

# **TERRORISM AND THE THREAT OF WEAPONS OF MASS DESTRUCTION IN THE 21<sup>ST</sup> CENTURY: AN ANALYSIS OF LEGAL REGIMES**

## **ABSTRACT**

Terrorism is a global phenomenon and can arise from almost any situation and in various forms. This article discusses the evolving threats of Weapons of Mass Destruction (WMD's) terrorism and proliferation, that is, Biological, Chemical, and Nuclear weapons and their mode of delivery: missiles, along with the numerous multilateral treaty regimes of non-proliferation of such WMD's to both states and non-state actors. The central part of this article considers the new approach of tackling the menace of proliferation via creating and maintaining international partnerships to combat the spread and use of WMD: the Proliferation Security Initiative; and international legislation: Security Council Resolution 1540. Finally, suggestions towards combating WMD proliferation are made.

Key words: International Law- United Nations- Terrorism- Weapons of Mass Destruction.

## **I) INTRODUCTION**

The threat of terrorism from the use of weapons of mass destruction (WMD) is one of the most fundamental issues of the 21<sup>st</sup> century. The international community is also facing some threat, especially at this time where new actors, including non-State actors, are involved at different levels in the conception, production and potential exploitation of these lethal weapons<sup>1</sup>. It raises grave questions on the role of the

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<sup>1</sup> Ambassador Maurizio Moreno's welcome address at the workshop on, 'The proliferation of Weapons of Mass Destruction and International Humanitarian Law-Current Challenges, Effective Responses',

United Nations in maintaining peace and security in the world. This article analysis the current legal regimes governing WMD's and proffers suggestions on the way forward.

## **II) MEANING AND CLASSIFICATION OF WEAPONS OF MASS OF MASS DESTRUCTION**

WMD's are weapons that can kill and bring significant harm to a large number of humans or cause great damage to man-made structures such as buildings and natural structures like, mountains, or the biosphere<sup>2</sup>. WMD's include biological, chemical and nuclear weapons, and their means of delivery (missiles).

### **A) BIOLOGICAL WEAPONS**

Biological weapons were first addressed at the Hague Convention of 1899<sup>3</sup>, which had a Declaration prohibiting the use of projectiles that spread asphyxiating gases<sup>4</sup>. At the second Hague Convention in 1907 the use of poison or poisonous weapons was also prohibited<sup>5</sup>. The Geneva Protocol of 1925 banned the use of asphyxiating, poisonous, or other gases, all analogous liquids, materials or devices, and bacteriological methods of warfare<sup>6</sup>. However, it did not ban their manufacture.

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Sanremo, Italy – Villa Ormond 16 November 2007. Organized by the International Institute of Humanitarian Law. Also available at: [http://www.iihl.org/iihl/Documents/Proliferation%20of%20WMD%20and%20IHL\\_whole\\_file.pdf](http://www.iihl.org/iihl/Documents/Proliferation%20of%20WMD%20and%20IHL_whole_file.pdf). Accessed 12 August 2012.

<sup>2</sup> Commission on Conventional Armaments (CCA), UN document S/C.3/32/Rev.1, August 1948, as quoted in UN, Office of Public Information, The United Nations and Disarmament, 1945–1965, UN Publication 67.I.8, 28.

<sup>3</sup> The first international peace conference.

<sup>4</sup> Declaration IV(2) concerning the Prohibition of the Use of Projectiles with eth Sole Object to Spread Asphyxiating Poisonous Gases.

<sup>5</sup> Convention IV respecting the Laws and Customs of War on Land.

<sup>6</sup> Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare, 26 U.S.T. 571 (1925).

In 1969 the General Assembly adopted Resolution 2603<sup>7</sup>, which declared that the ban on use of chemical and biological weapons reflected generally recognized rules of international law and thus are also binding on non-parties to the Protocol.

The Biological Weapons Convention (BWC) consisting of eight (8) Articles was passed in 1972<sup>8</sup>. The BWC is currently made up of 170 parties that have ratified or acceded to the treaty. The most recent party to ratify the BWC is Malawi on 2 April 2013. 10 states have signed but not ratified the treaty while 16 states have neither signed nor ratified<sup>9</sup>.

The BWC completely bans the development, acquisition, or stockpiling of biological weapons in armed conflict<sup>10</sup>. It requires member states before joining to destroy or divert to peaceful purposes all their existing biological weapons and associated resources<sup>11</sup>. The BWC also prohibits state parties from directly or indirectly transferring their biological weapons to third parties<sup>12</sup>. Thus, member states are to take all necessary measures for the implementation of the provisions of the BWC domestically<sup>13</sup>. The effect of this provision is to prevent terrorists from acquiring WMD. Therefore, when member states are facing challenges in implementing the BWC, they are required to consult bilaterally and multilaterally with other member

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<sup>7</sup> General Assembly *Resolution 2603* of 16 December 1969.

<sup>8</sup> Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163.

<sup>9</sup> List of parties to the BWC. Available on United Nations Office of Geneva website: Disarmament at: [http://www.unog.ch/80256EE600585943/\(httpPages\)/7BE6CBBEA0477B52C12571860035FD5C?OpenDocument](http://www.unog.ch/80256EE600585943/(httpPages)/7BE6CBBEA0477B52C12571860035FD5C?OpenDocument). Accessed 10 August 2012.

<sup>10</sup> *Op.cit.*, note 8, See Article I.

<sup>11</sup> *Ibid.*, See Article II.

<sup>12</sup> *Ibid.*, See Article III.

<sup>13</sup> *Ibid.*, See Article IV.

states to solve them<sup>14</sup>. The BWC also encourages member states to request the Security Council investigate alleged breaches of the BWC and to comply with subsequent decisions of the Security Council<sup>15</sup>. Article VII demands that member states give assistance to States that have been exposed to the dangers of a violation of the BWC<sup>16</sup> and Article VIII requests member states to do all of the above in a way that encourages the peaceful uses of biological science and technology<sup>17</sup>.

