percent of its domestic consumption.²⁴²

The most recent Security Council resolution, passed after another report from the IAEA indicating continued noncompliance on the part of the Iranian government, is not much of an improvement.²⁴³ It calls upon states "to exercise vigilance and restraint in the supply, sale or transfer" of conventional arms to Iran, instead of actually imposing sanctions on the export of such goods.²⁴⁴ Nor does the resolution impose any punitive sanctions or other measures that might increase pressure on the Iranian government, because of opposition from China and Russia.

On May 20, 2009, meanwhile, Iran announced that it had test-fired a new medium-range missile.²⁴⁵ The missile's stated range is 1200 miles, and it is capable of delivering a nuclear warhead. As of this writing, there has been no additional response to these developments from the U.N. Security Council.

Emboldened by the Security Council's impotence, Tehran has escalated. Most recently, Iran revealed a clandestine uranium enrichment facility,²⁴⁶ shot missiles capable of hitting Israel and Europe,²⁴⁷ reneged on an agreement to

239. S.C. Res. 1737, U.N. Doc. S/RES/1737 (Dec. 23, 2006).

240. *Id.* ¶ 4.

241. The Russian ambassador said that his country "regrets the necessity for imposing even these" limited sanctions, while the Chinese ambassador said that the resolution "should not be mainly focused on sanctions, but rather to invigorate diplomatic[] efforts." Nikola Krastev, *UN Security Council Approves Limited Sanctions On Iran*, RADIO FREE EUROPE, Dec. 23, 2006, <http://www.rferl.org/featuresarticle/2006/12/a415b11b-e19f-4d98-8da7-42acc3a4fed1.html>.

242. See H.R. 1985, 111th Cong. (2009).

243. S.C. Res. 1747, U.N. Doc. S/RES/1747 (Mar. 24, 2007).

244. *Id.* ¶ 6.

245. *Iran Tests Missile as Election Race Starts*, REUTERS, May 20, 2009, <http://www.reuters.com/article/worldNews/idUSTRE54J26N20090520?pageNumber=2&virtualBrandChannel=0>.

246. Jonathan Weisman, Siobhan Gorman & Jay Solomon, *West Raps Iran Nuclear Site – Ahmadinejad Is Defiant as U.S. Pushes for Sanctions Over Secret Uranium Facility*, WALL ST. J., Sept. 26, 2009, at A1.

247. *Iran Test-fires Long-range Missiles*, CNN, Sept. 28, 2009, <http://www.cnn.com/2009/WORLD/meast/09/28/iran.missile.tests/index.html>.

ship its low-enriched uranium to Russia,²⁴⁸ vowed to develop ten more uranium enrichment facilities,²⁴⁹ and sent arms to the terrorist group Hezbollah.²⁵⁰ The Security Council has done nothing in response. Even after the U.S. made significant concessions to China and Russia—President Obama became the first U.S. president to not meet with the Dalai Lama while he was in the U.S. capitol,²⁵¹ he withheld arms from Taiwan for nearly a year,²⁵² and he scrapped plans to install missile-defense systems in Russia's sphere of influence²⁵³—both countries remain opposed to sanctions. Indeed, China's ambassador to the U.N. recently stated that “[t]his is not the right time or right moment for sanctions” against Iran.²⁵⁴ Russia, meanwhile, will send advanced anti-aircraft missiles to Iran, decreasing the likelihood of a successful strike against Tehran's nuclear facilities.²⁵⁵ The United States has thus been forced to pursue unilateral sanctions against Iran.

b. *Russian support for an Iranian nuclear reactor at Bushehr*

United States opposition to Russian and Iranian efforts to build a nuclear reactor at Bushehr dates back to the Clinton Administration. In 1998, the State Department's press spokesman said that the United States was “opposed to any form of nuclear cooperation with Tehran, given its demonstrated interest in [acquiring] a nuclear weapons capability.”²⁵⁶ The Clinton Administration argued that Iran's vast oil and gas reserves meant that the country did not need a nuclear power plant.²⁵⁷ Citing security concerns, the Administration sought to convince Russia to retract its support for the proposed plant and to refrain

248. David Blair, *Iran Pulls Back from Deal on Uranium Enrichment*, DAILY TELEGRAPH, Oct. 19, 2009, <http://www.telegraph.co.uk/news/worldnews/middleeast/iran/6376902/Iran-pulls-back-from-deal-on-uranium-enrichment.html>.

249. *Iran OKs 10 New Uranium Enrichment Sites*, CBS NEWS, Nov. 29, 2009, <http://www.cbsnews.com/stories/2009/11/29/world/main5823458.shtml>.

250. James Hider, *Israeli Commandos Seize Ship 'Carrying Arms to Hezbollah'*, TIMES ONLINE, Nov. 5, 2009, http://www.timesonline.co.uk/tol/news/world/middle_east/article6903092.ece.

251. Alex Spillius, *Barack Obama Cancels Meeting with Dalai Lama 'to Keep China Happy'*, DAILY TELEGRAPH, Oct. 5, 2009, <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/barackobama/6262938/Barack-Obama-cancels-meeting-with-Dalai-Lama-to-keep-China-happy.html>.

252. *A Taiwan Lesson*, WALL ST. J., Jan. 9, 2010, at A12.

253. *U.S. Scraps Missile Defense Shield Plans*, CNN, Sept. 17, 2009, <http://edition.cnn.com/2009/WORLD/americas/09/17/united.states.missile.shield/index.html>.

