

U.N. Security Council Resolution 1540:

Dangerous Precedent for
Legislation by Council

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I. Introduction

In the aftermath of the September 11th terrorist attacks, the looming specter of nuclear terrorism led the United States to push for an international legal framework to enhance nuclear security. One result was U.N. Security Council Resolution 1540 (“1540”).¹ Binding on every U.N. nation, the Resolution obligates member states to secure their nuclear weapons and material. Enforced by a Reporting Committee, the 1540 framework threatens sanctions or force against violators. Ultimately, while 1540 constitutes a novel step toward solving the serious and immediate problem of nuclear security, the Resolution falls short. Unlike its predecessors, the failure of 1540 is not due to a lack of credible penalties or uncertain application, but rather due to its vague definition of state obligations.

One perspective on 1540 is that it was a good starting point, setting precedent for the Security Council (The “Council”) to use resolutions to address serious international threats.² Relying on 1540, the Council may supplement the Resolution with comprehensive and definitive standards in the future. This perspective misses the lessons of 1540. It is weak not because the Council failed to formulate the proper standards of liability within the Resolution. Instead, it is ineffective because fifteen nations, as members of the Council,

¹ Masahiko Asada, *Security Council Resolution 1540 to Combat WMD Terrorism: Effectiveness and Legitimacy in International Legislation*, 13 J. CONFLICT & SECURITY L. 303, 303 (2008).

² Some commentators directly suggest this approach. See Christopher Joyner and Alexander Parkhouse, *Nuclear Terrorism in a Globalizing World: Assessing the Threat and the Emerging Management Regime*, 45 STAN. J. INT’L L. 203, 232 (2009). Others imply this method. See Paige Willan, *The Convention on the Suppression of Acts of Nuclear Terrorism: An Old Solution to A New Problem*, 39 GEORGETOWN J. OF INT’L L. 527, 532 (2008).

cannot legitimately impose universally binding substantive law on the full 193 members of the United Nations, absent their involvement in the lawmaking process. The further the Council moves in attempting to legislate domestic law, the more it will undermine the legitimacy and credibility of the Security Council's resolutions. While it is vital that immediate and serious concerns like nuclear safety are not negotiated to death in the General Assembly, multilateral lawmaking is the only way to form a credible and effective legal regime of nuclear security.

First, in section II, this paper will establish the vast legal authority possessed by the Security Council, and show how resolutions like 1540, though novel, are within that authority. Section III will delve into the sufficiency and effectiveness of Resolution 1540 as establishing a legal regime of nuclear security. Section IV will address whether additional Council resolutions can be used to bolster any weaknesses in the current legal framework of 1540. Finally, section V will conclude by discussing possible means of establishing a legal framework outside of the Security Council.

II. Binding Nature of a U.N. Security Council Resolution

The Security Council is a U.N. body, composed of fifteen members of the General Assembly, with the "primary responsibility" to ensure "international peace and security," by the use of force if necessary.³ These fifteen Council members consist of the five permanent members, The United States, France, Russia, The United Kingdom and China, and ten non-permanent members that are elected from the General Assembly to a two-year

³ Alexander Benard & Paul J. Leaf, *Modern Threats and the United Nations Security Council: No Time for Complacency*, 62 STANFORD L. REV. 1395, 1399 (2010).

term.⁴ A decision by the Council requires at least nine supporting members, however, a motion will be defeated if any one of the permanent members exercises a veto.⁵

The first step in the legal analysis of 1540 is to address whether the Council has the authority to legislate security standards for every member of the U.N. as a means to combat the threat of nuclear theft. Under Articles 24 and 25 of the U.N. Charter, the Security Council has wide authority to act where it decides that there is a threat to peace. Article 24 states:

In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.⁶

Under Article 25, these decisions are binding, as “Members of the United Nations agree to accept and carry out the decisions of the Security Council....”⁷ This is an overwhelming grant of power. The outer bound of Council authority is set by the requirement that it act pursuant to maintaining peace and security; however, it is of the Council’s own judgment to “determine the existence of any threat to the peace, breach of the peace, or act of aggression.”⁸ Once they have identified such a threat, it is at their discretion to “decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore

⁴ U.N. Charter, art. 23(1)-(2).

⁵ *Id.*, art. 27.

⁶ *Id.*, art. 24(1).

⁷ *Id.*, art. 25.

⁸ *Id.*

international peace and security.”⁹ Article 41 includes those measures short of armed force, like sanctions, while Article 42 permits the exercise of any “operation by air, sea, or land forces” to enforce the decision. The Charter even vests in the Council the authority to act with quasi-judicial powers in resolving disputes between member states as to threats to the peace,¹⁰ preempting the International Court of Justice (“ICJ”).¹¹ These decisions are binding as law on the Member States, even if the Security Council’s order contravenes an obligation of international or national law.¹²

The Council is not currently subject to meaningful judicial review by the ICJ. At the highest interpretation of ICJ power, the Court is unable to question a Security Council determination unless it directly conflicts with a fundamental principle of Chapter I of the Charter.¹³ At the other end of interpretation, the Court is wholly without the power of judicial review over Security Council decisions.¹⁴ As an instance illustrating the latter interpretation, in the “Provisional Measures” decision of the Lockerbie case, the ICJ refused

⁹ *Id.* art. 39.

¹⁰ Article 37 states that “[s]hould the parties to a dispute of the nature referred to in Article 33 [those involving disputes between member nations likely to endanger international peace,] fail to settle it by the means indicated in that Article, they shall refer it to the Security Council. If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to *recommend such terms of settlement as it may consider appropriate*. U.N. Charter, art. 37 (emphasis added).

