

Comprehensive Review on the Status of Implementation of Resolution 1540 (2004)

**Background papers prepared by 1540 Committee experts according to the document
on modalities for the consideration of a comprehensive review (S/2009/170)**

Specific Element (a)

**“Assess the impact of resolution 1540, including through measures taken after the
adoption of resolution 1540”***

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* This background paper was prepared by the group of experts at the request of the 1540 Committee. It does not necessarily represent the views of the Committee.

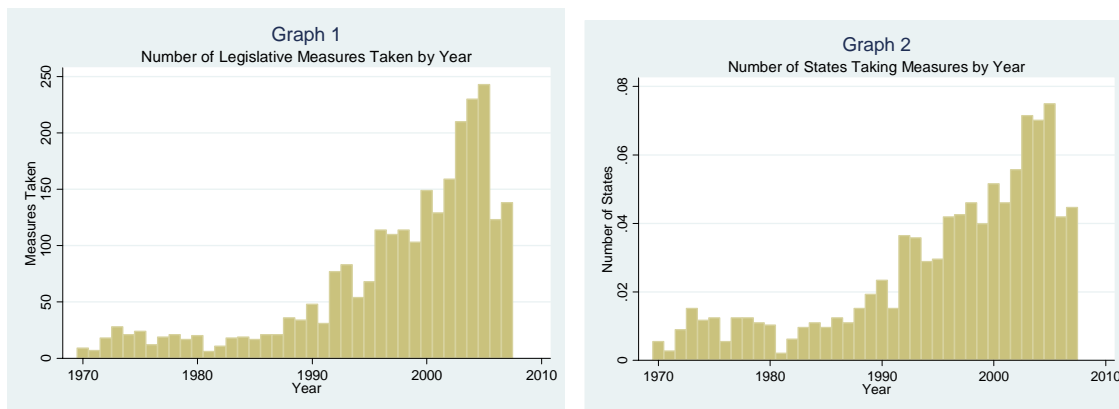
A. Current efforts by the 1540 Committee to monitor the implementation of resolution 1540 (2004)

The resolution obliges States to “adopt and enforce appropriate effective laws” regarding prohibited activities (OP2) and “take and enforce effective measures to establish domestic controls” meant to deter or prevent those prohibited activities from occurring (OP3). The resolution gives equal weight to adopting and enforcing legislation. In no small way this recognizes that proliferation by non-State actors had fallen through the gaps in international and national non-proliferation laws. Did the resolution prompt more States to adopt more national legal measures relevant to closing these gaps? The 1540 Committee will evaluate the impact of its efforts on other important topics, such as assistance, in separate background papers.

No single measure can answer the question of the impact of the 1540 Committee on national legislative activities very well, compounding the already difficult task of deciding how to calculate “legal measures.” The 1540 Committee, for example, has identified that States had 19,215 legislative and enforcement measures in place through 2008, a significant increase over the 17,833 total of 2007. The 1540 Committee understands, however, that better reporting, not new measures, accounts for some of this increase. Moreover, many of the legal measures States have taken cover multiple obligations, while for many specific obligations, States may have multiple laws, all of which makes the legislative measures difficult to compare. Finally, the report does not reveal much about when States have adopted relevant legislation.

This analysis excludes attempts to measure the impact that resolution 1540 (2004) has had on efforts to universalize the major nonproliferation treaties, as it seems unlikely that in this short format one can untangle the impact of the work from the work of others on this issue. It also leaves out many other measures to implement the resolution, such as the formation of new or changing existing inter-agency committees (unless States do so by legislation or regulation) the prosecution of violations, or the reduction in proliferation risk related to non-State actors, as the 1540 Committee initially focused its efforts on surveying the status of legislation and raising awareness about the resolution, and only later began to stress the development, enforcement, and impact of these national legislative frameworks.

Finally, the paper explores two variables. Graph 1 lists the number of relevant laws, regulations, ordinances, decrees, et cetera, taken by States each year from 1970 through 2007 (the last year for which the 1540 Committee has its most complete data). Graph 2 lists the number of States that have adopted measures in a particular year, from 1970 through 2007). Both graphs have a similar pattern. Both variables increase starting in the last decade of the twentieth century, and both undergo a sharp jump in 2003, peaking in 2005, and dropping in 2006 but appear to increase again in 2007. The 1540 Committee may consider the many ways to assess these two variables and the pattern that emerges from the analysis.



