

## The Role of the UN Security Council

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### RECOMMENDATIONS OF THE WMD COMMISSION

Disarmament and non-proliferation are best pursued through a cooperative rule-based international order, applied and enforced through effective multilateral institutions, *with the UN Security Council as the ultimate global authority*. (*Weapons of Terror*, 18; emphasis supplied)

The Security Council—in close contact with the members of the UN—should be the *focal point* for the world's efforts to reduce the threats posed by existing and future WMD, and to help harmonize, supplement and enforce the many efforts that are made. (*Weapons of Terror*, 57)

**Recommendation 60:** The United Nations Security Council should make greater use of its potential to reduce and eliminate threats of weapons of mass destruction—whether they are linked to existing arsenals, proliferation or terrorists. It should take up for consideration any withdrawal from or breach of an obligation not to acquire weapons of mass destruction. Making use of its authority under the Charter to take decisions with binding effect for all members, the Council may, *inter alia*:

- require individual states to accept effective and comprehensive monitoring, inspection and verification;
- require member states to enact legislation to secure global implementation of specific rules or measures; and
- decide, as instance of last resort, on the use of economic or military enforcement measures.

Before UN reform has made the Security Council more representative of the UN membership, it is especially important that binding decisions should be preceded by effective consultation to ensure that they are supported by the membership of the UN and will be accepted and respected.

In the current global institutional framework, the UN Security Council is well positioned to act expeditiously and authoritatively to prevent proliferation and advance disarmament. However, the Council's legitimacy and

accountability deficits are powerful reasons to be cautious about relying too much on the Council in this field. While acknowledging such problems, the WMD Commission is nonetheless emphatic about the Council's central role in reducing the risks posed by NBC weapons. It says that the Council should enforce disarmament and non-proliferation requirements, as a last resort employing or authorizing economic sanctions or military action. Moreover, it endorses the Council acting as a global legislator,<sup>1</sup> as it has already done in resolution 1540 aimed at preventing non-state actor trafficking in and acquisition of NBC weapons and materials. As developed below, the Commission has overstated the case for a preeminent Council role; other avenues for enforcement and law-making should additionally be pursued and developed.

### *The Security Council as the "Ultimate Global Authority"*

As the Commission notes, aside from the Security Council, institutional machinery for enforcement of non-proliferation and disarmament requirements is minimal.<sup>2</sup> The IAEA and the OPCW can withdraw privileges of membership, such as access to technical assistance; in review proceedings for all three NBC weapons treaties, states acting collectively can condemn violators and urge states to apply economic sanctions.<sup>3</sup> The BWC and the CWC provide that alleged violations of non-acquisition obligations are to be referred to the Security Council, by the conference of states parties in the case of the CWC, and by individual states in the case of the BWC. As for the NPT regime, the IAEA is empowered by its Statute to refer breaches of safeguards agreements involving diversion of nuclear materials and questions of peace and security to the Council (*see section 3.2*). However, there is no provision in the NPT or elsewhere for breaches of the nuclear disarmament obligation to be referred to the Council. Thus states acknowledged by the NPT to possess nuclear weapons, the United States, Britain, China, France, and Russia, do not face the prospect of Council action regarding lack of compliance with Article VI, and in any event, as permanent members can block Council action.

In contrast, by virtue of the UN Charter, the Security Council has broad powers. It is the only body explicitly authorized to authorize or direct military action, when it has found a threat to international peace and security under Chapter VII of the Charter. Further, while under current international law, economic sanctions may be applied by individual states or called for by international bodies, the Security Council is the only body authorized to *require* all states to impose economic sanctions. Finally, as the UN system has evolved, the Security Council has come to stand at the apex of the international institutional structure, regarded, as the Commission says, as the "ultimate global authority."<sup>4</sup> The Council was seen to be exercising this authority in the wake of the 1991 Gulf War when it required Iraq, subject to inspections, to dismantle its nuclear, biological, and chemical weapons and missile programs.