¹¹ Kathleen Rene Cronin-Furman, *The International Court of Justice and the United Nations Security Council: Rethinking A Complicated Relationship*, 106 COLUMBIA L. REV. 435, 439 (2006).

¹² Elizabeth C. Minogue, *Increasing the Effectiveness of the Security Council's Chapter VII Authority in the Current Situations Before the International Criminal Court*, 61 VANDERBILT L. REV. 647, 669 (2008).

¹³ Marko Oberg, *The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ*, 16 EUROPEAN J. OF INT’L L. 879, 885 (2005).

¹⁴ See Geoffrey R. Watson, *Constitutionalism, Judicial Review, and the World Court*, 34 HARVARD INT’L L. J. 1, 2 (1993).

to decide the issue on the merits because the Security Council previously entered a binding decision on that matter.¹⁵ Specifically, Libya asked the court to decide that the Council's resolution to compel extradition of Libyan nationals was an ultra vires act. The majority of the Court, however, rejected Libya's claim and did not decide whether the Security Council had contravened a fundamental principle of international law.¹⁶ Instead, the Court made the provisional finding that Council decisions have the normative power to preempt obligations stemming from treaties and other sources of international law.¹⁷ This is a large grant of authority that has the potential to negate the will of U.N. members who have entered into what they thought were binding legal agreements.¹⁸

There are two possible intrinsic limitations on Council power: first, the decision must be within the Council's *Ratione Materiae*, meaning within the scope of threats to peace and security.¹⁹ Second, assuming the stronger powers interpretation of ICJ authority, a resolution should not contravene a fundamental principle of Article I of the Charter.²⁰ For our purposes, it is unnecessary to delve further into the debate²¹ over the extent of judicial review, as 1540's substantive security regulations do not pose close questions as to either

¹⁵ *Id.*

¹⁶ *Id.* at 2.

¹⁷ Oberg, *supra* note 13, at 884.

¹⁸ *Id.* See, also, Thomas M. Franck, *The "Powers of Appreciation": Who Is the Ultimate Guardian of Un Legality?*, 86 AM. J. INT'L L. 519, 523 (1992).

¹⁹ Oberg at 885.

²⁰ See Watson, *supra* note 14, at 2.

²¹ See, generally, W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83 (1993); Ken Roberts, *Second-Guessing the Security Council: The International Court of Justice and Its Powers of Judicial Review*, 7 PACE INT'L L. REV. 281 [1995]; Mark Angehr, *The International Court of Justice's Advisory Jurisdiction and the Review of Security Council and General Assembly Resolutions*, 103 N.W. UNIV. L. REV. 1007 (2009); Geoffrey R. Watson, *Constitutionalism, Judicial Review, and the World Court*, 34 HARVARD INT'L L.J. 1 (1993); Thomas M. Franck, *The "Powers of Appreciation": Who Is the Ultimate Guardian of Un Legality?*, 86 AM. J. INT'L L. 519 (1992).

intrinsic limitation of Council power. This is because, first, the transfer of nuclear materials to terrorist organizations certainly affects international peace and security. Second, it is unlikely that there is any conflict whatsoever between the goal of nuclear security and the principles of the U.N. Charter. Having shown that it is within the authority of the Council to act in the sphere of nuclear material security, the next step is to determine whether 1540 was a legitimate exercise of that authority.

Council resolutions are only binding to the extent that they create “substantive legal effects.”²² That requires that the resolution (1) create obligations, rights or powers in the member states; (2) state an independent legal standard; and (3) that the Council manifests an intention for the resolution to be binding.²³ To create an obligation or right, the resolution must change the relationship between the member states in some way.²⁴ This serves to differentiate between the general meaning of “resolution,” which can refer to a recommendation or a decision. Only the latter has binding legal effect. Thus, when the Council merely recognizes the importance of an international principle or expresses the necessity of cooperation, that statement does not change the legal relationship of the states and is not binding. The resolution also must state a new standard, as opposed to restating a principle of law or an interpretation of the U.N. charter, neither of which are binding on the member states.²⁵ Finally, the intent of the Council governs. Only where the Council intends a resolution to be binding will it take legal effect. It does not matter what the Council names the document, but whether they use the language of command, such as

²² Oberg, *supra* note 13, at 881.

²³ *Id.* at 880.

²⁴ *See id.*

²⁵ *Id.* at 882.

“shall” and “demand,” as opposed to “should” or “recommend.”²⁶ When evaluating 1540, it is important to briefly examine whether the Resolution fits the definition of having “substantive legal effect.”

II. Adequacy of Resolution 1540 as a Legal Mechanism

In interpreting 1540 as a legal instrument, it is useful to first analyze the text and determine what obligations are created, then to examine the underlying purpose of the Resolution, and finally assess its weaknesses as a legal framework in achieving those purposes.

1. Textual Interpretation

The Resolution first invokes the Council’s authority to combat threats to international peace and security within the meaning of the Charter, then states the punishment for violations as including those remedies permitted “under Chapter VII of the Charter,” which provide for sanctions or physical force to effectuate a decision.²⁷ By invoking the “peace and security” clause and using words of decision, the Council manifested its intent that the Resolution be binding. Its stated purpose comes from the grave “concern[regarding] the threat of terrorism and the risk of non-State actors* such as those identified in the United Nations list... may acquire, develop, traffic in or use, nuclear, chemical and biological weapons and their means of delivery....”²⁸ Non-state actors are

²⁶ *Id.* at 880.

²⁷ U.N. Security Council Resolution 1540 para. 4, 14.

