

Appendix 18A. Non-proliferation of ballistic missiles: the 2002 Code of Conduct

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I. Introduction

The growing concern over the spread of ballistic missiles was reflected in two events in 2002. In July the United Nations Panel of Governmental Experts presented its report on the ‘issue of missiles in all its aspects’¹ and concluded that the issue should be regarded as of serious concern for international peace and security. It also noted that there are no universally accepted norms or instruments that deal with missile-related ‘concerns in all their aspects’. The UN General Assembly requested the Secretary-General, with the assistance of the Panel of Governmental Experts, to further explore the issue and prepare a report for its 59th session.² Most notable, however, were the intensive efforts to acquire wider support for the draft International Code of Conduct Against Ballistic Missile Proliferation (ICOC) that had been developed within the Missile Technology Control Regime (MTCR).³ The process of expanding support for the draft ICOC beyond the MTCR membership included two preparatory meetings in Paris and Madrid and culminated in a launching conference in The Hague on 25–26 November 2002. At the end of the conference, over 90 states declared their readiness to subscribe to the ICOC.⁴ While Russian representatives made reference to their proposal for a Global Control System (GCS), no steps were taken in 2002 to advance this proposal.⁵ It is probable that further efforts to promote the GCS are contingent on the future success of the ICOC. This appendix focuses on the efforts to acquire wider international support for the ICOC.

II. The Missile Technology Control Regime and the draft ICOC

Towards the end of the 1990s, international efforts to stem the proliferation of ballistic missiles faced serious challenges.⁶ A number of countries had acquired the technological capability to produce short- or medium-range ballistic missiles. In addition,

¹ United Nations, Report of the Secretary-General, General and complete disarmament: missiles, the issue of missiles in all its aspects, UN document A/57/229, 23 July 2002. The Panel of Governmental Experts was established under General Assembly Resolution 55/33A, 20 Nov. 2000.

² UN General Assembly Resolution 57/71, 22 Nov. 2002.

³ The ICOC is reproduced in appendix 18B. It is also discussed in Anthony, I., ‘Multilateral export controls’, *SIPRI Yearbook 2002: Armaments, Disarmament and International Security* (Oxford University Press: Oxford, 2002), pp. 748–51.

⁴ As of 1 Jan. 2003, the number had increased to 101 states. An updated list of subscribing states is available on the Dutch Ministry of Foreign Affairs site at URL <http://www.minbuza.nl/default.asp?CMS_ITEM=MBZ460166>.

⁵ For a comparison of the proposals, see Fedorov, Y. E., ‘The Global Control System and the International Code of Conduct: competition or cooperation’, *Nonproliferation Review*, vol. 9, no. 2 (summer 2002), p. 30. The documents presented at the first GCS meeting, in Mar. 2000, are available at URL <http://www.fas.org/nuke/control/mtcr/news/GSC_content.htm>.

⁶ E.g., Yuan, J., *The MTCR and Missile Proliferation: Moving Toward the Next Phase* (Department of Foreign Affairs and International Trade: Ottawa, Canada, May 2000).

some countries—India, Iran, Iraq, Israel, North Korea and Pakistan—were actively seeking the capacity to build long-range ballistic missiles. Tests conducted in the late 1990s also revealed that some ballistic missile programmes had broken through a technological ‘Scud barrier’—that is, developing multi-stage ballistic missiles that have the technological potential to achieve intermediate, and possibly even intercontinental, ranges.⁷ The only existing international instrument in the field of ballistic missile non-proliferation—the MTCR—focuses on supply-side controls of relevant goods and technologies.⁸ The effectiveness of the MTCR relates to the extent to which this cooperation includes all technology holders and potential suppliers of such goods and technologies. At the end of the 1990s it became increasingly apparent that a number of technology holders had emerged who remained outside the cooperation in the MTCR. The increasing cooperation between them and ‘countries of concern’ constituted a major challenge to the effectiveness of the MTCR.⁹

It was also seen as increasingly anomalous that there were no international norms for responsible behaviour relating to missiles, given that there are such norms for weapons of mass destruction (WMD). In October 1999, at the MTCR plenary meeting in Noordwijk, the Netherlands, the members decided to consider further steps to control missile proliferation. A key development was the recognition that these steps were urgently needed. It was decided that the Dutch chair of the MTCR should assume a coordinating role in these efforts and that the members should revisit the question of further steps at the spring 2000 Reinforced Point of Contact meeting in Paris.

