

# **The Proliferation of International Nuclear Law's Actors: Resolution 1540 and the Security Council's Fight Against Weapons of Mass Destruction Falling into Terrorists' Hands**

by Bruno Demeyere\*

*"To conclude a treaty would take forever,  
and it would probably never enter into force. (...)  
Getting the real countries to sign on (...)  
would take forever. (...)  
A multilateral treaty structure is not necessary.  
What is needed is a common understanding  
of the items that should be controlled."*<sup>1</sup>

## **Introduction**

23 September 2003: President Bush, turning the protester into a partner during his annual speech in front of the United Nations (UN), asks "the UN Security Council to adopt a new anti-proliferation resolution" compelling Member States "to criminalise the proliferation of Weapons of Mass Destruction" (WMD).<sup>2</sup> While WMD were one of the contentious issues during the run-up to

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1. Cummings, Edward (US State Department, Legal Adviser), in *Proceedings of the 89th Annual Meeting of the American Society of International Law*, 1995, p. 380.
2. President Addresses UN General Assembly, 23 September 2004, at the following URL: [www.state.gov/p/io/rls/rm/2003/24321.htm](http://www.state.gov/p/io/rls/rm/2003/24321.htm) in which President Bush also requested the UN Security Council "to enact strict export controls consistent with international standards, and to secure any and all sensitive materials within (states') own borders" and declared that "The United States stands ready to help any nation draft these new laws, and to assist in their enforcement".

the 2003 Iraq war, states' common interest in a unified approach in the post-9/11 security environment triggered, following the American president's appeal, diplomatic negotiations, concerted action and, eventually, a single document.

28 April 2004: The Security Council (SC) unanimously adopts Resolution 1540 entitled "Non-Proliferation of WMD".<sup>3</sup> The terrorist attacks perpetrated in Madrid on 11 March 2004 are fresh on everyone's minds. While not mentioned as such in its title, the resolution is intended as an anti-terrorist measure, as it explicitly aims to close an international legal loophole<sup>4</sup> by proactively ensuring from a legal point of view that non-state actors cannot get their hands on WMD materials. Indeed, all international arms treaties adopted so far are exclusively designed to curtail proliferation between states and, legally speaking, do not address the issue of WMD being transferred to or among non-state actors.<sup>5 6</sup>

Given the post-Cold War security environment, no longer characterised by two opposing superpowers but by a multi-polar world in which some states and an unknown number of non-state actors openly seek to acquire WMD capabilities, the inherited state-centric focus adopted by arms control treaties began to look increasingly anachronistic, taking into account the threat of WMD terrorism and in light of the fact that it is often those states remaining outside the treaty regimes which are of most concern.<sup>7</sup>

While a few well-known exceptions remain on the table and rightly cause concern, the vast majority of states are now committed to not acquiring any WMD by virtue of their membership in and – in certain cases monitored – compliance with the major relevant treaty regimes.<sup>8 9</sup> Most analysts agree that the threats posed by rogue states are pale compared to the threat posed by terrorists willing to die and kill on a large scale.<sup>10</sup> Recognising this assessment of threats, this is the point where Resolution 1540 steps in.

This paper analyses Resolution 1540 with a specific focus on nuclear materials and on nuclear weapons – one of the three types of weapons included under the resolution's general "WMD" heading – as they are being dealt with under current international nuclear law. In a Part I, an analysis will be made of states' main obligations under the resolution to refrain from helping non-state actors in gaining access to WMD on the one hand, and to adopt legislation prohibiting non-state actors from

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3. The full text of this resolution can be accessed at the following URL: [www.un.org/Docs/sc/unsc\\_resolutions04.html](http://www.un.org/Docs/sc/unsc_resolutions04.html) and is reproduced in the chapter "Texts" of this *Bulletin*.
  4. Global Policy Forum, *Security Council Approves Resolution to Deny Terrorists WMD*, 29 April 2004, at the following URL: [www.globalpolicy.org/empire/terrorwar/un/2004/0429wmd.htm](http://www.globalpolicy.org/empire/terrorwar/un/2004/0429wmd.htm).
  5. Zagaris, Bruce, "UN Security Council adopts Resolution to Prevent Proliferation of Mass Destruction Weapons (sic)", *International Enforcement Law Reporter*, July 2004.
  6. Fidler, David, "International Law and Weapons of Mass Destruction: End of the Arms Control Approach?", *Duke Journal of Comparative and International Law*, Winter/ Spring 2004, p. 57.
  7. Fidler, David, *op.cit.*, p. 64.
  8. Non-Proliferation Treaty (1968), Comprehensive Nuclear Test Ban Treaty (1996), Chemical Weapons Convention (1993) and the Biological Weapons Convention (1972).
  9. Thakur Ramesh and Newman Edward (ed.), *New Millennium, new perspectives: the United Nations, security, and governance*, *United Nations University Press*, 2000, p. 132.
  10. Imai Ryukicki, *Weapons of Mass Destruction: Major Wars, Regional Conflicts, and Terrorism*, *Asia-Pacific Review*, Vol. 9, No. 1, 2002, p. 98-99.

having any sort of contact with WMD, on the other hand. Part II assesses the obligations states have under the resolution in the field of domestic and export control, in order to prevent illicit trafficking and to combat black markets in nuclear material. Having outlined the basic obligations states have under the resolution, Part III intends to put this resolution in both a historic and an international legal perspective by briefly retracing the UN's record in terms of addressing threats posed by WMD and the approach taken by the SC in adopting Resolution 1540. Indeed, the fact that this resolution has been adopted under Chapter VII of the UN Charter and that it compels all Member States to adopt domestic legislation, is far from being controversial. Part IV tries to assess, in a more systematic way, what the resolution's major advantages are and by which vision it is inspired in terms of international law and the UN's role against the proliferation of WMD – to the detriment of disarmament? In this part, the role of the “1540 Committee”, established by the resolution in order to oversee its implementation, will be placed in the broader perspective of other actors involved in non-proliferation issues, with particular emphasis on the relationship with the International Atomic Energy Agency (IAEA) and the Nuclear Suppliers Group (NSG).

Given constraints of space, the very relevant and related “Proliferation Security Initiative”<sup>11</sup> (PSI) will not be analysed in this article. Still, it is important to mention that the *idea* of this initiative has been implicitly endorsed by the resolution.<sup>12</sup> The fact that Resolution 1540 has increased the legitimacy of the PSI has almost immediately triggered a certain number of states to declare their supporting, if not joining, the Initiative.

Throughout this article, the perspective is to underline the controversies and debates the resolution's negotiation generated while situating the resolution within previously existing international nuclear law: does it change, reinforce or merely reiterate the latter? Looking ahead, questions are raised as to how this resolution could influence the enforcement of international legal norms for the non-proliferation of nuclear weapons: are we entering a new era, leaving behind the era of nuclear non-proliferation norms being enforced in a less than lacklustre way?

## **Part I. Prohibition of assisting terrorists and the requirement to criminalise their actions: the Resolution's commandments**

### *To which substances does the resolution apply and will it be applied to all?*

Before analysing the Resolution's substantive content outlined in its paragraphs 1 and 2, it is appropriate to underline here that the concept of “Weapons of Mass Destruction” (WMD), used in the resolution, includes both nuclear, chemical and biological weapons. Thus, at least implicitly, this concept does not include radiological weapons (dirty bombs), a type of weapon which is occasionally included in the definition of WMD.<sup>13</sup> Still, this approach taken by the resolution is in line with the

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11. For an excellent analysis, see Michael Byers, “Policing the High Seas: The Proliferation Security Initiative”, *American Journal of International Law*, Vol. 98, No. 3 (July 2004), p. 526; see also [www.proliferationsecurity.info](http://www.proliferationsecurity.info).

12. See in particular Resolution 1540, paragraph 10. It must be emphasised that this paragraph explicitly provides that such “co-operative action” must be taken “consistent with international law”. In this respect, it may be noted that the introduction before the first of four “Interdiction Principles for the Proliferation Security Initiative”, available at [www.proliferationsecurity.info](http://www.proliferationsecurity.info), states that these Principles are “consistent with national legal authorities and relevant international law and frameworks, including the UN Security Council.” (emphasis added).

13. David P. Fidler, “Weapons of Mass Destruction and International Law”, *American Society of International Law Insights*, 97, February 2003, at [www.asil.org/insights/insigh97.htm](http://www.asil.org/insights/insigh97.htm).

December 2004 Report of the UN Secretary-General's High-Level Panel on Threats, Challenges and Change which explicitly states that radiological weapons "are more weapons of mass disruption than mass destruction."<sup>14</sup> Furthermore, one should note that the obligations of paragraphs 1 and 2, discussed immediately below, equally apply to the means of delivery<sup>15</sup> of nuclear, chemical and biological weapons.

While no one will contest the decision that "WMD" applies to nuclear, chemical and biological weapons, this still does not solve the problem of which products fall under each of these three categories.

One can read Resolution 1540 any way one wants, but every reading makes it all the more painfully clear that the resolution does anything but give us a clear sense of which items fall under its scope of application. While certain substances will undoubtedly qualify under one of these three categories, such an empiric "we know it when we see it" approach might become untenable once the less obvious cases arise. In the absence of any indication that Resolution 1540 would be a mere framework resolution, construing these terms might become contentious – especially as we have 191 states potentially having their own views on a given item's characterisation.

Equally before analysing the resolution's substantive obligations, one should consider the latter in light of the procedural framework in which these obligations are inserted. Indeed, states always find it easier to apply, within the realm of international law and with the sceptre of perceived greater legitimacy this mode of action entails, their daily domestic business: targeting non-state actors by using the state as the first line of control, guardian which is in this case being guarded by a specially established Committee of the Security Council. This Committee has a two-year mandate, whereby all states had to submit by 28 October 2004 a report "on steps they have taken or intend to take to implement this resolution".<sup>16</sup> As of mid-April 2005, about 112 states had submitted such a report.<sup>17</sup> The particular relationship between the Committee established by the SC and the SC itself needs to be emphasised. Indeed, according to paragraph 4 of the resolution, the Committee shall "report to the Security Council for its examination, on the implementation of this resolution". Thus, the Committee manages the process set in motion by Resolution 1540 and reports thereupon to the SC, which will in the end be the organ having the competence to examine states' compliance and make decisions where necessary.

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14. 2004 Report of the UN Secretary-General's High-Level Panel on Threats, Challenges and Change, December, page 39, para. 113, available at [www.un.org/secureworld](http://www.un.org/secureworld). In the same paragraph, the Panel adds that "there is a premium on educating the public about the limited consequences of radiological weapons in order to mitigate some of the alarm and uncertainty that would be unleashed in the event of an attack."

15. "Means of delivery" are defined "for the purpose of this resolution only" as "missiles, rockets and other unmanned systems capable of delivering nuclear, chemical or biological weapons, that are specifically designed for such use".

