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‘UN Security Council Resolution 1540 and its relevance for global export controls’

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‘Strengthened Export Controls: Pakistan’s Export Control Experience
Current and Future Challenges and Options’**

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Introduction

Throughout the last century, states have tried to control the flow of strategically important goods through the employment of national legislation. For the most part of this time, national legislation has been designed to prevent the enemy from enjoying direct or indirect benefits from free trade. Legislation aimed at tightly controlling items which could be used to further a belligerent state’s war efforts was introduced.¹ The birth of the atomic age prompted a re-think of national controls, since states now had to restrict items, technologies or knowledge simply because *the mere possession of these items* constituted a potentially severe threat to national security. The United States, for instance, reinforced their trade laws by aiming to restrict the trade in nuclear material or facilities at a very early stage.² From the 1970s, international coalitions formed to define what items should be restricted and work out how an export control system could be constructed; first in respect to nuclear material and facilities, and later in respect to biological weapons, missiles and conventional arms.³

Undeniably, there is a strong argument for trying to regulate the worldwide trade in these items. If trade cannot be regulated, monitored and controlled, states wishing to cheat on their treaty obligations will find it easier to do so. One clear consequence of states cheating on their legal obligations is the further deterioration of international security. National export control regimes

¹ See, for instance, ‘Wilson Expands List for Which the License Rules Obtain’, *Washington Post*, 28 August 1917, p. 1

² See, for instance, ‘Foreign Nuclear Scientists To See Peaceful Show’, *The News*, 20 July 1955, p. 4

³ The Zanger Committee was formally established in 1974, the Nuclear Suppliers Group in 1978, the Australia Group in 1985, the Missile Technology Control Regime in 1987 and the Wassenaar Arrangement in 1996. A large portion of these regimes are comprised of industrialized or developed nations.

play an important role, and they have proved their worth on several occasions.⁴ However, at other times, the export control systems have failed.⁵ In addition, and perhaps unsurprisingly, export control legislation in countries standing outside multilateral export control arrangements has been either non-existent or has failed as well.⁶

It is probably uncontroversial to say that the perceived inadequacy of national controls has stimulated new thinking, both in terms of how the international community can make best use of its legal toolbox and in terms of how it can cooperate to strengthen export controls on a worldwide basis. This thinking has been driven by the United States. In September 2003, US President George Bush asked the UN Security Council to call on all states to ‘enact strict export controls consistent with international standards’.⁷ Regional moves to strengthen controls were taken about the same time. In October, the Asia-Pacific Economic Cooperation (APEC) held that it was committed ‘to take all essential actions to ... adopting and enforcing effective export controls’⁸ Strengthened export controls also featured in the December 2003 European Union Strategy against the proliferation of WMD.⁹ In the beginning of 2004, the revelation that A.Q. Khan, a Pakistani engineer sometimes referred to the father of the Islamic bomb, had provided assistance to Iran, prompted other influential figures to join the call for an international export control regime.¹⁰

It is in this context the 28 April 2004 adoption of UN Security Council Resolution 1540 (UNSCR 1540) should be seen. Some states came out in strong support after its adoption. For instance, the Association of Southeast Asian Nations (ASEAN) recognized the resolution’s ‘unequivocal supremacy’ and pledged to implement ‘effective export controls and enforcement measures to

⁴ See, for instance, Richard M. Weintraub, ‘Pakistan Denies Connection to Any Nuclear-Export Plot: Officials Insist Smuggling Was Unsanctioned’, *Washington Post*, 22 July 1987, p. A.01.

⁵ For instance, the German export regime failed to detect the assistance that German entities provided to Iraq, see, for instance, David Albright, ‘Engineer for hire’, *Bulletin of Atomic Scientists*, volume 49, number 10, December 1993, pp. 28-36.

⁶ The most relevant example is the assistance that A.Q. Khan provided to Iran. See, for instance, John Lancaster and Kamran Khan, ‘Pakistanis Say Nuclear Scientists Aided Iran: Iran Nuclear Effort Said Aided in Secret ‘80s Deal’, *Washington Post*, 24 January 2004, p. A.01.

⁷ ‘Today, I ask the U.N. Security Council to adopt a new anti-proliferation resolution. This resolution should 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’, George W. Bush, *Address to the United Nations General Assembly*, 23 September 2003.