Although the BWC is a step in the right direction, weak participation by member states brings little legitimacy and importance to its obligations<sup>18</sup>. In addition, lack of provision for verifying compliance of Member States is worrying. To date, there have been six review conferences held in 1980, 1986, 1991, 1996, 2001/2002 and 2006 to negotiate a protocol to strengthen the BWC by creating a body vest with the responsibility to inspect compliance based on the model of the Chemical Weapons Convention (CWC)<sup>19</sup>.

In a significant development, at the sixth review conference, an Implementation Support Unit (ISU) was established to assist States parties in implementing the BWC<sup>20</sup>. The ISU provides help with National implementation and creates a constant

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<sup>14</sup> *Ibid*, See Article V.

<sup>15</sup> *Ibid*, See Article VI.

<sup>16</sup> *Ibid*, See Article VII.

<sup>17</sup> *Ibid*, See Article VIII

<sup>18</sup>Nicolas Isla, 'Challenges of The Biological Weapons Convention, National Implementation and Legal Enforcement'. Workshop on, 'The proliferation of Weapons of Mass Destruction and International Humanitarian Law-Current Challenges, Effective Responses', Sanremo, Italy – Villa Ormond 16 November 2007. Organized by the International Institute of Humanitarian Law. Isla gives the examples of Israel, Egypt and Syria, who are not bound by the international law prohibiting biological weapon development.

<sup>19</sup> Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 1974 U.N.T.S. 45.

<sup>20</sup>United Nations Office for Disarmament Affairs: Biological Weapons. Available at the United Nations Website: <http://www.un.org/disarmament/WMD/Bio/>. Accessed 14 August 2012.

link between all States Parties, and between States Parties and NGOs and the general public<sup>21</sup> for the purpose of implementing the BWC.

The Review Conferences have reaffirmed that the general-purpose criterion<sup>22</sup> includes all future scientific and technological developments relevant to the BWC. It is not the biological toxins or agents but rather certain purposes for which they may be employed that are prohibited. Thus, the general-purpose criterion provides an obvious thin line between prohibited activities and those allowed under the BWC and pays reference to the particular dual use nature of biology<sup>23</sup>.

## **B) CHEMICAL WEAPONS**

Chemical Weapons are toxic chemicals and their precursors, they include any chemical, which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals<sup>24</sup>. Chemical weapons were first used during World War I, by both sides to the conflict<sup>25</sup>. Poison gasses were also used during World War II in Nazi concentration camps and in Asia. Since the end of World War II, chemical weapons have reportedly been used in only a few cases, notably by Iraq in the 1980s against the Islamic Republic of Iran<sup>26</sup>.

There was significant development, manufacture and stockpiling of chemical weapons during the Cold War. By the 1970s and 80s, an estimated 25 States were developing chemical weapons capabilities<sup>27</sup>. The Chemical Convention Conference

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<sup>21</sup> *Op.cit*, See note 18.

<sup>22</sup> *Op.cit*, note 5, See Article 1.

<sup>23</sup> *Op.cit*, See note 18.

<sup>24</sup> *Op.cit*, note 20.

<sup>25</sup> FirstWorldWar.Com, Weapons of War: Poison Gas. Available at: <http://www.firstworldwar.com/weaponry/gas.htm>. Accessed 14 August 2012.

<sup>26</sup> *Op.cit*, note 20. See Chemical Weapons. Available at the United Nations Website: <http://www.un.org/disarmament/WMD/Chemical/>. Accessed 14 August 2012.

<sup>27</sup> *Ibid*.

(CWC) outlaws the production, stockpiling, use and production of chemical weapons and their precursors<sup>28</sup>. The CWC augments the Geneva Protocol of 1925<sup>29</sup> and includes extensive verification measures of compliance.

As of October 2013, 190 states have signed and ratified the CWC. Two states: Burma<sup>30</sup> and Israel have signed but not ratified the agreement whilst four states: Angola<sup>31</sup>, Egypt, North Korea and South Sudan have neither signed nor ratified the Treaty. Syria deposited its instrument of accession to the CWC on 14 September 2013.

The CWC is administered by the Organization for the Prohibition of Chemical Weapons (OPCW), which acts as the legal platform for specification of the CWC provisions.

There are several criticisms of the CWC. Firstly, the CWC is designed for rational, norm-based states. With the unprecedented profile now given to international terrorism, the CWC will have to adapt to the current security context in order to remain a valid barrier against the use of chemical weapons<sup>32</sup>.

Secondly, the delayed destruction of chemical weapon stockpiles by the United States and Russia even after the expiration of the final deadline of 2012 means that these

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<sup>28</sup> *Op.cit*, see note 19.

<sup>29</sup> *Op.cit*, see note 6.

<sup>30</sup> Angola and Burma have committed to ratifying the CWC.

<sup>31</sup> *Ibid*.

<sup>32</sup> Katie, Smallwood, 'Challenges For The Chemical Weapons Convention', Workshop on, 'The proliferation of Weapons of Mass Destruction and International Humanitarian Law-Current Challenges, Effective Responses', Sanremo, Italy – Villa Ormond 16 November 2007. Organized by the International Institute of Humanitarian Law. Also available at: [http://www.iihl.org/iihl/Documents/Proliferation%20of%20WMD%20and%20IHL\\_whole\\_file.pdf](http://www.iihl.org/iihl/Documents/Proliferation%20of%20WMD%20and%20IHL_whole_file.pdf). Accessed 14 August 2012.

States are in technical non-compliance with the CWC<sup>33</sup>. With no punitive action taken against them, confidence in the CWC has waned.

