

## United Nations Security Council Resolution 1540 (2004)

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The terrorist attacks on 11 September 2001 has brought about a paradigmatic change in multilateral efforts to combat proliferation of weapons of mass destruction. Before 9/11 these efforts had focused primarily on *states* as proliferators. The question of proliferation involving *non-state actors* was not on the international agenda, although certain events had clearly shown the relevance of the question (e.g., the 1995 sarin attacks in the Tokyo subway). After 9/11 it became obvious that non-proliferation work also had to focus on non-state actors as the nexus between terrorism and weapons of mass destruction became evident. The multilateral export control regimes rapidly altered their focus so as to also cover proliferation involving non-state actors. Their informal nature meant that they could amend their guidelines rather quickly. However, their reach was partial as a result of their limited membership. The formal elements of the non-proliferation regime – i.e., the global treaties on non-proliferation (NPT, CWC, BTWC) – had been drafted with the objective of preventing proliferation of WMD among states, and was not well equipped to deal with the new focus on non-state actors. From a policy perspective, the option of seeking amendments of these treaties did not seem particularly attractive as it would run the risk of opening a Pandora's Box. The non-proliferation agenda was also significantly affected by the revelation in 2003 of the existence of a network of private suppliers of sensitive nuclear technologies (A. Q. Khan). This signified a shift to focus not just on non-state actors as *recipients* of sensitive goods and technologies, but also as *suppliers* of such goods and technologies.

In a speech before the General Assembly on 23 September 2003, President Bush called upon the Security Council to adopt a new 'anti-proliferation' resolution that would 'call on all members of the U.N. to criminalize the proliferation of weapons -- 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.' After seven months of negotiations among the members of the Security Council, a resolution was adopted by consensus on 28 April 2004. The resolution was adopted under Chapter VII of the UN Charter and is legally binding upon the members of the organization. While there was a general consensus among the members of the UN on the importance of the *substance* of the resolution, the *process* of the Security Council 'legislating' for the other UN member states was criticized by several states.

The resolution lays down three major obligations. *First*, 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. *Second*, 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. *Third*, (which is not specifically limited to non-state actors) 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. To this end, states shall amongst others:

'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' (OP 3:d).

To monitor the implementation of the resolution, the Council also established a committee (*'the 1540 Committee'*) to sit for a maximum of two years. The member states should report to the Committee, before 28 October 2004, on steps they have taken, or intend to take, in order to implement the resolution.

While the resolution was adopted in a legally binding form, its language can hardly be described as 'self-executing'. The resolution calls for national export control legislation that should be 'appropriate' and 'effective', but it provides no further information on what is meant by this (a list-based approach or end-use controls?). Furthermore, the resolution contains a rather broad definition of its material field of application, which may in turn affect the domestic implementation of its provisions. The term 'related materials' is defined 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'. While there is one international treaty that contains a detailed definition of its material field of application (i.e., the CWC), the other two (i.e., the NPT and the BTWC) are notorious for their lack of precision in this respect. It is within the framework of the 'arrangements' (i.e., the multilateral export control regimes) where one finds the necessary specificity. However, at least prior to the adoption of UNSCR 1540, states that are not members of the multilateral export control regimes have been hesitant to recognize their work because of their alleged 'discriminatory' character.

The work of the 1540 Committee may reduce the negative impact of the indeterminacy of the resolution by establishing 'good practices' in the field of dual-use export control legislation. It is likely that the existing guidelines and control lists of the multilateral export control regimes will serve a very important role as a 'baseline' for what is to be seen as 'good practice'. It is important that the work of the Committee is not limited to the formal side of export controls (i.e., the legislation) but also focuses on the administration of the control system (i.e., allocation of resources for licensing and enforcement).

For many states, the adoption of the resolution will not entail any significant burden as their domestic legal systems already meets the requirements of the resolution. However, for some countries the implementation of its provisions is likely to entail a significant amount of work. Hence, the adoption of UNSCR 1540 could provide a framework for the multilateral export control regimes to engage in outreach-activities with the aim of assisting countries in meeting their obligations under the resolution. The resolution might also serve a useful purpose in the (perhaps) waning debate on the 'legitimacy' of multilateral export controls.

In conclusion, there are at least two sets of policy issues raised by UNSCR 1540 which are relevant for the multilateral export control regimes:

- *Assistance for the development of domestic export control systems* – what role for the existing multilateral export control regimes? Are the members willing to accept costs for such technical assistance? How to balance external assistance with domestic requirements? Technical assistance for inventories of exporters in the field of dual-use goods?
- *Export controls without end-user information* – should the multilateral export control regimes consider the provision of end-user information to those states that lack their own means to acquire such information? How effective could export

controls be without such information? How could such information be disseminated (databases for non-members)?