

## **Nuclear Terrorism and UN Security Council Resolution 1540:**

### **A comprehensive approach**

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### **1. Summary**

UN Security Council Resolution 1540 requires States to take measures to prevent nuclear terrorism, focusing particularly on prohibiting non-State actors from acquiring or using nuclear weapons and on further measures to control nuclear materials and prevent proliferation. The resolution arose in response to security concerns from a number of States, including the United States, arising from the possibility of the proliferation of nuclear weapons and other weapons of mass destruction to States and non-State actors.

A positive response by States to the measures called for in UN SC Resolution 1540 will assist in addressing these security concerns and building collaborative relationships between Nuclear Weapon States (NWS) and non-Nuclear Weapon States (non-NWS). However, it will remain difficult to effectively prevent nuclear proliferation to non-NWS and to non-State actors while NWS subscribe to doctrines rationalizing their own nuclear weapons possession, use and threat of use, and while they maintain stockpiles of nuclear weapons and fissile materials.

UN Security Council Resolution 1540 recognizes the importance of making progress on nuclear disarmament as well as nuclear non-proliferation, and provides opportunities for States to take effective domestic and international actions to further both, particularly through the implementation of an abolition approach. In particular, the resolution provides opportunities for States to comprehensively prohibit nuclear weapons, regardless of who currently possesses or is attempting to possess them, and adopt criminal laws applying to both non-State and State actors.

If States make use of these opportunities, implementation of UN SC1540 could advance both the non-proliferation and disarmament goals of the Non Proliferation Treaty.

## **2. Summary of recommendations**

States are encouraged to take the following steps in their implementation of nuclear non-proliferation and disarmament goals of UNSC 1540:

1. Make good faith efforts to implement material controls and other measures to prevent proliferation as required under operative paragraph 3
2. Adopt legislation prohibiting the acquisition, use or threat of use of nuclear weapons by both State and non-State actors, and prohibiting nuclear weapons from the territories of the State.
3. Extend such criminal legislation to apply to citizens extra-territorially and to embrace universal jurisdiction over any such acts regardless of nationality or location of the act.
4. Include the internal waters, territorial waters and airspace in the territory from which nuclear weapons are prohibited.
5. In their reports to the Security Council 1540 Committee, emphasize the requirement of all States to implement both non-proliferation and disarmament aspects of the resolution.

## **3. UNSC Resolution 1540 – An international response to terrorism**

In September 2003 US President George W Bush made a landmark speech urging all States to cooperate in preventing the proliferation of weapons of mass destruction, in which he said:

*A second challenge we must confront together is the proliferation of weapons of mass destruction. Outlaw regimes that possess nuclear, chemical and biological weapons -- and the means to deliver them -- would be able to use blackmail and create chaos in entire regions. These weapons could be used by terrorists to bring sudden disaster and suffering on a scale we can scarcely imagine. The deadly combination of outlaw regimes and terror networks and weapons of mass murder is a peril that cannot be ignored or wished away. If such a danger is allowed to fully materialize, all words, all protests, will come too late. Nations of the world must have the wisdom and the will to stop grave threats before they arrive.*<sup>1</sup>

President Bush called for a Security Council resolution requiring all countries to take action to prevent WMD proliferation. Subsequently the Security Council adopted Resolution 1540<sup>2</sup> which requires States to adopt and implement measures to a) prevent non-State actors from acquiring or using nuclear, chemical or biological weapons, and b) control nuclear, chemical and biological weapons and related materials in order to prevent proliferation.

Implementation by States of the measures called for in the resolution will help prevent proliferation of nuclear weapons to States and to non-State actors. Thus States should be encouraged to undertake what they can to implement the resolution. In light of the fact that some States might not have the experience or resources to fully implement the resolution established, mechanisms to assist States were established including a 1540 Committee<sup>3</sup> with technical advisers.