16. UN Security Council Resolution 1540, 28 April 2004, paragraph 4. On 11 June 2004, the chairman (Ambassador Motoc from Romania) and Vice-Chairman (Ambassador Baja from the Philippines) of the Committee were elected (UN Security Council document S/2004/472).

17. See the page on "National Reports" on the Web site of the 1540 Committee, available at: <http://disarmament2.un.org/Committee1540/report.html>.

The key of this resolution's significance lies in the monitoring of its implementation:<sup>18</sup> this is not a mere paper regime. However, the onus of implementing this resolution rests upon states<sup>19</sup> that wanted to make it explicitly clear that the Committee should not undercut, conflict or alter the mandates of multilateral treaty-established organisations or the role of States Party thereto.<sup>20</sup> Thus, the resolution is to be interpreted, according to its drafters, as complementary to rather than in contradiction with existing regimes and their efforts to curb proliferation and to monitor disarmament.

Leaving aside the uncertainties for the certainties, it is beyond doubt that paragraphs 1 and 2 of Resolution 1540 are at the core of the resolution's operative part, the first containing an obligation of abstention applicable to states, the latter containing an obligation for each state to enact domestic legislation. To what extent do these two paragraphs go beyond existing "hard law" treaties? Or, to phrase the question differently: why has Resolution 1540 been so widely heralded as a major step forward?

### ***Paragraph 1: Refrain from support to non-state actors***

In Paragraph 1, the SC:

"decides that all states shall refrain from providing any form of support to non-state actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery;" (emphasis added)

Through this wording, the resolution goes beyond the text of the "non-assistance commitment" of Article I of the Treaty on the Non-Proliferation of Nuclear Weapons (1968) (NPT), as the latter article is only applicable to nuclear-weapon states as they are defined under Article 9(3) of the NPT (*de facto* the Permanent Five of the SC), these states are bound by the commitment of this Article I "not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices" (emphasis added). At the same time, as far as nuclear-weapon states are concerned, while they are prevented ever since the NPT from transferring to both state and non-state actors, Resolution 1540 prohibits the much wider concept of "providing any form of support".

The bottom-line problem is that there is, apart from the NPT Review Conference held once every five years, no treaty mechanism which explicitly establishes a system to check compliance with Article I.<sup>21</sup> Under Resolution 1540, to the contrary, all states, irrespective of their official or unofficial nuclear weapons programme and of their being a party to the NPT or not, are bound by this obligation

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18. Bruce Zagaris, "UN Security Council adopts Resolution to Prevent Proliferation of Mass Destruction Weapons" (sic), *International Enforcement Law Reporter*, July 2004.

19. Cf. the remarks made in this respect by Ambassador Baja (Philippines) at the 4950<sup>th</sup> meeting of the SC of Thursday, 22 April 2004 at 9:50 a.m. (S/PV.4950).

20. UN SC Resolution 1540, paragraph 5: (the Security Council) "decides that none of the obligations set forth in this resolution shall be interpreted so as to conflict with or alter the rights and obligations of States Parties to the Nuclear Non-Proliferation Treaty, the Chemical Weapons Convention and the Biological and Toxin Weapons Convention or alter the responsibilities of the International Atomic Energy Agency or the Organization for the Prohibition of Chemical Weapons."

21. Serge Sur (ed.), "Disarmament and Arms Limitation Obligations: Problems of Compliance and Enforcement", UNIDIR, 1994, p. 255.

*vis-à-vis* non-state actors. Thus, the *status quo* for those states outside the NPT<sup>22</sup> remains that they are not bound by any restriction as regards assisting other state actors that are equally outside the whole system. On the other hand, as Resolution 1540 takes the point of view of the entity possessing the materials *vis-à-vis* the entity desirous to gain access to them and not the other way around, Resolution 1540 does not change anything to Article II of the NPT, according to which “each non-nuclear-weapon State Party to the treaty undertakes not to receive the transfer of nuclear weapons.”

### ***Paragraph 2: Adopt and enforce domestic legislation***

Whereas the content of the obligation contained in the resolution’s paragraph 1 is rather straightforward, many more questions are being raised in respect of paragraph 2 and will undoubtedly be raised when it comes to assessing a given state’s compliance with this paragraph. In paragraph 2 – as this paragraph gives teeth to the Resolution and is without any doubt the most important provision – the SC:

“Decides (...) that all states, in accordance with their national procedures, shall adopt and enforce appropriate effective laws which prohibit any non-state actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes, as well as attempts to engage in any of the foregoing activities, participate in them as an accomplice, assist or finance them.” (emphasis added)

Textually at least, this paragraph contains no reference whatsoever as to whether the said law should be of a criminal law nature. From the resolution’s preparatory works and from its sponsors’ views, however, it is unequivocally clear that this is the intention. The qualification “in accordance with their national procedures” explicitly allows for each national system to decide on the degree of punishment, within the resolution’s framework. This seeming tolerance for national systems’ diversity should not let us forget, as a letter from the 1540 Committee’s chairman to the president of the SC indicates, that the resolution does impose “binding far-reaching obligations on all Member States”.<sup>23</sup> As will be further analysed below, while falling short of being a true global legislator, the SC has indirectly acted as such, since it virtually compels all nationally competent bodies to adopt domestic legislation which should contain certain elements. Still, paragraph 2 leaves wide open all sorts of discussions as to whether a given law satisfies the requirement that it be both appropriate and effective. How appropriate are effective laws and how effective are appropriate laws?

On paper at least, adopting domestic legislation should be coupled with its effective implementation, the resolution containing a requirement to “enforce” those laws. Further on in the same paragraph the mention of “in particular for terrorist purposes” indicates once again that this resolution is to be considered as being part of each state’s national legal framework of anti-terrorism measures which should be *enforced*. If ever any doubt would have remained after Resolution 1373 (2001), which will be further dealt with below in the section on the use of Chapter VII by the SC: tolerating, harbouring or assisting terrorists is no longer an option for any state.

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22. India, Israel, Pakistan and, if one follows the opinion of those accepting that state’s notice of withdrawal from January 2003, North Korea.

23. Letter dated 8 December 2004 from the Chairman of the Security Council Committee established pursuant to Resolution 1540 (2004) addressed to the President of the Security Council, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N04/639/39/PDF/N0463939.pdf?OpenElement>.

Despite the seemingly wide range of activities covered by paragraph 2, it must be pointed out from the perspective of international nuclear law that the resolution cannot boast the diversity of activities covered by Article 7 of the Convention on the Physical Protection of Nuclear Material<sup>24</sup> (CPPNM). However, concepts such as “theft”, “embezzlement” and “fraudulent obtaining”, contained in Article 7 CPPNM but not mentioned in Resolution 1540, will eventually be covered by the resolution’s more generic concept of “possess(ing)”. On the other hand, whereas “manufacture” does not need to be criminalised pursuant to CPPNM, it figures prominently in the second paragraph of Resolution 1540.

Although not obvious upon reading Article 7 CPPNM in isolation, this article remains subject to the convention’s limited scope. Indeed, pursuant to Article 2, paragraphs 1 and 2 CPPNM, the convention is only applicable to “nuclear material used for peaceful purposes while in international nuclear transport (or) while in domestic use, storage and transport” (emphasis added). Thus, one of the big shortcomings of the CPPNM, namely the absence of any obligation for states to criminalise anything related to military uses of nuclear material, equally affects the obligation to criminalise contained in CPPNM, Article 7. Fortunately but surprisingly given states’ well-known enthusiasm when it comes to creating circumstances favourable to military activities supported by the state, Resolution 1540 applies to nuclear material both within a civilian and military context.

While CPPNM and Resolution 1540 basically are similar from the point of view of substantive legal obligations, despite the exceptions mentioned, Resolution 1540 operates a real procedural revolution in the world of good intentions and poor compliance. Indeed, contrary to the Chemical Weapons Convention’s Article VII (“National Implementation Measures”) paragraph 5,<sup>25</sup> no agency performed the role of watchdog checking whether states actually did anything after having signed up to CPPNM in terms of ensuring the acts mentioned in its Article 7 were actually translated into a “punishable offence”, as requested by this Article. Given the mandate and mere existence of the Committee established pursuant to Resolution 1540, it is to be expected that the vast majority of UN Member States will at least demonstrate some good efforts to enact “appropriate effective laws”. In order to counter any *ex post facto* discussions whether a given domestic legislation satisfies these criteria, the SC could implement the recommendation of the High-Level Panel on Threats, Challenges and Change to the effect that “the Security Council, acting under its resolution 1540 (2004), can offer states model legislation for security, tracking, criminalization and export controls, and by 2006 develop minimum standards for United Nations Member State implementation”.<sup>26</sup> This could be coupled with an explicit confirmation from the practice which seems to have developed: Resolution 1540 is similar to a directive in European law, as the resolution is binding on Member States as regards its aims but it leaves to Member States the choice of ways and means of reaching these objectives.<sup>27</sup>

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24. INFCIRC/274/Rev.1, May 1980. As of 21 September 2004, this Convention had 106 Parties and 45 Signatories. See [www.iaea.org/Publications/Documents/Conventions/cppn\\_status.pdf](http://www.iaea.org/Publications/Documents/Conventions/cppn_status.pdf).

25. “Each State Party shall inform the Organization of the legislative and administrative measures taken to implement the Convention.”

26. 2004 Report of the UN Secretary-General’s High-Level Panel on Threats, Challenges and Change, December, p. 43, para. 136, available at [www.un.org/secureworld](http://www.un.org/secureworld).

27. Stefan Talmon, “The Security Council as World Legislature”, *American Journal of International Law*, Vol. 99, No. 1, January 2005, p. 193.

***Where are paragraphs 1 and 2 leading the international legal architecture for both anti-terrorism and anti-proliferation efforts?***

Despite their clearly different focus and function, both paragraphs 1 and 2 of Resolution 1540 have in common that they both suffer from a worrying uncertainty regarding the definitions of concepts used: are these concepts to be construed according to each national legal system's definitions, or do they receive an autonomous international meaning, applicable irrespective of any national legal tradition? This will be crucial in view of national differences in defining criminal law concepts such as "attempt" and "accomplice".<sup>28</sup> Which activities can be qualified as the bottom line of a "form of support to non-state actors"? It is to be hoped that the Committee in charge of overseeing the resolution's implementation will provide guidance in this respect.