The discussions in Paris showed a preference for the formulation of a Code of Conduct. However, there was concern as to whether the MTCR would be the appropriate forum in which to undertake such a task because its area of responsibility was in the field of export controls and, more importantly, its standing among non-members was not particularly high given its alleged ‘discriminatory’ nature. A risk was seen that the ‘message’ would be confused with the ‘messenger’. Drafting a Code of Conduct that would only receive the support of MTCR members and a few non-members did not seem to be a meaningful effort, but there appeared to be no realistic alternatives. Given the wish to achieve a swift result, transmitting the question of ballistic missile non-proliferation to the Conference on Disarmament (CD) or to an ad hoc diplomatic conference was not an alternative. The MTCR was also the only existing international forum that possessed the necessary technical expertise. On the basis of input from the members, the Dutch chair worked out a draft Code of Conduct that was presented to the October 2000 MTCR plenary meeting in Helsinki. The plenary meeting reached consensus on the first version of a draft ICOC, which was circulated by the Finnish chair among non-members in order to collect their views. The members of the MTCR revisited the draft on the basis of these comments in order to agree on possible amendments and on the question of whether or not the initiative should be launched. However, the responses of the non-member states were more often than not of a general and preliminary character. It was apparent that they were not prepared to engage in the work on the draft ICOC until it was clear what kind of process would be available for its multilateralization (i.e., its expansion beyond the MTCR group).

⁷ For a discussion of the ‘technical plateau’ in the development of ballistic missiles, see Karp, A., *Ballistic Missile Proliferation: The Politics and Technics* (Oxford University Press: Oxford, 1996), pp. 204–206.

⁸ See chapter 18.

⁹ It should be noted that in some cases (e.g., North Korea) a technology holder was also a country of concern.

In order to facilitate comments on the draft ICOC, in May 2001 the Polish Government organized a round table meeting in Warsaw, which was attended by representatives of 53 non-member states. The meeting provided valuable input to the process of acquiring support for the initiative.

The draft ICOC was the subject of a separate meeting that was held just before the September 2001 MTCR plenary meeting in Ottawa. The chair presented the comments on the draft that had been received from the non-members. A working group reached agreement on a final version of the draft ICOC, which was subsequently approved by the plenary meeting. The Ottawa plenary meeting also decided that the process of acquiring wider support for the ICOC should continue without the active participation of the MTCR *per se*. However, the drafters of the ICOC wished to retain control of its substance, and concern was expressed that the process of multilateralizing the draft might lead to its being 'taken hostage' by a non-member state in order to prevent further action on the draft. It was therefore decided that the inclusion of amendments to the draft ICOC would require consensus, and that a date would be set for its launch. These steps were necessary to secure agreement that the ICOC could be pursued outside the MTCR. This form of 'reverse consensus' and the 'guillotine' on discussions were novel approaches to multilateral arms control and made the multilateralization process appear to have been determined in advance. The plenary meeting welcomed the offer by the French Government to host the first open-ended meeting on the multilateralization of the draft ICOC.

III. EU coordination on the multilateralization of the draft ICOC

The member states of the European Union (EU) played a prominent and coordinated role in the process of acquiring support for the draft ICOC. While the *substance* of the ICOC was worked out within the framework of the MTCR, the *process* of its multilateralization was developed and brought to fruition within the framework of the EU. It is thus appropriate to analyse the development of a common EU policy towards the process of multilateralizing the draft Code of Conduct.