While UNSC Resolution 1540 was adopted unanimously, there was considerable criticism that the US and other NWS were increasingly pro-active regarding the proliferation of WMD while doing little to implement obligations to eliminate their own

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<sup>1</sup> *President Bush Addresses United Nations General Assembly*, The White House, <http://www.whitehouse.gov/news/releases/2003/09/20030923-4.html>

<sup>2</sup> S/RES/1540 (2004), [http://disarmament2.un.org/Committee1540/Res1540\(E\).pdf](http://disarmament2.un.org/Committee1540/Res1540(E).pdf)

<sup>3</sup> <http://disarmament2.un.org/Committee1540/composition.html>

stockpiles. Ronaldo Mota Sardenberg, the UN ambassador for Brazil, for example, said that while Brazil supported the resolution, *"limiting the resolution to the question of non-proliferation as the overriding threat was inadequate. At the same time, disarmament must be pursued in good faith. Without such a comprehensive approach, all efforts to make the world safer were bound to fall short."*<sup>4</sup>

While it is correct that the resolution focuses on non-proliferation, it does not ignore disarmament (see **Disarmament and non-proliferation** below). However, the dissatisfaction of Brazil and others reflects the growing divide between NWS and some of their allies who are focusing on proliferation and counter-proliferation but paying little attention to disarmament, and the Non-Aligned Movement, which is focusing predominantly on the need for disarmament and paying little attention to proliferation. This divide is threatening the non-proliferation regime and contributing to the lack of progress on both sides.

Good faith implementation of the resolution by non-NWS will help bridge this growing divide. It will, for example, demonstrate that non-NWS appreciate the security concerns of the NWS and are willing to do something to address them. In addition, the resolution calls for dialogue and cooperation on non-proliferation, and provides for States to assist each other in implementing provisions of the resolution. Such dialogue and assistance between non-NWS and NWS will help build collaborative relationships.

Finally, some of the non-proliferation measures called for in UNSC 1540 could also assist disarmament. For example, operative paragraph 3 (a) calls for the development of measures to account for and secure items (nuclear, chemical, biological weapons and related materials) in production, use, storage or transport. Such steps could help build the information required for transparency and verification of nuclear weapons stockpiles and fissile materials – a key precursor to disarmament and component of disarmament steps.

However, Brazil and other States are correct in asserting that it will remain difficult to effectively prevent nuclear proliferation to non-NWS and to non-State actors while

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<sup>4</sup> UN Security Council Press Release SC/8076, *Security Council decides all States shall act to prevent proliferation of mass destruction weapons*. 28 April 2004, <http://www.un.org/News/Press/docs/2004/sc8076.doc.htm>

NWS subscribe to doctrines rationalizing their own nuclear weapons possession, use and threat of use, and while they maintain stockpiles of nuclear weapons and fissile materials (see **Nuclear terrorism – non-State and State actors?** below). As the 2004 New Agenda Coalition resolution notes: *"nuclear disarmament and nuclear non-proliferation are mutually reinforcing processes requiring urgent irreversible progress on both fronts."*<sup>5</sup>

While non-NWS should therefore be encouraged to implement the non-proliferation requirements of UNSC 1540, they should not hesitate to advocate for the NWS to implement their disarmament obligations, nor to take steps themselves that can contribute to nuclear disarmament.

#### **4. Disarmament and non-proliferation**

The initial draft resolution submitted to the Security Council for consideration only addressed non-proliferation and non-State actors. Due to the efforts of States like Brazil the resolution was amended to include a pre-ambular paragraph *"Encouraging all Member States to implement fully the disarmament treaties and agreements to which they are party."* In addition, operative paragraph 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 nonproliferation treaties; "*

This includes implementation by the NWS of their disarmament obligations under the NPT.

Non-NWS can thus use the resolution to strengthen their call on the NWS to take disarmament steps, and they can make such a call throughout the implementation process including in the development of cooperative non-proliferation efforts with the NWS and in the required reports to the Security Council (see reports below).