⁸ See APEC, ‘*Bangkok declaration on partnership for the future*’, Bangkok, Thailand, 21 October 2003. APEC has 21 member states: Australia, Brunei, Canada, Chile, China, Hong Kong, Indonesia, Japan, South Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, Philippines, Russia, Singapore, Taiwan, Thailand, the United States and Vietnam.

⁹ For an overview of the strategy, see, for instance, ISIS Europe, ‘The EU Strategy against the proliferation of WMD: past, present and future’, *European Security Review*, number 25, March 2005

¹⁰ For instance, the IAEA Director-General argued that we ‘must universalize the export control system, remove these loopholes, and enact binding, treaty-based controls—while preserving the rights of all States to peaceful nuclear technology’, see Mohamed ElBaradei, ‘Saving ourselves from destruction’, *New York Times*, 12 February 2004.

control the transfer of materials, technology and expertise that can contribute to the design, development, production or use of WMD and their means of delivery'.¹¹

UNSCR 1540 intends to strengthen and complement the treaty based non-proliferation regime.¹² It also represents another milestone in the development of the powers of the Security Council.

The Security Council as an international law-maker

UNSCR 1540 is the latest of two law-making resolutions adopted by the Council in response to an abstract threat to international peace and security. These two resolutions have peculiar characteristics. For instance, the provisions of the resolutions are drafted in treaty language, they contain abstract legal obligations, and they are mostly taken from existing international conventions.¹³ Moreover, the resolution does not apply to a specific situation, but has general application. Its duration is unlimited.

The debate whether the Security Council has the authority to adopt resolutions of this kind has been fierce and deeply divided. Amongst international lawyers there is almost complete agreement that the powers of the Security Council are exceptionally broad. This does not mean, however, that the powers of the Council are unlimited. That there exists some undefined outer limit to its powers has been recognized by at least one international court.¹⁴ Therefore, in the past, several recognized lawyers have argued that the Council does not have the right to lay down rules of general application.¹⁵ If this reasoning is correct, the Council would act *ultra vires* every time it laid down a resolution with general application. Today, these lawyers have been proven wrong,

¹¹ ASEAN Regional Forum, 'Statement on Non-Proliferation', Jakarta, 2 July 2004. The ASEAN has ten members: Brunei, Burma, Cambodia, Indonesia, Laos, Malaysia, Philippines, Singapore, Thailand and Vietnam. It has twelve 'dialogue partners': Australia, Canada, China, the European Union, India, Japan, South Korea, New Zealand, Pakistan, Russia, the United States and the UN Development Programme.

¹² UNSCR 1540 specifically states 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', see United Nations Security Council, 'Resolution 1540 (2004)', UN Document S/RES/1540 (2004), 28 April 2004, operative paragraph 5. Naturally, these conventions and institutions form part of the non-proliferation regime as a whole. Another noteworthy instrument is the 1980 Convention on the Physical Protection of Nuclear Material, which, coincidentally, is not protected under operative paragraph 5.

¹³ Axel Marschik, 'The Security Council as World Legislator?: Theory, Practice and Consequences of an Expanding World Power', IILJ Working Paper No. 2005-18, p. 17 [cit. Marschik]

¹⁴ See, in particular, International Court for the Former Yugoslavia, Prosecutor v. Dusko Tadic, *Decision on the Defence Motion on Interlocutory Appeal on Jurisdiction*, 2 October 1995, paragraph 28, which states, in relevant parts, '... the Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be. Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large, not to mention other specific limitations or those which may derive from the internal division of power within the Organization'.

¹⁵ See Rudiger Wolfrum and Volker Röben (eds), 'Developments of International Law in Treaty Making', Springer, Germany, 2005, p. 231

not due to an inherent flaw in their argument but rather due to a fundamental change of circumstance.

Since the end of the Cold War, the Council has increasingly asserted its authority. Its permanent members have also 'enjoyed greater unity of purpose'.¹⁶ However, the terrorist attacks on 11 September 2001 were perceived as a fundamental breach of international peace, with far-reaching consequences. So fundamental indeed, that it triggered a sea-change in Security Council practice.