The foundation for this coordinated policy was laid during the Swedish Presidency of the EU in the first half of 2001. When the members of the MTCR began elaborating on the draft ICOC there was no common EU position on the material provisions of the draft or on the process for acquiring wider support. In the spring of 2001 it became apparent that there were advantages to be gained from acting in a coordinated manner on the question of multilateralization. In May 2001 the EU General Affairs Council (GAC) adopted conclusions on missile non-proliferation in which grave concern was expressed over the proliferation of ballistic missiles that are capable of carrying WMD.¹⁰ It was concluded that there was an urgent need for the development of globally accepted norms in support of missile non-proliferation. The GAC noted that the ICOC 'is the most concrete and advanced initiative in this field, and that, as such, poses the best chances to achieve results in the short term'. It also expressed its support for promoting the ICOC through a 'transparent process which avoid[s] discrimination against any State wishing to subscribe to it'.¹¹

¹⁰ European Union, General Affairs Council, 'Council conclusions on missile non-proliferation', 2346th Council meeting, General Affairs, Brussels, 14–15 May 2001.

¹¹ European Union, General Affairs Council (note 10).

Nonetheless, it was apparent that a more specific Common Position was needed. On the initiative of France, at the European Council meeting in Gothenburg in June 2001, the heads of government adopted a Declaration on Prevention of Proliferation of Ballistic Missiles.¹² It was decided that the EU should adopt a Common Position on ballistic missile proliferation on the basis of the multilateralization of the draft ICOC. A Common Position to this end was adopted by the European Council on 23 July 2001, laying the foundation for a common EU position at the Ottawa MTCR plenary meeting in September.¹³ The preamble of the Common Position stated *inter alia* that the EU perceived an urgent need for a global and multilateral approach to complement existing efforts against the proliferation of ballistic missiles. It also noted that the ICOC would be a politically binding instrument that might have a positive influence on other similar initiatives. This formulation was included in order to avoid dismissing the Russian proposal for a more ambitious GCS treaty on ballistic missiles. It also encapsulates the view, held by many states, that the ICOC should be perceived as a first step towards a more comprehensive and robust regime on ballistic missile non-proliferation. The Common Position noted that ‘after its adoption the Code could be of interest to the United Nations’. This language was inserted in order to allay concerns from states which held the view that the issue of establishing multilateral norms against ballistic missile proliferation was best addressed by the UN. The EU Common Position states that its objective is to ‘actively support an ad hoc international negotiating process to finalise the Code, leading to an International Conference for its adoption no later than 2002’. By setting such a deadline for the adoption of the ICOC, the EU members took a firm decision that the multilateralization process would essentially have to be concluded within one year.

IV. From Paris to The Hague: the multilateralization of the draft ICOC

On the invitation of France an intergovernmental conference on the draft ICOC was held in Paris on 7–8 February 2002.¹⁴ All UN member countries, except Iraq, were invited, and representatives from 86 states attended the conference. Its task was to conduct an open-ended discussion on the material provisions of the ICOC. The conference did not entail formal negotiations. Several delegations expressed the view that addressing ballistic missile non-proliferation was timely. Yet, while the draft ICOC did not encounter outright rejection, it was apparent that several delegations held critical views of both its origin and substance. The view was expressed that the issue of ballistic missile non-proliferation—as well as disarmament—would best be addressed by the UN. Some delegations were concerned because of the ICOC’s lack of a stringent definition of its material field of application and because it did not cover cruise

¹² European Union, European Council, Annexes to the Presidency Conclusions, Göteborg European Council, 15–16 June 2001, Annex I, European Council document SN 200/01 ADD1, URL <<http://www.eu2001.se/static/eng/eusummit/conclusions.asp>>.

¹³ Council Common Position of 23 July 2001 on the fight against ballistic missile proliferation (2001/567/CFSP), *Official Journal of the European Communities*, L.202, vol. 44 (27 July 2001), p. 1.