A very recent development has come to corroborate the legal security architecture envisioned by Resolution 1540: on 13 April 2005, after several years of protracted negotiations, the UN General Assembly adopted the International Convention for the Suppression of Acts of Nuclear Terrorism.<sup>29</sup> While a separate analysis of this Convention is obviously outside the scope of the present paper, it must be emphasised that this convention basically proceeds from the same approach as the Resolution and that it will undoubtedly bolster both the definitional diversity and procedural enforcement mechanisms of the CPPNM. On the other hand, the proposed anti-terrorist Convention, which will be submitted for signature to states in September 2005, can under no circumstances be understood as being a substitute for the obligations states have under Resolution 1540. Indeed, the International Convention for the Suppression of Acts of Nuclear Terrorism basically aims to criminalise the unlawful possession or use of radioactive material "with the intent to cause death or bodily injury" or "with the intent to cause substantial damage to property or to the environment" [Article 2]. Given the explicit requirement of "intent" enshrined in the convention's text, the latter is much more limited than the objectively verifiable acts which are to be criminalised pursuant to Resolution 1540. At the same time, both the new convention and Resolution 1540 have managed to circumvent the well-known definitional problems surrounding the concept "terrorist", a universally-accepted definition of which has proven to be one of the major challenges facing international law. Thus, the drafters of the Convention on Nuclear Terrorism speak of "any person" who has a specified intent, while Resolution 1540 focuses on "non-state actors". Still, it is important to point out that, whereas certain aspects of the Convention on Nuclear Terrorism might already be incorporated into Resolution 1540 (which leaves some room for national authorities to manoeuvre in implementing it), it remains crucial that states explicitly adhere to the proposed convention. Indeed, the latter contains a provision of an international criminal legal nature [Article 7] and a provision pointing out which types of jurisdiction under international law a state should provide for vis-à-vis acts to be incriminated pursuant to the Convention on Nuclear Terrorism [Article 9] – both of which are aspects in respect of which Resolution 1540 is deficient. Therefore, the Convention on Nuclear Terrorism and Resolution 1540 need to be perceived as complementary instruments in the fight against nuclear terrorism.

It is clear that paragraphs 1 and 2 of the resolution reflect the 2002 American National Security Strategy's desire to create "new, strict standards for all states to meet in the global war against terrorism."<sup>30</sup> However, as will equally be argued at the end of Part II, the resolution falls short of combining the non-proliferation perspective with efficient and clear provisions of an international criminal law nature: while states are indeed obliged to criminalise certain activities within their

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28. Resolution 1540, paragraph 2 *in fine*.

29. For more information, see [www.un.org/law/terrorism/](http://www.un.org/law/terrorism/) and, more specifically, <http://daccessdds.un.org/doc/UNDOC/GEN/N05/295/27/PDF/N0529527.pdf?OpenElement>.

30. National Security Strategy of the United States (2002), point 18, at [www.whitehouse.gov/nsc/nss.html](http://www.whitehouse.gov/nsc/nss.html).



domestic criminal legislation and to enforce the enacted legislation,<sup>31</sup> it is uncertain whether this criminalisation needs to be based on the territorial and/or nationality principle of criminal jurisdiction.<sup>32</sup> The resolution most certainly does not require states to provide for universal jurisdiction over the activities enumerated in its paragraph 2. Furthermore, contrary to Articles 7 to 13 CPPNM, the Resolution is silent as to obligations belonging to the realm of international legal co-operation, for example in matters of fact-finding or extradition.

Despite these procedural weaknesses, which need not be a stumbling block on the road towards effective implementation, it must be emphasised that the resolution's paragraph 2 represents the new cornerstone in the previously existing security architecture by its criminalising actions of non-state actors. Indeed, the prohibitions embodied in the NPT, the Biological Weapons Convention and the Chemical Weapons Convention are directed to the actions of states, not individuals. Whereas the latter two contain, just like CPPNM, provisions compelling those states *which are a party to the treaty* to enact domestic legislation applicable to individuals falling under the scope of any of the principles for the exercise of jurisdiction allowed by the relevant treaty, all of the previously existing treaty regimes left international law's jurisdictional gaps wide open and provided for no fall-back solution in the event that an offender does not fall under any of the jurisdictional grounds provided for by those treaties due to a lack of nexus with the state desirous to exercise jurisdiction.<sup>33</sup> Theoretically at least, under the system designed by Resolution 1540, no offender should be beyond the reach of at least one state's criminal law, *if* all states implement the resolution and *if* the person can be effectively caught by one state. Otherwise, while the requirement of dual criminality should be automatically fulfilled where all states implement the resolution, there could still be extradition issues.

## **Part II: Domestic and Export Controls: Making the world a better place starts by monitoring your own borders**

As far as international nuclear law is concerned, Resolution 1540 has introduced a real revolution vis-à-vis the previously existing system of export control, recently labelled "deficient" on a number of occasions by the Director-General of the IAEA, Dr. Elbaradei. The said export control system relies on a system of informal clubs of countries, which are often deliberately far from universal in nature given their membership of both exporting and supplying countries, which make

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31. The concept of "enforce" is, like others used in this resolution, unclear: how much efforts must a state deploy before the Committee will be satisfied the state in question is "enforcing" the enacted legislation? It remains to be seen whether this obligation will be construed strictly, or whether we are evolving to a system similar to the one used in treaties enshrining social and political human rights ("second generation" rights), as exemplified by the International Covenant on Economic, Social and Cultural Rights (1966), Article 2 (1): "Each State Party (...) undertakes to take steps (...) to the maximum of its available resources, with a view to achieving progressively the full realization of (...) the present Covenant" (emphasis added).
  32. This is striking, especially in light of the Convention on Physical Protection of Nuclear Material, Article 8, which clearly provides for the enactment of criminal legislation based on the principle of territoriality and the principle of nationality.
  33. Michael P. Scharf, "Clear and Present Danger: Enforcing the International Ban on Biological and Chemical Weapons through Sanctions, Use of Force, and Criminalization", *Michigan Journal of International Law*, Spring 1999, 500, 506.

non-binding gentlemen's agreements, without any link between those export control systems and the existing verification system of the IAEA safeguards.<sup>34</sup>

For nuclear materials, most well-known is the Nuclear Suppliers Group (NSG)<sup>35</sup> with its Guidelines for Nuclear Transfers<sup>36</sup> containing an export 'trigger list' in respect of which governmental assurances about peaceful purposes are necessary. All listed nuclear materials and facilities have to be placed under physical protection.<sup>37</sup> Given its limited membership, the NSG has not been able to prevent numerous illicit traffic and smuggling networks in nuclear materials, the most recent and well-known example of such networks being the one headed by the Pakistani A.Q. Khan.

Whereas it is not new that concerns are being expressed in respect of the efficiency of the nuclear export control systems, the drastic extent to which Resolution 1540 aims to intervene in this area has almost passed unnoticed. First of all, paragraph 3 on export controls, one of the resolution's longest, *is* binding. The binding character of this provision is in line with the entire resolution, of course, but is reinforced by the paragraph's introductory concept "decides" and the exhortatory connotation this entails. Irrespective of whether this is a good or a bad thing, the fact is that the SC has created arms control law of a type that is usually only done through treaty negotiations or informal agreements among states.<sup>38</sup>

The obligations imposed by paragraph 3 apply to various stages and steps of the entire transportation cycle. Generally applicable is the requirement to "take and enforce effective measures to establish domestic controls". This general requirement is an end-goal, in respect of which states must *inter alia* take (a) measures to account for and secure WMD, (b) physical protection measures and (c) border controls (...) (against) illicit trafficking and brokering in WMD.

The word "effective" is used throughout this paragraph. This word's true meaning will have to be assessed depending on a state's specific situation. This, I would argue, places a higher burden of proof on countries which are of proliferation concern because of a worrying presence of non-state actors. Or, to drop names while recognising that in all cases an extremely high standard should apply, "effective" could be different in Norway from what should be expected from Pakistan. Still, as the implementation of this paragraph especially will have quite a significant price tag, such a higher standard of scrutiny can only be earnestly advocated where the states concerned are provided with the necessary international financial or logistical assistance. One could interpret in this sense paragraph 7, which "recognizes that some states may require assistance in implementing the provisions of this resolution within their territories and invites states in a position to do so to offer assistance (...)".

### ***"Appropriate effective physical protection measures" as the first line of defence***

Physical protection is the Achilles' heel of all efforts aimed at preventing WMD proliferation. Indeed, "the most effective, least expensive way to prevent nuclear terrorism is to lock down and

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34. Dr. Mohamed ElBaradei, "Nuclear Non-Proliferation: Global Security in a Rapidly Changing World", Carnegie International Non-Proliferation Conference, Washington DC, 21 June 2004.

35. [www.nuclearsuppliersgroup.org](http://www.nuclearsuppliersgroup.org).

36. INFCIRC/254.

37. Jozef Goldblat, *Arms Control: The New Guide to Negotiations and Agreements*, SIPRI, 2003, p. 117.

38. Jim Wurst, "Security Council Approves Resolution to Deny Terrorists WMDs", Global Policy Forum, 29 April 2004, at [www.globalpolicy.org/empire/terrorwar/un/2004/0429wmd.htm](http://www.globalpolicy.org/empire/terrorwar/un/2004/0429wmd.htm).

secure weapons and fissile materials in every country and every facility that has them”.<sup>39</sup> This rule of thumb has, however, been blatantly disregarded in 2003 in Iraq, where an enormous amount of explosives capable of detonating nuclear weapons remains missing due to an appalling lack of security, triggering justified concerns about their being in terrorists’ hands, eager to use them.<sup>40</sup>

Poor physical protection [i.e. non-compliance with paragraph 3(b)] quasi-automatically results in an impossibility to “account for and secure” WMD [i.e. non-compliance with paragraph 3(a)]. The resolution clearly addresses this link by requiring both. Whether intended to prevent state or non-state actors access to nuclear materials, *all* states now need to have such measures in place as a matter of international legal obligation, rather than a mere security option. Albeit indirectly, and while taking into account all concerns and objections that will be dealt with below, the resolution is strongly rooted into a classic international law structure, based on sovereign states, as it relies upon the national mechanism of all 191 UN Member States that need to prevent a leakage at the base: either terrorists themselves stealing nuclear material, or terrorists hiring formerly employed nuclear scientists to sell their ware and expertise.<sup>41</sup>

The “physical protection” prescribed by Resolution 1540 means a normative boost forward vis-à-vis *all* UN Member States, irrespective of their IAEA/NPT membership and of their accepting the IAEA Code of Conduct on the Safety and Security of Radioactive Sources.<sup>42</sup> This Code of Conduct is, for the time being, not legally binding from the point of view of public international law, as it remains at the stage of recommending IAEA Member States to take certain protective measures and to adopt certain legislation allowing for the safe and secure control over radioactive sources. To the extent that certain substances qualifying as “radioactive sources” under the Code of Conduct<sup>43</sup> can be integrated into objects falling under the Resolution’s scope of application, the Code of Conduct’s implementation will be greatly enhanced, even if this is not the case in respect of all of its provisions. The debate surrounding the question to what extent the Code of Conduct has any value in assessing a state’s compliance with Resolution 1540 is similar to the one about the normative value of previously existing, informal “export control” arrangements and will be addressed later on in this part.

