

Appendix 11A. United Nations Security Council Resolution 1540: non-proliferation by means of international legislation

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I. Introduction

The terrorist attacks in the United States on 11 September 2001 have brought about a significant change in the international efforts to combat the proliferation of weapons of mass destruction (WMD). The issue of proliferation involving non-state actors was not on the international agenda prior to September 2001—even if certain events had demonstrated its relevance (e.g. the 1995 attacks with nerve agents by the Aum Shin-rikyo religious sect in Tokyo). After September 2001 it became obvious that non-proliferation efforts had to include non-state actors within their ambit as the nexus between terrorism and the capacity for mass destruction became evident. The non-proliferation agenda was also significantly affected by the revelation in 2003 of the existence of a private network of suppliers of sensitive nuclear technologies led by the Pakistani scientist Abdul Qadeer Khan. This widened the focus to non-state actors not only as recipients, but also as suppliers of sensitive goods and technologies.

The multilateral export control regimes have extended their coverage to include proliferation involving non-state actors.¹ The informal nature of these regimes meant that they could amend their guidelines quickly, but their membership is limited. The formal elements of the non-proliferation regimes, the multilateral treaties on non-proliferation—the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (Non-Proliferation Treaty, NPT),² the 1972 Biological and Toxin Weapons Convention (BTWC),³ and the 1993 Chemical Weapons Convention (CWC)⁴—have a broader reach because of their wider participation. However, they were drafted with the primary objective of preventing the proliferation of WMD among states and, with the possible exception of the CWC,⁵ they are not equipped to deal with non-state actors.

¹ On multilateral export control regimes see section III below and chapter 15 in this volume.

² The Treaty on the Non-Proliferation of Nuclear Weapons was opened for signature on 1 July 1968 and entered into force on 5 Mar. 1970; the text is available in *United Nations Treaty Series*, vol. 729 (1970), p. 161 and at URL <<http://www.un.org/Depts/dda/WMD/treaty/>>.

³ The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction was opened for signature on 10 Apr. 1972 and entered into force on 26 Mar. 1975. The text is available in *United Nations Treaty Series*, vol. 1015 (1976), p. 163 and on the SIPRI Chemical and Biological Warfare Programme website, URL <<http://www.sipri.org/contents/cbwarfare/>>. On the BTWC see chapter 13 in this volume.

⁴ The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (corrected version), 8 Aug. 1994 was opened for signature on 13 Jan. 1993 and entered into force on 29 Apr. 1997. The text is reproduced in *International Legal Materials*, vol. 32 (1993), p. 800 and on the SIPRI Chemical and Biological Warfare Programme website (note 3). On the CWC see chapter 13 in this volume.

⁵ The CWC differs from the NPT in that it contains a detailed provision (Article VII) that obliges the parties to enact domestic legislation, including penal legislation, prohibiting individuals from acquiring or using chemical weapons. The BTWC contains a similar provision (Article IV) that obliges the states

From a policy perspective, the option of seeking formal amendments to the BTWC and the NPT, in particular, does not seem attractive because such efforts would run the risk of getting bogged down in protracted, politically complicated negotiations.

In a speech before the United Nations General Assembly on 23 September 2003, US President George W. Bush urged the UN Security Council to adopt a new 'anti-proliferation' resolution that would 'call on all Members of the United Nations to criminalize the proliferation of weapons of mass destruction, to enact strict export controls consistent with international standards and to secure any and all sensitive materials within their own borders'.⁶ Subsequently, the USA set out to negotiate an anti-proliferation resolution among the permanent members of the Security Council. The negotiations were held within a small circle of member states, which caused some consternation among the other UN members. At the request of some members, the Security Council held a meeting on 22 April 2004 in order to provide an opportunity for all the members to present their views on the draft resolution. Several national delegations took the opportunity to speak.⁷ While a majority of delegations agreed on the importance of the substance of the draft resolution, a majority also expressed reservations regarding the proposed procedure whereby the Security Council would be legislating (in the sense of adopting general obligations not limited to a specific situation) for the other UN members under Chapter VII of the UN Charter. After seven months of negotiation the Security Council adopted the resolution by consensus on 28 April 2004.⁸

The major controversy caused by the adoption of Resolution 1540 and, in 2001, of Resolution 1373⁹—relates to the question of the authority of the Security Council to impose general obligations on UN members by means of a binding resolution under Chapter VII of the UN Charter.¹⁰ Previously, the Security Council had exercised its powers mainly under Chapter VII in relation to a more or less specific threat in a more or less specific situation. Is the Security Council exceeding its authority under

parties to take measures to prohibit and prevent the acquisition of biological weapons on their territories, but it is not as detailed as the corresponding provision of the CWC.

⁶ See United Nations, Address by President George W. Bush to the 58th session of the General Assembly, UN document A/58/PV.7, 23 Sep. 2003, URL <<http://www.un.org/ga/58/pv.html>>, p. 11.

⁷ See United Nations, Security Council meeting on non-proliferation of weapons of mass destruction, UN documents S/PV.4950 and S/PV.4950 (Resumption 1), 22 Apr. 2004, URL <<http://www.un.org/Depts/dhl/resguide/scact2004.htm>>.

