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Terrorism and Weapons of Mass Destruction: United Nations Security Council Resolution 1540

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- The objective of United Nations Security Council resolution 1540 (2004) is to prevent individuals and organizations, including terrorist groups, from laying their hands on and spreading nuclear, chemical and biological weapons and their means of delivery.
- There were two concerns that led to this far-reaching resolution: terrorism, and proliferation of weapons of mass destruction.
- This is another 'legislative' resolution from the Security Council, in an area of law which is more usually left to states to agree among themselves, and on which organizations such as the International Atomic Energy Agency and the Organization for the Prohibition of Chemical Weapons are already working. Security Council resolutions of this kind, however, create law very much more quickly than the usually slow processes of treaty-making.
- This is a resolution made under Chapter VII of the UN Charter, but it does not authorize the use of force. Its effectiveness will depend in large part on whether the monitoring committee and supporting states will be able to secure global implementation.

Introduction

The United Nations Security Council unanimously adopted resolution 1540 (2004) under Chapter VII of the Charter of the United Nations on 28 April 2004. Legally binding on all UN member states, it obliges them to take a range of steps aimed at preventing the proliferation of nuclear, chemical and biological weapons, their delivery systems and related materials, especially by non-state actors.

Two concerns led to this far-reaching resolution: terrorism, and the proliferation of nuclear, chemical and biological weapons ('weapons of mass destruction', 'WMD'), their delivery systems and related materials. International terrorism has long been on the Security Council's agenda, both before and after the attacks of 11 September 2001. Non-proliferation, tied to disarmament and arms trade control, has been a concern of the international community for many years, in various bilateral, regional and more global fora. The resolution has to be seen in the context of existing treaties and arrangements. The Council has recognized a possible link between terrorism and WMD before: in resolution 1373 (2001) it noted the close connection between international terrorism and illegal arms-

trafficking, and illegal movement of nuclear, chemical, biological and other potentially deadly materials.

This briefing paper sets the resolution in its background and legal context and points to the contribution it may make to the law on terrorism and WMD. The text of the resolution is appended at the end of the paper.

The resolution

Following the precedent of its declaration of 1992, the Council stated that the proliferation of WMD and their means of delivery constituted a threat to international peace and security. The Council was thus able to adopt the resolution under Chapter VII, and to lay down binding rules.

The resolution imposes three major obligations on states:

1. to refrain from providing any support to non-state actors who are attempting to manufacture, possess, transport or use WMD and their means of delivery;

Box 1: The powers and practice of the Security Council

The Charter of the United Nations provides that one of the purposes of the UN is to maintain international peace and security; the primary responsibility for this function is given to the Security Council. UN members have agreed that in carrying out its duties in this regard, the Council acts on their behalf.

Most of the Council's specific powers are laid down in Chapters VI and VII of the Charter. The former concerns the peaceful settlement of disputes, while the latter, sometimes referred to as the 'enforcement chapter', gives powers to the Council to act in relation to 'threats to the peace, breaches of the peace, and acts of aggression'. Article 39 provides: 'The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.'

Under Article 41 the Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions; economic sanctions are an obvious example. Article 42 provides that if Article 41 measures would be or are inadequate, the Council may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.

While the Charter provisions allowing forces to be made available to the Council for this purpose have become a dead letter, the Council has on numerous occasions authorized the use of force under Chapter VII by member states to address threats to international peace and security. It is unusual for the Council to specify under which Article of the Charter it is taking decisions; resolution 1540 (2004) follows the normal practice in this regard by not so specifying.

In using its powers under Chapter VII the Security Council has, with the exception of resolutions 1373 (2001) and 1540 (2004), acted in relation to particular situations or particular conduct. Resolution 1373 (2001) imposed a very wide range of measures on states to counter terrorism generally. Most Chapter VII resolutions have not purported to lay down general rules with respect to thematic issues. In the event of new and specific situations arising, the Council has laid down new rules. Even in the two cases where the Council set up tribunals to try war crimes (the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda), the resolutions related to specific instances of threats to peace and security. Resolutions 1373 (2001) and 1540 (2004) differ in that they relate to the form of behaviour rather than to particular manifestations of that form of behaviour.

The powers given to the Security Council are given by the Charter and must be carried out in accordance with the Charter. Decisions adopted under Chapter VII are binding upon all member states. In accordance with Article 103 they override other international obligations. There is dispute as to whether the decisions of the Council can be reviewed by a court. Unless and until a case came before the International Court of Justice, for example, on the matter and that Court were prepared to adjudicate on the actions of the Council, it would appear that any resolution adopted by the Council must be treated as valid.

2. to prohibit in their domestic law any such activities by non-state actors, particularly for terrorist purposes, and to prohibit any assistance or financing of such activities;

3. to adopt domestic measures to prevent the proliferation of WMD, their means of delivery and related materials, including by accounting for and physically protecting such items; establishing and maintaining effective border controls and law enforcement measures; and reviewing and maintaining national export and trans-shipment controls (with appropriate criminal or civil penalties).

