

States' Obligations to Prevent CBRN Terrorism under Treaty Law and United Nations Security Council Resolutions

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1 Introduction

The international legal framework on CBRN threats has traditionally been developed based on a predominantly State-centred approach,¹ under the assumption that States are the subjects more likely to possess the capacity to obtain, develop and deploy CBRN weapons.² However, following high-profile episodes of attempted and successful CBRN terrorist attacks,³ the unveiling of highly organised and powerful terrorist organisations forced States and international organisations to refocus their anti-terrorism and arms control efforts to address the risk of acts of CBRN terrorism by non-State actors (NSAs).⁴ While this risk is relatively small compared to that of conventional, non-CBRN terrorist attacks, the possibility of acquisition and use of CBRN weapons by terrorist groups cannot be easily ruled out,⁵ and has required States to intensify

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- 1 Particularly in older treaties, the focus of disarmament obligations is on the conduct of States vis-à-vis other States. See eg Treaty on the Non-Proliferation of Nuclear Weapons (1968) (NPT) arts 2, 3. See M Asada, 'Security Council Resolution 1540 to Combat WMD Terrorism: Effectiveness and Legitimacy in International Legislation' (2008) 13 *JC&SL* 305–306.
 - 2 Ibid. For a long time the probability of nuclear terrorism has been considered relatively low. See CJ Mark, T Taylor, E Eyster, W Maraman and J Wechler, 'Can Terrorists Build Nuclear Weapons' in P Leventhal and Y Alexander (eds), *Preventing Nuclear Terrorism, The Report and Papers of the International Task Force on Prevention of Nuclear Terrorism* (Lexington Books 1987) 60.
 - 3 The mid-90s terrorist attacks carried out in Japan by the Aum Shinrikyo and the case of anthrax letters in the USA were a turning point with regard to States' attitudes towards chemical and biological attacks.
 - 4 This has become particularly evident since the adoption of UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373 and of UNSC Res 1540 (28 April 2004) UN Doc S/RES/1540.
 - 5 On the probability of nuclear terrorism, see CC Joyner and AI Parkhouse, 'Nuclear Terrorism in a Globalizing World: Assessing the Threat and the Emerging Management Regime' (2009) 45 *StanJIntlL* 214. The reported use of chemical weapons in Syria shows that both States and non-State actors might be willing to deploy them.

cooperation efforts to foster prevention and preparedness.⁶ In this connection, the pertinent treaty-based regime has been integrated by UN-imposed obligations, as well as by regional instruments.⁷

This chapter, taking into account the different components of prevention as defined in earlier chapters, attempts to identify the specific content of States' obligations to prevent CBRN terrorism resulting from the interplay between treaty law and UN Security Council resolutions. The contribution seeks to categorise prevention obligations according to their object and function; to analyse the normative relations between treaty law and UNSC resolutions; and briefly discusses the issue of implementation and enforcement of prevention obligations by States.

2 CBRN Terrorist Threats: The Challenge of Dealing with Non-State Actors

As a result of the State-centric character of the legal framework relating to CBRN weapons and materials,⁸ the pertinent treaties create predominantly inter-State and institutionalised regimes of cooperation, mutual assistance and information,⁹ and mechanisms of inspection and control to ensure the physical protection of CBRN materials and weapons.¹⁰ This approach rests on the assumption that these threats, considering the inherent technical and

6 For an analysis of generic and specific preparedness obligations, see chs 4 and 8 by de Guttry. It should be noted that, due to the uncertainty on the exact delimitation between the concepts of prevention and preparedness, it is difficult to draw a clear-cut distinction between obligations pertaining to the former and to the latter. Therefore, some of the pertinent international norms can be examined from both perspectives.

7 On regional perspectives, particularly in the European context, see chs 6 by Casolari,¹⁰ by Villani,¹⁴ by Ferri,¹⁵ and by Balboni.

8 Non-proliferation treaties originally focused on preventing the 'horizontal proliferation' of nuclear weapons and on the destruction of chemical and biological weapons possessed by States. See RJ Mathews, 'WMD Arms Control Agreements in the Post-September 11 Security Environment: Part of the Counter-Terrorism Toolbox' (2007) 8 *Melbourne Journal of International Law* 294.

9 Regimes of cooperation exist under all major non-proliferation and anti-terrorism treaties, and have been reinforced under the UNSC's legal framework. See paras 3.1 and 3.2 in this contribution.

