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**WMD Terrorism and Security Council  
Resolution 1540: Conditions for Legitimacy in  
International Legislation**

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# **WMD Terrorism and Security Council Resolution 1540: Conditions for Legitimacy in International Legislation**

Masahiko Asada

## Abstract

Faced with the urgent and grave threat of WMD terrorism, the international community has responded with a new approach of international legislation by adopting Security Council Resolution 1540. The traditional approach of multilateral treaties on WMD has primarily been aimed at the prevention of proliferation of such weapons to States. Another traditional approach of utilizing anti-terrorism treaties has been a sort of patchwork, and thus provides no guarantee that a new treaty is made in a timely manner in response to a newly emerging type of terrorism. By contrast, the new approach of international legislation through Council resolutions makes it possible to enact rules that legally bind all UN members immediately and automatically without exception and are equivalent to those in a treaty instantly ratified by all UN members. Indeed, a new thinking is necessary to effectively respond to a new, urgent and grave threat to the international community. In that sense, Resolution 1540 is welcome. This does not, however, mean that everything is allowed if it is effective to deal with the present or imminent threat. Not only from the viewpoint of legitimacy, which guarantees the long-standing effectiveness, but also from that of the rule of law in the international community, it seems of fundamental importance to establish some kind of understandings that we discuss in this Paper, if international legislation by the Security Council is destined to become inevitable in the future and is to be better implemented.

## WMD Terrorism and Security Council Resolution 1540: Conditions for Legitimacy in International Legislation\*

Masahiko Asada

### Introduction

The September 11 terrorist attacks (9/11) and the ensuing anthrax incidents in the United States in 2001 marked the opening of a new era in many respects. From an international security perspective, they showed that the gravest threat to international peace and security might no longer be the proliferation of weapons of mass destruction (WMD) to the “rogue States,” but may now be their proliferation to “terrorists.” *The National Security Strategy of the United States of America* of September 2002 described this possibility as follows: “[t]he gravest danger our Nation faces lies at the crossroads of radicalism and technology. Our enemies have openly declared that they are seeking weapons of mass destruction, and evidence indicates that they are doing so with determination. The United States will not allow these efforts to succeed.”<sup>1</sup>

Such perception is not specific to the United States alone; it has widely been shared by the international community. The Report of the High-level Panel on Threats, Challenges and Change entitled, *A More Secure World: Our Shared Responsibility*, published in December 2004, declared the need for “[u]rgent short-term action ... to defend against the possible terrorist use of nuclear, radiological, chemical and biological weapons.”<sup>2</sup> In the same year, the United Nations (UN) General Assembly adopted a resolution on the “[m]easures to prevent terrorists from acquiring weapons of mass destruction.”<sup>3</sup> Within the framework of G-8, the Gleneagles summit document of “G-8 Statement on Counter-Terrorism” of 2005 referred to the fact that they had “carried forward initiatives to prevent the spread of weapons of mass destruction to terrorists and other criminals.”<sup>4</sup>

Thus, the global threat has rapidly been shifting from one originating from States to one from non-State actors. Notwithstanding, the traditional measures in this field remain not adequate or not adequately implemented to counter the new threat. Against such a backdrop, the

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<sup>1</sup> White House, *The National Security Strategy of the United States of America*, September 2002, preface.

<sup>2</sup> A/RES/59/565, 2 December 2004, p. 43, para. 135.

<sup>3</sup> A/RES/59/80, 3 December 2004. This was the third such resolution of the UN General Assembly since 2002. See A/RES/57/83, 22 November 2002; A/RES/58/48, 8 December 2003; A/RES/60/78, 8 December 2005; A/RES/61/86, 6 December 2006.

<sup>4</sup> “G8 Statement on Counter-Terrorism,” Gleneagles, 2005, para. 2.

UN Security Council adopted Resolution 1540 unanimously on April 28, 2004, in response to the urgent need to keep WMD out of the “wrong hands.”

This Paper first shows how the traditional approaches to the problem lack effectiveness both in terms of the system itself as well as its implementation. It then examines the origins and content of Resolution 1540 as an alternative approach (international legislation) to the problem of WMD terrorism, followed by a general consideration of conditions for legitimate international legislation in light of the drafting process of the Resolution. Finally, the Paper concludes by emphasizing the importance of the rule of law and legitimacy in international legislation by the Security Council, if it is to be truly effective.

## I. Traditional Approaches and Their Problems

### 1. International Treaties on WMD

#### (1) WMD Treaties and Non-State Actors

WMD has traditionally been regulated by treaties on the non-proliferation or prohibition of the relevant weapons. Such treaties include the 1968 Nuclear Non-proliferation Treaty (NPT), the 1972 Biological Weapons Convention (BWC) and the 1993 Chemical Weapons Convention (CWC). They have set forth norms to be observed, ideally, by all States of the international community, and indeed have been adhered to by a vast majority of States.<sup>5</sup>

However, these treaties are not originally aimed at dealing with terrorism. They are primarily concerned with the proliferation of WMD in the traditional sense. As such, they established norms to be applied to States, not individuals such as terrorists, because it was assumed at the time of their drafting that only States had the intention and the capabilities to develop weapons of mass destruction. This does not, however, mean that there is nothing in these treaties that would have the effect of regulating the conduct of individuals. The provisions potentially having such an effect encompass those on national implementation of the treaty, export control and verification.

Of these, the most directly relevant provisions are those on national implementation. National implementation provisions of the WMD treaties typically provide that States Parties are obliged to prohibit what is prohibited to them also vis-à-vis their nationals and other individuals under their jurisdiction or control. It is expected that such provisions, if adequately implemented, could have a direct effect of regulating the conduct of terrorists, since they are essentially private persons, however internationally organized they are.

Export control consists of a set of measures designed to control the trade conducted between private firms from the export side. It may contribute to the prevention of the development or manufacturing of WMD by terrorists if they try to acquire the source materials or components from abroad. However, its primary objective and function have been to impede

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<sup>5</sup> The number of States Parties to the NPT, the BWC and the CWC is 190 (189 if North Korea is not counted), 156 and 182, respectively, as of June 2007.

such acquisition by *States*. Similarly, although verification measures of WMD treaties might detect terrorists plot to develop such weapons, it would be no more than a possibility. Thus, it follows that the key provisions of WMD treaties, which warrant close examination for our purposes, are those on national implementation.

## (2) National Implementation of WMD Treaties

According to a widely shared view, the States that the drafters of the NPT had in mind as its main targets were such industrial States as Japan and West Germany. Other States were not regarded as having the necessary technology to develop nuclear weapons. It appears that the development and manufacturing of nuclear weapons by individuals was beyond imagination at that time. Even in the 1980's, it was said that, although a crude design nuclear weapon could be constructed by a group not previously engaged in designing or building nuclear weapons, providing a number of requirements were adequately met, "the requirements that had to be met were such as to make the scenario extremely unlikely."<sup>6</sup> It was also said that the production of sophisticated nuclear explosive devices should not be considered to be a possible activity for a fly-by-night terrorist group.<sup>7</sup> It is, therefore, natural that the NPT does not contain any provision aimed at preventing the acquisition of nuclear weapons by individuals.

The Biological Weapons Convention of 1972 is the first WMD treaty that contains national implementation clause.<sup>8</sup> It provides in Article 4 that: "[e]ach State Party to this Convention shall, in accordance with its constitutional processes, take any necessary measures to prohibit and prevent the development, production, [etc.] of the [biological weapons] within the territory of such State, under its jurisdiction or under its control anywhere." It does not specify the measures to be taken to nationally implement the Convention, and leaves them to the discretion of each State Party. As a result, only a very small number of States Parties have enacted national legislation or taken administrative measures in accordance with this provision.<sup>9</sup>

In order to rectify the situation and to prevent the occurrence of ambiguities, doubts and suspicions, the Third Review Conference of the BWC held in 1991 agreed that States Parties

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<sup>6</sup> J. Carson Mark et al., "Can Terrorists Build Nuclear Weapons?," in Paul Leventhal and Yonah Alexander (eds.), *Preventing Nuclear Terrorism: The Report and Papers of the International Task Force on Prevention of Nuclear Terrorism* (Lexington Books, 1987), p. 60; David Fischer, *Stopping the Spread of Nuclear Weapons: The Past and the Prospects* (Routledge, 1992), p. 154.

<sup>7</sup> Mark et al., "Can Terrorists Build Nuclear Weapons?," *op.cit.*, p. 65.

<sup>8</sup> Nicholas A. Sims, "National Implementation of International Obligations: Experience under the Multilateral Treaty Regime of the 1972 Convention on Biological and Toxin Weapons," in Thomas Stock and Ronald Sutherland (eds.), *National Implementation of the Future Chemical Weapons Convention*, SIPRI Chemical & Biological Warfare Studies No. 11 (Oxford U.P., 1990), p. 59.

<sup>9</sup> See Jozef Goldblat and Thomas Bernauer, *The Third Review of the Biological Weapons Convention: Issues and Proposals*, UNIDIR Research Paper No. 9 (United Nations, 1991), p. 22.

submit “declaration of legislation, regulations and other measures,”<sup>10</sup> as one of the confidence-building measures (CBM). However, even such declaration requirement was not satisfactorily fulfilled. At the Fourth Review Conference of 1996, States Parties noted that participation in the CBM was not universal, and that not all declarations were prompt or complete.<sup>11</sup>

Logically, lack of declaration does not necessarily mean lack of implementation. But the unsatisfactory national implementation was revealed when the Final Report of the Fifth Review Conference of 2001/2002 listed, as the very first of a set of measures to strengthen the BWC, “the adoption of necessary national measures to implement the prohibitions set forth in the Convention, including the enactment of penal legislation.”<sup>12</sup>

The Chemical Weapons Convention of 1993 contains a sophisticated national implementation clause. It provides in Article 7, paragraph 1, that:

“Each State Party shall, in accordance with its constitutional processes, adopt the necessary measures to implement its obligations under this Convention. In particular, it shall:

(a) Prohibit natural and legal persons anywhere on its territory or in any other place under its jurisdiction as recognized by international law from undertaking any activity prohibited to a State Party under this Convention, including enacting penal legislation with respect to such activity.”