²⁸ *Id.* para. 8.

defined as an “individual or entity, not acting under the lawful authority of any State in conducting activities which come within the scope of this resolution.”²⁹

In the paragraphs that begin with the word “decides” the Council lays out the new obligations required of member states and the legal standard for meeting these obligations:

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

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

2. *Decides also* that all States, in accordance with their national procedures, shall adopt and enforce appropriate effective laws which prohibit any non-State actor to... acquire... or use nuclear... weapons... in particular for terrorist purposes...;³⁰

These two provisions are the “criminality” provisions in that they address the illegality of transfers of nuclear weapons to non-state actors. The text has been interpreted to compel state legislatures to enact legal mechanisms that prohibit the trade in nuclear materials with criminal penalties.³¹ This puts the burden on the state legislature to act to achieve conformity with the Resolution.³² It also legally prohibits all states from assisting non-state actors in acquiring nuclear weapons.³³ The next provision of 1540 creates additional “security” obligations, stating that the Council:

3. *Decides also* that all States shall make and enforce effective measures to establish domestic controls to prevent the proliferation of nuclear... weapons... by establishing appropriate controls over related materials and to this end shall:

²⁹ *Id.* at n. 1.

³⁰ *Id.* at para. 15-20 (emphasis in original).

³¹ See Asada, *supra* note 1, at 315.

³² *The Incentive Gap: Reassessing U.S. Policies to Secure Nuclear Arsenals World-Wide*, 121 HARVARD L. REV. 1864, 1870-71 (2008) [hereinafter “Incentive Gap”].

³³ *Id.*

Develop... appropriate effective measures... to account for and secure such items...; [provide] physical protection measures; ...boarder controls and law enforcement...³⁴

This “security” provision creates the obligation for state legislatures to enact standards of control for the physical safety of nuclear material in storage and transportation.³⁵

The Resolution meets the “substantive effect” test, addressed *supra*, as it creates obligations where there were none, by insisting on creation of standards of physical safety; sets out a legal standard, “appropriate effective measures,” rather than merely interpreting or restating existing law; and, finally, it manifests the Council’s binding intent with language of decision like “shall.” Given that such a resolution is within the Council’s broad authority, and having shown that the Council intended to use that authority to create substantive legal effects when promulgating 1540, it is clear that the Resolution is binding international law. The next step is to determine what actions are actually required of states to fulfill their obligations in adopting “appropriate effective measures.”

To ensure that states fulfill their obligation to enact “appropriate effective measures,” the Resolution explicitly creates a compliance mechanism. It delegates authority to a Reporting Committee to inform the Council of compliance issues by verifying the extent of the appropriateness of state measures:

4. *Decides* to establish, in accordance with rule 28 of its provisional rules of procedure... a Committee of the Security Council... which will... call upon States to present a first report no later than six months from the adoption of

³⁴ U.N. Security Council Resolution 1540, at para. 18-22.

³⁵ Incentive Gap, *supra* note 32, at 1870-71.

this resolution to the Committee on steps they have taken or intend to take to implement this resolution;³⁶

Evidently, there is now a minimum level of security that is now required by law. But the text of 1540 is not specific as to what level of security is mandated. There is simply no guidance for the Reporting Committee, when they receive the country reports, for assessing compliance. It may be helpful, then, to look to the purpose and history of the Resolution to provide context for the standard of “appropriate effective measures.”

2. Purpose

Resolution 1540 was designed to fill two major legal gaps: the absence, first, of a universal obligation to secure nuclear materials; and second, of a prohibition against providing non-state actors with nuclear materials.³⁷ It is well recognized that the impetus for the Council’s action on 1540 came from the United States after a speech by President Bush in September of 2003.³⁸ There, the President called for enacting, by resolution, an international legal regime to stop the spread of nuclear weapons to non-state actors:

Because proliferators will use any route or channel that is open to them, we need the broadest possible cooperation to stop them. Today, I ask the U.N. Security Council to adopt a new anti-proliferation resolution. This resolution should call on all members of the U.N. to criminalize the proliferation of weapons -- weapons of mass destruction, to enact strict export controls consistent with international standards, and to secure any and all sensitive materials within their own borders.³⁹

³⁶ U.N. Security Council Resolution 1540, at para. 24.

³⁷ Masahiko Asada, *Security Council Resolution 1540 to Combat WMD Terrorism: Effectiveness and Legitimacy in International Legislation*, 13 J. CONFLICT & SECURITY L. 303, 315 (2008).

³⁸ *Id.* at 313. See also, Sean Murphy, *UN Security Council Resolution on Non-Proliferation of WMD*, 98 AM. J. INT’L L. 606, 606 (2004).

³⁹ President George Bush, “President Bush Addresses United Nations General Assembly,” *The White House Archives*, available at: <http://georgewbush-whitehouse.archives.gov/news/releases/2003/09/20030923-4.html>.

This speech succinctly stated the two goals ultimately addressed in the Resolution's text: the "criminality" provisions addressing the illegality of the transfer of nuclear materials, and the "security" provision addressing standards of physical nuclear security. After another seven months of negotiation, on April 24th, 2004, the Security Council unanimously adopted Resolution 1540.⁴⁰ It was the first such international instrument to recognize the danger of non-state actors as a nuclear threat, and for that reason alone, it greatly expanded the legal framework for preventing nuclear terrorism.⁴¹

Up until 1540, the central legal structure in limiting the international spread of nuclear weapons was the Nuclear Nonproliferation Treaty ("NPT"), adopted in 1968. It constituted a binding legal commitment that forbid states without nuclear weapons from attempting to develop nuclear weapons, and states with nuclear weapons from transferring them to states without weapons.⁴² To ensure compliance, the International Atomic Energy Agency ("IAEA") was created to monitor via inspections and ensure that nuclear material was not diverted or traded.⁴³ As an incentive for nonproliferation, compliant nonnuclear states are given access to technology for nuclear energy and could engage in peaceful nuclear trade with member countries.⁴⁴ The international nature of inspections created an unbiased and more transparent verification procedure for compliance that inspired confidence that violators would be discovered. States were motivated towards

⁴⁰ Sean Murphy, *UN Security Council Resolution on Non-Proliferation of WMD*, 98 AM. J. INT'L L. 606, 607 (2004).