The resolution also creates a committee of the Council to monitor its implementation.

The major impact of the resolution, if states carry out their obligations, will be on non-state actors. However, the third major obligation (set out in paragraph 3 of the resolution, and relating to domestic controls) is not limited to private entities: domestic control measures have to be established and enforced in relation to all WMD, their means of delivery and related materials, whether in relation to states, industry or terrorist groups.

Adoption of the resolution

The resolution took several months to pass through its different stages of negotiation before its adoption by the Security Council on 28 April 2004. Early versions were initially discussed between the United States and the United Kingdom, which then involved the three other permanent Council members (Russia having its own informal draft) and reached an agreement on the terms of a final draft that was presented to other Council members. At an open Council meeting on 22 April, Council members and more than 30 non-members commented on this draft. The non-members were fairly representative of different regions. They included Ireland (speaking on behalf of the European Union), Malaysia (speaking on behalf of the large Non-Aligned Movement grouping), South Korea, Japan, Argentina, Nigeria, South Africa, Jordan, Israel and India. The holding of an open meeting is an unusual procedure for draft resolutions, which are more normally debated only by Council members in closed sessions. Thereafter a few changes were made to the draft before the Council voted on it on 28 April.

The records of the meetings of the Council on 22 and 28 April¹ show that the participating states recognized that the aim of the resolution was to fill a gap in existing international law. The web of bilateral and multilateral treaties and other arrangements concerning WMD on the one hand and international terrorism on the other did not adequately target the threat posed by terrorist

groups with WMD ambitions. However, representatives of the states participating in the Council meetings voiced a number of significant concerns about the resolution.

1. Disarmament: the total elimination of WMD and related programmes. The resolution expressly mentions disarmament once, in the preamble, where the Council reaffirms 'the need for all member states to fulfil their obligations in relation to arms control and disarmament'. That provision made its way into the resolution only after consultations on an earlier draft. But the resolution did not emphasize that, as is the view of many states, a related aim should be the total elimination of such weapons. Norway spoke for many in saying, 'Non-proliferation and disarmament are two sides of the same coin. The irreversible destruction of stockpiles of WMD is the best guarantee that such weapons do not fall in the wrong hands.' Concerns were also voiced that the Council should not replace or undermine open, global disarmament negotiation fora such as the Conference on Disarmament and the Non-Proliferation Treaty review; nor should it hinder the acquisition, development and use of nuclear, chemical and biological systems, technology and materials for peaceful purposes.

2. The 'legislative' nature of the resolution, binding upon all member states but adopted by a Council that consists of only 15 of them. It is only the second time since 1945 that the Council has, invoking its Chapter VII powers, taken sweeping, general decisions that can be described as being of a legislative nature; the resolution is in response to – or in anticipation of – a threat that is no doubt real but not as specific as is usually the case with Council resolutions. The other instance is resolution 1373 (2001), adopted while the fires were still burning in the rubble of the Twin Towers. Having determined that the attacks of 11 September, like any other act of international terrorism, constituted a threat to international peace and security, the Council adopted wide-ranging and legally binding decisions aimed at countering international terrorism generally, rather than a specific instance of terrorism.

The concern was well voiced by India: 'Our recognition of the time imperative in seeking recourse through the Security Council does not ... obscure our more 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. In the present instance, the Council seeks to both define the non-proliferation regime and monitor its implementation. But who will monitor the monitors? We are concerned that the exercise of legislative functions by the Council, combined with recourse to Chapter VII mandates, could disrupt the balance of power between the General Assembly and the Security Council, as enshrined in the Charter.'

Some speakers considered it more appropriate that a multilateral treaty be negotiated among the wider UN

¹ The records of the Council meetings of 22 Apr (S/PV.4950, and S/PV.4950 (Resumption 1), 4950th meeting) and 28 Apr (S/PV.4956, 4956th meeting) are available at the UN's website, www.un.org/documents/

membership, as in other cases of international regulation of WMD, and suggested that such a process be launched. But it was also recognized that multilateral treaty negotiations can take years, and that the threat posed by the proliferation of WMD and related items was too pressing.

3. A related concern about the adoption of the resolution under Chapter VII. Might its invocation be seen to authorize the use of force to ensure compliance? Pakistan noted: 'A legitimate fear arises that when one sees the draft resolution under Chapter VII, with language such as that used – 'to combat by all means' – an authorization is being sought which could justify coercive actions envisaged in Articles 41 and 42 of the Charter, including the use of force.' The UK, however, confirmed that 'the draft resolution is not about coercion or enforcement. Many delegations have raised questions about the Chapter VII legal base for the draft resolution and about what that implies ... What this draft resolution does not do is authorize enforcement action against states or against non-state actors in the territory of another country. The draft resolution makes clear that it will be the Council that will monitor its implementation. Any enforcement action would require a new Council decision.' The US, after having explained why Chapter VII should be invoked, said that the draft resolution 'is not about enforcement'. Other speakers acknowledged these reassurances. For example, Germany noted that in case of non-implementation, 'the resolution does not foresee any unilateral enforcement measures. If necessary, such measures must be subject to specific further decisions, to be adopted by the Security Council as a whole under paragraph 11 of the resolution and in conformity with the United Nations Charter.'