B. Challenges facing the 1540 Committee in examining the impact of the resolution

As some other background papers will note, assessing the impact of the resolution will require collection of new types of data, such as effort to identify the year of a legislative measure used in the analysis above. At a fundamental level, the 1540 Committee might attempt to measure if national implementation of the resolution has reduced the risk of non-State actors acquiring nuclear, chemical, biological weapons and the means of delivery or illicit activities involving related materials. The Center for Nonproliferation Studies, for example, tracks incidents of WMD terrorism, with 316 cases from 1988 to 2004, which, if expanded to encompass more recent years, might prove useful.

For its impact on legislative activities, the 1540 Committee might consider how it could both learn about the status of draft legislation – and perhaps contribute to the drafting process through tailored technical comments. Helping a State draft its laws, which many have requested, will help the 1540 Committee better understand the practical challenges that specific States face in enhancing their legislative framework. In particular, the current process of data collection looks mainly at what States have done, but not as much on how and why they have developed new laws or regulations.

As States continue to build their legal frameworks against proliferation of WMD by non-State actors, the 1540 Committee also will have an increasing challenge in measuring its impact and the impact of the resolution on the execution and enforcement of these laws. While some States publicize their relevant prosecutions, others do not. A few States have reported licensing data, but most have not. Very little information exists on the number of staff and other resources agencies have dedicated to 1540 implementation.

Understanding “appropriate effective” implementation

The true benefit sought under resolution 1540 (2004) rests on States implementing the provisions of the resolution in their own domestic legal systems. In others words,

effective implementation means enforcing the law, not just adopting it, and building appropriate capacities. The UN Security Council clearly recognizes and understands that Member States have very diverse legal and constitutional systems. In Operative Paragraph 2, for example, resolution 1540 implies that each State must resolve according to its own constitutional framework any potential conflicts between 1540 obligations and domestic legal requirements

The overall objective of the resolution requires effective implementation at the national level to achieve a successful result at the international level. Concomitantly, weakness at the international level will undermine national efforts. The dynamics of the interaction between these two levels, the national and international, puts a premium on promoting common understanding of the resolution and shared good practices among Member States to close or prevent loopholes across national systems.

Currently, the 1540 Committee monitors implementation at the national level. It does not explore, however, the compatibility of different national systems and the contributions that national implementation makes toward the development of an effective international barrier to proliferation by and to non-State actors. Do the different texts from national legislation and regulation, for example, point to an existing or emerging common interpretation of facets of the resolution? Have different interpretations emerged in different regions? Have some regions had more success in developing common understandings and, if so, why? Even where regions have common laws, such as in the European Union, how do specific differences in execution and enforcement within and across States or regions affect the success of the resolution at the national and international levels? Looking at these kinds of questions will foster, among other outcomes, greater and more effective technical cooperation.

Most States already have at least some laws in place to implement the main nonproliferation treaty regimes, for example, especially for implementing the Chemical Weapons Convention (CWC), the Nuclear Non-Proliferation Treaty (NPT), and the Biological and Toxic Weapons Convention (BTWC). Such States usually have related regulations organized under a single national authority or separate authorities for each regime. These treaties have specific prohibitions, mainly for States but some for non-States as well, which usually identify common understandings. However, these treaties – and resolution 1540 – do not establish specific penalties for violations by non-State actors. States thus need to adopt and apply such penalties at the national level. The 1540 Committee has not examined existing differences in criminal or civil penalties to see if and what common understandings have emerged. Where do States, for example, apply criminal penalties and where do they use civil or administrative punishments? What different kinds of preventive enforcement, such as outreach to industry and the public do States undertake? How do national systems of enforcement cope with transnational enterprises, either legitimate or illicit? Similar questions exist for the compatibility of accounting, securing, and physically protecting, controlling borders and the export, transit, transshipment, and re-export of related materials.

Similarly, the 1540 Committee knows little about what resources States apply to execute obligations under the resolution, including on capacity-building. Many states have reported that they adopted new bureaucratic structures to coordinate their national efforts to implement the resolution. The 1540 Committee has gathered some information on the existence of various mechanisms: national authorities for accounting, securing, and physically protecting related materials; enforcement bodies for border and export controls; and, relevant financial authorities.