Thirdly, the use of non-lethal chemicals for agricultural research, industrial and medical uses and ‘law enforcement including domestic riot control purposes’<sup>34</sup> is a loophole in the CWC. This loophole is a major challenge with regards to the new developments in the chemical industry. It also legalised the use of chemical weapons in the Moscow theatre siege in 2002<sup>35</sup>.

### C) NUCLEAR WEAPONS

A nuclear weapon is an explosive device whose destructive potential derives from the release of energy that accompanies the splitting or combining of atomic nuclei<sup>36</sup>.

Nuclear weapons are the most dangerous weapons on earth. The dangers from such weapons arise from their very existence<sup>37</sup>. Nuclear weapons have been used in the World twice: both times by the United States. On 6 August 1945, a uranium gun-type fission bomb code-named ‘Little Boy’ was detonated over the Japanese city of Hiroshima and on 9 August, a plutonium implosion-type fission bomb code-named ‘Fat Man’ was exploded over Nagasaki, Japan. These two bombings resulted in the

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<sup>33</sup> *Op.cit*, note 20.

<sup>34</sup> *Op. cit*, See note 19; Fidler, D.P. (2005) The Meaning of Moscow: ‘non-lethal’ weapons and international law in the early 21st Century, *International Review of the Red Cross*, Vol. 87, pp. 525-552

<sup>35</sup> Fidler, D.P. (2005) The Meaning of Moscow: ‘non-lethal’ weapons and international law in the early 21st Century, *International Review of the Red Cross*, Vol. 87, pp. 525-552

<sup>36</sup> BETA Dictionary.com, Nuclear Weapon. Available at: <http://dictionary.reference.com/browse/nuclear+weapon>. Accessed 14 August 2012.

<sup>37</sup> *Op.cit*, note 20. See Nuclear Weapons. Available at the United Nations Website: <http://www.un.org/disarmament/WMD/Nuclear/NPT.shtml>. Accessed 14 August 2012.

deaths of approximately 200,000 people<sup>38</sup>. There are about 22,000 nuclear weapons in the world today with over 2,000 nuclear tests conducted to date<sup>39</sup>.

The United Nations has sought to eliminate such weapons ever since its establishment<sup>40</sup>. The first resolution<sup>41</sup> adopted by the General Assembly in 1946 established a Commission to deal with problems related to the discovery of atomic energy and other weapons that can be adaptable to mass destruction.

Several treaties with the aim of preventing nuclear proliferation and encouraging nuclear disarmament have been passed: the Treaty on the Non-Proliferation of Nuclear Weapons (NPT)<sup>42</sup>, the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water (the Partial Test Ban Treaty- PTBT)<sup>43</sup> and the Comprehensive Nuclear Test Ban Treaty (CTBT)<sup>44</sup>.

The NPT consists of a preamble and eleven articles. The NPT is traditionally referred to as a three-pillar system of non-proliferation, disarmament and the right to use nuclear technology peacefully<sup>45</sup>. The first pillar of non-proliferation recognizes five states<sup>46</sup> as nuclear weapons states (NWS). The five NWS parties have made undertakings not to use their nuclear weapons against non-nuclear weapons states

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<sup>38</sup> Atomic Archive: The Atomic Bombing of Hiroshima and Nagasaki. Available at: [http://www.atomicarchive.com/Docs/MED/med\\_chp10.shtml](http://www.atomicarchive.com/Docs/MED/med_chp10.shtml). Accessed 14 August 2012.

<sup>39</sup> *Op.cit.*, note 20. See Nuclear Weapons. Available at the United Nations Website: <http://www.un.org/disarmament/WMD/Nuclear/NPT.shtml>. Accessed 14 August 2012.

<sup>40</sup> *Ibid.*

<sup>41</sup> GA Resolution A/RES/I(1) of 24 January 1946.

<sup>42</sup> Treaty on the Non-Proliferation of Nuclear Weapons, 21 UST 483 (1970)

<sup>43</sup> Available at the United Nations Website: [http://www.un.org/disarmament/WMD/Nuclear/pdf/Partial\\_Ban\\_Treaty.pdf](http://www.un.org/disarmament/WMD/Nuclear/pdf/Partial_Ban_Treaty.pdf). Accessed 14 August 2012.

<sup>44</sup> General Assembly Resolution 50/245 of 10 September 1996. Accessed 18 May 2012. This Treaty was signed in 1996 but is yet to enter into force.

<sup>45</sup> Ambassador Sudjadnan Parnohadiningrat, 26 April 2004, United Nations, New York, Third Session of the Preparatory Committee for the 2005 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, furnished by the Permanent Mission of the Republic of Indonesia to the United Nations. Available at: [indonesiamission-ny.org](http://indonesiamission-ny.org). Accessed 18 May 2012

<sup>46</sup> China, France, Russia, United Kingdom and United States.



(NNWS) except in response to a nuclear attack, or a conventional attack in alliance with a Nuclear Weapons State. These undertakings have not been incorporated formally into the NPT, and the exact details have varied over time.

The provisions of Article VIII, paragraph 3<sup>47</sup>, which recommends a review of the operation of the NPT every five years was reaffirmed by States parties at the 1995 NPT Review and Extension Conference. The NPT Review and Extension Conference of 1995 decided on 11 May 1995, in accordance with Article X, paragraph 2<sup>48</sup>, that the NPT should continue in force indefinitely.

The second pillar of disarmament is in Article VI of the NPT, which is the only, binding commitment in the NPT to the goal of disarmament by the nuclear weapon States. Although, Article VI<sup>49</sup> only requires State Parties ‘to negotiate in good faith’ to conclude a disarmament Treaty, the states in the Non-Aligned Movement, have interpreted Article VI’s language as constituting a formal and specific obligation on the NPT recognized NWS to disarm themselves of nuclear weapons, and argue that these states have failed to meet their obligation. In 1996, the International Court of Justice issued its historic Advisory Opinion<sup>50</sup> that unanimously interpreted the obligation in Article IV as extending to the need to bring negotiations on nuclear disarmament to a conclusion.