### ***Border and Export Controls: Formalising the Informal?***

Paragraph 3(c) requires that all states, through “border controls and law enforcement efforts” tackle, “including through international co-operation”, “illicit trafficking and brokering”. Furthermore, paragraph 3(d) requires them to put in place “national export (...) controls”. In respect of the latter, it is explicitly stated that states should “establish and enforce appropriate criminal or civil penalties for violations of such export control laws and regulations” (emphasis added). Due to limitations of space,

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39. Sam Nunn, “Black Dawn: a WMD Terrorism Exercise”, 4 May 2004, Brussels, at [www.nti.org/c\\_press/speech\\_nunnbrussels\\_050404.pdf](http://www.nti.org/c_press/speech_nunnbrussels_050404.pdf).

40. James Glanz, William J. Broad and David Sanger, “Huge Cache of Explosives Vanished from Site in Iraq”, *The New York Times*, 25 October 2004; “IAEA; Tons of Iraq explosives missing”, CNN, 25 October 2004 ; David Sanger, “Iraq Explosives becomes Issue in Campaign”, *The New York Times*, 26 October 2004.

41. Paul Reynolds, “Nuclear Weapons: Can they be stopped?”, BBC News Online World Affairs, 18 October 2004.

42. Approved by the IAEA Board of Governors on 8 September 2003.

43. See the Code of Conduct’s Annex I: List of Sources Covered by the Code and Table I: Activities Corresponding to Thresholds of Categories.

the very interesting paragraph 3(d) falls beyond the scope of this contribution. However, it must be mentioned that, here again, the effect will be greatest vis-à-vis countries which remain outside the formal treaty regimes or outside the informal arrangements. In a similar way to issues mentioned in respect of paragraph 2, one should note that no guidance is given concerning the question of which legal system – and which body of law belonging to the latter – defines the concepts used in paragraph 3(d).

Worse however is the fact that the introductory part to Article 3 stipulates that this article's requirements also include that states "establish appropriate controls over related materials". As it is situated in the introduction to Article 3, this obligation applies to all parts of Article 3.

The concept of "related materials" is defined in a footnote as "materials, equipment and technology covered by relevant multilateral treaties and arrangements, or included on national control lists, which could be used for the design, development, production or use of nuclear, chemical and biological weapons and their means of delivery" (emphasis added).

By including such a wide-ranging definition, one sees once again that paragraph 3 should really be perceived as being intended to be comprehensive. By its using "or", the resolution seems to be suggesting, in line with general principles of international law, that in the event that a state has a "national control list" which falls under the lists of "treaties and arrangements", the latter should prevail. Indeed, the formal requirement of having such a national list should not be used as a way to circumvent the international community's best practices. Therefore, paragraph 6 "recognizes the utility in implementing this resolution of effective national control lists and calls upon all Member States, when necessary, to pursue at the earliest opportunity the development of such lists". (emphasis added)

However, what exactly are those "relevant multilateral treaties and arrangements", the lists of which will become crucial when assessing a state's compliance with the resolution?

As far as nuclear weapons are concerned, the "relevant multilateral treaties" seem to be the items falling under the scope of application of the Non-Proliferation Treaty and CPPNM. On the other hand, the relevant "arrangements" – usually far less common than hard law instruments in the field of arms control law<sup>44</sup> – seem to be both the Zangger Committee,<sup>45</sup> the Nuclear Suppliers Group<sup>46</sup> and, as far as the "means of delivery" are concerned, the Missile Technology Control Regime,<sup>47</sup> no matter how flawed the latter is.<sup>48</sup>

Having said this, the crux of the matter and real testing point will need to be addressed once legal definitions need to come alive amidst a world of international politics. First of all, all of the

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44. Richard Williamson, "Hard law, Soft law, and Non-Law in multilateral arms control: some compliance hypotheses", *Chicago Journal of International Law*, Spring 2003, p. 67.

45. [www.zanggercommittee.org](http://www.zanggercommittee.org).

46. However, the Nuclear Suppliers Group has adopted strict guidelines, rendering the Zangger Committee, at least from the outside, a superfluous arrangement. See Jozef Goldblat, *Arms Control: the new guide to negotiations and agreements*, Sipri, 2003, p. 119.

47. [www.mtrc.info](http://www.mtrc.info). One could also add, as far as biological and chemical weapons are concerned, the Australia Group: [www.australiagroup.net](http://www.australiagroup.net).

48. Richard Williamson, "Law and the H-bomb: Strengthening the non-proliferation regime to impede advanced proliferation", *Cornell International Law Journal*, 1995, p. 147.

mentioned “arrangements” are of a non-binding, political nature, otherwise referred to as “soft law”.<sup>49</sup> The prevailing view is that they do not amount to treaties and do not create rights and obligations binding under international law.<sup>50</sup> Second, these “arrangements” are extremely limited in terms of membership when compared to the UN’s 191 Member States, all of which are subject to the obligations of Resolution 1540.

Long before discussions about Resolution 1540 were in the air, criticism had already been voiced against these “arrangements”, labelling them as discriminatory “oligopolies – born in secrecy – (which constitute a) club of white countries”.<sup>51</sup> It cannot be denied that most of these regimes are composed of like-minded exporting/supplying states sharing policy goals and interests and that the opposite is true for certain (constellations of) states within the UN system, a factor hampering the development of an intense, cooperative export control regime.<sup>52</sup>

How will this (perceived) state of affairs interfere with the implementation of Resolution 1540? Uncertainty abounds, but it can be expected that those countries which consider they are being discriminated against by the “trigger list” of a given “arrangement”, precluding their procuring without difficulties certain items, will raise strong objections to any attempt considering these lists as having any binding or even indicative value when it comes to assessing whether a state has respected its obligations under Resolution 1540, paragraph 3. Doing so would indeed amount to giving them universally binding force, a normative upgrading which it is highly uncertain whether even these arrangements’ members would approve.

This analysis demonstrates one of the more general objections to so-called SC legislation: while the Council has indeed tried to define certain concepts (such as “related materials” and “means of delivery”), nothing has been said about how to construe “relevant multilateral treaties and arrangements”. These vague and unclear concepts could result in very slow implementation at the national level of 191 states, each of which will have to follow its national legislative procedures in order to give specific meaning thereto. On the other hand, just like European Union directives, this technique *does* leave a certain margin to national constituencies, possibly resulting in diverging interpretations of the very same concept around the globe...<sup>53</sup>

Still, the way the resolution currently stands demonstrates the first part of the quotation from Edward Cummings, mentioned at the very beginning of this paper.<sup>54</sup> Indeed, “a multilateral treaty structure is not necessary” in order to combat the proliferation of WMD. However, the quotation’s

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49. Richard Williamson, “Hard law, Soft law, and Non-Law in multilateral arms control: some compliance hypotheses”, *Chicago Journal of International Law*, Spring 2003, 63: “soft law consist of instruments that are not binding but are nevertheless declaratory of aspirational norms of international behavior.”

50. Christer Ahlström, “The Status of Multilateral Export Control Regimes: An examination of Legal and Non-Legal Agreements in International Co-operation”, *Iustus Förlag AB*, Uppsala, 1999, p. 20.

51. B. Chellaney, *An Indian Critique of US Export Controls*, 38 *Orbis* (1994), No. 3, p. 440-443, as quoted in Christer Ahlström, *op.cit.*, p. 309.

52. Christer Ahlström, *op.cit.*, 421-422.

53. See Stefan Talmon, “The Security Council as World Legislature”, *American Journal of International Law*, Vol. 99, No.1, January 2005, p. 188-192.

54. See footnote 1: “To conclude a treaty would take forever, and it would probably never into force. A multilateral treaty structure is not necessary. What is needed is a common understanding of the items that should be controlled.”

second part mentioned that “what is needed is a common understanding of the items that should be controlled.” As indicated above, this will be the *real* problem in implementing paragraph 3.

At least part of the solution may be found by stressing that the lists which are used by these arrangements have been elaborated by experts, and often represent a trade-off between the conflicting values of allowing the trade flow of dual-use goods for peaceful purposes, on the one hand, and preventing the same dual-use goods from being diverted for military applications, on the other hand. The lists certainly make sense from the perspective of an exemplary peace-loving state in the UN,<sup>55</sup> the *bonus pater familias* of international law. On the other hand, they are a threat to the domestic sovereignty and trade interests of those states which, while sincerely refusing any WMD programme whatsoever, want to promote trade interests (be it as producer or consumer) due to domestic constituencies’ pressure.

The Committee in charge of overseeing the implementation of Resolution 1540 will have to draw the fine line between using the experience and expertise of these arrangements and informal documents while at the same time having to avoid creating any impression of trying to impose their content on states, especially when they are not a party to them. At the same time, paradoxes arise when taking into account the fact that, at the end of the day when assessing the implementation of Resolution 1540 by a certain country, issues of state responsibility *will* be put on the table. Thus, it can be recommended to consider these informal arrangements in exactly the same way as they have been set up and want to be perceived. They are to be used as a carrot, not as a stick.

#### ***International criminal law as the weak point of the Resolution’s effectiveness?***

If ever Resolution 1540 is to become an effective instrument in the fight against nuclear smuggling and terrorism, it is vital to stress the interplay between its provisions on export control (paragraph 3) on the one hand and its provisions on the criminalisation of non-state actors (paragraph 2) on the other hand. The whole exercise will only manage to have any meaningful effect if these incriminations are indeed being applied in countries where law enforcement used to be non-existing vis-à-vis these issues. As previously indicated, one can only regret that, contrary to the CPPNM with its numerous law enforcement, co-operation and extradition provisions,<sup>56</sup> it seems like Resolution 1540 has neglected to bolster its effectiveness in relation to non-proliferation with provisions belonging to the realm of international criminal law and the realm of interstate cooperation in penal matters.<sup>57 58</sup> Rather than being discouraged by this deficiency, states should seize this opportunity to consider attempting to convert Resolution 1540’s content into the form of a multilateral treaty containing straightforward obligations to co-operate and extradite.

In the following part, the analysis will assess from various perspectives the very last phrase of the Preamble, namely that the SC is “acting under Chapter VII of the Charter of the United Nations.”

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55. Charter of the United Nations, Article 4: “Membership in the United Nations is open to all other peace-loving states.”

56. See especially Articles 7-13.

57. Cfr. the recommendations made in Barry Kellman and David Gualtieri, “Barricading the Nuclear Window – a Legal Regime to Curtail Nuclear Smuggling”, *University of Illinois Law Review*, 1996, p. 667.

58. This includes issues such as mutual legal assistance and effective extradition provisions or effective prosecution of offenders.

At the same time, the opportunity will be seized to assess the UN's actions, past and present, in the fight against WMD proliferation.