Spain considered the resolution 'to be part of the fight against terrorism and a continuation of what began with resolution 1373 (2001), which was adopted within the framework of Chapter VII. It would therefore be hard to understand why one would not apply Chapter VII on this occasion.'

Use of terms

Unusually for a Security Council decision, a footnote defines some of the terms used in the resolution. These definitions caused difficulty in the negotiations, with regard to both their content and how they should be included. 'Non-state actor' is an 'individual or entity, not acting under the lawful authority of any state in conducting activities which come within the scope of this resolution'. While the preamble refers to non-state actors 'such as' those listed in the Security Council terrorism resolutions (resolutions 1276 (1999) and 1373 (2001)), this indicates only the Council's primary focus. The definition is wide enough to include 'ordinary' commercial enterprises. While the phrase 'not acting under the lawful authority of any state' would cover, for example, a group of terrorists manufacturing or transporting 'dirty bombs'

somewhere in Afghanistan, Pakistan or Iraq beyond the reach, let alone the authority, of the government, it also includes companies transporting chemical weapons without the necessary governmental authorization. This aspect of the definition, together with the terms of the third major obligation, which is not limited to non-state actors, takes the resolution further than prevention of terrorism, into the area of non-proliferation more generally. The effect is that every state must control all those involved in such activities, not simply non-state actors.

'Means of delivery' refers to 'missiles, rockets and other unmanned systems capable of delivering nuclear, chemical, or biological weapons, that are specially designed for such use'. Earlier drafts had included means of delivery intended for such use, but the phrase now adopted reflects a provision used in non-proliferation and arms trade control contexts.² It would cover any means of delivery specially designed, manufactured or modified for such use. The phrase will ensure that the legitimate development of, trade in and use of systems such as missiles and unmanned drones are not hampered. Pakistan asked whether 'missiles, rockets and unmanned aerial vehicles are the only means for the delivery of WMD? Who will judge whether or not they are designed for this purpose?'

'Related materials' refers to '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'. The definition is relevant only to the requirement on states (in paragraph 3 of the resolution) to take appropriate controls over these materials. It includes 'dual-use' goods – that is, goods that can be used in both civilian and non-civilian applications. Pakistan underlined an aspect of the definition that may impact on the work of the resolution's monitoring committee when it claimed that the 'list prepared by closed regimes such as the Missile Technology Control Regime (MTCR), the Nuclear Suppliers Group (NSG) or the Australia Group cannot automatically be accepted by or imposed upon states that are not parties to these regimes'.

² The Biological Weapons Convention, for example, covers 'weapons, equipment or means of delivery designed to use' the agents or toxins covered by the Convention 'for hostile purposes or in armed conflict' (Article I(2)). The Chemical Weapons Convention refers to 'any equipment specifically designed for use directly in connection with the employment of munitions and devices' as part of the definition of a chemical weapon covered by the Convention (Article II.1.c). And the UK's Export of Goods, Transfer of Technology and Provision of Technical Assistance (Control) Order 2003 (S. I. 2003 No 2764 made under the Export Control Act 2002) prohibits the export without a licence of certain prohibited goods, software and technology, including aircraft and unmanned airborne vehicles 'specially designed or modified for military use' (Article 3 and Schedule 1).

The resolution's contribution to non-proliferation measures

Proliferation of WMD is of course already the subject of international control through a variety of treaties, informal arrangements and organizations which have their origin elsewhere than in the UN. The principal multilateral treaties are the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT), the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (BWC), and the 1993 Convention on the Prohibition of Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (CWC). The NPT and matters relevant to its implementation fall within the purview of the International Atomic Energy Agency (IAEA); the verification of obligations under the CWC falls within that of the Organization for the Prohibition of Chemical Weapons (OPCW).

The subject-matter of the resolution overlaps with matters dealt with by these treaties and organizations; in its drafting there were clearly risks of conflict. The resolution therefore provides that none of its obligations are to be interpreted so as to conflict with or alter the rights and obligations of states parties to the

three treaties or to alter the responsibilities of the IAEA or the OPCW. Indeed the resolution recognizes the importance of multilateral treaties and other arrangements relating to WMD, calling on states to promote their universal adoption and their strengthening, and to renew their commitment and cooperation with the IAEA and the OPCW and within the framework of the BWC.

