

# Building A Universal Counter-Proliferation Regime: The Institutional Limits of United Nations Security Council Resolution 1540

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I wish to thank Allen Weiner, Scott Sagan, Condoleezza Rice, David Holloway, Deborah Hensler, Ronald K. Noble, Gabrielle Hecht, Amy Zegart, Jeff Knopf, Steven Miller, Mariano-Florentino Cuellar, Robert Keohane, Katharine Wies and Yogesh Joshia for their assistance and thoughtful comments on earlier drafts of this research. I appreciate the candor of present and former UN and nongovernmental organization officials, as well as state delegates who agreed to be interviewed. © 2019, Sarah Shirazyan.

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## INTRODUCTION

The risk of Weapons of Mass Destruction [WMD] materials falling into the hands of criminals has become a major international security concern in the aftermath of 9/11 and the revelation of the A.Q. Khan network. Efforts to curb the threat of terrorists using nuclear or radiological material have resulted in a set of innovative nonproliferation initiatives, including the Proliferation Security Initiative, the Container Security Initiative, United Nations [U.N.] Security Council Resolutions 1373 and 1540, the Global Initiative to Combat Nuclear Terrorism, the Second Line of Defense, the International Convention on the Suppression of Acts of Terrorism [ICSANT], the Nuclear Security Summits, and the G8 Global Partnership Against the Spread of WMD.<sup>1</sup> Enacted in 2004, U.N. Security Council Resolution 1540 is the most far-reaching international instrument of the post-9/11 nonproliferation infrastructure.

With Resolution 1540, the Security Council created an international institution – the 1540 regime – that was intended to prevent WMD proliferation by closing legal gaps in every U.N. member state. In addition to prohibiting states from engaging in proliferation activities, the instrument obliges states to address WMD trafficking at home through both criminal law enforcement and regulatory oversight. In other words, Resolution 1540 attempts to establish a comprehensive and universal legal regime against WMD terrorism and proliferation.

From its very inception, Resolution 1540 lacked legitimacy in the eyes of many U.N. member states. The 1540 regime faced potential disempowerment,<sup>2</sup>

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1. In addition to these initiatives, there were other similar counter-proliferation and counter-terrorism efforts on regional level. For example, the EU formulated its strategy against WMD proliferation in 2003 and its Counter-Terrorism Strategy in 2005.

2. In diagnosing a legitimacy crisis, I rely on Christian Reus-Smit’s definition of legitimacy crisis, constructed around potential disempowerment. According to Christian Reus-Smit’s definition, “An actor or institution experiences a crisis of legitimacy, it is argued, when the level of social recognition that its identity, interests, practices, norms, or procedures are rightful declines to the point where it must either adapt (by reconstituting or recalibrating the social bases of its legitimacy, or by investing more heavily in material practices of coercion or bribery) or face disempowerment. See Christian Reus-Smit, *International Crises of legitimacy*, 44.2-3 INT’L POL. 157, 157-174 (2007). Ian Clark offers further explanation of a disempowerment, arguing that is a relative concept and the level of disempowerment is

as it was created through a *process and authority* deemed not rightful by many states, including India, Cuba, Mexico, Namibia, Algeria, Nepal, Indonesia, South Africa, Iran, Pakistan and others.<sup>3</sup> Resolution 1540 was a departure from the consensual mode of international law. Instead, relying on Chapter VII powers, the Security Council's fifteen members formulated general and binding nonproliferation norms for 193 countries without their explicit consent. In essence, the Security Council moved away from its traditional model of addressing country-specific situations on a case-by-case basis towards a norm-setting one, by requiring all states to adopt and enforce effective laws to keep WMD materials outside the reach of terrorists. Therefore, during the open debates leading up to the passage of 1540, many states openly denounced the Council's efforts to redefine its role and assume a global lawmaking function. The Japanese delegate urged the Council to exercise caution and not undermine the stability of the international legal framework. Representatives from other countries pledged not to comply with externally prescribed nonproliferation norms irrespective of their source.<sup>4</sup> Many prominent international lawyers also condemned the Council for assuming the role of a global legislator.<sup>5</sup> Jose Alvarez presented the first set of forceful arguments against Council's legislative actions as a form of "hegemonic international law."<sup>6</sup> Stefan Talbon and Ian Johnstone further criticized the Council for its lack of deliberative democracy and advocated for a wider participation in far-reaching international legislative processes like 1540.<sup>7</sup> Other scholars have reached identical conclusions: Klaus Dicke, Jasper Finke, and Christiane

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context-specific. See Ian Clark, *Setting the Revisionist Agenda for International Legitimacy*, 44.2-3 INT'L POL. 325 (2007).

3. The Security Council held an open debate, as the representatives of Albania, Argentina, Australia, Austria, Belarus, Canada, Cuba, Egypt, India, Indonesia, the Islamic Republic of Iran, Ireland, Israel, Japan, Jordan, Kazakhstan, Kuwait, Liechtenstein, Lebanon, Malaysia, Mexico, Namibia, Nepal, New Zealand, Nicaragua, Nigeria, Norway, Peru, the Republic of Korea, Singapore, South Africa, Sweden, Switzerland, the Syrian Arab Republic, and Tajikistan requested to participate in the discussion of the item on the Council's agenda. See U.N. SCOR, 59th Sess., 4950th mtg. at 2, U.N. DOC. S/PV.4950 (Apr. 22, 2004); U.N. GAOR, 58th Sess., 30th plen. mtg. at 1-26, U.N. DOC. A/58/PV.30 (Oct. 14, 2003). For India's declarations, see U.N. DOC. S/PV.4950, *supra*, at 23-24; see also U.N. SCOR, 58th Sess., 4772d mtg., U.N. DOC. S/PV.4772 (June 12, 2003).

4. U.N. DOC. S/PV.4950, *supra* note 3 *passim*.

5. See, e.g., Stefan Talmon, *The Security Council as World Legislature*, 99 AM. J. INT'L L. 175, 175-93 (2005) (citing Klaus Dicke, *Weltgesetzgeber Sicherheitsrat*, 49 VEREINTE NATIONEN 161, 163-167 (2001) (Ger.); Jasper Finke & Christiane Wandscher, *Terrorismusbekämpfung jenseits militärischer Gewalt. Ansatze der Vereinten Nationen zur Verhütung und Beseitigung des internationalen Terrorismus*, 49 VEREINTE NATIONEN 161, 172 (2001) (Ger.); Ian Johnstone, *Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit*, 102 AM. J. INT'L L. 275 (2008) Jose" E. Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT'L L. 873, 873-888 (2003). See also Paul C. Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT'L L. 901, 901-905 (2002); Matthew Happold, *Security Council Resolution 1373 and the Constitution of the United Nations*, 16 LEIDEN J. INT'L L. 593, 596-598 (2003).

6. Alvarez, *supra* note 5. Hegemonic rule through the collective processes of international law (including the Security Council and its counterterrorism efforts) are debatable. Alvarez has questioned whether the Council's resort to legislation evinces global Hegemonic International Law in action and elevates security over other concerns.

7. Johnstone, *supra* note 5; Talmon, *supra* note 5; Szasz *supra* note 5.

Wandscher, argue that the Council has acted as a “world legislator”; Nico Krisch claims that the Council’s new resolution replaced conventional lawmaking; and Daniel Joyner describes 1540 as a dangerous departure from the authority vested in the Council.<sup>8</sup>

In subsequent years, scholars and policy makers have come to view 1540 as an important foundation of the global nonproliferation and counter-terrorism regime.<sup>9</sup> Many experts conclude that 1540 strengthens the nonproliferation regime by ensuring that key features of other international instruments are universally applicable; by closing the gaps in the coverage of existing nonproliferation instruments with respect to actions by non-state actors; and by requiring states to implement robust domestic controls on WMD materials and their means of delivery.<sup>10</sup> In 2016, former Secretary General Ban Ki-moon, noted that “1540 has become an important component of the global security architecture and a pillar of UN strategy” to confront non-state actor proliferation and described it as a fine example of international cooperation.<sup>11</sup>

Such enthusiastic views are driven, in part, by the high level of state participation and cooperation in the work of the 1540 regime. One hundred seventy-nine states have submitted domestic implementation country reports, and on average, countries report more than 145 new or existing domestic measures to comply with Resolution 1540 obligations. According to the Security Council Committee responsible for implementing Resolution 1540 (the 1540 Committee), countries have reported a total of 30,632 domestic legal measures currently in effect to fight non-state-actor proliferation.<sup>12</sup> In its 2016 Report, the Security Council

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8. See Talmon, *supra* note 5. Previously, a significant number of commentators had claimed that the Security Council could not enact generic legal obligations in the non-proliferation domain without states’ express consent. See JORGE CASTAÑEDA, LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS 1-16 (1969); Jarrod Wiener, *Introduction*, in THE UNITED NATIONS IN THE NEW WORLD ORDER: THE WORLD ORGANIZATION AT FIFTY ix-xvi (Dimitris Bourantonis & Jarrod Wiener eds., 1995); FRANCIS O. WILCOX & CARL M. MARCY, PROPOSALS FOR CHANGES IN THE UNITED NATIONS 51-61 (1955); Erwin Dahinden, *The Future of Arms Control Law: Towards a New Regulatory Approach and New Regulatory Techniques*, 10 J. CONFLICT & SECURITY L. 263 (2005); Daniel H. Joyner, *Non-proliferation Law and the United Nations System: Resolution 1540 and the Limits of the Power of the Security Council*, 20 LEIDEN J. INT’L L. 489, 510-511 (2007).

9. Chair, 1540 Committee, Closing Remarks at the Formal Open Consultations (June 22, 2016), <http://www.un.org/en/sc/1540/documents/1540%20Chair%20Closing%20Remarks.pdf>; Tanya Ogilvie-White, *UN Security Council Resolution 1540: Origins, Status, and Future Prospects*, in INTERNATIONAL COOPERATION ON WMD NONPROLIFERATION 140, 148 (Jeffrey W. Knopf ed., 2016).

10. See Nicolas Kasprzyk, Presentation on Non-proliferation of Weapons of Mass Destruction to Non-State Actors: The Role of UNSC Resolution 1540 (2004) at NATO Regional Cooperation Course (NRCC), NATO Defense College Rome, Italy (Mar. 11, 2013), <https://www.un.org/ar/sc/1540/documents/expert-presentation-2013-15-Rome.pdf>; see also Masahiko Asada, *Security Council Resolution 1540 to Combat WMD Terrorism: Effectiveness and Legitimacy in International Legislation*, 13 J. CONFL. SECUR. LAW 303, 314.

11. U.N. Secretary-General, Secretary-General’s Remarks to the Open Formal Consultation for the Comprehensive Review of UN Security Council Resolution 1540 (2004) (July 21, 2016), <https://www.un.org/sg/en/content/sg/statement/2016-06-21/secretary-generals-remarks-open-formal-consultation-comprehensive>.

12. Rep. of the S.C. Comm. Established Pursuant to Resolution 1540 (2004), transmitted by Letter dated 9 December 2016 from the Chair of the Security Council Comm. Established Pursuant to

commended the enormous progress states have made in implementing Resolution 1540.<sup>13</sup>

Yet, despite the alleged success of the 1540 regime, there are still gaps in the post-9/11 nonproliferation ecosystem. In recent years there were a number of attempts by non-state actors to buy, steal, or otherwise traffic WMD materials by evading regulatory controls.<sup>14</sup> For example, in 2006, a North Ossetian smuggler, Oleg Khinsagov, easily bypassed radiation detectors at the Russian-Georgian border and attempted to sell 100 grams of Highly Enriched Uranium [HEU] in Georgia.<sup>15</sup> In 2007, armed men broke into South Africa's Pelindaba nuclear facility, exposing the site's weak security measures.<sup>16</sup> From 2010 to 2015 there were at least four instances of nuclear smuggling in Moldova, where a group of middlemen sought to sell the material to Islamic State [IS] radicals.<sup>17</sup> In 2016, revelations about IS fighters spying on Belgian top nuclear scientists and purported plans to attack Belgian nuclear facilities further indicated the possible nuclear intent of terrorists.<sup>18</sup> Reports suggest the Islamic State stole around 40 kg of low enriched uranium from Iraq's Mosul University in 2014.<sup>19</sup> In its 1540 national implementation report, Syria bluntly lied to the Security Council, declaring, "[Syria] neither possesses nor intends to acquire weapons of mass

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Resolution 1540 (2004) Addressed to the President of the Security Council, ¶ 28, U.N. Doc S/2016/1038 (Dec. 9, 2016) ("Of a total of 64,076 possible measures, the measures recorded in the 2016 matrices numbered 30,632 (48 percent)").

13. *Id.* at ¶ 76.

14. Graham Allison, *Nuclear Terrorism Fact Sheet Policy Memo*, BELFER CTR. SCI. INT'L AFF. (2010), [http://belfercenter.ksg.harvard.edu/publication/20057/nuclear\\_terrorism\\_fact\\_sheet.html](http://belfercenter.ksg.harvard.edu/publication/20057/nuclear_terrorism_fact_sheet.html); Ashfaq Ahmed & Saima Kausar, *Nuclear Terrorism: Myth or Reality?*, 16 DEF. J. J1, J3 (2012) (Pak.); Graham Allison, *A Response to Nuclear Terrorism Skeptics*, 16 BROWN J. WORLD AFF. 31, 36-37 (2009). *But see* John Mueller, *Radioactive Hype*, NATL. INT. 59 (2007).

15. Julian Borger, *Georgia Foils Attempt to Sell Weapons-Grade Uranium*, GUARDIAN (Apr. 13, 2010), [https://www.theguardian.com/world/julian-borger-global-security-blog/2010/apr/13/georgia-nuclear-smuggling; see also Michael Bronner, 100 grams \(and counting...\): Notes from the Nuclear Underworld](https://www.theguardian.com/world/julian-borger-global-security-blog/2010/apr/13/georgia-nuclear-smuggling; see also Michael Bronner, 100 grams (and counting...): Notes from the Nuclear Underworld), BELFER CTR. SCI. INT'L AFF. (2008), <https://www.belfercenter.org/sites/default/files/files/publication/100-Grams-Final-Color.pdf>.

16. Douglas Birch & R. Jeffrey Smith, *The Assault on Pelindaba*, CTR. FOR PUB. INTEGRITY (Mar. 14, 2015), <https://www.publicintegrity.org/2015/03/14/16894/assault-pelindaba>. For a more comprehensive account on insider threats inside the organizations responsible for protecting the national security and its critical infrastructure, see INSIDER THREATS (Matthew Bunn & Scott D. Sagan eds., Cornell Univ. Press 2017).

17. *Nuclear Smuggling Deals "Thwarted" in Moldova*, BBC NEWS (Oct. 7, 2015), <http://www.bbc.com/news/world-europe-34461732>. In 2011, Moldovan authorities detained a group of middlemen who attempted to sell 4.4 grams of Highly Enriched Uranium (HEU) in a cylindrical lead container to an undercover police agent. *See Six People Arrested in Moldova Over Bomb-Grade Uranium*, TELEGRAPH (June 29, 2011), <http://www.telegraph.co.uk/news/worldnews/europe/moldova/8607235/Six-people-arrested-in-Moldova-over-bomb-grade-uranium.html>. Through sting operations the smugglers were caught, but the ringleaders escaped.

18. Matthew Bunn, *Belgium Highlights the Nuclear Terrorism Threat and Security Measures to Stop It*, HUFFINGTON POST (Mar. 29, 2016, 1:54 PM, updated Dec. 6, 2017), [https://www.huffingtonpost.com/matthew-bunn/belgium-nuclear-terrorism\\_b\\_9559006.html](https://www.huffingtonpost.com/matthew-bunn/belgium-nuclear-terrorism_b_9559006.html).

19. NATO REV., *Could ISIL Go Nuclear?* <http://www.nato.int/docu/review/2015/ISIL/ISIL-Nuclear-Chemical-Threat-Iraq-Syria/EN/index.htm>.

destruction.”<sup>20</sup> Nonetheless, as it later became apparent, not only did Syria possess chemical weapons, both IS extremists and the Syrian government used those chemicals as weapons in the Syrian conflict.<sup>21</sup>

How does one explain the contrast between the proclaimed success of 1540 as a key international instrument to address non-state-actor proliferation and WMD trafficking and these operational failures? Drawing on fifty-two in-depth interviews, fieldwork, and observation data, this article presents a novel assessment of the 1540 regime’s development and performance. The findings challenge widely held assumptions about the Resolution’s positive effects in preventing non-state actor proliferation. While the widespread support of 1540 Resolution and country reporting is remarkable, this article demonstrates that country reports are an insufficient metric of the 1540 regime’s success. This is because the quality of the reports and the effectiveness of the reported implementation efforts are not subject to evaluation. More generally, the 1540 Committee does not critically assess countries’ compliance or systematically identify areas of concern, let alone set priorities or target resources to address vulnerabilities that could be exploited by non-state actors to traffic WMD materials.

This relatively weak performance is surprising in light of Resolution 1540’s strong legal mandate. The instrument is designed as legally binding hard law, backed with Chapter VII enforcement power, and universally applicable. On paper, the 1540 regime has the authority to scrutinize states’ compliance and compel reforms. In fact, the extraordinary power and scope of the law – or, more precisely, concerns about that legal mandate – help to explain how 1540 evolved into a popular but relatively weak regime.