254. Colum Lynch, *China Says It's Not 'Right' Time for Sanctions on Iran*, WASH. POST, Jan. 6, 2010, at A07.

255. Luke Harding, *Russia Sells Iran New Anti-aircraft Missiles*, GUARDIAN, Dec. 27, 2007, at 26; *see also* Benard & Leaf, *supra* note 65.

256. James Rubin, State Dep't Spokesman, State Dep't Noon Briefing (Feb. 23, 1998), *available at* http://www.fas.org/news/iraq/1998/02/23/98022310_tpo.html.

257. GlobalSecurity, *Weapons of Mass Destruction: Bushehr*, <http://www.globalsecurity.org/wmd/world/iran/bushehr.htm> (last visited Nov. 15, 2009).

from supplying any technologies that might have a military application.²⁵⁸

Since that time, Russia has persisted in its support for the plant at Bushehr, despite consistent U.S. opposition. Shortly after 9/11, several retired Russian officials as well as a scientist working on the Iranian reactor acknowledged that Russia's Atomic Energy Ministry was using Bushehr to boost Iran's nuclear arms program.²⁵⁹ These sources cited clandestine technology transfers and other more extensive exchanges of nuclear information.²⁶⁰ In 2005, Russia signed a deal in which it agreed to deliver fuel to the nuclear reactor.²⁶¹ Two years later, amidst reports that Russia was planning to cancel the deal, Russian representatives went out of their way to clarify that the deal was still on track. Russia's U.N. ambassador said that the deal was "intact" and a spokesman for the Russian Atomic Energy Ministry said that there were two thousand Russian specialists working at Bushehr, a sign of the country's commitment to the project.²⁶²

U.S. concerns with Russian and Iranian cooperation at Bushehr are serious, and call into question Russia's commitment to WMD counter-proliferation. By most accounts, the nuclear program has facilitated the transfer of technologies, nuclear material, and other equipment that could be used in a nuclear weapons program.²⁶³ The spent nuclear fuel that would be generated by the Bushehr nuclear reactor would contain enough uranium and plutonium to enable low-cost production of nuclear explosive devices.²⁶⁴ Russian claims that it supports U.S. efforts to prevent Iran from obtaining nuclear weapons capability must, against this backdrop, be viewed with skepticism.

258. Rubin, *supra* note 256.

259. The Russian scientist also said in an interview that he did not believe a nuclear-armed Iran would be a problem, stating that "Pakistan has them. Israel has them. Other countries have them. So what if Iran has them?" Alexei Yablokov, a senior advisor to former president Boris Yeltsin, said that he has "no doubt that the building of an [a]tomic reactor in Bushehr is a coverup for Iran's plans to build an atomic bomb." Meanwhile, a senior U.S. official in Moscow said that "Bushehr is just the tip of the iceberg," adding that "[w]e are quite convinced that dangerous tech transfers are still taking place." A former Assistant Secretary in the State Department's Bureau for Non-proliferation said that "[f]rom the early 1990s, our concern was that this large project would serve as a cover for more sensitive technical interactions between Russians and Iranians." Now, "the concerns we had have materialized." Anne E. Kornblut & David Filipov, *Russia May Be Boosting Iran's Nuclear Aims*, BOSTON GLOBE, May 19, 2002, http://www.boston.com/globe/nation/packages/nuclear_shadow/.

260. *Id.*

261. *Russia-Iran Nuclear Deal Signed*, BBC NEWS, Feb. 27, 2005, http://news.bbc.co.uk/2/hi/middle_east/4301889.stm.

262. *Kremlin Denies Bushehr Ultimatum*, NEAR ABROAD, Mar. 20, 2007, available at <http://nearabroad.wordpress.com/2007/03/20/kremlin-denies-bushehr-ultimatum/>.

263. See, e.g., MICHAEL JASINSKI, JAMES MARTIN CTR. FOR NONPROLIFERATION STUDIES, *RUSSIA'S NUCLEAR AND MISSILE TECHNOLOGY ASSISTANCE TO IRAN* (2003), <http://cns.miis.edu/iran/rusnuc.htm>.

264. Kornblut & Filipov, *supra* note 259.

* * *

There are many reasons for these divergent approaches to the Iranian nuclear issue, including balance-of-power considerations, the fact that a nuclear-armed Iran would target the West, not China or Russia, and the increasingly close economic and military relationship that China and Russia have forged with Iran. China is investing nearly \$100 billion to develop oil and gas fields in Iran.²⁶⁵ In exchange, China will have access to over 150,000 barrels of crude oil per day and 250 million tons of liquefied natural gas over the next twenty-five years.²⁶⁶ In addition, Chinese companies obtained contracts and built Tehran's subway system.²⁶⁷ Russia and China, meanwhile, are Iran's "top two weapons suppliers."²⁶⁸ This includes Chinese exports of ballistic missile technology and chemical weapons equipment.²⁶⁹ Both China and Russia have a vested interest, then, in maintaining good relations with Iran, so as not to undermine potential economic benefits.