⁸ See UN Security Council Resolution 1540, 28 Apr. 2004; it is reproduced in appendix 11B. For this and other UN Security Council resolutions discussed in this chapter see URL <<http://www.un.org/documents/scres.htm>>. See also Bosch, O. and Ham, P. van (eds), *Global Non-Proliferation and Counter-Terrorism: The Impact of UNSCR 1540* (Brookings Institution Press: Washington, DC, 2005); and *International Lawyer* vol. 40, no. 2 (2006), pp. 490–93.

⁹ UN Security Council Resolution 1373, 28 Sep. 2001. This resolution sets out certain mandatory measures to prevent and suppress international terrorism, including reporting to the UN Counter-Terrorism Committee on the actions taken in their respective legal systems. On the resolution's 'legislative' elements see e.g. Szasz, P. C., 'The Security Council starts legislating', *American Journal of International Law*, vol. 96 (2002), pp. 901–905; and Ward, C. A., 'Building capacity to combat international terrorism: the role of the United Nations Security Council', *Journal of Conflict & Security Law*, vol. 8, no. 2 (2003), pp. 289–305.

¹⁰ Lavalle, R., 'A novel, if awkward, exercise in international law-making: Security Council Resolution 1540 (2004)', *Netherlands International Law Review*, vol. 51 (2004), pp. 411–37; Marschik, A., 'The Security Council as world legislator? Theory, practice and consequences of an expanding world power', IILJ Working Paper, no. 2005/18, Institute for International Law and Justice (IILJ), New York University School of Law, New York, N.Y., 2005, URL <<http://www.iilj.org/papers/>>; and Beyer, E., 'The Security Council and Resolution 1540: a law-maker above the law?', Unpublished LLM international law thesis, Uppsala University, Faculty of Law, 2006.

the Charter (i.e. acting *ultra vires*) when adopting resolutions of a more generic and 'legislative' kind? Some states and legal commentators have expressed concern that it may be. Without addressing the controversial question of whether the decisions of the Security Council are subject to judicial review,¹¹ it may be noted that the main indicator of the acceptance by member states of such an alleged *ultra vires* resolution would be the actual level of implementation.¹²

This appendix addresses three issues in relation to Resolution 1540. Section II discusses the authority of the Security Council to adopt binding resolutions that contain legislative elements under Chapter VII of the UN Charter. This is a controversial issue within international legal doctrine, but for reasons of space this appendix does not present a comprehensive treatment of the issue. Section III analyses the extent and character of the legal obligations that the resolution establishes. The implementation of Resolution 1540 is discussed in section IV, and a concluding observation on the use of legislative resolutions by the Security Council is presented in section V.

II. The powers of the Security Council under the United Nations Charter

As an organ of a global organization, the Security Council is entrusted with the powers that its Charter bestows on it. Articles 24–26 of the UN Charter establish the functions and powers of the Security Council. According to Article 24, the members of the organization 'confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf'. This assignment of primary responsibility is linked to the interest of ensuring 'prompt and effective action' by the UN. Yet Article 24 also establishes that the Security Council in discharging its duties shall 'act in accordance with the Purposes and Principles of the United Nations'.¹³ As this formulation indicates, the powers of the Security Council are not unfettered.¹⁴ It is also recognized that further 'specific powers' granted to the Security Council are laid down in Chapters VI, VII, VIII and XII.

Under 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'. A key term in this provision is 'decisions' because it is in relation to such acts of the Security Council that the member states have pledged their acceptance and execution. Article 25 can also be read as creating this duty for UN members—as a matter of law—only if the Security Council has acted 'in accordance with the present Charter'.

¹¹ See e.g. Martenczuk, B., 'The Security Council, the International Court and judicial review: what lessons from Lockerbie?', *European Journal of International Law*, vol. 10, no. 3 (1999), pp. 517–47; and Fassbender, B., 'Quis iudicabit? The Security Council, its powers and its legal control', *European Journal of International Law*, vol. 11, no. 1 (2000), pp. 219–32.

¹² It has been argued that an *ultra vires* resolution may be accepted by the subsequent practice of the members of the organization if this practice shows that the members are acting in accordance with the resolution. See Marschik (note 10), p. 7.

¹³ The purposes and principles of the United Nations are laid down in Articles 1 and 2 of the Charter. Charter of the United Nations, URL <<http://www.un.org/aboutun/charter/>>. It should be noted that Article 2:7 states that 'nothing in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state'. This proviso is, however, not applicable to enforcement measures under Chapter VII of the Charter.

¹⁴ See Bowett, D. W., *The Law of International Institutions*, 4th edn (Stevens & Sons: London, 1982), p. 33.

In other words, members would be obliged to respect the Security Council's decisions only if it acted within its powers (i.e. *intra vires*). However, some international lawyers are not prepared to accept such an interpretation because it would give individual member states some leeway to decide whether or not a decision is *intra vires*.¹⁵ Several key provisions of the UN Charter are vague and, consequently, it may be difficult in a concrete situation to determine whether the Security Council has acted within its powers. Yet if the Security Council were to take a decision on a matter that appears to be outside its powers it could be considered a moot point whether the member states would be under a legal obligation to comply with the decision.¹⁶

Resolution 1540 was adopted with reference to the specific powers of the Security Council under Chapter VII of the Charter. Chapter VII deals with 'action with respect to threats to the peace, breaches of the peace, and acts of aggression'. The first pre-ambular paragraph of Resolution 1540 states that the 'proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, constitutes a threat to international peace and security'. The explicit characterization of such proliferation as a threat to international peace and security is significant because it paves the way for measures under Chapter VII of the Charter (see below).¹⁷ The formulation used is broad and covers any proliferation—not just proliferation involving non-state actors.