This article offers three main conclusions. First, in order to overcome doubts about the legitimacy of the Resolution and opposition to its work, the 1540 Committee chose to structure itself as a voluntary and cooperative mechanism unlike the North Korea or Iran Sanctions Committee. Second, the decision to abdicate its strong enforcement authority has succeeded in building strong political support, but also constrained the regime’s ability to effectively monitor and assess countries’ compliance with 1540 obligations. Third, a trade-off exists between institutional design features that bolster cooperation and those that produce effective enforcement. Adopting a cooperative institutional design may allow an international institution to lower the costs of participation and offer incentives for member states to support the institution. This cooperative design may ultimately result in increased legitimacy and support; however, the cooperative model often lacks tools necessary to enforce compliance with the

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20. Amended National Rep. of the Syrian Arab Republic Submitted Pursuant to the Comments to the Security Council Comm. Established Pursuant to Resolution 1540 (2004), Transmitted by Note Verbale Dated 7 November 2005 from the Permanent Mission of the Syrian Arab Republic to the U.N. addressed to the Chairman of the Comm., ¶ 3, U.N. Doc. S/AC.44/2004/(02)/70/Add.3 (Nov. 10, 2005).

21. *Both ISIL and Syrian Government Responsible for Use of Chemical Weapons*, UN Security Council Told, UN NEWS (Nov. 7, 2017), <https://news.un.org/en/story/2017/11/570192-both-isil-and-syrian-government-responsible-use-chemical-weapons-un-security>.

international obligations. As a consequence, the institution has become less effective in achieving its primary policy goals.

Nevertheless, despite the implicit political bargain that prevents 1540 from exercising the full enforcement authority granted by the Resolution, the regime still has untapped potential to close gaps and promote strong counter-proliferation laws. In particular, the 1540 Committee could provide more direction and strategic oversight by setting priorities, developing technical guidance, and making recommendations or promoting specific implementation goals.

This article proceeds in four steps. First, it provides an assessment of 1540's origins and its past performance, based on the 1540 Committee's own metrics of success. Second, it demonstrates the regime's weak performance, examining its effectiveness and accomplishments thus far. Third, it explains how the creation of the 1540 mechanism and its early institutional choices shaped its current structure and performance. In particular, this article illustrates how 1540's legitimacy-building strategies have constrained the institution's ability to effectively manage the implementation of the resolution. Finally, this paper briefly explores options on how to strengthen the 1540 regime to halt non-state actor proliferation.

#### I. METHODOLOGY AND PRIMARY DATA SOURCES

This research relies heavily on original sources. It draws from fifty-two in-depth semi-structured interviews with key stakeholders involved in the design and implementation of Resolution 1540. The majority of interviews took place in person from September 5 to December 1, 2013 and from April 23 to May 5, 2014. I conducted a few follow-up phone interviews in late 2016. The interviews were conducted in a formal meeting, where I took detailed notes of the discussions after explaining the scope of the study. In addition to formal interviews, I have discussed my research in informal settings with several people in the field who afforded me with interesting insights into the U.N. strategies to facilitate its counter-proliferation mandate. These conversations have further informed my thinking and analysis of Resolution 1540. I have selected the interviewees based on their involvement in the practice of Resolution 1540's implementation, their country and regional representation, the nature of their functions, and their contrasting characteristics in implementing 1540 mandate. Additionally, I utilized a snowball sampling method. All interviews followed ethical requirements. The interviewees preferred to stay anonymous, thus the entire corpus of my interview material is confidential. The key stakeholders interviewed include senior U.N. officials from the U.N. Secretariat, members of the 1540 Committee, incumbent and former 1540 Experts, senior diplomats from Permanent Missions to the U.N. and other country delegates, as well as representatives from regional, sub-regional, and international organizations, civil society, and academia. Many of the U.N. senior officials, especially 1540 Experts, had previously served in a national capacity with the authority to implement non-proliferation arrangements in their respective countries. Therefore, these public officials also offered insights into their countries' domestic efforts to implement 1540 obligations.

Interview questions were based on several loosely structured themes. The questions were aimed at understanding the historical development and evolution of Resolution 1540's mandate; interviewees' perceptions of the changes and progress of the 1540 regime; the goals, outcomes, successes, and limitations of the U.N.'s efforts to facilitate Resolution 1540's implementation; the primary actors involved; the key challenges identified; and the influence of implementation strategies on global efforts to counter non-state-actor WMD proliferation. I analyzed the interview data using the Dedoose web-based software for qualitative analysis.

In addition to interviews with key stakeholders, data collection was supported by an externship at the U.N. Office for Disarmament Affairs, along with the direct observations from and participation in the 68th U.N. General Assembly First Committee debates on Disarmament and International Security and the 2014 Preparatory Committee meetings for the Nuclear Non-Proliferation Review Conference. In all of my interactions with the 1540 actors, I have identified my academic affiliation and explained my scholarly work on Resolution 1540.

## II. EVALUATING THE ORIGINS AND PERFORMANCE OF UNSCR 1540

### A. Background

U.N. Security Council Resolution 1540 is a legally binding and universally applicable nonproliferation instrument. It attempts to prevent terrorists from obtaining WMD and related materials and technology by requiring all U.N. member states to adopt and enforce three broad sets of “*effective*” domestic regulations.<sup>22</sup> First, the Resolution sets its objective by condemning and outlawing any type of state-sponsored WMD proliferation. States shall refrain from taking any steps that could support non-state actors in acquiring, using or transferring nuclear, chemical, or biological weapons and their delivery systems.<sup>23</sup> Second, the Resolution calls for criminalization of proliferation-related activities. States are required to adopt effective domestic controls and enforcement mechanisms over WMD materials and criminalize possession, manufacturing, acquisition, development, transportation, transfer, financing, or use of such materials.<sup>24</sup> Third, the Resolution requires states to address the illicit trafficking of WMD materials by establishing and enforcing four types of controls related to: (a) accounting and securing; (b) physical protection; (c) border and law enforcement, including combating illicit trafficking and brokering; and (d) export,

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22. S.C. Res. 1540, ¶ 3 (Apr. 28, 2004). The resolution offers operational definitions for means of delivery, non-state actors, and related materials, *see* footnote in the S.C. Res. 1540. For more details on the analysis of the threat the Security Council was attempting to solve via Resolution 1540, *see also* David Salisbury, Ian J. Stewart & Andrea Viski, *Introduction to PREVENTING THE PROLIFERATION OF WMDs: MEASURING SUCCESS OF UN SECURITY COUNCIL RESOLUTION 1540 2-3* (David Salisbury, Ian J. Stewart & Andrea Viski eds., 2018).

23. S.C. Res. 1540, *supra* note 22, ¶ 2; Interview with 1540 Expert #8, in N.Y.C., N.Y. (Nov. 20, 2013).

24. *See* S.C. Res. 1540, *supra* note 22, ¶ 2.



transit, and trans-shipment.<sup>25</sup>

Resolution 1540 broke new ground in the global nonproliferation regime by its scope and legally binding nature. It was designed to address the gaps in existing nonproliferation architecture. As such, it provides a consolidated approach to deal with all three types of WMD materials and all aspects of weapons proliferation, including but not limited to dual-use materials and technology, delivery means, as well as export-import and physical security. Many pre-existing multilateral arms control treaties and/or export-import regimes already contained some obligations comparable to those in the Resolution.<sup>26</sup> Despite the overlaps, unlike 1540, these legal instruments were neither universally binding nor targeted to non-state actor proliferation.<sup>27</sup> 1540 integrated a range of WMD obligations all in one parcel and made these obligations mandatory for all U.N. member states.

To oversee states' compliance with these substantive obligations, the Council introduced a national reporting mechanism for states and created an institutional framework to monitor this process. States are called upon to submit a national report about the domestic measures they have taken or intend to take to meet their 1540 obligations.<sup>28</sup> To facilitate and examine countries' domestic implementation, the Council formed a subsidiary body – the 1540 Committee.<sup>29</sup> The Committee is composed of representatives of all members of the Security Council, with one rotating chair and three vice chairs.<sup>30</sup> The initial two-year mandate has been extended three times; the third extension, in 2011, prolonged the

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25. See S.C. Res. 1540, *supra* note 22, ¶ 3. The Resolution, however, did not provide a specific list of controlled items similar to those provided by other non-proliferation export-import controls. See generally Bryan R. Early, Explaining Nonproliferation Export Controls, Dep't of Political Sci., Univ. at Albany, SUNY (July 14, 2009) (presentation available at <http://live.belfercenter.org/files/Nonproliferation-Export-Controls.pdf>).

26. For example, Nuclear Non-Proliferation Treaty [NPT], the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction [Biological Weapons Convention, BWC], and the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction [Chemical Weapons Convention, CWC] contain obligations overlapping with 1540.

27. A set of non-proliferation regimes addresses export-import controls or limitations on means of delivery, but many of them are voluntary mechanisms. See OFFICE OF THE SEC'Y OF DEF., MULTILATERAL EXPORT CONTROL AND NON-PROLIFERATION REGIMES, <http://www.dtsa.mil/SitePages/promoting-engagement/multilateral-non-proliferation-regimes.aspx>.

28. S.C. Res. 1540, *supra* note 22, ¶ 4.

29. U.N. Security Council, Provisional Rules of Procedure of the Security Council, Rule 28, p. 6, U.N. DOC. S/96/Rev.7 (1983), <http://www.un.org/ar/sc/pdf/rules.pdf>.

30. In *Hindsight: Appointment of Chairs of Subsidiary Bodies*, SECURITY COUNCIL REP., [https://www.securitycouncilreport.org/monthly-forecast/2013-12/in\\_hindsight\\_appointment\\_of\\_chairs\\_of\\_subsidary\\_bodies.php](https://www.securitycouncilreport.org/monthly-forecast/2013-12/in_hindsight_appointment_of_chairs_of_subsidary_bodies.php); January 2011 Monthly Forecast: *Elections of Chairs of Subsidiary Bodies*, SECURITY COUNCIL REP., [http://www.securitycouncilreport.org/monthly-forecast/2011-01/lookup\\_cgIKWLeMTIsG\\_b\\_6453291.php](http://www.securitycouncilreport.org/monthly-forecast/2011-01/lookup_cgIKWLeMTIsG_b_6453291.php); U.N. President of the S.C., Note dated Dec. 17, 2012 from the President of the Security Council, U.N. DOC S/2012/937 (Dec. 17, 2012). Like any Security Council subsidiary body, the 1540 Committee is composed of official representatives of all fifteen Security Council Member States and adopts every decision through a unanimous vote. See generally Michael C. Wood, *Security Council Working Methods and Procedure: Recent Developments*, 45 INT'L COMP. L. Q. 150, 150–61 (1996).

1540 Committee's life for an additional ten years till 2021.<sup>31</sup>

A group of nine independent experts as well as the U.N. Office for Disarmament Affairs [UNODA] support the 1540 Committee's day-to-day work. The first of these, commonly referred to as the 1540 Group of Experts, is comprised of independent consultants,<sup>32</sup> who provide the Committee with unbiased technical advice regarding implementation. The key function of the 1540 Experts is to examine each state's implementation of the Resolution by analyzing national reports submitted to the Committee. The group also complements the Committee's work via direct engagement with national governments, international and regional organizations, the industry sector, and civil society.<sup>33</sup> Similarly, UNODA provides substantive and logistical support to the 1540 Committee.

### B. 1540 Country Reporting and Status of Implementation

The central procedural requirement of Resolution 1540 is the submission of national implementation reports, wherein states document their compliance with the instrument's substantive requirements. The reports serve as a basic tool for the Security Council, operating through the 1540 Committee, to monitor states' progress in developing the legal, regulatory, and policy frameworks to prevent WMD proliferation, especially by non-state actors. Thus, once the 1540 Committee organized itself and selected its 1540 Experts, the first order of business was collecting and reviewing the national reports.

The first national reports were due to the Committee in six months – by October 28, 2004.<sup>34</sup> Eighty-six countries and the European Union submitted their first national reports to the Committee on time. Two countries – the Republic of Moldova and South Africa – requested an extension of the submission deadline. The remaining 105 U.N. members did not meet the first report submission deadline.<sup>35</sup>

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31. S.C. Res. 1977, ¶2 (Apr. 20, 2011). Resolution 1540's mandate had already been renewed twice in its first five years: in 2006, S.C. Res. 1673, ¶4 (Apr. 27, 2006), and in 2008, S.C. Res. 1810, ¶6 (Apr. 25, 2008).

32. Cable from U.S. Mission to the U.N. to U.S. Sec'y of State, 1540 COMMITTEE DISCUSSES EXPERTS' PANEL, (2007), [https://wikileaks.org/plusd/cables/07USUNNEWYORK37\\_a.html](https://wikileaks.org/plusd/cables/07USUNNEWYORK37_a.html).

33. Terence Taylor, *Evolving Efforts of the 1540 Experts*, 1540 COMPASS no. 4 (Univ. of Ga. Ctr. for Int'l Trade & Sec.), 2013, at 44. The 1540 Experts are nominated to serve on the 1540 Group for up to five years. Each country can propose one or more candidates by responding to the U.N. Secretariat's note verbale soliciting nominations for the Group of Experts. The 1540 Committee scrutinizes the candidates, and the U.N. Secretary-General directly appoints the experts after consultations with the 1540 Committee. The candidates are selected based on their qualifications and expertise, geographical representations and taking into account the gender balance.

34. S.C. Res. 1540, *supra* note 22, ¶ 4; *see also* U.N. SCOR, 59th Sess., 5097th mtg. at 3, U.N. Doc. S/PV.5097; *see generally* Merav Datan, *Security Council Resolution 1540 – WMD and Non-state Trafficking*, 79 ACRONYM INST. FOR DISARMAMENT DIPL. May 2004, at 48-60. In subsequent years, the Security Council mandated the 1540 Committee to report back on the status of implementation annually and to hold recurring comprehensive reviews to identify ways to improve implementation of 1540. As of this writing, the Security Council held three Comprehensive Reviews of Resolution 1540 – in 2009; 2011 and most recently in 2016. *See* S.C. Res. 1977, ¶ 3 (Apr. 20, 2011).

35. First Report to the Security Council by the Chairman of the S.C. Comm. Established Pursuant to Resolution 1540 (2004), transmitted by Letter Dated 8 December 2004 from the Chairman of the S.C.

When the very first reports trickled in, it became evident that there were enormous discrepancies among them in terms of content, structure, length, and quality.<sup>36</sup> Some countries followed the structure of the Resolution, while others reported what they believed was necessary. Although the major developed states generally submitted substantial reports,<sup>37</sup> quite a few states submitted reports that were extremely brief and provided little information on the country's domestic measures to counter non-state-actor WMD proliferation.<sup>38</sup>

The Group of Experts recognized the need to develop a standardized evaluation tool to examine national reports. Following the Experts' proposal, the Committee approved the Resolution 1540 matrix template.<sup>39</sup> This matrix has become the primary method used by the Committee and the Experts to organize and examine the information submitted by member states about their implementation of the resolution.<sup>40</sup> It is essentially a breakdown of the resolution's provisions into a table format. This table contains roughly 300 questions/fields related to both national legal frameworks and enforcement measures in the area of biological, chemical, and nuclear weapons and their means of delivery.

The 1540 Committee set universal reporting as its number one goal. From its early days, the Committee took every effort to advocate for universal country reporting and underscore the importance of submitting the first report.<sup>41</sup> Both the Committee and its experts conducted targeted outreach via workshops with national governments, most particularly with non-reporting ones. In 2006 and 2007, UNODA organized three inaugural, high-level regional workshops – in the Asia-Pacific region,<sup>42</sup> in Latin

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Comm. Established Pursuant to Resolution 1540 (2004) Addressed to the President of the Security Council, U.N. Doc. S/2004/958, at 4-7 (Dec. 8, 2004) [hereinafter First Report to the Security Council].

36. Skype Interview with 1540 Expert #9 (Apr. 18, 2013).

37. At that time, the states that had submitted comprehensive reports were mostly from the Americas and Europe, while states lagging behind on their national reporting were from Africa and the Middle East. See *WMD 1540 Reports Trickling In*, 118 TRUST AND VERIFY (2005), at 6 <http://www.vertic.org/media/assets/TV118.pdf>.

38. Interview with Former 1540 Expert #5, in N.Y.C., N.Y. (May 14, 2014).

39. See Report of the Comm. Established Pursuant to Resolution 1540 (2004), transmitted by Letter Dated 25 April 2006 from the Chairman of the Security Council Comm. Established Pursuant to Resolution 1540 (2004) Addressed to the President of the Security Council, at 17, U.N. Doc. S/2006/257 (Apr. 25, 2006) <https://undocs.org/S/2006/257> [hereinafter 2006 Report to the Security Council]. A matrix is based on the provisions of the resolution and is used by the committee and the experts to store the information stemming from the national reports. There are 300+ questions/fields in the matrix.

40. Skype Interview with a Former 1540 Expert #9 (April 18, 2013).

41. Interview with Senior South African Civil Society Representative #1, in N.Y.C., N.Y. (May 16, 2014); see also Program of Work of the Security Council Comm. Established Pursuant to Resolution 1540 (2004) from 1 February 2010 to 31 January 2011, transmitted by Letter Dated 26 February 2010 from the Chairman of the Security Council Comm. Established Pursuant to Resolution 1540 (2004) Addressed to the President of the Security Council, U.N. Doc. S/2010/112, at 3 (Mar. 2, 2010), [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/2010/112](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2010/112).

42. U.N. Dep't for Disarmament Affairs, United Nations Seminar on Implementing UN Security Council Resolution 1540 in Asia and the Pacific, DDA Occasional Papers No. 11, U.N. Sales No. 06. IX.2 (Oct. 2006), <https://www.un.org/disarmament/publications/occasionalpapers/no-11>.