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<sup>5</sup> A/Res/59/75, Accelerating the implementation of nuclear disarmament commitments

Non-NWS can also themselves take nuclear abolition steps which include both non-proliferation and disarmament aspects. For example, operative paragraph 3 calls on States to develop border controls to detect and prevent proliferation of nuclear weapons and nuclear weapons materials including transit and trans-shipment. In implementing this paragraph States could adopt border control measures prohibiting the stationing and transit of nuclear weapons (i.e. those possessed by anyone including the NWS) through their territories including territorial waters. Such a prohibition could place some minimal restrictions on the forward deployment of nuclear weapons, but more importantly would strengthen the moral, political and legal norms against nuclear deterrence itself. When New Zealand, for example, adopted legislation in 1987 prohibiting transit of nuclear armed warships into its harbours,<sup>6</sup> it was perceived by the NWS as a significant challenge to their deterrence policies.<sup>7</sup>

## **5. Nuclear terrorism – non-State and State actors?**

States are currently negotiating a *Draft International Convention for the Suppression of Acts of Nuclear Terrorism*.<sup>8</sup> One of the key difficulties in the negotiations is the definition of nuclear terrorism and thus the scope of the convention. Some assert that nuclear terrorism would involve any threat or use of nuclear weapons that would threaten civilians or be otherwise illegal regardless of whether such acts were undertaken by non-States actors or State actors. Others believe that the threat or use of nuclear weapons by armed forces of a State would not be a terrorist act.<sup>9</sup>

The former approach, which includes both non-State and State actors, would appear more consistent with the general principle that the law should apply to all, and that a behaviour is either permitted or prohibited regardless of the position of the person undertaking the action. It is also consistent with developments in international law that have eroded State immunity for serious international crimes. For example, the

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<sup>6</sup> New Zealand Nuclear Free Zone, Disarmament, and Arms Control Act 1987, <http://www.gs institute.org/pnnd/docs/nukefree.html>

<sup>7</sup> See Aotearoa/New Zealand outlaws nuclear weapons, in Aotearoa/New Zealand at the World Court, Kate Dewes and Rob Green, Disarmament and Security Centre, Christchurch, 1999 pp16-19

<sup>8</sup> See A/53/37 Annex I: Draft text of the convention on the suppression of acts of nuclear terrorism submitted by the Russian Federation. <http://daccessdds.un.org/doc/UNDOC/GEN/N98/106/72/PDF/N9810672.pdf?OpenElement>

<sup>9</sup> See Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, Seventh session (31 March-2 April 2003)

<http://daccessdds.un.org/doc/UNDOC/GEN/N03/320/11/PDF/N0332011.pdf?OpenElement>

Nuremberg and Tokyo trials, criminal tribunals on Rwanda and former Yugoslavia, and the International Criminal Court all hold that State actors are not immune from criminal responsibility for war crimes and crimes against humanity.

This inclusive approach would have implications for the nuclear policies and practices of the NWS and the responsibilities of their officials, and thus, if adopted, would require nuclear disarmament steps relating particularly to their doctrines of threat and use.

This inclusive approach would be more effective in preventing non-State nuclear terrorism for political, technical and legal reasons.

On the political side, terrorist organizations gain support when they are able to point to a perceived injustice or discriminatory practice to which they are responding. So long as NWS maintain nuclear weapons and the policies to use or threaten to use them, terrorist organizations will be able to derive a rationale for acquiring nuclear weapons in response.

On the technical side, so long as NWS maintain nuclear weapons and fissile material stocks to refurbish their stockpiles or construct new nuclear warheads, there is the potential for non-State actors to steal a nuclear weapon or acquire fissile materials with which to make one. Jayantha Dhanapala, when serving as UN Under-Secretary-General of the United Nations, noted that *"We need to eliminate weapons of mass destruction because they could fall into the hands of terrorists...We don't want to give terrorists more tools than they have at the moment."*

On the legal side, an inclusive approach strengthens the norm against nuclear weapons to a far greater degree than one which only addresses non-State actors. In addition, as the revelations of the Abdul Qadeer Khan network showed, it can sometimes be difficult to determine if an actor is operating as a State actor with State protection or non-State actor.<sup>10</sup>