The dynamic surrounding the Security Council's handling of Iran is clear and disheartening. The United States, Great Britain, and France displayed genuine concern over WMD proliferation and wanted to use the Security Council to exert greater pressure on Iran. Russia and China on the other hand, while offering just enough superficial support to render their obstructionism less immediately obvious, at every step of the way pushed back as much as reasonably possible. Summing up the result, one scholar recently observed that the "tactical caution" of China and Russia at times

[O]bscure[s] the fact that the Security Council on most major issues is clearly divided between the autocracies and the democracies, with the latter systematically pressing for sanctions and other punitive actions against Iran, North Korea, Sudan, and other autocracies and the former just as systematically resisting and attempting to weaken the effect of such sanctions.²⁷⁰

3. *Missile defense in Eastern Europe and East Asia*

In May 2006, President Bush proposed the establishment of a missile defense system in Eastern Europe to guard against attacks by rogue regimes

265. Peter S. Goodman, *China Rushes Toward Oil Pact With Iran*, WASH. POST, Feb. 18, 2006, at D01.

266. *Id.*

267. Zhu Yinghuang & Wang Hao, 'Made-in-China' Subway Fulfills Iranian Dream, CHINA DAILY, June 12, 2004, available at http://www.chinadaily.com.cn/english/doc/2004-06/12/content_338907.htm.

268. John J. Tkacik, Jr., Editorial, *Confront China's Support for Iran's Nuclear Weapons*, HERITAGE FOUND., Apr. 18, 2006, <http://www.heritage.org/Research/AsiaandthePacific/wm1042.cfm>.

269. *Id.*

270. Kagan, *supra* note 72, at 35.

such as Iran. Under the proposal, the United States would install ten missile interceptors in Poland and the Czech Republic by 2011. The plan made more progress in 2007, with a July visit to the United States by Polish President Lech Kaczynski in which he agreed about the need for such a system, saying that it would be “aimed at defense of our democracies against the countries who might have . . . nuclear weapons and weapons of mass destruction.”²⁷¹

Russia’s response to this proposal was immediate and negative. Then Russian President Vladimir Putin told reporters in June that his country would take “retaliatory steps” if the United States established an anti-missile system in Poland and the Czech Republic.²⁷² Russian First Deputy Prime Minister Sergei Ivanov echoed these statements, saying that he could not rule out “[a]n asymmetrical and effective response” to the proposed system.²⁷³ In its most dramatic move, Russia also announced that it would suspend its obligations under the Conventional Forces in Europe Treaty, which limits the deployment of heavy weaponry on Russia’s western border.²⁷⁴ President Putin explained that he was taking this step to fend off American bullying and European encirclement—despite the fact that the missile defense system was aimed at protecting the United States and its allies against rogue regimes like Iran, not Russia. Indeed, the missile defense system could never have posed a real threat to Russia or limited Russia’s nuclear deterrent, as the system—consisting of one radar site in the Czech Republic and ten interceptor missiles in Poland—was not designed to defend against a nuclear arsenal as large and sophisticated as Russia’s.²⁷⁵

The United States recently scrapped the planned Eastern European missile defense system. The Obama Administration argued that it did so after concluding that Iran’s short-range missiles posed a more imminent threat than its long-range missiles, meaning that it would make more sense to have a missile defense system located closer to Iranian territory—in Turkey, for example.²⁷⁶ Many analysts believe, however, that the Administration made the decision solely to placate Russia.²⁷⁷

271. Peter Baker, *Bush Persists on Placement of European Missile Defense*, WASH. POST, July 17, 2007, at A14.

272. Michael A. Fletcher, *Strains With Russia Shadow Bush’s Europe Trip*, WASH. POST, June 5, 2007, at A10.

273. Tony Halpin & Tom Baldwin, *Russian Missile Threat to Europe Raises Cold War Fear Over US Shield*, TIMES ONLINE, July 5, 2007, <http://www.timesonline.co.uk/tol/news/world/europe/article2028710.ece>.

274. *Russia Suspends Arms Control Pact*, BBC NEWS, Jul. 14, 2007, <http://news.bbc.co.uk/2/hi/6898690.stm>.

275. David J. Kramer, *Placating Russia Won’t Work*, WASH. POST, Sept. 18, 2009, at A25.

276. *Obama: Missile Decision Not About Russia*, ASSOCIATED PRESS, Sept. 20, 2009.

277. See, e.g., Editorial, *Obama’s Missile Offense*, WALL ST. J., Sept. 18, 2009, at A22; see also Alexander Benard & Paul J. Leaf, ‘Smart Power’ Diplomacy?, NAT’L

A very similar situation has arisen in the East Asian theatre. The U.S. would like to install defensive anti-missile systems in Japan, South Korea, and Taiwan to protect its allies and its own troops stationed in the region against North Korea's nuclear arsenal.²⁷⁸ China is opposed, stating that the sale of American missile defense technology will "lead to serious confrontation."²⁷⁹ Beijing even threatened to "continue to sell missile technology to Pakistan, and possibly to countries in the Middle East" if the U.S. pursues its missile defense plans.²⁸⁰ The Chinese view defensive missile shields in East Asia, not as an effective tool to combat nuclear-armed rogue regimes, but as America's "pursuit of strategic superiority and hegemony" in its sphere of influence.²⁸¹ China realizes that a missile defense system in East Asia will weaken it relative to the United States inasmuch as it "integrate[s] Taiwan into the U.S.-Japan [s]ecurity [a]lliance," "elevates the role of Japan in regional security," and dilutes the effectiveness of China's limited nuclear arsenal.²⁸²

The U.S. experiences with anti-missile shield systems in Eastern Europe and East Asia cut against Professor Weiner's argument that "new security threats do not involve balance-of-power rivalries."²⁸³ Absent a balance-of-power approach to international relations, there is no reason that Russia would be concerned about a limited number of defensive missile shield sites near its borders, or that China would oppose similar technologies to defend against North Korean attacks. But Russia and China still view the world in terms of spheres of influence. The idea that the United States would place a missile shield in Eastern Europe or East Asia is, in that context, an encroachment into Russia's or China's sphere, respectively. Neither country will therefore lend its support, even if the plan serves a legitimate purpose with respect to defending against nuclear attacks from rogue regimes.