According to Article 39 of Chapter VII, the Security Council 'shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security'. The first analytical question is thus whether the risk of proliferation of WMD involving non-state actors qualifies as 'a threat to international peace and security', and whether the adoption of a resolution establishing general obligations could be seen as a 'measure' in the terms of Article 39. The key terms in this provision are not defined in the UN Charter. The General Assembly subsequently defined the concept of aggression,¹⁸ but the notions of 'threat to the peace' and 'breach of the peace' remain undefined.¹⁹ It has therefore been recognized that the Security Council enjoys 'considerable discretion' when it comes to the designation of a particular situation as

¹⁵ Delbrück, J., 'Article 25', eds B. Simma et al., *The Charter of the United Nations: A Commentary*, 2nd edn, vol. 1 (Oxford University Press: Oxford, 2002), p. 459.

¹⁶ See *Prosecutor v. Tadic*, Appeal on Jurisdiction (ICTY, no. IT-94-1-AR72), section 43, 2 Oct. 1995; Nolte, G., 'The limits of the Security Council's powers and its functions in the international legal system: some reflections', ed. M. Byers, *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford University Press: Oxford, 2000), pp. 315–26; and Talmon, S., 'The Security Council as world legislator', *American Journal of International Law*, vol. 99 (2005), pp. 175–93.

¹⁷ Resolution 1540 also 'reaffirms' the statement made by the President of the Security Council, adopted at its meeting at the level of heads of state and government on 31 Jan. 1992, declaring that the proliferation of WMD is a threat to international peace and security. See United Nations, Note by the President of the Security Council, UN document S/23500, 31 Jan. 1992, reprinted in *International Legal Materials*, vol. 31 (1992), p. 762. In Resolution 825, adopted on 11 May 1993 in relation to North Korea's withdrawal from the NPT, the Security Council noted the 'crucial contribution which progress in non-proliferation can make to the maintenance of international peace and security'. In Resolution 1172, adopted on 6 June 1998 as a reaction to the nuclear weapon tests carried out by India and Pakistan, the Security Council also declared that the 'proliferation of all weapons of mass destruction constitutes a threat to international peace and security'.

¹⁸ See the annex to UN General Assembly Resolution 3314, 14 Dec. 1974, URL <<http://www.un.org/documents/ga/res/29/ares29.htm>>.

¹⁹ See Österdahl, I., *Threat to the Peace: The Interpretation by the Security Council of Article 39 of the UN Charter* (Iustus Förlag: Uppsala, 1998).

a threat to the peace.²⁰ The Security Council has on at least three other occasions indicated that it considers the spread of WMD to be a threat to international peace and security. The logic of this reasoning is that the more states that possess such weapons, the greater the risk of use.²¹ However, a difference between Resolution 1540 and the previous pronouncements of the Security Council is that the statement about a threat to the peace is made *in abstracto*—that is, not in relation to a specific situation threatening international peace and security as was previously the case. Some international lawyers argue that the powers of the Security Council under Chapter VII may only be exercised in relation to a specific situation,²² but such a qualification would seem to follow from the Security Council's past practice rather than the wording of Article 39. Hence, it is dubious to argue that Resolution 1540 is *ultra vires* simply because of its focus on a generic rather than specific threat to the peace.

The subsequent question is whether the adoption of a resolution establishing general obligations could be seen as a 'measure' under Article 41, which deals with the measures not involving the use of armed force that the Security Council may decide on in order to give effect to its decisions. Article 41 lists examples of such measures (e.g. interruption of economic relations), but the list of measures is not intended to be exhaustive. The Security Council has also used its powers under Chapter VII in order to establish general obligations in other fields, and the International Criminal Tribunal for Former Yugoslavia, has found it to be in accordance with the UN Charter.²³ Hence, there would not seem to be any provision in the UN Charter that renders the adoption of Resolution 1540 manifestly *ultra vires* from a procedural and substantive perspective.²⁴ That said, whether the adoption of binding resolutions that contain general obligations that are not limited to a specific situation may be said to constitute an effective and legitimate method of addressing an international problem is an open question, addressed in section IV.

III. The substance of Resolution 1540

The preamble

The preambular paragraphs of a Security Council resolution are not designed to create specific legal obligations or to establish a cause for action by the UN member states, but they provide insight into the political rationale behind the adoption of the

²⁰ See Frowein, J. A. and Krisch, N., 'Article 39', eds Simma et al. (note 15), p. 719.

²¹ On this view see Sagan, B. and Waltz, K. N., *The Spread of Nuclear Weapons: A Debate Renewed*, 2nd edn (W. W. Norton & Company: New York, N.Y., 2003).

²² See e.g. Happold, M., 'Security Council Resolution 1373 and the constitution of the United Nations', *Leiden Journal of International Law*, vol. 16 (2003), pp. 593–610.

²³ *Prosecutor v. Tadic* (note 16), sections 35, 39.