It started on 28 September 2001, less than three weeks after the collapse of the World Trade Centre in New York, when the Security Council, 'deeply concerned by the increase, in various regions of the world, of acts of terrorism motivated by intolerance or extremism', adopted UN Security Council Resolution 1373 (UNSCR 1373).¹⁷ The resolution laid down wide-ranging obligations, going well beyond both customary law and treaty law.¹⁸ Its provisions were general since it was adopted to counter an abstract threat to international peace and security (terrorism). The language bears many similarities with treaty language, and the resolution's provisions even have the potential to have direct effect on the rights and obligations of citizens of UN Member States, thus directly affecting the powers of the national legislature and judiciary. Indeed, the consequences for the individual have been proven to be far ranging and in some instances severe.¹⁹

One would expect that such broad provisions would have provoked ear-splitting opposition in the public arena, most notably the General Assembly. However, states showed overwhelming support for the resolution, and no fundamental concerns were raised. The validity of the resolution has been regularly reaffirmed by subsequent Security Council practice²⁰ and the resolution's usefulness has been lauded by the UN Secretary-General in connection with his report 'in larger freedom'.²¹ This absence of state objection could be convincingly construed as meaning that state have not only accepted the resolution in question, 'but also the Council's

¹⁶ United Nations General Assembly, 'In larger freedom: towards development, security and human rights for all', report of the Secretary-General, UN document A/59/2005, 21 March 2005, page 41, paragraph 165

¹⁷ See United Nations Security Council, 'Resolution 1373 (2001)', UN Document S/RES/1373 (2001), 28 September 2001

¹⁸ In the past, some authors have argued that the Security Council acted *ultra vires* in adopting resolution 1373, see, for instance, Matthew Happold, 'Security Council Resolution 1373 and the Constitution of the United Nations', *Leiden Journal of International Law*, volume 16, 2003, pp. 593-610

¹⁹ In 2002, for example, three Swedish nationals were listed as terrorists by the United Nations. The Swedish government froze all their assets and cut them off from basic sustenance (giving them funds would have been contrary to the resolution). This led to court action in Sweden. The three nationals were eventually taken off the list. See 'USA puts three Swedish citizens on UN terrorist list', *Statewatch News*, 5 April 2002 and 'Treasury Removes Names From Terror Financing List', *Fox News*, 27 August 2002.

²⁰ See, for instance, United Nations Security Council Resolutions 1390 (2002), 1438 (2002), 1440 (2002), 1450 (2003), 1465 (2003), 1516 (2003), 1526 (2004), 1535 (2004), 1566 (2004), 1611 (2005), 1617 (2005) and 1618 (2005).

²¹ 'To prevent a cascade of proliferation, we must find ways to mitigate the tensions caused by the fact that technology required for civilian uses of nuclear power can also be used to develop nuclear weapons ... We should [welcome] Security Council Resolution 1540, which aims to prevent nonstate actors from gaining access to hazardous weapons, technology, and materials', Kofi Annan, 'In Larger Freedom: Decision Time at the UN', *Foreign Affairs*, Volume 84, Number 3, May/June 2005

competence to enact such wide, binding rules, at least in the field of terrorism'.²² The success of UNSCR 1373 inspired one international lawyer to assert that the Security Council has now 'entered its legislative phase'.²³ While the more cautiously minded legal academic would probably say that is too early to talk about phases, the trend towards a more assertive—and legislative—Security Council seems to be relatively stable. The adoption of UNSCR 1540 would bolster the arguments of those who argue that the Council is assuming the role of 'global legislator' with at least the tacit consent by states.

Was there a 1540 blowback?

Did states give such consent? In principle, it would seem so, but this conclusion is based on a number of caveats. Without doubt, states were considerably more concerned when UNSCR 1540 was adopted and this could possibly be interpreted as an allergic reaction to the Council assuming broader powers. It could also simply be because states were given an unprecedented opportunity to address the council prior to the resolution's adoption, something which did not happen prior to the adoption of UNSCR 1373. Quite possibly, India raised the strongest concerns. While not opposing the resolution *per se*, the Indian government had been worried over the Security Council's increasing tendency to assume new and wider powers of legislation on behalf of the international community.²⁴ This strong objection, which possibly mirrors other concerns, would indicate that the Council was pushing the boundaries of its mandate when adopting UNSCR 1540. India has, however, as so many other concerned states, reported to the 1540 Committee in a timely fashion.²⁵ While states seem to have accepted UNSCR 1540 as an *exceptional measure* plugging known loopholes in the non-proliferation regime, it remains to be seen whether the Security Council can go further in the future.