It is not difficult to imagine that such a worldview would cause problems in the event that the United States and its allies sought authorization from the

REV. ONLINE, Oct. 8, 2009, <http://corner.nationalreview.com/post/?q=YWU3YmU2ZmRhNWI1NjAzNjY5ZjMyM2QyNjE0NGRINDE=>.

278. See Seth Faison, *Forget Taiwan Missile Shield, China Warns*, N.Y. TIMES, Mar. 24, 1999, at A18; Greg May, *China's Opposition to TMD Is More About Politics Than Missiles*, FORESIGHT MAG., Feb. 2000, available at <http://www.bu.edu/globalbeat/usdefense/May0200.html> ("[A missile defense system in East Asia] would reduce the risks of grouping large numbers of troops and equipment in small areas (the 28 Americans killed in the Iraqi Scud attack [in Gulf War I] were all in a single barracks) and limit the ability of countries like North Korea to use their [now developed] missile forces to blackmail neighbors.").

279. John Pomfret, *China Threatens Arms Control Collapse*, WASH. POST, July 14, 2000, at A01.

280. Pomfret, *supra* note 71. This is another example of China linking its non-proliferation cooperation to American acquiescence on other issues that are more important to China.

281. May, *supra* note 278.

282. *Id.*

283. Weiner, *supra* note 1, at 504.

Security Council to use force in response to a terrorist threat. For example, if a country inside Russia's sphere of influence, such as a Central Asian republic, were harboring terrorists, it would be difficult to rely upon Russia to authorize any military action by the United States or its allies.²⁸⁴ Indeed, as indicated in a previous Part, Russia has already become decidedly unhelpful to the United States in its efforts against terrorism in Central Asia: a recent taskforce report found that China and Russia have been trying "to curtail U.S. access to bases in Central Asia" that are critical to operations against al Qaeda in Afghanistan.²⁸⁵

IV. ALTERNATIVES TO COLLECTIVE AUTHORIZATION

If the United States cannot rely on the Security Council to provide collective authorization for the use of force to counter terrorist and WMD threats, then it has several alternative options. First, the United States can push to reform Article 51 of the Charter, so that it better reflects modern security threats. Second, the U.S. can seek to modify the Security Council. Finally, the United States can make use of force decisions *outside* of the U.N. system. This Part does not advocate any particular idea, but rather illustrates possible advantages and disadvantages of the different approaches.

A. Article 51 Reform

If the United States wants to use force within the confines of the Charter, it must do so pursuant to the Charter's self-defense rule.²⁸⁶ This rule was crafted before the dangers of nuclear-armed terrorists existed, and some scholars therefore argue that it does not allow states to effectively counter those and other modern threats.

Developed after World War II, the Charter's purpose was to address conventional threats posed by states—hordes of troops engaged in overt attacks against other states. Faced with these threats, a country could defend itself even under a standard that required it to wait until the attack became imminent. In

284. It could be argued that Afghanistan is in Russia's sphere of influence and yet Russia did not oppose the U.S. intervention in that country. There are two strong counterarguments to this. First, Russia was not given the chance to oppose the U.S. intervention because the United States relied upon the Article 51 self-defense clause instead of seeking Security Council authorization. So, it is unclear what Russia's position would have been. Second, Afghanistan was not properly in Russia's sphere of influence because Russia never considered the Taliban government to be its ally. Indeed, the two countries did not even have diplomatic relations since members of the Taliban (as part of the Afghan mujahideen) fought to oust Soviet troops from Afghanistan during a nine-year war in the 1980s.

285. See *supra* note 92.

286. Read broadly, Article 51 of the Charter permits the use of force in self-defense before an imminent armed attack has occurred, but only if force is used subject to the *Caroline* requirements of necessity and proportionality. See *supra* note 13.

this type of warfare, the attacking army would have to take “overt actions” like mobilization, “which would give the victim enough lead time.”²⁸⁷

A terrorist attack shares none of these traits, so it can occur without notice.²⁸⁸ Terrorists “do not deploy large military forces, whose mobilization can be detected days if not weeks in advance by satellites.”²⁸⁹ An imminence standard is unworkable against such threats. Furthermore, because terrorists “do not control territory, and they have no population to defend,”²⁹⁰ they “give little thought to the costs of a ‘second strike’ response.”²⁹¹ This means the United States may need to anticipate, rather than respond to, possible terrorist attacks.