The third pillar of peaceful use of nuclear weapons recognizes that nuclear technology is used in several peaceful endeavors such as, medical research<sup>51</sup>, the exploration of

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<sup>47</sup> *Ibid.*

<sup>48</sup> *Op.cit.*, note 42.

<sup>49</sup> *Ibid.*, See Article IV.

<sup>50</sup> Available at the International Court of Justice Case Docket at the United Nations Website: <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=e1&p3=4&case=95>. Accessed 14 August 2012.

<sup>51</sup> Currently used for treating certain cancers and further research on cancer and AIDs treatments.

mineral resources<sup>52</sup>, industrial<sup>53</sup> and commercial purposes<sup>54</sup>. It therefore allows for the transfer of nuclear technology and materials to NPT signatory countries for the development of civilian nuclear energy under conditions that make it difficult to develop nuclear weapons. Hence, the NPT restricts the inalienable right of sovereign states to use nuclear energy for peaceful purposes in conformity with Articles I and II<sup>55</sup>.

Article X of the NPT which establishes the right of State parties to withdraw from the NPT by giving 3 months notice, if ‘extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country’<sup>56</sup>, is a major thorn of the NPT. North Korea is the first state to ever withdraw from the NPT. It ratified the NPT on 12 December 1985, but following the United States allegations that it had started an illegal enriched uranium weapons program<sup>57</sup>, North Korea gave notice of withdrawal from the NPT on 10 January 2003. The withdrawal became effective 10 April 2003<sup>58</sup>. Three states namely, India<sup>59</sup>, Israel, and Pakistan<sup>60</sup> never

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<sup>52</sup> Nuclear technology uses the ‘well-logging’ procedure.

<sup>53</sup> Radioisotopes are used in nuclear technology to ensure the quality of manufactured goods.

<sup>54</sup> Germs in food and medical supplies can be killed with nuclear technology.

<sup>55</sup> *Op.cit*, note 42.

<sup>56</sup> *Ibid*. See Article X.

<sup>57</sup> In 2007, reports from Washington suggested that the 2002 CIA reports stating that North Korea was developing an enriched uranium weapons program, which led to North Korea leaving the NPT, had overstated or misread the intelligence. Some critics worry could have been planted in order to justify the United States giving up trying to verify the dismantlement of Pyongyang's uranium program in the face of North Korean intransigence

<sup>58</sup> International Atomic Energy Agency: Fact Sheet on the Democratic Peoples Republic of Korea Nuclear Safeguards, (May 2003). Available at: [http://www.iaea.org/newscenter/focus/iaeadprk/fact\\_sheet\\_may2003.shtml](http://www.iaea.org/newscenter/focus/iaeadprk/fact_sheet_may2003.shtml). Accessed 12 August 2012; North Korea had once before announced withdrawal, on 12 March 1993, but suspended that notice before it came into effect.

<sup>59</sup> Advocates of arms control have denounced the United States-India Peaceful Atomic Energy Cooperation Act claiming it violates the NPT by facilitating nuclear programmes in States that are not parties to the NPT. Likewise, On 4 December 2011, Australia's Prime Minister Julia Gillard overturned its long-standing ban on exporting uranium to India.

<sup>60</sup> Proponents of arms control have denounced the China-Pakistan civil nuclear deal of 2010 claiming that it violates the NPT by facilitating nuclear programmes in States that are not parties to the NPT.

signed the NPT. India and Pakistan are confirmed nuclear powers, and Israel has a long-standing policy of deliberate ambiguity<sup>61</sup>.

There have been several Review Conferences on the NPT. The last was held in May 2010 in New York City. A final document that included a summary by the Review Conference President, Ambassador Libran Capactulan of the Philippines, and an Action Plan were adopted by consensus<sup>62</sup>. United States President Barack Obama's commitment to non-proliferation and disarmament of nuclear weapons made the 2010 conference a success because it reached consensus whereas the previous Review Conference in 2005 ended in disarray<sup>63</sup>. The next review conference is in 2015.

Today, there are also treaties establishing nuclear-weapon-free zones in Latin America, Africa, Southeast Asia, and the South Pacific, which together now cover virtually the entire Southern Hemisphere<sup>64</sup>. However, with 35 to 40 states having an

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<sup>61</sup> A policy of deliberate ambiguity or policy of strategic ambiguity is the practice by a country of being intentionally ambiguous on certain aspects of its foreign policy or whether it possesses certain weapons of mass destruction. For example, Israel practices deliberate ambiguity over the issue of targeted killings, never confirming or denying whether Israel is involved in the deaths of suspected terrorists on foreign soil. The United Kingdom is deliberately ambiguous about whether its ballistic missiles submarines would carry out a nuclear counter-attack in the event that the government were destroyed by a nuclear first strike. Upon taking office, the incoming Prime Minister issues sealed letters of last resort to the commanders of the submarines on what action to take in such circumstances and the United States is deliberately ambiguous on the issue of whether US surface ships, such as destroyers, carry nuclear weapons. This led to a New Zealand ban of US Navy ships from its ports, however, the US has many ballistic missiles submarines that it has acknowledged to be equipped with nuclear warheads.

<sup>62</sup> Final Document, 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, NPT/CONF.2010/50, adopted 28 May 2010. Also available at: <http://www.reachingcriticalwill.org/legal/npt/revcon2010/FinalDocument.pdf>. Accessed 14 August 2012.

<sup>63</sup> J. Dhanapala, 'Evaluating the 2010 NPT Review Conference', *United States Institute of Peace Special Report*, October 2010, p.3; Harald Mueller, 'The 2005 NPT Review Conference: Reasons and Consequences of Failure and Options for Repair', *Weapons of Mass Destruction Commission*, paper n°31, August 2005, available at <http://www.blixassociates.com/wp-content/uploads/2011/03/No31.pdf>, Accessed 14 August 2012; Geneva Centre for Security Policy, 'The 2010 NPT Action Plan Monitoring Report', Available at: [www.gcsp.ch/content/download/8886/105587/download](http://www.gcsp.ch/content/download/8886/105587/download), Accessed 14 August 2012.