²⁴ One argument against the constitutionality of Resolution 1540 relates to the general role of the UN in the field of armaments (including conventional and non-conventional weapons). Under the UN Charter, the General Assembly and the Security Council are both endowed with a recommendatory role when it comes to the level and composition of the armaments of the member states (articles 11 and 26). It has been suggested in legal doctrine that attempts by the Security Council to regulate armaments in general—in contrast to specific situations such as the disarmament regime established for Iraq after the 1991 Gulf War—may amount to an *ultra vires* measure. See Frowein and Krisch (note 20), p. 726. The International Court of Justice (ICJ) has also stated that states are only bound by those limitations on armaments that they themselves have accepted. ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), *ICJ Reports 1986*, URL <<http://www.icj-cij.org/icjwww/iceses/inus/inusframe.htm>>, p. 14, para. 269.

resolution. Hence, preambular paragraphs may facilitate proper interpretation of the operative parts of a resolution. This is particularly true for Resolution 1540 which, in its preamble, defines the key concepts in the operative part.

Resolution 1540 is designed to reduce the risk of proliferation of WMD to non-state actors. The definition of this term is crucial because non-state actors constitute the personal field of application (*ratione personae*) of the resolution. The key element of this definition is that the individual or entity should not be legally authorized by any state to conduct the activities that fall under the resolution. The definition includes individuals or entities engaged in prohibited activities irrespective of the motivation—pecuniary (e.g. the A. Q. Khan network) or political (as in the case of a terrorist organization). The material field of application (*ratione materiae*) of Resolution 1540 is rather wide. The resolution contains definitions of the terms ‘means of delivery’ and ‘related materials’. It is noteworthy that the ‘traditional’ parameters of range and payload used for other purposes of missile control are not included in the definition of means of delivery—hence, the definition covers any missile, rocket and other unmanned system capable of delivering WMD. However, the definition is limited by the formulation that missiles and the like should be ‘specially’ designed for the delivery of WMD. This could be perceived as an inconsistency because such delivery systems are already explicitly prohibited by Article I(2) of the BTWC and Article II of the CWC. Thus, with the exception of nuclear delivery vehicles, not many existing systems are included in the definition. The definition of related materials is very broad because it relates to materials, equipment and technology covered by ‘relevant multilateral treaties’ as well as ‘arrangements’. Neither the ‘relevant multilateral treaties’ nor the ‘arrangements’ in question are identified in the resolution. Furthermore, the resolution does not specify which national control list would be relevant for determining the scope of the provisions. It is apparent that the definitions provided in the resolution may, in fact, give rise to more questions than answers.

In the fifth preambular paragraph of Resolution 1540 the Security Council affirms its support for the multilateral treaties that aim to eliminate or prevent the proliferation of nuclear, biological or chemical (NBC) weapons and stresses the importance of their full implementation by all parties in order to promote international stability. The full and effective implementation of existing non-proliferation treaties has become a leitmotif for much of the current work in the field of non-proliferation. There is a growing realization that a treaty entered into without corresponding national measures being taken in order to effectively implement its provisions may create opportunities for non-state and state actors to engage in proliferation activities. In the context of the multilateral treaties the preamble welcomes the efforts made by ‘multilateral arrangements’ which contribute to non-proliferation (i.e. the informal export control regimes that control the transfer of goods and technologies that may be used for the production of WMD). The work conducted in these informal arrangements has been viewed as controversial by non-participants because the arrangements have been alleged to put the interest of non-proliferation before the interest of the widest possible exchange of goods and technologies for peaceful purposes. A perennial issue within the multilateral treaty regimes has been the question of the removal of such alleged trade barriers, and the full membership of the treaty regimes has been reluctant to recognize the work carried out in the export control regimes. It is thus notable that the UN Security Council now welcomes the efforts of the export control regimes. Yet it also notes in the subsequent preambular paragraph that

prevention of the proliferation of NBC weapons ‘should not hamper international cooperation in materials, equipment and technology for peaceful purposes *while goals of peaceful utilization should not be used as a cover for proliferation*’ (emphasis added). This formulation more or less restates the relevant provisions of the non-proliferation treaties with one important addition. While the treaties declare that the control efforts should not hamper international cooperation in goods and technologies for peaceful purposes, Resolution 1540 adds that peaceful use should not be a cover for proliferation. In other words, the formulation in the resolution qualifies the right to peaceful use in comparison with the similar provisions of the treaties.

While the Security Council recognizes that most states have ‘undertaken binding legal obligations’, or have made ‘other commitments’ aimed at preventing the proliferation of WMD, it is also recognized that there is a need for all states to take additional measures to prevent the proliferation of NBC weapons and their means of delivery. Against this backdrop the Security Council adopted the measures included in the operative part of the resolution.

The operative part

In five of the paragraphs of the operative part of the resolution the Security Council decides that the member states shall undertake a defined measure. As noted above, the paragraphs of a resolution in which the Security Council ‘decides’ are the ones that create an obligation under international law for the member states to take implementing action. The other paragraphs of the operative part are framed in the form of recommendations—outlining what member states are encouraged to do.