In a nutshell, it obliges States Parties to enact legislation to penalize those who develop, produce, or use chemical weapons on their territories. By imposing penal sanctions system, it is generally expected that this provision could lead to an effective control of the conduct of individuals, including terrorists, in the chemical field.<sup>13</sup> But the actual effectiveness of such a system would partly depend on how strict the penalties are in each national legislation.

In order to show the importance of the strictness of the penalties, it is worth mentioning the circumstances under which the Japanese Diet (Parliament) enacted two different laws related to the CWC in 1995. One was the Chemical Weapons Act, and the other the Sarin Act, both regulating the manufacture, possession and use (release) of toxic chemical agents. There were reasons for more than one Acts being enacted in the same year to serve essentially the same objectives at least partly.

The Chemical Weapons Act was enacted to nationally implement the CWC. In terms of penalty, it provides for relatively light penalties reflecting the administrative nature of the obligations, for instance, of not possessing certain toxic chemicals (such as sarin) *without*

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<sup>10</sup> BWC/CONF.III/23, Geneva, 1992, p. 14.

<sup>11</sup> BWC/CONF.IV/9, Geneva, 1996, p. 19, para. 5. Indeed, the level of participation in the CBM has remained relatively low. In most years, only 40-50 States Parties submit CBM information. BWC/CONF.VI/INF.3, 28 September 2006, p. 7, para. 25.

<sup>12</sup> BWC/CONF.V/17, Geneva, 2002, p. 3, para. 18(a).

<sup>13</sup> See Ian R. Kenyon, “Keynote Address,” Asian Seminar on National Implementation of the Chemical Weapons Convention for Industrial Verification, Makuhari, Japan, October 16, 1996, p. 7.

*permission*, notwithstanding its inherent danger to public peace and order. The extent of the penalties is not severe enough to activate the so-called emergency arrest system, an extremely effective system that enables the police to arrest the suspects without a warrant. In addition, the Chemical Weapons Act does not penalize certain ways of “preparations” for the production of certain toxic chemicals (such as sarin) without permission, and thus is not satisfactory from the viewpoint of preventing terrorism and ensuring public safety and security, though such penalization is not required by the CWC as a non-anti-terrorism convention.<sup>14</sup>

That is why the Sarin Act was enacted in the same year with severer penalties and with provisions covering the “preparations” that had not been covered by the Chemical Weapons Act. This was a response to the Tokyo subway incident perpetrated by the Aum Shinrikyo religious cult, which involved the use of sarin. In other words, if the incident had not occurred, there would not have been the Sarin Act and the Japanese legislation could have been seriously flawed in terms of preventing and responding to chemical terrorism. It is doubtful that States Parties that had not experienced similar chemical terrorism have enacted legislation with sever enough penalties provided therein.

The issue does not stop there. There is a more serious question concerning the enactment of relevant legislation. The CWC requires States Parties to inform the Organization for the Prohibition of Chemical Weapons (OPCW) of “the legislative and administrative measures taken to implement this Convention” (Art. VII, para. 5). This has, in effect, made the kind of request made in the BWC context (CBM) a legal obligation in the CWC context. Obviously, the purpose of this obligation is to ensure the implementation of the obligation to enact penal legislation. However, the implementation record is not good at all. According to the OPCW’s statistics as of October 2002, only 27% of the States Parties had legislation that covers all key areas of the Convention.<sup>15</sup> Even the declaration obligation was fulfilled only by 48% of the States Parties. Accordingly, the First Review Conference of the CWC held in April-May 2003 expressed a “major concern” about the fact that a large number of States Parties had still not notified the OPCW of the legislative and administrative measures they had taken to implement the Convention, and also noted that “an even larger number of States Parties have not adopted legislation covering all areas essential to adequate national enforcement of Convention obligations.”<sup>16</sup> Thus, even the CWC with a most sophisticated national implementation clause has faced with a serious problem in its actual implementation.<sup>17</sup>

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<sup>14</sup> See Masahiko Asada, “National Implementation of the Chemical Weapons Convention in Japan: Its Relevance and Irrelevance to the Tokyo Subway Incident,” *Japanese Annual of International Law*, No. 39 (1996), pp. 40-46.

<sup>15</sup> OPCW Doc. C-10/DG.4/Rev.1 – EC-M-25/DG.1, 2 November 2003, Annex, p. 5.

<sup>16</sup> OPCW Doc. RC-1/5, 9 May 2003, pp. 19-20, para. 7.77.

<sup>17</sup> A more recent implementation record shows a slight improvement: as at 11 November 2006, 40 % of the States Parties had legislation covering all key areas of the Convention. “Update National Implementation,” *Chemical Disarmament*, Vol. 4, No. 4 (December 2006), p. 33. See also Masahiko Asada, “Bio-Terrorism and National



## 2. International Treaties on Terrorism

### (1) Common Structure of Anti-Terrorism Treaties

In addition to the WMD-related treaties, quite a number of anti-terrorism treaties exist that may bear on the suppression of WMD terrorism. Currently, there are 14 anti-terrorism conventions; if regional treaties are also counted, the number goes up to 24.<sup>18</sup> Despite the numbers, the basic structure of the conventions is essentially the same and includes the following elements:<sup>19</sup> first, an obligation of each State Party to make specific categories of acts punishable offences under its national law with appropriate penalties taking into account their grave nature; second, to establish a semi-universal jurisdiction over such offences; third, to submit the case to its competent authorities for the purpose of prosecution, if the alleged offender is not extradited (the principle of *aut dedere aut judicare*); and fourth, to deem such offences to be included as extraditable offences in any existing extradition treaty and to include them as extraditable offences in every future extradition treaty. Thus, the purposes of anti-terrorism conventions are to oblige States Parties to criminalize the relevant terrorist acts with grave penalties and to take the necessary domestic measures not to fail to punish any terrorist. As such, it is important to promote the universality of each convention, particularly because of the *aut dedere aut judicare* principle enshrined in it, as well as to ensure the full implementation by all States Parties of their obligations.

The number of anti-terrorism conventions is growing. The high number does not necessarily signify their effectiveness; rather, it implies that new types of terrorism of serious concern have ever been emerging constantly. At the same time, it shows that a comprehensive anti-terrorism convention is yet to be concluded. The need for such a convention has long been perceived and the negotiation of it continues to be conducted in an ad hoc committee of the UN General Assembly since its establishment in 1996.<sup>20</sup> The disagreement on how to define “terrorism” has prevented the convention from being finalized.<sup>21</sup>

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Implementation of the Biological Weapons Convention,” *Kyoto Journal of Law and Politics*, Vol. 3, No. 1 (November 2006), pp. 32-33.

<sup>18</sup> For a list of the relevant conventions, see A/59/210, 5 August 2004, pp. 12-14. It lists 22 global and regional anti-terrorism conventions in accordance with a common UN practice. The number 24 shown in the text include, in addition to the 22 conventions, the 1994 Convention on the Safety of United Nations and Associated Personnel and the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism, both of which are also to be regarded as anti-terrorism conventions.

<sup>19</sup> The 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft and the 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection are exceptions.

<sup>20</sup> A/RES/51/210, 17 December 1996, para. 9; A/RES/53/108, 8 December 1998, para. 11.

<sup>21</sup> The major differences concern the question of whether to include the “legitimate struggle of people against foreign occupation” in the definition of terrorism. See A/59/37, New York, 2004, Annex I, p. 7, paras. 15-16; A/57/37, New York, 2002, Annex IV, p. 17.

## (2) Anti-Terrorism Treaties Pertaining to WMD

Among the anti-terrorism conventions concluded so far, only a few are directly relevant to WMD terrorism. The earliest of them is the 1980 Convention on the Physical Protection of Nuclear Material (Nuclear Material Convention), which has obligated its States Parties to criminalize the unlawful possession, use, transfer or theft of nuclear material and threat to use nuclear material to cause death, serious injury or substantial property damage; to make these offences punishable; and to establish a semi-universal jurisdiction as well as the *aut dedere aut judicare* principle for such offences (Arts. 7, 8, and 10). The Convention also provides that, during international nuclear transport, nuclear material within the State Party's territory, or on board a ship or aircraft under its jurisdiction, shall be protected at the designated level (Art. 3).

The Convention entered into force in February 1987, and Japan acceded to it in October 1988. The delay of Japan's accession was primarily due to its preparations for the enactment of domestic legislation, particularly the provisions for the punishment of foreigners committing the designated crimes outside Japan.<sup>22</sup>

As mentioned above, the Convention provides the physical protection of nuclear material only for those materials that are in the process of "international nuclear transport," which is defined as the carriage of nuclear material by any means of transportation intended to go beyond the territory of an originating State. In other words, the Convention did not cover the physical protection of nuclear material and facilities in peaceful *domestic* use, storage and transport. Such protection had long been advocated in light of the terrorist threat, and was finally materialized in the amendment to the Convention agreed upon in July 2005.<sup>23</sup> However, it is said that some more years will be needed before the amendment comes into effect because of the high hurdle set in the amendment clause of the Convention that requires two thirds of the States Parties<sup>24</sup> to ratify an amendment for its entry into force (Art. 20).

Another Convention that has much to do with WMD terrorism is the 1997 International Convention for the Suppression of Terrorist Bombings (Terrorist Bombing Convention). This Convention is to criminalize the unlawful and intentional use of "explosives and other lethal devices" in, into, or against various defined public places with the intent to cause death or serious bodily injury, or with the intent to cause extensive destruction of such a place; to make these offences punishable; and to establish a semi-universal jurisdiction as well as the *aut dedere aut judicare* principle for the offences (Arts. 2, 4, 6, and 8).