⁴¹ Asada, *supra* note 1, at 315.

⁴² David Jonas and Christopher Swift, *Reformulating the Nuclear Nonproliferation Regime: Al-Qaeda, Global Terrorism, and the Rogue State Paradigm*, 13 UCLA J. OF INT'L L. & FOREIGN AFFAIRS 337, 347 (2008).

⁴³ *Id.*

⁴⁴ Sepehr Shahshahani, *Politics Under the Cover of Law: Can International Law Help Resolve the Iran Nuclear Crisis?*, 25 BOSTON UNIV. INT'L L. J. 369, 383 (2007).

nonproliferation by the incentive of peaceful nuclear trade, and the threat of sanctions or force pursuant to Chapter VII of the U.N. Charter if they violated the treaty. Finally, the near universal acceptance of this legally binding treaty created a normative effect towards nonproliferation that, to some degree, has constrained state behavior.⁴⁵ While the NPT was vital to halting expansive proliferation, the essentially state-centric focus of the treaty resulted in a severe lack of security obligations for nuclear materials. Only the transfer of nuclear materials to a nonnuclear state was prohibited; non-state groups were never addressed in the treaty.⁴⁶ For that reason, the theft of nuclear materials was not considered, and the security of nuclear materials not addressed.

The threat of fissile material theft was first addressed in 1980 with the Convention on the Physical Protection of Nuclear Material (“CPPNM”). This treaty, with 141 parties, requires states to provide a minimum threshold of security for nuclear material during “international nuclear transport,” though nothing is required of stationary, domestic nuclear material.⁴⁷ The most recent international instrument, the International Convention for the Suppression of Acts of Nuclear Terrorism (“NTC”), was drafted and passed in the wake of the September 11th attacks, and finally came into force in 2007 with 107 signing nations.⁴⁸ Its focus was on the global threat of terrorist networks and nuclear smugglers. The member nations agreed to “make every effort to adopt appropriate measures to ensure

⁴⁵ Jonas, *supra* note 42, at 348

⁴⁶ *Id.*

⁴⁷ Incentive Gap, *supra* note 32, at 1870.

⁴⁸ Russia and the United States both signed, but the United States has failed to ratify the treaty. “International Convention for the Suppression of Acts of Nuclear Terrorism,” *United Nations Treaty Collection: Treaty Status*, available online at: http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=IND&mtdsg_no=XVIII-15&chapter=18&Temp=mtdsg3&lang=en.

the protection of radioactive material, taking into account relevant recommendations and functions of the International Atomic Energy Agency.”⁴⁹ Unfortunately, the treaty did not mandate that nations impose the relevant recommendations of the IAEA, only that they consider them. The result is that it was unclear after the NTC exactly what was required for a state to make “every effort” to secure its nuclear materials.⁵⁰

The vagueness of that declaration makes it subject to varied interpretation and, therefore, nearly impossible to assess an instance of actionable negligence. Any nation may argue it has made “every effort” at security. In nuclear material security, nations should not get credit for their effort; only real security should meet the required threshold. Thus, without any standards for what “every effort” at security actually means, the security obligation is vague to the point of uselessness.⁵¹ But even if there had been a specific set of security obligations, these are multilateral conventions, political agreements, not legal commitments backed by sanctions or force.⁵² None create an actionable offense of negligence backed by some form of penalty, and therefore they fail to alter the legal regime of nuclear security.

1540 came about after the terrorist attacks of September 11th, 2001, with renewed concern over non-state terrorist organizations acquiring nuclear materials or weapons. It grew out of the reality that no international legal instruments addressed the problem of

⁴⁹ Incentive Gap, *supra* note 32, at 1869.

⁵⁰ “International Convention for the Suppression of Acts of Nuclear Terrorism,” *United Nations Audiovisual Library of International Law*, available at: http://untreaty.un.org/cod/avl/pdf/ha/icsant/icsant_e.pdf.

⁵¹ *Id.* at 1876.

⁵² Paige Willan, *The Convention on the Suppression of Acts of Nuclear Terrorism: An Old Solution to A New Problem*, 39 *GEORGETOWN J. OF INT’L L.* 527, 532 (2008).

nuclear terrorism with reference to terrorists.⁵³ Instead, the NPT addressed nuclear concerns solely in state-centric terms. An international legal framework was needed to address the non-state actor threat. At the forefront of the threat was al-Qaeda. Like several other terrorist organizations that have attempted to acquire nuclear weapons, the al-Qaeda organization is a loose and informal association of cells operating in Yemen, Afghanistan, Algeria, Iraq, and Pakistan, among other countries. They have carried out attacks in the Middle East, Asia, Africa, Europe and North America.⁵⁴ There is no centralized base-of-operations nor a particular country that directs the group's attacks.⁵⁵ As such, this organization and its many affiliates represent a diffuse terrorist non-state actor.