<sup>64</sup> Jayantha Dhanapala, 'International Law, Security, and Weapons of Mass Destruction', Showcase Program 2002. Spring Meeting of the Section of International Law and Practice American Bar Association, New York. 9 May 2002. Available at the United Nations Disarmament Website: [http://www.un.org/disarmament/HomePage/HR/docs/2002/2002May09\\_NewYork.pdf](http://www.un.org/disarmament/HomePage/HR/docs/2002/2002May09_NewYork.pdf). Accessed 14 August 2012.

enrichment capability, the spread of enrichment and reprocessing capabilities is the ‘Achilles heel’ of the nuclear nonproliferation regime<sup>65</sup>.

A trend of identifying the need for disarmament and non-proliferation of nuclear weapons on the basis of humanitarian objectives has currently emerged. The summary and Action Plan of the 2010 NPT Review Conference stress the humanitarian consequences of nuclear weapons<sup>66</sup>. In addition, there have been twelve General Assembly resolutions that identified humanitarian aims as their goals on the issue of nuclear weapons. For example, the preamble to resolution 65/76<sup>67</sup> asserts that the continuing existence of nuclear weapons poses a threat to all life on Earth and Resolution 65/59<sup>68</sup> reaffirmed the need for all States at all times to comply with applicable international law, including international humanitarian law.

Over the years the NPT has been severely criticized. Firstly, Rydell argues that with respect to nuclear weapons - the deadliest of all - the world has fallen several steps behind. Almost 60 years after the first use of such weapons in Japan, there are still no negotiations underway on a nuclear weapons convention in the Conference on Disarmament, the world's single disarmament negotiating forum<sup>69</sup>.

Secondly, the non-nuclear weapons states (NNWS) see the NPT as a conspiracy of the nuclear 'haves' to keep the nuclear 'have-nots' in their place. This is because the

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<sup>65</sup> Mohamed ElBaradei, ‘*Preserving the Non-Proliferation Treaty*’. 2004 Disarmament Forum. Available at the United Nations Institute for Disarmament Research: <http://www.unidir.org/pdf/articles/pdf-art2185.pdf>. Accessed 13 August 2012.

<sup>66</sup> *Op.cit.*, See note 62.

<sup>67</sup> General Assembly *Resolution 65/76* of 8 December 2010 had the support of 133 States, the most ever.

<sup>68</sup> General Assembly *Resolution 65/59* of 8 December 2010. The NWS were deeply split, with China and Russia voting in favour, France and the United States voting against, and the United Kingdom abstaining. 173-5-5.

<sup>69</sup> Randy Rydell, ‘The United Nations and a Humanitarian Approach to Nuclear Disarmament’, *Nuclear Abolition Forum*, no.1 (2011) pp25-34. Also available at: [http://www.un.org/disarmament/content/speeches/oda-ny/rydell/2011-10-NAF-Humanitarian\\_Disarmament.pdf](http://www.un.org/disarmament/content/speeches/oda-ny/rydell/2011-10-NAF-Humanitarian_Disarmament.pdf). Accessed 15 August 2012.

distinction made by the NPT between the five NWS and the NNWS makes the NPT a double standards system. In addition, Article III of the NPT makes submission to the International Atomic Energy Agency (IAEA) Safeguards only for the NNWS.

Furthermore, NATO's nuclear sharing is also seen as being non-compliant with Articles I and II of the NPT by the NWS with no punitive actions taken and Article IV which tasks the NWS to liquidate their nuclear stockpiles and complete disarmament has not been complied with.

Thirdly, the NPT has been weakened by bilateral deals made by NPT member states<sup>70</sup> because it frustrated the request made by the NPT State Parties to India, Israel and Pakistan to be signatories to the NPT as NNWS. To date, no sanctions have been carried out on states that possess nuclear weapons and are not authorized to do so under the NPT.

Finally, a new frontier in the struggle against the proliferation of nuclear weapons is represented by nuclear terrorism<sup>71</sup>, from which, a state with nuclear ambitions can purchase<sup>72</sup> and the NPT says nothing about uranium mines and mills from which terrorists could easily acquire fissile material.

## **D) MISSILES**

A missile is a self-propelled guided weapon system, as opposed to an unguided self-propelled munition, referred to as just a rocket<sup>73</sup>. There are five types of missiles:

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<sup>70</sup> USA and India, China and Pakistan, Australia and India.

<sup>71</sup> Lucilla Tempesti, 'Loopholes In The Nuclear Non-Proliferation Regime: The Cases Of Iran And North Korea', Workshop on, 'The proliferation of Weapons of Mass Destruction and International Humanitarian Law-Current Challenges, Effective Responses', Sanremo, Italy – Villa Ormond 16 November 2007. Organized by the International Institute of Humanitarian Law.

<sup>72</sup> For example, Libya is suspected of buying from North Korea and Abdul Qadeer Khan made use of Flag States flagged vessels to transport nuclear equipment and technology.

<sup>73</sup> Beta Dictionary.com: Missile. Available at: <http://dictionary.reference.com/browse/missile>. Accessed 14 August 2012.

surface to surface; air to air; surface to air; air to surface; and anti-satellite missiles<sup>74</sup>. Missiles have the potential to carry and deliver WMD, in particular, nuclear weapons payload quickly and accurately. Hence, missiles are currently the focus of increased international attention, discussion and activity<sup>75</sup>.

The diversity of international views on matters related to missiles poses a particular challenge for efforts to address the issue. As a result, there is currently no legally binding Treaty dealing with the issue of missiles<sup>76</sup>. However, there are some multilateral regimes, which seek to prevent the proliferation of missiles and related technology<sup>77</sup>.