Although the term 'weapons of mass destruction' is commonly used to refer to all three kinds of weapons, the nature of each of them and the legal measures adopted by states with regard to each of them are very different. Obligations under the three treaties that deal with issues similar to the resolution include the following. Under the NPT, the nuclear-weapon states parties undertake not to transfer 'to any recipient whatsoever' nuclear weapons or other nuclear explosive devices. In their turn, the other states parties undertake not to receive such items from any transferor whatsoever. As regards biological weapons, the BWC requires state parties to destroy or divert to peaceful means agents and toxins, weapons and equipment coming within its scope. States are also required not to transfer these items to 'any recipient whatsoever' and to prohibit and prevent their production. Parties to the treaty notoriously have not been able to agree a verification mechanism. The treaty dealing with chemical weapons is far more comprehensive: the CWC

Box 2: Other relevant arrangements

As well as the three major treaties establishing prohibitions and controls for nuclear, chemical and biological weapons, there are numerous other relevant international efforts. These include treaties and informal arrangements, some having a regional scope. Examples include the following.

The Australia Group seeks to ensure that the industries of the participating states do not in any way assist states seeking to acquire a chemical and biological weapons capability. The group maintains a list of items over which they exercise national export controls, including weapons-related production equipment (such as corrosion-resistant reactor vessels). The group's membership is little more than 30 states, and does not include, for example, North Korea, Iran, Syria, Saudi Arabia, Israel and Egypt.

The purpose of the Missile Technology Control Regime (MTCR) is to restrict the proliferation of nuclear, chemical and biological capable missiles and related technology, including to terrorists. The participating states apply a common export control policy to a common list of controlled items, including virtually all key equipment and technology needed for missile development, production, and operation. Again membership is not large: fewer than 40 states. Supplementing the MTCR, is the International Code of Conduct Against Ballistic Missile Proliferation (also known as the Hague Code of Conduct), the objective of which is to strengthen anti-ballistic missile proliferation efforts. It 'consists of a set of general principles, modest commitments, and limited confidence-building measures'. There are more than 110 subscribing states.

The Nuclear Suppliers Group is an export-control mechanism consisting of 40 states. Its members adhere to a voluntary set of guidelines governing the export of nuclear materials and equipment and of nuclear-related dual-use equipment and materials, the general aim being to ensure that such trade for peaceful purposes does not contribute to the proliferation of nuclear weapons or explosive devices.

The Zangger Committee is a grouping of 35 states less formal than the Nuclear Suppliers Group. Its aim is to harmonize the implementation of the requirement under the NPT to apply IAEA safeguards to nuclear exports, to which end the committee maintains a list of equipment that may only be exported if safeguards are applied to the recipient facility.

Among regional treaties, one of the oldest is the Treaty for the Prohibition of Nuclear Weapons in Latin America (Tlatelolco Treaty) with 33 Latin American and Caribbean states parties. It is aimed at, among other things, ensuring the prohibition and prevention in the region of the 'manufacture, production or acquisition by any means whatsoever of any nuclear weapons' and the 'receipt, storage, installation, deployment and any form of possession of any nuclear weapon' by the parties, 'directly or indirectly, on behalf of anyone else or in any other way'. The treaty also established the Agency for the Prohibition of Nuclear Weapons in Latin America (OPANAL) and a control system. OPANAL cooperates with the IAEA in monitoring compliance with the obligations stemming from the treaty; violations that 'might endanger peace and security' can be referred to the UN Security Council.

not only bans states from the use, production, and stockpiling of chemical weapons, but also contains a mechanism for verifying their compliance with the treaty's provisions. It also requires states parties to adopt measures (including criminal measures) to prohibit natural and legal persons on their territory, with their nationality or otherwise under their jurisdiction from undertaking any activity prohibited to a state party under the Convention. All such measures are to be notified to the OPCW.

States are the primary focus of the three principal treaties and the other relevant treaties and arrangements; activities by private entities are not adequately dealt with. Nor do those treaties sufficiently cover the means of delivery of WMD and related materials. In both respects, resolution 1540 (2004) contributes to the international control of WMD and related goods. Further, these treaties are binding only on those who are parties to them, leaving gaps in the protection they accord (since the treaties are not regarded as generally constituting customary law, binding on all states). More states are parties to the NPT than any other arms control and disarmament agreement,³ but Pakistan, India and Israel, for example, are not; North Korea has recently announced its withdrawal from it.

The other treaties and arrangements relevant to non-proliferation efforts similarly apply only to the parties to them. The advantage of a Security Council resolution adopted under Chapter VII, of course, is that it is binding on all UN member states.

Implementation of the resolution

For states to review, adopt and enforce the laws and other measures referred to, as required by the resolution, will not be easy. This is especially true for many of the world's developing states, some of which, even if they have the will to do so, lack resources. States particularly affected are those which are not already parties to the relevant WMD treaties and do not therefore already have the appropriate measures in place – and those which, although parties, have not fully implemented their obligations. There are also some states of proliferation concern which are likely to lack the political will to implement the resolution. Particular problems in implementation may arise from the fact that the definition of 'related materials' may include dual-use items covered by treaties and arrangements to which not all member states are parties.