10 This is the case with the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (1993) (CWC), particularly under Part IV(A) of the Verification Annex. With regard to physical protection, the most important legal instrument is the Convention on the Physical Protection of Nuclear Materials (1979) (CPPNM).

organisational obstacles, are more likely to come from States, which might directly acquire from other States CBRN weapons (or parts of them), or the materials and know-how to develop them. Nevertheless, experience has shown that NSAs might be willing to obtain or develop these kinds of weapons in order to use (or threaten to use) them in furtherance of their criminal purposes.¹¹ Moreover, the globalisation of trade, technological and scientific advancements, and the increasingly easy access to information, have opened new possibilities to criminal organisations, making it imperative to adapt the existing instruments to new challenges.¹² At the same time, when considering the multifaceted terrorist phenomenon, the pertinent sectoral conventions – with notable exceptions in the field of nuclear terrorism¹³ – have mainly focused on conventional forms of terrorist attack, only more recently devoting specific attention to the CBRN threat, under the influence of UNSC resolutions.¹⁴

Against this backdrop, the non-State character of terrorist actors that might be inclined to use CBRN weapons poses serious challenges to the identification of the scope and content of States' obligations to prevent such acts, as well as to their implementation and enforcement.¹⁵

3 The Different Categories of Prevention Obligations

In attempting a classification of States' obligations to prevent CBRN terrorism, it is useful to distinguish between different categories of obligations according

11 On the reasons for terrorist groups to consider the acquisition and use of CBRN weapons, see J Revill, 'Past as Prologue: The Risk of Adoption of Chemical and Biological Weapons by Non-State Actors in the EU' (2017) 8 *European Journal of Risk Regulation* 629; SE Meulenbelt and MS Nieuwenhuizen, 'Non-State actors' pursuit of CBRN weapons: From motivation to potential humanitarian consequences' (2015) 97 *IRRC* 835–839.

12 *Ibid* 843–847; Joyner and Parkhouse (n 5) 206–208, 211–212.

13 CPPNM (n 10) art 7(1)(e)(ii), in particular as modified by the Amendment (2005) (CPPNM Amendment); International Convention for the Suppression of Acts of Nuclear Terrorism (2005) (ICSANT); International Convention for the Suppression of Terrorist Bombings (1997) (ICSTB).

14 Instruments such as the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (1988) (SUA Convention) have been updated to take into account CBRN terrorism. See Protocol to the SUA Convention (2005) (2005 SUA Protocol) art 3*bis*. See also Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation (2010) (Beijing Convention) art 1(1)(g)–(i).

15 In other words, it is necessary to establish if and to what extent provisions that do not directly tackle CBRN terrorism can nevertheless be the source of prevention obligations applicable to this threat.

to their function and object. In this regard, prevention obligations incumbent on States can relate to:

a) The legal regime on CBRN weapons (or parts thereof), materials and related equipment that might be used for terrorist purposes. These obligations serve prevention purposes because they prohibit, limit or otherwise strictly regulate State conduct that might increase the probability of NSAs acquiring or developing CBRN weapons that could be used in terrorist attacks. Therefore, the main function of this set of obligations, from the point of view of prevention, is to reduce the risk of such weapons or materials falling into the wrong hands.¹⁶ A related subset of obligations, lying at the boundary between prevention and preparedness, concerns duties of cooperation, mutual assistance and sharing of information in relation to CBRN disasters, which apply also to the consequences of terrorist actions.¹⁷

b) The conduct of individuals and legal entities characterised as terrorism under international law, in particular when involving CBRN weapons or materials. These obligations concern the duty to criminalise, investigate, prosecute and punish (or extradite) the alleged perpetrators of acts prohibited by international instruments on terrorism.¹⁸ This duty is frequently coupled with obligations of technical, administrative and judicial cooperation among States to prevent and counter such acts.¹⁹ This regime, thanks especially to UNSC resolutions, has gradually extended to the countering of underlying conduct, such as financing and other forms of support to terrorist organisations.²⁰ These obligations serve prevention purposes because they oblige States to set up appropriate legislative, administrative, financial and judicial mechanisms that create a hostile environment for the commission of acts of terrorism, thus helping to prevent, deter and eventually punish their commission.²¹

16 This is in line with the understanding of prevention as explained in chs 1 by Frulli and 3 by Venier.

17 For instance, duties of early warning and cooperation based on disaster law instruments, although mainly relevant to the preparedness and response phase, might contribute to the prevention of CBRN terrorism. See n 36.