America and the Caribbean;<sup>43</sup> and in Africa.<sup>44</sup> These workshops provided an opportunity for the Committee to meet with domestic players (predominantly foreign ministry officials of participating states) to raise awareness about the resolution's requirements and solicit reporting.<sup>45</sup> For the past fourteen years, each of the Chairmen of the 1540 Committee has prioritized universal reporting as a leading theme for the Committee's work.<sup>46</sup> In its most recent quarterly message from December 2017, the Committee's current chair reiterated "the full reporting by Member States remains to be the highest priority for the Committee."<sup>47</sup>

Since the first submissions of national reports, there has been a steady increase over the years both in the overall number of 1540 country reports and in the number of specific measures states reported taking to meet their 1540 commitments. By December 16, 2005, when the 1540 Committee Chair submitted its second report to the Security Council, the total number of submitted national reports was 124, plus one from the European Union.<sup>48</sup> Today, 179 countries have submitted 1540 national implementation reports to the Committee.<sup>49</sup> [Table 1](#) below illustrates the number of country reports the Committee received from 2004-2018.<sup>50</sup>

43. U.N. Dep't for Disarmament Affairs, United Nations Seminar on Implementing UN Security Council Resolution 1540 in Latin America and the Caribbean, DDA Occasional Papers No. 13, U.N. Sales No. 08.IX.3 (Dec. 2007), <https://www.un.org/disarmament/publications/occasionalpapers/no-13>.

44. U.N. Dep't for Disarmament Affairs, United Nations Seminar on Implementing UN Security Council Resolution 1540 in Africa, DDA Occasional Papers No. 12, U.N. Sales No. 07.IX.3 (May 2007), <https://www.un.org/disarmament/publications/occasionalpapers/no-12>.

45. Interview with Former 1540 Expert #7, in N.Y.C., N.Y. (Apr. 28, 2014); Skype Interview with former 1540 Expert #2 (Apr. 28, 2014). Skype Interview with Former 1540 Expert #2 (Apr. 28, 2014). Many developing states confronted challenges in grasping what is actually required by the Resolution, especially compared to existing arms-control and other non-proliferation arrangements. The difference between state-to-state proliferation and non-state actor proliferation was not always clear to some.

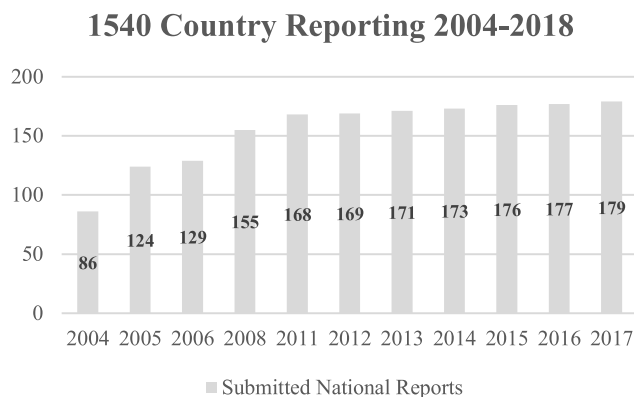
46. The majority of 1540 outreach activities have been focused on non-reporting countries and regions. The content analysis of 1540 Committee work plans indicates the importance the Committee has placed on soliciting national 1540 reports.

47. See Quarterly Message from the 1540 Comm. Chair, 2017/Issue No. 12, 1540 Comm. (December 2017), <http://www.un.org/en/sc/1540/chair-message.shtml>.

48. The Second Report to the Security Council, transmitted by Letter Dated 16 December 2005 from the Chairman of the Security Council Committee Est. Pursuant to Resolution 1540 (2004) Addressed to the President of the Security Council, U.N. Doc. S/2005/799, at 15 (Dec. 19, 2005) <https://www.securitycouncilreport.org/un-documents/document/1540-S2005-799.php> [hereinafter 2005 Report to the Security Council].

49. National Implementation Reports, 1540 Comm., <https://www.un.org/en/sc/1540/national-implementation/national-reports.shtml>.

50. I have polled the data manually from annual reports and comprehensive review final documents the 1540 Committee has submitted to the Security Council. See First Report to the Security Council, *supra* note 35 ; 2005 Report to the Security Council, *supra* note 48, at 1-7; 2006 Report to the Security Council, *supra* note 39, at 33-35 ; Report of the Comm. Established Pursuant to Resolution 1540 (2004), transmitted by Letter Dated 8 July 2008 from the Chairman of the Comm. Established Pursuant to Resolution 1540 (2004) Addressed to the President of the Security Council, U.N. Doc. S/2008/493, at 33 (July 30, 2008) [hereinafter 2008 Report to the Security Council]; Final document on the 2009 Comprehensive Review of the status of implementation of Security Council resolution 1540, at 2 (2004), U.N. Doc. S/2010/52; [http://www.un.org/ga/search/view\\_doc.asp?symbol=S/2010/52](http://www.un.org/ga/search/view_doc.asp?symbol=S/2010/52); 2011 review of the implementation of resolution 1540 (2004), U.N. Doc. S/2012/79; Final Document on the 2016 Comprehensive Review of the Status of Implementation of Security Council Resolution 1540 (2004), U.N. Doc. S/2016/1038 (Dec. 9, 2016). Final Document on the 2016 Comprehensive Review,



**Table 1.**

The 1540 Committee’s 2016 report offers the latest and the most comprehensive information on 1540 implementation, based on the data provided in 1540 matrices. The report finds an increase in legislative measures for 1540 implementation, especially with regards to prohibiting proliferation of nuclear, chemical and biological weapons. There has also been progress in relation to accounting, security, and export control measures, although some gaps remain in those areas.<sup>51</sup> Calculations reveal an absolute increase of approximately 7 percent in the overall number of measures documented in 2016 for all 193 countries compared to 2011.<sup>52</sup> The report breaks down the increase in measures into weapons categories and regions. It states, “[o]f this overall total, the percentage of the possible measures recorded for each of the weapons categories was as follows: nuclear weapons – 51 percent; chemical weapons – 50 percent; and biological weapons – 42 percent. There is a significant variation across regions. Africa states record 28 percent, Latin America and the Caribbean record 39 percent, Asia-Pacific states record 41 percent, Eastern Europe states record 80 percent, whereas Western European and other states record 85 percent of all the possible measures listed in the matrix.<sup>53</sup> The Committee report concludes that these findings reveal significant progress in 1540 implementation.

Many other experts agree that increased reporting reflects overall progress in countries’ legal regulatory efforts to prevent WMD proliferation. 1540 expert and scholar Richard Cupitt points out that a web of Security Council Resolutions on counter-terrorism and nonproliferation regularly cite 1540 as a cornerstone of global efforts to combat WMD terrorism and proliferation. He seems to agree

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U.N. Doc. S/2016/1038, *supra* note 12 at 9 (Dec. 9, 2016). As of this writing, the non-reporting countries are Central African Republic, Chad, Democratic Republic of North Korea (DPRK), Gambia, Guinea, Mauritania, Mali, Mozambique, Solomon Islands, and Swaziland.

51. U.N. Doc. S/2016/1038, *supra* note 12, at 9.

52. *Id.*

53. *Id.* at 9-10.

with the Security Council assessment that countries across the globe continue adopting laws and regulations to conform to their 1540 obligations.<sup>54</sup> Andrea Viski arrives at an identical conclusion, arguing that, despite challenges, the direction of 1540 implementation is positive.<sup>55</sup> Recognizing the valuable role of the resolution, some scholars point out ways to maximize 1540's effectiveness. Peter Crail introduces a risk-based framework that prioritizes 1540 implementation in two sets of countries – *primary origin*, from which WMD materials may originate, and *transit*, through which WMD materials could be transferred.<sup>56</sup> Lawrence Scheinman and others underscore the important role regional organizations play in facilitating 1540 implementation.<sup>57</sup> Tanya Ogilvie-White describes 1540 domestic implementation as very slow, and argues that national capacity shortfall is the main factor restraining states' ability to fulfill 1540 obligations. Yet, she does not judge effectiveness of 1540 negatively.<sup>58</sup>

In 2010, in a joint briefing to the Security Council, the Chair of the 1540 Committee Ambassador Claude Heller praised 1540 for stimulating significant steps across the globe to prevent non-state actors from manufacturing, acquiring, possessing, developing, transporting, transferring or using nuclear, chemical and biological weapons and their means of delivery. According to his assessment, 1540 facilitated the gathering of comprehensive data of measures taken by states in this regard. While admitting the need for improvement, he expressed satisfaction with the very high number of states reporting on 1540 measures.<sup>59</sup> Similarly, in 2016, then 1540 Committee Chair Ambassador Román Oyarzun Marchesi commended 1540's success by relying on the high number of national reports. He concluded, "Resolution 1540 is recognized as an important element of the international nonproliferation regime. But it is not merely an addition. It strengthens the regime, and support for its implementation is worldwide. Is there evidence for this? For sure! One hundred and seventy-six states have provided national reports to the 1540 Committee, and many have provided more than one."<sup>60</sup>

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54. See Richard Cupitt, *Forward*, in PREVENTING THE PROLIFERATION OF WMDs: MEASURING SUCCESS OF UN SECURITY COUNCIL RESOLUTION 1540, *supra* note 22, at vi.

55. Andrea Viski, *UNSCR 1540: Implementation Trends*, in PREVENTING THE PROLIFERATION OF WMDs: MEASURING SUCCESS OF UN SECURITY COUNCIL RESOLUTION 1540, *supra* note 22, at 52.

56. Peter Crail, *Implementing UN Security Council Resolution 1540: A Risk-Based Approach*, 13 NONPROLIFERATION REV. 355, 356 (2006).

57. IMPLEMENTING RESOLUTION 1540: THE ROLE OF REGIONAL ORGANIZATIONS (Lawrence Scheinman ed., 2008).

58. Ogilvie-White, *supra* note 9, at 140, 148. Key players within the 1540 community pointed out the limited human and technical resources within the U.N. dedicated to 1540 implementation. Cf. Richard T. Cupitt, *Nearly at the Brink: The Tasks and Capacity Of the 1540 Committee*, 42 ARMS CONTROL TODAY 18 (2012).

59. Claude Heller, Chairman of the Committee established pursuant to S.C. Res. 1267 (1999), 1373 (2001) and 1540 (2001) (May 11, 2010), <http://www.un.org/en/sc/1540/documents/statement.chair.sc.11may10.pdf>.

60. Román Oyarzun Marchesi, *Message from 1540 Chair*, 1540 COMPASS no. 11 (Univ. of Ga. Ctr. for Int'l Trade & Sec.), 2016, at 3.

The next section critiques 1540's past performance, with a focus on demonstrating why the current metric of success is flawed.

### III. CRITIQUING THE 1540'S PAST PERFORMANCE

#### A. *Why 1540 National Reports and Matrices are not the Right Metric for 1540's Success*

To demonstrate the impact of the 1540 regime, the 1540 Committee essentially relies on two measures: 1) the overall number of domestic implementation reports, and 2) the number of specific measures that states reported taking to meet their 1540 commitments, organized in 1540 matrices. Both measures are insufficient to determine the success of 1540.

To measure the full impact and success of 1540, one would need to evaluate whether, in response to Resolution 1540, countries adopted and enforced domestic policies to control WMDs and whether these controls have been effective in reducing vulnerabilities and preventing or interdicting proliferation activities. Measuring such domestic enforcement and its effectiveness is beyond the scope of this article due to a number of constraints, most particularly, the need to rely on classified intelligence information to answer this question. Although it may be tempting to evaluate success strictly in terms of the increase in the number of 1540-related laws, regulations, and policies, this approach is problematic. First, 1540 is a "catch all" legal instrument. The 1540 obligations often overlap with a number of other non-proliferation norms – one cannot assume that a reported 1540 domestic measure was introduced *directly* in response to 1540 Resolution rather than in response to other external pressure (e.g., to meet obligations stemming from the Nuclear Security Summit, the Convention on Suppression of Nuclear Terrorism, preconditions for EU membership, etc.). Second, a new law or existing regulation may on paper meet 1540 obligations but yet be ineffective and inadequate. Therefore, this paper adopts an alternative method to examine 1540's impact – it addresses the 1540 regime's effectiveness by assessing the 1540 Committee's *ability* to identify, assess, and help countries close vulnerabilities in their regulatory and enforcement infrastructure. This analytical framework allows us to examine how effective the 1540 Committee is in *managing* the implementation of the resolution. The insights will help policy makers to design sound policy options to improve the 1540 regime and serve as a foundation for further scholarly work on the topic, such as drawing comparative analysis between the 1540 and other international mechanisms.

The high rate of 1540 domestic reports is a remarkable achievement for the Security Council and it may well signify countries' overall commitment to fighting non-state actor proliferation. Yet, framing the Resolution's impact through mere citation of the 1540 reports is ill-suited. The high number of country reports may produce a false sense of security and confidence in the resolution's universal implementation and states' capacity to address the non-state-actor proliferation threat. While soliciting universal reporting remains the top priority for the

Committee, reports of domestic implementation measures alone do not necessarily demonstrate progress toward the substantive goals of the Resolution.

Resolution 1540 requires states to adopt and enforce “*effective*” laws to control WMD materials and their means of delivery. In its current setup, the 1540 Committee and its Group of Experts, however, do not evaluate the efficacy of countries’ domestic measures. Theoretically, the 1540 Committee and its nine independent experts are responsible for reviewing national reports, identifying gaps in legislative and enforcement frameworks, and proposing solutions to help countries build capacity to address non-state actor proliferation.<sup>61</sup> The examination of a national report simply indicates that one of the 1540 Experts has organized the national reporting data into the 1540 matrix – this is primarily a matter of data entry rather than analysis.<sup>62</sup> These evaluations do not translate into any assessment of country implementation.<sup>63</sup>

There are at least five overlapping challenges inherent to treating universal reporting as the sole requirement for comprehensive implementation of 1540 goals, all of which are related to the content and completeness of such reports. In particular, some national reports (i) are incomplete; (ii) are complete, but reveal major gaps in legislative frameworks and/or operational practices; (iii) contain false, inaccurate, and outdated information; (iv) focus only on a country’s legislative provisions and institutional structures, but fail to provide any information on how the state’s non-proliferation controls function in practice; (v) contain only references to international WMD treaty regimes as proof of adherence to the resolution without indicating any domestic legal and/or enforcement measures. In other words, rather than demonstrating compliance, the submission of a national report may well demonstrate the state’s failure to implement 1540’s substantive requirements.

The 1540 Committee does not conduct critical analysis of the data included in the national reports, nor does it routinely check the veracity of the information.<sup>64</sup> There are no set implementation indicators that would let the Committee assess how vigorously each country implements its 1540-related measures in practice.<sup>65</sup> In other words, the 1540 Expert records the *presence or absence* of relevant controls reported by states, but does not assess *how well* these domestic controls satisfy specific obligations or *how well* the state is implementing or enforcing the measures.<sup>66</sup> For example, when a country lists a potentially outdated law from,

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61. See Program of Work of the S.C. Committee established pursuant to S.C. Res. 1540 (2004) (Apr. 1, 2005 – June 30, 2005), [http://www.un.org/en/sc/1540/documents/pow\\_22\\_apr\\_2005\\_e.pdf](http://www.un.org/en/sc/1540/documents/pow_22_apr_2005_e.pdf); U.S. INST. OF PEACE, AMERICAN INTERESTS AND UN REFORM 67 (2005), [https://www.usip.org/sites/default/files/file/usip\\_un\\_report.pdf](https://www.usip.org/sites/default/files/file/usip_un_report.pdf).

62. One 1540 Committee member strongly criticized the utility of matrices, arguing that they are simply “a bunch of Excel documents” that are not presented in a user-friendly way and are not at all helpful to understand the status of implementation in a given country. Interview with 1540 Committee Member #5, in N.Y.C., N.Y. (May 2, 2014).

63. Interview with U.N. Official #1, in N.Y.C., N.Y. (Nov. 15, 2013).

64. *Id.*

65. Skype Interview with Former 1540 Expert #1 (Apr. 18, 2014).

66. *Id.*



say, 1983 as a measure to criminalize WMD trafficking, the 1540 Experts do not question the effectiveness of the domestic measure. The evaluating 1540 Expert mainly catalogs the measure as an existing control that aligns with the requirement set by the Resolution. Moreover, if the report raises questions, the Experts are constrained in their ability to consult additional sources of information. Beyond the data directly provided by member states, the 1540 Experts can supplement the country matrix by consulting *only* publicly available websites of governments, international bodies, and regional organizations in order to identify Resolution 1540 legislation and other measures.<sup>67</sup> The 1540 Experts are not supposed to rely on civil society, academic, or other secondary sources.<sup>68</sup>

Despite the shortcomings as regards to the content and completeness of national reports, for the past twelve years, often a mere submission of a national implementation report has served as the key indicator upon which the Committee and its staff have evaluated country performance. Even after securing a high number of country reports, the Committee often continues to put its emphasis on receiving additional information from already reporting states.<sup>69</sup>

#### *B. Close Analysis of National Report Shows the Policy Limitations of the 1540 Regime*

Countries' self-reporting and the lack of assessment of those reports highlight the policy limitations of the 1540 regime. Some country reports consisted of nothing more than a note to the Committee, certifying that "there [are] no nuclear materials in [our] borders."<sup>70</sup> Many of the first national reports did not contain enough information to clearly demonstrate to the 1540 Committee that the country in question had any specific laws or regulations to prevent non-state-actor WMD proliferation. For example, the Albanian national report was only five pages long and contained a generic list of the country's export-import control laws and its membership to multilateral arms control treaties and other non-proliferation instruments.<sup>71</sup> Similarly, Afghanistan, Bangladesh, and Qatar each submitted two-page national reports;<sup>72</sup> Egypt submitted a five-page

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67. The Program of Work of the Security Council Committee Established Pursuant to Resolution 1540 (2004) (Oct. 1, 2006 - Sept. 30, 2007), [http://www.un.org/en/sc/1540/documents/pow\\_01\\_oct\\_2006\\_e.pdf](http://www.un.org/en/sc/1540/documents/pow_01_oct_2006_e.pdf).