That some states would have difficulties in implementing the resolution was clear to the Council. It therefore invited capable states to offer assistance, in response to specific requests, to states lacking the legal and regulatory infrastructure, implementation experience and resources for fulfilling the resolution's

³ There are some 189 parties to the NPT; 137 to the Statute of the NPT; 151 to the BWC; 164 to the CWC. It should be recalled that there are 191 member states of the UN.

provisions. The G8 states have announced that they are prepared to assist.

States such as the UK will already have the necessary legislation in place, largely as a result of their participation in the multilateral treaty regimes.⁴ For them the task will be to ensure that their reports to the Council committee established to monitor the implementation of the resolution are sufficiently transparent and comprehensive, and to set an example to others. An additional task will be to ensure that the necessary physical protection and accounting measures are in place and properly enforced. The recent temporary closure of the US nuclear laboratory at Los Alamos in response to the apparent theft of computer discs containing nuclear secrets (following a string of recent security breaches there), and the alleged involvement of a US company in the Khan trafficking network, clearly demonstrate that even developed states cannot rest on their laurels.

The monitoring committee established by the Council has been given a mandate for two years. The duration was changed from six months following suggestions made in the negotiations. Like sanctions committees, the monitoring committee will be composed of all Council members, will operate on the basis of consensus and will report to the Council. States are to present to the committee by the end of October 2004 a first report on steps they have taken or intend to take to implement the resolution. The Council has also called upon states to develop at the earliest opportunity effective national control lists to assist in the implementation of the resolution.

In the discussions of the resolution, there was some disagreement about the scope of the committee's work; it is unclear whether the concerns have been satisfactorily resolved. The resolution mandates the committee to 'report to the Security Council for its examination, on the implementation of this resolution'. At the Council meeting on 22 April 2004, the view of one delegation (Pakistan) as to the scope of the committee's work (that it will 'merely collate and submit the reports from member states') is quite different from that of two others, respectively the UK and Russia ('We see the committee as the heart of a cooperative approach, allowing countries to compare experience, to establish best practice and to identify areas where technical assistance is needed', and the committee 'would be engaged in collecting and analysing the responses of member states with respect to the measures they have taken in implementation of the resolution and with respect to possible assistance to those states, when relevant requests are made').

The unprecedented and hitherto successful work of the Counter-Terrorism Committee (CTC), the committee established by resolution 1373 (2001), may provide some pointers for the monitoring committee. The mandate of

⁴ For example the Biological Weapons Act 1974, the Chemical Weapons Act 1996, provisions of the Anti-terrorism, Crime and Security Act 2001 and the Export Control Act 2002.

the CTC is to monitor implementation of the resolution concerned. Emphasizing the differences between sanctions committees of the Council and a committee such as the CTC, the first Chairman of the CTC, Sir Jeremy Greenstock of the UK, adopted a cooperative approach, avoiding condemnation of states that did not adhere to all their resolution obligations and focusing on helping member states to identify their particular needs and matching them with expert advisers. The expertise of the advisers assisting the CTC includes legislative drafting; customs law and practice; police and law enforcement and illegal arms-trafficking. While the CTC itself does not provide assistance, it has set up an easily accessible electronic database to help states looking for information, experts and model legislation. A similar approach may be adopted with respect to the monitoring committee.

The concern was expressed in the Council debates that the monitoring committee must cooperate with and not undermine the work of other relevant bodies. It can be expected that the committee will seek to draw on the relevant experience and expertise of these bodies, in particular the OPCW and IAEA; it may need to overcome information-sharing problems with some of them and to secure intelligence cooperation from significant states.

The use of force

As indicated above, anxiety about whether the resolution authorizes the use of force to ensure compliance with its terms was voiced during the negotiations and the Council meetings. This was expressed in some cases as opposition to the resolution being adopted under Chapter VII of the Charter.

The outcome is that the resolution leaves to the Council itself the task of monitoring compliance. It does not authorize the use of force – by any state – to enforce it. The Council expressed its intention to monitor closely the implementation of this resolution, and ‘to take further decisions which may be required to this end’. In the preamble, the Council also affirmed its resolve to ‘take appropriate and effective actions’ against any threat to international peace and security caused by the proliferation of WMD and their means of delivery, in conformity with its primary responsibilities. Language commonly used in resolutions authorizing the use of force by member states or regional groupings to enforce compliance is absent.

Earlier informal drafts in the operative part of the resolution would have authorized the forcible interdiction of shipping with suspect cargoes, if in accordance with national legal authorities and international law, but the reference was removed at the request of China and others. The only legacy is to be found in paragraph 10 of the resolution which calls upon states to take cooperative action to prevent illicit trafficking in WMD. The fact that this provision is not

Box 3: Use of force

The fact that a resolution is adopted under Chapter VII of the UN Charter does not give states or regional groupings the right in international law to use force against other states – or against vessels on the high seas – to ensure compliance with the terms of the resolution. To render the use of such force lawful in international law, the Security Council must explicitly authorize its use. This is often done by a Chapter VII decision that states may use ‘all necessary means’.

