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1540 IMPACT: SUBSTANTIVE NORMATIVE CHANGES AFTER 2004?

The actual implementation of Resolution 1540 (2004) remains a lengthy process, and there is a number of hurdles on its way. The latest 1540 Committee implementation report came out in 2016. It indicated the progress made since the previous report of 2011 with an average 25,5% increase in the number of states fulfilling 120 or more activities related to the resolution. However, in the view of the 1540 Committee's mandate expiration in 2021, some may say it has already achieved its maximum and should no longer function: a number of issues remain unresolved and there was little progress since 2016. At the same time, the best strategy to fully assess the status of the 1540 implementation is to conduct a robust audit for each member state. With the new peer review concept, it is doable but requires a lot of coordination and encouragement on the part of the Committee.

Keywords: Resolution 1540, 1540 Committee, WMD, terrorism, nonproliferation.

Introduction. On April 28, 2004, the United Nations Security Council unanimously adopted Resolution 1540. Sixteen years after, Security Council still shares the understanding that the actual implementation of 1540 is a lengthy process, and there is a number of hurdles on its way. The question that rises in connection with any UN resolution is whether it has real impact on the issues it was destined to address. It becomes exponentially more important in the view of the next comprehensive review required to by 25 April 2021 when the 1540 Committee mandate is set to expire. The impact can be tested by both assessing 1) the creation of normative basis corresponding the Resolution 1540 in member states' legislation after 2004 and 2) practical implementation steps by the governments.

As proclaimed at the 1540 official site, the resolution requires states to "adopt and enforce appropriate effective laws that prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes, as well as attempts to engage in any of the foregoing activities, participate in them as an accomplice, assist or finance them" as well as to enhance security, account and trade control of aforementioned items.

The current study's aim is to determine whether resolution 1540 serves own goal through effectively motivating governments to introduce changes into national legislation covering the resolution's scope and enforcing it.

It is important to understand the level of progress of 1540 implementation since it is tailored to serve the general goal of preventing nuclear, chemical, and biological weapons proliferation through establishing proper account and control over materials and technologies, and preventing non-state actors from access to them. The possible identification of weak spots in evidence of the resolution's inefficiency will show an objective need to find the ways of enhancing its practical impact, or even to estimate its relevance and consider other possible mechanisms that will be more productive in addressing the same goals.

To conduct this research, the author analyzed 1540 committee-approved matrices indicating existing states' legislation relevant to the aims of the resolution. In addition, we will use the dataset prepared by Meili Swanson and updated by the author of current research.

Background. As early as in October 2004 it became obvious that even the initial step of presenting state reports on current conditions, as well as measures taken and planned, will take much more time than expected. Only fifty members managed to do it within six months. Others complained that the time frame was inadequate for the introduction of considerable changes. The Security Council further adopted five follow-up resolutions that complemented the initial document and addressed the arising issues: 1673 (2006), 1810 (2008), 1977 (2011), 2055 (2012), and 2325 (2016). Even though progress has been made in 1540 implementation, and in spite of continuous search for and application of new approaches, the main problems existing from 2004 are still not fully resolved.

Eighteen states have not yet even presented their initial national reports and the number has not changed since 2015.

Africa: Central African Republic, Chad, Comoros, Equatorial Guinea, Eswatini, Gambia, Guinea, Guinea-Bissau, Mali, Mauritania, Mozambique, Somalia, Zimbabwe.

Caribbean: Haiti.

Oceania: Solomon Islands.

Southeast Asia: Timor-Leste.

Europe: Holy See.

East Asia: North Korea.

The latest 1540 Committee report on the implementation of the resolution came out in 2016. It indicated the progress made since the previous report of 2011 with an average 27% increase in the number of states fulfilling 240 activities or more, and an average 24% increase in the number of states fulfilling between 120 to 180 activities. In 2011, out of a possible maximum number of 330 measures under paragraphs 2 and 3 of the resolution, 124 States had individually 150 or fewer measures and 68 States had more than 150 measures. In 2016, the figures were 110 and 83 respectively. On top of that, only 9 states reached the maximum in 2011 compared to 2016 – 17. The average number of activities in general also rose: 93 (2008) 134 (2011) 159 (2016). Additionally, 35 voluntary national implementation action plans were received as encouraged by resolutions 1977 and 2325.