In light of these factors, some argue that Article 51 must be updated.²⁹² Whether a threat justifies the use of defensive force is no longer only a matter of temporal imminence. Rather, scholars have proposed that Article 51 account for other considerations, including: (1) “the probability of an attack,” measured by the enemy’s capability and intention²⁹³ and (2) the “magnitude of the harm.”²⁹⁴ The rationale for modifying Article 51 this way is that as the extent of “harm threatened by modern weapons has expanded and the time necessary for their launch has decreased, the temporal restriction on self-defense” has become less reasonable.²⁹⁵ The imminence standard of the 1800s, “if applied literally to a world of modern weapons, would be a suicide pact.”²⁹⁶

The chief criticism of such a modification to Article 51 is that it would move the law closer to a standard. Questions of when use of force is appropriate would become too subjective, and thus ripe for abuse and error.²⁹⁷ States might use force based on inaccurate evaluations of perceived threats or use the increased flexibility of Article 51 as a pretext for initiating wars of aggression.

These are valid concerns, but they must be weighed against the potential

287. Arend, *supra* note 13, at 98.

288. See Weiner, *supra* note 1, at 442 (“Terrorists operate in secrecy, often blending in with the civilian population, and typically attack using means other than large formations of conventionally armed troops.”).

289. Yoo, *supra* note 13, at 756.

290. Weiner, *supra* note 1, at 442.

291. Ruth Wedgwood, *The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense*, 97 AM. J. INT’L L. 576, 582 (2003).

292. See Weiner, *supra* note 1, at 418-19 (listing sources).

293. The fact that probability takes hostile intention into account means that a state may use force only to defend itself. “In comparison, a number of other proposed use of force doctrines entirely eliminate the requirement of a connection to an attack against the state contemplating the use of force.” *Id.* at 450.

294. Yoo, *supra* note 13, at 757 (listing these and other factors).

295. *Id.* at 755-56.

296. *Id.* at 756.

297. See, e.g., Weiner, *supra* note 1, at 494-95. Some would point to Israel’s 1981 strike of Iraq’s Osirak nuclear plant, the U.S. assessment in 2003 of the Iraqi WMD threat, and the 2008 Russian invasion of Georgia as examples.

costs of inaction that exist under the present system.²⁹⁸ Moreover, it is not clear that states will use self-serving force less often merely because there is a bright-line rule in place rather than a more flexible standard.²⁹⁹ Restrictive legal rules have little effect on states that are “prepared to use force in bad faith,”³⁰⁰ because the U.N. as an institution lacks a meaningful enforcement mechanism. Aggressors are mainly deterred by the prospect of being punished by more powerful states—a dynamic that exists whether the use of force is governed by a rule or standard.³⁰¹

There are at least two additional concerns with the proposed change to Article 51. First, as a practical matter it would be very difficult to actually achieve Article 51 reform. P5 members are unlikely to authorize a change in law that would give the United States greater latitude to use force. Second, using force unilaterally (i.e. without vetting the decision through a collective body made up of other states) decreases legitimacy, even if it is technically in compliance with international law.

B. Security Council Reform

If the present structure and procedures of the U.N. Security Council make it difficult to deal effectively with modern threats, then one option that merits serious consideration is reform of the U.N. Security Council. In recent years, scholars and policymakers have proposed two different reforms for the Security Council, each with its own benefits and drawbacks: first, to expand the membership of the U.N. Security Council; and second, to abolish or limit the veto power of the P5.

298. See Yoo, *supra* note 13, at 758 (“It might also be the case that the existing set of rules will yield errors in the other direction, in failing to allow preemptive attacks that should have been undertaken to prevent an aggressive assault.”).

299. Some scholars assume that there is a correlation between the strictness of a legal rule and the ability of nations to use the rule as a pretext to conceal the true motives for a use of force. Nations have often claimed self-defense to justify attacks, both before and after the UN Charter, and there is no indication that the rate of these claims has declined as a result of a more restrictive set of rules.

Id. at 782 n.160.

300. Abraham D. Sofaer, *On the Necessity of Pre-emption*, 14 EUR. J. INT’L L. 209, 225 (2003).

301. Yoo provides another reason why states will comply with the broader standard: If a nation violates what are seen as the international rules on the use of force, it might hurt its own reputation, independent of any . . . military, economic, or diplomatic sanctions. Such reputational harm may decrease the ability of a nation to credibly enter into international agreements in the future, as other nations may view a nation’s willingness to violate international law as a signal of its untrustworthiness.

Yoo, *supra* note 13, at 796 (citation omitted).

1. Security Council expansion

Calls to revise the membership of the U.N. Security Council date back to the Cold War, but they have grown louder in recent years. Over the past few decades countries like Brazil, Germany, India, and Japan have significantly increased their share of the world's economic and military power. As a result, these countries, and others like them, have begun to lobby for permanent seats on the U.N. Security Council. Many outside observers agree that such reform is necessary, with one scholar in particular noting in 1998:

Most governments, interested non-governmental organizations and academic observers agree that in the last decades the international state system, and more generally, conditions of international relations have experienced a change so profound that the *status quo* established in 1945 cannot be maintained without running the risk of relegating the [U.N.] to the backseats of international life.³⁰²

More recently, a high-level panel convened by the U.N. Secretary General recommended taking immediate action on enlarging the membership of the U.N. Security Council. The report produced by that panel provided two possible models.³⁰³ The first would create, among other things, six new permanent seats without veto power.³⁰⁴ Two of these seats would go to African countries, two to Asian countries, one to Europe, and one to the Americas.³⁰⁵ The second would create no new permanent seats, but would establish a "new category of eight four-year renewable-term seats," which would also be divided among different regions.³⁰⁶

Both of these proposals would go a long way towards preserving the legitimacy of the U.N. Security Council. It is already difficult to defend the fact that France and Great Britain, each with a population of roughly 60 million, have permanent seats on the U.N. Security Council, while Brazil (population of roughly 200 million) and India (population of roughly 1 billion) do not. This disconnect will become only more indefensible over time, until at some point large segments of the world's population will no longer feel that it is necessary to take seriously the decisions of the U.N. Security Council.