68. Interview with 1540 Expert # 5, in N.Y.C., N.Y. (Oct. 28, 2013); Interview with 1540 Expert #9, in N.Y.C., N.Y. (Apr. 30, 2014); *see also* Daniel Salisbury, *UNSCR 1540 Implementation: Challenges Past and Present*, in PREVENTING THE PROLIFERATION OF WMDs: MEASURING SUCCESS OF UN SECURITY COUNCIL RESOLUTION 1540, *supra* note 22, at 87. Relying on the data from 1540 matrices, Daniel Salisbury documents both conceptual and practical challenges of 1540 implementation.

69. Interview with Senior Civil Society Representative #1, in N.Y.C., N.Y. (May 16, 2014).

70. Discussion with Former Senior Advisor to U.N. Secretary-General #1, in Stanford, California (May 15, 2014).

71. Republic of Albania Implementation Rep. to the Security Council Comm. Established Pursuant to Resolution 1540 (2004), transmitted by Note Verbale Dated 28 October 2004 from the Permanent Mission of the Republic of Albania to the United Nations Addressed to the Chairman of the Comm., U.N. Doc. S/AC.44/2004/(02)/38 (Nov. 4, 2004).

72. Rep. of the Islamic Republic of Afghanistan to the Security Council Comm. Established Pursuant to Resolution 1540 (2004), transmitted by Note Verbale Dated 28 August 2008 from the Permanent

report;<sup>73</sup> and half of Angola's eight-page national report was taken up with the exact text of the resolution.<sup>74</sup> Furthermore, in cases where countries report adoption of 1540 compliant domestic legislation, it is false to assume 1540 is the immediate trigger for such regulatory measures. For example, India has introduced export-import legislation that meets its 1540 obligation, but it was enacted not necessarily in response to 1540, but predominantly as a pre-condition for the India-U.S. Civil Nuclear Cooperation deal. Similarly, the UAE and Malaysia have passed comprehensive export control legislation in 2007 and 2010. Yet, 1540 did not trigger any of these legislative actions as such. These measures were in response to U.S. pressure: first, there was a threat that the United States may classify the UAE as a destination of diversion concern; and, second, the United States might have refused to invite Malaysia to the Nuclear Security Summit in the absence of such legislation.<sup>75</sup>

The lack of assessment of country reports may enable states to patently lie and yet appear to be in good standing with their 1540 commitments. The Syrian case is the most glaring example of this paradox. On November 24, 2004, the permanent mission of the Syrian Arab Republic to the U.N. transmitted its first national implementation report to the 1540 Committee. In this document, the Syrian government welcomed Resolution 1540 as a positive step for maintaining international peace and security. The report stated in black and white that "[t]he Syrian Arab Republic is a State that neither possesses nor intends to acquire weapons of mass destruction." The Syrian government further affirmed its commitment to international instruments on non-proliferation.<sup>76</sup> In the following year, Syria passed a new legislative decree restricting the use and transportation of radioactive materials, and imposing fines for obtaining nuclear or radioactive materials illegally.<sup>77</sup> The follow-on national implementation reports contained identical statements from the Syrian government, reconfirming its commitment to international nonproliferation norms and the absence of any WMD materials. The 2005

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Mission of Afghanistan to the United Nations Addressed to the Comm., U.N. Doc. S/AC.44/2004/(02)/139 (Feb. 13, 2009); Rep. of Bangladesh to the Security Council Comm. Established Pursuant to Resolution 1540 (2004), Note Verbale Dated 27 June 2006 from the Permanent Mission of Bangladesh to the United Nations Addressed to the Chairman, U.N. Doc. S/AC.44/2004/(02)/133 (June 28, 2006).

73. Rep. of Egypt to the Security Council Comm. Established Pursuant to Resolution 1540 (2004), transmitted by Note Verbale Dated 28 October 2004 from the Permanent Mission of Egypt to the United Nations addressed to the Chairman of the Comm., U.N. Doc. S/AC.44/2004/(02)/88 (Dec. 29, 2004).

74. Nat'l Rep. of the Republic of Angola on Measures Taken in Implementation of Security Council Resolution 1540, transmitted by Note Verbale Dated 27 October 2004 from the Permanent Mission of the Republic of Angola to the United Nations Addressed to the Chairman of the Comm., U.N. Doc. S/AC.44/2004/(02)/29 (Nov. 3, 2004).

75. Salisbury, *supra* note 68, at 87.

76. Nat'l Rep. of the Syrian Arab Republic Submitted Pursuant to the Comments of the Security Council Comm. Established Pursuant to Resolution 1540 (2004), transmitted by Note Verbale Dated 24 November 2004 from the Permanent Mission of the Syrian Arab Republic to the United Nations Addressed to the Chairman of the Comm., U.N. Doc. S/AC.44/2004/(02)/70 (Nov. 24, 2004).

77. Legislative Decree No. 64 of 3 August 2005, transmitted by Note Verbale Dated 26 August 2005 from the Permanent Mission of the Syrian Arab Republic to the United Nations addressed to the Chairman of the Comm., U.N. Doc. S/AC.44/2004/(02)/70/Add.1. (Aug. 3, 2005).

Syrian national implementation report went as far as specifying that “[t]he Syrian Arab Republic does not possess any chemical weapons, their means of delivery, or any related materials.”<sup>78</sup>

The timely and multiple reports technically put Syria in good standing with the 1540 regime. However, in 2013 it became apparent that the country, still allegedly compliant with its 1540 obligations, not only possessed a chemical weapons arsenal but repeatedly used it against its civilian population. Although Syria agreed to join the Chemical Weapons Convention (CWC) and dismantle its chemical arsenal, the reality is different.<sup>79</sup> The 2015 U.N. and Organizations for the Prohibition of Chemical Weapons (OPCW) Joint Investigative Mechanism – the international mechanism to identify perpetrators in the use of chemical weapons – confirmed both the Syrian government and IS used chemical weapons in Syria. In its fact-finding report, the Joint Investigative Mechanism concluded the Assad regime was accountable for a number of attacks with chlorine barrel bombs, including the attack on Sarmin, and use of sarin in Khan Sheikhoun in April 2017.<sup>80</sup> In February 2018, the Syrian American Medical Society, a humanitarian group, recorded 197 chemical attacks for which the Assad regime was accountable.<sup>81</sup> In addition, U.N. investigators have found links between North Korea and the Syrian chemical weapons program. A confidential U.N. report has documented North Korea’s attempts to ship materials to the Syrian chemical weapons agency. Such clandestine trade is likely to allow Syria to preserve its chemical arsenal and empower North Korea with necessary funds to maintain its missile and nuclear programs.<sup>82</sup> Despite these findings by sister U.N. agencies, the 1540 Committee has recorded demonstrated progress in the resolution’s implementation by Syria, while the trafficking of WMD materials continues to remain a concern.<sup>83</sup>

The Syrian case highlights that measuring the progress of 1540 implementation by relying on country reporting is misplaced. Syria clearly violated its 1540

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78. U.N. Doc. S/AC.44/2004/(02)/70/Add.3, *supra* note 20, at ¶ 24, 26. The report noted, however, that Syria “possesses chemical materials for peaceful industrial and agricultural use.” (emphasis added).

79. *Syria’s Accession to the Chemical Weapons Convention Enters into Force*, Organization for the Prohibition of Chemical Weapons [OPWC], <https://www.opcw.org/media-centre/news/2013/10/syrias-accession-chemical-weapons-convention-enters-force>.

80. See generally OPCW, *Report of the OPCW Fact-Finding Mission in Syria Regarding an Alleged Incident in Khan Shaykhun, Syrian Arab Republic April 2017*, OPCW Doc. S/1510/2017 (June 29, 2017).

81. Gregory D. Koblenz, *#NoImpunity: Will the Newest International Effort to Stop Chemical Attacks in Syria Succeed?*, WAR ON THE ROCKS (Mar. 2, 2018), <https://warontherocks.com/2018/03/noimpunity-will-newest-international-effort-stop-chemical-attacks-syria-succeed>. As of this writing, reports suggest the most recent chlorine attack took place in Ghouta on February 25, 2018.

82. Harriet Alexander, *North Korea Twice Attempted to Ship Material to Syria’s Chemical Weapons Agency, UN Experts Say*, TELEGRAPH (Aug. 22, 2017), <http://www.telegraph.co.uk/news/2017/08/22/north-korea-accused-un-experts-twice-attempting-ship-material>; Michael Schwartz, *U.N. Links North Korea to Syria’s Chemical Weapons Program*, N.Y. TIMES (Feb. 27, 2018), <https://www.nytimes.com/2018/02/27/world/asia/north-korea-syria-chemical-weapons-sanctions.html>.

83. See Alexander, *supra* note 82; Schwartz, *supra* note 82.

obligations; however, the Committee has never publicly flagged this transgression in anyway. Instead, the Committee counted Syria's multiple reports towards the success of the 1540 regime. I acknowledge that this case may be an extreme example of a state's duplicity in its national reports as well as in its blatant violation of 1540 obligations. Yet, considering the Committee does not have tools to review or otherwise assess the accuracy of national reports, it is unclear how many more "Syrian" type cases exist out there. More generally, this example demonstrates the 1540 regime's surprisingly limited ability to *identify* and *assess* countries' regulatory gaps.

*C. Beyond the National Reports: Evaluating the Substantive Impact of the 1540 Regime's Work*

1. The 1540 Technical Assistance Mechanism is Fragile

Assessing Resolution 1540's utility requires examining not only the Committee's ability to identify regulatory gaps, but also the credibility of its efforts to close those gaps. A state must be able to maintain a certain degree of technical and legal expertise, and financial and human resources to establish and enforce specific measures outlined in Resolution 1540. Recognizing that achievement of 1540's ambitious goal would require adequate domestic capacity, the Security Council pledged to facilitate capacity-building assistance for states lacking the necessary domestic resources.<sup>84</sup> That promise remains largely unfulfilled. Many 1540 stakeholders have described the assistance mechanism as "very fragile," "dysfunctional," "a challenge," "without benefits," "politicized," and "not working."<sup>85</sup>

The importance of filling the capacity gap cannot be overstated, considering the original mission of the Resolution – namely, to close gaps in nonproliferation treaties and prevent terrorists from obtaining the world's most dangerous weapons. As discussed above, the high rate of reporting does not mean that comprehensive implementation of Resolution 1540 obligations has been achieved. Thus, a major component of the 1540 Committee's ability to mitigate the WMD proliferation threat is its capacity to close vulnerabilities in states' regulatory and enforcement infrastructure via the assistance mechanism. In this regard, the 1540 regime has so far made limited contribution.<sup>86</sup>

The procedure through which the 1540 Committee facilitates capacity building resembles that of a typical post office – receiving letters and directing them to the addressees. The assistance request should originate from a governmental agency

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84. See S.C. Res. 1540, *supra* note 22, ¶ 7; Interview with U.N. Official #1, in N.Y.C., N.Y. (Nov. 15, 2013). The three subsequent Resolutions that extended the 1540 Committee mandate have continued to call for improving the assistance mechanism. Similarly, 1540 comprehensive reviews, Programs of Work and annual reviews have contained similar language of calling for improving the technical assistance mechanism.

85. Aggregated interview data with a number of 1540 actors.

86. Dana Perkins, *Op-Ed: 1540 Through the Fog of War*, 1540 COMPASS, no. 6 (Univ. of Ga. Ctr. for Int'l Trade & Sec.), 2016, at 3, 4.

(for example, the Ministry of Foreign Affairs) and follow the template available on the Committee's website.<sup>87</sup> After receiving a request, the 1540 Committee Chair will issue a note and distribute the request to the Committee members, UNODA, and the 1540 Experts. Meanwhile, the Chair will also acknowledge the receipt of the request by sending a note to the requesting party. Within five working days following the acknowledgment letter, the Chair sends a *note verbale* to potential assistance providers. While the official document on the interim working procedures for processing assistance requests requires the Chair to send a follow-up letter to all requestors after one *year* from the date of the request, traditionally there has not been any active follow-up to ascertain whether the provider has provided adequate assistance or not.

The 1540 Committee's assistance mechanism lacks the resources needed to live up to its mandate. The 1540 Committee itself does not have a dedicated technical assistance fund to provide direct assistance to countries. There are resources available in the U.N. Voluntary Trust Fund for Global and Regional Disarmament Activities, yet, those funds are donor-controlled money and the UNODA has largely managed these funds to support outreach activities.<sup>88</sup> The Committee plays a match-making role and forwards the assistance requests to the potential providers. In doing so, the Committee has no ability to compel or influence potential assistance providers to action.<sup>89</sup> Even when countries are seeking help with drafting or analysis of legislation, the 1540 Experts do not possess sufficient knowledge and expertise about the requesting state's domestic legal system to be able to make concrete proposals.

According to the data made available by the 1540 Experts, at the time of this writing, at least fifty-five states and two regional organizations have submitted assistance requests since 2004. Out of all these requests, sixteen came from African states, twenty-two from states in the Asia-Pacific region, six from Eastern Europe, and eleven from Latin America and the Caribbean. In general terms, the Asia-Pacific and Eastern European countries have sought assistance primarily on export and border control, as well as for training and equipment. Countries from Latin America mostly focused on training and legislative assistance. African country requests were of a general nature targeting all aspects of the Resolution.<sup>90</sup> The 1540 Committee lists *forty-seven* states and *sixteen* international and regional organizations as registered assistance providers. Despite these numbers, both direct interview and secondary data confirm that the Committee has not been

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87. Interview with 1540 Expert #8, in N.Y.C., N.Y. (Nov. 20, 2013); 1540 Comm., *Interim Working Procedures for Processing Assistance Requests*, U.N. Doc. Note 61/Add. 3, at 1 (Mar. 25, 2015).

88. 1540 Comm., *2016 Comprehensive Review: Background Paper for the Formal Open Consultation by the 1540 Committee*, at 8 (2016), <http://www.un.org/en/sc/1540/documents/CR-June-Consultation-Background-Paper.pdf>.

89. Interview with 1540 Expert #9 in N.Y.C., N.Y. (Apr. 30, 2016).

90. 2016 Comprehensive Review, *supra* note 88, at 7.

successful in its matchmaking role.<sup>91</sup> At the time of this writing, only eight of the sixteen international organizations have officially responded to the specific assistance requests. Only nine out of forty-seven states have responded to assistance requests. Moreover, these responses were modest, covering workshops, seminars, and trainings. There are very few examples of responses that addressed the specific aspects of the request and in which the assistance has actually been provided. These cases usually touch very small countries, like Grenada, Trinidad and Tobago.<sup>92</sup> The 1540 Committee has not channeled a single instance of hard security assistance (such as, for example, assisting radiation detection efforts in ports like Panama or in China that handle massive amount of container traffic).<sup>93</sup>

Conflicting perceptions exist about the role of the assistance mechanism and the type of activities that fall under its purview. Many on the receiving side of the assistance (particularly countries in the Global South) expect more assistance in terms of financial resources and technology transfers, whereas the United States, United Kingdom, France, China, and Russia do not necessarily share this view.<sup>94</sup> It took the Committee approximately twelve years before it organized its first Regional Assistance Conference in April 2016. The conference brought together twelve African states and arranged for bilateral meetings with assistance providers. At the time of this writing, there was no publicly available data on the actual assistance matches that resulted from this conference.<sup>95</sup> In general, many 1540 actors, especially those among U.N. member states, view the Committee's limited ability to identify and close proliferation gaps via technical assistance as the biggest strategic challenge facing the 1540 mechanism.<sup>96</sup> In recent years, the Committee has started to recognize the need to improve its assistance matching strategies and to play a more proactive role in channeling assistance requests to providers.

To conclude, the 1540 Committee has limited ability to effectively *manage* the implementation of the resolution. In its current setup the 1540 Committee does not have the ability to identify the weakest links in the proliferation chain because it does not assess the national reports. Not only does the Committee have limited knowledge about country performance and where to locate implementation problems, it has very limited means to plug the gaps by facilitating technical assistance.

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91. See *id.* at 7-8; Interview with U.N. Official #1, in N.Y.C., N.Y. (Nov. 15, 2013); Interview with 1540 Expert #8, in N.Y.C., N.Y. (Nov. 20, 2013); Interview with Senior U.N. Official #4, in N.Y.C., N.Y. (Oct. 24, 2013); Interview with 1540 Expert #6, in N.Y.C., N.Y. (Oct. 30, 2013).

92. Interview with 1540 Committee Member #5, in N.Y.C., N.Y. (May 2, 2014). Grenada, Togo, Trinidad and Tobago have received legislative drafting assistance.

93. While the pending assistance requests are not publicly available, interviewees suggested that the Committee received "hard security assistance" requests but was unable to match these with assistance providers (as of 2016). Interview with U.N. Official #1, in N.Y.C., N.Y. (Nov. 15, 2013).

94. Interview with 1540 Committee Member #5, in N.Y.C., N.Y. (May 2, 2014).

95. 2016 Comprehensive Review, *supra* note 88, at 8.