18 CPPNM (n 10) art 7; ICSANT (n 13) arts 2, 5, 6; ICSTB (n 13) arts 2, 5; SUA Convention (n 14) arts 3(2), 3*bis*, 5*bis* (as amended by the 2005 SUA Protocol); Beijing Convention (n 14) arts 1(1)–(3), 3; International Convention for the Suppression of the Financing of Terrorism (1999) (CFT) arts 2, 4, 5, 8.

19 CPPNM (n 10) arts 5, 8; ICSANT (n 13) arts 7, 8, 18; ICSTB (n 13) art 15; SUA Convention (n 14) arts 8, 8*bis* (as amended by the 2005 SUA Protocol); Beijing Convention (n 14) art 17; CFT (n 18) arts 12, 18.

20 UNSC Res 1373 (n 4) op paras 1–3; UNSC Res 1540 (n 4) op paras 1–3.

21 On duties of criminalisation, see ch 33 by Amoroso.

To summarise, the identification of the precise content of obligations to prevent acts of CBRN terrorism requires, on the one hand, ascertaining the degree of concurrent applicability of non-proliferation and anti-terrorism obligations to this specific threat and, on the other hand, an assessment of the functional relations between obligations stemming from treaties and obligations stemming from UNSC resolutions.²²

3.1 *Prevention Obligations Deriving from Non-Proliferation and Physical Protection Regimes*

The first set of prevention obligations concerns the legal regime applicable to CBRN weapons and materials that might be turned into weapons. By subjecting such objects – and State conduct in relation to them – to severely restrictive regulation, these provisions aim at reducing or eliminating the risk of acquisition, development and use of CBRN materials for non-peaceful purposes by both States and NSAs.

Beginning with analysis of older international instruments, it can be argued that treaties mainly aimed at regulating State conduct in relation to nuclear weapons, such as the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), are the source of obligations that can contribute to the prevention of any misuse or diversion of such weapons, including for terrorist purposes. This is the case with respect to the obligations incumbent on nuclear States not to transfer nuclear weapons or assist, encourage, or induce a non-nuclear State to manufacture, acquire or control such weapons;²³ and the symmetric obligations imposed on non-nuclear States.²⁴ In addition, States Parties, under the supervision of the IAEA, undertake to accept certain standards of protection and safety in relation to peaceful nuclear activities and facilities 'with a view to *preventing* diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices'.²⁵ An even more sophisticated and institutionalised regime, which includes a verification mechanism designed to identify stockpiles for the purposes of destruction, is provided under the Chemical Weapons Convention (CWC).²⁶ Article 1 of the CWC establishes that States are prevented not only from using chemical weapons, but

22 On this issue, see Asada (n 1) 315–317.

23 NPT (n 1) art 1. For an in-depth analysis of States' obligations on nuclear disarmament and testing, see ch 24 by Spagnolo.

24 NPT (n 1) art 2.

25 Ibid arts 3 and 5 (emphasis added). These obligations can serve prevention purposes in relation to nuclear terrorism, since their implementation strengthens the protection of nuclear materials that might be diverted from peaceful uses also by NSAs.

26 CWC Verification Annex (n 10). See also ch 23 by Poli.

also from developing, producing, otherwise acquiring, stockpiling or retaining chemical weapons, or transferring such weapons to *anyone*, and from assisting, encouraging or inducing *anyone* to engage in any activity that is prohibited for States Parties.²⁷ The expression ‘anyone’ certainly encompasses both States and non-State actors, making the prohibition relevant also for the prevention of terrorism. Despite a more limited scope and a less structured oversight system, the Biological Weapons Convention (BWC) contains similar provisions.²⁸ It is evident from the letter, object and purpose of these provisions that States’ obligations to prevent the proliferation of CBRN weapons, as authoritatively clarified by the relevant treaty bodies, extend to State conduct vis-à-vis NSAs and to the conduct of NSAs themselves.²⁹ Moreover, in the case of chemical and biological weapons, the provision of regimes for their destruction ensures – if properly implemented – the elimination of the risk of use for terrorist purposes.

International cooperation to stop the proliferation of CBRN weapons and materials has been reinforced through the Convention on the Physical Protection of Nuclear Materials (CPPNM), which contributes to the prevention of terrorism by imposing obligations on States concerning the international transportation of nuclear materials.³⁰ The Convention creates a physical protection regime for nuclear materials as a prerequisite for their export, import and transit on the territory of States Parties.³¹ The CPPNM also creates a system of information sharing, technical cooperation and mutual assistance. This protective infrastructure was significantly enhanced in 2005 through an amendment, which has extended the application of some of the Convention’s provisions to situations other than the international transportation of nuclear

27 CWC (n 10) art 1(1)(a) and (d) (emphasis added).

28 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (1972) (BWC) arts 1–4.