### **Part III: We have been here before: Chapter VII as the Security Council's magical tool in the fight against the use of WMD by terrorists?**

#### *The United Nations and WMD proliferation in light of nuclear terrorism*

The UN has a long history of engagement and disengagement with WMD, leading to mixed results in this field.<sup>59</sup> Despite certain efforts in this direction and certain committees/working groups being established, the UN did not take, as far as the Cold War period is concerned, non-proliferation and disarmament questions seriously enough,<sup>60</sup> although one could invoke in its defence the fact that the Organization was generally paralysed by the globe's divisive bipolarity. Overall, despite the UN's centrality in generating institutional responses to WMD threats, the SC has been irresolute when confronted with *concrete* WMD problems, mainly because of one of its Permanent Five members' threatening to use its veto.<sup>61</sup>

Waging the legal fight against nuclear terrorism was, when judged by the operational effects felt on the ground, all good intentions to foster treaty negotiations notwithstanding,<sup>62</sup> definitively not the main achievement of the New York and Geneva-based UN institutions. Voices were raised to ask whether the international community was taking full advantage of the UN.<sup>63</sup> This relative failure can be demonstrated by the fact that the most relevant instrument concluded so far in this field – the Convention on the Physical Protection of Nuclear Material – was concluded under the auspices of the Vienna-based IAEA – which, admittedly, does have strong links to the UN. It has only been since April 2005, with the UN General Assembly's adopting an International Convention for the Suppression of Acts of Nuclear Terrorism, that the UN has proven to be able to overcome some of the issues previously deadlocking it<sup>64</sup> though it remains to be seen how many states will sign up to this convention once they are offered the opportunity to do so in September 2005.

Overall, it is indeed the IAEA which should be credited for its having taken the lead, for example by its adopting, in 2002, a Plan of Activities to protect against Nuclear Terrorism,<sup>65</sup> designed to upgrade worldwide protection against terrorist acts involving nuclear and other radioactive materials by making the strong physical protection of nuclear facilities and materials the first line of

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59. Ramesh Thakur and Edward Newman (ed.), *op.cit.*, p. 144-146, 148.

60. Serge Sur (ed.), *Disarmament and Arms Limitation Obligations: Problems of Compliance and Enforcement*, UNIDIR, 1994, p. 105.

61. International Peace Academy, *Weapons of Mass Destruction and the United Nations: Diverse Threats and Collective Responses*, June 2004, at [www.ipacademy.org](http://www.ipacademy.org).

62. The Stanley Foundation, *The Role of the United Nations in Eliminating Weapons of Mass Destruction: Report of the Twenty-Seventh United Nations Conference*, 23-25 February 1996, p. 3.

63. The Stanley Foundation, *op.cit.*

64. See [www.un.org/law/terrorism/](http://www.un.org/law/terrorism/) and, more specifically, <http://daccessdds.un.org/doc/UNDOC/GEN/N05/295/27/PDF/N0529527.pdf?OpenElement>.

65. For this and other IAEA initiatives, see [www-ns.iaea.org/security/](http://www-ns.iaea.org/security/), especially the IAEA DG's report of 12 August 2002, GOV/INF/2002/11-GC(46)/14.

defence against nuclear terrorism.<sup>66</sup> The IAEA also adopted, in 2003, a Report on Measures to Protect against Nuclear Terrorism.<sup>67</sup>

The post-Cold War period, characterised by its relief from the previous Armageddon mentality,<sup>68</sup> proved capable of overcoming the previously existing tension, as demonstrated by the Conference on Disarmament's successfully negotiating the Chemical Weapons Convention (1993) and the – so far not yet entered into force – Comprehensive Test Ban Treaty (1996). It was also during this period that the SC adopted Resolution 984 (1995)<sup>69</sup> which took note of the security safeguards provided by the nuclear weapons states in their commitment to not using nuclear weapons against non-nuclear weapons states *if* the latter are parties to the NPT. Also in 1995, the NPT Review Conference decided to indefinitely extend the treaty.

The wake up call of 9/11 was immediately<sup>70</sup> answered by the UN Secretary-General, who called upon the General Assembly to react to the risks posed by terrorist attacks using biological or nuclear weapons.<sup>71</sup> For once and for all, the UN was to become a strong player in the fight against WMD proliferation. Obviously, legal initiatives' effectively being adopted and implemented are entirely subject to political considerations and momentum. It suffices to recall the regrettable example of the United States of America's curtailing, in one blow in 2001, year long efforts to finally provide the Biological Weapons Convention with an institutional structure in charge of verifying compliance.<sup>72</sup>

Despite some regrettable setbacks in this period, it would have been an unforgivable mistake not to seize the window of opportunity suddenly offered by the Bush administration in the aforementioned September 2003 speech. Fortunately, the UN *has* acted by virtue of SC Resolution 1540.

Certainly, the UN's action deserves to be commended: it is the only institution in today's world capable of serving the disaggregated interests of its Member States, all of which have multifaceted disarmament and non-proliferation goals. Put bluntly while bearing in mind the presence of non-state actors in countries of concern such as Pakistan and India – both of which remain, as does Israel, outside the IAEA and NPT safeguards system – using the UN is the only option if any action is to

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66. IAEA Action to combat nuclear terrorism, at the following URL: [www.iaea.org/NewsCenter/Features/Nuclear\\_Terrorism/index.shtml](http://www.iaea.org/NewsCenter/Features/Nuclear_Terrorism/index.shtml).

67. IAEA GC (47)/17, 20 August 2003, Nuclear Security – Measures to Protect against Nuclear Terrorism, at [www.iaea.org/About/Policy/GC/GC47/Documents/gc47-17.pdf](http://www.iaea.org/About/Policy/GC/GC47/Documents/gc47-17.pdf).

68. Agnès Marcaillou, *The current global disarmament agenda: trends and obstacles*, speech held on behalf of the UN Department for Disarmament Affairs, 21 May 2004, at [www.swefor.org/engelska/gothenburg/download/a\\_marcaillou.pdf](http://www.swefor.org/engelska/gothenburg/download/a_marcaillou.pdf).

69. SC Resolution 984 (11 April 1995) on “security assurances against the use of nuclear weapons to non-nuclear-weapon States that are Parties to the Treaty on the Non-Proliferation of Nuclear Weapons”.

70. Also the IAEA reacted swiftly by its adopting, on 21 September 2001 at its General Conference a Resolution entitled “Measures to improve the security of nuclear materials and other radioactive materials, containing measures against illicit trafficking” and measures about the *physical protection*, though it must be said that these documents, quite logically, remain at the stage of “inviting” and “appealing” all states to join existing programs and treaties.

71. Speech of Kofi Annan to the General Assembly, October 1st 2001, AG/1193, at [www.un.org/News/fr-press/docs/2001/AG1193.doc.htm](http://www.un.org/News/fr-press/docs/2001/AG1193.doc.htm).

72. Lisa Tabassi and Scott Spence, “Arms Control II: the Case of the OPCW”, in Krieken and Mackay (eds.), *The Hague: Legal Capital of the World*, TMC Asser Press 2004.



have universal consequences, even though the SC is an utterly politicised body,<sup>73</sup> where the crux of authority lies with the five official nuclear-weapons states.

Given the controversial technique used by the SC to invoke Chapter VII in order to address the issue of WMD proliferation to non-state actors, the remainder of this part will present and assess these controversies and possible future implications.

### *Chapter VII as heightened legitimacy?*

Who has the competence to decide that another entity has a certain authority which it can exercise vis-à-vis other subjects? International law is all about states' desiring to win this race, is all about states' allocating these roles in their global dance of sovereigns<sup>74</sup> opposed by their national interests but united by the need to address common problems, thus triggering joint initiatives in which they accept to forfeit parts of their sovereignty for the common good.

Thus, the SC enters into the debate. The SC is a hybrid organ, part of an organisation having as one of its basic principles all members' sovereign equality<sup>75</sup> but consisting of 15 members who can adopt decisions in respect of which all UN Member States undertake to "accept and carry out" their content.<sup>76</sup> The SC's prime responsibility being "the maintenance of international peace and security",<sup>77</sup> it "shall determine the existence of any threat to the peace, breach of the peace, or act of aggression".<sup>78</sup> If such determination occurs, the situation is plainly governed by Chapter VII of the UN Charter. In this event, the Council has at its disposal a wide range of measures – up to authorising the use of armed force – to restore "international peace and security". Subject to having obtained the required nine votes and not having been vetoed<sup>79</sup> by one of the Permanent Five's members<sup>80</sup>, the SC's qualifying a given issue or situation as a "threat to international peace and security" opens the separate legal regime of Chapter VII.

All throughout the process leading up to the resolution's adoption, states considered the absence in international law of any binding norm prohibiting states from proliferating WMD to non-state actors, and the gap resulting from this absence, as a sufficient reason to justify, with urgency, extreme means. Although Article 25 of the UN Charter confirms, in general, the binding force of SC Resolutions and invoking Chapter VII might not have been necessary provided that the language

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73. The Stanley Foundation, *The Role of the United Nations in Eliminating Weapons of Mass Destruction: Report of the Twenty-Seventh United Nations Conference*, 23-25 February 1996, p. 9-10.

74. Alfred P. Rubin, "Ethics and Authority in International Law", *Cambridge Studies in International and Comparative Law*, Cambridge University Press, 1997.

75. UN Charter, Article 2(1): "The Organization is based on the principle of the sovereign equality of all its Members."

76. UN Charter, Article 25, "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

77. UN Charter, Article 24(1).

78. UN Charter, Article 39.

79. UN Charter, Article 27(3). An abstention, however, is not considered a veto.

80. China, France, Russia, United Kingdom and United States of America.

adopted by the resolution was mandatory,<sup>81</sup> recourse to Chapter VII was deemed necessary. As demonstrated by the analysis above of the Resolution's paragraph 3, part of the obligations states have under the resolution, consist in the adoption, at the national level of all 191 UN Member states, of national legislation. All throughout the discussions, states made it clear that the motive underlying the use of Chapter VII was to make the resolution unequivocally *legally* binding, on the one hand, and to send a strong *political* message about the seriousness with which the SC regards this issue, on the other.<sup>82</sup>

By using Chapter VII, the SC's 15 members have the ability to bypass the otherwise applicable requirement that, in order to have written<sup>83</sup> and binding international law, a state needs to have expressed its consent to the content of the norm. Desirous to remedy these burdensome requirements of "classic" international law, the SC chose the option of imposing obligations rather than relying on multilateral negotiations painfully negotiated and agreed upon by all signatories. It has done so deliberately, exemplified by the SC's president stating that Resolution 1540 would be "the first major step towards having the Security Council legislate for the rest of the United Nations' membership".<sup>84</sup> This revolutionises the idea that only states have the capacity to legislate and produce international law.<sup>85</sup> The impact of this idea must be assessed in light of the fact that the SC has done so in reaction to a *general* phenomenon<sup>86</sup> – *in casu* proliferation of WMD to non-state actors – in light of which the SC has decided to take a pro-active approach rather than having to wait – again – to have to qualify a *specific* situation as a threat to international peace and security.