If an al-Qaeda-linked group acquired a nuclear weapon, they would likely use it.⁵⁶ Osama Bin Laden arranged to purchase nuclear materials at least once, attempting to buy weapons-grade uranium to fabricate a nuclear bomb.⁵⁷ In this case, in the late 1990s, Bin Laden offered to buy a three-foot tall cylinder that he believed to contain nuclear material for \$1.5 million, but the sale was a scam.⁵⁸ In 2004, an al-Qaeda spokesman urged Islamic people around the world to retaliate against the United States by killing up to four million

⁵³ Murphy, *supra* note 40, at 607.

⁵⁴ Kimberly McCloud and Matthew Osborne, "WMD Terrorism and Usama Bin Laden." *Center for Nonproliferation Studies*, available at: <http://cns.mills.edu/pubs/reports/binladen.htm>.

⁵⁵ Jonas, *supra* note 42, at 338.

⁵⁶ Rebecca Leung, "Bin Laden Expert Steps Forward," *CBS 60 Minutes*, Nov. 14, 2004, available at: <http://www.cbsnews.com/stories/2004/11/12/60minutes>.

⁵⁷ Joseph Cirincione, *Proliferation Threats and Solutions*, 19 NOTRE DAME J. OF L., ETHICS & PUB. POLICY, 339, 339 (2005).

⁵⁸ McCloud, *supra* note 54.

Americans.⁵⁹ That same year, Bin Laden received a fatwa, a religious decree, justifying a nuclear attack on the U.S. based on religious grounds.⁶⁰ It is clear that terrorist groups seek to use nuclear materials and that acquiring the necessary material is the primary obstacle.

With that knowledge, 1540 was conceived as a supply-side prevention model. That is, it focused on restraining the supply of nuclear weapons to non-state actors, rather than on curbing the terrorist demand for nuclear weapons. The message was for states to secure their nuclear weapons and material from terrorist theft as a preventative scheme.⁶¹ A supply-side model is likely to be effective because states control the only supply of nuclear materials. For a nuclear attack, terrorists must have special nuclear material. Only two types of this nuclear material can be used in a nuclear device: highly enriched uranium (“HEU”) or plutonium, neither of which can be found naturally. To acquire fissile material, a terrorist cell must fabricate, buy, or steal it.⁶² The process of fabricating HEU relies on sophisticated, expensive, and bulky enrichment equipment that requires a high degree of scientific expertise. Plutonium is only created in a nuclear reactor and requires similarly sophisticated reprocessing technology to separate it from radioactive waste.⁶³ For these reasons, it is highly unlikely that even the most sophisticated terrorist group could produce nuclear materials on its own, absent state involvement.⁶⁴ Since the production of nuclear material requires the apparatus of a state, the major goal of a supply-side prevention is to

⁵⁹ James Kraska, *Averting Nuclear Terrorism: Building a Global Regime of Cooperative Threat Reduction*, 20 AM. UNIV. INT’L L. REV. 703, 722 (2005).

⁶⁰ Rebecca Leung, “Bin Laden Expert Steps Forward,” *60 Minutes*, Jan. 11, 2009, available at: <http://www.cbsnews.com/stories/2004/11/12/60minutes/main655407.shtml>.

⁶¹ Murphy, *supra* note 40, at 607.

⁶² Incentive Gap, *supra* note 32, at 1865.

⁶³ *See id.*

⁶⁴ *Id.*

eliminate state transfer of nuclear materials to non-state groups. If there is a secure enough standard of protection of nuclear weapons and materials, the so-called “Fort Knox standard,” then the threat of nuclear terrorism drops to near zero.⁶⁵

Thus, the essential issue that prompted 1540 was the absence of a legal instrument addressing the threat of nuclear theft, and a corresponding lack of security standards for physical security.⁶⁶ While it is obvious that nuclear materials are dangerous in the wrong hands, up until Resolution 1540 was promulgated, there was no minimum level of security necessary.⁶⁷ As to what measures are required to reach the minimum legal threshold for compliance, we are given the term “appropriate effective measures.” On the spectrum of physical nuclear security, that is somewhere between a mere modicum of nuclear security and the “Fort Knox standard.”

Some commentators have said that “appropriate effective measures” was a specific reference to those guidelines listed in earlier treaties, and by reference, the IAEA standards of nuclear security.⁶⁸ For instance, the CPPNM treaty, discussed *supra*, set out guidelines for nuclear transport. The text of this treaty, and its 2005 amendment, provide specific categories of facilities and corresponding protections.⁶⁹ Similarly, the NTC references the copious nuclear security standards promulgated by the IAEA. This analysis suffers from two serious problems. First, these standards were available in 2005 when 1540 was

⁶⁵ Graham Allison, “How to Stop Nuclear Terrorism,” *Foreign Affairs*, Jan.-Feb. 2004.

⁶⁶ Asada, *supra* note 1, at 304.

⁶⁷ *Id.*

⁶⁸ Christopher Joyner and Alexander Parkhouse, *Nuclear Terrorism in a Globalizing World: Assessing the Threat and the Emerging Management Regime*, 45 STAN. J. INT’L L. 203, 231.