29 See IAEA (Board of Governors) ‘Nuclear Security Plan 2018–2021’ (14 September 2017) GC(61)/24, 1 referring to the Agency’s role in this field as established in the plans adopted in 2002, 2005, 2009 and 2013; OPCW (Executive Council) ‘Decision: Addressing the Threat Posed by the Use of Chemical Weapons by Non-State Actors’ (13 October 2017) EC-86/DEC.9, 1–4 focusing on States’ obligations to prevent and punish the use of chemical weapons by NSAs; BWC (Conference of the States Parties) ‘Final Document of the 4th Review Conference of the States Parties to the BWC’ (25 November–6 December 1996) BWC/CONF.IV/9, 17, according to which ‘The States Parties recognize the need to ensure [...] the effective fulfilment of their obligations under the Convention in order, inter alia, to exclude use of biological and toxin weapons in terrorist or criminal activity’.

30 CPPNM (n 10) arts 3, 4.

31 For an in-depth analysis of this regime, see ch 25 by Viterbo.

materials.³² The content of the obligation of physical protection is clarified by reference to 12 fundamental principles, some of which fall squarely under the concept of prevention.³³ These provisions must be read together with those of the Convention on Nuclear Safety, which creates a web of similar prevention obligations relating to civil nuclear activities.³⁴ Although non-binding, the recommendations formulated by the IAEA complement these provisions on the technical aspects of protection of nuclear and radioactive materials.³⁵ Also disaster management treaties contain provisions that might be applicable to disasters caused by acts of CBRN terrorism, especially in relation to early warning or notification of accidents or the provision of mutual technical assistance in the prevention of disasters.³⁶ Despite the fact that most of the aforementioned provisions do not refer directly to terrorist threats, taken together and read in light of the extensive interpretations put forward by the specialised international organisations and agencies, they are instrumental to giving substance to the obligation to prevent acts of CBRN terrorism, under all three general understandings of prevention for the purposes of this study.³⁷

This layer of conventional obligations is further reinforced by UNSC Resolution 1540 (2004), which tackles the issue of CBRN terrorism and NSAs' access to CBRN materials. More specifically, the Resolution imposes upon all States the obligation to adopt and enforce effective measures to ensure the safety and physical protection of CBRN materials; to establish controls on the movement, transportation and import-export of these materials in order to prevent their proliferation; as well as a general duty to refrain 'from providing any form of support to non-State actors that attempt to develop, acquire,

32 CPPNM (n 10) art 2 as amended which applies also to the domestic context.

33 See the reference to an adequate 'Legislative and Regulatory Framework' (Principle C); the identification of a 'Competent Authority' for implementation (Principle D); risk assessment based on the level of 'Threat' (Principle G) and a 'Graded Approach' to physical protection (Principle H).

34 Convention on Nuclear Safety (1994) arts 7, 14, 17–19.

35 See eg IAEA, 'Code of Conduct on the Safety and Security of Radioactive Sources' (January 2004) IAEA/CODEOC/2004, and the two related documents IAEA, 'Guidance on the Import and Export of Radioactive Sources' (March 2005) IAEA/CODEOC/IMP-EXP/2005 and IAEA, 'Guidance on the Management of Disused Radioactive Sources' (April 2018) IAEA/CODEOC/MGT-DRS/2018.

36 Convention on Early Notification of a Nuclear Accident (1986) arts 1–3; Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency (1986) arts 1–4.

37 As described in ch 3 by Venier, prevention consists of three main aspects, namely the adoption of adequate legal and regulatory frameworks; the duty to perform risk assessments; and the duty to cooperate to reduce the risk of adverse events.

manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery'.³⁸

3.2 *Prevention Obligations Concerning the Conduct of Individuals and Entities in Relation to CBRN Terrorist Activities*

The second set of prevention obligations stems from treaties and UNSC resolutions that impose a duty on States to criminalise and prosecute terrorist conduct that might involve CBRN materials or weapons, and conduct that contributes to financing, preparing, facilitating or organising terrorist acts. By requesting States to modify their legal systems and to cooperate to effectively proscribe, investigate, prosecute and punish these acts – including some underlying activities far removed from an actual terrorist attack – these obligations contribute to preventing CBRN terrorist acts through the deterrent function of criminal law and other forms of administrative, civil and financial control. While the exact content of the duty to criminalise and prosecute CBRN-related unlawful conduct is analysed elsewhere in this volume,³⁹ it is appropriate to mention here its most relevant aspects in relation to prevention, without delving into the jurisdictional and cooperation regime.⁴⁰