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<sup>10</sup> See Pakistan nuclear probe in peril, Jane's Intelligence Digest, 11 December 2004, <http://www.pakistan-facts.com/article.php?story=20041211153958518>

Unfortunately, it will be politically difficult, if not impossible, to include State-actor responsibility in the *Draft International Convention for the Suppression of Acts of Nuclear Terrorism* if the NWS are to be included as potential parties under current conditions, which is why a compromise is being offered by Mexico.<sup>11</sup> Similarly, it was not possible to adequately address State-actor responsibility in UNSC Resolution 1540 due to the implications this could have on the NWS.

However, in implementing UN SC 1540, there is nothing preventing States from adopting legislation which takes an inclusive approach and prohibits the acquisition, use or threat of use of nuclear weapons by both non-State and State actors. New Zealand's 1987 legislation, for example, does just this. Section 5 (1) prohibits New Zealand citizens from acquiring or having control over nuclear weapons or from assisting any other person to acquire or have control over nuclear weapons. There is no exclusion for government officials (State actors) from this provision.

## **6. Extent of criminality: territorial, extra-territorial and universal jurisdiction**

In general, States have jurisdiction over acts committed within their territory. However, where there are international agreements or the development of international law prohibiting acts, a State can and should extend its jurisdiction appropriately. Such extension could include acts committed by its citizens anywhere in the world (extra-territoriality) or even to acts committed by any person regardless of their citizenship or where the act was committed (universal jurisdiction).

As long as something is not expressly permitted in international law, and nuclear weapons are not,<sup>12</sup> States are able to prohibit an act committed within its territory or by officials of the State anywhere in the world. New Zealand does this in its 1987 legislation. The sections dealing with prohibition of acquisition and control of nuclear weapons within New Zealand are dealt with above. Section 5 (2) extends the

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<sup>11</sup> See *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 37, (A/57/37)*, annex V, B, proposal A/C.6/56/WG.1/CRP.9. Submitted by Mexico, Article 4, new paragraph  
“*This Convention does not address, nor can it be interpreted as addressing, in any way the issue of the legality of the use or threat of use of nuclear weapons by States.*”  
<http://daccessdds.un.org/doc/UNDOC/GEN/N02/248/17/PDF/N0224817.pdf?OpenElement>

<sup>12</sup> The International Court of Justice affirmed that “*There is in neither customary nor conventional law any specific authorization of the threat or use of nuclear weapons.*”



prohibition of such activities by New Zealand officials or agents anywhere in the world. At a minimum, other States are encouraged to adopt similar legislation.

With respect to chemical weapons, a number of States have adopted legislation extending criminal prohibitions extra-territorially and encompassing universal jurisdiction. The United States, for example, prohibits persons from acquiring, using or threatening to use chemical weapons whether that act " (1) takes place in the United States; (2) takes place outside of the United States and is committed by a national of the United States; (3) is committed against a national of the United States while the national is outside the United States; or (4) is committed against any property that is owned, leased, or used by the United States or by any department or agency of the United States, whether the property is within or outside the United States. "

UNSC Resolution 1540 was adopted under Chapter VII of the UN Charter and reaffirmed that the proliferation of nuclear (chemical and biological) weapons constitutes a threat to international peace and security. The International Court of Justice in 1996 affirmed that the threat or use of nuclear weapons would in general not be compatible with the rules of international law applicable in armed conflict and in particular the principles and rules of humanitarian law.

UNSC Resolution 1540 combined with the conclusions of the International Court of Justice in its 1996 Advisory Opinion, thus indicate that the international legal norms against nuclear weapons have strengthened to such a degree that States, in adopting legislation prohibiting nuclear weapons, could extend extra-territoriality to all their citizens and also codify universal jurisdiction for such crimes committed by any person regardless of their nationality or location of the act.