⁶⁹ Nuclear Security – Measures to Protect Against Nuclear Terrorism, *Amendment to the Convention on the Physical Protection of Nuclear Material* (2005), available at: <http://www.iaea.org/About/Policy/GC/GC49/Documents/gc49inf-6.pdf>

promulgated. The CPPNM standards were agreed to in 1980, and the amendment was written the same year that 1540 was decided (although the amendment it is still not in effect, as 2/3 of the 147 countries have not yet ratified it).⁷⁰ Likewise, the terms of the NTC, which compel states to make “every effort” at nuclear security by taking account of IAEA standards, was being negotiated at the time Council designed 1540.⁷¹ It is not as though the Council was unaware of the standards being agreed upon in these treaties, as every permanent member of the Council is a party to both treaties.⁷² Thus, had the Council intended to include the IAEA guidelines, they would have made some explicit reference to them.⁷³ Second, even if the Council had referenced the treaties as defining the term “appropriate effective” measures, this would be meaningless because the language of the treaties merely *suggests* standards for domestic control. The CPPNM’s standards only apply to international transport, not domestic security,⁷⁴ and the NTC obligation to enact standards based on IAEA guidelines requires merely to “taking into account the relevant

⁷⁰ *Id.*

⁷¹ It opened for signatures on September 14, 2005. “International Convention for the Suppression of Acts of Nuclear Terrorism,” *United Nations Audiovisual Library of International Law*, available at:

http://untreaty.un.org/cod/avl/pdf/ha/icsant/icsant_e.pdf.

⁷² For NTC signatories, see “International Convention for the Suppression of Acts of Nuclear Terrorism,” *United Nations Treaty Collection: Treaty Status*, available online at: http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=IND&mtdsg_no=XVIII-15&chapter=18&Temp=mtdsg3&lang=en. For CCPNM signatories, see “Convention on the Physical Protection of Nuclear Material,” *International Atomic Energy Agency*, available at:

http://www.iaea.org/Publications/Documents/Conventions/cppnm_status.pdf

⁷³ A number of IAEA implementing guides are available at: http://www-pub.iaea.org/MTCD/publications/PDF/Pub1359_web.pdf.

⁷⁴ Incentive Gap, *supra* note 32, at 1870.

recommendations” of the IAEA, not necessarily following them.⁷⁵ 1540 is even less compelling than the NTC, as it doesn’t even ask member states to consider the recommendations of the IAEA. There is nothing binding about either of these treaties regarding domestic nuclear security, thus providing no guidance as to what the term “appropriate effective measures” actually means.

This was by design. The members of the Council were worried that being too specific as to guidelines would provide legal cover to authorize political punishments under the guise of security.⁷⁶ Specifically, China and Pakistan didn’t want a minor violation to provide an excuse for sanctions or even invasion.⁷⁷ China threatened to veto the resolution until specific and forceful clauses were dropped, like a provision that allowed for international interdiction of ships suspected of transporting nuclear material.⁷⁸ Likewise, Pakistan was adamantly against using the Security Council to legislate domestic security standards.⁷⁹ India, too, stated that it would “not accept any interpretation of the draft resolution that imposes obligation arising from treaties that India has not signed or ratified, consistent with the fundamental principles of international law.”⁸⁰ For many nations on the Council, sovereignty as to the content of national law was simply more important than nuclear security.⁸¹ We don’t know what “appropriate effective measures” are because they are not supposed to have an enforceable meaning. Had they listed a solid

⁷⁵ “International Convention for the Suppression of Acts of Nuclear Terrorism,” *United Nations Audiovisual Library of International Law*, available at: http://untreaty.un.org/cod/avl/pdf/ha/icsant/icsant_e.pdf.

⁷⁶ Murphy, *supra* note 40, at 607.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Asada, *supra* note 1, at 316 (quoting S/PV.4950, p. 24).

⁸¹ *Id.* at 317.

definition, the Resolution would have never gotten passed. Possibly, the hope was that the Reporting Committee would have a flexible basis to determine violations in practice, instead of by a fixed standard. For that reason, it is necessary to look at the practical effects of 1540.

3. Efficacy as a Legal Framework

On at least one level, 1540 was important and highly effective. The “criminality” provisions of the Resolution created an obligation against assisting non-state actors in acquiring nuclear weapons. As a legal provision, it addressed an urgent need through a universally binding legal framework that has teeth.⁸² When it comes to the “security” provisions, however, the success was more limited. The goal of ushering in a new security regime has not moved as swiftly or effectively as the Council may have hoped. The initial two year grant to the Committee to collect country reports has since been extended by resolution several times, most recently in 2008, by Resolution 1810.⁸³ In its most recent report to the Council, the 1540 Committee noted some progress in that a high number of states, nearly 160, have reported “on their capabilities and gaps in stopping the proliferation” of nuclear weapons.⁸⁴ The document does not list the number of states that have actually made changes to their legal codes reflecting the Resolution’s obligations, and it did note that the Committee often lacked information about the measures adopted by

⁸² *Id.* at 315.

⁸³ “United Nations Security Council Resolution 1540 (2004),” *1540 Committee*, available at: <http://www.un.org/sc/1540>.

⁸⁴ Claude Heller, Chairman of the 1540 Committee, “Letter dated 29 January 2010 from the Chairman of the Security Council Committee established pursuant to resolution 1540,” *United Nations Security Council*, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/225/71/PDF/N1022571.pdf?OpenElement>.