Three Panels of Government Experts on the issue of missiles have been established by the General Assembly<sup>78</sup>. The first Panel was established from July 2001 to July 2002, the second Panel in 2004 and the third Panel completed its work in June 2008, agreeing on its report by consensus<sup>79</sup>. The Panel regarded missile's as serious concerns for international peace and security and concluded, among other things, that it was important to further deliberate on the issue, specifically focusing attention on existing and emerging areas of consensus via the important role of the United Nations in providing a more structured and effective mechanism to build such a consensus<sup>80</sup>.

### **III) THE THREAT OF WEAPONS OF MASS DESTRUCTION AND TERRORISM**

The 21<sup>st</sup> century has brought the link between WMDs and Terrorism to the fore. In

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<sup>74</sup> For example, cruise, ballistic, anti-aircraft, anti-ship, and anti-tank missiles.

<sup>75</sup> *Op.cit.*, note 20. See Disarmament. Available at the United Nations Website: <http://www.un.org/disarmament/WMD/Missiles/>. Accessed 14 August 2012.

<sup>76</sup> *Ibid.*

<sup>77</sup> For example, the Hague Code of Conduct and the Missile Technology Control Regime.

<sup>78</sup> General Assembly *Resolution 59/67* of 3 December 2004.

<sup>79</sup> *Op.cit.*, note 20. See Disarmament. Available at the United Nations Website: <http://www.un.org/disarmament/WMD/Missiles/>.

<sup>80</sup> *Ibid.*

particular, the threat of WMD has profoundly influenced the Bush administration's national and homeland security strategies in the United States<sup>81</sup>.

The October 2000 attack on the USS Cole and the attack on the French oil tanker MV Limburg off the Yemen Coast in 2002 led to fears that terrorist groups can exploit weaknesses in the global sea container system and use international shipping as a means of transporting individuals or WMDs for a terrorist attack<sup>82</sup>. Furthermore, a high-profile incident involving the interception of North Korean Scud missiles and rocket fuel on board an unmarked ship traveling to Yemen in December, 2002 in which, acting on intelligence from the United States, a Spanish frigate stopped and boarded the *So San* and discovered the missiles. After confirming that the missiles were purchased by Yemen, the Bush Administration concluded that there was no legal basis to arrest the vessel or seize its cargo, because North Korea had not violated any law<sup>83</sup>. The frustrated effort to prevent the delivery of the shipment added further impetus to the launch of the Proliferation Security Initiative (PSI)<sup>84</sup>.

## **A) THE PROLIFERATION SECURITY INITIATIVE**

President Bush formally announced the initiative on 31 May 2003, in Crakow, Poland. There are currently 103 participating states in the PSI. The most recent

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<sup>81</sup> White House, *The National Security Strategy of the United States of America*, September, 2002. Available at: <http://www.whitehouse.gov/nsc/nss.html>; White House, *National Strategy To Combat Weapons of Mass Destruction*, December, 2002. Available at: <http://www.whitehouse.gov/news/releases/2002/12/WMDStrategy.pdf>. Accessed 15 August 2012.

<sup>82</sup> Ian Davis, 'The Proliferation Security Initiative (PSI): An Effective Response To WMD Threats?' workshop on, 'The proliferation of Weapons of Mass Destruction and International Humanitarian Law- Current Challenges, Effective Responses', Sanremo, Italy – Villa Ormond 16 November 2007. Organized by the International Institute of Humanitarian Law. Also available at: [http://www.iihl.org/iihl/Documents/Proliferation%20of%20WMD%20and%20IHL\\_whole\\_file.pdf](http://www.iihl.org/iihl/Documents/Proliferation%20of%20WMD%20and%20IHL_whole_file.pdf).

<sup>83</sup> See Ari Fleischer, White House Press Briefing, Dec. 11, 2002, *available online at* 2002 WL 31764110 (F.D.C.H.)(Westlaw). Accessed 15 August 2012.

<sup>84</sup> *Op.cit.*, see note 82.

member is Malaysia<sup>85</sup>. The reaction of states can be grouped into three broad categories: an inner core of 15- 20 states, led by the United States and some of its closest allies; around 80 other states that have signed up to the initiative, but are bit-part players; and the rest of the world, which is either agnostic or skeptical<sup>86</sup>.

The aim of the PSI is to eliminate or ‘roll back’ WMD from certain states and terrorist groups who possess such weapons or are close to acquiring them<sup>87</sup>. Member states of the PSI are developing a formal set of tools called Critical Capabilities and Practices (CCP) for use by all PSI partners to aid their ability to interdict WMD. The CCP is divided into four aspects. The first aspect deals with ways of prohibiting proliferation<sup>88</sup>. The second is to do with inspection and identification of proliferators<sup>89</sup>. The third is the seizure and disposition of WMDs<sup>90</sup> and the fourth is about rapid decision making by Government in interdiction scenarios.

The PSI suffers from some key legal, political and operational flaws that continue to hinder its legitimacy and viability as an international non-proliferation regime<sup>91</sup>. The PSI has been criticized as violating Article 51<sup>92</sup> of the United Nations Charter<sup>93</sup> and Articles 19, 23 and 88 of the United Nations Convention on the Law of the Sea

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<sup>85</sup> During a bilateral meeting on 27 April 2014, in Putrajaya, Malaysia, Malaysia Prime Minister Najib and President Obama announced Malaysia's decision to endorse and participate in the PSI<sup>85</sup>. <http://www.state.gov/r/pa/prs/ps/2014/04/225349.htm>. Accessed 15 August 2012.

<sup>86</sup> *Op.cit.*, See note 82.