¹⁴ Smith, M., ‘Rules for the road? The International Code of Conduct Against Ballistic Missile Proliferation’, *Disarmament Diplomacy*, no. 63 (Mar./Apr. 2002), pp. 10–15; NTI [Nuclear Threat Initiative] Global Security Newswire, ‘Code of Conduct ineffective, experts say’, 15 Feb. 2002, URL <http://www.nti.org/d_newswire/issues/2002/2/15/13s.html>; and Grahame, D., ‘A multilateral approach to ballistic missiles?’, *BASIC Notes*, 2 Apr. 2002, URL <<http://www.basicint.org/pubs/Notes/2002codeofconduct.htm>>.

missiles. Other delegations expressed concern over the fact that the ICOC did not separate peaceful uses of missile technology (i.e., space launch vehicles, SLVs) from military uses (i.e., ballistic missiles), but rather emphasized their close technological link.¹⁵ It was felt that if the ICOC emphasized this link, it ran the risk of impeding the development of civilian space programmes. It was argued that the code should include stronger language on the right to peaceful uses of space and that it should remain non-militarized. The draft ICOC was also perceived as having introduced a division between 'haves' and 'have-nots', similar to that found in the 1968 Non-Proliferation Treaty (NPT), because the provision on disarmament in the draft was weak. Such a division was held by some delegations to be untenable. The section of the draft ICOC on cooperation was also severely criticized as being too weak and ambiguous. A firmer commitment on international cooperation was sought in return for a commitment to forgo ballistic missiles and SLVs. In addition, the section on confidence-building measures (CBMs) was deemed by some delegations to be too weak, while other delegations thought it went too far and ought to be deleted. At the end of the Paris meeting Spain, which had assumed the Presidency of the EU in January 2002, announced that a follow-up meeting would be held in Madrid.¹⁶

Representatives from 96 countries attended the second meeting on the draft ICOC in Madrid on 17–18 June 2002.¹⁷ Iraq was not invited, and North Korea and Syria declined to participate. Iran, which attended the Paris conference, did not attend the Madrid meeting. The format of the Madrid meeting also did not entail formal negotiations on the draft ICOC. On the basis of comments made at the Paris conference, France had made some amendments to it. Most noteworthy was the deletion of the section on international cooperation that had generated considerable controversy. The subsequent discussions revealed that the concerns expressed in Paris were still relevant. The most difficult issue at the Madrid meeting was the section on CBMs,¹⁸ which delegations found either too weak (e.g., the lack of transparency on existing missile inventories) or too intrusive. Despite the criticism of parts of the draft ICOC, no delegation expressed outright rejection of it. Denmark, which held the Presidency of the EU in the latter half of 2002, was given the task of consulting various countries on the basis of the comments received in Madrid. China, India, Israel and Egypt were among the countries approached.¹⁹

In the autumn of 2002 the Netherlands invited all UN members except Iraq to participate in a two-day launching conference, held in The Hague on 25–26 November, to inaugurate the ICOC and discuss its future implementation. At the launch of the ICOC, over 90 states indicated their willingness to subscribe to it.²⁰ States that

¹⁵ The distinction between the 2 types of missile is discussed in section V below.

¹⁶ See also European Union, Council Joint Action of 27 May 2002 on financial support for the international negotiating process leading to the adoption of an International Code of Conduct Against Ballistic Missile Proliferation (2002/406/CFSP), *Official Journal of the European Communities*, L.140, vol. 45 (30 May 2002), p. 1.

¹⁷ Harris, A., 'International Code of Conduct Against Ballistic Missile Proliferation', *BASIC Notes*, 18 July 2002, URL <http://www.basicint.org/pubs/Notes/2002international_code.htm>.

¹⁸ Wagner, A., 'States hold second missile Code of Conduct meeting', *Arms Control Today*, vol. 32, no. 6 (July/Aug. 2002), p. 26.

¹⁹ Nartker, M., 'International response: EU works to finalize missile Code of Conduct', NTI [Nuclear Threat Initiative] Global Security Newswire, 23 Aug. 2002, URL <http://www.nti.org/d_newswire/issues/2002/8/23/11p.html>.

²⁰ Nartker, M., 'International response: Missile Code of Conduct launches in The Hague', NTI [Nuclear Threat Initiative] Global Security Newswire, 26 Nov. 2002, URL <http://www.nti.org/d_newswire/issues/2002/11/26/9p.html>.

decided against doing so included China, India, Israel, Iran, North Korea, Pakistan and Syria.