It is worth paying attention to the three important aspects: 1) advance in legislation adoption; 2) measures in accounting and securing; 3) border controls and law enforcement. States were most successful in introducing legal measures and sanctions in relation to the prohibition of weapons of mass destruction (WMD) manufacturing. The least progress is observed in addressing means of delivery.

Progress, hurdles and corresponding recommendations. The challenges that the Resolution 1540 implementation process faces remained the same to a large extent. However, the scope of the problems shrunk because more countries tend to fulfill their obligations. The background paper prepared by the 1540 Committee for the 2016 comprehensive review identified significant progress made between 2011 and 2016. The overall trends are positive with 7% global increase in implementation measures (it is also noteworthy that countries with lower implementation in 2011 have reached 12% increase on average). The states made explicit progress on adopting legislation to prohibit activities of non-state actors in the sphere. At the same time, traditionally nuclear aspect acquired greater attention whereas biological weapons are not addressed as much, especially when it touches upon security, accounting, and transport of biological materials. Chemical area made progress after the risk of chemical attacks in the Middle East increased. Moreover, the fact that industrial chemical facilities using precursor materials are omnipresent makes states pay greater attention to the chemical aspect of Resolution 1540. However, there is a huge disproportion between the attention to establishing legal framework for the prohibition of production versus transportation and physical protection in favor of the former.

It seems that states made significant advances in the field of introduction of legislation. At the same time, numerous countries included the adoption of norms only distantly or collaterally related to the issues of 1540 concern. This is especially true for the legislation related to biological threats. For example, some reports included laws on plant protection (e.g. Algeria) or even on birds and eggs fertilization (Thailand). Meili Swanson proposes that the possible reason for this can be the lack of a verification regime for Biological Weapons Convention, thus member states are not forced to progress. At the same time, Resolution 1540 can become such a mechanism.

The fact of inclusion of distantly relevant documents into reports underlines the lack of awareness about what the 1540 Committee expects to see. Numerous states in their assistance requests asked for clarifications of what actually they should do and from where they should start. The range of obligations under the Resolution is overwhelming. For that reason, it would be sensible of the 1540 Committee to work closely with each state and identify unique sequence of actions. This should be conditional upon the salience of each domain for a particular country. Direct state visits, since their start in 2011, spurred the drafting of voluntary National Implementation Action Plans and most importantly intergovernmental cooperation. Although the creation of action plans to implement Resolution 1540 is not the direct implementation, it opens the road for its acceleration and provides for the understanding of phased approach. In addition, the Committee has to be explicit about why it is important. As of now, a lot of small countries do not even think that they are at all vulnerable to the issues of 1540 concern. Universalization is important as none of the world states will remain immune in case of nuclear or radiological danger, whereas any may become involved in illicit activities (trade, smuggling, etc.).

In 2004, there already existed various tools to prevent proliferation of weapons of mass destruction, including such powerful mechanisms as the Nuclear Nonproliferation Treaty (NPT), the Chemical Weapons

Convention (CWC), the Biological and Toxin Weapons Convention (BTWC), the Convention on Physical Protection of Nuclear Material (CPPNM), the International Atomic Energy Agency (IAEA), and others. Resolution 1540 is specifically targeted at preventing proliferation by non-state actors. For that reason, the adoption of legislation addressing terrorism is crucially important. Basically, it is one of the best indicators of progress in 1540 implementation. Significant number of states (72) have adopted specific laws on money laundering and terrorism financing since 2004. In addition, a lot of countries had already had similar regulations at the time Resolution 1540 was adopted.