In the absence of an authorization by the Council, states and others would not be able legally to use force in the event of non-compliance with the resolution by other states, unless that force was justified in self-defence. The lawfulness of the use of force in self-defence is preserved by Article 51 of the Charter, but the well-accepted conditions are that there is either an armed attack or a threat of an imminent attack, and that the use of force is necessary to avert the attack and proportionate to that need. These criteria of imminence, necessity and proportionality would not be satisfied if action were taken before a threat had materialized, as seems to be foreseen under wide formulations of so-called pre-emptive self-defence.

obligatory (it is not in the language of a decision) and that it calls for action to be consistent with international law makes it clear there is no authorization here of forcible interdiction action.

Interdiction of shipping: the PSI and the IMO

The language of paragraph 10 is reminiscent of the Statement of Interdiction Principles of the Proliferation Security Initiative (PSI). The PSI is a political framework for an ad hoc cooperative effort by a number of states to restrict WMD-trafficking in the air, on land and at sea. Its aims, informally and pithily summarized by a senior US official, are to create a basis ‘for action to ensure that, if proliferators manage to place their deadly cargoes aboard a ship, plane, or truck, we are prepared to stop them in their tracks’. The PSI does not itself provide any legal basis for intercepting suspected shipping on the high seas without flag state consent. As indicated above, neither does resolution 1540 (2004).

Related activity is under way within the International Maritime Organization (IMO). The intention is to criminalize the transport of WMD, and to provide for boarding of suspect ships in certain circumstances. This is to be done by amending the provisions of the Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA) and its Protocol. In the wake of 11 September, and long before the adoption of resolution 1540 (2004), states parties to the IMO acknowledged that maritime interests are widely exposed to risks such as the use of ships as weapons and the transport of material which might

Box 4: Proliferation Security Initiative (PSI)

Begun in May 2003, the core group of PSI, numbering around 16 states, includes the UK, the US, France, Germany, Italy, the Netherlands, Norway, Spain, Russia, Japan and Singapore. The core states are attempting to gain global support for the initiative; altogether more than 70 states have expressed political support for the Statement of Interdiction Principles agreed at the PSI meeting in Paris on 4 September 2003.

The initiative aims to enhance coordinated efforts to impede and stop sea, air and land shipments of WMD, delivery systems, and related materials to and from states and non-state actors of proliferation concern, and to prevent 'WMD proliferation facilitators' from trading in such goods. The Statement of Interdiction Principles sets out the kinds of practical implementation steps that the participating states have agreed to take. They include reviewing and strengthening national laws, streamlining information-sharing procedures, preventing anyone under the jurisdiction of the participating state from transporting such goods to actors of proliferation concern, and permitting or undertaking interdiction (interception) efforts.

Under the initiative, 'states or non-state actors of proliferation concern' are countries or entities that the PSI states establish should be subject to interdiction activities because they are engaged in proliferation through efforts to develop or acquire chemical, biological, or nuclear weapons and associated delivery systems, or transfers of WMD, their delivery systems or related materials.

As part of the initiative, a number of air, ground and sea interdiction training-exercises, organized by the UK, US, France and Australia, among others, have been held and more are planned. The US has also recently signed ship-boarding treaties with two of the largest shipping-registry states, Liberia and Panama. The treaties permit the US under certain circumstances forcibly to stop, search and detain ships flying Panamanian or Liberian flags that are suspected of transporting WMD and related goods. The treaties also contain provisions allowing Liberia and Panama speedily to grant permission to a third state to undertake similar operations against their flag-flying ships.

Concerns have been raised that the initiative aims to permit the interdiction of ships on the high seas over which the PSI states have no jurisdiction. On its face, however, the Statement of Interdiction Principles is consistent with international law, including the law of the sea, and encourages measures that are consistent with international law and the laws of the participating states. There would be a problem in international law only if the US (or other PSI partners) undertook interdiction operations without host state consent and in reliance on a wide doctrine of pre-emptive self-defence. In its Seventh Report of 21 July 2004, however, the House of Commons Select Committee on Foreign Affairs recommended that, 'the Government work for a United Nations Security Council resolution which would resolve the legal difficulties over PSI'.

lead to the proliferation of WMD. They began negotiations within the IMO Legal Committee, to prepare a text for a diplomatic conference for the amendment of the Convention; proposals add a number of criminal offences to the Convention, including the transport of WMD, and make provision for the boarding of suspect vessels. It is likely that agreement will not be reached on the inclusion of boarding provisions unless boarding is dependent on flag state consent, or unless a state has made an appropriate declaration on ratification of the new agreement waiving its jurisdiction. The negotiations are covering similar issues to those raised in relation to resolution 1540 (2004): parts of the two instruments are likely to overlap to a large extent.