96. See Former 1540 Expert #1, *supra* note 65.

## 2. 1540's Institutional Adaptation: Direct Engagement Strategies with Countries

In 2011 the Security Council prolonged the Committee's life for an additional ten years through 2021. This extended mandate provided a firmer footing for the 1540 regime to engage in a more direct interaction with member states to facilitate 1540 implementation beyond country reporting. The U.N. facilitated three key institutional adjustment strategies in this regard: assisting member states to draft Voluntary National Implementation Action Plans [NAP], conducting country visits, and facilitating a peer-review process. While all three strategies are explicitly focused on a process of identifying and plugging gaps in a country's counter-proliferation framework, their overall impact on WMD proliferation is likely to be low.

NAP is a cooperative arrangement that allows an interested state to develop a plan that outlines the country's 1540 priorities and its implementation strategy. As of this writing, the Committee has received NAP from thirty different countries.<sup>97</sup> The process gives the requesting country complete discretion regarding the purpose, the format, the style, the content, and the implementation timeline of its own NAP. The NAP may take a narrative or table format (or a combination of both); it can be subject-specific (i.e., focus on certain parts of the Resolution) or strategic and comprehensive.<sup>98</sup> The 1540 Committee Experts have identified six key objectives of a successful NAP process, namely: conducting gap analysis, generally based on joint review of the country's 1540 matrix; setting priorities for addressing the vulnerabilities identified by the analysis; ascertaining the source of the gaps and related issues; identifying potential solution strategies and selecting the best fit; putting the solution into action; and evaluating the results and adjusting the implementation program accordingly.

A country visit is a mission to a country by the 1540 Committee and Experts to review domestic 1540 implementation; as of this writing, the 1540 Committee has conducted twenty-six country visits.<sup>99</sup> 1540 country visits take place only at the invitation of the host state. Each country visit consists of three phases: high-

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97. S.C. Res. 1810, *supra* note 31, ¶ 4. As of this writing, the following countries have submitted NAP: U.S., Argentina, Canada, France, Serbia, Belarus, Kyrgyzstan, United Kingdom, the former Yugoslav Republic of Macedonia, Niger, Croatia, Columbia, Montenegro, Mexico, Armenia, Grenada, Spain, Bosnia and Herzegovina, Togo, Senegal, Dominican Republic, Malawi, Ghana, Uzbekistan, Lesotho, Belize, Peru, Chile, Tajikistan, and Panama.

98. Chair of the 1540 Comm., *National Implementation Action Plans: Workshop on the Implementation of United Nations Security Council Resolution 1540 (2004)*, at 4 (Dec. 10-11, 2013), <http://www.un.org/ar/sc/1540/documents/expert-presentation-2013-86-Addis%20Ababa-3.pdf>.

99. Dana Perkins (1540 Comm. Expert), *UN Security Council Resolution 1540 (2004): National Action Plans and Country Visits as Tools for Assistance and Capacity – Building*, at 7 (Nov. 21-22, 2012), <http://www.un.org/ar/sc/1540/documents/expert-presentation-2012-42-pretoria-2.pdf>. At the time of this writing, the 1540 Committee conducted country visits to the United States, Republic of Albania, Republic of Madagascar, Republic of the Congo, Republic of Trinidad and Tobago, Grenada, Burkina Faso, Republic of Korea, Niger, Bangladesh, Malawi, China, United Kingdom, Zambia, Malawi, Jordan, Togo, Senegal, Antigua and Barbuda, Ghana, Lesotho, Guatemala, El Salvador, Mauritius, Timor-Leste, and Guatemala.

level meetings, working discussions, and on-site visits.<sup>100</sup> High-level meetings with senior officials of the host country provide an opportunity to shore up political support for 1540's implementation and outline key aspects for future work. The working sessions are the backbone of country visits. During this phase, host country officials present and discuss their work on Resolution 1540 implementation and representatives of the 1540 Committee introduce the U.N.'s work and explain 1540 obligations. Similar to the NAP drafting process, during working sessions the 1540 Experts and domestic stakeholders review the matrix and discuss existing gaps in implementation along with measures to be taken to close these gaps.<sup>101</sup> The matrix is a starting point for the working discussion, but the actual content of the discussions is not standardized. There is no one-size-fits-all strategy, and the nature of a country visit reflects the local conditions.<sup>102</sup> During the on-site visits the Committee members and the Experts visit facilities where states enforce the provisions of the resolution. Such facilities may include ports, border posts, hospitals, laboratories, or research institutes.<sup>103</sup>

The 1540 peer review is an arrangement between two or three countries to examine each other's practical implementation measures, to compare national procedures and experiences, as well as to identify and share best practices.<sup>104</sup> Thus far, there have been three peer-reviews: Croatia-Poland;<sup>105</sup> Chile-Columbia; and Belarus-Kyrgyzstan-Tajikistan. The UNODA has traditionally convened the peer-review process, though the participating countries lead the assessment and exchange information as equals. In general, the interested countries should be geographically, economically, and politically close to each other.<sup>106</sup> The process commonly consists of multiple legs – at least one country visit to each participating state.<sup>107</sup> It starts with a preparatory meeting between the UNODA and participating peer-review countries. Then each country hosts a visit, when stakeholders from similar agencies of all sides participate. The host country discloses its

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100. Enrique Ochoa, *1540 Committee State Visits Provide Tailored Engagement*, 1540 COMPASS no. 5 (Univ. of Ga. Ctr. for Int'l Trade & Sec.), 2014, at 35, 37.

101. *Id.*

102. Interview with 1540 Expert #9, in N.Y.C., N.Y. (Apr. 30, 2014).

103. Ochoa, *supra* note 100.

104. U.N. Office for Disarmament Aff., *UNODA's Activities in Support of National and International Efforts to Implement UNSC Resolution 1540 (2004)*, at 2 (Mar. 20, 2014), <http://scm.oas.org/pdfs/2014/CP32458T.pdf>.

105. *Joint Report of Croatia and Poland on the Bilateral Peer Review of Implementation of the UN Security Council Resolution 1540 (2004)*, <http://www.un.org/en/sc/1540/documents/Croatia-Poland%20Letter%20re%20effective%20practices%202014.pdf>. For example, the Polish segment of the peer-review process had an on-site visit to the Warsaw Chopin Airport. Polish authorities demonstrated their capacity to handle a suspicious shipment of a possible dirty bomb, from early detection to removal from the airport. The exercise underlined the necessity for operational inter-agency coordination and cooperation for handling such suspicious items. Additionally, the delegates participated in a tabletop exercise that offered an opportunity for both sides to compare each other's responses to a proliferation scenario.

106. Interview with U.N. Official #1, in N.Y.C., N.Y. (Nov. 15, 2013).

107. Joint Report of Croatia and Poland on the Bilateral Peer Review of Implementation of the UN Security Council Resolution 1540 (2004), *supra* note 105, at 2-3.



respective national implementation measures and conducts comparisons with other participating peer-review countries. Similar to 1540 country visits, during a peer-review the host country can organize on-site visits (such as to border crossing points, sea-ports, and nuclear facilities).<sup>108</sup>

All three strategies are structured as voluntary and cooperative processes, entirely subject to the discretion of the participating states, and focused on the state's particular needs. Thus, each process is initiated by the state(s) and limited to the issues and agenda set by the states. Representatives of the 1540 Committee, Experts, or UNODA participate as advisors rather than independent investigators. Such direct engagement is an opportunity to focus on country-specific 1540 implementation issues. Moreover, these strategies invite states to take a more comprehensive and inclusive approach to counter-proliferation policies. The biggest contribution of 1540's direct engagement strategies is the facilitation of an inter-agency dialogue among various agencies – both within and between countries. The country engagement process presupposes the involvement of various stakeholders in an intra-governmental review process.<sup>109</sup> Such a review process through an inter-agency dialogue could uncover cross-sectorial vulnerabilities. Additionally, the NAP and other direct engagement strategies create a timeline for implementing priority objectives and designates individuals responsible for the process. The Resolution compels cooperation between agencies when different stakeholders had often not interacted or worked in a coordinated fashion before.<sup>110</sup>

While country engagement strategies demonstrate the Committee's more serious attempt to plug proliferation gaps, the overall effect of these strategies, and country visits in particular, are likely minimal. First, some of the countries that 1540 Experts visit are adversely selected – countries are either already compliant with 1540 obligations due to their existing strong domestic infrastructure (for example, the United States, China, France, Korea, United Kingdom) or countries are not of a big proliferation concern. Second, 1540 Experts do not conduct any verification or assessment in the nuclear or other facilities during their visits. Third, country visits often target non-reporting states to solicit first reports or to collect additional information from already reporting states. This new information is then reflected in the Committees' final reports to demonstrate the progress of its work. It is yet unclear what kind of specific operational actions direct engagement strategies trigger beyond facilitating inter-agency dialogues.

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108. *Id.*

109. Interview with 1540 Expert #8, in N.Y.C., N.Y. (Nov. 20, 2013).

110. Interview with Senior Gov't Official from S. Afr. #1, in N.Y.C., N.Y. (Oct. 16, 2013); Interview with 1540 Expert #3, in N.Y.C., N.Y. (Oct. 23, 2013); Interview with 1540 Expert #2, in N.Y.C., N.Y. (Oct. 7, 2013); Interview with 1540 Committee Member #4, in N.Y.C., N.Y. (Apr. 30, 2014).

## IV. EXPLAINING THE SHY MANDATE OF THE 1540 REGIME

*“There was a big legitimacy problem with the resolution and in its inception, therefore a test will come how the Security Council manages its implementation.”*<sup>111</sup>

## A. 1540’s Legitimacy Deficit When “West Protects West at The Expense of The Rest”

With Resolution 1540, the Security Council created an international institution – the 1540 regime<sup>112</sup> – that posed a unique implementation problem. From its very inception, the 1540 regime lacked legitimacy and faced potential disempowerment, as it was created through a *process and authority* deemed not rightful by many of its stakeholders. With its extensive scope and legally binding nature, 1540 possesses characteristics similar to traditional arms-control treaties, such as NPT, with one big exception – it is not a product of collective action. Rather than follow the traditional treaty-making precedent, the Security Council’s five permanent members (P5) spent months in negotiations deliberating responses to the threat of non-state-actor proliferation – a new security dilemma that traditional arms control treaty regimes had failed to address adequately before. Under American leadership, the P5 privately drew up a draft resolution text and only then handed this draft to the nonpermanent members of the Security Council.<sup>113</sup> While several members of the Non-Aligned Movement [NAM]<sup>114</sup> and various non-governmental organizations had pushed for involvement, and a few consultations were eventually held, the P5 carefully controlled such external input to

111. Interview with Senior Gov’t Official from S. Afr. #1, in N.Y.C., N.Y. (Oct. 16, 2013).

112. Throughout this paper I regularly use the term “1540 regime.” I construct my definition of this term borrowing from Krasner’s formulation of international regimes, defined as rules, norms, principles, and procedures that focus expectations regarding international behavior. Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in INTERNATIONAL REGIMES 1, 1 (Stephen D. Krasner ed. 1983). I understand “1540 regime” to also include the actors in the system, which are charged with the duties necessary to implement Resolution 1540. These actors include the UNODA, the 1540 Committee, and the 1540 Group of Experts.

113. Peter Van Ham & Olivia Bosch, Global Non China agreed to support the Resolution only after the interdiction clause was dropped. *-Proliferation and Counter-Terrorism: The Role of Resolution 1540 and Its Implications*, in GLOBAL NON-PROLIFERATION AND COUNTER-TERRORISM: THE IMPACT OF UNSCR 1540 3, 6-7 (Peter Van Ham & Olivia Bosch eds., 2007). The earlier drafts of the Resolution contained no references to disarmament obligations, and the draft read as a PSI-type initiative, requiring states to interdict shipments that would lead to WMD proliferation. See Datan, *supra* note 34. For a more detailed account of the history of the 1540 Resolution, see William H. Toby, *A History of United Nations Security Council Resolution 1540*, in PREVENTING THE PROLIFERATION OF WMDs: MEASURING SUCCESS OF UN SECURITY COUNCIL RESOLUTION 1540, *supra* note 22, at 13-32; Richard T. Cupitt, *Capstone and Mortar: Notes on the Creation of UNSCR 1540*, 1540 COMPASS no. 6 (Univ. of Ga. Ctr. for Int’l Trade & Sec.), 2014, at 5, 6.

114. See Nuclear Threat Initiative, NON-ALIGNED MOVEMENT (NAM), <http://www.nti.org/learn/treaties-and-regimes/non-aligned-movement-nam/> (last updated May 31, 2018); see generally PETER WILLETTS, THE NON-ALIGNED MOVEMENT: THE ORIGINS OF A THIRD WORLD ALLIANCE (1978); Sally Morphet, *Multilateralism and the Non-Aligned Movement: What is the Global South Doing and Where is it Going?*, 10 GLOBAL GOVERNANCE 517 (2004) (review essay).

minimize its impact on the Resolution.<sup>115</sup> Acting under Chapter VII, the Security Council passed Resolution 1540 on April 28, 2004 with only fifteen votes. The resolution required all 193 U.N. members to enact and enforce domestic measures to control WMD materials without their explicit consent.<sup>116</sup>

In the run-up to and after the Resolution's passage, the 1540 regime faced difficulty in soliciting norm-compliant behavior because many states questioned 1540's legitimacy. There were two sets of legitimacy claims against Resolution 1540 – procedural and substantive. These debates reflect the dramatic divide in interests and threat perception between North and South.

From the procedural concerns, first related to the legality of the Security Council's action. Some states, especially those in the Global South, believed the Council overstepped its legal mandate by passing Resolution 1540 without all states' *special* [explicit] consent.<sup>117</sup> According to this argument, because 1540 addressed a generic problem of non-state-actor WMD proliferation, which did not constitute a *specific* threat to international peace and security, it should fall outside of the Council's traditional mandate under Chapter VII. The implicit [general] consent given under the U.N. Charter did not grant the Council an authority to act as a global legislator and create universal rules.<sup>118</sup> This logic suggests that the Council's actions contravened the U.N. Charter and thus lacked legitimacy.<sup>119</sup> In this context, Pakistan declared:

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115. Interview with Former 1540 Expert #4 in N.Y.C., N.Y. (May 2, 2014).

116. It is well established among international lawyers that international law is a consent-based system. In other words, states follow their international legal obligations because they have consented to do so. *See, e.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. I, ch.1, intro., at 18 (AM. LAW. INST. 1987) ("Modern international law is rooted in acceptance by states which constitute the system."); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 4 (6th ed. 2003); LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 28 (1995); Laurence R. Helfer, *Nonconsensual International Lawmaking*, 2008 U. ILL. L. REV. 71, 72; Duncan B. Hollis, *Why Consent Still Matters - Non-State Actors, Treaties, and the Changing Sources of International Law*, 23 BERKELEY J. INT'L L. 137, 140 (2005). *But see* Andrew T. Guzman, *Against Consent*, 52 VA. J. INT'L L. 747 (2012), for a critique of the conventional view of consent in international law.

117. Developing countries have voiced similar concerns about international environmental regimes. For example, Malaysia and other countries questioned the legitimacy of the Antarctic Treaty System in relation to the parties who did not consent to it. *See, e.g.*, GOVERNING THE ANTARCTIC: THE EFFECTIVENESS AND LEGITIMACY OF THE ANTARCTIC TREATY SYSTEM (Olav Schram & Davor Vidas eds., 1996).

118. Eric Rosand, *The Security Council as 'Global Legislator': Ultra Vires or Ultra Innovative?*, 28 FORDHAM INTL L. J. 542, 546 (2005).

119. Starting from 2001 the Council had entered into a new legislative phase. In the previous years (1945 until 2001) the Council's actions shared a number of common characteristics not present in 1540. For example, past Chapter VII decisions (i) responded to a concrete political or humanitarian crisis, hence the Council's approach had been reactive as opposed to being proactive; (ii) enforced existing international law; (iii) addressed specific countries; (iv) contained explicit or implicit time limits; and (v) reflected the Council's actions on an *ad hoc* basis within the context of a specific threat, with no attempt to address prospective similar threats through that present normative framework. In fact, the Council's first attempt utilizing Chapter VII to impose obligations of a legislative nature was a resolution on Counter-Terrorism, S.C. Res. 1373. Resolution 1373 was less controversial, however, as it was passed 17 days after the 9/11 terrorist attacks and in many respects, it mirrored the provisions of the 1999 Convention for the Suppression of the Financing of Terrorism without defining key notions, such

[t]here are grave implications arising from the effort by the Security Council to impose obligations on states which their governments and sovereign legislators have not freely accepted, especially when some of those obligations infringe in matters related to national security and the right to self-defense. It strongly adheres to the position that the Security Council, despite its wide authority and responsibilities, is not empowered to unilaterally amend or abrogate international treaties and agreements freely entered into by sovereign States.<sup>120</sup>

Other delegates from Algeria, Nepal, Indonesia, Pakistan, South Africa, and India have echoed similar statements.

The P5, and the United States in particular, had a different view, according to which the basis for the Council's jurisdiction over WMD proliferation was U.N. member states' original agreement to let the Council act on issues of international peace and security on their behalf. The Security Council derived its legitimacy from the "original consent" given through the U.N. Charter,<sup>121</sup> and, therefore, states were bound by its resolutions.