In operative paragraph 1 of Resolution 1540, the Security Council decides that states shall not provide support to non-state actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use NBC weapons and their means of delivery. This provision corresponds to the main intent of the non-proliferation clauses of the, BTWC, the CWC and the NPT with the difference that it specifically applies to non-state actors. Its scope is wide because it covers ‘any form of support’—which must be read to cover not only the weapons themselves, but also goods and technologies that may be used for the production of WMD, as well as financial support to a development programme. The provision is also broad in the sense that it covers all the stages in an acquisition process. In other words, the scope of Resolution 1540 is much wider than that of the non-proliferation treaties.

Operative paragraph 2 relates specifically to the domestic legal systems of the member states. Apart from the obligation on UN member states not to assist in the proliferation of WMD to non-state actors, they are also obliged to ‘adopt and enforce’ effective domestic legislation that would prohibit such activities under their jurisdictions. The provision specifically refers to ‘laws’—which in most countries would imply the involvement of the legislature.²⁵

Operative paragraph 3 lays down detailed obligations for the domestic control of goods and technologies that may be used to produce WMD. While the previous two

²⁵ This element of the resolution was criticized by some member states as an encroachment on the separation of powers in domestic constitutional law. It was argued that legislatures would find themselves under an international obligation to adopt laws conforming to the demands of the resolution, and that this international obligation would have been established before they could exercise their domestic constitutional functions in the making of international agreements. See UN documents S/PV.4950 and S/PV.4950 (Resumption 1) (note 7).

paragraphs specifically relate to non-state actors, paragraph 3 outlines more general obligations. It lists the specific controls that member states should establish over such weapons and 'related materials'.

Operative paragraph 3's obligations are extensive and potentially demanding in terms of resources. The member states are required to establish and maintain effective accounting systems, physical protection measures, border controls, law enforcement measures and national export controls that would also cover trans-shipments. For many developing countries these requirements could seem totally unrealistic because of a lack of resources. The Security Council recognizes that some states may require implementation assistance and invites states to offer such assistance.

Article 103 of the UN Charter establishes that in the event of a conflict between obligations owed under the Charter and obligations under any other international agreement the former will prevail. It anticipates the situation in which a member state may seek to avoid honouring decisions of the Security Council with the argument that doing so may conflict with existing treaty obligations. In this context it is interesting to note that in operative paragraph 5 of Resolution 1540 the Security Council decides that the obligations in the resolution are not to conflict with the BTWC, the CWC and the NPT or alter the responsibilities of the International Atomic Energy Agency or the Organization for the Prohibition of Chemical Weapons.

Operative paragraph 10 recommends that member states take cooperative action to prevent illicit trafficking in WMD, their means of delivery, and related materials. During the negotiation of the resolution, the USA sought to include a provision that would authorize the interdiction and seizure of WMD in transit. The *So San* incident in 2002 had demonstrated the limits set by international law to undertake such measures on the high seas,²⁶ and the policy objective of the US Government was to have an authorization by the UN Security Council in a binding resolution under Chapter VII to remedy this lack of legal authorization. However, this proposal was not accepted by the Security Council members and the provision in operative paragraph 10 makes clear that such cooperative actions should be consistent with existing international law.²⁷

In operational paragraph 8 the Security Council calls on the UN members to ensure universality and full implementation of multilateral treaties in the field of non-proliferation of WMD. This paragraph is significant because it does not contain the other component found in the relevant treaties—disarmament by the existing possessors of such weapons. While the Security Council declares its intention 'to monitor closely' the implementation of Resolution 1540, there are no sanctions envisaged in the resolution for those member states that do not comply with its requirements.

Resolution 1540 imposes significant obligations on the UN member states and the new elements in these obligations are likely to be most significant for those states that are not participants in the export control regimes and that may not have enacted implementation legislation in relation to the non-proliferation treaties. Given the significant character of these obligations, it may be questioned how suitable the language of the resolution is as a guide for national implementation legislation. As noted above, some definitions give rise to uncertainties and, more importantly, at several points the resolution calls on the UN members to adopt 'appropriate' and 'effective'

²⁶ On the *So San* incident see Ahlström, C., 'The Proliferation Security Initiative: international law aspects of the Statement of Interdiction Principles', *SIPRI Yearbook 2005: Armaments, Disarmament and International Security* (Oxford University Press: Oxford, 2005), pp. 741–42.

²⁷ Ahlström (note 26), p. 763.

national legislation, but the resolution provides no further criteria for judging appropriateness and effectiveness. In the light of this it would essentially be up to the individual member state to decide, and this situation may in turn lead to differences in implementation between them. The procedures surrounding Resolution 1540 also did not produce any published *travaux préparatoires*—which in many instances serve as an important tool for the proper interpretation of ambiguous treaties, as well as other forms of legislation.

IV. The implementation of Resolution 1540

In the controversy over whether the Security Council has the power to adopt legislative resolutions it would be pertinent to assess the extent to which the member states have implemented Resolution 1540, as a practical indicator of how far they have been willing to conform to its provisions.

To monitor the implementation of the resolution, the Security Council established the 1540 Committee, consisting of all members of the Security Council, to sit for a maximum of two years. The member states were requested to report to the committee no later than six months after the adoption of the resolution (i.e. before 28 October 2004) on steps they had taken, or intended to take, in order to implement it—in other words, not necessarily on full and complete implementation. This procedure does not address the point that reporting in itself is no guarantee of compliance nor does it make clear the standards of compliance by which states would be assessed. A full check of national measures for compliance and adequacy with the range of international conventions would demand abundant resources. The 1540 Committee began its work in June 2004.²⁸ In August the committee adopted guidelines for the conduct of its work as well as for the preparation of national reports. Towards the end of 2004 the committee began to hire experts for the task of assessing the national reports.²⁹ The first experts began work in February 2005. However, no more than eight experts were involved at any time and the level of relevant knowledge in the states making up the Security Council at the time and the levels of expertise were uneven.