Conclusions

Does the resolution add anything to the current – and evolving – international system regulating weapons of mass destruction? First, as a binding decision of the Security Council it imposes obligations on all states, regardless of their participation in existing treaties and arrangements. It will thus, if effective, remove the possibility of safe havens for terrorists seeking to acquire WMD. Secondly, in one instrument it covers all three kinds of WMD and, importantly, their means of delivery and related materials. Thirdly, it requires the

imposition of prohibitions and controls under domestic law of a wider range of activities, in particular in relation to non-state actors, including terrorist groups. Fourthly, it sets up a committee which will combine in one body the monitoring of obligations relating to the three weapons which are at present regulated under separate regimes. The committee may come to play an important role in ensuring that states do in fact take measures to control proliferation by non-state actors.

The resolution also adds to the fast-growing body of international law on counter-terrorism, following recent Security Council resolutions (in particular resolution 1373 (2001) on terrorism generally) and multilateral treaties on specific sectors of terrorism.

The resolution has been criticized by some as another example of a legislative measure of general application, in an area which should be left to negotiation among states. It should be noted, however, that the measures taken to enhance the legitimacy and authority of the resolution in the wider UN membership were extensive and unusual. The open Security Council meeting held to consider the draft text allowed non-members of the Council to give their views, and more than 30 such states, representing a considerable body of divergent opinion, took the opportunity to speak. The adoption of the resolution was by a unanimous Council. Even Pakistan, a nuclear-weapons power, opposed to what it sees as the discriminatory WMD disarmament and arms

control policies of some of the five permanent Council members, voted in favour of the resolution once it had voiced a number of concerns about its terms. It is true, however, that the amendments made to the draft as a result of the open meeting were very few, and that the 'real' negotiations went on behind closed doors and, in the initial stages, between only two members of the permanent five members. It is because of the absence of real negotiation among non-Council members, as well as for reasons of Charter purity, that criticisms of Council legislation of this nature are likely to be voiced if the practice continues. But it cannot be denied that the speed and efficiency of this kind of international legislation invites its continuation. The test for such Council resolutions will be whether states generally continue to accept them as binding and implement them as required.

The effectiveness of the resolution will depend in large part on whether the monitoring committee and supporting states will be able to secure global implementation. Staffing and resources will affect whether or not the committee will match the relative success of the Counter-Terrorism Committee. The resolution authorizes neither the use of force against states to ensure their compliance, nor the use of force in interdiction of shipping or aircraft carrying prohibited items. At the end of the day, the only recourse for the committee in the face of non-cooperative states will be to report to the Council. At the least it will be able to bring to public attention those states that are either not cooperating with it or failing to take the measures required. Whether there will be further Council decisions will depend upon the will of the Council, but the adoption of the resolution under Chapter VII creates a precedent for future action.

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**Security Council**Distr.: General
28 April 2004

Resolution 1540 (2004)**Adopted by the Security Council at its 4956th meeting,
on 28 April 2004***The Security Council,*

Affirming that proliferation of nuclear, chemical and biological weapons, as well as their means of delivery,* constitutes a threat to international peace and security,

Reaffirming, in this context, the Statement of its President adopted at the Council's meeting at the level of Heads of State and Government on 31 January 1992 (S/23500), including the need for all Member States to fulfil their obligations in relation to arms control and disarmament and to prevent proliferation in all its aspects of all weapons of mass destruction,

Recalling also that the Statement underlined the need for all Member States to resolve peacefully in accordance with the Charter any problems in that context threatening or disrupting the maintenance of regional and global stability,

Affirming its resolve to take appropriate and effective actions against any threat to international peace and security caused by the proliferation of nuclear, chemical and biological weapons and their means of delivery, in conformity with its primary responsibilities, as provided for in the United Nations Charter,

Affirming its support for the multilateral treaties whose aim is to eliminate or prevent the proliferation of nuclear, chemical or biological weapons and the importance for all States parties to these treaties to implement them fully in order to promote international stability,

* Definitions for the purpose of this resolution only:

Means of delivery: missiles, rockets and other unmanned systems capable of delivering nuclear, chemical, or biological weapons, that are specially designed for such use.

Non-State actor: individual or entity, not acting under the lawful authority of any State in conducting activities which come within the scope of this resolution.

Related materials: 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.