States gave various reasons for not joining the ICOC. China indicated during the multilateralization phase that it could not accept the provisions of the ICOC on CBMs and transparency. The fact that these views were not taken into account in the final draft led to its decision not to join.²¹ The provisions on transparency were also the reason Israel gave for not joining the ICOC; it argued that the ICOC would 'harm its national security and is not suitable for the political reality in the Middle East'.²² India had consistently objected to the provisions of the draft that indicated a technological equivalence between civilian SLVs and military ballistic missiles because it perceived that this would probably impair cooperation for civilian purposes. The retention of these provisions led to India's decision not to subscribe to the ICOC. Brazil expressed similar concerns, and it was the only MTCR participating state to remain outside the ICOC.²³ Pakistan decided against joining because of the ICOC's focus on ballistic missiles and the failure to include cruise missiles.

During the second day of the launching conference, the subscribing states addressed issues related to the implementation of the ICOC. As a tribute to The Hague as the 'world's legal capital', it was decided to rename the non-legally binding instrument The Hague Code of Conduct. The Netherlands was appointed the Chair of the Code for a period of one year. Austria was appointed as the Central Contact of the Code and was given the role of collecting information on transparency and on new subscribing states. The subscribing states decided to hold regular meetings, and a 'technical meeting' was scheduled in the spring of 2003. They also agreed to transmit the ICOC to the UN for its information.²⁴

V. Assessment

It was decided during the drafting phase within the MTCR that, whatever the outcome of the process, it would not result in a legally binding treaty. While the non-legal status of the ICOC is not explicitly evident from its text, it is reflected in the aspirational nature of its provisions, the absence of imperative propositions and the fact that the ICOC is designed to be transmitted to the UN for information purposes—rather than registered under Article 102 of the UN Charter.²⁵

Preamble

One obvious result of the multilateralization process is the addition of a preamble, which begins by noting the commitment of the ICOC subscribing states to the UN

²¹ Reuters (Asia), 'China hints it won't sign missile proliferation code', 12 Nov. 2002, URL <<http://asia.reuters.com/printerfriendly.jhtml?StoryID=1719554>>.

²² Benn, A., 'Israel rejects new technology proliferation code of conduct', *Ha'aretz*, 27 Nov. 2002, URL <<http://www.haaretzdaily.com/hasen/objects/pages/PrintArticleENn.jhtml?itemNo=234513>>.

²³ Zaborsky, V., 'The MTCR's new Code of Conduct: a solution or a problem?', Center for International Trade and Security, URL <<http://www.uga.edu>>.

²⁴ Dutch Ministry of Foreign Affairs, 'International Conference against ballistic missile proliferation in The Hague comes to a conclusion', Press Release, 26 Nov. 2002, available at URL <http://www.minbuza.nl/default.asp?CMS_ITEM=>>.

²⁵ It was decided at Ottawa to delete any text that could indicate that the subscribing states had any intention to enter into a legally binding agreement, rather than inserting a provision that would explicitly declare the non-legal nature of the document.

Charter and the role and responsibilities of the UN in the field of international peace and security. It is probable that these references, apart from highlighting the significance attached by some states to the role of the UN, were also inserted in order to allay apprehensions that the provisions of the ICOC could be used as a pretext for the use of force in contravention of the relevant provisions of the UN Charter. The preamble notes the widespread concern about the proliferation of WMD and their means of delivery and the increasing regional and global security challenges related to the proliferation of ballistic missiles, specifically. It also notes that the ICOC will strengthen existing national and international security arrangements and disarmament and non-proliferation objectives and mechanisms. During the drafting process effort was devoted to the task of ensuring that the ICOC would not return to 'haunt' the MTCR by challenging its existence. This was achieved by noting that the ICOC would complement existing non-proliferation mechanisms (including the MTCR) rather than become a substitute for them. The draft ICOC not only focused on the non-proliferation of ballistic missiles, but also included an element of 'rollback' of existing missile programmes by means of positive cooperation (e.g., subsidized launch services) for those states that forgo ballistic missiles and SLVs. During the multilateralization phase it became evident that the section on international cooperation was perceived by non-members as vague and the notion of 'buying out' missile programmes as contentious in light of the civilian uses of SLVs. The section was therefore deleted and a paragraph was included in the preamble which states that 'subscribing States may wish to consider engaging in cooperative measures among themselves'.