## **7. Extent of territorial prohibition – territorial waters**

The first pre-ambular paragraph of UNSC Resolution 1540 affirms 'that proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, constitutes a threat to international peace and security. ' In addition the final pre-ambular paragraph notes that the Security Council is "Acting under Chapter VII of the Charter of the United Nations" which relates to actions in response to threats to the peace.

There was some speculation that the United States wanted the Security Council to endorse the possibility of interceptions and interdictions of ships on the High Seas that may be suspected of shipping nuclear, chemical or biological weapons or their related materials or delivery vehicles. The United Nations Convention on the Law of the Sea provides for freedom of navigation on the High Seas and the right of innocent passage through territorial waters. In order to provide a legal justification for interdictions, there would need to be an authoritative decision that such shipments are inconsistent with the United Nations Convention on the Law of the Sea which reserves the seas for peaceful purposes consistent with 'the principles of international law embodied in the Charter of the United Nations. <sup>13</sup> Even then, there is no automatic right of interdiction except possibly by Coastal States of suspected shipments transiting their territorial waters. Coastal States have authority in their territorial waters to prevent passage which is not innocent,<sup>14</sup> including passage which is 'prejudicial to the peace, good order or security of the coastal State, <sup>15</sup> or passage which is 'in violation of the principles of international law embodied in the Charter of the United Nations. <sup>16</sup> However, even that has difficulties as the Security Council did not determine specifically which materials or delivery systems would give rise to such a determination.

What could meet the criteria for prohibition (and possible interdiction) in territorial waters at this stage would be the weapons themselves, i.e. nuclear, chemical and biological weapons. Thus States might be able to prohibit the transit through their territorial waters of chemical, biological and nuclear weapons. Judge C.G. Weeramantry, former Vice-President of the International Court of Justice argues that such a prohibition of nuclear weapons in territorial waters would be justified in light of the 1996 ICJ Advisory Opinion:

*Assuming that nuclear weapons are deployed on naval vessels on alert status, they constitute a threat of use. The ICJ's opinion was that the threat or use of*

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<sup>13</sup> United Nations Convention on the Law of the Sea, Article 301

<sup>14</sup> United Nations Convention on the Law of the Sea, Article 25

<sup>15</sup> United Nations Convention on the Law of the Sea, Article 19 (1)

<sup>16</sup> United Nations Convention on the Law of the Sea, Article 19 (2) (a)

*nuclear weapons would be generally contrary to international law, and in particular the humanitarian laws of warfare.<sup>17</sup>*

Such a prohibition would support both non-proliferation and disarmament goals, but would be strongly resisted by the NWS who maintain there is a right for their nuclear weapons to transit the high seas and territorial waters.

## **8. Reporting**

Security Council Resolution 1540 established a Committee of the Security Council and called on all States to report to the Committee on steps they take and further steps planned. This provides an opportunity for States to report on disarmament steps taken as a way of encouraging other States to take disarmament steps and to examine the reports from other States to ascertain possibilities for collaboration or other progress.

### **a) Reporting on disarmament steps**

New Zealand, in reporting its implementation of operative paragraph 1, for example, said

*"New Zealand's strong and consistent policy is that all weapons of mass destruction (WMD) should be eliminated, and that this elimination should be verified and enforced through robust legally binding multilateral disarmament instruments. New Zealand provides no support whatsoever to any entity - whether State or non-State actor - attempting to develop, acquire, manufacture, possess, transport, transfer or use WMD and their means of delivery. This is reflected in the prohibitions under New Zealand law which make it an offence to aid or abet any person in developing WMD. For example the New Zealand Nuclear Free Zone, Disarmament, and Arms Control Act 1987 expressly makes it an offence to aid, abet or procure any person to manufacture, acquire, possess, or have control over any nuclear explosive device. This*

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<sup>17</sup> Submission to the New Zealand Foreign Affairs Select Committee, C.G. Weeramantry, 14 August 2003