Out of a total UN membership of 191, 59 member states (and one non-member, the European Union) submitted their first national report by the deadline, on 28 October 2004.³⁰ As of 7 December 2004, the number of member states that had submitted reports increased to 87.³¹ An overwhelming majority of the 104 non-submitting states were developing countries. As of 16 December 2005, the response rate had improved somewhat and 124 member states had submitted their initial reports, while 67 mem-

²⁸ United Nations, 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, UN document S/2004/958, 8 Dec. 2004.

²⁹ Most of the documents related to the work of the 1540 Committee are available on its website, URL <<http://disarmament2.un.org/Committee1540/>>.

³⁰ In comparison, 112 states had complied with the reporting requirement in Resolution 1373 by the end of 2001. See Stiles, K. W. and Thayne, A., 'Compliance with international law: international law on terrorism at the United Nations', *Cooperation and Conflict*, vol. 41, no. 2 (2006), pp. 153–76; and Stiles, K. W., 'The power of procedure and the procedures of the powerful: anti-terrorism law in the United Nations', *Journal of Peace Research*, vol. 43, no. 1 (2006), pp. 37–54.

³¹ United Nations, 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, Corrigendum, UN document S/2004/958/Corr.1, 23 Dec. 2004.

ber states had yet to do so.³² On 25 April 2006, two years after the adoption of the resolution and one and a half year after the expiry of the deadline, the committee submitted to the Security Council its third successive report, the first to make substantive comments on implementation. At this time, 62 UN member states had still not submitted a first report.³³ However, it should be emphasized that the countries that have submitted national reports account for the overwhelming majority of the trade in the relevant goods and technologies. Over half of the non-reporting states were in Africa, while another significant group consisted of small states in the Pacific region. Again, most were developing countries that were generally parties to the formal treaties on non-proliferation of WMD but not participants in the informal export control regimes. Reports from such countries would have revealed the need for them to take substantial additional measures to implement Resolution 1540, underlining that the work needed in order to implement the terms of the resolution is still greater than indicated in the third report of the 1540 Committee as it stands. Tellingly, the language of this report is generic, referring to the overall implementation level, rather than identifying what individual member states have done or have yet to do. More detailed information on the level of implementation in particular member states may be accessed in the legislative database that the 1540 Committee has made available on the Internet.³⁴

With respect to the implementation of operative paragraph 1 of the resolution (the obligation to refrain from supporting non-state actors seeking to acquire or develop WMD and their means of delivery), the committee noted that a majority of the 62 states that had not submitted reports are parties to the treaties on non-proliferation of WMD. In light of this it concluded that 'these States should be in a position to report within a short period of time on steps they have taken to implement the obligations under those agreements in their national legislation'.³⁵ The assumption made about the role of the formal treaties in relation to the fulfilment of operative paragraph 1 seems too sweeping because the former do not, in general, relate to non-state actors in the first place.

The committee has identified several issues in relation to the implementation of operative paragraph 2. Several states have apparently reported that the implementation of this requirement would be met by means of their pre-existing legislation on export control, but the committee notes that the requirements of the resolution cannot be considered to be met just by such measures. Furthermore, some member states have also reported the measures they have undertaken to implement the BTWC, the CWC and the NPT as sufficient to meet the requirements of operative paragraph 2. The committee states, however, that these treaties 'deal primarily with State-to-State prohibited activities' and that they do not 'explicitly address non-State actors'.³⁶ The committee also notes that some member states have recently adopted anti-terrorism legislation that criminalizes the acquisition of WMD by terrorist organizations. In this context the committee cautions that the material field of application of Reso-

³² United Nations, Letter dated 19 December 2005 from the Chairman of the Security Council Committee established pursuant to Resolution 1540 (2004) addressed to the President of the Security Council, UN document S/2005/799, 19 Dec. 2005.

³³ United Nations, Letter dated 25 April 2006 from the Chairman of the Security Council Committee established pursuant to Resolution 1540 (2004) addressed to the President of the Security Council, UN document S/2006/257, 25 Apr. 2006.

³⁴ See 1540 Committee, 'Legislative database', URL <<http://disarmament2.un.org/Committee1540/legalDB.html>>.

³⁵ United Nations (note 33), p. 10.

³⁶ United Nations (note 33), p. 11.

lution 1540 is wider because of its focus on all non-state actors, rather than terrorists alone. Looking at the different categories of WMD, the committee notes that the most 'promising' level of implementation is in the field of chemical weapons—at least as long as the material provisions of the resolution correspond to the provisions of the CWC.³⁷ A similar situation also exists with respect to biological and nuclear weapons. Several states have legislation that covers, and provisions that penalize violations of, the prohibition to manufacture and acquire biological weapons. However, with respect to the requirements in the resolution that have no correspondence in the BTWC, the situation is not as good. With regard to the means of delivery for WMD the committee notes that only 36 states have legislation in place that prohibits non-state actors from acquiring such means. The general conclusion drawn on operative paragraph 2 is that major variations exist in the domestic legislation of member states, and the committee concludes by expressing concern about the number of states that 'still have no legislation in place that prohibits and penalizes the possible use by non-State actors of their territory as a safe haven for activities related to weapons of mass destruction'. The committee recommends the Security Council to encourage states that have a legal framework already in place to revisit their legislation in order to fill gaps related to all aspects of operative paragraph 2. Hence, the report indicates that several UN members have reported national legislation that, on closer analysis, does not meet the requirements of the resolution.

