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MEMORANDUM

To: Members of the Security Council and other interested states
From: Lawyers' Committee on Nuclear Policy; Reaching Critical Will, UN Office, Women's International League for Peace and Freedom
Re: Proposed Security Council resolution on "non-proliferation"

The following comments are directed to the "Draft Resolution on Non-Proliferation" dated March 24, 2004, and expand upon points made in our March 25 letter on behalf of the Abolition 2000 Global Network to Eliminate Nuclear Weapons. Enclosed with this memorandum is a document containing suggested alterations to the draft, offered with the intention of illustrating the very serious issues raised by the resolution and suggesting possible improvements. All paragraph references below are to paragraphs as numbered in the enclosure, not the March 24 draft. Our recommendations are in bold type. ***At the outset, we emphasize the need for full consultation with all interested states, and with civil society, including through an open session and an informal ("Arria formula") civil society briefing.*** We would be interested in meeting with you if desired.

Disarmament: Operative paragraph (OP) 6(a) calls for states to promote the "full implementation" of multilateral treaties on nuclear, biological and chemical (NBC) weapons. See also OP 6(b) and preambular paragraph (PP) 5. The draft is otherwise silent, operationally or rhetorically, on disarmament, which is the aim of the treaties. Indeed, the word "disarmament" appears nowhere in the document. *The draft thus ignores that the problem of the spread of NBC weapons, and their potential acquisition by terrorists, will never be effectively addressed absent effective compliance with disarmament obligations.* This is true above all regarding the obligation of complete nuclear disarmament, but is also pertinent regarding biological and chemical disarmament. For example, vast "biodefense" research programs are now underway which raise profound issues of compliance with the Biological and Toxin Weapons Convention (BWC).¹

Disarmament obligations should be built into the resolution, as the enclosure illustrates. For example, there can be a preambular reference to the recognition in S/23500, the Presidential statement of 31 January 1992, of the need for member states to fulfil disarmament obligations

¹ See, e.g., Marylia Kelley and Jay Coghlan, "Mixing Bugs and Bombs," Bulletin of the Atomic Scientists, September/October 2003 (online at www.thebulletin.org/issues/2003/so03/so03kelley.html); Nicole Deller and John Burroughs, "Arms Control Abandoned: The Case of Biological Weapons," World Policy Journal, Summer 2003 (online at www.worldpolicy.org/journal/articles/wpj03-2/deller.html).

(see PP 2). In existing operative provisions of the draft, it is also appropriate to refer to disarmament. Thus the requirement that states take effective measures, *e.g.* of accounting (see OP 4(a)), implements disarmament as well as non-proliferation obligations. The resolution should also call upon states to adopt effective measures regarding state compliance with disarmament obligations (see OP 3).

Security Council “lawmaking”: The proposed resolution purports to *require* states to prohibit non-state actors from acquiring NBC weapons and their means of delivery and to take measures to account for, secure, and prevent unlawful trafficking in the weapons, related materials, and means of delivery. *If adopted, it would represent a far-reaching assumption of authority by the Security Council to enact global legislation requiring each state to modify its national legal system and policies.* Such legislation is usually the subject of painstakingly negotiated multilateral treaties, like the Nuclear Non-Proliferation Treaty (NPT), Chemical Weapons Convention (CWC), and BWC. For reasons developed below, we urge instead adoption of a resolution which sets forth guidelines, requests, and recommendations, including recommendation of negotiation of multilateral agreements.

First, issues raised by the March 24 draft demand careful scrutiny and deliberation of the kind inherent in multilateral negotiations. For example, OP 4 requires states “to establish domestic controls to prevent the proliferation” of NBC weapons and their means of delivery. Although the sponsors have insisted that the resolution is aimed at proliferation involving non-state actors, by its terms OP 4 appears to require states not party to the NPT, BWC, or CWC to refrain from transfer of NBC weapons, means of delivery, and related materials to other non-party states, or to party states, whether or not the transfer involves non-state actors. The resolution generally would impose obligations upon states with regard to NBC-weapon “related materials”, missiles and other “unmanned systems” of delivery, and “non-state actors,” yet provides no full and precise definition of those terms. *In these and other respects, a rational and legitimate lawmaking process would require in-depth negotiation with the participation of affected states.*