But it is less clear whether these reforms would enhance the U.N. Security Council's effectiveness. As we have argued in this Note, the main reason that the U.N. Security Council has found itself unable to deal with modern threats like WMD proliferation and terrorism is because China and Russia consistently block sanctions and other punitive measures, either by vetoing resolutions or

302. BARDO FASSBENDER, U.N. SECURITY COUNCIL REFORM AND THE RIGHT OF VETO: A CONSTITUTIONAL PERSPECTIVE 7 (1998).

303. SEC'Y GEN.'S HIGH-LEVEL PANEL ON THREATS, CHALLENGES & CHANGE, A MORE SECURE WORLD: OUR SHARED RESPONSIBILITY 81 (2004), available at <http://www.un.org/secureworld/>.

304. *Id.*

305. *Id.*

306. *Id.*

threatening to do so. That veto power would remain untouched under these reform proposals. Enlarging the U.N. Security Council, therefore, would not make the United States and its allies any less vulnerable to Chinese or Russian vetoes.

Furthermore, there are significant impediments to U.N. Security Council reform. The P5 would have to approve expansion, but some members of the P5 are opposed to the very idea of enlargement, while others are against specific candidates. China, for example, does not want Japan to have a permanent seat on the U.N. Security Council. In addition, there is infighting among potential candidates for permanent seats.³⁰⁷ India is opposed by Pakistan, for instance, while several Spanish-speaking countries in Latin America oppose Brazil's bid.³⁰⁸ All of this goes a long way towards explaining why the concept of U.N. Security Council expansion has languished for so many years.

2. *Veto reform*

If the problem is Chinese and Russian veto power, then perhaps the remedy is veto reform. Indeed, one idea that has been proposed is to abolish the veto power altogether. The veto, after all, is at odds with the U.N. principle of "equal rights . . . of nations large and small."³⁰⁹ In 1992, a large group of developing countries went so far as to convene a conference and call for an end to the veto power, arguing that it provides the P5 an "exclusive and dominant" position that is "contrary to the aim of democratizing the United Nations."³¹⁰ More recently, President Muammar al-Qaddafi of Libya delivered a speech at the U.N. General Assembly describing the veto as "political feudalism for those who have a permanent seat" and calling for the abolition of the veto power for the P5.³¹¹

Others have argued in favor of limiting the veto power to certain situations. Two scholars, for example, authored a report in which they made the following recommendation:

The veto should be abolished for [U.N. Security Council] resolutions authorizing direct action in response to a crisis. It makes no sense, in 2006, for five countries that represent the distribution of power at the end of World War II to have individual vetoes over what constitutes legitimate action.

The current veto process does not serve the interests of the United States. America does not need it to block action of which we do not approve; we are

307. BOLTON, *supra* note 67, at 251.

308. *Id.*

309. U.N. Charter pmbl.

310. Tenth Conference of Heads of State or Government of Non-Aligned Countries, Jakarta, Sept. 1-6, 1992, *The Jakarta Message: A Call for Collective Action and the Democratization of International Relations*, ch. 2, ¶ 32, UN Doc. A/47/675, S/24816 (Nov. 18, 1992).

311. Neil MacFarquhar, Diane Cardwell & Ravi Somaiya, *Libyan Leader Delivers a Scolding in U.N. Debut*, N.Y. TIMES, Sept. 24, 2009, at A15.

almost always pushing the [U.N. Security Council] to take action rather than not, and in those cases where we are unpersuaded of the wisdom of a particular course, we prefer to use diplomacy rather than the veto. Instead, the veto is a license for prevarication, obstructionism, and disillusionment. The veto should be replaced by a supermajority vote—of perhaps three-quarters of voting members—in an enlarged Security Council.³¹²

There is merit in both of these, and similar, proposals. The veto power, limited to the five countries that were dominant in the wake of World War II, at this point arguably appears arbitrary and unjust. It provides a ready excuse for countries to question the legitimacy of decisions made by the Security Council. And, of course, it is the reason that China and Russia are able to unilaterally prevent the Security Council from taking collective action against terrorism and WMD proliferation.

But these reforms, unfortunately, are entirely unrealistic. Any change in the voting procedures of the Security Council would require an amendment to the charter.³¹³ This, in turn, would require the approval of the P5.³¹⁴ China and Russia would never vote to approve a measure that dilutes their power in the Security Council. Indeed, even the United States would likely oppose any diminishment of its veto authority, since it often needs the veto to shield itself and its allies—notably, Israel—against Security Council resolutions that are adverse to its interests.

C. *Making Use-of-Force Decisions Outside of the U.N.*

At present, the Security Council possesses a monopoly on legitimizing the use of force—meaning that when countries seek international approval for military action, they invariably turn to the Security Council. The United States is no exception, having sought Security Council resolutions approving use of force numerous times over the past decades. The most recent example was Iraq, in which the United States attempted and failed to secure a Security Council resolution explicitly authorizing use of force—resulting in fallout and statements by some that the U.S. intervention in Iraq was illegitimate. The Iraq issue demonstrates the continued importance of the Security Council in legitimizing the use of force.