Pakistan, to take the most ardent example, has not hesitated to criticize this non-democratic approach both before, during and after the adoption of Resolution 1540, advocating that not the SC but the Conference on Disarmament should function as the sole multilateral negotiating forum for this type of issue.<sup>87</sup> While all UN Members were given an opportunity to present their views on the Resolution pending its adoption, thus making the discussions as inclusive as possible, they obviously lacked any voting, let alone veto, powers. As the SC is sovereign in its decision to qualify a given situation as a "threat to international peace and security", diplomacy and lobbying are the only options available to a state opposing the use of Chapter VII. Irrespective of the use of Chapter VII, Article 103 of the Charter<sup>88</sup> always applies, including whenever the SC phrases its resolutions in such a way as to

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81. Cf., *inter alia*, "Commentary on Article 25", Jost Delbrück in *The Charter of the United Nations*, Simma (ed.), 1997, especially 455-458. See also International Court of Justice, "Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)", Advisory Opinion of 21 June 1971, para. 113.

82. See for example the intervention of the Spanish ambassador to the UN, Mr. Arias, during the debates of Thursday, 22 April 2004.

83. Abstraction is being made here of customary international law.

84. Press Conference by Security Council President, 2 April 2004, at [www.un.org/News/briefings/docs/2004/pleugerpc.doc.htm](http://www.un.org/News/briefings/docs/2004/pleugerpc.doc.htm).

85. On the many controversies surrounding this quite recently technique discovered by the SC, see Stefan Talmon, "The Security Council as World Legislature", *American Journal of International Law*, Vol. 99, No. 1, January 2005, 175, p. 181.

86. Stefan Talmon, *op.cit.*, p. 180.

87. Pakistan Press International Information Services, "Pakistan supports improvement in working methods of UN disarmament machinery", Wednesday, 13 October 2004.

88. "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

impose obligations on UN Member States: from then on, there is no longer a way out for any Member State.

### ***Chapter VII as the Road towards Enforcing Resolution 1540 through Armed Force?***

As Chapter VII has been put openly on the table, even though the invocation thereof was contested in the SC until the very last moment, it is crucial to assess what its potential consequences will be in case of partial or total non-compliance by a state with the resolution's terms. I can only agree with the Chayes' analysis that, as "the principal source of non-compliance is not willful disobedience but the lack of capability or clarity or priority, then coercive enforcement is as misguided as it is costly."<sup>89</sup> In this sense, Resolution 1540 explicitly recognises the financial burden the resolution's implementation entails for certain countries and tries to remedy this by "inviting" other states to assist.<sup>90</sup> It is to be hoped that the acceptance of this invitation will largely be determined by a well-understood self-interest within an overall cooperative framework. The United States, to take just one example, has immediately indicated such willingness to assist any state that would require assistance in the resolution's implementation.<sup>91</sup>

As previously indicated, it is undeniable that the SC was aware of and intended to remedy the situation of developing countries, as it indicated<sup>92</sup> a willingness to assess a state's efforts in light of its resources and good faith. Still, the more delicate question remains: how will the SC react in the event that a certain state demonstrates blatant bad faith, for example by refusing to submit a report worthy of that name or, worse, by expressing its opposition to the resolution's objectives? There seemed to be a rather general understanding and agreement among SC Members that, in the words of the Spanish ambassador, "the resolution in no way explicitly or implicitly gives a blank check for the use of coercive measures, including the use of force, in cases of non-compliance".<sup>93</sup> As such, the resolution does not contain an automatic grant for the use of force. Still, it must be stressed that this aspect has not been explicitly incorporated into the resolution itself. Furthermore, proposals which were raised to limit the applicability of Chapter VII to a limited number of the operative part's paragraphs, were not accepted.

Despite these uncertainties, the trend should be clear: the SC assumes compliance by all states while, at the same time, refusing to explicitly include, *a priori*, an enforcement perspective. The framework of reference is one of cooperating and of bargaining in case of difficulties in complying with the resolution's obligations rather than projecting immediate punishment.<sup>94</sup> In case of persisting non-compliance, the SC<sup>95</sup> will seize the matter and decide upon any necessary measures, using any of the instruments usually at its disposal, choosing among them the one(s) it regards as being most suited

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89. A. Chayes and A.H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements*, 1995, p. 22.

90. UN SC Resolution 1540, paragraph 7.

91. US Department of State, Bureau of International Organization Affairs, *UN Security Council Resolution on Non-Proliferation*, 28 April 2004, at [www.state.gov/p/io/rls/fs/2004/31963.htm](http://www.state.gov/p/io/rls/fs/2004/31963.htm).

92. SC Resolution 1540, paragraph 7.

93. Debates of Thursday 22 April 2004 at 9:50 a.m.

94. Cf. the distinctions in this respect by Lori Damrosch, *The Permanent Five as Enforcers of Controls on Weapons of Mass Destruction: Building on the Iraq 'Precedent'?*, *European Journal of International Law*, 2002, Vol., 13, No.1, p. 308–309.

95. Rather than the specific Committee it has established to monitor this resolution's implementation.

to address the issue at hand. Thus, any enforcement action would require a new SC resolution specifically tailored to the specific situation the Council is confronted with.<sup>96</sup> All these various concerns seem to be reflected in paragraph 11, in which the SC “expresses its intention to monitor closely the implementation of this resolution and, at the appropriate level, to take further decision which may be required to this end” (emphasis added).

The case of persistent non-compliance by a *state*, Member of the UN, needs to be clearly distinguished from the hypothesis that a non-state actor, despite all good efforts by the state on which territory it operates to comply with Resolution 1540, would manage to perpetrate an attack against targets in another state, hereby using WMD. The window of legally permitted action available to the attacked state is entirely unclear: whereas SC Resolution 1373 (2001) – discussed in the following paragraph – seemed to suggest, for the first time by the UN itself, that the “inherent right of self-defence”<sup>97</sup> might equally be applicable when the author of the “armed attack” has no link to a state, the International Court of Justice has, in its recent 2004 Advisory Opinion on the Separation Barrier, opined that there is no self-defense against non-state actors unless their actions can be attributed to a state.<sup>98</sup> In this sense, the failure of one state to prevent non-state actors on its territory from acquiring WMD might put the state which is, as a result of this failure, attacked, in an impasse where public international law will be silenced due to political considerations’ overtaking the debate, only the authorisation to use armed force pursuant to the Charter’s Chapter VII being possible. Hereby, it remains to be seen to what extent pragmatism withstands the International Court of Justice’s attempt to curtail the doctrine of self-defense’s elasticity.<sup>99</sup>

### ***The use of Chapter VII to accomplish what could otherwise never be accomplished: a slippery slope?***

The use of Chapter VII as a way to compel *all* UN Member States to adopt domestic legislation has, before Resolution 1540, only been used once, namely in Resolution 1373,<sup>100</sup> adopted on 28 September 2001 and entitled “Threats to international peace & security caused by terrorist acts”. From the relevant point of view of substance, Resolution 1373 aims to address the issue of terrorist groups’ possessing considerable financial support to secure or work on the design of weaponised nuclear material. Certainly, thematic SC Resolutions on terrorism have been around for some time, for example Resolution 1269 of 12 October 1999 on “the responsibility of the Security Council in the maintenance of peace and security”. For the first time, however, through Resolution 1373 and its use

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96. Cf. the speech by Ambassador Thomson (United Kingdom) during the April 22nd, 2004 discussions.

97. UN Charter, Article 51.

98. International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, paragraphs 138 – 139, at [www.icj-cij.org](http://www.icj-cij.org). One should note, however, that several Judges have criticized the Opinion on this specific point. See, on this question, Frederik Naert and Jan Wouters, “Shockwaves through international law after 11 September: finding the right responses to the challenges of international terrorism” in C. Fijnaut, J. Wouters and F. Naert (eds.), especially pp. 430-432 and 446-450. See also Frederik Naert, “The impact of the fight against terrorism on *ius ad bellum*”, 10 *Ethical Perspectives* 2004, pp. 146, p. 153-155.

99. Michael Lacey, *Self-defense or self-denial: the proliferation of weapons of mass destruction*, Indiana International & Comparative Law Review, Volume 10:2, p. 294.

100. For the sake of completeness, one will indicate that the SC has, at two other occasions, equally adopted “Security Council legislation” without hereby compelling UN Member States to adopt domestic legislation, namely through the adoption of Resolutions 1422 and 1487 on the International Criminal Court. See, on this point, Stefan Talmon, *op.cit.*, p. 177-178.

of Chapter VII, the SC required all states to criminalise and otherwise prohibit certain activities of terrorists, especially in respect of their being financed. In order to oversee the implementation of this resolution, as is now the case for Resolution 1540, the SC established a Counter-Terrorism Committee.<sup>101 102</sup> As all states had to adopt anti-terrorist legislation pursuant to an obligation imposed on them by the SC, the latter had found a way to bypass international law's requirement of having to obtain consent of all states before a given written instrument can receive worldwide applicability. Apparently at ease with this technique, the SC has used the same tool in Resolution 1540. Given the extreme nature of this measure, certain limits will need to be taken into account if the SC does not want to lose credibility. Indeed, resorting too frequently to the same technique might evoke growing resistance to the SC which would thus, rather than being at the forefront of the fight against terrorism by rotating towards the centre, risk gradually gravitating towards the outskirts of all relevant actors.

#### **Part IV: Merits and Demerits of Resolution 1540: Implementation as the Real Test**

After Resolution 1540 has been poured into the glass of all counter-proliferation efforts, is the glass half-full or half-empty? Whereas the SC has traditionally been characterised by its indecisiveness in the face of specific WMD problems, this time, it has acted resolutely in the face of a loophole in international law in terms of preventing terrorists from acquiring or attempting to acquire WMD, an objective for which the traditional non-proliferation and disarmament regimes were absolutely ill-suited.

At the same time, two important factors which previously contributed to the SC's irresoluteness have not been eliminated at all by the resolution: first, despite the establishment of a Committee, Resolution 1540 remains short of providing the UN with its own inspections regime. In the long run, establishing such a regime should become one of the international community's major concerns.<sup>103</sup> Second, there still remains a lack of precise criteria according to which one can assess proliferation threats, resulting in a great amount of difficulty when one tries to predict which responses will be considered appropriate in light of a specific threat. At the same time, the resolution provides few guidelines on how and according to which criteria the international community – as seated in the SC – intends to deal with proliferation by the well-known hold-out states which have decided to remain outside the classic treaty regimes.<sup>104</sup> While it is clear that the response will differ depending on the extent to which a breach is considered serious by those affected, there still remains a wide range of possible actions which can be taken, ranging from diplomacy to armed action.<sup>105</sup> At this point in time, the only analysis which can certainly be made is that any response will be dependent on the specific facts of the case, and the relationship any of the five veto-powers in the SC maintains with these facts.