Putting the issue of legislative powers aside, what did the states say about UNSCR 1540's relevance for international export controls? States presented relatively consistent views, but it was clear that one concern was how to address the role of closed export control regimes, and in particular their control lists. Views on how to do this differed. While South Korea hoped 'that the guidelines and standards being implemented under the existing export control regimes will provide useful reference for the committee to be established by the resolution in discharging its duties',²⁶ France held that UNSCR 1540 'does not compel any State to abide by the rules of instruments to which some States have chosen not to accede'.²⁷ Moreover, in France's view, the

²² Marschik, p. 19

²³ Stefan Talmon, 'The Security Council as World Legislature', *American Journal of International Law*, Volume 99, Number 1, January 2005, pp. 175-193

²⁴ 'Speakers in Security Council Debate on Weapons of Mass Destruction: Express Doubts over Content of Proposed Non-Proliferation Text', Statement by H.E. Vijay K. Nambiar, United Nations Press Release SC/8070, 22 April 2004

²⁵ India's first report was submitted on 1 November 2004. Since then, India has submitted two updates, the first on 16 January 2006 and the second on 9 February 2006.

²⁶ Statement by Mr. Kim Sam-hoon (Republic of Korea), United Nations Security Council, *Verbatim Record of 4950th Session*, UN Document S/PV.4950 (resumption 1), 22 April 2004, p. 7

²⁷ Statement by Mr. De La Sablière (France), United Nations Security Council, *Verbatim Record of 4950th Session*, UN Document S/PV.4950, 22 April 2004, p. 8

resolution ‘leaves each State free to define the penalties, legal regulations and practical measures to be adopted’.²⁸ Pakistan moved to outright dismiss the role of existing export control regimes. In Pakistan’s view, ‘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’.²⁹

Some scepticism was expressed by India and Egypt, two influential states in the Non-aligned Movement (NAM). India objected to the Security Council proscribing norms on export controls since these arrangements, in the past, ‘often [have] served to deny ... technologies to responsible nations which play the game by the rules’.³⁰ India did, however, stress that it believed in the concept of *national* export controls, and that it had considerably strengthened its own legislation in this respect.³¹ Egypt, while not dismissing the idea of international export controls, stressed that they would need to be implemented in a cooperative manner and that they ‘must thus not be formulated in a hurried way’.³² It was not clear from Egypt’s argument whether it thought that the adoption of UNSCR 1540 was a rash move, or if it simply meant that it may take time to properly implement its provisions.

Australia welcomed the resolution and held that it ‘responds to a clear need for Member States to strengthen their domestic controls and legislation and ensure that proliferators do not exploit legislative and enforcement loopholes’.³³ The European Union stressed that it ‘is advocating, where applicable, adherence to effective export control criteria by countries outside the existing regimes and arrangements’.³⁴

The question whether states have accepted the resolution can ultimately only be ascertained by examining subsequent state adherence to its provisions. Of particular interest is to examine state compliance with the resolution’s reporting requirements, since compliance with this provision is easy to quantify. Further, it is also easy to compare state compliance with UNSCR 1373’s and 1540’s respective reporting requirements.

State reporting practice

As was briefly mentioned above, UNSCR 1540 established a committee of the Security Council tasked with reporting on the implementation of the resolution (the 1540 Committee).³⁵ States

²⁸ Statement by Mr. De La Sablière (France), *Ibid*, p. 8

²⁹ Statement by Mr. Akram (Pakistan), *Ibid*, p. 15

³⁰ Statement by Mr. Mr. Nambiar (India), *Ibid*, p. 24

³¹ Statement by Mr. Mr. Nambiar (India), *Ibid*, p. 24

³² Statement by Mr. Aboul Gheit (Egypt), *Supra*, S/PV.4950 (resumption 1), p. 3

³³ Statement by Mr. Dauth (Australia), *Ibid*, p. 7

³⁴ Statement by Mr. Mr. Ryan (Ireland), Speaking on behalf of the European Union, *Supra*, S/PV.4950, p. 26

³⁵ See *supra* S/RES/1540 (2004), operative paragraph 4, which reads, in relevant parts, ‘Decides to establish ... a Committee of the Security Council ... which will ... report to the Security Council for its examination, on the implementation of this resolution’.

were asked to submit their first reports by 28 October 2004.³⁶ On the eve of the target day, only 58 states had reported to the committee, while three states had asked for an extension of the deadline.³⁷ This is a low turnout compared to state adherence with the reporting obligation under UNSCR 1373, where some 140 states had reported in a similar timeframe. Several states that had expressed some form of concern prior to the adoption of the resolution submitted their reports in a timely fashion.³⁸ This would indicate that these states would consider themselves bound by the resolution, even if they do not agree with the suitability of all of its provisions.