However, it has accumulated little data on staff, funding, and other resources that States apply to nonproliferation issues. How does the use of resources in one area affect other aspects of implementation? Does implementing various controls for nonproliferation advance other goals, such as development, environmental protection and public health? Understanding what States perceive as effective and efficient uses of their resources has tremendous implications for technical assistance programs, upon which full implementation of the resolution depend.

Resolution 1540 makes several references to control lists. In the preamble, the Security Council notes its grave concern that non-State actors identified in the list of the Committee established under UN Security Council resolution 1267 may have access to nuclear, chemical biological weapons and their means of delivery. It also refers to control lists in defining related materials as:

...materials, equipment and technology covered by relevant multilateral treaties and arrangements, or included on national control lists, which could be used for the design, development, production or use of nuclear, chemical and biological weapons and their means of delivery.

The final reference appears in Operative Paragraph 6, which acknowledges the utility of national control lists in combating proliferation. Moreover, in resolutions related to proliferation of nuclear, chemical, biological weapons and means of delivery that were adopted since 2004 to address other problems, the Security Council itself has specified lists of controlled items.

Clearly, the 1540 Committee does not need to replicate the work done by the Security Council and other bodies to create control lists specific to the resolution 1540. Some have argued that these lists exist as public goods, available without cost to all States to use without decreasing their value to other states. Indeed, these may operate as a sort of *super public good*, where their value increases the more States use them.

While the 1540 Committee monitors whether States have control lists, either of end-users or of items, it does examine the compatibility of these national lists, or their incorporation into national policy and practice. How many States, for example, use the control lists of one or more of the international treaties or multilateral export control

arrangements? If States do not use such lists, what do they use? How efficiently do States update their national lists in coordination with similar efforts by others? How do States use these lists in executing and enforcing controls on the movement of items across borders? How do States incorporate the controls into their national customs or trade legislation? How do States address the critical issue of classification of items on such lists?

Different legislative approaches

In implementing their obligations to adopt appropriate effective domestic legislation for prohibited proliferation activities (OP2), for border controls (OP3-c), and for controls on the export, re-export, transit, and transshipment of related materials (OP3-d), States have taken two paths. States have adopted a **single-act approach** or a **multiple-act approach** (with more or less integration and harmonization across the acts). In the single-act approach, States have a single piece of legislation that cuts across the different weapons types and their means of delivery. Several of these acts emerged as a specific response to resolution 1540 (2004). In contrast, many States rely on legislation that arose as they responded to the individual proliferation risks of nuclear, chemical, biological weapons and their means of delivery in the past, usually not in response to the resolution itself, or in response to seemingly unrelated threats (e.g., anti-terrorism, pollution, disease, and other hazards). In some instances, however, States have updated such acts, making them more complementary and responsive to the risks identified in resolution 1540 (2004). For implementation of accounting, securing, transporting, and physical protection of these weapons, their means of delivery, and related materials (i.e., OP3-a and OP3-b), in contrast, almost all States use a **multiple-act approach**.

Each approach has implications for building an effective international effort to combat proliferation of nuclear, chemical, and biological weapons and their means of delivery to non-State actors. What impact does each approach have on making individual national systems compatible with emerging international standards? Does a multiple-act approach make it more or less likely that national systems will address the “gaps” between more traditional non-proliferation laws? How does each approach affect the provision of technical assistance in drafting legislation?

Examining these and similar questions remain an important challenge for the efforts of the 1540 Committee to understand the impact of the resolution, particularly with regard to elements not considered an obligation.

C. Options to consider regarding the impact of the resolution

The 1540 Committee could increase its focus on understanding the compatibility of national systems of legislation and regulation related to the resolution, including the use of penalties and preventive enforcement. This would put its work on monitoring

national implementation in greater context and better promote the objectives of the resolution at the international level. Pilot studies on compatibility of national systems for different paragraphs and sub-paragraphs of the resolution would serve as a first step in this process. Similarly, the 1540 Committee might conduct pilot studies on the use of resources to implement these laws and regulations, with particular attention to the relationship between capacity building in these areas and national development agendas.

For control lists, the 1540 Committee might consider more authoritative promotion of useful controls lists, the lists of dual-use items in S/2006/815, the lists of scheduled chemicals of the CWC, the consolidated list of dual-use items of regional organizations such as the European Union, and of the multilateral export control regimes. Although it is a prerogative of each individual State to determine what items it should control, moving toward a common understanding on control lists would be a remarkable step toward a more effective international effort to combat the proliferation of nuclear, chemical, and biological weapons and their means of delivery to non-State actors.