<sup>87</sup> Jennifer K. Elsea, Report for Congress: Weapons of Mass Destruction Counterproliferation: Legal Issues for Ships and Aircraft’, October 1, 2003. Received through the CRS Web. Order Code RL32097CRS. Also available at: <http://www.fas.org/spp/starwars/crs/RL32097.pdf>.

<sup>88</sup> For example, by having in place appropriate legal authorities to prohibit and prevent proliferation activity within and across one's border.

<sup>89</sup> The ability to effectively inspect air, land, and sea cargos and to identify proliferation-related materials.

<sup>90</sup> The ability to undertake appropriate actions to seize and dispose of interdiction-related materials.

<sup>91</sup> *Op.cit.*, See note 82.

<sup>92</sup> the inherent right of self-defense.

<sup>93</sup> Adopted 26 June 1945 and entered into force 24 October 1945. United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

Available at: <http://www.un.org/aboutun/charter/index.html>. Accessed 15 August 2012. In addition, the Charter of the United Nations is always reprinted in the most current Volume of the Yearbook of the United Nations.



(UNCLOS) 1982<sup>94</sup>. The UNCLOS guarantees freedom of the seas and allows ships ‘carrying nuclear or other inherently dangerous or noxious substances’ the right of innocent passage through territorial seas. By stopping ships on the sea, the PSI gives states a license to carry out acts of piracy on the high seas<sup>95</sup>.

Furthermore, the PSI was not initiated through a multilateral process and has been accused of focusing specifically on some states<sup>96</sup>. Indeed, in the aftermath of the Democratic Peoples Republic of Korea (DPRK) nuclear test in October 2006, government officials in many countries called for the PSI to be specifically targeted to prevent imports into DPRK<sup>97</sup>.

## **II) SECURITY COUNCIL RESOLUTION 1540**

The Security Council had recognized the proliferation of WMD as a threat to international peace and security in the Security Council Presidential Statement of January 31, 1992<sup>98</sup>. However, a resolution on the issue was only adopted in 2004<sup>99</sup>. This was in response to the unmasking of the Abdul Qadeer Khan proliferation network and the prevention of the acquisition of WMD by terrorist groups.

Resolution 1540 is the second resolution to invoke Chapter VII of the United Nations Charter without relating the fact to a specific time and place<sup>100</sup>. The opening paragraph of resolution 1540 states that, ‘proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, constitutes a threat to

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<sup>94</sup> United Nations Convention on the Law of the Sea of 10 December 1982.

<sup>95</sup> Anti-Imperialist News Service, ‘US Practicing Sea and Air Piracy’, 16 September 2003, Chicago, USA. Also available at: [http://www.anti-imperialist.org/korea-piracy\\_9-16-03.html](http://www.anti-imperialist.org/korea-piracy_9-16-03.html). Accessed on 14 August 2012.

<sup>96</sup> Such as Iran and the DPRK.

<sup>97</sup> *Op.cit.*, see note 82.

<sup>98</sup> United Nations Security Council Presidential statement January 31, 1992.

<sup>99</sup> Security Council *Resolution 1540* of 28 April 2004.

<sup>100</sup> The first is Security Council Resolution 1373, which was voted in the aftermath of the September 11 attacks as an attempt to counter international terrorism.

international peace and security’.

There are three main obligations created by resolution 1540. Firstly, member states should ‘refrain from providing any form of support to non-State actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery’<sup>101</sup>. Secondly member states should ‘adopt and enforce appropriate effective laws which prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery’<sup>102</sup> and thirdly, member states should ‘take and enforce effective measures to establish domestic controls to prevent the proliferation of nuclear, chemical, or biological weapons and their means of delivery’<sup>103</sup>.

Resolution 1540 provides for the creation of an ad-hoc committee to oversee the implementation of the resolution. This committee is known as the 1540 committee<sup>104</sup>. The 1540 Committee was deliberately created without the power to impose sanctions because it was decided that the implementation process should be based on collaboration and participation rather than enforcement. The mandate of the 1540 Committee was extended for a further ten years by Resolution 1977<sup>105</sup>.

Resolution 1540 tries to fill gaps in the varying approaches to existing treaties on WMD by applying to non-state actors via implementation in national law and hints at

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<sup>101</sup> *Op.cit.*, note 99, See Article I.

<sup>102</sup> *Ibid.*, See Article II.

<sup>103</sup> *Ibid.*, See Article III.

<sup>104</sup> United Nations Website: 1540 Committee. Available at: <http://www.un.org/en/sc/1540/faq/facts.shtml>. Accessed on 18 August 2012.

<sup>105</sup> Security Council *Resolution 1977* of April 2011.

the possibility of sanctions for non-compliance<sup>106</sup>. It also contributes to treaty universality<sup>107</sup> by harmonizing the current regimes on WMD via four ways: Firstly, resolution 1540 has a complementary relationship to the NPT and the IAEA<sup>108</sup>. The 1540 Committee can inform states about requesting legislative and technical assistance and advisory services from the IAEA<sup>109</sup>. Secondly, resolution 1540 aims to remedy the challenges of WMDs and terrorism facing the CWC and its organization the OPCW. It does this by giving a broad definition of the issue of related materials in the CWC<sup>110</sup>. Thirdly, unlike the OPCW to the CWC and the IAEA to the NPT, there exists no such organization to the BWC. Resolution 1540 aims to remedy this by establishing a monitoring system, based on states' declarations on implementation, through the reports provided to the 1540 Committee<sup>111</sup> and finally, it promotes a greater understanding of non-proliferation instruments related to means of delivery such as the Missile Technology Control Regime (MTCR).

Resolution 1540 has been criticised by many states as interference by the United Nations on the sovereignty of Member States. In addition, it is cumbersome and ill-adapted to their situations because it is a drain on resources that could better be used on problems that are of more direct local relevance and is an attempt by the United States to co-opt others into its war on terror.