*prohibition also applies extra-territorially to agents or servants of the Crown outside the New Zealand nuclear free zone.<sup>18</sup>*

**b) Examining reports from other States to ascertain possibilities for collaboration or other progress**

The United States, in reporting on its implementation of operative paragraph 3 (a) noted:

*Radiation Detection Equipment and Non-Intrusive Inspection Imaging Technology*

- *CBP (Customs Border Protection) has developed and implemented a comprehensive strategy to detect, deter, prevent and combat the trafficking and brokering of illicit nuclear and radiological materials. An integral part of CBP's comprehensive strategy to combat nuclear and radiological terrorism is to screen all arriving trucks, containers, trains, cars, airfreight, mailbags and express consignment packages with radiation detection equipment prior to release.*
- *CBP employs radiation detection equipment and large-scale non-intrusive inspection (NII) imaging technology at ports of entry to screen shipments for the presence of illicit radioactive and nuclear materials. These technologies include: radiation portal monitors (RPM), radiation isotope identifier devices (RIID), personal radiation detectors (PRD) and large-scale NII imaging systems. Large-scale NII imaging systems and RPMs enable CBP to quickly and effectively screen conveyances and cargo for illicit materials while the PRDs and RIIDs enable CBP officers to safely conduct examinations of those shipments suspected of containing illicit radiological materials. Used in combination, these tools provide CBP with a significant capacity to detect illicit nuclear or radiological materials and weapons while facilitating the flow of legitimate trade and travel.<sup>19</sup>*

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<sup>18</sup> New Zealand Report to the UN Security Council Resolution 1540 Committee, October 2004.

<http://www.gs institute.org/pnnd/NZUNSC1540.htm>

<sup>19</sup> United States Report to the Nonproliferation Committee--Efforts Regarding United Nations Security Council Resolution 1540, Bureau of Nonproliferation, Washington, DC. September 27, 2004.

<http://www.state.gov/t/np/rls/37375.htm>

It is possible that some of the equipment and mechanisms developed by the United States (and other States) could enhance current international verification of non-proliferation and provide verification capabilities for nuclear disarmament.

The United States, reported under operative paragraph 7:

*The Global Nuclear Material Threat Reduction program removes vulnerable nuclear material; reduces and, to the extent possible, eliminates HEU from civil applications worldwide. Under this program, the Department of Energy will conduct multi-year initiatives to: (1) return to the United States U.S-origin spent nuclear fuel from foreign research reactors in 40 countries, (2) return to the Russian Federation 4 MT of both fresh and irradiated Soviet-/Russian-supplied fuel, (3) convert 105 targeted research reactors from the use of HEU fuel to the use of LEU fuel, (4) convert the use of HEU targets to the use of LEU targets in the production process for molybdenum-99, (5) secure for final disposition three tons of weapons-grade plutonium contained in spent nuclear fuel from the BN-350 fast breeder reactor in Kazakhstan, and (6) remove other vulnerable nuclear material not currently covered by existing programs.*

The aim and experience reported above to eliminate HEU from civil applications worldwide indicates the possibilities to move towards a world without HEU production.

The United States, in reporting on its implementation of operative paragraph 3 (a) noted:

*"Department of Defense (DoD) Directives provide appropriate measures to account for and secure nuclear weapons and their means of delivery. "*

Such accounting by all NWS could provide the basis for an international inventory of nuclear weapons, a useful component for multilateral disarmament agreements.

These are a few illustrative examples of where dialogue could be entered into with States on possible opportunities arising from their activities to implement UNSC Resolution 1540.

## **9. Conclusion**

UN Security Council Resolution 1540 provides opportunities for non-NWS to support and cooperate with NWS on the prevention of proliferation and non-State acquisition

of nuclear weapons. In addition, the resolution provides opportunities for non-NWS to strengthen their calls on the NWS to take disarmament steps, and for the non-NWS to take their own abolition steps embracing both non-proliferation and disarmament.

Non-NWS should make the most of these opportunities to make significant progress towards nuclear abolition.