States to form a legal opinion of their adequacy.⁸⁵ The Committee has yet to recommend punishment to any state, declare a state's measures to be in violation of the "appropriate effective" standard, or define what factors they consider when evaluating compliance with that standard.⁸⁶

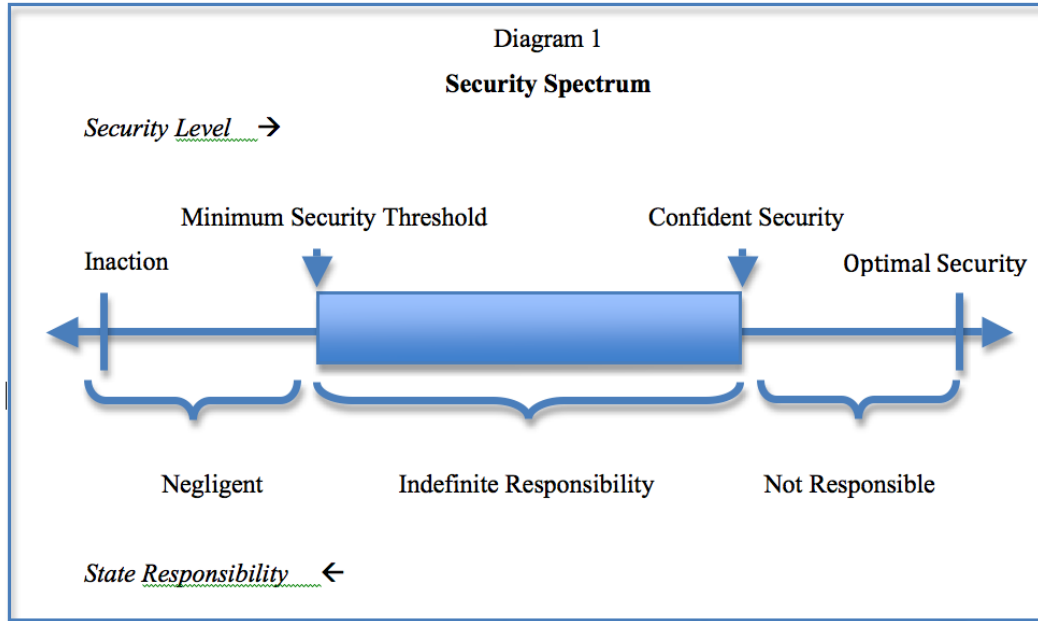
As a result, the standard of "appropriate effective" measures makes the obligation vague and de facto unenforceable. Taking action against even a clearly negligent actor would be difficult and unlikely in lieu of a specific set of obligations.⁸⁷ As if to ensure the ineffectiveness of 1540, the Committee, as the only mechanism to monitor compliance, is forced to rely on the assurance of the very entities they are supposed to monitor. The committee has no independent monitoring power. Instead, the Resolution leaves the member states to set up their own guidelines, self-police, and criminalize violations within their own jurisdictions. Ultimately, Resolution 1540 represents an international consensus regarding the threat of proliferation to non-state actors, enshrined in binding legal obligations, but imposed with vague terms and self-enforcement.⁸⁸ The good news is that it is universally binding, punishment is associated with violations, and there is a means of monitoring compliance. The bad news is that determining a violation is almost impossible. The result is that states may enact cursory measures for the protection of nuclear weapons and material, that arguably make "every effort" to meet the threshold of "appropriately effective," thereby avoiding liability.

⁸⁵ *Id.* para. 13.

⁸⁶ *See Asada, supra* note 1, at 331.

⁸⁷ Incentive Gap, *supra* note 32, at 1870.

⁸⁸ Jonas, *supra* note 42 at 352.



The diagram above represents the legal framework of nuclear security after Resolution 1540. The left side of the nuclear security spectrum represents insecure nuclear material. After 1540, complete inaction is clearly a violation of international law because a state has an obligation to institute “appropriate effective measures.” This requires some minimum amount of security, below which a state is subject to sanctions. The right end of the spectrum represents the goal of the nuclear security, optimal coverage. A state with confident security cannot be held legally liable even if nuclear material is stolen from their facility. However, the bar in the middle represents a level of security where a state can argue that it has met its legal obligations, yet still not have secure facilities. Because there is no definite standard imposed by 1540, this is the range of indefinite responsibility, wherein the Resolution has little to no legal effect.

III. Future Measures by the Security Council

A commonly voiced prescription is for the Council to simply try again, using 1540 as a stepping-stone to enact stronger and more definite measures the next time around.⁸⁹ Or simply issue a resolution stating the standards the Council intended as “appropriate effective.” After all, the Council possesses overwhelming authority to pass binding resolutions swiftly and effectively.⁹⁰ This is a dangerous assumption likely to cause serious legitimacy concerns, as a small group of nations would effectively be enacting international legislation without the consent of those nations to be bound.⁹¹ In the past, the Security Council has only acted pursuant to an immediate, but temporary, threat to the peace, and its resolutions have been crafted to remain in place for a finite amount of time. Here, the Council is not responding to a specific collective security crisis, such as when it established criminal tribunals for Yugoslavia and Rwanda, or acted when Kuwait was invaded by Iraq.⁹² Instead, 1540 is more like an item of general legislation that is intended to apply indefinitely, standing in place of what would otherwise require a multilateral treaty.⁹³ Until the early 2000s, the Council had only addressed specific threats to the peace; however, right after September 11th, 2001, the Security Council declared in Resolution 1373 that the threat of terrorist activity now “constitutes an [ongoing] threat to international peace and security.”⁹⁴ The ongoing nature of the threat laid the groundwork

⁸⁹ See note 2 and accompanying text.

⁹⁰ Asada, *supra* note 1, at 318.

⁹¹ *Id.* at 319.

⁹² *Id.* at 320.