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<sup>22</sup> *Minutes of the Committee on Science and Technology, House of Representatives*, 14 April 1988, p. 1.

<sup>23</sup> IAEA, "Convention on the Physical Protection of Nuclear Material: Amendment" (adopted on July 8, 2005), 25 July 2005. See also CPPNM/AC/L.1/1, 28 April 2005; CPPNM/AC/L.1/2 (China), 28 April 2005. For earlier proposals, see George Bunn, "Raising International Standards for Protecting Nuclear Materials from Theft and Sabotage," *Nonproliferation Review*, Vol. 7, No. 2 (Summer 2000), p. 152.

<sup>24</sup> As of May 2007, the number of the parties to the Convention is 128.

According to the definition given in the Convention, “explosives and other lethal devices” include a weapon or device that has the capability to cause death, serious bodily injury or substantial material damage through the release of “toxic chemicals, biological agents or toxins or similar substances or radiation or radioactive material” (Art. 1, para. 3 (b)). Thus, the Convention can be seen as an anti-WMD terrorism treaty, at least partly.

The Convention entered into force in May 2001, three and half years after being opened for signature in January 1998. Japan deposited its instrument of approval in November 2001. Again, the reason for the delay was related to the preparation for the necessary domestic legislation.<sup>25</sup>

The most recent Convention that has direct relevance to WMD terrorism is the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism (Nuclear Terrorism Convention). It obliges the States Parties to criminalize a broad range of acts and to make these offences widely punishable through a semi-universal jurisdiction, and provides for the *aut dedere aut judicare* principle (Arts. 2, 5, 9, 11). It covers the following acts that are unlawful and intentional and accompanied by the intent to cause death or serious bodily injury or the intent to cause substantial damage to property or the environment: the possession of radioactive material; making or possession of a nuclear explosive device or a radioactive material dispersal or radiation-emitting device; use of such a device or radioactive material; use of, or damage to, a nuclear facility in a manner which releases radioactive material.

Among the listed offences, acts involving radioactive material other than nuclear material are not covered by the Nuclear Material Convention, including the amended one; and acts of using or damaging nuclear facilities to release radioactive material are not dealt with by the Nuclear Material Convention (original).

The Nuclear Terrorism Convention entered into force in July 2007 and Japan is an original party to it.

### (3) Problems with Anti-Terrorism Treaties

The first impression gained from the above sketch of the relevant treaties is that international law of anti-terrorism is in patchwork. The conventions relevant to WMD terrorism are relatively small in number, and all have gaps. That is partly why additional treaties are drafted and amendments are agreed upon to fill the gaps, thus the patchwork. Nonetheless, it is questionable whether the international community could make treaties timely in response to the newly emerging international security threat, taking into account the time period that is needed to draft a treaty in a multilateral forum. The Nuclear Terrorism Convention required more than six years before being finalized.<sup>26</sup>

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<sup>25</sup> *Minutes of the House of Representatives*, 1 October 2001, p. 17.

<sup>26</sup> See A/C.6/59/L.10, 8 October 2004, Annex, p. 6, para. 15.

Second, the problem of requiring too much time does not apply only to the negotiation of a treaty; it also holds true with the domestic legislative process. By definition, anti-terrorism treaties require national penal legislation in order to give real effect to them. Such legislation sometimes involves an extremely complicated drafting process. As noted above, the reason for Japan's delayed ratification of the relevant conventions was first and foremost the time required to prepare for the domestic implementing legislation. The delay of ratification may lead to the delay of entry into force of the treaty itself.

The most striking example in this respect is the 1999 International Convention for the Suppression of the Financing of Terrorism (Terrorist Financing Convention), which is also somewhat relevant to WMD-terrorism. It has long been recognized that this Convention compels its States Parties to work on an extremely complicated and difficult legislative process, because there are few States, if any, that have penal legislation providing for the financing of terrorism as a crime before adhering to this Convention. In fact, at the time of the September 11, 2001 terrorist attacks on the United States, almost two years after the opening for signature, only four States had ratified the Convention which requires 22 ratifications for effectuation,<sup>27</sup> though the number of ratifications has grown rapidly after 9/11 due to its sheer impact.<sup>28</sup>

Generally speaking, the truth is that few States are willing to adhere to a treaty that inevitably involves complicated national legislation; for the adherence to a treaty is left to the discretion of each State after all. This fact presents a grave problem to the establishment of an effective worldwide counter-terrorism legal system, as the universal adherence to an anti-terrorism treaty is the prerequisite for its effective functioning.

Third, there are problems with regard to the content of the anti-terrorism treaties themselves. As already noted, the main purposes of these treaties are to criminalize terrorist acts with grave penalties and to ensure that offenders are punished. The idea behind this system is the *ex post facto* punishment of terrorists and not the prevention of terrorism. Considering the grave nature of the threat arising from the nexus of WMD and terrorism, one cannot emphasize the importance of the preventive approach more.<sup>29</sup> It is true that the existence of a heavy penalty in itself has a deterrent and preventive effect. However, it is still questionable how much such deterrent effect is expected to work vis-à-vis terrorists who dare even to commit suicide bombing. This aspect of the problems with the anti-terrorism conventions is shared by the WMD treaties that provide national implementation obligations, including enacting penal legislation.

From the foregoing discussions on both WMD treaties and anti-terrorism conventions, it is difficult to expect that traditional approaches could respond to the new threat of WMD

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<sup>27</sup> They were Botswana, Sri Lanka, the United Kingdom and Uzbekistan.

<sup>28</sup> As of June 2007, the number of the parties to the Convention is 158.

<sup>29</sup> During the debate on the draft of Resolution 1540, several delegations mentioned the same point. See, e.g., S/PV.4950, 22 April 2004, pp. 13-14 (Romania); S/PV.4950 (Resumption 1), 22 April 2004, pp. 5 (Mexico), 16 (Albania).

terrorism satisfactorily. It is, therefore, even natural that in the post-9/11 era the United States began to pursue a new approach utilizing Security Council resolutions. In contrast to multilateral treaties whose drafting tends to require much time and the accession to which is not obligatory, Security Council resolutions (decisions) adopted under Chapter VII of the UN Charter legally bind all UN members immediately and automatically without exception and are equivalent to the treaties instantly ratified by all UN members.

## II. Possibilities and Limitations of the New Approach

### 1. Origin and Content of Security Council Resolution 1540

The United Nations Security Council adopted Resolution 1540 under Chapter VII of the UN Charter on April 28, 2004 unanimously.<sup>30</sup> Although an earlier initiative is sometimes referred to as the first precursor to the Resolution<sup>31</sup>, it is widely recognized that it originated from US President George W. Bush's call for a "new antiproliferation resolution" at the UN General Assembly in September 2003. In his statement, he said that:

"That [antiproliferation] resolution should 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. The United States stands ready to help any nation draft these new laws and to assist in their enforcement."<sup>32</sup>

This call of the US President was reiterated in his seven-point initiative made on February 11, 2004, at the National Defense University. He proposed as the second item of his initiative "a new Security Council resolution requiring all states to criminalize proliferation, enact strict export controls, and secure all sensitive materials within their borders."<sup>33</sup>

The Resolution, as adopted by the Security Council, required 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" (para. 1);

-- "in accordance with their national procedures, [...] adopt and enforce appropriate effective laws which prohibit any non-State actor to manufacture, acquire, possess, develop,

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<sup>30</sup> The co-sponsors of the draft Resolution were the United States, the United Kingdom, France, Russia, Spain, Romania and the Philippines.

<sup>31</sup> Merav Datan refers to the fact that in early 2003 the United Kingdom circulated a non-paper within the European Union, drawing lessons from the Counter-Terrorism Committee (CTC) established by Security Council Resolution 1373, and the idea of a Counter-Proliferation Committee was put forward for discussion and found general favor within the EU. Merav Datan, "Security Council Resolution 1540: WMD and Non-State Trafficking," *Disarmament Diplomacy*, No. 79 (April/May 2005), p. 48.

<sup>32</sup> A/58/PV.7, 23 September 2003, p. 11.

<sup>33</sup> White House, "President Announces New Measures to Counter the Threat of WMD," February 11, 2004.

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” (para. 2);

-- “take and enforce effective measures to establish domestic controls to prevent the proliferation of nuclear, chemical, or biological weapons and their means of delivery, including by establishing appropriate controls over related materials [...]” by developing security, physical protection, border and export controls (para. 3).

These requirements were adopted as “decisions” under Chapter VII of the UN Charter, and thus legally bind all members of the United Nations.<sup>34</sup> At the same time, the Resolution set up a Committee (the 1540 Committee) of the Security Council, composed of the 15 Council members and supported by governmental experts, to monitor the implementation of the Resolution and, to that end, called upon States to present a report on the implementation of the Resolution (para. 4). Moreover, as was referred to in President Bush’s statement at the UN General Assembly, the Resolution invited States in a position to do so to offer assistance, in response to specific requests, to the States lacking the infrastructure, experience or resources (para. 7).

How could we assess these provisions? First, the above measures, particularly those contained in the first three operative paragraphs (decisions), are aimed at filling the gaps that have existed in the WMD-related treaties. The latter treaties were not drafted having (fully) in mind the threat of proliferation of WMD to non-State actors; and in terms of the means of delivery of WMD, there exists no global treaty regulating their development, production or possession.<sup>35</sup> Under such circumstances, the Resolution was adopted as a product of the urgent necessity arising from a new security threat of WMD terrorism. Indeed, during the deliberation on the evolving draft of the Resolution, a number of States pointed out the urgent need to fill the gaps.<sup>36</sup> In the Resolution, the term “non-State actor” is defined rather narrowly as “individual or

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<sup>34</sup> Professor Daniel H. Joyner, however, argues that Resolution 1540 is null and void of legal effect, because it was adopted under Chapter VII rather than under Articles 11 and 26 of the UN Charter, the latter, according to him, being the authoritative basis for the creation of new non-proliferation law. Daniel H. Joyner, “Non-Proliferation Law and the United Nations System: Resolution 1540 and the Limits of the Power of the Security Council,” *Leiden Journal of International Law*, Vol. 20, No. 2 (January 2007), pp. 489-518.