As noted above, operative paragraph 3 is the most demanding provision of the resolution. In its review of the implementation of paragraphs 3(a) and 3(b)—accounting and effective physical protection measures—the committee notes that most of the measures reported relate to hazardous NBC weapon-related materials and the like that are used for permitted peaceful purposes. Only 14 member states have reported that they have taken such measures in relation to the means of delivery of WMD. A problem in connection with the measures reported under this provision is that they often serve other purposes than security—for example, occupational health and environmental protection. Hence, it cannot be taken for granted that such legislation covers all obligations under paragraphs 3(a) and (b). The committee also notes that some states might consider that there is no need for legislation on accounting and physical protection measures because they currently do not have any goods and technologies within their territories. Here the committee reiterates that Resolution 1540 establishes a 'direct and binding requirement' with which all states are meant to comply. Without uniform implementation there is a risk that some member states' territories may become 'proliferation pathways'.

Paragraphs 3(c) and 3(d) require the member states to develop and maintain effective border controls as well as export and trans-shipment controls. In relation to border controls, the committee notes that 77 states have reported that they have a national legal framework for the control of the flow of goods over their borders and that these controls also cover items related to WMD. While many of these states also have enforcement agencies for border control, there are apparently some instances where such enforcement agencies do not have a specific authority in relation to

³⁷ The higher level of national implementation in respect of the CWC can largely be credited to the focused work (in the framework of the Article VII Action Plan) that the Organisation for the Prohibition of Chemical Weapons has conducted in recent years in order to ensure full national implementation of the provisions of the treaty. See Guthrie, R., Hart, J. and Kuhlau, F., 'Chemical and biological warfare developments and arms control', *SIPRI Yearbook 2006: Armaments, Disarmament and International Security* (Oxford University Press: Oxford, 2006), p. 715.

WMD and their means of delivery. The general conclusion in relation to the requirement for border controls is: 'The Committee's findings concerning border control efforts raise concern that a large number of States might not have either the technical capacity or the equipment to implement the full range of border controls called for under resolution 1540 (2004)'.³⁸

The establishment of a domestic export control system is a prerequisite for being able to differentiate between legitimate trade for peaceful purposes and illicit trafficking of dual-use goods (items that were not specially designed, developed or adapted for military use but that could nevertheless be used in military programmes). In this context the committee notes that 'effective measures of export control will facilitate legitimate and secure trade among States. Such controls can also reduce the incidence of theft or diversion, including the illicit acquisition and use of such items'.³⁹ Of the 129 UN member states that have submitted national reports, 80 report that they have some export controls in place that cover items related to WMD, while 69 report that they have penalties associated with export control legislation. It is mainly among the participants in the multilateral export control regimes that the implementation of the specific requirements of Resolution 1540 is found to be comprehensive.⁴⁰ Specifically in relation to the licensing of exports and imports of sensitive goods, 69 states report that they have such a system. Few participating states, however, have reported on the existence of any penalties for violating, or on the enforcement of, such licensing requirements.

While almost all UN member states that have export control legislation in place also have adopted national control lists, the committee notes that these vary: 59 include items for biological weapons, 66 cover goods and technologies for chemical weapons, 61 list nuclear items, and 55 include the means of delivery of WMD. It is also noted that some countries exercise control over goods and technologies not listed in any control list (so-called catch-all controls) and that 38 countries exercise control over intangible transfers of technology (i.e. where no goods physically cross any borders). The number of UN member states controlling the provision of financial services related to the export of items related to WMD stands at 16, while 9 member states report that they also control the provision of transport services. Finally, with respect to end-use controls, the committee notes that 49 states have reported that they exercise such controls. However, as far as control over the transfer, trans-shipment or re-export of dual-use items is concerned, the 1540 Committee notes that a limited number of member states exercise such control. In relation to this situation, the committee concludes that 'these findings outline another gap in the international system that could be exploited, particularly with the increase in the use of free-trade zones or similar territories'.⁴¹

In its conclusions, the committee notes that Resolution 1540 is an important and timely response to the threat of non-state actors, in particular terrorists, acquiring WMD. However, this response may only be effective if all UN members 'irrespective of whether they possess a potential associated with weapons of mass destruction and their mean of delivery implement fully the requirements laid down in the resolution

³⁸ United Nations (note 33), p. 20.

³⁹ United Nations (note 33), p. 21.

⁴⁰ For a list of the current membership of the multilateral export control regimes see table 11.1 in chapter 11.