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101. The Web site of which is available at [www.un.org/Docs/sc/committees/1373/documentation.html](http://www.un.org/Docs/sc/committees/1373/documentation.html).

102. For an in-depth analysis of this Resolution, see E. Rosand, "Security Council Resolution 1373, the Counter-Terrorism Committee, and the fight against terrorism", *American Journal of International Law*, vol. 97, 2nd issue, 2003, 333. See also N. Angelet, "*Vers un Renforcement de la Prévention et la répression du terrorisme par des moyens financiers et économiques?*", in *Le droit international face au terrorisme: après le 11 septembre 2001*, Karine Bannelier (ed.), Paris, Pedone, 2003.

103. Trevor Findlay, *A Standing United Nations WMD Verification Mechanism?*, 6 July 2004, via [www.vertic.org](http://www.vertic.org).

104. International Peace Academy, *Weapons of Mass Destruction and the United Nations: Diverse Threats and Collective Responses*, June 2004, at [www.ipacademy.org](http://www.ipacademy.org).

105. Jozef Goldblat and Pericles Gasparini Alves, *Responses to violations of arms control agreements*, in Serge Sur (ed.), "Disarmament and Arms Limitation Obligations: Problems of Compliance and Enforcement", UNIDIR, 1994, p. 281.

If the use of force is being considered, one hopes that, by then, specific follow-up will have been given to the “rules and guidelines” and the “criteria of legitimacy” for the use of force, as recommended in Part Three (“Collective security and the use of force”) of the UN Secretary-General’s High-Level Panel on Threats, Challenges and Change (December 2004).<sup>106</sup>

Despite these uncertainties, one cannot sufficiently applaud the fact that, after having remained reactive for years, the SC has indicated a strong desire to become proactive. On paper at least, one of international law’s gaps has been filled. In practice, it obviously is too early to assess to what extent the resolution’s provisions will be implemented.

Let us not fool ourselves: the threat which Resolution 1540 seeks to address is inevitably linked to *states’* possessing WMD.<sup>107</sup> The SC has, strategically speaking, taken the right approach, even though one can rightly argue about the legality and desirability of this course of action, to act pursuant to the UN Charter’s Chapter VII. No state can claim to be outside the whole regime, unless it wants to face the uncertain course of action chosen by the SC in those instances. Their concerns should be heard, for using the tools of power is one thing, maintaining one’s credibility and managing to inspire action is another thing. Indeed, logistically speaking, the SC cannot really monitor the effectiveness of the implementation of the resolution at the level of all 191 Member States: submitting a formal report is one thing, checking its being substantively acted upon is quite another thing. Therefore, despite the informal possibility for non-SC Members to express their views, this resolution still falls far short of any sincerely inclusive process, and therefore does not exclude the possibility that some states will resist.<sup>108</sup> It is the old debate about and tension between efficiency and legitimacy, which is being crossed this time by the factor of compelling 191 national parliaments to use their legitimacy to increase the SC’s efficiency.

‘Embellish the world, start by cleaning your own house’, is the central strategy chosen by Resolution 1540: every sovereign state has the obligation to implement the resolution for all territories under its jurisdiction. ‘Clean your own house and make sure others are in a position to effectively do so, is the Resolution’s second course of action, by its providing for assistance and co-operation mechanisms benefiting those states that want to but cannot implement it. At the same time, the use of Chapter VII and the establishment of a Committee indicate that the obligations are intended to be more than mere paperwork.

### ***The Role of Other Relevant Actors***

Obviously, by its adopting this resolution in the same field as Resolution 1373, the SC has positioned itself as playing the leading role in the fight against terrorism, while the proper role of existing arms control and disarmament treaties as well as of institutions active in this field, has been expressly recognised. Indeed, in the fifth paragraph of Resolution 1540, the SC:

“Decides that none of the obligations set forth in this resolution shall be interpreted so as to conflict with or alter the rights and obligations of State Parties to the Nuclear Non-Proliferation Treaty, the Chemical Weapons Convention and the Biological and Toxin Weapons Convention

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106. Accessible at [www.un.org/secureworld/report.pdf](http://www.un.org/secureworld/report.pdf) See especially paras. 183-209.

107. International Peace Academy, *Weapons of Mass Destruction and the United Nations: Diverse Threats and Collective Responses*, June 2004, at [www.ipacademy.org](http://www.ipacademy.org), p. 17.

108. Stefan Talmon, *op.cit.*, p. 192.

or alter the responsibilities of the International Atomic Energy Agency or the Organization for the Prohibition of Chemical Weapons;”

Here, the resolution clearly indicates that it does not intend nor purport to alter or affect states’ obligations under the existing multilateral or regional treaty regimes. Neither does the Resolution change the statutory responsibilities of the OPCW and the IAEA, organisations which are nevertheless called upon to assist and co-operate with the Committee established pursuant to Resolution 1540 by providing their expertise. This will be extremely useful in order to share information, thus avoiding a duplication of efforts.<sup>109</sup>

One should, on the other hand, avoid that the 1540 Committee be transformed into a super organisation disregarding the technological specificities and respective civilian sectors of the three types of WMD over which it has the responsibility vis-à-vis non-state actors.<sup>110</sup> Indeed, the proliferation of non-proliferation organisations is not necessarily a bad thing, and concentrating them into the one-and-only ultimate organisation will not necessarily increase the system’s force or reliability.<sup>111</sup>

It seems that, after a few months of prevailing uncertainty as to the respective organs’ relationship, the right balance has been found. For example, after a request by the 1540 Committee to both the OPCW and IAEA to embark upon inter-organisational co-operation,<sup>112</sup> the Director-General of the OPCW expressed the readiness of the Organization’s Technical Secretariat to provide technical assistance.<sup>113</sup> In this sense, the High-Level Panel on Threats, Challenges and Change expressly recommends that the 1540 Committee “should establish a permanent liaison with IAEA, OPCW and the Nuclear Suppliers Group”.<sup>114</sup>

Thus, the resolution carefully avoids stepping on the toes of competent bodies.<sup>115</sup> While decisively acting as the leading body in this field, the SC has thus avoided, at the same time, monopolising the subject, further demonstrated by the discussions held, during the UN General Assembly’s 59<sup>th</sup> regular session (2004), on the topic entitled “Measures to prevent terrorists from

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109. Lisa Tabassi, *A Note on UN Security Council Resolution 1540 (2004)*, The Chemical and Biological Weapons Conventions Bulletin, Issue No. 64, June 2004, p. 12-13.

110. Harald Muller, *Specific Approaches: Nuclear, Chemical and Biological Proliferation*, in Serge Sur (ed.), *Disarmament and Arms Limitation Obligations: Problems of Compliance and Enforcement*, UNIDIR, 1994, p. 269.

111. Paul C. Szasz, *The Proliferation of Arms Control Organizations*, in Niels M. Blokker & Henry G. Schermers (ed.), *Proliferation of International Organizations*, Kluwer Law International, 2001, p. 135, 143.

112. UN Press Conference by Chair of Security Council Committee Aimed at Preventing Terrorist Acquisition of Mass Destruction Weapons, 27 September 2004, at [www.un.org/News/briefings/docs/2004/Motoc040927.doc.htm](http://www.un.org/News/briefings/docs/2004/Motoc040927.doc.htm).

113. See *OPCW Director General, Ambassador Rogelio Pfirter, visits the United Nations and meets UN Secretary General*, Press release, 11 October 2004, at [www.opcw.org](http://www.opcw.org).

114. Report of the UN Secretary-General’s High-Level Panel on Threats, Challenges and Change, December 2004, page 43, para. 136, available at [www.un.org/secureworld](http://www.un.org/secureworld).

115. Thus the words of Ambassador Thomson (United Kingdom) during the 22 April, 9:30am discussions.

acquiring WMD” as part of its debates on “General and complete disarmament”<sup>116</sup>: the SC takes the lead, but appreciates the importance of delegating to other actors responsibilities in which they are specialised.

### ***Resolution 1540: unilateralism disguised as multilateralism?***

The balancing exercises done on the tightrope of the international legal order, based on state sovereignty and structured along a positivist-dualist mode, are subtle in respect of the hold-out states that have refused to join any of the existing treaty regimes: the resolution does not compel these states to adopt those treaties but provides, at the same time, an obligation to comply with the parts of the resolution which mirror previously existing law. The resolution could well be an incentive to join a particular system. Rather than judging past actions, the resolution sets forward-looking standards for how states should act in the future.<sup>117</sup> Thus, the SC has enhanced its key role in the area of non-proliferation as part of the global struggle in the fight against terrorism.<sup>118</sup> The SC has authoritatively ended the debate about whether certain international nuclear law norms are of a customary international law nature: they are binding on all UN Member States, by virtue of the UN Charter’s Chapter VII, customary law or not.<sup>119</sup>

It is both fortunate and surprising that the US has explicitly advocated in favour of the UN’s co-operative multilateral system. Indeed, right after 9/11, many of the American officials openly considered breaking down the universal approach by focusing on bilateral measures based on a discriminate non-proliferation policy, thus embarking on an era of retrenchment of multilateralism, to be replaced by an era of confrontational unilateral and bilateral US initiatives.<sup>120</sup> This approach was inspired by the impression the USA seemed to have that the existing multilateral system was unlikely to serve its key interests in an effective global nuclear non-proliferation regime protecting against nuclear terrorism.<sup>121</sup> Such ideas remind us of Anne-Marie Slaughter’s “International law in a world of liberal states”<sup>122</sup> in her theory’s formulation at its earliest stage:<sup>123</sup> discrimination would be the name

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116. Items included in the provisional agenda of the fifty-ninth regular session of the General Assembly, To convene on 14 September 2004, Published by the UN Department of Public Information, 44359 – DPI/2358 – August 2004 – 3m, agenda – item 66(r).

117. US Department of State, Bureau of International Organization Affairs, April 28, 2004, *UN Security Council Resolution on Non-Proliferation*, at [www.state.gov/p/io/rls/fs/2004/31963.htm](http://www.state.gov/p/io/rls/fs/2004/31963.htm).

118. Cfr. the heavy emphasis placed on this dimension in the Statement by Russia’s Ministry of Foreign Affairs, *In relation to adoption of UN Security Council Resolution on Nonproliferation*, 30 April 2004, at [www.iss.niit.ru/sobdog-e/sd-172.htm](http://www.iss.niit.ru/sobdog-e/sd-172.htm).

119. Lisa Tabassi, *A Note on UN Security Council Resolution 1540 (2004)*, *The Chemical and Biological Weapons Conventions Bulletin*, Issue No. 64, June 2004, p. 12-13.

120. Antonio F. Perez, *The Adequacy of International Law for Arms Control, Post-September 11*, in *American Society of International Law Proceedings*, “Arms Control and Nonproliferation”, 2002, p. 274.