Second, there is nothing in the UN Charter that confers authority to enact such global legislation on the Security Council. The Charter contains no references to a Security Council role in the development of international law. When the framers of the Charter saw a role for a UN body in such development, it was spelled out. Article 13 states that the General Assembly shall “make recommendations for the purpose of ... encouraging the progressive development of international law and its codification.” With regard to privileges and immunities of the UN Organization, its officials, and state representatives, Article 105 states that the General Assembly “may make recommendations with a view to determining the details ... or may propose conventions to the Members of the United Nations.” Article 62(3) says that the Economic and Social Council “may prepare draft conventions for submission to the General Assembly, with respect to matters falling within its competence.” No such provisions appear in support of a Security Council role in lawmaking. Article 24 states that the Security Council has “primary responsibility for the maintenance of international peace and security,” and provides that in meeting this responsibility the “specific powers granted to the Security Council” are found in Chapters VI, VII, VIII, and XII. Of these, Chapter VII is the only one relevant to a decision requiring all states to adopt certain measures. But the measures not

involving the use of force identified (without excluding others) in Article 41 are “complete or partial interruption of economic relations [and] means of communication, and the severance of diplomatic relations.” There is not even a trace of intent that the Security Council would engage in detailed regulation of conduct of all states of the kind envisaged by the proposed resolution. Further, Chapter VII seeks to deal with disputes involving particular states. Article 40 refers to the “parties concerned” in a situation. The practice of the Security Council has been to address particular situations of conflict. The incongruity of the Security Council attempting to act as a global legislature is reinforced by the fact that enforcement of its own resolution against the permanent five members would be subject to the veto. *It is plain that the Charter contemplated multilateral agreements entered into by sovereign states, encouraged by the General Assembly, as the primary mode of global lawmaking.* The Statute of the International Court of Justice, adopted at the same time as the Charter, in Article 38, identified “international conventions” as the first source of law to be applied by the Court, and nowhere mentions Security Council resolutions as a source.

Third, a resolution requires political acceptance if it is to be effectively implemented. The highly unrepresentative Security Council, dominated by the nuclear-armed permanent five, is not the best institution to elicit such acceptance, especially with respect to NBC-weapon measures as to which hypocrisy and double standards will rightly be charged. In a recent lecture, the then Under-Secretary-General for Legal Affairs, Hans Corell, noted that “the core body of today’s international law was progressively developed and codified under the auspices of the United Nations. The United Nations was and remains in the centre of this process, not so much because of Article 13 of its Charter that addresses this issue, but *due to the authority that the World Organization enjoys as a universal and democratic institution.*”² It hardly needs saying that the Security Council has no such claim to universality and democracy.

It is true that Security Council resolution 1373 requires all states to take measures to suppress terrorism. But it was adopted in the special circumstance of responding to the September 11 attacks, and deals with simpler and less controversial topics than the present resolution, which strongly impinges upon state to state relations and issues of security.

There are good reasons (as well as bad reasons, particularly the present U.S. hostility to multilateral treaty regimes) why a Security Council resolution is nonetheless being proposed. Important states remain outside the NBC-weapon treaty regimes. The recent public revelations regarding the Pakistan-based nuclear proliferation network involving businesses in several countries and a scientist, A.Q. Khan, allegedly acting without governmental authority have highlighted new pathways for the spread of NBC-weapon items and raise the specter of terrorist acquisition. Extra impetus should therefore be given to efforts to a) strengthen compliance mechanisms within current disarmament and non-proliferation regimes, b) bring all relevant states into the regimes, and c) negotiate supplemental or new agreements to address issues related to terrorist and other non-state trafficking in and acquisition of NBC weapon-related items. These include application of strengthened IAEA safeguards to all states with nuclear facilities, the proposal for an emergency mechanism within the NPT to deal with

² Hans Corell, “Prospects for the Rule of Law among Nations,” UN Vienna International Centre, February 24, 2004, emphasis supplied (online at www.un.org/law/counsel/english/Vienna_24_2_04final.doc).

a state's intention to withdraw, resumption of negotiations to create a verification regime for the existing ban on biological weapons, and negotiations on the draft convention on nuclear terrorism. However, such efforts can be difficult, cumbersome, and time-consuming, and more immediate action may be required with respect to particular acts or practices involving particular states. Article 24 gives the Security Council primary responsibility for maintenance of international peace and security in "order to ensure *prompt and effective* action by the United Nations" (emphasis supplied), and thus authority to take such action.

A desirable compromise approach would be for the Security Council to adopt a resolution that sets forth guidelines, requests, and recommendations. That would lay the foundation for mandatory Security Council action with respect to particular acts or practices or patterns involving particular states. It also could spur the negotiation of such additional multilateral agreements as are needed, which the resolution should recommend. It further, importantly, would remove the basis for any claim of "enforcement" not explicitly approved by the Security Council of the kind made by the United States and Britain with respect to the invasion of Iraq. If the resolution remains mandatory in form, a sunset clause setting a date for expiration of the resolution should be included.