⁴¹ United Nations (note 33), p. 22.

and cooperate closely among themselves to this end'.⁴² Examination of the national reports reveals that several member states intend to base their implementation of the provisions of Resolution 1540 on legislation that predated the adoption of the resolution. However, as noted above, most of this legislation was originally designed to comply with non-proliferation treaties that, at least in significant parts, do not address the threats posed by non-state actors. The committee notes that at least 'some' states have shown an interest in revisiting the existing legal framework in order to bring it in line with the new requirements established by Resolution 1540. The lack of sufficient information in many national reports coupled with the sizeable number of UN member states that still have to submit their first national reports leads the 1540 Committee to conclude that 'much needs to be done henceforth to fulfil the implementation obligations under resolution 1540 (2004) in a comprehensive manner'.⁴³ It is also obvious from the first substantive report of the 1540 Committee that the formal status of the resolution plays an important role for it. On several occasions the committee emphasizes its binding nature when discussing the lack of implementation of Resolution 1540.

On the basis of the 1540 Committee's report, the Security Council adopted Resolution 1673 on 27 April 2006, in which the Security Council notes that not all UN member states have submitted their first national reports on their implementation of Resolution 1540. It also notes that the full implementation of the resolution's requirements, including the adoption of national laws and measures, 'is a long term task that will require continuous efforts at national, regional and international levels'. Resolution 1673 is also adopted under Chapter VII of the UN Charter. In the resolution, the Security Council reiterates its decision on the adoption and the requirements of Resolution 1540 and emphasizes the importance of all states fully implementing the resolution. It calls on all states that have not yet submitted any reports to do so 'without delay' rather than setting any precise deadline. Interestingly, the operative paragraphs containing (legally binding) decisions by the Security Council are directed at the 1540 Committee, rather than at the recalcitrant member states. The Security Council decides to extend the mandate of the 1540 Committee for an additional two years (until 27 April 2008) and decides that the committee shall intensify its efforts to promote the full implementation of Resolution 1540. The latter, however, may be an empty expectation owing to the lack of funding, staff and so on.⁴⁴

Given the relatively clear provision in Article 25 of the UN Charter that member states *shall* carry out the decisions of the Security Council it may seem out of the ordinary that the Security Council finds itself in the situation of having to reiterate a previous legally binding resolution. The implementation record thus far of Resolution 1540 has most probably led at least some members of the Security Council to realize that its adoption was not the quick fix they may originally have expected. The same understanding would explain why, although the 1540 Committee was originally envisaged to sit for only two years (Resolution 1540 provides no time frame for

⁴² United Nations (note 33), p. 28. The General Assembly has called on its members to strengthen and coordinate their efforts to combat the proliferation of WMD to terrorists. See e. g. United Nations, The United Nations Global Counter-Terrorism Strategy, UN document A/RES/60/288, 8 Sep. 2006.

⁴³ United Nations (note 33), p. 28.

⁴⁴ Some countries and organizations have provided funding for regional meetings to support the implementation of Resolution 1540. See e.g. 'Council Joint Action 2006/419/CFSP of 12 June 2006 in support of the implementation of the United Nations Security Council Resolution 1540 (2004) and in the framework of the implementation of the EU Strategy against the Proliferation of Weapons of Mass Destruction', *Official Journal of the European Union*, L165 (17 June 2006), p. 30.

complete implementation), Resolution 1673 explicitly recognizes that full implementation is a 'long-term task'. On the other hand, there is information to suggest that countries which strongly supported Resolution 1540 never intended the UN to be the sole implementing organization. More effort is needed in the national and regional programmes of outreach to improve non-proliferation awareness and capacity—the results of which have not filtered back to the United Nations. It also remains to be seen whether the explicit recognition that the full implementation of Resolution 1540 is a long-term task may—as in the case of the UN Counter-Terrorism Committee—lead the 1540 Committee to adopt a conciliatory and non-confrontational posture, rather than relying mainly on the formal character of the obligations laid down in the resolution.

V. Conclusions

This appendix addresses the question of whether the actual implementation of a controversial UN Security Council resolution could be used as a measure of its acceptance by the UN members. If this were so, then the fact that about one-third of the UN member states have never reported under UN Security Council Resolution 1540 would seem to call such acceptance into question. However, there are other ways of reading the situation. Countries may have had practical or political reasons for not responding. This is all the more plausible because no clear penalty was defined in the resolution. That said, the implementation of Resolution 1540 thus far would seem to indicate that its acceptance is still far from universal and, hence, that it remains controversial. A substantial number of member states missed the deadline for reporting set by the resolution, and an equally significant number of member states have yet to submit their first national reports. Among those member states that have provided reports, there seems to be a tendency to refer to pre-existing national legislation as far as possible. The 1540 Committee has reported that only some UN members seem ready to take a fresh look at their national legislation in view of the new threat of weapons of mass destruction coming into the possession of non-state actors and to take action to remedy any deficiencies found in the national legislation.

The level of implementation of Resolution 1540 would also indicate that a legislative resolution under Chapter VII of the UN Charter need not necessarily imply a prompt answer to an urgent threat to international peace and security. Resolution 1540 will probably not be implemented by all UN member states for several years—despite the fact that its provisions are legally binding under the Charter of the United Nations. The main proponents of the resolution may also not have envisaged the UN as the sole implementing body.

In view of all these complexities, it is too early to tell if the UN Security Council has achieved the purpose of the resolution. This could only be determined if a direct survey of compliance and the reasons for non-compliance were to be carried out. After only two years of operation, it is not possible to determine whether the resolution has been a success.