⁹³ *Id.*

⁹⁴ U.N. Security Resolution 1373 (2001).

for the Council to pass rules of general applicability, like those in 1540. As such, it was an entirely novel use for the Security Council.⁹⁵

Simply because this type of act appears to be within the authority of the Council does not mean that it is wise.⁹⁶ There are three problems with the Council acting as a general legislature, even as to grave and immediate concerns. First, the Council is not representative of the members of the U.N. It is unbalanced and selective, consisting of the most powerful (and distrusted) nations.⁹⁷ While there are gaps in the legal framework, those can be filled by multilateral treaties where every nation may participate in the political process.⁹⁸ It is particularly unfair for the Council to create general legislation binding all members because the five permanent members have the power to veto any legislation impinging upon their national interest, whereas the rest of the 192 members are forced to quietly obey the Council's decision. When the veto authority of the UK or France on such a powerful Council is nearly impossible to justify, the composition of the Council looks arbitrary. And even if the Council restrained itself to only urgent issues, such as nuclear safety, it is still difficult to argue that the best nations to develop plans to disarm

⁹⁵ *Id.* at 322.

⁹⁶ Several scholars argue that such a lawmaking power was envisioned by the drafters of the U.N. Charter. The general wording of Article 25 of the U.N. Charter's grant of power to the Council to determine and combat a "threat to the peace" was deliberately phrased to allow the Council to take preventive actions, including through general lawmaking. "It must also be deemed empowered to enact general regulations prohibiting or restricting certain activities which, regardless of who is the author, are susceptible to putting in jeopardy international peace through the effects they are likely to produce." Christian Tomuschat, *Obligations Arising for States Without or Against Their Will*, 241 RECUEIL DES COURS 344, 345 (1993). See also, Harper, *Does the United Nations Security Council Have the Competence to Act as Court and Legislature?*, 27 NEW YORK UNIV. J. OF INT'L L. AND POLITICS 149 (1994).

⁹⁷ Murphy, *supra* note 40, at 607.

⁹⁸ Asada, *supra* note 1, at 323.

are those that first built nuclear weapons, continue to possess them, and are the reason they sit on the Council in the first place.⁹⁹ Second, Council legislation preempts the opportunity of the international community to treaty-build. This eliminates the possibility that nations could negotiate a multilateral treaty and bind themselves.¹⁰⁰ Such a treaty would have far more legitimacy because nations would be bound by their own consent. A nation seems more likely to comply with a treaty when they negotiated and bound themselves to it, at least more than blind adherence to the dictates of the mostly unelected Council. Finally, Council legislation subverts state sovereignty over domestic law, which could create significant backlash against the U.N. The threat of these three issues doesn't appear to be an arbitrary and totalitarian Council (or even one acting unfairly), but rather an international community that just stops paying attention. Such a result would drastically undermine the credibility of international law. The next time the fifteen members of the Council decide to legislate for the 193, it is far more likely to create a constitutional crisis for the U.N., than it is to make the world more secure.¹⁰¹

IV. Conclusion

The U.N. Security Council has the power to act to protect the peace and security of the international community. Resolution 1540 was decided under this power as a means to address two gaps in international law: first, the absence in international law of provisions targeting nuclear transfers to non-state actors; and second, the lack of mandatory nuclear

⁹⁹ Thomas M. Franck, *The "Powers of Appreciation:" Who Is the Ultimate Guardian of UN Legality?*, 86 AM. J. INT'L L. 519, 523 (1992).

¹⁰⁰ *Id.*

¹⁰¹ Incentive Gap, *supra* note 32, at 1881.

security standards. As to the first gap, the Resolution successfully criminalized providing assistance to nuclear terrorists. As to the second gap, while the Resolution created a minimum requirement of security, it is impossible to judge whether a nation is complying with that standard or not. In that sense, the Resolution was a step forward, as it was universally binding, it had a penalty for failure to uphold the standard, and it provided a mechanism to enforce compliance, Reporting Committees. However, these Committees were left trying to apply a nebulous standard of “appropriate effective measures,” without much success. Unfortunately, the solution is not as simple as going back to the drawing board and bolstering 1540. The Council, as an unrepresentative body acting without the consent of those they legally bind, may push too far in creating substantive legal rules. If they do, it is more likely to have the effect of undermining the legitimacy of the Council rather than creating an effective framework for enforcement.

Within the international community, we need a legal standard to protect nuclear weapons and associated materials from theft. The specific guidelines necessary to achieve a confident level of security do not need to be laboriously created because they have already been developed by the IAEA. Whether the IAEA guidelines for physical security or another internationally agreed upon “gold standard,” it is essential to have reliable standards upon which the international community can be sure that nuclear weapons are confidently secure.¹⁰² The threat is real; terrorist organizations have made attempts at acquiring nuclear materials, and only true security will stop them in the future. The issue is getting states to agree upon a security standard they can be held to.

¹⁰² *Id.*

1540 is an attractive weapon on this front, with the capability to universally bind nations and threaten force as punishment. It is, however, only part of the solution. States need to negotiate between themselves to create a multilateral treaty listing what “appropriate effective” measures they find necessary to ensure security. This would capitalize on the strengths of 1540 while eliminating its weakness of vague standards and lack of consent. The result would be a binding set of specific obligations that would create a normative regime of nuclear security. Compliant states would foster international prestige by showing the scientific and technological capability of being among the most secure nations, while nations that failed to consent to the treaty, or failed to meet the minimum standard, would be ostracized, even branded as incompetent.¹⁰³ Vitally, with a specific set of obligations that states have consented to, a state failing to meet the security benchmark could legally be presumed negligent if an attack occurred using their weapons. The desire of states to be a part of the security regime, enjoy the presumption of innocence, and avoid the threat of sanctions and force will incentivize states to secure their nuclear materials from terrorist theft. Thus, by defining “appropriate effective measures” through an international treaty, the enforcement of 1540 can be kept in place and the standards of security can be politically negotiated and agreed upon.

¹⁰³ *Id.*