Compared to UNSCR 1373, reporting turnout remained low during the resolution's first year in existence.³⁹ By December 2005, the number of reports had doubled, and a majority of UN member states had reported.⁴⁰ However, one will find that virtually all states had reported to the Counter-Terrorism Committee in a similar time-frame.⁴¹ Also, more states reported to the Counter-Terrorism Committee *during its first six months in existence* than have ever reported to the 1540 Committee during its more than two years in existence. Therefore, disappointingly, one must conclude that there is still a long way to go in respect to achieving universality in reporting on UNSCR 1540. However, one simply cannot dismiss the fact that there seems to be wide acceptance of UNSCR 1540, at least in respect to its reporting requirement.

States which have not reported

Over the past year, the reporting trend has levelled off considerably. In fact, since December 2005, the number of first reports received by the 1540 Committee has virtually ground down to a halt. As of 7 November 2006, 132 states have submitted a report to the committee (several states have also submitted additional reports).⁴² 59 states still have to submit their first report.⁴³ In the

³⁶ *Ibid*, which also reads, in relevant parts, 'calls upon States to present a first report no later than six months from the adoption of this resolution'. The use of the word 'call' instead of the words 'decide' or 'demand' indicates that the requirement was not inflexible.

³⁷ Ian Anthony, 'Arms Control and non-proliferation: the role of international organizations', *SIPRI Yearbook 2005*, Oxford University Press, Norfolk, 2005, p. 545

³⁸ Amongst the submitting states were, for instance, India (1 November 2004), Pakistan (27 October 2004) and Syria (14 October 2004). See United Nations Security Council, 'First report to the Security Council by the Chairman of the Security Council Committee established pursuant to resolution 1540 (2004)', UN Document S/2004/958, 8 December 2004, pp. 5

³⁹ In February 2005, VERTIC wrote that 'Compliance by UN member states with the reporting requirements of UN Security Council resolution 1540 of 28 April 2004 has been poor', see, 'WMD 1540 reports trickling in', *Trust & Verify*, Number 118, January—February 2005.

⁴⁰ By 19 December 2005, 125 States had submitted their reports, see United Nations Security Council, 'Report to the Security Council by the Chairman of the Security Council Committee established pursuant to resolution 1540 (2004)', UN Document S/2005/799, 19 December 2005

⁴¹ CTC Reports are available at <http://www.un.org/sc/ctc/countryreports.shtml>

⁴² See United Nations 1540 Committee, 'List of submitting member States as of 26 October 2006', website accessed on 6 November 2006

⁴³ Afghanistan, Antigua and Barbuda, Barbados, Bhutan, Botswana, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Congo (Republic of the), Côte d'Ivoire, Democratic People's Republic of Korea, Democratic Republic of the Congo, Dominica, Dominican Republic, Equatorial Guinea, Ethiopia, Fiji, Gabon, Gambia, Guinea, Guinea-Bissau, Haiti, Lesotho, Liberia, Madagascar, Malawi, Maldives, Mali, Mauritania,

meanwhile, all but two states have reported to the 1373 Committee.⁴⁴ A closer examination of 1540 reporting shows that only eleven of states *not reporting* are not a ‘least developed country’ or a ‘small-island developing state’.⁴⁵ The majority of the remaining states are developing, and most of them are located in Africa.⁴⁶ Two European nations have yet to submit their reports, namely the small land-locked state of San Marino (with its approximately 30.000 citizens) and Montenegro, which only became a member of the United Nations on 28 June 2006.⁴⁷ To date, all developed nations except San Marino have submitted at least one report.⁴⁸

One should be careful when reading these statistics, especially when comparing the reporting adherence to UNSCR 1540 with UNSCR 1373. It is highly probable that several non-reporting states have neglected their reports due to institutional deficiencies or a general lack of resources. Several states may also feel that they have other, higher, priorities. A survey of statements by non-reporting states to the UN General Assembly’s sessions during 2004, 2005 and 2006 is somewhat enlightening. No non-reporting state has claimed that the Security Council acted *ultra vires* when it adopted UNSCR 1540. One state, Mali, has expressed concern over the expanding role of the Security Council,⁴⁹ whereas others have expressed their support.⁵⁰ One case of reporting fatigue has been announced.⁵¹