Another and related procedural concern was the dangerous precedent 1540 could create for conventional lawmaking. A number of states feared that 1540 could pave the way for the Council to serve as a global legislature in the future too.<sup>122</sup> For example, the Japanese delegate observed that "[i]n adopting a binding Security Council resolution under Chapter VII of the United Nations Charter, the Security Council assumes a lawmaking function. The Security Council should, therefore, be cautious not to undermine the stability of the international legal framework."<sup>123</sup> The Indian delegate used stronger language to express its misgivings about using the Security Council to bypass the process of creating international consensus. India announced:

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as "terrorists," "terrorism," "international terrorism," or "terrorist acts." Happold, *supra* note 5 at 593, 596-598; see also Joyner, *supra* note 8, at 510-511. Examples of the Council enforcing existing international law include, e.g. the Council reinforcing the principles of the U.N. Charter in the case of the 1990 Iraq invasion of Kuwait, or similarly reinforcing the 1948 Genocide Convention in the case of Rwanda. See ABI-SAAB, *THE CHANGING CONSTITUTION OF THE UNITED NATIONS* (Hazel Fox ed., 1997); *THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW* (Michael Byers ed., 2000). On the point related to the Council's actions addressing specific countries, Georg Nolte argues, "Security Council law must remain preliminary and situation specific." Georg Nolte, *The Limits of the Security Council's Powers and Its Functions in the International Legal Systems: Some Reflections*, in 16 *THE ROLE OF LAW IN INTERNATIONAL POLITICS* (Michael Byers ed., Oxford University Press, 2000). For a critique on the Security Council's ability to enforce nuclear disarmament and human rights, see David A. Koplow, *You're Gonna Need a Bigger Boat: Alternatives to the UN Security Council for Enforcing Nuclear Disarmament and Human Rights*, 29 *HARV. HUM. RTS. J.* 135-201 (2016).

120. U.N. DOC. S/PV.4950, *supra* note 3, at 15.

121. U.N. Charter art. 26.

122. See generally John J. Mearsheimer, *The False Promise of International Institutions*, 19 *INT'L SECURITY* 5 (1994).

123. U.N. DOC. S/PV.4950, *supra* note 3, at 28.

India cannot accept any obligations arising from treaties that India has not signed or ratified. International treaties or arrangements should be multilaterally negotiated not imposed. They should be based on the balance of obligations to ensure universal adherence – the true test of legitimacy and credibility. It will not accept externally prescribed norms, whatever their source, on matters within the jurisdiction of its parliament, including national legislation, regulations or arrangements, which are not consistent with India's constitutional provisions and are contrary to India's national interests or infringe on its sovereignty.<sup>124</sup>

The Brazilian and South African representatives used identical language to express their disagreement with UNSCR 1540's passage. Summarizing their concerns surrounding legislative overreaching, the Iranian delegation stated that the Charter "[d]oes not confer authority on the Council to act as a global legislature imposing obligations on States without their participation in the process. The draft resolution is a clear manifestation of the Council's departure from its Charter-based mandate."<sup>125</sup>

Typically, lawmaking on general problems is addressed through multilateral treaties. Unlike a binding Security Council resolution adopted pursuant to Chapter VII of the U.N. Charter, however, a multilateral treaty usually takes many years to negotiate, involves many compromises and trade-offs, and only binds those states that consent to become parties to the treaty. It is widely accepted that consent serves as a foundational basis of international law obligations.<sup>126</sup> Resolution 1540 is a rare instrument in which the Council sought to adopt international legal rules, binding on all states, to provide a global solution to a regulatory challenge of general scope. The adoption of UNSCR 1540 avoided the delays and limitations of a multilateral process, but many states disapproved of this fast-track practice and felt uncomfortable with the Council assuming power to prescribe global legislation and encroach on states' internal

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124. U.N. DOC. S/PV.4950, *supra* note 3, at 23.

125. U.N. DOC. S/PV.4950, *supra* note 3, at 32.

126. See EMER DE VATTEL, *THE LAW OF NATIONS* 77 (Bela Kapossy & Richard Whatmore eds., Liberty Fund 2008) (1797). Bynkershoek, a leading proponent of the theory of consent, argues that the basis of obligation in international law is explicit or implied consent. States have no obligations other than what they expressly or impliedly agreed to undertake. In the *Lotus* case, the Permanent Court of International Justice subscribed to this consensual view of international law. The Court held that "[i]nternational law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law." *S.S. Lotus (Fr. v. Turk.)*, Judgment, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7) (emphasis added). A leading international law scholar Michael Glennon has further explained the volitional nature of international law. He wrote, "The international legal system cannot compel a state to subscribe to a rule unless it consents to do so. It cannot adjudicate the application of a rule to a state unless the state has accepted the jurisdiction of the tribunal to apply the rule. It cannot enforce a rule against a state unless the state has consented to the rule's enforcement." MICHAEL J. GLENNON, *THE FOG OF LAW: PRAGMATISM, SECURITY, AND INTERNATIONAL LAW* 135 (2010).

affairs without their explicit consent.<sup>127</sup> This essentially meant that the Council, particularly the P5 who enjoy veto power, could decide the rules for the world on matters of strategic importance to itself. Moreover, the Resolution's imprecise obligations left many countries skeptical about how the Council would enforce those rules and address matters of non-compliance.<sup>128</sup> Such uncertainty was particularly worrisome in light of the aggressive political and strategic context surrounding the Resolution's adoption. The United States had claimed a right to preventive strike against those who supported WMD proliferation and justified the invasion of Iraq in part as a response to Iraq's failure to comply with its international nonproliferation obligations. There was a concern that 1540 might provide a legal basis for the United States to impose economic sanctions for alleged 1540 noncompliance or even be used to justify military intervention.

The second set of legitimacy claims put forward by a number of NAM states raised two substantive points. First, there was a frustration over what NAM countries perceived to be a lack of balance between nonproliferation and disarmament in Resolution 1540.<sup>129</sup> Pakistan, India, Iran, South Africa, Niger, Mexico, Namibia, and others publicly opposed devoting efforts to nonproliferation at the expense of disarmament. NAM members contended that, as long as there was not a single resolution adopted on disarmament, it would be unacceptable for the international community to add new nonproliferation obligations. Some officials questioned the legitimacy of the Resolution by pointing out the lack of progress by the Nuclear Weapon States on their disarmament obligations as required by Article VI of the NPT.<sup>130</sup> For example, South Africa declared:

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127. For example, India, Cuba, Mexico, Namibia, Algeria, Nepal, Indonesia, South Africa, and Pakistan expressed reservations. *See* U.N. DOC. S/PV.4950, *supra* note 3; U.N. DOC. A/58/PV.30, *supra* note 3. For India's declarations, *see* U.N. DOC. S/PV.4950, *supra* note 3; *see also* U.N. DOC. S/PV.4772, *supra* note 3.

128. Interview with 1540 Expert #2, in N.Y.C., N.Y. (Oct. 7, 2013).

129. Interview with Former 1540 Expert #4, in N.Y.C., N.Y. (May 2, 2014); Interview with 1540 Expert #5, in N.Y.C., N.Y. (Oct. 28, 2013).

130. Treaty on the Non-Proliferation of Nuclear Weapons, art. VI, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 (entered into force Mar. 5, 1970), states in full: "Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a Treaty on general and complete disarmament under strict and effective international control." Some commentators have criticized such an approach to UNSCR 1540. For example, nuclear security expert Elizabeth Turpen has reiterated the importance of adhering to the existing disarmament obligations to sustain international cooperation for a number of nonproliferation objectives. Yet she has argued "that awaiting disarmament by the nuclear-haves prior to moving forward with global adherence to minimal standards in counter proliferation is not an option." *See* Elizabeth Turpen, *UN Security Council Resolution 1540 Part II: The Caribbean States: A Case Study*, STIMSON CTR., <https://www.stimson.org/content/un-security-council-resolution-1540-part-ii-caribbean-states-case-study>. For a good account on linkages between disarmament and nonproliferation, *see* Jeffrey W. Knopf, *Nuclear Disarmament and Nonproliferation: Examining the Linkage Argument*, 37 INT'L SECURITY 37, No. 3, 92, 96 (2013). For discussion on the United States' violation of Article VI, *see* David A. Koplow, *Parsing Good Faith: Has the United States Violated Article VI of the Nuclear Non-Proliferation Treaty?* WIS. L. REV., 301, 303 (1993).

We are concerned, however, that the draft resolution that we have before us only addresses the spread of weapons of mass destruction, even then in an incomplete manner. There is a passing reference to disarmament in spite of the fact that chemical and biological weapons have been prohibited by international law and despite the unequivocal undertaking of the Nuclear Weapon States to eliminate their nuclear arsenals. On the issue of non-proliferation, the resolution only addresses non-State actors while ignoring the threat to international peace and security posed by proliferation by States. If the Council were not to act in a comprehensive manner, there is a danger that loopholes may remain that could be exploited by those who seek financial or political gain, and by those who seek to achieve their objectives through terror.<sup>131</sup>

Second, smaller states were concerned that P5 members were hijacking the international security agenda and pursuing their own parochial interests.<sup>132</sup> In other words, the P5 stood to benefit enormously from the effective implementation of the 1540 regime, but smaller parties stood to lose more than they got out of it. Developing countries perceived non-state-actor WMD proliferation and terrorism as Western problems. Compared to pressing human security challenges and development priorities, non-state-actor WMD proliferation was a very low-priority threat for most countries of the Global South. These countries saw no incentive to divert their scarce domestic resources to address an irrelevant security problem, such as WMD proliferation. In their view, the Resolution was another tool for the Bush Administration to fight the U.S.'s "global war on terror" and advance American national security interests rather than international peace and security. Developing countries viewed the 1540 regime as a manifestation of American hegemonic law.<sup>133</sup> Most importantly, developing countries looked at 1540 as a means of continuing to deny technology to developing countries, to the advantage of the wealthy North. These perceptions ignited the North-South divide, and 1540 was widely perceived as yet another instrument through which "the West is protecting the West at the expense of the rest."<sup>134</sup>

Thus, while the resolution appeared strong on paper, political support for the 1540 regime and, consequently, its effective implementation, was far from certain. To sum, the 1540 Committee had to shape its responsibilities in an

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131. See Ambassador D.S. Kumalo, Ambassador of South Africa to the Sec. Council, Statement on Non-Proliferation of Weapons of Mass Destruction (Apr. 22, 2004), [http://www.southafrica-newyork.net/pmun/speeches/sc\\_nonproliferation.htm](http://www.southafrica-newyork.net/pmun/speeches/sc_nonproliferation.htm).

132. Robert Powell, *Absolute and Relative Gains in International Relations Theory*, 85 AM. POL. SCI. REV. 1303, 1306 (1991).

133. Resolution 1540 was a direct response to threats to American national security. Its policy objective was to deal with what U.S. Secretary of Defense Donald Rumsfeld has popularly described as the "sum of all fears," that is, the nexus between WMD and terrorist networks. 1540 was designed to be another tool in the U.S.'s layered nonproliferation defense strategy. Americans envisioned the 1540 regime to serve as a second line of defense to counter the threats before they reached the homeland. Interview by Sam Donaldson with Donald Rumsfeld, Sec'y of Def., U.S. Dep't of Def. (Sept. 16, 2001), <http://archive.defense.gov/Transcripts/Transcript.aspx?TranscriptID=1886>

134. Interviews with Regional UNODA Officials #7, #8 & #9 in N.Y.C., N.Y. (Oct. – Nov. 2013).

environment in which (i) many states disagreed with the remit and legality of the instrument because they believed the Security Council had overstepped its mandate by creating generic legislative measures; (ii) some states feared that the clauses of the Resolution that reference Chapter VII could open up the possibility of the use of force and sanctions for alleged 1540 non-compliance;<sup>135</sup> (iii) a number of states opposed the lack of balance between nonproliferation and disarmament in the Resolution;<sup>136</sup> and (iv) many small states maintained the Resolution was inapplicable and irrelevant to them due to pressing national priorities and lack of domestic WMD capabilities.<sup>137</sup>

### *B. Cultivating Legitimacy Through Changing Norms of Appropriateness*

To solicit smaller states' support, the 1540 regime cultivated its legitimacy primarily through two institutional choices: changing the norms of appropriate behavior – that is, developing its norms around cooperation and flexibility; and changing the calculus of participation by lowering costs and offering incentives to induce participation by skeptics. These institutional choices of the 1540 regime garnered a greater support for the Resolution. However, lowering the costs and increasing the institution's flexibility to solicit support had a price tag. This adaptation came at the cost of sacrificing 1540's enforcement and monitoring power.

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135. The way in which the international community reacted to Iraq's WMD clandestine networks, and to the subsequent U.S. military operations in Iraq for its alleged WMD program, has colored states' perception of Resolution 1540. See generally MARC WELLER, *IRAQ AND THE USE OF FORCE IN INTERNATIONAL LAW* (2010); Sean D. Murphy (ed.), *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT'L L. 4, 956-962 (2002).

136. See, e.g., Ambassador D.S. Kumalo, *supra* note 131. During subsequent U.N.-level discussions, the South African Government continued to identify certain difficulties with the way in which Resolution 1540 was operationalized. In addition to the conceptual issue of the Council's legislative powers, South Africa underscored two other concerns: a utility concern and value for money. On the issue of utility, South Africa viewed the Resolution as incapable of delivering on its goals, and the country critiqued the Council's decision to extend the Committee's second mandate. In South Africa's judgment, the Resolution did not create an investigative, prosecutorial, or intelligence-sharing capacity between states. Yet A.Q. Khan's case had demonstrated the urgency and importance of such intelligence sharing to effectively counter proliferation networks. In South Africa's opinion, the Resolution had focused predominantly on domestic regulations, but that approach failed to produce operational progress on the ground. Moreover, South Africa believed that the Security Council had set the yardstick for Resolution 1540 implementation too high for developing countries by comparing them against their Western counterparts. In its discussions with P5 representatives, South Africa argued that such an approach "is self-defeating, and that the Resolution browbeats developing countries to pass laws so that the Security Council's 1540 Committee can tick boxes on a matrix." Along those lines, South Africa indicated that most African countries' national reports do not mean much, as they are not comprehensive and primarily note the absence of WMD materials within their borders, and list their participations in relevant multilateral treaties and domestic export-border controlled legal frameworks. South Africa suggested that developing countries must follow a different reporting standard that could be tailored to a country's capabilities. On the value-for-money argument, South Africa anticipated the serious possibility of a backlash from NAM countries. This was because, in their view, the 1540 Committee and the Group of Experts were consuming the U.N.'s regular budget instead of spending those resources on more development work. See *South Africa Criticizes 1540 to UK Expert*, WIKILEAKS (Dec. 19, 2007, 9:05 PM), [https://wikileaks.org/plusd/cables/07USUNNEWYORK1186\\_a.html](https://wikileaks.org/plusd/cables/07USUNNEWYORK1186_a.html).

137. Interview with Former 1540 Expert #5, in N.Y.C., N.Y. (May 7, 2014).



In its current form, 1540 has a limited ability to identify gaps in domestic implementation and enforce 1540 compliance.

*C. Strategic Self-Restraint: 1540 Chose Not to Become A Sanctions Committee*

With a universal mandate backed by Chapter VII enforcement power, the 1540 Committee is organized as a Special Political Mission under the Sanctions and Monitoring cluster.<sup>138</sup> This cluster primarily consists of monitoring teams, panels, and other groups that bear the responsibilities of monitoring the implementation of Security Council resolutions and providing assessments of compliance with these legal regimes – assessments that may lead to punitive measures such as sanctions. Despite both its formal legal mandate, and its organizational design, the 1540 Committee chose not to become a U.N. sanctions regime either in the name of counter-proliferation or counter-terrorism. Instead, from the very beginning, transparency and openness characterized the work of the Committee.<sup>139</sup> Unlike the North Korea or Iran sanctions committees, the 1540 Committee refrains from pursuing any investigative, monitoring, or sanctioning measures. The Committee's choice to serve as a cooperative body was a strategic response to the Resolution's initial legitimacy crisis.

Two key factors informed the Committee's choice to evolve into a cooperative and non-inspection mechanism. First, turning the Committee into a compellence regime seemed unlikely to help the already fragile 1540 regime succeed. In the political climate, when countries criticized the Council for interfering in their sovereignty by acting as a global legislator, the use of punitive measures to enforce 1540 norms would likely generate further opposition. Placing the Committee on a cooperative footing instead could work to overcome the Resolution's legitimacy deficit and encourage states to implement it. Second, since the regime was global in scope, the 1540 Committee would require tremendous financial and human resources to carry out monitoring functions. With the proposed U.N. regular budget of approximately \$2.3 million for WMD-related activities for 2005,<sup>140</sup> and eight 1540 Experts, it seemed vastly unrealistic to conduct serious accounting of WMD materials in every member state. Resources

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138. Special Political Missions are generally divided into three clusters: (i) special envoys, (ii) sanctions panels and monitoring groups, and (iii) field-based missions. "Monitoring teams, groups and panels are composed of technical experts who monitor the implementation of Security Council resolutions and track and report on the sanctions measures imposed by the Council, such as, but not limited to, arms embargoes, asset freezes and travel bans. These teams, groups and panels report to the Security Council through the relevant committee (composed of Security Council members), while the Secretariat provides administrative and substantive support." U.N. Secretary-General, *Overall Policy Matters Pertaining to Special Political Missions*, ¶ 31, U.N. Doc. A/68/223 (July 29, 2013); see also U.N. Secretary-General, *Estimates in Respect of Special Political Missions, Good Offices and Other Political Initiatives Authorized by the General Assembly and/or the Security Council*, ¶ 17, U.N. Doc. A/69/363 (Oct. 17, 2014).

139. 2006 Report to the Security Council, *supra* note 39, at 272008 Report to the Security Council, *supra* note 50, at 28.