Against this background, it is understandable that the WMD Commission lays so much emphasis on the role of the Security Council in anchoring the NBC weapons regimes. There are serious obstacles, however, to the Council effectively fulfilling this role. One is that in seeking to rationalize their illegal invasion of Iraq, the United States and United Kingdom abused Council resolutions taken under Chapter VII requiring Iraq to disarm. That has led to a marked reluctance of Russia, China, and France to allow the Council to ground resolutions regarding the Iran and North Korea situations in a Chapter VII determination of a threat to international peace and security.

A second obstacle is that the five permanent members of the Council all have nuclear arsenals that they are showing no operational signs of intending to eliminate. As permanent members, each of them can veto any Council action regarding nuclear disarmament; this effectively means that the topic is never considered. Just as seriously, the fact that the permanent members generally control the agenda and outcomes of Council deliberations means that Council decisions regarding compliance with nuclear non-proliferation requirements, and to a lesser extent regarding requirements of biological and chemical weapons disarmament, are automatically suspect in the eyes of much of the world. The decisions inherently smack of “do as we say, not as we do.”

A third, related obstacle is that the Council, dominated by five World War II victors, is conspicuously not representative of today’s world. In particular, major states of the developing world, for example India, Indonesia, Nigeria, Brazil, and South Korea, have no say except when they serve two-year terms as one of the ten elected members of the Council. Even then, their role is very limited; by dint of experience, practice, the veto, and influence wielded outside Council chambers, the permanent five, and especially the United States, have the decisive role. Efforts at reform of the Council, to make it more representative, and to limit or extinguish the veto power, so far have faltered, due partly to lack of effective collaboration in such efforts by the permanent five. In particular, they show little interest in limiting the veto power. The Commission politely acknowledges the problem of the non-representative character of the Council in Recommendation 60, calling for “effective consultation” pending reform of the Council.

A fourth obstacle is that the Security Council by design is a political body that acts on an ad hoc basis to maintain peace and security, not a technical or judicial body charged with making determinations in accordance with general principles.<sup>5</sup> So far as the law is concerned, practice seems to be overtaking design, as the Council in various areas has effectively stimulated or even itself undertaken the development of international legal norms and institutions.<sup>6</sup> Still, it remains the case that the Council does not engage in recognizable legislative or, even less so, judicial deliberation. Further, the Council is not bound, and does not attempt, to address all cases in a given category or to ensure consistency in treatment of similar situations, a requisite of law. While the Council has been active regarding the Iranian nuclear

program, oversaw the dismantlement in the 1990s of the Iraqi NBC weapons programs, and has played a limited but still significant role regarding the North Korean nuclear weapons program, it had no role in the termination of Libyan NBC weapons programs, did little to address acquisition of nuclear arsenals by India, Pakistan, and South Africa (later dismantled), and has done nothing regarding Israel's acquisition of an arsenal.<sup>7</sup>

### ***Promoting and Enforcing Compliance with NBC Weapons Regimes***

In light of these problems, it is crucial, as the Commission indeed recognizes,<sup>8</sup> to strengthen mechanisms to induce or compel compliance short of Security Council action, while retaining the Council as a back-up. In the case of the NPT, the establishment of an executive council or similar body and a secretariat, along with annual meetings of states parties prepared to call for economic sanctions, would provide means for addressing compliance with both non-proliferation *and* disarmament requirements (*see section 2.1*). The role of the IAEA and its Board of Governors could be expanded, as has occurred on a de facto basis with respect to the Iran program. For example, application of the additional protocol to safeguards agreements giving the IAEA enhanced monitoring powers could be made mandatory in the event of significant violations of safeguards reporting requirements. More ambitiously, the IAEA or a successor to UNMOVIC<sup>9</sup> could be given authority and technical resources to monitor and investigate "weaponization" whether or not nuclear materials tracked by the IAEA are involved. That would mean, for example, investigation of allegations that a country is engaged in designing warhead delivery vehicles to be mounted on missiles or high explosives used in the first stage of a thermonuclear weapon. Monitoring of weaponization is a task that would be performed by a global disarmament agency in a nuclear weapons-free world, but it is presently needed for prevention of proliferation. Similarly, the IAEA or other body could now play a role in monitoring reductions of existing arsenals.