But the United States might consider exploring alternatives to the Security Council when it seeks legitimacy for the use of force. First, for the reasons discussed throughout this Note, in many important situations the United States will not be able to obtain collective authorization from the P5. Second, because of its decision-making procedures—most notably, the veto power that allows one country to prevent a decision supported by fourteen others—the Security

312. Ikenberry & Slaughter, *supra* note 132, at 25.

313. U.N. Charter arts. 108-09.

314. *Id.*

Council “cannot be said to uphold the principle of equality of states.”³¹⁵ Third, it is problematic that the veto power is not held by the countries that make “the most significant financial or military contributions to collective security.”³¹⁶ Fourth, precedent exists for working outside of the U.N. framework for authorizing the use of force.³¹⁷ Finally, it is troubling that the United States must seek permission from a country like China, which imprisons and tortures its own political dissidents, to use force to stop human rights abuses.³¹⁸ Similarly, the fact that a P5 member like China or non-permanent members of the Security Council like Cuba, Libya, and Syria get to vote on matters related to international peace and security is troubling when juxtaposed against the fact that these states do not allow their own citizens to vote.³¹⁹

315. Weiner, *supra* note 1, at 488.

316. *Id.* at 488-89 n.330.

317. The assertion that the United Nations confers legitimacy is weakened inasmuch as states use force outside the confines of the charter. For international law to be legitimate, it “must be built upon and reflect the realities of power and the security needs that confront states in the real world. Otherwise, states that face the greatest threats will not regard the rules as consistent with their national security needs and will disregard them.” Jane E. Stromseth, *Law and Force After Iraq: A Transitional Moment*, 97 AM. J. INT’L L. 628, 637 (2003) (footnote omitted). Indeed, there are many examples that represent “the kinds of force that have been used against the political independence and territorial integrity of states, have not been authorized by the Security Council, and cannot be placed within any reasonable conception of self-defense.” Arend, *supra* note 13, at 100 (listing “the Soviet action in Czechoslovakia (1948); the North Korean invasion of South Korea (1950); U.S. actions in Guatemala (1954); the Israeli, French, and British invasion of Egypt (1956); the Soviet invasion of Hungary (1956); the U.S.-sponsored Bay of Pigs invasion (1961); the Indian invasion of Goa (1961); the U.S. invasion of the Dominican Republic (1965); the Warsaw Pact invasion of Czechoslovakia (1968); the Arab action in the 1973 Six-Day War; North Vietnamese actions against South Vietnam (1960-1975); the Vietnamese invasion of Kampuchea (1979); the Soviet invasion of Afghanistan (1979); [and] the Tanzanian invasion of Uganda (1979)”). Even after the Soviet Union collapsed, the United Nations did not become the only legitimizing force in the world. The Security Council signed off on the first Gulf War in 1991, but only after then President Bush moved half a million troops into the Iraqi theatre. The message was clear: the United States would use force unilaterally to defend its interests in the region. The Clinton administration put boots on the ground in Haiti in 1994 without a nod from the Security Council. Four years later, the Clinton administration shot a volley of cruise missiles into Iraq (Operation Desert Fox) without a resolution. Then, in 1999, without Security Council authorization, the Europeans and Americans jointly used force to stop ethnic cleansing in Kosovo.

318. See, e.g., Miguel Helft, *Chinese Political Prisoner Sues in U.S. Court, Saying Yahoo Helped Identify Dissidents*, N.Y. TIMES, Apr. 19, 2007, at C4; cf. Sikorski, *supra* note 68 (“[T]he UN’s procedures create situations that are morally repugnant and politically counterproductive. The annual meeting of the UN Human Rights Commission in Geneva in 2003 was typical. With the votes of countries such as Saudi Arabia, Zimbabwe, Syria, China, Pakistan, Sudan and others, the UN’s Economic and Social Council . . . re-elected Cuba to serve on the UN Human Rights Commission just a few days after the Castro regime summarily executed several people whose only crime was attempted emigration. The meeting was chaired by Libya. In 2004, Sudan was elected to serve, just as its government faced allegations of genocide in Darfur. . . . An organization that was set up with the aim of promoting human rights has become a body that protects those who abuse human rights.”).

319. United Nations Sec. Council, Members: Cuba, <http://www.un.org/sc/>

Perhaps the most appropriate alternative would be to look to a democracy-based organization as a forum in which to legitimize the use of force. In 1999, without a nod from the Security Council, the North Atlantic Treaty Organization (NATO) intervened in the Balkans to stop ethnic cleansing.³²⁰ This humanitarian intervention demonstrated that Americans and Europeans “did not believe international legitimacy resided exclusively at the UN Security Council, or in the UN Charter, or even in the traditional principles of international law”³²¹ Rather, acting in Kosovo without Security Council approval “left the determination of international justice in the hands of a relatively small number of powerful Western [democracies].”³²² But NATO itself encompasses too few countries and its mission is too circumscribed for the organization to consistently serve as an alternative to the Security Council on use of force legitimization. The United States might, therefore, consider pushing for the creation of a democracy-based organization—often referred to as a Concert of Democracies—with the power to legitimize the use of force.³²³