<sup>35</sup> The SALT and START treaties, which have limited or reduced the number of strategic arms, including ballistic missiles, are (essentially) bilateral treaties between the United States and the Soviet Union. The Guidelines for the Missile Technology Control Regime (MTCR) of 1987 and the International Code of Conduct against Ballistic Missile Proliferation (ICOC) of 2002, both aimed at preventing and curbing the proliferation of certain categories of missile, are not legally binding.

<sup>36</sup> See, e.g., S/PV.4950, pp. 3 (Philippines), 3 (Brazil), 5 (Algeria), 8 (France), 9 (Angola), 12 (UK), 14 (Romania), 20 (Peru), 21 (New Zealand), 25 (Singapore); S/PV.4950 (Resumption 1), pp. 5 (Mexico), 7 (Norway), 8 (Republic of Korea), 10-11 (Jordan).

entity, not acting under the lawful authority of any State in conducting activities which come within the scope of this resolution,” which shows what was the central concern of the drafters of the Resolution.

Second, it should be recognized that the measures contained in paragraph 2 are not all new. A comparable set of measures or the like can be found in national implementation provisions of the WMD treaties. The CWC’s national implementation clause is a case in point. As far as chemical terrorism is concerned, the problems lie not in the lack of provisions but in their insufficient implementation. If so, one might ask what would be the effect of adopting a resolution containing similar obligations - will they produce greater results?.

To this, it may be argued that a legally binding resolution of the Security Council could have more political weight than a treaty, precisely because the Council is the most powerful political organ of the United Nations in the maintenance of international peace and security. Thus, it could be expected that although the net content of obligations are similar, those in a legally binding Security Council resolution would be respected more and implemented better than those in a treaty, particularly if the insufficient implementation of treaty obligations is due to a lack of political will.<sup>37</sup>

For the cases where the cause of insufficient implementation is attributable to the lack of infrastructure, experience or resources, the Resolution has provided for an apparatus that would accelerate the assistance for the implementation of the obligations under the Resolution. The 1540 Committee set up by the Resolution may be expected to function as a clearinghouse for capacity building that coordinates the exchange of offers and requests for such assistance. The Committee’s task also includes the compilation of States’ reports on their implementation of the Resolution.<sup>38</sup> By doing so, the Committee could monitor and hopefully improve the Resolution’s implementation.

Third, one cannot fail to point out another added value of the Resolution. Through the binding Security Council resolution, non-States Parties to the WMD treaties or anti-terrorism conventions are equally obliged along with the States Parties thereto to take the relevant steps, as if they were parties to them. During the drafting of the Resolution, India voiced a concern by saying that it will “not accept any interpretation of the draft resolution that imposes obligations arising from treaties that India has not signed or ratified, consistent with the fundamental principles of international law and the law of treaties.”<sup>39</sup> This and similar other concerns were somewhat accommodated in certain paragraphs of the Resolution which, for instance, affirm the importance for “all States parties” to WMD treaties to implement them fully, or call upon all

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<sup>37</sup> During the Council debates, however, assurances were given that the Resolution does not *ipso facto* authorize enforcement action against States that fail or are unable to comply with the obligations imposed by the Resolution. See, e.g., S/4950, pp. 3 (Philippines), 15 (Pakistan), 17 (US).

<sup>38</sup> See <http://disarmament2.un.org/Committee1540/report.html>

<sup>39</sup> S/PV.4950, p. 24.

States to promote the universal adoption and full implementation of WMD non-proliferation treaties “to which they are parties.”<sup>40</sup> Nevertheless, they do not change the fact that the Resolution does oblige non-States Parties to the CWC, for instance, to take the kind of national measures that the States Parties to it are supposed to take.<sup>41</sup>

Be that as it may, the measures that States are required to take under the Resolution are not as clear as those under the CWC. Paragraph 2 of Resolution 1540 requires all States to adopt and enforce “appropriate effective laws” to prohibit non-State actors to manufacture, develop or use WMD. With such an ambiguous requirement,<sup>42</sup> it cannot be said with conviction that it would lead to universal enactment of truly effective regulative laws; for it is difficult to determine whether the obligation under that paragraph is fulfilled or not in the first place. This is, however, an inevitable result of some States’ resistance to a move to write out a detailed prescription in the Resolution, a resistance made in view of the undiminished sovereignty to which they attach great importance.<sup>43</sup>

Fourth, paragraph 3, unlike paragraph 2, contains a new set of measures that are not usually found in WMD treaties or anti-terrorism conventions. They concern security, physical protection, and border and export controls and, unlike paragraphs 1 and 2, cover not only WMD themselves but also the “related materials.”<sup>44</sup> These measures are important because of their preventive nature. Prevention is particularly important in the WMD terrorism context, because their use in terrorism would surely result in a devastating situation. As noted earlier, one of the grave deficits of anti-terrorism conventions (and WMD treaties) is the lack of preventive mind.

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<sup>40</sup> See the fifth preambular paragraph and operative paragraph 8 (a) of Resolution 1540. See also the eleventh preambular paragraph. They reflect the changes introduced by the sponsors to clarify their intention regarding the concerns expressed by others. See S/PV.4950, p. 18 (US); S/PV.4956, 28 April 2004, pp. 3-4 (Pakistan).

<sup>41</sup> Still, it should not be forgotten that what Resolution 1540 emphasizes is not those WMD treaties per se but the relevant national legislation and other regulations and controls that provide the basis for action against non-State actors. Peter van Ham and Olivia Bosch, “Global Non-Proliferation and Counter-Terrorism: The Role of Resolution 1540 and Its Implications,” in Bosch and van Ham (eds.), *Global Non-Proliferation and Counter-Terrorism: The Impact of UNSCR 1540* (Brookings Institution Press, 2007), p. 15.

<sup>42</sup> See S/PV.4950, p. 28 (Switzerland). For other problems raised on Resolution 1540, see Roberto Lavalle, “A Novel, If Awkward, Exercise in International Law-Making: Security Council Resolution 1540 (2004),” *Netherlands International Law Review*, Vol. 51, Issue 3 (2004), pp. 428-435; Stefan Talmon, “The Security Council as World Legislature,” *American Journal of International Law*, Vol. 99, No. 1 (January 2005), pp. 188-190.

<sup>43</sup> For an argument that the Resolution does not prescribe specific legislation, which is left to national action by States, S/PV.4956, p. 3 (Pakistan). See also S/PV.4950, p. 24 (India); S/PV.4950 (Resumption 1), p. 7 (Kazakhstan).

<sup>44</sup> The term “related materials” is defined by the Resolution 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.”



In that sense, measures provided for in paragraph 3 would have the potential of greatly enhancing terrorism prevention preparedness, if properly implemented.<sup>45</sup>

The importance of this aspect of the Resolution will become more apparent, if one thinks of the inherently limited effect of the activities of export control groups. The Nuclear Suppliers Group (NSG), an informal (not legally formed) export control group established in 1975, for instance, requires its members to exercise restraint in the transfer of nuclear and nuclear related items in certain cases in accordance with their national laws and practices.<sup>46</sup> While its 45 members are supposed to have an effective national export control system, the vast majority of States in the international community are not, notwithstanding the fact that the latter States may well contribute to the transfer of such items in one way or another. In fact, the illicit trafficking activities by the Pakistani metallurgist A.Q. Khan and his network used Malaysia, United Arab Emirates (Dubai) and other countries with little or no nuclear-related activities to provide nuclear weapon-related items and technologies to such end-users as Iran, Libya and North Korea.<sup>47</sup> Nevertheless, it is not deemed conceivable to invite or admit the former kind of countries to the Group, because of the proliferation risks that the sensitive information sharing among such wider membership may entail, as well as the fact that they are not considered to be “nuclear suppliers.”

By this Resolution, all UN members are legally obliged<sup>48</sup> to “[e]stablish, develop, review and maintain appropriate effective national export and trans-shipment controls” over WMD and their means of delivery as well as related materials, including appropriate laws and regulations to control export, transit, trans-shipment and re-export, and “establishing and enforcing appropriate criminal or civil penalties for violations of such export control laws and regulations” (para. 3(d)). No treaties can obligate States to establish such a national export control system so extensively, so quickly and so effectively. Although no time line is given for the implementation of these

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<sup>45</sup> Peter Crail states that the provisions in paragraph 3 are “the most important from a nonproliferation standpoint” for the same reason. Peter Crail, “Implementing UN Security Council Resolution 1540: A Risk-Based Approach,” *Nonproliferation Review*, Vol. 13, No. 2 (July 2006), p. 368.

<sup>46</sup> See “Guidelines for Nuclear Transfers” in INFCIRC/254/Rev.8/Part 1, 20 March 2006; “Guidelines for Transfers of Nuclear-Related Dual-Use Equipment, Materials, Software, and Related Technology” in INFCIRC/254/Rev.7/Part 2, 20 March 2006.

<sup>47</sup> See *Nuclear Black Markets: Pakistan, A.Q. Khan and the Rise of Proliferation Networks* (International Institute of Strategic Studies, 2007), pp. 65-91.