In the Security Council itself, it should be recognized that issues of compliance with disarmament/non-proliferation requirements, such as violations regarding reporting nuclear activities to the IAEA, do not necessarily rise to the level of threats to international peace and security.<sup>10</sup> Accordingly, a Council response need not be taken under Chapter VII, "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression." Invoking Chapter VII and finding a threat to the peace opens the way to authorization of military action, and is taken by many to automatically imply that possibility, with the further possibility that the United States may (wrongly) regard itself as entitled to "enforce" Council edicts. As Hans Blix has noted, Chapter VI, "Pacific Settlement of Disputes," can provide an appropriate basis for Council action, since it envisages Council recommendations with respect to situations whose continuance may jeopardize peace and security.<sup>11</sup>

It can further be argued that invocation of Chapter VII is not required to give Council action a binding character; in Article 25 of the UN Charter, member states agree to carry out decisions of the Council. It is true that Chapter VII is the only part of the Charter identifying specific bases for Security Council decisions. Nonetheless, the International Court of Justice held binding a non-Chapter VII Security Council resolution calling upon states to act consistently with the General Assembly's termination of South Africa's mandate to administer Namibia.<sup>12</sup> The Court invoked Article 25 in stating that UN member states must comply with Council decisions to maintain peace and security in conformity with the purposes and principles of the UN Charter. Moreover, innovation is needed to make Council work in this area effective. There is precedent: Security Council establishment of peacekeeping operations was definitely an innovation; it is nowhere contemplated in the Charter.

Security Council resolutions adopted in July 2006 regarding the North Korea test launch of ballistic missiles<sup>13</sup> and the Iran nuclear program<sup>14</sup> may represent an evolution of Council practice in the direction suggested here. In both cases, the Council did not determine that a threat to peace and security existed. The resolution on North Korea did not invoke Chapter VII, yet "required" all member states to prevent transfer or procurement of missile-related items to or from North Korea. The resolution on Iran invoked Chapter VII only with reference to Article 40, which authorizes the Council to "call upon" states to comply with "provisional measures." Yet the resolution's provision "calling upon" Iran to take steps identified by the IAEA Board of Governors, notably suspension of enrichment and reprocessing-related activities, was regarded as binding by Council members. Resolution 1737, adopted in December 2006, goes further, "deciding" that Iran shall suspend fuel-cycle activities and that states shall refrain from assisting Iran's nuclear and missile programs. Still, while invoking Article 41 of Chapter VII regarding coercive measures not involving the use of force, it contains no finding of a threat to the peace.

As previously noted, the Security Council's choice of language reflects the post-Iraq war desire to avoid any implication that use of force is anticipated or implicitly authorized. Its readiness to adopt new approaches also seems to flow from the Council's assertion of an expanded role in preventing proliferation, going back to a 1992 presidential statement and exemplified in the post-9/11 era by resolution 1540, discussed below.<sup>15</sup> The Council deserves criticism for focusing only on proliferation, not existing arsenals, and in the case of Iran, arguably has been hijacked for U.S. policy goals going far beyond concerns about the Iranian nuclear program.<sup>16</sup> Nonetheless, to the extent that the Council is developing less confrontational and more flexible techniques for authoritatively addressing non-proliferation compliance issues, that is to the good.