The most densely regulated area in this regard is that of nuclear terrorism. Article 7 of the CPPNM imposes several duties of criminalisation, requiring States to criminalise actions undertaken without lawful authority, involving the receipt, possession, use, transfer, alteration, disposal or dispersal of nuclear material likely to cause death or serious injury to persons or damage to property;⁴¹ theft, robbery, embezzlement or fraudulent obtaining of nuclear material;⁴² demands for nuclear material by threat or use of force or intimidation;⁴³ and – most importantly – threats to commit such offences '*in order to compel a natural or legal person, international organization or State to do or to refrain from doing any act*'.⁴⁴ The 2005 Amendment to the CPPNM adds a duty to criminalise nuclear smuggling as a stand-alone offence, and reinforces

38 UNSC Res 1540 (n 4) op para 1.

39 See ch 32 by Vierucci and ch 33 by Amoroso.

40 On the jurisdictional regime of anti-terrorism treaties, see R Kolb, 'The Exercise of Criminal Jurisdiction over International Terrorists' in A Bianchi (ed), *Enforcing International Law Norms Against Terrorism* (Hart Publishing 2004). On issues of extradition, see MA Newton, 'Terrorist crimes and the *aut dedere aut judicare* obligation' in L van den Herik and N Schrijver (eds), *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges* (CUP 2013).

41 CPPNM (n 10) art 7(1)(a).

42 Ibid art 7(1)(b)–(c).

43 Ibid art 7(1)(d).

44 Ibid art 7(1)(e) (emphasis added).

States' obligations in the field of cooperation and sharing of information in case of threats of nuclear sabotage.⁴⁵ Pervasive obligations functional to the prevention of nuclear terrorism are also imposed under Article 2 of the International Convention for the Suppression of Acts of Nuclear Terrorism (ICSANT). In particular, Article 2(1)(b)(iii) expressly contemplates the criminalisation of the use (or threat of use) of radioactive material or devices, and of the use or damage of a nuclear facility in a manner which releases or risks the release of radioactive material in connection with a terrorist intent. The International Convention for the Suppression of Terrorist Bombings (ICSTB) specifically tackles the use of CBRN explosives or lethal devices, and includes an explicit reference to offences 'intended or calculated to provoke *a state of terror* in the general public or in a group of persons or particular persons'.⁴⁶ The preventive scope of the Convention is limited by the fact that it only imposes the criminalisation of offences that are either completed or, at least, attempted, but excludes planning and preparatory acts.⁴⁷ Nevertheless, Article 15 of the Convention imposes a general duty of inter-State cooperation to prevent and counter terrorist bombings, including through the sharing of information and transfer of technology.⁴⁸

The survey of this category of prevention obligations would not be complete without reference to the sectoral treaties dealing with the safety of maritime navigation, fixed platforms located on the continental shelf and civil aviation. The 2005 SUA Protocol reinforces the criminalisation of acts against the safety of navigation by referring to various types of conduct, both of individuals and legal entities, including the use (or threat of use) of CBRN weapons, as well as the transportation on ships of CBRN weapons or 'equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon, with the intention that it will be used for such purpose'.⁴⁹ Analogous provisions are contained in the 2005 Protocol to the Protocol for the Suppression of Unlawful Acts against

45 CPPNM (n 10) art 7(1)(d) as amended regarding smuggling, defined as an 'act which constitutes the carrying, sending, or moving of nuclear material into or out of a State without lawful authority'; and letter (e) as regards sabotage of nuclear facilities. See also art 5(3) in relation to duties of cooperation in the case of a credible threat of sabotage.

46 ICSTB (n 13) art 5 (emphasis added).

47 Obviously, States are not prevented from criminalising preparatory acts, such as a criminal agreement to use CBRN weapons.