<sup>48</sup> Some States argued that since Article 25 of the UN Charter provides that all decisions of the Security Council shall be accepted and carried out by the Member States, there is no need to invoke Chapter VII of the UN Charter. The co-sponsors of the Resolution responded by saying that the draft resolution is placed under Chapter VII in order to underline the seriousness of their response to the issue, and because they are dealing with what is clearly a threat to international peace and security, and because they are levying binding requirements. See S/PV.4950, pp. 4 (Brazil), 5 (Algeria), 31 (Indonesia); *ibid.*, pp. 7 (Spain), 8-9 (France), 12 (UK), 17 (US).

obligations, if they are implemented within a reasonable time period, considerable effects could be expected in the field of export control without compromising sensitive information.<sup>49</sup>

## 2. Resolution 1373 as the First International Legislation by the Security Council

As outlined above, the approach that Resolution 1540 has taken has opened a new horizon for the prevention of WMD terrorism. As a new approach, however, it is not free of criticism. Speaking generally of the Security Council, while it could act swiftly and effectively when needed, it should be cautious not to resort to its extremely powerful means too easily. Speaking specifically of Resolution 1540, it could be asked whether the Security Council has the international legislative power and, if so, on what conditions it could be exercised.

Although “international legislation”<sup>50</sup> is a very equivocal term, it is used here as meaning the establishment of legal rules of general application to abstract situations, binding all (UN<sup>51</sup>) States without their separate consent to be bound by them, and usually intended to remain in force for an indefinite period.<sup>52</sup> Since every Security Council decision (adopted under Chapter VII) binds all Member States under Article 25 of the UN Charter without their separate consent, the key here is the general nature of the content of the rules concerned, i.e., the aspect of establishing new rules of conduct of general application, independent of any specific conflict or situation.

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<sup>49</sup> In this sense, a Security Council resolution that levies similar requirements without sensitive information sharing accompanied is a clever means to attain the same objectives.

<sup>50</sup> There is no established definition of “international legislation.” It has, however, generally referred to the making of multilateral treaties, while, in a more strict sense, referring to the formulation, by a majority vote, of international legal rules of general application to abstract situations. For the traditional concept of “international legislation,” see, e.g., Manley O. Hudson, *International Legislation*, Vol. I (Carnegie Endowment, 1931), pp. xiii-xviii; Arnold D. McNair, “International Legislation,” *Iowa Law Review*, Vol. 19 (1933-34), p. 178; Philip C. Jessup, “Parliamentary Diplomacy: An Examination of the Legal Quality of the Rules of Procedure of Organs of the United Nations,” *Recueil des Cours*, tome 89 (1956-I), p. 203; Krzysztof Skubiszewski, “Enactment of Law by International Organizations,” *British Year Book of International Law*, Vol. 41 (1965-1966), pp. 198-201; idem, “New Source of the Law of Nations: Resolutions of International Organizations,” in *Recueil d’études de droit international en hommage à Paul Guggenheim* (Faculté de droit de l’Université de Genève, 1968), p. 509.

<sup>51</sup> The Security Council addresses a growing number of Security Council resolutions, including Resolution 1540, to “all States” rather than “all Member States” of the United Nations. However, non-UN member States are not bound by the Charter or the resolutions.

<sup>52</sup> See, e.g., Matthew Happold, “Security Council Resolution 1373 and the Constitution of the United Nations,” *Leiden Journal of International Law*, Vol. 16, No. 3 (October 2003), pp. 596-601; Lavalle, “A Novel, If Awkward, Exercise in International Law-Making,” op.cit., p. 415; Joyner, “Non-Proliferation Law and the United Nations System,” op.cit., p. 511.

According to a generally held view, the collective security system of the United Nations is a system in which the Security Council is to respond to a *specific* conflict or situation by imposing sanctions on the subjects that have given rise to such a conflict or situation, after determining it as a threat to the peace, breach of the peace or the act of aggression, in order to maintain or restore international peace and security.<sup>53</sup> The task of the Council in this respect has been characterized as a “police function.”<sup>54</sup> It is not what the drafters of the UN Charter had specifically in mind as part of collective security system, if not expressly prohibited by the Charter, that the Security Council establishes such rules of general application as would normally be made by a multilateral treaty.<sup>55</sup>

It is true that the Council has recently broadened the scope of measures to be taken under Chapter VII, particularly under Article 41, of the Charter,<sup>56</sup> including the establishment of the

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<sup>53</sup> See, e.g., Jochen Abr. Frowein and Nico Krisch, “Introduction to Chapter VII,” in Bruno Simma (ed.), *The Charter of the United Nations: A Commentary*, 2nd ed. (Oxford U.P., 2002), p. 709; Karl Zemanek, “Is the Security Council the Sole Judge of Its Own Legality?,” in Emile Yakpo and Tahar Boumedra (eds.), *Liber Amicorum Judge Mohammed Bedjaoui* (Kluwer, 1999), pp. 636-637; Happold, “Security Council Resolution 1373 and the Constitution of the United Nations,” *op.cit.*, pp. 599-600; Lavalle, “A Novel, If Awkward, Exercise in International Law-Making,” *op.cit.*, p. 412. Hans Kelsen, who accepts the concept of the Security Council creating new law, recognizes such law making for “the concrete case” only. Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (Stevens & Sons, 1951), pp. 295, 446.

<sup>54</sup> See Frowein and Krisch, “Introduction to Chapter VII,” *op.cit.*, pp. 705, 707, 709.

<sup>55</sup> Professor D.W. Bowett argues that: “the [Security] Council does not ‘legislate’: it enforces Charter obligations.” D.W. Bowett, “Judicial and Political Functions of the Security Council and the International Court of Justice,” in Hazel Fox (ed.), *The Changing Constitution of the United Nations* (B.I.I.C.L., 1997), p. 80. Professor Martti Koskenniemi contends that: “No doubt, it is not possible to conceive the Security Council as a legitimate global law-maker.” Martti Koskenniemi, “International Legislation Today: Limits and Possibilities,” *Wisconsin International Law Journal*, Vol. 23, No. 1 (2005), p. 74. Professor Georg Nolte, referring to the possible role of the Security Council as a world legislature, describes it as “a role for which it was not designed.” Georg Nolte, “The Limits of the Security Council’s Powers and its Functions in the International Legal System: Some Reflections,” in Michael Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford U.P., 2000), p. 322. See also Marc Perrin de Brichambaut, “The Role of the United Nations Security Council in the International Legal System,” in *ibid.*, pp. 275-276; Axel Marschik, *The Security Council as World Legislator?: Theory, Practice and Consequences of an Expansion of Powers*, IILJ Working Paper 2005/18 (Institute for International Law and Justice, New York University, 2005), p. 7; Gaetano Arangio-Ruiz, “On the Security Council’s ‘Law-Making,’” *Rivista di Diritto Internazionale*, Vol. 83, Fasc. 3 (2000), pp. 628-629; *ICJ Reports 1971*, p. 294, para. 115 (Dissenting Opinion of Judge Sir Gerald Fitzmaurice to the Advisory Opinion on Namibia).

<sup>56</sup> See generally Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart Pub., 2004), pp. 338-368.

International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR),<sup>57</sup> as well as the creation of the United Nations Compensation Commission (UNCC) to process claims and pay compensation for losses resulting from Iraq's invasion of Kuwait, the establishment of the United Nations Iraq-Kuwait Boundary Demarcation Commission to demarcate the international border between Iraq and Kuwait, and the imposition of disarmament obligations on Iraq.<sup>58</sup> But they all can be understood as part of the measures taken in response to a specific situation being a threat to the peace or breach of the peace and, as such, within the traditional purview of the powers and functions of the Security Council.

By contrast, Resolution 1540 was *not* adopted in order to respond to a certain specific conflict or situation, but to respond to a generally perceived threat of WMD terrorism and lay down rules of general application for that.

Resolution 1540 was not an entirely new phenomenon, however. Resolution 1373 adopted unanimously on September 28, 2001, some two weeks after 9/11, can be seen as a precedent and probably the first such precedent in this respect.<sup>59</sup> After reaffirming its unequivocal condemnation of the 9/11 terrorist attacks, the Security Council reaffirmed in the preamble of Resolution 1373 that “such acts [referring to the 9/11 terrorist attacks], like any act of international terrorism, constitute a threat to international peace and security.” This phrase may be viewed as showing that the Resolution was a response to the specific incident of 9/11, as it is exactly the same as a phrase found in the preamble of Resolution 1368 adopted on the following day of the 9/11 attacks. However, the content of the operative paragraphs of Resolution 1373 is so general as to be usually found in an anti-terrorism treaty. The Resolution provides, for example, the obligations of all States to prevent and suppress the financing of terrorist acts, and to criminalize the willful provision or collection of funds with the intention that the funds should be used in order to carry out terrorist acts (para. 1); and to refrain from providing any form of support to entities or persons involved in terrorist acts, and to deny safe haven to those who finance, plan, support, or commit terrorist acts (para. 2). These are decisions made under Chapter VII without referring to any specific situation or specific entity. That they would normally be provided in a treaty can be ascertained by the fact that they largely mirror what is contained in the 1999 Terrorist Financing Convention<sup>60</sup>.

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<sup>57</sup> S/RES/827(1993), 25 May 1993; S/RES/955(1994), 8 November 1994.

<sup>58</sup> See S/RES/687(1991), 3 April 1991.

<sup>59</sup> Talmon, “The Security Council as World Legislature,” *op.cit.*, p. 176. Professor Talmon also refers to Resolutions 1422 and 1487 on the International Criminal Tribunal as often overlooked examples of Security Council legislation. *Ibid.*, pp. 177-178. According to Mr. Marschik, the United States initiated negotiations on a draft resolution that was to become Resolution 1540 in view of the success of the Resolution 1373 regime. Marschik, *The Security Council as World Legislator?*, *op.cit.*, p. 16. See also note 31 above.