Principles and general measures

The section on principles lists points agreed by the subscribing states. It notes the need to prevent and curb the proliferation of ballistic missiles capable of delivering WMD and the need to continue pursuing appropriate international endeavours to this effect—the first time in a multilateral instrument that this has been explicitly recognized. Despite the absence of universally recognized norms on missiles in all their aspects, the development of the ICOC did not occur in a normative vacuum. A number of UN treaties and resolutions adopted by the General Assembly establish important legal principles governing the use of outer space.²⁶ One such legal principle recognized in the ICOC is that states should not be excluded from utilizing the benefits of space for peaceful purposes. However, the ICOC adds that, in reaping such benefits and in conducting related cooperation, states must not contribute to the proliferation of ballistic missiles capable of delivering WMD. The ICOC also recognizes that SLV programmes should not be used in order to conceal ballistic missile programmes.

The subsequent section of the ICOC outlines general measures, phrased as commitments, that the subscribing states resolve to implement, such as agreeing to curb and prevent the proliferation of ballistic missiles capable of delivering WMD. The inclusion of this commitment in the ICOC is a significant development. It applies both at a global and at a regional level and includes multilateral, bilateral and national endeavours. However, the ICOC does not provide a specific definition of the types of missile

²⁶ E.g., the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies. The relevant instruments are compiled in the volume *United Nations Treaties and Principles on Outer Space* (United Nations: Vienna, 1999).

to which it applies, although it lists ‘ballistic missiles’, ‘ballistic missiles capable of delivering weapons of mass destruction’ and ‘space launch vehicles’.²⁷ Previous definitions of the material field of application have usually focused on the range of the missile and its payload. Taking into consideration the ICOC’s origin, it would have been reasonable to draw on the parameters used within the MTCR. However, this was not deemed to be politically feasible. It was also felt that the inclusion of a specific definition of the material field of application would invite lengthy discussions on technical issues. It was acknowledged that while unmanned air vehicles (UAVs)—such as cruise missiles and target drones²⁸—may be used for the delivery of WMD, to include them in the ICOC would have risked delaying its launch. During the drafting process an attempt was made to avoid letting an overly detailed definition of the material field of application become ‘a trap for the innocent and a signpost to the guilty’. The ICOC therefore sets no parameters for range or payload. Nonetheless, it is evident that this lack of definition may lead to future controversy. While UAVs would not fall under the ICOC, it is unclear whether sounding rockets would do so.²⁹ Historical experience from the spread of sounding rockets indicates that they may pose a proliferation concern.³⁰

International norms prescribing restrictions on the possession of ballistic missiles are few and emanate either from bilateral arms control agreements related to certain classes of missile³¹ or from multilateral peace agreements which established ‘rocket bans’ in relation to particular states.³² The ICOC calls upon the subscribing states to ‘exercise maximum possible restraint in the development, testing and deployment of Ballistic Missiles capable of delivering weapons of mass destruction, *including, where possible, to reduce national holdings of such missiles*, in the interest of global and regional peace and security’ (emphasis added). The wording in italics constitutes the first instance of a generic commitment to reduce existing inventories of ballistic missiles capable of delivering WMD in a multilateral instrument. However, it is in a non-legal form and qualified by the wording ‘where possible’—leaving ample room for subjective assessments. Nevertheless, the United States deemed it necessary to declare at the launching conference that it ‘understands this commitment as not limiting our right to take steps in these areas necessary to meet our national security requirements consistent with U.S. national security strategy’.³³

²⁷ SLVs and ballistic missiles are self-sustained flight vehicles which carry their fuel and oxidizer internally and boost their payloads to high velocity. After engine burnout, the payload continues on an unpowered ballistic trajectory either into orbit or to a target on earth. *The Missile Technology Control Regime: Annex Handbook* is available at Federation of American Scientists (FAS), ‘Missile Technology Control Regime (MTCR) texts’, URL <http://www.fas.org/nuke/control/mtr/text/mtr_handbook.pdf>, p. 1-1.

