

Transnational Governance and Democratic Legitimacy

The Case of WMD Proliferation

by Peter van Ham

1. Introduction

There is hardly a policy area that merits the label “high politics” more than that of Weapons of Mass Destruction (WMD). Nuclear, chemical, and biological weapons are unique in raising the specter of mass-scale destruction and annihilation, be they in the hands of rogue states or terrorists. A few decades ago, the fall of the Soviet empire gave rise to nightmare scenarios where the “burgeoning flow, or even a catastrophic flood, of nuclear-weapons material, or perhaps even the weapons themselves, has become a distinct danger given the conditions in which nuclear assets are held in Russia.”¹ Today’s security agenda is more varied, encompassing keeping Iran from developing nuclear military capabilities, assuring that Syria’s chemical weapons are not diverted in a protracted and hazy civil war between the Assad government and a mixed bag of “rebels”, and upgrading the existing treaty-based WMD non-proliferation framework to meet 21st century standards. But no matter how diverse, these policy issues all qualify as “high politics”, which implies that they are *hors catégorie*, and deserve our special attention.²

The WMD agenda is first and foremost a *security* agenda. As a result, three elements apply: first, the state is considered the key actor to take responsibility and action; second, the main source of danger is generally considered to be external; and third, the privileged policy response comprehends coercive (even military) action.³ Given the strategic impact of WMD, the process of securitization is spontaneous and natural, following the line of a long and established tradition.⁴ The nuclear arms race gave the Cold War its special edge, and the looming Armageddon has been used to establish the “national security state”, with its wide array of intelligence institutions and the concomitant surveillance of society.⁵ The nuclear threat has long been used to silence political dissent at home, legitimate control and the use of violence (both at home and abroad), as well as nurturing a general contempt for normal democratic procedures.

¹ Graham T. Allison, Owen R. Coté, Jr., Richard A. Falkenrath and Steven E. Miller, *Avoiding Nuclear Anarchy: Containing the Threat of Loose Russian Nuclear Weapons and Fissile Material* (Cambridge, Mass.: The MIT Press, 1996), p. 2.

² Michael Quinlan, *Thinking About Nuclear Weapons: Principle, Problems, Prospects* (Oxford: Oxford University Press, 2009).

³ Jack Donnelly, *Realism and International Relations* (Cambridge: Cambridge University Press, 2000).

⁴ Harald Müller, “Security Cooperation”, in Walter Carlsnaes (ed), *Handbook of International Relations* (London: Sage, 2002). See also Harald Müller and Carmen Wunderlich (eds), *Norm Dynamics in Multilateral Arms Control: Interests, Conflict, and Justice* (Athens and London: The University of Georgia Press, 2013).

⁵ Daniel Yergin, *Shattered Peace: The Origins of the Cold War and the National Security State* (Boston: Houghton Mifflin, 1977).

By their very nature, Weapons of Mass Destruction make the state the prime – if not the sole – actor, claiming a monopoly on policy-ownership.

This paper takes a broader view, and examines how even the apparently exclusive WMD agenda has been forced open to public debate and scrutiny. It is still dominated by states, yet even here traditional top-down, authoritative “government” is gradually giving way to more open and diverse transnational governance. The main drive behind this process toward normalizing the overly securitized WMD agenda is a rather common one: in many cases, states require societal involvement and cooperation for their WMD policies and strategies to acquire broad acceptance and be effective. This applies to export control regimes like the Wassenaar Arrangement, which deals with conventional arms and dual-use goods and technologies; the more formalized Missile Technology Control Regimes (MTCR); innovations in transnational governance, such as UN Security Council Resolution 1540, which obliges all states to develop and enforce legal and regulatory measures to halt WMD proliferation; and platforms like the Nuclear Security Summit, which brings together all relevant stakeholders in order to take measures to protect nuclear facilities and material from falling in the hands of terrorist groups. All four of these cases, together with many others, are examined in this paper.

This paper studies all layers of the WMD framework, starting with nuclear weapons and fissile materials, chemical weapons and chemical agent precursors, biological and toxin weapons and their precursors, and on to the broader field of missile and dual-use technologies. A brief overview, in four sections, is given of the state of play in these WMD areas, with a clear focus on the main innovations in transnational governance, and their impact on the question of democratic legitimacy. In most WMD areas, established International Organizations (IOs) and treaties intermingle with separate, and occasionally even enigmatic and highly exclusive, regimes. We also see the active involvement of societal actors, ranging from NGOs and firms to research institutes and hospitals. This paper examines the impact of these innovations of transnational governance on democratic legitimacy by looking through the five prisms as they were defined in the introductory chapter.