48 ICSTB (n 13) art 15.

49 SUA as amended by the 2005 SUA Protocol (n 14) arts 3(2), 3bis(1)(b)(iv).

the Safety of Fixed Platforms located on the Continental Shelf⁵⁰ and in the 2010 Beijing Convention on the Safety of Civil Aviation.⁵¹

With specific regard to chemical and biological weapons, criminalisation provisions capable of covering their use for terrorist purposes are contained both in the CWC and in the BWC.⁵² The Treaty on the Prohibition Nuclear Weapons (TPNW), which entered into force on 22 January 2021 and is ratified by some 50 States,⁵³ mimics these provisions with regard to nuclear weapons, establishing that States Parties shall take 'all appropriate legal, administrative and other measures, including the imposition of penal sanctions, to prevent and suppress any activity prohibited to a State Party under this Treaty *undertaken by persons* or on territory under its jurisdiction or control'.⁵⁴

While it is true that criminalisation of various forms of CBRN-related conduct might well contribute to the prevention of acts of CBRN terrorism through deterrence, it has been pointed out that effective prevention requires that States act much earlier, such as at the stage of design and preparation of terrorist acts, and that they effectively counter the financing of terrorist activities.⁵⁵ This is the area most deeply influenced by the 'legislative' activity of the UNSC in recent years.⁵⁶

UNSC Resolution 1373 sets a number of general obligations to prevent terrorism, in relation to the financing of terrorist organisations; the provision of any form of support to terrorists; the provision of early warning to other States through the exchange of information; the denial of safe haven; the criminalisation and prosecution of various kinds of conduct related to

50 Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (2005) arts *2bis*, *2ter*.

51 Beijing Convention (n 14) art 1(1)(g)–(i).

52 CWC (n 10) art 7(1)(a)–(c); BWC (n 28) art 4.

53 Treaty on the Prohibition of Nuclear Weapons (2007) (TPNW).

54 *Ibid* art 5(2) (emphasis added).

55 Mathews (n 8) 306 speaks of a "pre-September 11" and "post-September 11" approach. Asada (n 1) 313 stresses the importance of prevention and the limits of investigation and punishment, which only intervene after the threat has materialised.

56 The adoption of Resolutions 1373 and 1540 sparked doctrinal debate with regard to the power of the UNSC to 'legislate' for the international community. A very critical view was expressed by DH Joyner, 'Non-Proliferation Law and the United Nations System: Resolution 1540 and the Limits of the Power of the Security Council' (2007) 20(2) LJIL 489. On the same topic, see also O Bosch and P van Ham (eds), *Global Non-Proliferation and Counter-Terrorism: The Impact of UNSCR 1540* (Brookings Institution Press 2007); S Talmon, 'The Security Council as World Legislature' (2005) 99(1) AJIL 188–190. In earlier literature, the UNSC's power to impose on States both specific and general prevention measures had been recognised by C Tomuschat, 'Obligations Arising for States without or against Their Will' (1993) 241 *Recueil des Cours de l'Académie de Droit International* 345.

terrorist acts; and the limitation of free movement of terrorists.⁵⁷ This resolution, while being concerned with the terrorist phenomenon in general, makes a specific reference to the potential use of CBRN materials and the related challenges.⁵⁸ The UNSC's call on States to strengthen cooperation and to ratify the International Convention for the Suppression of Financing of Terrorism (CFT) greatly contributed to the entry into force of this instrument.⁵⁹ Article 2 of the CFT clarifies what constitutes financing of terrorism for the purposes of the Convention, partly by reference to the terrorist conduct defined in the sectoral treaties listed in the annex, and clarifies the different modes of liability (including attempt, participation as accomplice, organising or directing others to commit an offence, intentionally contributing to its commission by a group of people).⁶⁰ The Convention, similarly to Resolution 1373, then goes on to establish obligations placed at the uncertain boundary between prevention and preparedness, when it imposes on States the duty to enact appropriate criminal legislation and to cooperate in preventing financing by 'taking all practicable measures' (such as freezing of funds) to counter the preparation of such offences.⁶¹

UNSC Resolution 1540 (2004) marked a significant development in the UNSC's approach to the fight against CBRN terrorism, by fully acknowledging this global phenomenon and by addressing States' obligations vis-à-vis NSAs. It established, *inter alia*, that States 'shall 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';⁶² that they 'shall 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 [...] *in particular for terrorist purposes*';⁶³ and that all States are called upon to 'take cooperative action to *prevent* illicit trafficking in nuclear, chemical or biological weapons, their means of delivery, and related materials'.⁶⁴ This was coupled

57 UNSC Res 1373 (n 4) op paras 1–3.

58 Ibid op para 4.

59 At the time of the 9/11 attacks only four States had ratified it (Botswana, Sri Lanka, United Kingdom, Uzbekistan). After the adoption of Resolution 1373, ratifications quickly rose to the required 22 necessary for the entry into force.

