

EXISTING AND EMERGING LEGAL APPROACHES
TO NUCLEAR COUNTER-PROLIFERATION
IN THE TWENTY-FIRST CENTURY*

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There are three emerging methods to combat proliferation of nuclear and other weapons of mass destruction. First is the multilateral method of counter-proliferation. One may call this a universal approach, as it seeks to establish a method applicable to and supported by all states around the world. Second is what I call a plurilateral method of counter-proliferation. This method involves joining like-minded countries. Third is what I call an individual method of counter-proliferation. This is often called a unilateralist method, with “unilateralist” frequently used in a derogatory sense.

The first multilateral approach is typically taken up in the context of the United Nations (UN). The Nuclear Non-proliferation Treaty (NPT) is a major framework for the multilateral method, but the NPT has three important outsiders: India, Israel, and Pakistan. These outsiders object every year when the UN General Assembly adopts a resolution calling for the universality of the NPT. These three NPT outsiders are members of the International Atomic Energy Agency (IAEA), however, making the IAEA closer to a universal framework than the NPT—although North Korea has effectively withdrawn from the IAEA.¹

There are calls for a universally applicable, legally binding, multilateral regime of nuclear export control every year in the UN General Assembly, in every NPT Review Conference,

* This essay is based on the author’s statement at the 10th Annual Herbert Rubin and Judge Rose Luttan Rubin International Law Symposium, “Existing and Emerging Legal Approaches to Nuclear Weapons in the 21st Century,” held at New York University School of Law on March 31, 2006.

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1. The legal status of North Korea’s declared withdrawal, which has not been universally recognized, is unclear.

and virtually every time the export control regime of the Nuclear Suppliers Group is discussed from a critical point of view. Unfortunately, there has yet to be any active discussion or concrete preparation to adopt such an export control regime. It is still a distant goal.

The basic drawbacks of the multilateral method are the difficulty of achieving a near-universal consensus among the diverse countries around the world, the time it would take to achieve such a consensus, and the compromise that would be required to form a consensus that would necessarily include would-be or active nuclear proliferators.

A unique universal method of counter-proliferation was adopted three years ago in the Security Council. Security Council Resolution 1540 was adopted unanimously in the Council after a laborious and torturous process of negotiations. It established binding obligations under Chapter 7 of the UN Charter, which refers to enforcement measures that apply not only to all UN member states but also to non-member states. Though the resolution applies only to the nuclear proliferation of non-state actors (e.g., terrorists, insurgents, and other entities not recognized as states), it also obliges states to adopt domestic legislation prohibiting proliferation of weapons of mass destruction, to block their means of delivery to non-state actors, to establish border and export controls, and to physically protect the materials involved.

I call this a unique method because it is rare for the Security Council to impose such sweeping legal obligations upon UN member states. And it was for this reason that the adoption was contentious. Indeed, it might have been better if Resolution 1540 had been adopted by unanimous consensus in the General Assembly, because it would have ensured the universal acceptance of such obligations by member states. On the other hand, it could have taken many years to reach unanimity in the General Assembly.

Realistically, the facts of life in the United Nations today are such that neither the resolutions of the General Assembly, which only have recommendatory force, nor the legally binding resolutions of the Security Council are readily implemented. As a result, Resolution 1540 contains provisions requiring states to report to the Council on the implementation of the resolution and establishing a Committee to oversee

work on the resolution. The Committee hired a number of experts and is reviewing reports submitted by states, organizing and joining efforts to promote implementation, and arranging assistance for countries that need help in implementation.

In fact, it is such peer review and mutual encouragement and assistance that guarantee a high degree of implementation of and compliance with the resolution. When I left the UN Department for Disarmament Affairs in early 2006, almost two years after the adoption of Resolution 1540, only about two-thirds of UN member states had submitted their national reports. The initial review of the reports indicated that many had yet to establish the required legislation and border, export, and other controls. At that time, there was still a long way to go. For that reason, it was a welcome development when the Security Council extended the mandate of the 1540 Committee for another two years.²

The next method of combating nuclear proliferation is the plurilateral method. Typical of this method is the NSG, or Nuclear Suppliers Group. This is a well-established group of forty-five participating countries, including Russia and China. Established in reaction to the “peaceful nuclear explosion” by India in 1974, the NSG is in a way an outgrowth of efforts to overcome the limited scope of another group addressing the legal obligations under the NPT, the Zangger Committee of the IAEA.

The basic weakness of most methods based on joining like-minded countries together is that participation and compliance are essentially voluntary. The NSG, for example, has Guidelines for national export control of nuclear material and technology. Regardless, in an effort to induce Russia and China to join, the group granted a “grandfather clause” exception under which Russia is permitted to continue its exports to build nuclear power stations in India. To tighten and

2. On April 27, 2006, the Security Council adopted Resolution 1673 reiterating its decisions in and the requirements of Resolution 1540 and extending the mandate of the 1540 Committee until April 27, 2008. The fact that the resolution called for submission of first reports without delay, encouraged provision of additional information, and required the Committee to intensify its efforts to promote the full implementation of the resolution indicates the Council’s recognition that full implementation is a long-term task.

strengthen the Guidelines of the NSG, the group must achieve a consensus. I remember building such a consensus to be quite a lengthy, laborious, and frustrating process.