140. U.N. General Assembly, 58th Sess., *Programme Budget for the Biennium 2004-2005*, Ch. 2, § 4, U.N. Doc. (Aug. 17, 2004).

aside, it was unclear how to interpret any 1540 non-compliance. The first tangible evidence of 1540 compliance seemed to be the submission of national reports. Yet, everybody inside the 1540 community had difficulty believing that the Council could use coercion in the absence of good reporting.<sup>141</sup> In other words, coercive power seemed impossible without first gaining compliance. Moreover, few believed the U.N. Charter provided the Security Council with the authority to interfere with the domestic legislative affairs of a country and impose sanctions if a state failed to pass domestic legislation complying with 1540 norms.<sup>142</sup>

Thus, although Resolution 1540 was designed as legally binding hard law; the Security Council employed a soft mode of governance to enhance the legitimacy of the 1540 regime. Adopting 1540's cooperative institutional design has become one of the core strategies for empowering the 1540 mechanism.<sup>143</sup> Over time, many countries learned that the Committee is not what they feared it would be – an investigative tool with broad legal interpretations in the hands of the P5. As Costa Rican Ambassador Jorge Urbina concluded, “[t]he questions that were initially posed regarding the legitimacy of the resolution seem to have disappeared, as have the initial doubts on the need for the Committee. This represents a concrete achievement by the Committee and the Group of Experts that supports it.” Mr. Urbina further noted, “[w]hat was once seen as interference by the Security Council in domestic matters was now viewed as the coming together of states for a common cause.”<sup>144</sup>

The 1540 regime left a good deal of flexibility in domestic implementation to member states, allowing them to tailor implementation to domestic needs and priorities. Most of the Resolution 1540 provisions were kept vague and general. The resolution did not fully spell out how to interpret the myriad 1540 obligations and

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141. See Interview with Former Senior Advisor to U.N. Secretary-General #1, *supra* note 70.

142. Interview with Former 1540 Expert #4, in N.Y.C., N.Y. (May 2, 2014).

143. The legitimation strategies of international organizations may take various forms and features (largely depending on the legitimacy problem at hand, e.g. a particular interpretation of a norm, an issue-specific institution or regime, or international society in general). These strategies broadly fall into two categories: (i) discursive recalibration strategies, and (ii) behavioral adaptation strategies. Behavioral adaptation strategies may include a situation in which an organization recalibrates through introducing new internal processes, opts for soft or hard legalization for its rules, or makes other strategic choices to build legitimacy, such as, for example, adapting its institutional design. See Clark, *supra* note 2, at 330-332. Darren G. Hawkins & Wade Jacoby, *How Agents Matter*, in DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS 199, 210 (Darren G. Hawkins et al. eds., 2006); Jens Steffek, *The Legitimation of International Governance: A Discourse Approach*, 9 EUR. J. INT'L REL. 249 (2003); Eero Vaara & Janne Tienari, *A Discursive Perspective on Legitimation Strategies in Multinational Corporations*, 33 ACAD. MGMT. REV. 985 (2008). Suchman also posits that legitimacy management heavily relies on communication between the organization and its constituencies. See generally, Suchman 1995; Elsbach, 1994; Ginzel, Kramer & Sutto, 1992. DOMINIK ZAUM, LEGITIMATING INTERNATIONAL ORGANIZATIONS 224 (2013); Roy Suddaby & Royston Greenwood, *Rhetorical Strategies of Legitimacy*, 50 ADMIN. SCI. Q. 35 (2005).

144. Briefing by Ambassador Jorge Urbina, Chairman of the Committee Established Pursuant to Security Council Resolution 1540, at 2 (Dec. 14, 2009), <http://www.un.org/en/sc/1540/documents/statement.chair.sc.14dec09.pdf>; Press Release, What Was Once Seen as Security Council Interference in Domestic Affairs Now Viewed as States 'Coming Together for Common Cause,' 1540 Review Hears Upon Closing, U.N. Press Release SC/9758 (Oct. 2, 2009).

what constitutes compliance. Many have argued that the resolution tells states what to do, but not how to do it. Such imprecision was deliberate. The generic language was meant to reinforce the fact that one size does not and will not fit all. The implementation depends on national discretion and on what states devise as appropriate and effective policies. “What to do, but not how to do” served as an informal slogan for the 1540 key players to signal to countries that the 1540 committee is not a world policeman, and that states would preserve their national sovereignty in deciding how to implement their 1540 obligations in accordance with their national priorities.

*D. The Voluntary Nature of the 1540 Mechanism Constrains Evaluation of Country Performance*

The 1540 Committee’s limited ability to evaluate country performance is a direct cost of refashioning the mechanism into a friendly facilitator with no enforcement and monitoring capabilities. Giving the 1540 Committee and its experts a mandate to assess country performance or prioritize countries might have indicated that the Committee would be an enforcement mechanism with the power to target states. Instead, to address the legitimacy claims and garner political support, the Committee has maintained a shy mandate.

Under this shy mandate, the 1540 Committee scrupulously avoids any activities that might be perceived by member states as potentially invasive into their domestic affairs. For example, at the time of this writing, there were no unified guidelines governing the process of transferring national reports into matrices. In the early years of the Resolution, there was a disagreement within the Expert Group as to what Experts should consider as acceptable responses, how those responses should be categorized, and even whether or not it was the Experts’ role to question the veracity of states’ responses. In 2007, two Experts developed rules for coding 1540 national reports into data fields in a 1540 matrix. These rules were intended to serve as guidelines that would ensure that all experts, present and future, would follow a consistent process in transmitting national report data into matrices.<sup>145</sup> Yet these rules have never been formally implemented.<sup>146</sup> To preserve the Committee’s friendly nature, the Experts are discouraged from categorizing or otherwise assessing the country report information they transfer to 1540 matrices.

Second, and related, 1540 Experts are not allowed to conduct any research to identify legislative or enforcement measures, or a lack thereof, when reviewing a specific country’s report. Doing so would again imply that the Committee is leaning towards adopting an investigatory function. The Experts could *only* supplement the information originating from national reports with official government information, including information made available to inter-governmental

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145. Interview with Former 1540 Expert #5, in N.Y.C., N.Y. (May 14, 2014). Coding rules are on file with the author.

146. *Id.*

organizations.<sup>147</sup> Yet it is outside the scope of the Experts' tasks to evaluate whether the legislation they have located through publicly available official sources is accurate or relevant for 1540. After translating the primary information from national reports into the matrix template, the Experts then send the matrices to member states to solicit their input in the form of confirmation, amendments, and additional information.<sup>148</sup> Member states can choose to add more data or delete information and resubmit the report to the Committee. After receiving a country's input, the Committee approves the matrices and then makes them publicly available on its website. Soliciting a country's review of its 1540 matrices is an additional strategy the Committee established to give states the final word and avoid the perception of being a monitoring body.

The flexibility of the 1540 regime allows states to take actions for meeting their 1540 commitments at the time of their choosing. Compliance with 1540 often comes down to national report submission – a report not subject to assessment or any form of substantive review by the Committee. The 1540 regime has become fixated on operational means – soliciting 1540 national reports – and has failed to reflect on how these efforts contribute to its overall policy objective of closing the weakest links in the proliferation chain. Indeed, it might be said that the 1540 regime has displaced its goals from plugging the proliferation gaps to measuring the number of domestic reports countries submit.<sup>149</sup> Many continue to support the goal of universal reporting partly because it seems something feasible for the 1540 Committee to accomplish and demonstrate success.<sup>150</sup> The institutional choices that the 1540 regime originally made to gain legitimacy now constrain its ability to meaningfully engage with WMD non-proliferation challenges.<sup>151</sup>

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147. For instance, some of the information required to examine the status of 1540 implementation was also available through official sources other than the 1540 national report (such information could include, for example, the status of disarmament treaties or IAEA Safeguards Agreements, membership status to the World Custom Organization SAFE Frameworks, etc.). See 2006 Report to the Security Council, *supra* note 39, at 8.

148. See Former 1540 Expert #1, *supra* note 65; see also 2006 Report of the Security Council, *supra* note 39, at 40.

149. See generally Robert K. Merton, *Bureaucratic Structure and Personality*, 18 SOC. FORCES 560–568 (1940); HERBERT ALEXANDER SIMON, *MODELS OF BOUNDED RATIONALITY: EMPIRICALLY GROUNDED ECONOMIC REASON* (1982); Charles Perrow, *The Analysis of Goals in Complex Organizations*, 26 AM. SOC. REV. 854–866 (1961).

150. Interview with U.N. Senior Official #5, in N.Y.C., N.Y. (Apr. 25, 2014). Even after ten years of the Committee's existence, in 2014, the Korean Chair had set universal reporting as its number one priority and tried to use the momentum generated during the tenth anniversary to direct the Committee's efforts towards that goal. Interview with 1540 Committee Member, Country Representative, in N.Y.C., N.Y. (May 2, 2014); Interview with 1540 Committee Member #3, in N.Y.C., N.Y.; interview with 1540 Committee Member # 1 in N.Y.C., N.Y. (May 02, 2014).

151. While it is beyond the scope of this study to conduct comparative institutional analysis between the 1540 regime and other international mechanisms, it is noted that the tradeoff between legitimacy and robust implementation of international legal obligations is a recurring theme in the UN human rights system. See, e.g., Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises*, 110 AM. J. SOC. 1373 (2005). The authors argue that “the global institutionalization of human rights has created an international context in which (1) governments often ratify human rights treaties as a matter of window dressing, radically decoupling policy from practice

*E. Challenges Inherent to the Internal Management of the 1540 Committee  
Further Limit its Impact*

To fully understand the 1540 regime's effectiveness in countering non-state-actor WMD proliferation, we must also consider its organizational structure, operations, and institutional resources, as well as the strategic behavior and competing interests at play within the 1540 architecture. While these institutional and political dynamics alone are not determinative of the U.N.'s success or failure in facilitating Resolution 1540's implementation, the impact of these dynamics on policy outcomes should not be neglected.

The 1540 Experts' work is thematic, as opposed to threat-based assessment or prioritization based on proliferation risks, weapon types, countries, or regions. The 1540 Committee and Experts do not prioritize their efforts by state or region.<sup>152</sup> Other than relying on some general themes for Resolution 1540 implementation, neither the Committee nor its Group of Experts has an agreed-upon set of implementation priorities. The Experts' calendar of events does not reflect any common counter-proliferation priority that their collective efforts intend to target. In conversations with 1540 Experts, many identified different priorities that each individual 1540 Expert sees as an important task. For example, some suggested export-import controls of strategic goods should be the central topic of Resolution 1540's efforts, whereas others underscored the importance of physical security and accounting. Even those who underlined the significance of strategic export-import controls as opposed to other issues did not articulate a common metric upon which countries should be selected (for example, based on trade, container or shipment traffic, sharing borders with countries of proliferation concern, etc.).<sup>153</sup>

The 1540 Committee operates by consensus.<sup>154</sup> This internal decision-making structure of the 1540 Committee not only defines the pace and the substance of the Committee's work, but also, perhaps most importantly, permits the delegates to easily politicize the Committee's action and block anything that runs against the delegate country's strategic interests. Morocco's behavior in the run-up to the first pan-African 1540 regional conference is illustrative of such politicization.

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and at times exacerbating negative human rights practices, but (2) the emergent global legitimacy of human rights exerts independent global civil society effects that improve states' actual human rights practices." See also Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Justice Lost! The Failure of International Human Rights Law to Matter Where Needed Most*, 44 J. PEACE RES. 407 (2007). Other scholars have discussed the relationship between legitimacy and effectiveness in the context of global economic, refugee and environmental governance. See, e.g., Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT'L L. 3, 599-600 (1999); Michael Zürn, *Global Governance and Legitimacy Problems*, 39 GOV'T & OPPOSITION 2, 260-287 (2004); Daniel C. Esty, *The World Trade Organization's Legitimacy Crisis*, 1 WORLD TRADE REV. 1, 8-10 (2002); and Mariano-Florentino Cuéllar, *Refugee Security and the Organizational Logic of Legal Mandates*, 37 GEO. J. INT'L L. 583, 636-646 (2005).

152. Interview with Former 1540 Expert #6, in N.Y.C., N.Y. (Oct. 30, 2013); Interview with 1540 Expert #8, in N.Y.C., N.Y. (Nov. 20, 2013).

153. Interview with U.N. Official #1, in N.Y.C., N.Y. (Nov. 15, 2013).

154. See 1540 Terms of Reference (TOR).

When the 1540 Committee liaised with the African Union [A.U.] to organize this event, the Moroccan delegate almost blocked the entire workshop by rejecting the participation of the 1540 Chairman, Committee members, and 1540 experts on the basis that Morocco is not an A.U. member due to the conflict over the Western Sahara.<sup>155</sup> Similarly, there have been a number of instances when a Committee member's state would veto a MCTR or NSG briefing simply because his/her country lacked membership in these regimes.<sup>156</sup>

Even processing minor technical issues within the Committee is extremely time-consuming because of the unanimity requirement. For example, if a Chairman of the Committee plans to deliver a speech, the prepared text must be approved by all 1540 Committee members. This process may take up to three weeks and often engenders non-substantive discussion over the text of the speech.<sup>157</sup> The situation is exacerbated by the fact that the 1540 Committee delegates change every two years when the Security Council elects its non-permanent members. New Council members are often reluctant to support new processes, partly because they are not familiar with the system and the work conducted prior to their tenure.

The mismatch between the Committee's tasks and available resources; the challenges inherent to the process of replacing the 1540 Experts; and the lack of continuity of 1540 Committee members further constrain the 1540 regime's ability to generate tangible impact.

Although 1540 Experts do not evaluate country performance, there is recognition that real assessment requires a structure in which a number of lawyers and technical analysts are dedicated to the task of conducting analysis of relevant legislative frameworks and operational practices.<sup>158</sup> In its current form, the 1540 regime does not have such resources. Some 1540 Experts even acknowledged that they personally lack the expertise to enable them to judge the quality of domestic implementation.<sup>159</sup> The manner in which states and regions have been divided among the Experts does not conform to any strategy other than "you are familiar with/from that part of the world." In essence, the initial division and subsequent completion of states' matrices had nothing to do with an Expert's specific skill set and had more to do with their geographic point of origin.<sup>160</sup>

With each subsequent resolution extending the mandate of the 1540 Committee, the Security Council gradually expanded the scope and the breadth of the 1540 Committee's tasks, but the human capital and resources allocated specifically to the 1540 Committee stayed largely the same.<sup>161</sup> The 1540 Committee currently has nine Experts, but this group is hardly enough human capital to

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155. Interview with 1540 Expert #8, in N.Y.C., N.Y. (Nov. 20, 2013).

156. Interview with Former 1540 Expert #7, in N.Y.C., N.Y. (Apr. 28, 2014).

157. See Former 1540 Expert #1, *supra* note 65.

158. Interview with U.N. Official #1, in N.Y.C., N.Y. (Nov. 15, 2013).

159. Interview with 1540 Expert #8, in N.Y.C., N.Y. (Nov. 20, 2013).

160. Written interview with Former 1540 Expert #5 (Apr. 22, 2014).

161. Cupitt, *Nearly at the Brink*, *supra* note 58.

facilitate implementation in 193 U.N. Member States. Over time, the number of 1540 Expert positions has varied from six to nine. The actual number of sitting Experts has often been lower due to the replacement and rotation of individual participants.<sup>162</sup> Part of the problem with the Expert Group is the absence of a smooth process for replacing experts. There is no standard transition process so that incoming 1540 Experts have an opportunity to absorb the experience of the outgoing ones. The selection process is so long that it is very difficult to make steady progress. Often Expert slots remain vacant for long periods.<sup>163</sup> Such delays adversely affect the Committee's capacity and ability to realize its tasks.

Analogously, the non-permanent member delegates only serve two years on the 1540 Committee. Except for representatives of the United Kingdom, the United States, China, Russia and France, this means the Committee's composition constantly changes. Such changes adversely affect the Committee's institutional memory and ability to engage in long-term projects.

Despite the existing institutional and structural challenges that limit 1540's impact as a global counter-proliferation tool, there are policy options the committee could explore to strengthen its role. The following section explores five such options.

#### V. HOW TO EXPAND AND STRENGTHEN THE 1540 REGIME?

Now that the 1540 regime has overcome the original legitimacy doubts that plagued it at the outset, the question remains whether it can successfully shift strategies towards enforcement and adopt measures to give more teeth to the system. Drawing from my analysis of the 1540 regime's evolution for the last 14 years, it is my belief that having navigated the difficult task of maximizing legitimacy, the 1540 mechanism is stuck with its institutional path. In my view, it would be very difficult, and perhaps impossible, for the 1540 regime to disturb the status quo and enhance its efficacy by adopting enforcement strategies. There is a widespread perception that even minor actions containing elements of compulsion, such as "naming and shaming," are inconsistent with the 1540 Committee's cooperative, consensual mode of functioning.

The procedural requirement to report 1540 violations to the Security Council illustrates the 1540 Committee's reluctance to refashion itself into a sanctions or other enforcement regime. The Security Council Resolution 2118 on dismantling chemical weapons in Syria made a reference to Resolution 1540 and included a procedural requirement for U.N. member states to "inform immediately the Security Council of any violation of resolution 1540 (2004), including acquisition by non-State actors of chemical weapons, their means of delivery, and related

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162. Interview with U.N. Official #1, in N.Y.C., N.Y. (Nov. 15, 2013). In fact, the increase in 1540 Experts was driven by political calculations rather than concern over the Committee's workload. Germany lacked representation on the 1540 Expert Group, and the expansion was approved in order to accommodate Germany's desire to be included in the Expert Group.