<sup>60</sup> Happold, “Security Council Resolution 1373 and the Constitution of the United Nations,” *op.cit.*, p. 594. See also Nico Schrijver, “September 11 and Challenges to International Law,” in Jane Boulden and Thomas G. Weiss (eds.),

The Terrorist Financing Convention, entering into force in April 2002, was not in force in September 2001 when Resolution 1373 was adopted. As already noted, it was at that time only four States that had already ratified the Convention, which requires 22 ratifications for the entry into force; and there was a strong demand for the earliest possible effectuation of the *content* of the Convention by any means, which seems to have led to the adoption of a legally binding Security Council resolution containing largely the same content.<sup>61</sup> Put another way, given the scarce number of ratifications, the Security Council decided to “forcibly” bring into force part of the content of the Convention, and to make it universally applicable to all (UN member) States. While this may have been viewed as a questionable exercise, such concern must have been minimized by the fact that the UN General Assembly’s Sixth Committee and the General Assembly itself had already adopted a resolution with the text of the Terrorist Financing Convention annexed, without a vote.<sup>62</sup> In that sense, Resolution 1373 was not an entirely new attempt at international legislation. Perhaps that is why there was little criticism voiced against the Resolution for the reason that it was international legislation by the Security Council, and the adoption of the Resolution was widely welcomed by the UN member States.<sup>63</sup>

### 3. Resolution 1540 and the Problems with International Legislation by the Security Council

How then could we assess Resolution 1540 from the perspective of international legislation? As already seen, the Resolution was adopted under Chapter VII of the UN Charter and binding all UN member States. In its preamble, it affirmed that: “proliferation of nuclear, chemical and biological weapons, as well as their means of delivery,” *in general*, “constitutes a threat to international peace and security.” This affirmation comes from a passage of the Presidential Statement<sup>64</sup> made at the Security Council summit meeting held on January 31, 1992 as a general statement and with no specific conflict or situation in mind. The measures contained in operative paragraphs are also general in nature, as we have already seen earlier. Thus,

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*Terrorism and the UN: Before and After September 11* (Indiana U.P., 2004), p. 58; Gilbert Guillaume, “Terrorism and International Law,” *International and Comparative Law Quarterly*, Vol. 53, Pt. 3 (July 2004), p. 543.

<sup>61</sup> Indeed, paragraph 3 (d) of the Resolution called upon all States to become parties as soon as possible to the relevant international conventions relating to terrorism and, in that context, specifically referred to the Terrorist Financing Convention.

<sup>62</sup> A/54/PV.76, 9 December 1999, p. 8.

<sup>63</sup> Talmon, “The Security Council as World Legislature,” *op.cit.*, pp. 177, 187-188. For somewhat contrastive views on Resolution 1373 from an international legislation perspective, see Paul C. Szasz, “The Security Council Starts Legislating,” *American Journal of International Law*, Vol. 96, No. 4 (October 2002), p. 905; Happold, “Security Council Resolution 1373 and the Constitution of the United Nations,” *op.cit.*, pp. 607-610.

<sup>64</sup> The Presidential Statement said that: “The proliferation of all weapons of mass destruction constitutes a threat to international peace and security.” S/23500, 31 January 1992, p. 4.

Resolution 1540 has set forth legal rules of general application and can be called as international legislation. Most of these features of Resolution 1540 are shared by Resolution 1373. But the content of the latter Resolution largely reflected that of an already adopted multilateral treaty yet to enter into force. In contradistinction, Resolution 1540, though part of the measures contained in it can be found in a political document of the 2002 Kananaskis Summit,<sup>65</sup> is entirely new international legislation. That is partly why during the drafting of the Resolution, criticisms were made and concerns were expressed in terms of the competence of the Security Council regarding international legislation.

If one sums up the problems with international legislation by the Security Council, as found in the relevant statements made during the drafting of Resolution 1540 and as compared with normal multilateral treaty-making, the following three aspects may be identified. The first problem concerns the formulation of legal rules by a limited number of States. Namibia, for instance, stated that “[it] recognizes that there are gaps in the existing multilateral legal instruments which need to be filled. However, such gaps can be filled by multilateral negotiated instruments and should not be filled by the Council measures, which are unbalanced and selective, as they represent only the views of those who drafted them.”<sup>66</sup> Likewise, Iran said that “[t]he United Nations Charter entrusted the Security Council with the huge responsibility to maintain international peace and security, but it does not confer authority on the Council to act as a global legislature imposing obligations on States without their participation in the process.”<sup>67</sup>

International legislation by the Security Council means that only 15 members of the Security Council would establish by a majority vote general rules that legally bind 192 members of the United Nations; and the vast majority of States of the international community would be bound by the resulting rules without participating in their drafting process. Among the 15 members are included five permanent members who have the veto power, with which they could block any rules that are contrary to their national interest. The 15 members might also possibly include a few States that are not very suitable for the drafting of international legislation in certain specific fields in terms of motivations or capabilities. It is true that these apply to all and any legally binding Council resolutions. But the influence is qualitatively different in the case of international legislation because of its general and perpetual application.

Second, the lack of treaty negotiation process also poses problems. Nepal rather harshly held that “the Security Council lacks competence in making treaties. We are afraid that the Council, through this draft resolution, is seeking to establish something tantamount to a treaty by its fiat. This is likely to undermine the intergovernmental treaty-making process and

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<sup>65</sup> “Statement by G8 Leaders: The G8 Global Partnership against the Spread of Weapons and Materials of Mass Destruction,” Kananaskis, June 27, 2002.

<sup>66</sup> S/PV.4950 (Resumption 1), p. 17.

<sup>67</sup> S/PV.4950, p. 32.

implementation mechanisms.”<sup>68</sup> In the case of treaty, it may be expected that conflicting interests between States or groups of States are ironed out through negotiations, resulting in a satisfactorily balanced text of rules overall. The same cannot perhaps be expected of the legislation by the Security Council, where the five permanent members have a dominant power not only politically but also procedurally. As a result, it may be questionable whether the rules enacted by the Council, while legally binding in formal terms, are placed on a firm basis in the international community as a whole. This aspect of the problem may, in turn, affect their actual implementation and compliance. If they are not well implemented or complied with despite their legally binding nature, that might further adversely affect the legally binding force of the Security Council decisions in general.

Third, the denial of the freedom of participation may raise a question. Cuba maintained that “international legal obligations ... must not be imposed upon [UN] Member States without their participation and their sovereign acceptance, through the signing and ratification of the corresponding treaties and agreements that have been negotiated multilaterally.”<sup>69</sup> From a slightly different perspective, India declared, as mentioned earlier, that it will “not accept any interpretation of the draft resolution that imposes obligations arising from treaties that India has not signed or ratified, consistent with the fundamental principles of international law and the law of treaties.”<sup>70</sup> In the case of treaty, States have the freedom of whether to join or not to join the treaty, irrespective of their participation in the treaty-making process. With such a freedom, they could safeguard their national interest and sovereign rights. However, the Security Council legislation would not allow such sovereign freedom: it necessarily binds all UN member States without exception,<sup>71</sup> whether one likes it or not. Thus, the States’ ultimate sovereign guarantee of not being bound by what they have not consented to becomes flimsy.

Admittedly, by joining the UN, its member States have “agree[d] to accept and carry out the decisions of the Security Council” (Art. 25 of the UN Charter). In that sense, it cannot be said that they are bound by what they have not consented to. However, it may be questioned whether that agreement in Article 25 can be said to naturally extend to the Security Council’s power to enact international legislation. To take India, which has stayed out of the NPT regime, for example, the 40-year long problem would promptly be resolved if the Security Council adopts a legally binding resolution to the effect that all UN member States, except for the five recognized nuclear-weapon States, shall not receive, or manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices. Its substantive desirability (denuclearization of

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<sup>68</sup> S/PV.4950 (Resumption 1), p. 14.

<sup>69</sup> S/PV.4950, p. 30.

<sup>70</sup> *Ibid.*, p. 24.

<sup>71</sup> Axel Marschik views Article 48, paragraph 1, of the UN Charter as allowing States to be exempted from the application of the new legally binding rules established by a Security Council resolution. Marschik, *The Security Council as World Legislator?*, op.cit., p. 26.

India) aside, such a course of action would destroy the very foundation of the treaty law order that bases itself on the consent of each State to be bound by a treaty. This is what India warned about during the drafting of Resolution 1540, as shown above.

At the same time, however, what Professor Barry Kellman says contains some truth. He argues that: “If a matter of international peace and security requires implementation of obligations that, in another context, might be the substance of a treaty, the Security Council can (and, according to the charter process, should) trump the treaty-making process. One reason for this trump of authority is precisely because the Security Council is better able to shear away extraneous considerations from the treaty negotiation process and make decisions more quickly that have more direct and exclusive bearing on resolving the security threat. When the issue arises to the most important category of concerns (war and peace), the process is not meant to epitomize participatory democracy of sovereign states; it is meant to get the job done.”<sup>72</sup>

Professor Christian Tomuschat supports the idea of international legislation by the Security Council in more general terms by saying that: “The wording ‘threat to the peace’ was chosen precisely with a view to permitting the Security Council to take precautionary action well before an armed attack occurs. If prevention is the philosophical concept underlying Article 39 [of the UN Charter], then it must also be possible that the Security Council, in a more *abstract* manner, without having regard to the particular nature of a regime, outlaws certain activities as being incompatible with fundamental interests of the international community.” He also maintains that: “the Security Council is not confined to taking preventive measures with regard to country-specific situations that threaten international peace. It must also be deemed empowered to enact *general* regulations prohibiting or restricting certain activities which, regardless of who is the author, are susceptible of putting in jeopardy international peace through the effects they are likely to produce” (emphasis added)<sup>73</sup>

If such is the case and we have to accept international legislation by the Security Council despite the various problems discussed above, we should at least consider the conditions to be met as brakes, lest the Council should exercise its Chapter VII power too much in trumping the treaty-making process.

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<sup>72</sup> Barry Kellman, “Criminalization and Control of WMD Proliferation: The Security Council Acts,” *Nonproliferation Review*, Vol. 11, No. 2 (Summer 2004), p. 159.