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<sup>106</sup> Van Ham, P and Bosch O, 'UNSCR 1540: Its Future and Contribution to Global Non-Proliferation and Counter-Terrorism', *Global Non-Proliferation and Counter-Terrorism*, 218–219.

<sup>107</sup> *Ibid.*

<sup>108</sup> The IAEA also covers radioactive material, which is easier for non-state actors to obtain.

<sup>109</sup> The IAEA has activities and programs that are relevant to the implementation of the resolution 1540 such as legislative assistance, training of state officials and support to states in the development and implementation of physical protection of nuclear material and facilities.

<sup>110</sup> Its definition includes chemicals and equipment covered by multilateral arrangements and national control lists such as the EU's strategy against the proliferation of WMD, the Australia Group and the PSI.

<sup>111</sup> *Op.cit.*, See note 106.

#### **IV) THE WAY FORWARD**

The ancient Indian epic: The Ramayana, recounts a war between Rama, prince of Ayodhya in India, and Ravana, ruler of Sri Lanka. Lakshmana offered Rama a new weapon that could ‘destroy the entire race of the enemy, including those who could not bear arms’<sup>112</sup>. Notwithstanding the fact that Ravana was fighting an unjust war with an unrighteous objective Rama responded that such a weapon could not be used ‘because such destruction en masse was forbidden by the ancient laws of war’<sup>113</sup>. This story proves that man's quest for the protection of humanity even in war has been the foremost principle.

The link between disarmament and proliferation, which, is no NWS would seriously consider eliminating its last nuclear weapons without high confidence that other countries will not acquire them. Disarmament by the superpowers—which has led to the elimination of thousands of weapons and delivery systems, could eventually make the possession of nuclear weapons more attractive by increasing the perceived strategic value of a small arsenal<sup>114</sup>. Thus, the PSI should be adapted to become the key policing mechanism for a new initiative towards the global elimination of nuclear weapons.

For the objectives of Resolution 1540's<sup>115</sup> with respect to biological weapons to be realized, an effective verification mechanism for the BWC must be sought in the future for. To a lesser extent, the CWC must also be adapted to new developments<sup>116</sup>.

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<sup>112</sup> This story was recounted by Judge Weeramantry in his dissenting opinion in the 1996 Advisory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons.

<sup>113</sup> *Ibid.*

<sup>114</sup> U.S. Special Representative for Nuclear Nonproliferation Christopher Ford, ‘Disarmament and Non-Nuclear Stability in Tomorrow's World’, remarks at the Conference on Disarmament and Nonproliferation Issues, Nagasaki, Japan (31 August 2007).

<sup>115</sup> Angela Woodward, ‘United Nations Security Council Resolution 1540 On Weapons Of Mass Destruction And Terrorism: A Step In The Right Direction?’. Workshop on, ‘The proliferation of

Perhaps the weakest area of the rule of law now concerns the issue of enforcement of the international law. It is a truism that international law lacks the police functions that are found in domestic legal systems. The ability of the Security Council to perform its enforcement responsibilities under the United Nations Charter is limited by the veto power and its practical inability to order enforcement actions against one of its permanent five members<sup>117</sup>.

Cooperation across borders among national regulatory authorities is necessary to neutralize the threat of WMD. This has given rise to a phenomenon of ‘transgovernmentalism’ - a process harnessing the state's power to solve global problems<sup>118</sup>. International co-operation can also be seen in the search for Malaysia Airlines Flight 370 (MH370) that had over 40 States involved.

The problem of granting the right of a nuclear program for peaceful uses and dealing with the threat of proliferation can be tackled by the adoption of a Security Council resolution that discourages the withdrawal by states from the NPT<sup>119</sup>. The resolution can also provide that such withdrawal represents a threat to international peace and security<sup>120</sup> and does not release a State from the breaches of the treaty, which occurred before withdrawal.

Finally, the rule of law also contributes significantly to the processes of verification by establishing the ground rules for states to reassure themselves that others are living

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Weapons of Mass Destruction and International Humanitarian Law-Current Challenges, Effective Responses’, Sanremo, Italy – Villa Ormond 16 November 2007. Organized by the International Institute of Humanitarian Law.

<sup>116</sup> In anticipation of new developments, the negotiators of the CWC drafted a non-specific definition of a chemical weapon.

<sup>117</sup> China, France, Russia, the United Kingdom and United States.

<sup>118</sup> Anne-Marie Slaughter a Professor of International, Foreign and Comparative Law at Harvard coined the term ‘transgovernmentalism’. See, Anne-Marie Slaughter, ‘The Real World Order’, *Foreign Affairs*, September/October 1997.

<sup>119</sup> Mishra, J. ‘NPT and the Developing Countries’, (*Concept Publishing Company, 2008*).

<sup>120</sup> *Op.cit*, note 93, See Article 39.

up to their treaty obligations. In his Millennium Report to the United Nations, Secretary-Kofi Annan called for 'respect for law, in international as in national affairs, in particular the agreed provisions of treaties on the control of armaments, and international humanitarian and human rights laws<sup>121</sup>.

## **V) CONCLUSION**

Change in all walks of life has played a major role in surfacing new challenges. In particular, the challenges of the 21<sup>ST</sup> century with reference to WMD generally and terrorism specifically is radically different from the challenges when the various treaties on WMD were created.

It is the author's firm conclusion that complete disarmament is the only protection against the dangers of WMD. No weapon system, whether defensive or offensive in orientation, offers this kind of guarantee. Since, the Security Council seems unable to fulfill its mandate of securing peace and security with reference to WMD, the General Assembly needs to rally together and use the 'Uniting for Peace' procedure provided by United Nations General Assembly Res 377 (V) of 3 November 1950 to safeguard humanity.

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<sup>121</sup> Kofi Annan, '*We the Peoples: The Role of the United Nations in the Twenty-First Century*', A/54/2000, 27 March 2000, p. 56.