Welcoming efforts in this context by multilateral arrangements which contribute to non-proliferation,

Affirming that prevention of proliferation of nuclear, chemical and biological weapons should not hamper international cooperation in materials, equipment and technology for peaceful purposes while goals of peaceful utilization should not be used as a cover for proliferation,

Gravely concerned by the threat of terrorism and the risk that non-State actors* such as those identified in the United Nations list established and maintained by the Committee established under Security Council resolution 1267 and those to whom resolution 1373 applies, may acquire, develop, traffic in or use nuclear, chemical and biological weapons and their means of delivery,

Gravely concerned by the threat of illicit trafficking in nuclear, chemical, or biological weapons and their means of delivery, and related materials,* which adds a new dimension to the issue of proliferation of such weapons and also poses a threat to international peace and security,

Recognizing the need to enhance coordination of efforts on national, subregional, regional and international levels in order to strengthen a global response to this serious challenge and threat to international security,

Recognizing that most States have undertaken binding legal obligations under treaties to which they are parties, or have made other commitments aimed at preventing the proliferation of nuclear, chemical or biological weapons, and have taken effective measures to account for, secure and physically protect sensitive materials, such as those required by the Convention on the Physical Protection of Nuclear Materials and those recommended by the IAEA Code of Conduct on the Safety and Security of Radioactive Sources,

Recognizing further the urgent need for all States to take additional effective measures to prevent the proliferation of nuclear, chemical or biological weapons and their means of delivery,

Encouraging all Member States to implement fully the disarmament treaties and agreements to which they are party,

Reaffirming the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts,

Determined to facilitate henceforth an effective response to global threats in the area of non-proliferation,

Acting under Chapter VII of the Charter of the United Nations,

1. *Decides that* all States shall refrain from providing any form of support to non-State actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery;

2. *Decides also* that all States, in accordance with their national procedures, shall adopt and enforce appropriate effective laws which prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for

terrorist purposes, as well as attempts to engage in any of the foregoing activities, participate in them as an accomplice, assist or finance them;

3. *Decides also* that all States shall 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 and to this end shall:

(a) Develop and maintain appropriate effective measures to account for and secure such items in production, use, storage or transport;

(b) Develop and maintain appropriate effective physical protection measures;

(c) Develop and maintain appropriate effective border controls and law enforcement efforts to detect, deter, prevent and combat, including through international cooperation when necessary, the illicit trafficking and brokering in such items in accordance with their national legal authorities and legislation and consistent with international law;

(d) Establish, develop, review and maintain appropriate effective national export and trans-shipment controls over such items, including appropriate laws and regulations to control export, transit, trans-shipment and re-export and controls on providing funds and services related to such export and trans-shipment such as financing, and transporting that would contribute to proliferation, as well as establishing end-user controls; and establishing and enforcing appropriate criminal or civil penalties for violations of such export control laws and regulations;

4. *Decides* to establish, in accordance with rule 28 of its provisional rules of procedure, for a period of no longer than two years, a Committee of the Security Council, consisting of all members of the Council, which will, calling as appropriate on other expertise, report to the Security Council for its examination, on the implementation of this resolution, and to this end calls upon States to present a first report no later than six months from the adoption of this resolution to the Committee on steps they have taken or intend to take to implement this resolution;

5. *Decides* that none of the obligations set forth in this resolution shall be interpreted so as to conflict with or alter the rights and obligations of State Parties to the Nuclear Non-Proliferation Treaty, the Chemical Weapons Convention and the Biological and Toxin Weapons Convention or alter the responsibilities of the International Atomic Energy Agency or the Organization for the Prohibition of Chemical Weapons;

6. *Recognizes* the utility in implementing this resolution of effective national control lists and calls upon all Member States, when necessary, to pursue at the earliest opportunity the development of such lists;

7. *Recognizes* that some States may require assistance in implementing the provisions of this resolution within their territories and invites States in a position to do so to offer assistance as appropriate in response to specific requests to the States lacking the legal and regulatory infrastructure, implementation experience and/or resources for fulfilling the above provisions;

8. *Calls upon* all States:

(a) To promote the universal adoption and full implementation, and, where necessary, strengthening of multilateral treaties to which they are parties, whose aim is to prevent the proliferation of nuclear, biological or chemical weapons;

(b) To adopt national rules and regulations, where it has not yet been done, to ensure compliance with their commitments under the key multilateral non-proliferation treaties;

(c) To renew and fulfil their commitment to multilateral cooperation, in particular within the framework of the International Atomic Energy Agency, the Organization for the Prohibition of Chemical Weapons and the Biological and Toxin Weapons Convention, as important means of pursuing and achieving their common objectives in the area of non-proliferation and of promoting international cooperation for peaceful purposes;

(d) To develop appropriate ways to work with and inform industry and the public regarding their obligations under such laws;

9. *Calls upon* all States to promote dialogue and cooperation on non-proliferation so as to address the threat posed by proliferation of nuclear, chemical, or biological weapons, and their means of delivery;

10. Further to counter that threat, *calls upon* all States, in accordance with their national legal authorities and legislation and consistent with international law, to take cooperative action to prevent illicit trafficking in nuclear, chemical or biological weapons, their means of delivery, and related materials;

11. *Expresses* its intention to monitor closely the implementation of this resolution and, at the appropriate level, to take further decisions which may be required to this end;

12. *Decides* to remain seized of the matter.