### ***The Security Council Responsibility for “Regulation of Armaments”***

The Security Council could dramatically boost its legitimacy in preventing proliferation and undertake a mission crucial to global security by fulfilling a long-ignored responsibility assigned to it by the UN Charter: Article 26 provides that the Council “shall be responsible for formulating ... plans to be submitted to the Members of the United Nations for the establishment of a system for the regulation of armaments.”<sup>17</sup> Today there is no global agreement on control and reduction of major conventional arms—tanks, aircraft, artillery—or missiles and other delivery systems that can carry both conventional and NBC warheads. Nor, aside from the general disarmament obligation of the NPT, is there any global treaty on reduction and elimination of nuclear arsenals. Initiating a process of controlling major conventional arms would reduce the risks of war (especially among advanced industrial powers, war could be devastating regardless of whether nuclear weapons were used) and, in the words of Article 26, promote “the least diversion for armaments of the world’s human and economic resources.” Given the interrelationships between nuclear and other strategic forces (*see sections 2.4 and 3.3*), it would also facilitate the achievement of the enduring elimination of nuclear weapons. A genuine process of nuclear disarmament initiated by the Council and its nuclear weapon-possessing permanent five members would have great authority.

Referring to the Council’s failure to implement Article 26, the WMD Commission observes: “While the conditions of the Cold War might explain the passivity in the past it might be questioned whether there is today any good reason why the Council, which comprises as permanent members the states with the world’s largest diversion of resources for armaments, should not embark upon the role laid upon it.”<sup>18</sup> In addition to the benefits accruing directly from demilitarization, Security Council-generated movement toward elimination of nuclear weapons and reduction of major conventional arms would build the Council’s authority to prevent proliferation, because the problem of double standards would be alleviated. It would also squarely address a principal factor causing states to consider or undertake acquisition of nuclear weapons, military imbalances caused by some states’ possession of nuclear forces and major conventional forces.

### ***The Security Council as Global Legislator***

Under U.S. leadership, in April 2004 the Security Council adopted resolution 1540, which seeks to prevent non-state actor acquisition of, or trafficking in, NBC weapons-related equipment, materials, and delivery systems. The term “non-state actor” refers not only to terrorists, but also to brokers, businesses, and unauthorized state officials. Invoking its authority under Chapter VII of the UN Charter to maintain international peace and security, the Security Council *required* every state in the world to adopt

appropriate measures—national criminal laws, export controls, border controls, physical security and materials accounting techniques—to achieve those objectives, and to report to the Council that they have done so. In a cursory manner, the resolution generally urges compliance with existing NBC weapons treaties, but the resolution itself contains no mandatory disarmament provisions.<sup>19</sup> Its focus is on prevention of proliferation by and through non-state actors.

In some ways resolution 1540 reinforced and elaborated obligations states already have under the NBC weapon treaties, and applied them to the relatively few states outside those treaties. In other ways the resolution forged new ground, notably by requiring all states to adopt export controls as appropriate; previously export controls had been the subject of non-binding arrangements among groups composed of a limited number of states (*see section 1.1*). The Commission captured this function of the resolution in saying the Council should “help harmonize, supplement and enforce the many efforts that are made.”<sup>20</sup> However, harmonization is a challenging task. One of the criticisms of the resolution is that its vague definitions of key terms like “related materials” may undermine higher standards employed by existing export control groups and lay a foundation for uneven implementation.<sup>21</sup> The reference to “appropriate” controls, as opposed to uniform controls pursuant to universal standards, is intended to accommodate the fact that states at different levels of development have different goods to monitor. However, it too injects vagueness and subjectivity into the requirement.

Like most observers, the Commission is generally appreciative of resolution 1540, while also noting that its power to adopt such resolutions must be exercised “in broad consultation with and for the benefit of the whole UN membership.”<sup>22</sup> The proviso is well-taken. In the case of resolution 1540, there were strong criticisms of the way the resolution was negotiated among the permanent members, then presented to the rest of the Council with only a limited opportunity for input and minimal adjustment of the draft based on that input.<sup>23</sup> More generally, the Commission has underestimated the problems posed by mandatory Council action, this time in its new 21<sup>st</sup> century role as a global legislator.