However, the most effective strategy is to put forward specific comprehensive counterterrorism legislation that would encompass all the possible aspects, including WMD nonproliferation and terrorism financing. Such laws have been introduced in 29 states since 2004. Similar to terrorism financing norms, at some states this legislation had already existed before. It would be helpful to include drafting of comprehensive antiterrorism laws in 1540 Committee recommendations to member states. It is also expedient to include penal measures or references thereof in criminal code into the antiterrorism legislation. There might be a concern whether such regulations are repetitive of other norms adopted by states in connection to prior WMD nonproliferation obligations. However, redundancy is often helpful in WMD realm: take the example of the IAEA security recommendations for nuclear facilities. Furthermore, fast decision making is vital in case of a WMD terrorism threat, thus, being able to locate the relevant norms and sanctions as early as possible is important. New documents can and should as well reference previously existing laws.

Overall there are over 40 states showing little to no progress after 2004. They can be divided into two groups: 1) countries where compound legislation relevant to 1540 already existed; 2) those who do not assume it their primary concern. The first group is represented by the responsible members of the NPT, CWC, BTWC, CPPNM, IAEA (e.g. Argentina, Estonia, Iceland, Kazakhstan, Poland, Portugal, Ukraine, and the UK). It is especially true, for example, for safety, security, and export control regulations in case a country hosts nuclear power or research reactors. The second group is represented by the states that are low on resources for implementing the Resolution, that do not fully understand the range of activities they are expected to perform (which is reflected in assistance requests), or by those who have more pressing issues to address at the first place (e.g. Chad, Djibouti, Dominica, Eritrea, Honduras, Maldives, Palau, Somalia, Vanuatu).

There is also a hurdle of appropriate matching of assistance requests and offers. There exists a number of assistance programs (including those in the states having officially requested help) that have not been reported to the Committee. Matching “demand” and “supply” remains challenging for two reasons: 1) a considerable amount of countries does not use the proposed request template and thus lack specific technicality in the assistance requests; 2) the responses mainly come from organizations, whereas only nine of 47 designated supplying states directly responded to requests. Therefore, the resources in the United Nations Trust Fund for Global and Regional Disarmament Activities, managed by the Office for Disarmament Affairs, have been mostly used to finance outreach activities, not technical projects. The most recurrent requests for assistance include legislative assistance, training for personnel of various agencies (especially border security officers), financial aid requests, and provision of radiation detectors and surveillance equipment. Moreover, numerous states asked for clarifications on their obligations under Resolution 1540 and for help in drafting National Action Plans. This again underlines the complexity of the process.

One of the useful mechanisms to address the aforementioned issues is 1540 implementation peer review. Croatia and Poland introduced the concept of 1540-related peer review in 2014. It is a framework for comparing experiences and examining, jointly and on an interactive basis, 1540 implementation policies, approaches, and practices. Since then, the approach was tested three times with the latest report issued on January 7, 2020. Only nine countries participated in it so far (Belarus, Chile, Columbia, Croatia, Dominican Republic, Kyrgyzstan, Panama, and Tajikistan). However, it proves to be a useful assessment mechanism that allows for close attention to a particular country’s implementation efforts, bearing in mind 1540 Committee’s limited human and financial resources to conduct comprehensive reviews itself.

Proposition: interactive matrices. The overall impression of the current 1540 matrices assessment is that they are complicated and obscure. Despite extensiveness, they fail to reflect the existing regulations, changes already made, and gaps that need to be addressed explicitly. In addition, they are internally repetitive because the aspects listed in different sections tend to belong to the same laws. Moreover, each state understands the matrix template partly in an own way. Thus, the information that gets included in matrices can greatly vary. From time to time, it is nearly impossible to assess whether the presented changes were introduced due to the Resolution adoption or have no relevance to it, as far as the laws are presented without

the force dates. Additionally, states occasionally give number codifications without the names of laws. Such presentation makes it hard to judge on the relevance (e.g. Brazil, Cape Verde, Colombia, Costa Rica, Czech Republic, Djibouti, and Iceland).