Mauritius, Micronesia (Federated States of), Mozambique, Nauru, Nicaragua, Niger, Palau, Papua New Guinea, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, San Marino, Sao Tome and Principe, Seychelles, Sierra Leone, Solomon Islands, Somalia, Sudan, Suriname, Swaziland, Timor-Leste, Togo, Tuvalu, Vanuatu, Zambia and Zimbabwe.

⁴⁴ Montenegro and Qatar

⁴⁵ Compare with United Nations Security Council, ‘*Report of the Committee established pursuant to resolution 1540 (2004)*’, UN Document S/2006/257, 25 April 2006, at p. 35 with UN Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States, ‘*List of Least Developed Countries*’ and ‘*List of Small Island Developing States (UN Members)*’, website accessed on 6 November 2006

⁴⁶ The remaining states which are not LDCs or SIDS are Botswana, Cameroon, Côte d’Ivoire, Democratic People’s Republic of Korea, Democratic Republic of the Congo, Gabon, Montenegro, Nicaragua, San Marino, Swaziland and Zimbabwe. Note that Montenegro only recently achieved independence.

⁴⁷ Montenegro is seen to have submitted its report together with Serbia. According to the chair of the 1540 Committee, ‘Fifty nine States have yet to submit their first report, since Montenegro which has recently joined the UN as an independent State submitted its first report together with Serbia’, see United Nations, *Briefing by the Chairman of the Security Council Committee established pursuant to resolution 1540 (2004)*, 28 September 2006, at p. 1

⁴⁸ This paper uses the definition of ‘developed nations’ used in the *CIA World Factbook 2006*, Appendix B: International Organizations and Groups

⁴⁹ Statement by Mr. Diarra (Mali), United Nations General Assembly, *Verbatim Record of the 26th Plenary Meeting of the 59th Session*, UN Document A/59/PV.26, 12 Oct. 2004, p. 23.

⁵⁰ Statement by Mr. Cuttaree (Mauritius), United Nations General Assembly, *Verbatim Record of the 14th Plenary Meeting of the 59th Session*, UN Document A/59/PV.14, 28 Sept. 2004, p. 20. Without doubt, Montenegro would align itself with statements of the now defunct Republic of Serbia and Montenegro, see statement by Mr. Kaludjerović (Serbia and Montenegro), United Nations General Assembly, *Verbatim Record of the 27th Plenary Meeting of the 59th Session*, UN Document A/59/PV.27, 12 Oct. 2004, p 25

⁵¹ Nauru has stated that they experience ‘...a lack of capacity in our country to generate the necessary legislation and other actions required under Security Council resolution 1373 (2001). The requirements under resolution 1540 (2004) have made the work more arduous’, statement by Mr. Clodumar (Nauru), United Nations General Assembly, *Verbatim Record of the 28th Plenary Meeting of the 59th Session*, UN Document A/59/PV.28, 13 Oct. 2004, p. 7

Requirements of UNSCR 1540

UNSCR 1540 aspires to create a comprehensive, international export control regime. This control system should encompass export, transit, transshipment and re-export of proscribed goods.⁵² Moreover, controls should be set up on providing funds and services to prohibited export and import activities.⁵³ The resolution also requires states to set up so-called end-user controls. States are also required to establish and enforce appropriate criminal or civil penalties for violations of these laws and regulations.

For many states, implementing UNSCR 1540 must have been a steep task. The resolution requires them to establish new laws and regulations if they do not have them, to review and develop their laws and regulations if they do have them but they are deemed ineffective or outdated, and to maintain the regulations once they are in place.⁵⁴ Many states also have to cope with the requirements of UNSCR 1373, which may lead to a general exhaustion of resources.⁵⁵

While the resolution has many advantages, it carries a few problems with its language. These problems may prove to be obstacles to its successful implementation. This paper will only touch on a few of these problems.