60 CFT (n 18) art 2. The range of types of conduct and modes of liability that fall under the duty of criminalisation and prosecution significantly expands the anticipatory use of criminal law.

61 Ibid art 18.

62 UNSC Res 1540 (n 4) op para 1.

63 Ibid op para 2 (emphasis added).

64 Ibid op para 10 (emphasis added).

with a call on States to fully implement their obligations under the existing multilateral treaties and with the institution of a Committee to supervise compliance with the Resolution.⁶⁵ This course of action, also in light of the lack of adequate implementation and reporting by some States, was reaffirmed by the UNSC in Resolution 2325 (2016).⁶⁶

To summarise, the common traits of this set of prevention obligations are: a) The duty of criminalisation of CBRN-related terrorist conduct under both principal and accessory forms of liability, which extends to certain preparatory conduct. The determination of penalties is left to States, provided that they are appropriate, proportionate to the gravity of the conduct and realise the required prevention objectives; b) The imposition upon States, even beyond the material scope of the duties of criminalisation, of obligations to cooperate in the prevention of CBRN-related terrorist conduct; c) The trend towards an ever-increasing anticipation of prevention activities, including the punishability of conduct removed in time and space from an actual CBRN terrorist attack but instrumental to increasing the risk of it occurring, with particular emphasis on financing.

4 The Impact of the UN-Derived Legal Regime on Treaty Obligations and the Issue of National Implementation and Enforcement

A second distinction between different kinds of prevention obligations relates to their source. While treaties can only create obligations for the States Parties, posing insurmountable challenges to the effectiveness of prevention obligations in situations involving non-parties, UNSC resolutions adopted under Chapter VII of the Charter are binding upon all States Parties to the organisation, and are capable of reducing – at least in theory – the risk of discrepancies among national legal systems and the existence of safe havens for terrorist activities. In this connection, treaty obligations, some of which already enjoyed a quasi-universal character, have been reinforced and further expanded by UNSC resolutions, in a clear attempt to ‘universalise’ them and urge States to

65 Ibid op para 4.

66 UNSC Res 2325 (15 December 2016) UN Doc S/RES/2325 op paras 3–4. On the status of implementation and enforcement, see Chair of the Security Council Committee established pursuant to Resolution 1540 (2004), ‘Letter dated 9 December 2016 from the Chair of the Security Council Committee established pursuant to resolution 1540 (2004) addressed to the President of the Security Council’, containing the ‘Report of the Security Council Committee established pursuant to resolution 1540’ (2016) S/2016/1038 (2016 Report) paras 25–35.

comply under the concurrent authority of the two sets of sources. The impact of these resolutions on both existing and emerging treaties must be briefly examined.

To begin with, the pertinent UNSC resolutions contain safeguard clauses, according to which none of the obligations set out by the resolutions should be interpreted as conflicting with existing obligations incumbent on States based on treaties already in force.⁶⁷

With regard to the relationship between UNSC resolutions and existing or emerging treaty regimes, in some cases, the UNSC's intervention attempted to fill gaps in the conventional regimes, or to reinforce them by providing a more uniform legal framework. Moreover, the adoption of resolutions under Chapter VII allowed the UNSC to 'universalise' obligations already in existence for some (but not all) States under treaty law, or to create new general obligations of a latitude hardly attainable through sectoral treaties. Sometimes the resolutions of the UNSC have made binding upon States obligations already envisaged by treaties not yet in force, such as in the case of Resolution 1373, which imposed on States obligations almost identical to those contained in the 1999 FTC.⁶⁸ UNSC resolutions, with their calls for cooperation in the prevention of terrorism and proliferation, have also sought to incentivise States to become parties to existing treaties, to amend treaties in order to take into account the CBRN threat, or to negotiate the conclusion of new treaties, and have contributed to their entry into force.⁶⁹

The effects of UNSC resolutions are also felt in relation to the implementation and enforcement of underlying treaty obligations. For instance, the creation of an oversight mechanism under Resolution 1540 and the work of the Committee have increased international supervision in relation to both the obligations created by the Resolution and by treaties. This is because the ratification and implementation of treaties can itself constitute a form of implementation of UNSC-imposed obligations, particularly under the heading of the obligation to cooperate in order to prevent terrorism and CBRN proliferation.⁷⁰ This is clearly demonstrated by the States' and Committee's

67 See eg UNSC Res 1540 (n 4) op para 5; UNSC Res 2325 (n 66) preambular para 3.

68 A quick comparison of the two texts clearly shows this. See also M Happold, 'Security Council Resolution 1373 and the Constitution of the United Nations' (2003) 16(3) LJIL 594.