163. For example, in 2014, three experts (those from Russia, France, and the United States) left the Expert Group, creating immediate vacancies.

materials in order to take necessary measures therefore.”<sup>164</sup> This mandatory reporting clause gave rise to conflicting interpretations. For example, there is no guidance as to who should serve as the designated recipient of such reports—the 1540 Committee or the Security Council itself. Additionally, there is no agreement among many within the 1540 community as to what constitutes a violation. Perhaps most significantly, it is not clear how the Council – or the 1540 Committee, for that matter – should respond to reports on alleged 1540 violations. Some speculated the Council could trigger an action through the Secretary-General’s mechanism for investigation of the alleged use of chemical and biological weapons or be referred to the Security Council as a threat to international peace and security.<sup>165</sup> While the 1540 violation reporting clause could be viewed as a legal basis for refashioning the Committee into an investigative body, many 1540 Committee members, especially those in the P5, remain committed to maintaining the Committee’s cooperative nature and oppose giving investigative authority to the 1540 Committee. In their view, such structural changes to the regime could further politicize the Committee and would be “the best way to kill it.”<sup>166</sup>

This is not to claim that all U.N. Security Council Resolutions are ineffective because of the legitimacy question. Indeed, Security Council Resolution 1373 on countering terrorism finance is another example of the Security Council assuming a role as global legislator by relying on its Chapter VII powers. Both Resolutions 1373 and 1540 are legally binding and are applicable worldwide. The Council faced criticism for assuming a role of a global legislator for 1373 too. Both mechanisms attempt to facilitate capacity-building assistance for countries that lack resources to fully implement the binding commitments. Yet, the 1373 regime evolved differently, adopting more of an enforcement and assessment authority

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164. S.C. Res. 2118, ¶ 14 (Sept. 27, 2013).

165. The Secretary-General’s authority to investigate allegations of the use of chemical, biological, or toxin weapons is derived from General Assembly Resolutions 42/37 C and 620 (1988). The mandate of the “Secretary-General’s Mechanism” empowers the Secretary-General “to carry out investigations in response to reports that may be brought to his attention by any Member State concerning the possible use of chemical and bacteriological (biological) or toxin weapons that may constitute a violation of the Geneva Protocol or other relevant rules of customary international law in order to ascertain the facts of the matter and to report promptly the results of any such investigations to all Member States.” U.N. Office for Disarmament Affairs, *The Secretary-General’s Mechanism for Investigation of Alleged Use of Chemical and Biological Weapons*, Fact Sheet (July 2018).

166. Interview with 1540 Committee Member #5, in N.Y.C., N.Y. (May 2, 2014). The Republic of Syria has put the Resolution 2118 reporting clause into practical application by delivering more than 200 official letters to the U.N. Secretary-General, to the U.N. Security Council Presidents, and to the 1540 Committee on the support provided by alleged terrorist-supporting governments, particularly Turkey and Saudi Arabia, on the terrorists’ obtaining of chemical weapons and substances. According to Syrian officials, Syrian letters also documented information on al-Qaeda terrorists producing and testing chemical weapons on rabbits in a laboratory located in Turkey. *Syria Demands UNSC to Question Terror-Supporting States*, AL MANAR (June 21, 2016, 5:51 PM), <http://archive.almanar.com.lb/english/article.php?id=275163>; Permanent Mission of the Syrian Arab Republic to the U.N., Note verbale dated May 29, 2013 from the Permanent Mission of the Syrian Arab Republic to the United Nations addressed to the Chair of the Committee, U.N. Doc. S/AC.44/2013/21 (Nov. 14, 2013).



as compared to the 1540 regime. While I plan to embark on a detailed comparison between Resolutions 1373 and 1540 as my next research project, two important differences may explain the variation in outcomes.

First, the two resolutions diverged in terms of *timing and existence of a threat to international peace and security*. UNSCR 1373 was adopted in the immediate aftermath of the 9/11 terrorist attacks. The resolution specifically referred to the 9/11 events by confirming “that such acts, like any act of international terrorism, constitute a threat to international peace and security.”<sup>167</sup> This preamble clearly identifies the existence of an immediate threat to international peace and security, which serves as the legal basis for the Security Council to utilize its Chapter VII powers. In contrast, UNSCR 1540 did not refer to an “imminent threat,” and the Security Council did not justify 1540 as a response to a specific threat to international peace. Instead, the language of 1540 used the generic threat of terrorism and risk of non-state actors accessing WMD materials as a catalyst for establishing an indefinite normative regime addressing proliferation and terrorism.<sup>168</sup>

Second, and related to the question of the timing, the *strategic context* surrounding the adoption of Resolution 1373 was quite different than that of Resolution 1540. Again, UNSCR 1373 was a direct response to the catastrophic events of 9/11. Moreover, Resolution 1373 was adopted before the U.S. invasion of Iraq and before the Bush Administration asserted its right to strike preemptively those who support WMD proliferation.<sup>169</sup> Therefore, the UNSCR 1373 reference to Chapter VII was less controversial. In contrast, UNSCR 1540 came after the invasion of Iraq and the U.S. doctrine of preemption. By 2004, many U.N. member states had reason to fear that the adoption of UNSCR 1540 created a real possibility for the Security Council – or a unilateral actor, like the United States – to use military force against a “non-compliant” state for an alleged proliferation threat. In short, states’ doubts about 1540 were colored by the way in which the international community reacted to Iraq’s WMD clandestine networks and by the subsequent U.S. military operations in Iraq for a suspected WMD program. These two broad factors – the timing and the strategic context – played an important role in shaping the very different institutional development of the two mechanisms.

It is undeniable that through the 1540’s awareness raising efforts many states began to realize the importance of fighting WMD terrorism and slowly started to prioritize capacity building for fighting this threat. But the question now becomes how to establish an effective set of policies to help the Security Council 1540 regime enhance its impact as an international counter-proliferation instrument,

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167. Additionally, the resolution’s language borrowed from key provisions of the Convention for the Suppression of the Financing of Terrorism (1999). UNSCR 1373 did not, however, provide definitions of “terrorism,” “terrorist acts,” or “international terrorism.” See generally S.C. Res. 1373 (Sept. 28, 2001).

168. See Joyner, *supra* note 8.

169. See David Luban, *Preventive War*, 32 PHIL. & PUB. AFF. 207, 207-248 (2004), for a discussion of justifiability of preventive war.

while maintaining states' support for and cooperation with the regime. Before I outline some general policy guidelines regarding the future development of the 1540 mechanism, two points merit attention. *First*, since the policy option of turning the 1540 Committee into a compellence mechanism is off the table at this time, any policy prescriptions must build on the 1540's existing soft governance model. *Second and related*, the sheer lack of enforcement tools should not serve as an excuse for the players in the system to refrain from taking more proactive measures in facilitating Resolution 1540's effective implementation.

*A. Priority Setting and Evaluation – Developing a Strategic Matrix for 1540 Implementation*

One important strategy that the 1540 mechanism might explore to help strengthen its role as a counter-proliferation tool is starting a process of priority setting. Limited resources require the 1540 regime to be strategic in selecting which proliferation themes, countries, and regions warrant attention. Therefore, the primary 1540 actors need to put more strategic thinking into the regime's overall implementation efforts and demonstrate an effective leadership that would make the most impact.

One suggestion is to develop a Strategic Matrix for 1540 Implementation. This matrix may serve as a tool that maps out the key countries and regions of concern based on particular proliferation threats and themes. It will then help Committee members analyze how the different measures covered by the resolution (for example, accounting and physical protection measures for WMD-related materials; export and transshipment controls; border controls; proliferation financing and more) can help close these risks. This knowledge will assist the 1540 actors to better tailor their programmatic activities to each country or region and decide which countries and/or regions are of higher priority. In fact, such a matrix would also inform the 1540 outreach activities and let them select topics that are most relevant and helpful to the country or region in question. While this sounds like the type of threat analysis that 1540 actors argue is both beyond their competence and likely to interfere with the regime's cooperative function, there are subtle ways to structure such a matrix around these objections. One approach would be to solicit the help of universities or civil society representatives from each region and rely on their expertise in conducting these analyses. These civil society actors would be free to rely on open-source data and other publicly available secondary materials to map out different countries' needs and threats. The 1540 mechanism can then indirectly draw from these analyses in trying to strategize its programmatic activities.

The principle of priority setting should be the premise of the initiatives taken by the Committee, the Group of Experts or UNODA. It is time to break the cycle of "reporting fatigue," and stop emphasizing the value of national reports. Prioritizing also means strategically selecting countries for 1540 visits and drafting of national action plans.

### *B. Leverage the Value of Civil Society and Academia*

Another strategy to strengthen the overall capacity and resources of the 1540 regime is to rely more on outside help, particularly from civil society and academia. Civil society has multiple roles to play in the 1540 context, including, but not limited to raising awareness about the resolution; sharing best practices for implementation; offering legislative and regulatory drafting assistance; providing education and technical assistance; fostering regional cooperation; as well as offering fresh and creative implementation ideas. One specific project to pursue with the help of civil society is developing a manual of 1540 implementation, similar to a technical implementation guide. This should not be another report on best practices. Instead, such a manual should serve as an interpretation of 1540's vague obligations and offer some model domestic laws to regulate nonproliferation issues. This can serve as a starting point of 1540 implementation, especially for developing countries. While some could argue that offering such standardized legislation may undermine the Resolution's flexible design and improperly restrain member countries in one way or another, in fact, my interview data suggests that some countries are looking to the Committee for more comprehensive guidance or some sort of blueprint for implementation. A manual could begin to provide the type of direction countries seek. It will help countries with diverse resources and expertise to better understand and gradually implement the 1540 goals. Because Resolution 1540 has such wide scope and covers almost every aspect of non-proliferation, it could be overwhelming for member states to try to implement every aspect of it. Trying to make the process more manageable through specific guidelines will help start the implementation process domestically.

### *C. Adopting "Gift-Basket" Diplomacy to Foster 1540 Implementation*

One broader strategy to foster 1540 implementation is to have the U.N. Secretary General host an annual 1540 conference and adopt "House Gifts" and "Gift-Basket" diplomacy, a practice that draws from the Nuclear Security Summit model.

Gift basket diplomacy was one of the key innovations of the Nuclear Security Summit. At the heart of gift basket diplomacy lies the concept of national and group commitments to concrete actions to improve nuclear security. In other words, gift basket diplomacy is the power of social obligation and public commitment to prevent free-riding behavior. As one senior U.S. official from the National Nuclear Security Administration explained, the idea draws on the social custom obligating party guests to demonstrate their appreciation to the host by bringing an appropriate gift. Applying this tradition to the Nuclear Security Summit, Washington actively encouraged states to bring "gifts" to the Summit host in the form of commitments to specific nuclear policies or announcements of nuclear security actions. At subsequent meetings, leaders built on this idea by

offering collective commitments from groups of states.<sup>170</sup> National commitments came to be known as house gifts, while group commitments became known as gift baskets.

The gift basket approach could easily be applied to the context of 1540 implementation. For example, an annual 1540 meeting – hosted by the U.N. Secretary General – could serve as the setting for individual countries, or a group of countries, to offer “gift baskets” such as policy commitments, new implementation initiatives, or ideas and strategies to further the goals of Resolution 1540. In my own view, the best way to think about “gift-basket” diplomacy in the 1540 context is to foster the expectation that countries do not simply make declarations on future action plans, but also show implementation results at the conference. In other words, the regime would develop a norm, or custom, that requires each country to attend the annual 1540 conference and report on its result-driven contribution to counter non-state-actor proliferation. This project could be tailored to the priorities set by the 1540 Committee – for example, each year the conference could adopt a priority theme (for instance, proliferation finance or transshipment) and each attending country would be expected to introduce its “house-gift” related to that specific theme.

#### *D. Increased Funding and Resources*

A discussion on enhancing the effectiveness of 1540, or any institution for that matter, cannot avoid the question of funding and resources. While it is natural to think that resources influence an organization’s ability to produce better results, lack of resources may often serve as a justification for poor organizational management. One could argue that the failure to prioritize and target countries and regions based on their proliferation threats, as well as limited follow-ups on assistance requests by the 1540 Committee, seem to indicate that the existing resources are not utilized in an efficient way. Before seeking new funds, the 1540 mechanism should conduct an assessment of its current resource allocation to close proliferation gaps.

With that said, one proposal commonly offered by those working within the 1540 regime is to follow the model of Resolution 1373. The Security Council has established a dedicated Secretariat office – the Counter-Terrorism Committee Executive Directorate [CTED] – to facilitate implementation of Resolution 1373. The Directorate has approximately forty staff members and is organized into two sections, an Assessment and Technical Assistance Office (ATAO) and an Administrative and Information Office (AIO).<sup>171</sup> The staff members conduct analysis of national reports. The Directorate also includes a senior human rights officer. While a similar set-up would undoubtedly enhance the impact of the

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170. William Tobey, *Peering Down from the Summit: The Path to Nuclear Security 2010–2016 and Beyond*, 2.2 GLOBAL SUMMITRY 93-113 (2016).

171. Press Kit, U.N. Counter-Terrorism Committee Executive Directorate, The Counter-Terrorism Committee and Its Executive Directorate (2016), <https://www.un.org/sc/ctc/wp-content/uploads/2015/09/CTED-press-kit-2016-ENGLISH.pdf>.

1540 mechanism, its realization largely depends on the political interests of the Security Council, especially Russia and the United States. There have been some discussions about establishing a Counter-Proliferation Directorate within UNODA. This would only be productive, however, if the directorate is indeed given the human and other resources similar to CTED. Considering the current political tensions between Russia and the United States, I remain skeptical that this proposal will gain traction in the near term.

Other options that may help strengthen the 1540 regime and improve implementation efforts include: working on new themes, such as maritime controls and banking; adding scientists to the 1540 Expert Group; helping governments use their obligations under Resolution 1540 to seek more resources from their domestic governments for counter-proliferation programs; and developing the 1540 regime as a communication gateway and a mechanism to build confidence among various countries.

Last, but not least, Resolution 1540 cannot be implemented by governmental actors alone. Regional organizations<sup>172</sup> and other actors, such as industry players, civil society groups, and banks, are fundamental to 1540's implementation in the long run. The 1540 regime should work to develop strong expertise, interest, and political support among these non-state actors, including the private and financial sectors, and particularly among parliamentarians – people who could retain the memory of 1540 and act in an oversight capacity to ensure that countries continue to implement 1540 in a progressive manner.

#### CONCLUSION

Resolution 1540's role in countering non-state actor proliferation is limited by the Committee's capacity, legitimacy, and structural constraints, as well as the way in which the U.N. interpreted its 1540 mandate. The limited authority of the Committee and its staff is an artifact of certain early strategic decisions the Committee took to ease countries' fears of being monitored or potentially sanctioned for alleged Resolution 1540 noncompliance. The early efforts to "water-down" the Committee's role in counter-proliferation have largely driven the Committee's legal interpretations of its own jurisdiction with respect to evaluating country performance. The Committee chose not to adopt an assessment or investigatory function in order to gain and maintain political consensus among countries for the support of the Resolution. This implicit political bargain between the Security Council and member states has shaped the 1540

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172. I have argued elsewhere how regional organizations can bolster the implementation of global nonproliferation strategies. At least four ingredients are needed to turn a regional institution into a force multiplier in 1540 implementation: the regional stakeholder's political support for the goals of the resolution, a dedicated regional coordinator, sustained programmatic funding, and a well-defined mutual benefit for both parties. See more Sarah Shirazy, 'Synergies of Strengths': A Framework to Enhance the Role of Regional Organizations in Preventing WMD Proliferation, 48.7 ARMS CONTROL TODAY, Sept. 2018, <https://www.armscontrol.org/act/2018-09/features/%E2%80%98synergies-strengths%E2%80%99-framework-enhance-role-regional-organizations-preventing>.

Committee's response to non-state-actor proliferation. The foundational basis for Resolution 1540's architecture continues to be the maintenance of political consensus among member states to support nonproliferation goals, while there is minimal U.N. focus on strategies to push for domestic implementation efforts and evaluate country performance. One U.N. official summarized this political bargain in the following terms:

If you do the analysis and point out fingers [sic], then you will lose states' interest to work with you. Countries are asked to submit a report, but they rarely hear back. The reason for this on the one hand is positive as it gives the 1540 a lot of consensus, but on the other hand this minimalistic approach loses substance. At the end, you have consensus, but you lose substance.<sup>173</sup>

More generally, this article demonstrates that certain institutional choices that help to maximize legitimacy may have detrimental consequences on policy outcomes. The 1540 story offers a cautionary tale for other international institutions facing a legitimacy challenge: when an international regime is born in a highly contentious political environment, it is possible that resolving legitimacy claims may come at the cost of the regime's primary goals. Consequently, some of the institutional choices may have a path-dependent effect – a situation where institutional processes, once adopted, tend to reinforce the status quo and increase the costs of institutional change over time.<sup>174</sup> There is a trade-off between institutional design features that bolster cooperation and those that produce effective enforcement. Adopting a cooperative institutional design may allow an international institution to lower the costs of participation and offer incentives for member states to support the institution. This cooperative design may ultimately result in increased legitimacy and support; however, the cooperative model often lacks tools necessary to enforce compliance with the international obligations. As a consequence, the institution may become less effective in achieving its primary policy goals.

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173. Interview with U.N. Official #1, in N.Y.C., N.Y. (Nov. 15, 2013).

174. PAUL PIERSON, *POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS* 46 (2004); *see also* ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* (1984) (offering a rich discussion of path-dependency problems in institutions).