²⁸ ‘Unmanned air vehicles (UAVs) are typically air-breathing vehicles which use aerodynamic lift to fly and thereby perform their entire mission within the earth’s atmosphere.’ *The Missile Technology Control Regime: Annex Handbook* (note 27), pp. 1-5–1-6. See also chapter 12 in this volume.

²⁹ Sounding rockets are used to gather scientific data in the upper atmosphere. The MTCR distinguishes between ‘ballistic missiles’, ‘space launch vehicles’ and ‘sounding rockets’. The first 2 are covered by the ICOC.

³⁰ See Karp (note 7), pp. 56–66.

³¹ E.g., the 1987 US–Soviet Treaty on the Elimination of Their Intermediate-Range and Shorter-Range Missiles (INF), *International Legal Materials*, vol. 27 (1988), p. 90.

³² E.g., the 1947 Peace Treaty with Italy (Article 51) and the 1947 Peace Treaty with Finland (Article 17). Their present status is discussed in Tanner, F. (ed.), *From Versailles to Baghdad: Post-War Armament Control of Defeated States* (United Nations Institute for Disarmament Research: New York, 1992).

³³ US Department of State, ‘International Code of Conduct Against Ballistic Missile Proliferation’, John R. Bolton, Under Secretary for Arms Control and International Security, Remarks at the launching

The ICOC calls upon the subscribing states to exercise vigilance in the consideration of assistance to SLV programmes in another country in order to prevent contributing to the development of WMD delivery systems (the underlying concern is that SLV programmes may be used to conceal ballistic missile programmes as a result of technological similarities between the two missile types). The most fundamental problem raised during the drafting and subsequent multilateralization phase of the ICOC relates to the dual-use character of missile technology. Some states hold the view that there is a more or less complete technological equivalence between ballistic missiles and SLVs. Other states argue that there is a discernible difference and that it is possible to engage in cooperation for peaceful purposes. In terms of functional equivalence, there is only a limited possibility that states would engage in cooperation with respect to SLVs without simultaneously engaging in technology transfers that would contribute to the development of ballistic missiles. This issue is directly linked to the question of which incentives may be offered to states that decide to relinquish ballistic missiles while seeking to maintain an SLV programme. Most existing arms control and non-proliferation instruments strike a balance between military uses of technology, which are to be constrained, and peaceful uses, which are to be facilitated. One issue that will undoubtedly play a prominent role in future attempts to address ballistic missile non-proliferation is the question whether it is possible to achieve an acceptable balance between these interests in the field of missile technology.

The subscribing states have also made a commitment not to contribute to, support or assist any ballistic missile programme in countries which might be developing or acquiring WMD. However, there is a caveat to this general measure—it applies when the development or acquisition of such weapons are in contravention of: (a) norms established by international disarmament and non-proliferation treaties; or (b) obligations assumed by the countries that are parties to such treaties. Prima facie, the wording of this provision may seem odd, as it implies that, under the ICOC, it would be acceptable to give assistance to ballistic missile programmes in ‘hold-out’ countries—such as India, Israel and Pakistan—which remain outside the NPT. The provision can be explained by the desire to enable the participation of such states in the ICOC.

Transparency measures

The ICOC specifies transparency measures, ‘with an appropriate and sufficient degree of detail’, as the tool for increasing confidence in the peaceful nature of SLV programmes and to promote the non-proliferation of ballistic missiles. With regard to ballistic missiles, the ICOC states that the subscribing states should make an annual declaration providing an outline of their ballistic missile policies, such as ‘relevant information’ on ballistic missile systems and land test-launch sites. The ICOC does not state what would constitute such relevant information and ample room is left for the submitting state to decide. The subscribing states are also asked to provide annual information on the number and generic class of ballistic missiles which they have launched during the preceding year in accordance with the pre-launch notification mechanism to be established under the ICOC.

With respect to expendable-SLV programmes (i.e., excluding non-expendable SLV systems such as the space shuttle), and consistent with commercial and economic confidentiality principles, the subscribing states are requested to make an annual declaration providing an outline of their SLV policies and land test-launch sites. In addition, they are required to provide annual information on the number and generic class of SLVs launched in the preceding year, as declared in conformity with the pre-launch notification mechanism. In contrast to the transparency provision for ballistic missiles, the subscribing states may also invite international observers to their SLV launch sites on a voluntary basis (and are allowed to determine the degree of access permitted).