69 The influence of UNSC resolutions on the adoption and ratification of instruments such as the 2005 Amendment to CPPNM, the Protocol to the SUA Convention, the Beijing Convention, and the TPNW is particularly evident.

70 This is implicit in the Resolution's call for the ratification, implementation and enforcement of existing treaties.

reporting practice.⁷¹ At the same time, the practice of the Committee has been significant in providing assistance to States at the implementation stage, thanks to the sharing of technical expertise and best practices, and to the coordination with other specialised institutions and agencies (such as the IAEA and OPCW).⁷²

The focus on implementation and enforcement is evident from the wording of the resolutions, which makes it clear that the prevention of CBRN terrorism can only be effective through diligent fulfilment by States of their obligations, in close cooperation with each other and the relevant international organisations and technical bodies. On this crucial point, it should be noted that, despite the activity of the Committee, many States have yet to fully implement their obligations or have poor track records as regards actual enforcement of national prevention measures.⁷³ Some States have offered limited cooperation with the supervisory body, something which prompted the Council to recall the role of the Committee and the importance of States' reporting and compliance in Resolution 2325 (2016).⁷⁴

5 Concluding Remarks

This contribution has attempted to provide a categorisation of States' universal or quasi-universal obligations to prevent CBRN terrorism, which are disseminated across various fields of international law and legal instruments. This categorisation was based on a functional analysis of the object and purpose of

71 See eg the 2016 Report (n 66) paras 54–55 and Annex VII titled 'Adherence by States to non-proliferation-related treaties, conventions, protocols and other instruments relevant to Security Council resolution 1540 (2004) as at 24 April 2016', which shows the close connection between the implementation of treaty obligations and UN-imposed obligations.

72 The 1540 Committee has in various ways provided assistance to States in the design of implementation measures, in connection with specialised international agencies. See 2016 Report (n 66) paras 180–189 for a summary of the activities of assistance and international cooperation fostered by the Committee. See also Annex XIX for the list and content of requests for assistance. With regard to obligations relating to the financing of terrorism, see Counter-Terrorism Committee Executive Directorate, 'Technical Guide to the Implementation of Security Council Resolution 1373 and other relevant resolutions' (2017) UN Doc S/2017/716.

73 See 2016 Report (n 66) paras 25–35. The 2021 comprehensive review was postponed due to the Covid-19 pandemic. See also 'Review on the implementation of resolution 1540 (2004) for 2020' (2020) S/AC.44/2020/OC.84 paras 9–10.

74 UNSC Res 2325 (n 66) preambular paras 8–10, op paras 3–4. In particular, some States have delayed the presentation of (or have yet to present) their first report under Resolution 1540.

different sets of obligations incumbent on States, which contribute to realising discrete but interconnected aspects of prevention.

The analysis carried out in the previous paragraphs revealed the sheer complexity of the universal legal framework on the prevention of CBRN terrorism, which is further increased by the interaction with regional, subregional and bilateral instruments, as well as by an increasingly dense web of soft law initiatives.⁷⁵ Despite the UNSC's attempts to build a unifying framework of general and specific obligations in support of the underlying treaty regime, fragmentation and lack of coordination still persist, with negative consequences on the effectiveness of prevention.

Finally, it has been underlined that only through full implementation and enforcement of prevention obligations at the national and regional level, under the supervision of and in close dialogue with the relevant international organisations and technical bodies, is it possible to realise an effective prevention-preparedness-response cycle capable of reducing the risk of CBRN acts of terrorism and of minimising their consequences. Experience shows that the pursuit of this objective requires a constant process of adaptation of the legal framework to meet the ever-changing challenges to the security of the international community, of which CBRN terrorism constitutes a prominent example.

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75 Non-binding initiatives are abundant in the area of CBRN materials and weapons. Examples include the Proliferation Security Initiatives; the Global Initiative to Combat Nuclear Terrorism; the EU CBRN Centres of Excellence Initiative; the IAEA NSSC-Network; the NATO Joint CBRN Defence COE. In late 2020, INTERPOL and the UNCTC launched a joint initiative to produce a Global Threat Study on Non-State Actors and Their CBRNE Materials. See <<https://www.interpol.int/en/News-and-Events/News/2020/INTERPOL-and-UN-launch-initiative-on-CBRNE-terror-threats>> (all links were last accessed on 25 November 2021).

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