<sup>73</sup> Christian Tomuschat, “Obligations Arising for States without or against Their Will,” *Recueil des Cours*, tome 241 (1993-IV), pp. 344, 345. See also idem, “Discussion,” in Jost Delbrück (ed.), *Allocation of Law Enforcement Authority in the International System* (Duncker und Humblot, 1995), pp. 92-94; Keith Harper, “Does the United Nations Security Council Have the Competence to Act as Court and Legislature?,” *New York University Journal of International Law and Politics*, Vol. 27, No. 1 (Fall 1994), p. 149. For different viewpoints, see literature cited in note 55 above.



#### 4. Resolution 1540 and the Conditions for Legitimate International Legislation by the Security Council

Although it is impossible to identify all such conditions precisely, it is possible to enumerate relatively important elements. They can be categorized into two groups: substantive and procedural ones. From a substantive perspective, the subject matter of international legislation by the Security Council must concern, first of all, an essential, common interest of States or of the international community as a whole. Second, it must also be related to issues that have to be tackled with urgency. The first condition can be derived from the fact that Council decisions legally bind *all* UN members *without* requiring individual consent to be bound by them, while the second stems from the fact that the Council legislation establishes legal rules *without* following the normal treaty-making processes.

Of these two conditions, the importance of the latter was particularly emphasized during the Council discussions leading to the adoption of Resolution 1540. For instance, the United Kingdom, after referring to the threat posed by WMD terrorism, said that “[i]t is clear that in the face of this urgent threat only the Security Council can act with the necessary speed and authority. My delegation believes that, in such circumstances, not only is it appropriate for the Security Council to act, it is imperative that it do so. The Council has a responsibility to respond to this threat to international peace and security.”<sup>74</sup>

Among the Non-Aligned, Singapore, while sharing the concerns expressed by other delegations, supported the draft resolution by stating as follows: “Singapore understands many of the concerns expressed here in this debate by some of the other delegations. For example, they question whether the Security Council can assume the role of treaty-making or of legislating rules for Member States. We agree that a multilateral treaty regime would be ideal. But multilateral negotiations could take years, and time is not on our side. Urgent action is needed.”<sup>75</sup> Likewise, Switzerland said that: “[i]n principle, legislative obligations, such as those foreseen in the draft resolution under discussion, should be established through multilateral treaties, in whose elaboration all States can participate. It is acceptable for the Security Council to assume such a legislative role only in exceptional circumstances and in response to an urgent need.”<sup>76</sup>

From a procedural point of view, it is important, in order for the Security Council’s role of international legislation to be accepted as legitimate, that both the decision-making procedure and the composition of the Security Council are seen as fair and representative. In terms of the decision-making procedure of the Council allowing its permanent members to exercise veto power, it is worth noting that Security Council Resolutions 1373, 1540 and 1673, the last resolution extending the mandate of the 1540 Committee for two years, are all adopted

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<sup>74</sup> S/PV.4950, p. 11.

<sup>75</sup> *Ibid.*, p. 25.

<sup>76</sup> *Ibid.*, p. 28.

unanimously.<sup>77</sup> It may be that there exists or is emerging an unwritten rule among the Council members that those Council resolutions that function as international legislation should be adopted by unanimous consent. Strictly and legally speaking, there is no requirement that certain types of resolutions must be adopted by unanimous consent. However, in order for a legislative resolution to be seen as legitimate, to be respected and implemented, and thus to be effective, it is quite important that its sponsors, and particularly those permanent members that are sponsors, try to gain unanimous consent to the adoption of the resolution. During the debate on the eventual Resolution 1540, Spain stated that “[w]e believe that, since the Council is legislating for the entire international community, this draft resolution should preferably, although not necessarily, be adopted by consensus.”<sup>78</sup> And in fact, efforts were made to get unanimous consent to the draft.

In the time after the first draft was circulated within the P-5 members in October 2003,<sup>79</sup> extensive consultations were made and resulted in several important modifications. For instance, paragraph 10 of the Resolution underwent significant transformations. It provided in the December 2003 draft, paragraph 6, that the Security Council calls upon all States “to cooperate to prevent, and if necessary interdict, shipments that would contribute to the proliferation of nuclear, chemical or biological weapons and their means of delivery.”<sup>80</sup> “Interdict” was a term that tends to remind people of counter-proliferation and Proliferation Security Initiative (PSI)<sup>81</sup> type of measures, and thus was deleted from the paragraph in March 2004 to read that the Security Council calls upon all States “to take cooperative action to prevent illicit trafficking in

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<sup>77</sup> S/PV.4385, 28 September 2001, p. 2; S/PV.4956, p. 2; S/PV.5429, 27 April 2006, p. 2.

<sup>78</sup> S/PV.4950, p. 7. Delegations emphasized the importance of the unanimous adoption of Resolution 1540 in their statements following the adoption. See, e.g., S/PV.4956, pp. 2 (France), 5 (US), 6 (Russia), 7 (UK), 8 (Spain), 9 (Romania).

<sup>79</sup> A revised draft was circulated to the non-permanent members of the Council on December 23, 2003 but the consultations continued strictly among the P-5 members until March 2004. Marschik, *The Security Council as World Legislator?*, op.cit., p. 16.

<sup>80</sup> Datan, “Security Council Resolution 1540,” op.cit., pp. 48-50.

<sup>81</sup> US President George Bush announced the establishment of the PSI during a speech in Krakow, Poland, on May 31, 2003. The PSI is a program under which the US and certain of its allies bestow upon themselves the authority to interdict shipments of WMD-related cargoes and seize such cargoes that are identified at sea, in the air or on land. For the basic program of the PSI, see White House, “Fact Sheet: Proliferation Security Initiative, Statement of Interdiction Principles, September 4, 2003.” The PSI is said to be “an activity, not an organization.” John R. Bolton, “The Bush Administration’s Forward Strategy for Nonproliferation,” *Chicago Journal of International Law*, Vol. 5, No. 2 (Winter 2005), p. 400.

nuclear, chemical or biological weapons, their means of delivery, and related materials.”<sup>82</sup> It was only then that China, as the last member of the P-5, agreed to the draft resolution.<sup>83</sup>

The statement by Pakistan, a non-permanent member of the Council at that time, delivered after the adoption of the Resolution, attests the intensity and seriousness of the efforts that were made to obtain unanimous consent. It said that “[w]e appreciate the serious efforts made by the sponsors of the draft resolution to accommodate our major concerns and those of other States. The draft resolution was revised three times. That enabled Pakistan to support the resolution.”<sup>84</sup> During the consultations, Pakistan had raised a number of doubts, questions and concerns about the draft resolution from a historical, legal and political perspective.<sup>85</sup> The consultations and debates seem to have contributed to alleviating some of these concerns and doubts, leading to the adoption of the Resolution with unanimity. One may be able to see these extensive consultations and debates in the same light as multilateral treaty negotiations, as a process to adjust differences in interests among States.<sup>86</sup>

Still, unanimity among the Council members may not be enough. For a resolution adopted unanimously by the Security Council to be truly legitimate, its composition must also be representative. This is the second aspect of the procedural conditions for a legitimate legislative resolution. However, the representativity of the Security Council is not only an extremely complicated question in itself<sup>87</sup> but also is beyond the purview of this Paper. It will limit itself to stating the following facts in this regard. First, it is simply impossible to reach an agreement on the composition of the Security Council that would satisfy all UN members. If a truly representative body is an objective, it might be concluded that the General Assembly is the right forum to legislate. However, not only does the Assembly not have the power to adopt a

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<sup>82</sup> “Draft Resolution on Non-Proliferation, March 24, 2004,” para. 8, in David Krieger and Carah Ong, *Disarmament: The Missing Link to an Effective Non-Proliferation Regime* (Nuclear Age Peace Foundation, 2004), p. 33.

<sup>83</sup> Datan, “Security Council Resolution 1540,” op.cit., p. 50; S/PV.4950, p. 6 (China).

<sup>84</sup> S/PV.4956, p. 3.

<sup>85</sup> S/PV.4950, p. 15.

<sup>86</sup> This may remind us the argument made by Professor Jonathan I. Charney that rather than state practice and *opinio juris*, multilateral forums often play a central role in the creation and shaping of contemporary international law. Jonathan I. Charney, “Universal International Law,” *American Journal of International Law*, Vol. 87, No. 4 (October 1993), p. 543 et seq.

<sup>87</sup> On this question, see, e.g., Nico Schrijver, “Reforming the UN Security Council in Pursuance of Collective Security,” *Journal of Conflict and Security Law*, Vol. 12, No. 1 (Spring 2007), pp. 127-138.

resolution legally binding all UN member States,<sup>88</sup> such possibility was overwhelmingly rejected at the San Francisco Conference that adopted the UN Charter.<sup>89</sup>

Under such circumstances, a second best approach would be to make efforts to listen to and incorporate as many opinions of the UN members as possible beyond the Security Council<sup>90</sup> in order to reflect “the general will of the world community” in the legislation.<sup>91</sup>

The desirability of such efforts was expressed especially by New Zealand and seven other States. They argued that: “the draft resolution will not succeed in its aim without the support and acceptance of Member States. Such acceptance requires the Council to dispel any impression of negotiations behind closed doors or that a small group of States is drafting laws for the broader membership without the opportunity for all Member States to express their views.”<sup>92</sup> Thus, they requested an open debate. The opportunity for open debate was provided on April 22, 2004. In that debate, as many as 36 non-members of the Council were invited and expressed their views on the draft resolution,<sup>93</sup> which included Ireland representing 34 EU member and other States as well as Malaysia representing 116 Non-Aligned Movement States. Even modification of the draft was made, based on the views expressed. Thus, it is submitted that in legislating through Resolution 1540 the Security Council provided the international community of States with the opportunity to incorporate their views in the Resolution. It did so in terms of both substance and procedure – an endeavor to draw up rules reflecting the general will of the world community as a whole.<sup>94</sup> Some commentators tend to downplay the importance of the public debate held in the Council as an occasion to vent off steam. However, even so, what is important is that the UN members in general felt that they have participated in the drafting of the Resolution and some of their views, however trivial, were incorporated in the final product.