The ICOC establishes a pre-launch notification mechanism that covers both ballistic missiles and SLVs. As originally envisaged, this section would virtually have replicated the US–Russian Memorandum of Understanding on Notifications of Missile Launches, which establishes a pre- and post-launch notification system (PLNS)³⁴ to be operated under the Joint Data Exchange Center (JDEC).³⁵ Because the implementation of that agreement was delayed, it was decided to include a general provision in the ICOC on the matter while leaving open the possibility for states to further develop pre-launch notifications. The subscribing states commit themselves to exchange pre-launch notifications of their ballistic missile and SLV launches and test flights. These notifications should include such information as the generic class of the ballistic missile or SLV, the planned launch notification window, the launch area and the planned direction.

During the MTCR phase of the development of the ICOC, concerns were expressed by some states that a country of concern could subscribe to the ICOC and use it to ‘justify’ or ‘legitimize’ its ballistic missile programme. In order to preclude such a course of action it was decided to include the wording that the ‘implementation of the above Confidence Building Measures does not serve as justification for the programmes to which these Confidence Building Measures apply’.³⁶ In the absence of universally accepted norms or instruments which stigmatize the acquisition of ballistic missiles as unjustified, the logic of this provision is debatable.

VI. Conclusions

Towards the end of the 1990s, international efforts to stem the proliferation of ballistic missiles were described as a ‘lost cause’.³⁷ In 1999 the Secretary-General of the United Nations highlighted the need for multilaterally negotiated norms against the proliferation of ballistic missiles.³⁸ It appeared improbable then that a multilateral instrument dealing with the non-proliferation of ballistic missiles would be in place

³⁴ US–Russian Memorandum of Understanding on Notifications of Missile Launches, Brussels, 16 Dec. 2000, reproduced in Conference on Disarmament document CD/1640, 15 Feb. 2001.

³⁵ Russian–US Memorandum of Agreement on the Establishment of a Joint Center for the Exchange of Data from Early Warning Systems and Notifications of Missile Launches, Moscow, 4 June 2000, reproduced in Conference on Disarmament document CD/1617, 21 June 2000.

³⁶ In both the Helsinki and the Ottawa versions of the draft ICOC, the heading for this section was ‘Confidence building measures’. However, perhaps as a gesture towards those states that did not wish the inclusion of such measures, the version adopted in The Hague refers to ‘Transparency measures’.

³⁷ Speier, R., ‘Can the Missile Technology Control Regime be repaired?’, ed. J. Cirincione, *Repairing the Regime: Preventing the Spread of Weapons of Mass Destruction* (Routledge: New York, 2000), p. 205.

³⁸ United Nations, ‘Secretary-General stresses need for multilaterally negotiated norms against development of missiles’, Press Release SG/SM/6960, 15 Apr. 1999.

just three years later. The ICOC has brought about a qualitative change, but in the final analysis it must be described as a qualified success.

Taking into consideration the special circumstances that surrounded the multilateralization process, it is remarkable that over 90 states subscribed to it so soon—almost 60 non-MTCR states joined the initiative. Even so, this represents only about half of the states of the world. More important than the number of states that joined the ICOC is the fact that a majority of those states whose participation was especially desirable did not join, the only exception being Libya. None of the states that have been identified as actively seeking the capacity to build long-range ballistic missiles—India, Iran, Iraq, Israel, North Korea and Pakistan—joined the ICOC. Hence, there are still no universal norms for responsible missile technology transfers that apply to technology holders which remain outside the MTCR. It is noteworthy that one member of the MTCR, Brazil, did not join the ICOC. It can be questioned whether a more inclusive and longer multilateralization phase, incorporating formal negotiations on the basis of consensus, would have convinced some of these states to join. For many states the ICOC was not perceived as the final answer to the problem of ballistic missile proliferation, but rather as a first step. It is a first step which has amply demonstrated the issues that ought to be tackled in future efforts.