The Proliferation Security Initiative (PSI) is another unique effort by over seventy like-minded countries to strengthen and supplement national efforts to implement nonproliferation measures. As an example of the difficulties in implementing nonproliferation standards, even this regime has critiqued some measures, such as interdiction of the shipment of proliferation materials, as being beyond the bounds of international law.

At the initial stage, some may have thought of creating a new set of international laws to regulate nuclear proliferation in much the way an exception to the basic principle that ships on the high seas come only under the jurisdiction of flag states was established to combat piracy. During the days when rampant piracy threatened navigation around the world, a principle emerged to allow any state to seize and punish pirates. A similar principle is still not unthinkable with regard to the proliferation of weapons of mass destruction. If the major powers around the world established the practice of seizing illicit weapons of mass destruction on the high seas and if there were general international acceptance of such seizure as lawful, this practice could become a new order of customary international law.

However, according to the Interdiction Principles of the PSI established among the participating states, PSI actions must be within the bounds of existing international law. Therefore, there can theoretically be no conflict with international law as far as the current PSI framework is concerned. Because of this and other complications, the "ifs" of establishing a new rule of customary international law to control nuclear proliferation have not been fulfilled.

The final method of counter-proliferation is the individual or unilateral technique. While unilateralist measures are frequently considered ineffective, they can be justified by international law governing the right of individual and collective self-defense. Since international law recognizes this right, the act of self-defense is legitimate if the necessary prerequisites have been fulfilled. These prerequisites include the existence of an actual or imminent threat of attack such that there is no

other effective option to avoid such attack and the requirement that the threat and the action of self-defense be proportionate to the action or the threat that it intends to counter.

The current debate is whether preventive action to remove the threat of the use of weapons of mass destruction is permitted under international law. There is a distinction between “preemptive action” and “preventive action.” Preemptive action is defined as an act of self-defense when the threat of attack is clear and imminent, whereas preventive action is an act against a more distant perceived threat. It seems that there is general acceptance of such a right of preemptive action even though Article 51 of the UN Charter seems to contemplate the right of self-defense only “if an armed attack occurs.” For example, during the height of the Cold War, there was discussion concerning the use of nuclear forces of “launch under attack” or “launch on warning.” I do not recall much argument about compatibility with Article 51 in this discussion.

Individual methods of counter-proliferation have many drawbacks, however. The experience of 9/11 heightened the concern that terrorists or rogue states could use nuclear and other weapons of mass destruction (WMDs) in future attacks against the United States. The effects of WMDs are so devastating that it would be too late to react after the country had already sustained such an attack. Complicating the debate further is the nature of nuclear-weapons manufacturing. The manufacture of nuclear weapons includes the production of nuclear fissile material, i.e., either highly enriched uranium or plutonium separated from spent nuclear fuel. Both of these are radioactive materials, and any attempt to destroy a production facility housing these materials will risk their dispersal. Such action would invite accusations of premature use of force and environmental damage. Besides, facilities for the enrichment of uranium and the separation of plutonium are essentially the same as facilities for civilian nuclear operation, thus adding the risk of mistargeted self-defense.

If we are to avoid such dire results in the exercise of the right of self-defense, the nations of the world must intensify their efforts to come up with effective multilateral and plurilateral ways of preventing proliferation of nuclear weapons. I would start by strengthening or universalizing the existing tools available to us.

First, there is Security Council Resolution 1540. Though there is still a lot of work to be done here, full implementation would close the existing loopholes considerably. This may go hand-in-hand with American-led efforts under the Cooperative Threat Reduction (CTR) Initiative. It is one thing to establish a legal requirement to install border and export controls. However, many countries of the former Soviet Union, for example, do not have enough resources to install devices at the borders to detect radioactive material. Mutual assistance programs like the CTR can do a lot to effectuate the actual implementation of counter-proliferation measures.

Second, there is the Model Additional Protocol to the IAEA's Safeguards Agreement. This protocol was drafted after the IAEA failed to detect Iraq's clandestine nuclear weapons program. While the conventional Safeguards Agreement only allows the IAEA to inspect the facilities that signatories report to the IAEA, the Model Additional Protocol allows the IAEA to go to a wider range of facilities and sites and to collect surrounding soil samples. The fact that Libya and Iran rushed to sign the Model Additional Protocol after their clandestine activities were uncovered shows that it is an important tool to establish confidence in the peaceful nature of nuclear activities. Unfortunately, the protocol still remains voluntary and only seventy-eight countries to date have brought the protocol into force.

Third, the PSI could be expanded to include more countries. Given the concern about the activities of North Korea, the cooperation of countries in that region is critical. An expanded PSI could also include the cooperation of those countries who grant what are called flags of convenience to shipments of unauthorized nuclear material.

Finally, the Security Council has to live up to its responsibilities. The current problem with the IAEA system of verifying the peaceful use of nuclear energy is not that its nuclear experts are poorly trained or incompetent but that the agency has insufficient legal competence to rigorously pursue its mandate. This is exemplified by the fact that the IAEA Model Additional Protocol still remains voluntary. When a dispute about the peaceful nature of a nuclear program causes security concerns among some states and leads to threats of force, the dispute clearly falls within the responsibility of the Security Council to maintain international peace and security. Moreo-

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ver, the Security Council is the body empowered with strong means of enforcement including, ultimately, potential authorization of the use of military force. The IAEA does not have such enforcement power. Unless the Security Council takes effective measures to cope with the issue of nuclear proliferation, it will open the door to individual actions that are decentralized and, as such, will likely be controversial.