The resolution contains vague terms

The resolution contains vague terms, which can be subject to considerable interpretation. An attempt was made to make state obligations clearer, by adding definitions to the text. However, these definitions often contain little guidance. This was highlighted by for instance Pakistan during open deliberations.⁵⁶

Another definitional problem is that it is not immediately clear what is meant by ‘appropriate and effective’ measures. It can be assumed that many states had the export control regimes established under multilateral arrangements as the Nuclear Suppliers Group in mind when

⁵² See *supra* S/RES/1540 (2004), operative paragraph 3

⁵³ *Ibid*

⁵⁴ *Ibid*

⁵⁵ In 2004, Gabriel Oosthuizen and Elisabeth Wilmshurst warned that implementing the requirements of the resolution would not be easy. They argued that 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’, see Chatham House, ‘*Terrorism and Weapons of Mass Destruction: United Nations Security Council Resolution 1540*’, International Law Programme Briefing Paper 04/01, September 2004, p. 6

⁵⁶ In Pakistan’s view, ‘the definitions provided in the footnote of the draft resolution are entirely unclear. Are missiles, rockets and unmanned aerial vehicles the only means for the delivery of WMD? Who will judge whether or not they are designed for this purpose? What is meant by the term “related materials”?’, see Statement by Mr. Akram (Pakistan), *supra* S/PV.4950, p. 15

drafting UNSCR 1540. As noted above, this view was also challenged by Pakistan during deliberations.

The resolution calls for controls on related materials, which are 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’.⁵⁷ What does this mean? Which multilateral treaties and arrangements are relevant? Are these treaties and arrangements binding on non-parties or non-participants? Is it sufficient to have a national control list that does not consider these arrangements?

Christer Ahlström, the former Deputy Director of SIPRI, observed that this weakness could be bridged by the 1540 Committee. He argued that the committee could 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’.⁵⁸ Indeed, the most convenient route for any state wishing to comply with UNSCR 1540 would be to confirm to criteria established under multilateral arrangements. Whether any other form of control system could be deemed appropriate and effective remains to be seen. At present, the 1540 Committee does not oversee those aspects of state compliance. It is not entirely clear whether it intends to do so under its new work programme.

Lack of guidance on national control lists

The usefulness of national control lists, which enumerate controlled items, has long been recognized by the established export control regimes. Consequently, the Security Council called on member states to pursue the development of such lists at the earliest opportunity.⁵⁹ However, these lists are only required ‘when necessary’ and no guidance is given as to what items should be included. Anecdotal evidence would, however, suggest that states standing outside the export control regimes have implemented control lists similar to those adopted by the regimes.⁶⁰ In the nuclear field, this development is likely to be due to an increasing adherence to the IAEA additional protocol, which has a similar control lists annexed.⁶¹

No compliance deadline

⁵⁷ *supra* S/RES/1540 (2004), footnote

⁵⁸ Christer Ahlström, ‘*United Nations Security Council Resolution 1540 (2004)*’, presentation to the Sixth International Conference on Export Control, 8-10 November 2004, London, UK

⁵⁹ *supra* S/RES/1540 (2004), operative paragraph 6

⁶⁰ Personal communication with 1540 Expert, October 2006

⁶¹ IAEA, ‘Model Protocol Additional to the Agreement(s) between State(s) and the International Atomic Energy Agency for the Application of Safeguards’, INFCIRC/540, [September 1997], Annex II

Another weakness is that the resolution contains no compliance deadline. States are obliged to report what implementing measures they have, and what they plan to do to improve them, but are essentially free to determine *when to implement* these measures. This problem was not rectified by United Nations Security Council Resolution 1673 (UNSCR 1673), which, amongst other things, extended the mandate of the 1540 Committee.⁶² However, the Security Council did note that the full implementation of the resolution would be a ‘long-term task that will require continuous efforts at national, regional and international levels’.⁶³

No direct implementation assistance

Operative paragraph 4 of the resolution only tasks the 1540 Committee with reporting to the Security Council on the implementation of the resolution. The Committee was not tasked with directly assisting states with implementation. Rather, the Committee was set up to bring assistance providers together with states in need of help.⁶⁴ Despite an unclear mandate, the 1540 Committee did help organize several outreach events, and experts from the committee attended several others, including ones organized by VERTIC. UNSCR 1673 encourages the ‘pursuit of the ongoing dialogue’ between states and the Committee and has invited the Committee to explore experience sharing and lessons learned with states over the coming two years.⁶⁵ Hopefully this will be properly reflected in the Committee’s future work programme.