There are several reasons to support a Concert of Democracies. First, such an organization would be more likely to approve use of force to counter WMD and terrorism threats. A tremendous overlap of interests exists between the United States and the other liberal democracies of the world. Democracies are keen on developing a common approach to deal with the threat of transnational terrorism, which has struck in the United States, Europe, and America’s new democratic allies in Iraq and Afghanistan. Democracies have also displayed similar concerns with the spread of WMD. Moreover, democracies are the only countries in the world that are genuinely committed to the spread of human rights as well as civil and political liberties. To be sure, there will still be disagreements, particularly in the realm of tactics, but the United States would likely find that serious conflicts of interest will arise not among the democracies, but between democracies and autocracies.³²⁴

Second, democracies can more authoritatively legitimize the use of force in a given situation, since their leaders have “a legitimate claim to be speaking for

searchres_sc_members_english.asp?sc_members=82 (last visited Apr. 1, 2010); United Nations Sec. Council, Members: Libyan Arab Jamahiriya, http://www.un.org/sc/searchres_sc_members_english.asp?sc_members=90 (last visited Apr. 21, 2010); United Nations Sec. Council, Members: Syrian Arab Republic, http://www.un.org/sc/searchres_sc_members_english.asp?sc_members=148 (last visited Apr. 1, 2010).

320. See Javier Solana, *NATO’s Success in Kosovo*, 78 FOREIGN AFF. 114, 116 (1999).

321. KAGAN, *supra* note 68, at 127.

322. *Id.*

323. See, e.g., Daalder & Kagan, *supra* note 5, at 16; Daalder & Lindsay, *supra* note 131; Tod Lindberg, *The Treaty of the Democratic Peace*, WKLY. STANDARD, Feb. 12, 2007; Sikorski, *supra* note 68 (“Some commentators have argued that coalitions of the willing—that is, groups of countries that share values, threat perceptions and a demonstrated willingness to act—can supersede the useless talking shop that the UN has become.”).

324. The Parts of this Note dealing with Iran and North Korea demonstrate that democracies, acting in concert and left to their own devices, would respond more forcefully than China and Russia to modern threats.

the people of their countries.”³²⁵ The opinions of democratic leaders carry the force of majority sentiment, which other democracies view as more meaningful than the opinion of an autocrat, which may represent little more than his own personal whim. Scholars have, therefore, argued that democracies have “a special capacity to legitimize international action.”³²⁶ Some have even gone so far as to say that authorization for the use of force from merely twenty-five democracies could be more meaningful than authorization from ten democracies and fifty autocracies—a scenario that could occur at the U.N., where a majority of the member-states are autocratic and “do not represent the interests or perspectives of the people they rule.”³²⁷

Third, a Concert of Democracies would provide incentives for more peaceful state behavior than the present U.N. framework. At the U.N., the most coveted position—permanent membership on the Security Council—is obtained on the basis of a state’s power. The current P5 are the victors of World War II—those countries considered most powerful when the U.N. was established. The states currently under consideration for additional permanent seats have achieved great power status, such as Brazil and India. The U.N., then, provides a strong incentive for states to amass power. States observing the present structure of the Security Council and the apparent criteria for obtaining a permanent seat would do well to increase their size and military arsenals. In contrast, membership in the Concert of Democracies would depend on whether a country is sufficiently democratic. The organization would reward democracy instead of power, and could become a powerful catalyst for the expansion of democracy worldwide.

But there are, of course, potential downsides to the Concert of Democracies alternative.³²⁸ First, some will oppose the effort out of a belief that a Concert of Democracies would merely be a ploy to increase the power of the West vis-à-vis the developing world.³²⁹ The Concert would therefore require the buy-in of several key third-world democracies. Second, democracies acting in concert outside of the U.N. may incentivize autocracies to band together, though as this Note has argued, autocracies, led by Russia and China, already seem to be moving in this direction. Indeed, it is precisely because the P5 autocracies already act together that the U.S. needs to seek an alternative to collective authorization. Finally, although use of force approved by a Concert of Democracies may be viewed as legitimate among those

325. Lindberg, *supra* note 323.

326. *Id.*

327. Daalder & Lindsay, *supra* note 131.

328. See Charles A. Kupchan, *Minor League, Major Problems: The Case Against a League of Democracies*, 87 FOREIGN AFF. 96, 99 (2008) (arguing that “a league of democracies does not fare well under closer scrutiny” and that “the United States and its democratic allies should invest in greater collaboration with rising autocracies, such as China, Russia, and the oil-rich states of the Persian Gulf”).

329. *Id.* at 104.

democracies, non-democracies will be opposed, which could make the action more difficult to carry out.³³⁰

CONCLUSION

All too often, the U.N. Security Council remains divided over what constitutes a threat to international peace and security, as well as how to respond to such threats when there is agreement that they exist. Though the United States will generally find common ground with its allies Great Britain and France, it will not be able to rely upon China and Russia to authorize the use of force against terrorist and WMD-related threats. Indeed, China and Russia have stymied U.S. efforts with respect to North Korea, Iran, and missile defense systems in Eastern Europe and East Asia. In each case, other P5 members seemed less concerned with countering terrorism and WMD proliferation in meaningful ways, and more concerned with preserving their economic interests and balancing against the power of the United States.

It is imperative that the United States remains focused on identifying viable alternatives to collective authorization. This Note has proposed several possible substitutes: Article 51 reform, Security Council modification, and making use of force decisions outside of the U.N. framework, for example, through a Concert of Democracies. But this is not meant to be an exhaustive list. The purpose of presenting these ideas is to ensure that scholars continue their dialogue about alternatives, rather than grow overly complacent with the system as it is presently structured.

330. *Id.*