121. Patricia Hewitson, *Nonproliferation and reduction of nuclear weapons: risks of weakening the multilateral nuclear nonproliferation norm*, *Berkeley Journal of International Law*, 2003, 405 (“Between Empire and Community: the United States and Multilateralism 2001-2003: a mid-term assessment; arms control”).

122. Anne-Marie Slaughter, *International Law in a World of Liberal States*, *European Journal of International Law*, Volume 6, 1995, p. 503.

123. It must be stressed that Anne-Marie Slaughter has, over the years, greatly adopted her theory.



of the game, justifying a disaggregate web of international legal commitments with different standards depending on the Contracting States' domestic constituency.

Despite all these theories having floated around both before and after 9/11, the USA has tried to achieve the broadest consensus possible throughout the process leading to the Resolution's adoption. Most important given today's multi-polar context, all of Resolution's 1540 obligations are equally applicable to all UN Member States in a non-discriminatory way, contrary to the NPT's openly discriminatory system which distinguishes in terms of rights and obligations between nuclear and non-nuclear weapon states. This clearly is one of Resolution 1540's great advantages: by avoiding any complaint *a priori* of discrimination, it curtails those who would de-legitimise the regime.<sup>124</sup> Turning from theory and paper to practice and implementation, a strong recommendation should be emitted that Committee 1540 ensures the same non-discriminatory approach, thus ensuring that the resolution's implementation does not become an instrument merely serving US foreign policy objectives to the detriment of genuine multilateral objectives.

Choosing the road of Chapter VII walks the thin line between, on the one hand, the efficiency of only a handful of actors having to agree and, on the other hand, the sometimes frustratingly slow process of having to agree on a treaty's terms and thereafter getting states to sign up for it. At the same time, this approach maintains the legitimacy attached to SC's decisions. With President Bush' being re-elected in November 2004, it is to be expected that the WMD issue will remain the centerpiece of the leading power's strategic doctrine. At the same time, controversy remains as to whether the way in which this resolution was adopted signals the end of the traditional reliance on multilateral arms control *treaties*. It remains to be seen whether states will increasingly shy away from multilateral treaties as the traditionally dominant policy and legal approach to WMD.<sup>125</sup> The May 2005 Review Conference of the Non-Proliferation Treaty will certainly indicate in which direction the international community is heading.

Fears of nuclear terrorism are here to stay, especially as more countries are predicted to turn to nuclear energy, entailing more transfers within the global nuclear fuel cycle.<sup>126</sup> Unless Dr. Elbaradei's proposal on multilateral control over the nuclear fuel cycle is adopted, the said fuel cycle will continue to exist according to a disaggregated pattern of public/private traders dispersed across the globe, whereby each transport of nuclear materials causes security risks.<sup>127, 128</sup> The perceived threat has changed: mirroring early 1960's fears that there would be about 25 nuclear weapons states by the end of the 1970s,<sup>129</sup> the post-9/11 environment is characterised by fears that a terrorist looms around every corner, desirous and capable of using WMD in an attack against innocent civilians. In light of a threat perceived to be serious, the SC chose the path of prevention, along with the concerns as to its intrusive

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124. Richard Williamson, *Law and the H-bomb: strengthening the nonproliferation regime to impede advanced proliferation*, Cornell International Law Journal, Winter 1995, 167.

125. David Fidler, *op.cit.*, 39-40 and 43.

126. On 21 March, 2005, the IAEA Director-General, Dr. Elbaradei, at the OECD-hosted *International Conference on Nuclear Power for the 21st Century*, presented the IAEA's latest predictions in this respect. See [www.iaea.org/NewsCenter/Statements/2005/ebsp2005n004.html](http://www.iaea.org/NewsCenter/Statements/2005/ebsp2005n004.html).

127. Katrin Bennhold, *Nuclear Comeback strokes terror fears*, International Herald Tribune, 18 October 2004.

128. Risks which are far from eliminated under the proposal to multilateralise the nuclear fuel cycle, as it would lead to quite frequent transports of nuclear materials across the globe.

129. Thomas Graham, "Nuclear Non-proliferation and Nuclear Terrorism", *Transnational Lawyer*, 2004 (Symposium: Bordering on Terror – Global Business in Times of Terror – The Legal Issues).

and onerous character such path entails. If properly applied, one might never know whether and how many attacks using WMD have been prevented by the SC's initiative.

In spite of its short history and even before the 28 October 2004 deadline to submit initial reports, a number of states have openly considered this deadline as an opportunity to assemble all information available at the national level. In a joint statement, for example, Russia and China explicitly "favour strict implementation of the resolution".<sup>130</sup> Another striking example confirming the initial analysis that – abstraction made of the question whether this was a good idea and a legitimate procedure – the Resolution's approach, relying on a Chapter-VII backed Resolution, has worked is Pakistan's swift adoption, in September 2004, of an Export Control Act.<sup>131</sup>

### ***Disarmament: a deliberate oversight?***

For all this resolution merits applause, it does not make any progress at all on the issue of disarmament, the most effective remedy to fears of proliferation. While the resolution's sponsors invoked that including disarmament would distract its focus, many other states openly deplored this approach.<sup>132</sup> In order to secure the necessary votes, the sponsors eventually accepted some references to disarmament in the preamble,<sup>133</sup> which obviously have no teeth in this resolution with its heavy emphasis on non-proliferation, considered to be the most ominous security threat of our times.<sup>134</sup> The USA being the resolution's initial sponsor, it is for history and the NPT's 2005 Review Conference to decide how sincere this country is in its efforts to "pursue negotiations in good faith"<sup>135</sup> leading to disarmament and in conformity with Article VI of the NPT, or whether Resolution 1540 was designed to get the entire world's horses ready and keep them busy while failing itself to even start think about implementing Article VI of the NPT. It is indeed remarkable that, after 9/11, the big powerhouses' priorities are exclusively focused on criminalisation and law enforcement issues to the detriment of

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130. BBC Monitoring Asia Pacific, *Full text of 14 October China-Russia Joint Statement*, Friday, 15 October 2004 and Xinhua News Agency, *China, Russia to co-operate in nuclear nonproliferation*, Thursday, 14 October 2004.

131. Full name: "the Export Control on Goods, Technologies, Material and Equipment related to Nuclear and Biological Weapons and their Delivery Systems Act", see BBC Monitoring Newsfile, "Pakistan Assembly passes bill to control nuclear goods export", Tuesday, 14 September 2004 and Pakistan Press International Information Services, "Pakistan supports improvement in working methods of UN disarmament machinery", Wednesday, 13 October 2004.

132. For example, Ambassador Pleuger (Germany, then Chairman of the SC) voted for the Resolution but regretted that no explicit language was included to deal with disarmament issues. See: Jim Wurst, "Security Council Approves Resolution to Deny Terrorists WMDs", Global Policy Forum, 29 April 2004, at [www.globalpolicy.org/empire/terrorwar/un/2004/0429wmd.htm](http://www.globalpolicy.org/empire/terrorwar/un/2004/0429wmd.htm).

133. Cf. Preamble, paragraph 2 ("reaffirming (...) the need for all Member States to fulfill their obligations in relation to arms control and disarmament") and paragraph 13 ("Encouraging all Member States to implement fully the disarmament treaties and agreements to which they are party") (underlining added). The word "disarmament" does not figure in the Resolution's operative part.

134. UN Press Conference by Chair of Security Council Committee Aimed at Preventing Terrorist Acquisition of Mass Destruction Weapons, 27 September 2004, at [www.un.org/News/briefings/docs/2004/Motoc040927.doc.htm](http://www.un.org/News/briefings/docs/2004/Motoc040927.doc.htm).

135. Non-Proliferation Treaty, Article VI.

disarmament issues.<sup>136</sup> This trend forgets the crucial relationship between both aspects, a delicate relationship which has recently been reiterated by Secretary-General Kofi Annan, speaking about the May 2005 NPT Review Conference, that “progress in both disarmament and non-proliferation will be essential, and neither should be held hostage to the other”.<sup>137</sup> Non-proliferation efforts having received a tremendous boost forward through Resolution 1540, one can only hope that the same will be true in respect of disarmament at the NPT Review Conference.

**Conclusion: “This is a race we cannot afford to lose”<sup>138</sup>**

The extent to which the perceived threat of non-state actors successfully using WMD is real did not constitute the subject of analysis of this paper. Taking in this respect a positivist approach, this article adopted the point of view that states have decided the threat was real enough to warrant the adoption of an instrument sanctioned by a very high source of authority: Chapter VII of the UN Charter, an exceptional response to a perceived clear and present danger that non-state actors would take advantage of international law’s gap.<sup>139</sup> Thus, the Resolution is intended to become an instrument to act against this threat and to prevent a tragedy before it materialises.

In case certain states openly refuse to comply with Resolution 1540, we are heading towards an uncertain future, in which the resolution’s projected rule of law risks to be eventually replaced by the rule of UN-backed force. If the conversation currently going on among UN members leads to a general and internalised understanding that no state can provide any support whatsoever to terrorists and if all states externalise this understanding through their domestic criminal law, the world will be a better place than it was before 28 April 2004. Will practical implementation withstand theoretical analysis?

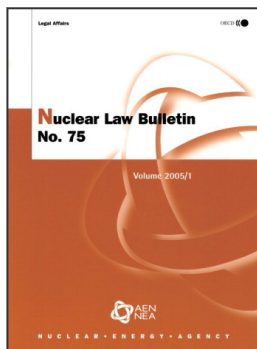
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136. Agnès Marcaillou, *The Current global disarmament agenda: trends and obstacles*, speech made on behalf of the UN Department for Disarmament Affairs, 21 May 2004, at: [www.swefor.org/engelska/gothenburg/download/a\\_marcaillou.pdf](http://www.swefor.org/engelska/gothenburg/download/a_marcaillou.pdf).

137. Kofi Annan’s statement on the thirty-fifth anniversary of the Treaty on the Non-Proliferation of Nuclear Weapons, entitled “Nuclear Non-Proliferation Treaty True Cornerstone of Global Security”, 4 March 2005, SG/SM/9748 ; DC/2948. See [www.un.org/News/Press/docs/2005/sgsm9748.doc.htm](http://www.un.org/News/Press/docs/2005/sgsm9748.doc.htm).

138. US Department of State, *UN Security Council Resolution 1540: The US Perspective*, Andrew Semmel, Principal Deputy Assistant Secretary for Nuclear Nonproliferation, October 12, 2004, at [www.state.gov/t/np/rls/rm/37145.htm](http://www.state.gov/t/np/rls/rm/37145.htm).

139. Cfr. the remarks made by Ambassador Baja (Philippines) at the SC’s 4950<sup>th</sup> meeting of Thursday, 22 April 2004, at 9:50 a.m. (S/PV.4950).



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