Following on resolution 1373 of September 2001, requiring all states to adopt measures to suppress terrorism, in resolution 1540 the Council acted as a global legislator, requiring all states to adapt their national legal and regulatory systems to address a *problem of global scope*. This is not comparable to previous Council decisions over the decades imposing requirements on states with respect to *particular situations*, such as the embargo on arms trade with the Taliban regime.<sup>24</sup> With the exception of Article 26 on regulation of armaments, the UN Charter makes no explicit provision for the Council to engage in or promote global law-making. In contrast, the General Assembly is empowered to and does recommend to member states the development of international law through treaty negotiation.<sup>25</sup> This is no mere problem of lack of direct textual support. Rather, as one critic explains, “having the Security

Council, a fifteen-Member body not accountable to other UN organs, impose obligations on all 191 members threatens to weaken one of the cornerstones of the traditional international law structure, namely, the principle that international law is based on the consent of States.”<sup>26</sup>

When there is an urgent need, here demonstrated by the Khan nuclear supply network and the 9/11 attacks, and when the Security Council acts within the bounds of a general consensus, as it did in the cases of resolutions 1373 and 1540, those objections probably are not insuperable. It is certainly true that negotiating multilateral treaties is a cumbersome, time-consuming process, tied to the practice of seeking consensus of many states.<sup>27</sup> Such negotiations may become hostage to demands that many states regard as going beyond the objective of the enterprise, for example, access to biotechnology in the case of the effort to negotiate a verification protocol for the BWC. The Charter does require members to carry out Council decisions, and as noted above, in a developing international system innovation is sometimes desirable. Moreover, when member states subsequently accept the Council actions, as they generally have done for both resolutions, this arguably operates as a sort of “healing” of any violations of the Charter, at least with respect to Council actions in the field of terrorism.<sup>28</sup>

None of this, however, necessarily translates into vigorous and effective implementation of resolution 1540. The evidence so far is that states are meeting the reporting requirements, and adopting some measures in response to the resolution, but it certainly has not had anything close to a transformative effect.<sup>29</sup> Security Council legislation by resolution is not the optimal way to strengthen and create law-based global regimes that engender compliance through reciprocity and participatory decision-making. By its nature, the resolution was not the product of negotiations involving all affected states, as a treaty would be. Nor did it benefit from the expertise and experience that would be contributed by many states in a multilateral negotiation. While there is a Council committee assessing states’ reports, the resolution establishes no agency or compliance and review procedures comparable to those found in the treaties on NBC weapons. Again, the Council is controlled by states possessing nuclear weapons, and suffers more generally from problems of legitimacy and accountability.

Accordingly, the WMD Commission has laid too much emphasis on the role of the Security Council as a “focal point” for action to reduce the risks of NBC weapons. Especially absent reform of the Security Council to make it more representative and accountable, the emphasis going forward should be on making the existing treaty regimes—including review processes, implementing agencies, and governance mechanisms—more effective, and on negotiating new multilateral treaties as needed. Despite the time-consuming and difficult nature of such negotiations, it remains the best way to obtain in-depth investment by a wide range of states in an international norm, institution, or regime. The Rome Statute of the International Criminal Court illustrates how multilateral negotiations can be stimulated by Security Council action,



in that case the Council's establishment of ad hoc international tribunals for the former Yugoslavia and Rwanda. A similar path could be followed with respect to resolution 1540.

*Recommendations for U.S. Policy*

- The United States should work with other states to utilize and improve governance mechanisms for the nuclear, biological, and chemical weapons regimes instead of relying on the Security Council as the first resort to deal with issues of non-compliance with non-proliferation and disarmament obligations.
- When a non-compliance matter is before the Security Council, the United States should seek political solutions that address underlying perceptions and conditions of insecurity, and favor innovative approaches to inducing and enforcing compliance that avoid, when possible, the direct or implied invocation of the possibility of military action.
- To improve the effectiveness of the Security Council in this and other fields, the United States should vigorously support reforms to make it more representative, transparent, and accountable.
- The United States should support multilateral treaty negotiations, not Security Council resolutions, as the optimal means of global law-making.