State of play of implementation

The chairman of the 1540 Committee has presented three reports to the Security Council, each outlining the progress of the committee. The latest report is from 25 April 2006.⁶⁶ Two things strike the observer when reviewing the work of the committee. First, less than half of all UN member states have national export controls in place. Second, the work of the committee has focussed on quantity, not quality. The work of the committee has provided a clear picture of how many states actually subscribe to export control practices—but not an assessment of how effective these controls are in practice.

It transpires that the majority of those 80 states which have export control legislation in place are members of various export control arrangements.⁶⁷ This is not very surprising since states outside these regimes have traditionally viewed them with a fair amount of scepticism. It is also

⁶² United Nations Security Council, ‘*Resolution 1673 (2006)*’, UN Document S/RES/1673 (2006), 27 April 2006

⁶³ *Supra* S/RES/1673 (2006), preambular paragraph 6

⁶⁴ United Nations Security Council 1540 Committee, ‘*Guidelines for the Conduct of its Work*’, paragraph 2(f), disarmament2.un.org/Committee1540/work.html, accessed 15 November 2006

⁶⁵ *Supra* S/RES/1673 (2006), operative paragraph 5 (a) and (b)

⁶⁶ *Supra* S/2006/257, 25 April 2006

⁶⁷ *Ibid*, p. 21

evident that the concept of control lists and, most significantly, catch-all controls are gaining acceptance outside these voluntary regimes.⁶⁸

The report also shows that few states have set up controls on so-called intangible transfers (controls on non-physical assets such as know-how) and even fewer states have set up controls on financial or transport services in connection with the export of sensitive goods.⁶⁹

Conclusions and options for the future

There is no immediate solution to the lack of conceptual clarity in UNSCR 1540. The material substance will have to be filled by states sharing views on implementation and best practices. UNSCR 1673 helps bridge that gap by envisioning a more proactive Committee. Ultimately, the implementation of the resolution hangs on the work programme of the Committee itself. While another statistical survey would be useful at the end of the current mandate (27 April 2008), it is highly desirable that the Committee starts to look at substance. An attempt to identify and rectify material gaps in the legal framework of states has the potential to significantly enhance the regime. The ultimate aim is to encourage states to adopt ‘appropriate and effective’ laws combating the proliferation of dangerous knowledge, materials and technologies. To optimize cross-border cooperation concerted efforts could be made to harmonize legislation.

The harmonization drive would benefit from the setting up of realistic and achievable goals. *The ultimate goal is not to set up identical regimes in all countries.* The goal is rather to establish appropriate and effective regimes where they do not exist, review and possibly update existing regimes, and to provide law enforcement with proper resources so that the regime can be maintained. Only the national legislator would know the precise requirements of his or her state and national legislation would need to correspond to those requirements. *There is no one size fits all.*

Legislative or operative assistance needs to be tailored to the needs of each individual state. States providing assistance need to intensify their efforts in bringing the world export control regime up to speed. Without doubt, this will be a costly endeavour, but the present situation, where ‘compliance is required without direct recourse to resources’⁷⁰, is unsustainable in the long run. The 1540 Committee could be reinforced with more experts, who are able to specialize in the unique legal, political and trade environment of each individual region or sub-region. This requires states to commit more funding to the Committee itself.

At present, there are several efforts underway in terms of legislative assistance, both at the global, regional and sub-regional level. These efforts are driven by individual states, such as the United States, by regional groups, such as the European Union, by international organizations, such as the IAEA and the OPCW, or by non-governmental entities, such as VERTIC and SIPRI. In my

⁶⁸ *Ibid*, p. 21 and 22

⁶⁹ *Ibid*, p. 22

⁷⁰ Scott Jones, ‘Resolution 1540: Universalizing Export Control Standards?’ *Arms Control Today*, May 2006.

mind, the UN 1540 Committee remains the natural focal point for legislative assistance, and it could play a pivotal role in facilitating and coordinating assistance. Hopefully, UNSCR 1673 will provide the necessary basis for such efforts.

While it is fair to say that UNSCR 1540 has not been as successful as UNSCR 1373, it is equally fair to recognize that full implementation of UNSCR 1540 will take time. Appropriate and effective laws are important to combat the spread of controlled items. The resolution itself forms a good basis for this endeavour, but the most effective way to build a good and sustainable process is to base it on a cooperative and deepened dialogue between states, where no state feels excluded.