## Conclusions

Faced with the new threat of WMD terrorism, the international community has responded with a new approach of international legislation through Security Council resolutions. The

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<sup>88</sup>There are few exceptions, such as those on the admission of a State to membership in the UN and on the expelling of a member from the UN, where a General Assembly resolution has a legally binding effect.

<sup>89</sup> *Documents of the United Nations Conference on International Organization* (United Nations Information Organizations, 1945), Vol. 9, pp. 70, 346-347.

<sup>90</sup> The United Kingdom stated after the adoption of Resolution 1540 that “Throughout the discussion of the resolution, the sponsors sought to work closely with Council members and, perhaps uniquely, with the wider United Nations membership.” S/PV.4956, p. 7.

<sup>91</sup> Szasz, “The Security Council Starts Legislating,” op.cit., p. 905.

<sup>92</sup> S/PV.4950, p. 21 (New Zealand).

<sup>93</sup> S/PV.4950, p. 2; S/PV.4950 (Resumption 1), p. 2.

<sup>94</sup> Such an opportunity also served as a means to clarify the meaning and implications of certain specific provisions of the Resolution.

traditional approach of multilateral treaties on WMD has primarily been aimed at the prevention of proliferation of such weapons to States and not to non-State actors, except for national implementation measures in certain WMD treaties. Moreover, the implementation of such national implementation measures has generally been poor as well. Thus, there have been obvious gaps both in law and in reality there.

Another traditional approach is to utilize anti-terrorism treaties. In this approach, being a sort of patchwork, there is no guarantee that a new treaty is made in a timely manner in response to a newly emerging type of terrorism. Anti-terrorism treaties do not necessarily recognize the importance of prevention, either, as their main objective is to universally criminalize certain types of terrorist acts with heavy penalties, i.e., *ex post facto* punishment, through the establishment of semi-universal jurisdiction.

Ideally, a new multilateral treaty should be drafted to counter the new threat. However, the urgent and grave nature of the threat emanating from the nexus of terrorism and weapons of mass destruction does not allow time for such a course of action. Thus, the trump card of binding Security Council resolutions was played. Resolution 1540 was adopted, following the example of Resolution 1373. It may be said that these resolutions have also opened up the possibilities of international legislation in other fields. As Dr. Stefan Talmon describes, “the Security Council has entered its legislative phase.”<sup>95</sup>

The motivation, objective and substantive provisions aside, it should be borne in mind that an easy resort to international legislation through Security Council resolutions involves fundamental problems. If the 15 Council members enact international legislation for the international community without broader outside support, it might not be complied with or implemented, thereby weakening the binding power of Chapter VII resolutions of the Security Council in general. This would be a serious blow to the UN collective security system as a whole. Moreover, a frequent resort to the binding Council resolutions in place of multilateral treaty-making or treaty-amendment processes could also become a serious threat to the international legal order that is increasingly based on multilaterally negotiated treaties and agreements. The utilization of a last resort should be cautious.<sup>96</sup>

As far as Resolution 1540 is concerned, a number of non-member States of the Security Council had the opportunity to express their views, and their views were reflected in the Resolution in one way or another. As a result of such and other endeavors, the Resolution was adopted unanimously and has been implemented with a relatively good record, at least as

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<sup>95</sup> Talmon, “The Security Council as World Legislature,” p. 175. See also José E. Alvarez, “Hegemonic International Law Revisited,” *American Journal of International Law*, Vol. 97, No. 4 (October 2003), p. 874.

<sup>96</sup> On this point, Japan argued during the deliberation of the draft of Resolution 1540 that: “In adopting a binding Security Council resolution under Chapter VII of the United Nations Charter, the Security Council assumes a lawmaking function. The Security Council should, therefore, be cautious not to undermine the stability of the international legal framework.” S/PV.4950, p. 28. See also S/PV.4950 (Resumption 1), p. 8 (Republic of Korea).

compared with the implementation record of the corresponding obligations under the CWC. According to the Report of the 1540 Committee to the Security Council submitted on April 25, 2006, 129 States have submitted their national reports on the implementation of the Resolution to the Committee by the end of its two-year term (April 2006).<sup>97</sup> Most of the remaining 62 States are from the three regions of Africa, the Caribbean and the South Pacific,<sup>98</sup> and many of them are not parties to the BWC and/or CWC.<sup>99</sup> They share the problems of insufficient understanding, lack of capacity and different national priorities.<sup>100</sup> This shows the importance of the outreach, assistance and cooperation activities of the 1540 Committee. In this respect, it seems promising that Resolution 1673, extending the Committee's mandate for two years with the emphasis given to such activities, was adopted unanimously on April 27, 2006.<sup>101</sup>

However, reporting cannot be equated with the implementation of the required measures. In fact, according to a statistical analysis of the national reports under Resolution 1540, the key 84 States identified as particularly relevant for the implementation of the Resolution have, on average, established less than one-third of the 382 legislative and enforcement mechanisms necessary to prevent WMD proliferation to non-State actors; even P-5 members of the Security Council have established less than half of the mechanisms, except for the United States.<sup>102</sup> This not only shows that a lot more needs to be done in all senses, but it also uncovers the fact that even a Security Council resolution adopted under Chapter VII might not fully be respected if it is too ambitious and demanding.

Still, the enactment by India in June 2005 of the "Weapons of Mass Destruction and Their Delivery Systems (Prohibition of Unlawful Activities) Act 2005" and by Pakistan in September 2004 of "Export Control on Goods, Technologies, Material and Equipment related to

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<sup>97</sup> The number was as at April 20. In response to the Committee's examination of the first national reports, 79 States provided additional information. S/2006/257, 25 April 2006, p. 7, para. 14.

<sup>98</sup> *Ibid.*, p. 7, para. 15. See also United Nations, *United Nations Seminar on Implementing UN Security Council Resolution 1540 in Africa*, ODA Occasional Papers No. 12, May 2007.

<sup>99</sup> Olivia Bosch and Peter van Ham, "UNSCR 1540: Its Future and Contribution to Global Non-Proliferation and Counter-Terrorism," in Bosch and van Ham (eds.), *Global Non-Proliferation and Counter-Terrorism*, *op.cit.*, p. 218.

<sup>100</sup> S/2006/257, p. 3.

<sup>101</sup> This resolution was proposed by the President of the Security Council, because there had been agreement among all 15 members of the Council on the adoption of the resolution. For the work of the 1540 Committee, see Bosch and van Ham, "UNSCR 1540," *op.cit.*, pp. 209-212.

<sup>102</sup> According to the author of the analysis, to some extent this assessment underestimates the measures that States currently have in place, as nearly every State included information in its report for which the Committee required clarification in order to determine that particular provisions had been fulfilled. Crail, "Implementing UN Security Council Resolution 1540," *op.cit.*, pp. 356, 369, 370, 371. A matrix consisting of 382 measures was created by the Committee's governmental experts to identify which provisions of the Resolution a State has fulfilled. See *ibid.*, pp. 369, 389-399.

Nuclear and Biological Weapons and their Delivery Systems Act, 2004,”<sup>103</sup> is to be noted as among the major achievements of the Resolution, depending, of course, on the actual implementation of the respective legislation by them. It should be recalled that the two States are among those which expressed strong reservations about international legislation by the Security Council during the drafting of Resolution 1540.

It should also be recalled that during the deliberation of the draft for Resolution 1540 a lot of statements were made to the effect that: “draft [resolution] does not preclude multilateral agreements on the subject,” and that “consideration by the Council of this issue should be on a temporary basis and for a specific, limited time until an internationally ratified agreement can be concluded.”<sup>104</sup> These are in addition to the statements referring to the “basic concerns over the increasing tendency of the Council in recent years to assume new and wider powers of legislation on behalf of the international community, with its resolutions binding on all States” and to the effect that “[a]ny far-reaching assumption of authority by the Security Council to enact global legislation is not consistent with the provisions of the United Nations Charter.”<sup>105</sup>

All these statements seem to show the deep-rooted reluctance of certain quarters of the international community, particularly among the members of the Non-Aligned Movement, to accept international legislation by the Security Council as a replacement for a multilaterally negotiated treaty, even where an urgent necessity requires exceptional measures.

In the final analysis, a new thinking is necessary to effectively respond to a new, urgent and grave threat to the international community. In that sense, Resolution 1540 is welcome. This does not, however, mean that everything is allowed if it is effective to deal with the present or imminent threat. Not only from the viewpoint of legitimacy, which guarantees the long-standing effectiveness, but also from that of the rule of law in the international community, it seems of fundamental importance to establish the kind of understandings that we discussed in this Paper (see Section II.4), if international legislation by the Security Council is destined to become inevitable in the future and is to be better implemented.

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<sup>103</sup> S/AC.44/2004/(02)/62/Add.1, 18 January 2006, pp. 2-4, paras. 2-5; S/AC.44/2004/(02)/22, 5 November 2004, pp. 4-5.

<sup>104</sup> S/PV.4950, p. 3 (Philippines); S/PV.4950 (Resumption 1), p. 2 (Egypt). See also S/PV.4950, pp. 5 (Algeria), 15 (Pakistan), 21 (New Zealand), 28, 29 (Switzerland); S/PV.4950 (Resumption 1), pp. 4 (Malaysia on behalf of NAM), 15 (Nigeria), 17 (Namibia); S/PV.4956, pp. 4 (Pakistan), 9 (Philippines). Cf. S/PV.4950 (Resumption 1), p. 7 (Australia).

<sup>105</sup> S/PV.4950, pp. 23 (India), 31 (Indonesia).