It would be useful for the matrices to:

1. somehow emphasize what has been specifically done since 2004
2. specify separately what was done before Resolution 1540 adoption that is corresponding to obligations under it
3. avoid repetitiveness and thus overcomplicating
4. include separate assessments for penal measures and for practical steps (e.g. border detectors establishment, interagency personnel training).

Therefore, it may be useful to introduce interactive matrices. They should be not static PDF documents, but web-pages with active hyperlinks. An interactive state matrix could possibly include two lists: the list of issues to be addressed (e.g. export control, transshipment) and the list of laws relevant to the scope of Resolution 1540. Clicking on any particular regulation should automatically highlight the points from the list of measures that it addresses. Clicking on the type of measure should automatically highlight the relevant norms. There should also be an option to show the full scheme. In this case, each law should be assigned a color. Thus, when the page is shown in full, color bars near types of activities would identify corresponding laws and serve as hyperlinks to them as well. The interactive matrices should also include the following links:

1. “Adopted after July 2004” (lists of laws): it is preferable that the states specify whether a certain norm was put forward pursuant to 1540 (specifically or inter alia), or primarily pursuant to any other obligations;
2. “Adopted before July 2004” (lists of laws)
3. “Existing gaps in legislation”
4. “Background”: whether a country has nuclear power or research reactors, radioactive sources, chemical production, what is the level of terrorist threat.

There should also be a possibility to click on the relevant regulation and read its text in English. In this case, the matrices would at the same time provide legal assistance because the states would be able to consult any time and look at the best examples or similar examples (e.g. for the states of similar sizes or located in one region).

Conclusion. Despite the fact that the progress in the implementation of Resolution 1540 may seem limited, it is ongoing. It is harder to assess the effect of the document itself as far as by the time of its adoption a lot of states had already fulfilled their obligations under the CWC, BTWC, NPT, and others. However, the Resolution is important because all the states became legally obliged to adopt appropriate legislation on the prevention of WMD (nuclear, chemical, biological) proliferation as well as the proliferation of their delivery means. In other words, it is mostly for those who are to be forced, not for those who did it voluntarily before.

The scope of obligations under 1540 is wide and it is hard for states to make comprehensive changes quickly, so it remains a lengthy task. The Resolution 1540 comprehensive review 2009 led to the adoption of the resolution 1977 in 2011. The following formulation given in it is worth noting: “conduct a comprehensive review... prior to the renewal of its [the Committee’s] mandate.” Such coining of words nearly presupposes that this mandate was already expected to be renewed after 2021. It is very likely to be the case. During the 2016 review the Committee chair HE Román Oyarzun Marchesi also inter alia brought up the idea of the Committee’s mandate extension or making it indefinite.

In the view of the 1540 Committee’s mandate expiration in 2021, some may say it has achieved its maximum and should no longer function: a number of issues remain permanently unresolved and there was little progress since 2016. At the same time, the best strategy to fully assess the status of the 1540 implementation is to conduct robust audit for every country. The 1540 Committee needs to understand whether the laws states listed in their matrices actually reflect the issues of the Resolution concern. In addition, it is worth assessing in further research whether the laws adopted by states prior to the 1540 introduction and included into state reports are adequate. It can be done by designated groups of legal and technical experts working together with a country’s officials as well as interpreters. With the new (though not yet widespread) peer review concept, it is doable but requires a lot of coordination and encouragement on the part of the Committee. At the same time, such measuring is only possible for the outputs of all aforementioned activities. One of the next tasks for the Committee is to create an evaluation with key performance indicators for the outcomes.

A lot of states decide to address the issues that are more urgent for them, such as social dissonance, poverty, conventional military or terrorism threats, domestic conflicts, and organized crime before they even come to thinking about Resolution 1540 implementation. Taking this in consideration, there is a big task in front of the 1540 Committee and the Experts: to find a way to address countries' primary concerns and resolution's tasks simultaneously, to look for the ways to tie them. Introducing interactive 1540 matrices may help in locating which member states have experience in such tasks, they would also better inform all member states about each other's implementation models (e.g. what legislation is considered relevant), and possibly help the Committee to come up with key performance indicators.

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