Prevention of "trafficking": The proposed resolution calls upon states, "consistent with international law," to "take cooperative action to prevent illicit trafficking" in NBC weapons, means of delivery, and related materials (OP 8). In earlier drafts, the provision had referred to "interdiction" and action in accordance with international "frameworks." The removal of these terms has lessened the imprimatur of Security Council approval of the U.S.-led Proliferation Security Initiative (PSI). Nonetheless, as remarked by Undersecretary of State for International Security and Arms Control John Bolton, the present draft still lends support to PSI.³ To the extent PSI contemplates interdiction of suspected NBC weapon-related shipments upon the high seas or in international airspace, the Law of the Sea Convention and other existing international law generally provide no basis for such interdiction and indeed, absent a supervening authoritative act like a Security Council decision, shield against it.⁴ Any strengthening of the right to intercept shipments, which affects both sovereignty and use of force issues, should proceed through legitimate multilateral lawmaking, and not by means of an ambiguous Security Council resolution. *Especially given the extremely elastic understanding of international law displayed by the United States and Britain with respect to*

³ Colum Lynch, "U.S. Urges Curb on Arms Traffic," Washington Post, March 24, 2004. According to the article, "John R. Bolton, the U.S. undersecretary of state for arms control and international security, said in an interview that a provision in the resolution calling on states to 'take cooperative action to prevent illicit trafficking' would cover the interdiction of ships believed to be hauling banned weapons. He said [Amb.] Wang acknowledged this in private by arguing that the word 'interdict' is redundant."

⁴ See, e.g., Devon Chafee, "Freedom or Force on the High Seas? Arms Interdiction and International Law," IALANA News, October 2003, pp. 7-8, online at www.lcnp.org/pubs/IALANA_Newsletter_Oct_2003.pdf; Sue Soo-ha Yang, "Legal Basis for State Interception of Shipments on the High Seas," October 1, 2003, online at www.lcnp.org/disarmament/MEMO_NK_interdiction.pdf. Both are also available from LCNP. If, absent authoritative acts like a Security Council decision, the Law of the Sea Convention nonetheless is consistent with interdiction of NBC weapon-related shipments, one may well pose questions like why the movements of nuclear-armed submarines are permissible given the general illegality of threat or use of nuclear weapons as declared by the International Court of Justice in its 1996 advisory opinion.

*the invasion of Iraq, as well as the national “intelligence failures”/deceptions regarding NBC-weapon programs in Iraq, the mere invocation of international law is not enough. Clarity and international consensus needs to be developed on the types of shipments prohibited and the nature of interdictions permissible under international law. **There should be provision for Security Council or other multilateral, treaty-based decision-making and dispute resolution (as by the International Law of the Sea Tribunal) as to interdiction of specific shipments that otherwise would appear to be protected by the customary freedom of navigation on the high seas, the right of innocent passage, and other existing international law. Alternatively, the provision should be dropped.***

Implementation and enforcement: The March 24 draft makes a mockery of follow-up. It establishes a Security Council committee on implementation to last only six months, while requiring states to adopt complex national legislation and measures that will clearly take longer than six months fully to put in place. *It is crucial to avoid leaving follow-up on the resolution to individual states, above all the United States.* However, that is the course President Bush signaled the United States intends, stating in his February 11, 2004 speech that after the resolution is adopted, the United States "stands ready to help other governments to draft and enforce the new laws that will help us deal with proliferation." *Nor should implementation of the resolution be placed exclusively under the supervision of the Security Council.* It is not the Council's role to develop a new quasi-agency, and it is important to coordinate with existing regimes and institutions.

Accordingly, we recommend (see OP 9 of the enclosure) that the resolution request the Secretary-General to establish an implementation body, for a period of no more than two years, calling upon, inter alia, the expertise of the Department for Disarmament Affairs, IAEA, OPCW, UNMOVIC, the governing bodies of the NPT, CWC, and BWC, and civil society, to monitor implementation of this resolution, to elaborate definitions of its terms and to ensure consistency in its application, and to offer assistance to states in implementation. OP 5 inviting states to offer assistance to other states in implementation of the resolution should be struck. OP 9 plus the deletion of OP 5 will make clear that it is for the implementation body to provide assistance and monitor implementation, not the United States or other individual states.

Regarding enforcement, in the wake of the invasion of Iraq, an evident concern about this resolution is that individual states may take it upon themselves to “enforce” its provisions by means even including military action absent explicit, situation-specific approval by the Security Council or other authoritative, treaty-based international organizations or bodies. Making the resolution recommendatory rather than mandatory would address this problem. *Especially if it remains mandatory, as noted above states should make clear, as they did in the case of Iraq-related resolutions, that the resolution provides no basis for such “enforcement”.* It is also possible to imagine a provision that would serve to bar such “enforcement” (see OP 13).

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