Although it is clear from the onset that even the uniquely securitized policy area of WMD has steadily accustomed itself to the reality of transnational governance, the question of democratic legitimacy has hardly been raised. For obvious reasons (most prominently the greatest moral silencer of all: state security!), WMD remains a different ballgame than the other case studies of this Study (such as the climate change, global health, and economic and financial policy). In a WMD policy setting, democracy and legitimacy tend to be considered secondary to security, and even to safety (see below for a debate on the differences). How should we value, measure, and analyze the democratic legitimacy of initiatives that aim to halt WMD smuggling, for example? What does transparency and deliberation imply in such a highly securitized environment? Have innovations in transnational governance helped to *desecuritize* WMD policy, imbuing the WMD agenda with traditional political concerns, including matters of democratic legitimacy? The process of desecuritization merits special attention, since transnational governance tends to counter the three security practices indicated above (state centrism; inside/outside thinking; and

coercion). Transnational governance innovations in the WMD domain may normalize, and hence help to democratize, a policy area that hitherto has been unapproachable and oblique.

The paper concludes that, despite marked changes in the institutional set-up of tackling WMD proliferation, encompassing key innovations in transnational governance, democratic legitimacy remains contested, and auxiliary to security. The need for more stakeholders and new allies in the continued struggle to halt WMD proliferation has contributed significantly to the transparency of decision-shaping and policy-making. However, strict limits to democracy and legitimacy remain, based on longstanding and deeply rooted concerns about secrecy, security, and – ultimately – effectiveness.

2. Democracy in the Nuclear Realm: Old Enemies, New Allies

Restricting the spread of nuclear weapons has been a long-standing mission of several IOs, including the International Atomic Energy Agency (IAEA) and the Comprehensive Test-Ban Treaty Organization (CTBTO). The nuclear non-proliferation norm was established and codified in the Nuclear Non-Proliferation Treaty (NPT) of 1975. It is monitored by (amongst others) the IAEA, and enforced by the United Nations Security Council.⁶ On account of five states (the United States, Russia, France, the United Kingdom, and China) being allowed to possess nuclear weapons, while all other state parties to the NPT have promised to refrain from acquiring them, the “nuclear club” remains highly restrictive, as well as based on inherently discriminatory (one might even say: arbitrary) rules justified mainly by Realpolitik and opportunism.⁷ Insomuch as the world’s five established nuclear powers are also permanent members of the UN Security Council, the impression is given that nuclear capabilities confer status, and even grandeur. Despite significant nuclear disarmament after the end of the Cold War, the nuclear arsenals of the US and Russia remain sizable, drawing continued criticism of anti-nuclear NGOs, as well as most non-nuclear weapons states.⁸

The IAEA meticulously monitors nuclear proliferation, offering both expertise (specialists and on-site inspectors) and authority (the IAEA is UN-based). Every five years, the nuclear norm is scrutinized and reinforced by a NPT Review Conference, bringing together not only all state parties, but also a wide array of stakeholders (ranging from the Campaign for Nuclear Disarmament to Greenpeace and Mayors for Peace).⁹ One could argue that the IAEA offers a certain level of transparency and a

⁶ Christine Wing and Fiona Simpson, *Detect, Dismantle, and Disarm: IAEA Verification, 1992-2005* (Washington DC: United States Institute of Peace Press, 2013).

⁷ Daniel H. Joyner and Marco Roscini (eds), *Non-Proliferation Law as a Special Regime: A Contribution To Fragmentation Theory in International Law* (Cambridge: Cambridge University Press, 2012).

⁸ The list of anti-nuclear NGOs is long and diverse. The UK Campaign for Nuclear Disarmament (CND) is amongst the best-known and most influential. Internet: <http://www.cnduk.org/>.

⁹ List of participants of the 2005 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons (New York, April 25 – May 2005). Internet: <http://www.un.org/en/conf/npt/2005/npt-conf2005-misc1.pdf>.

level playing field (for NPT signatories). As Stuart Reid suggests, “The real value of the IAEA, then, is less as an advocacy group than as a ratings agency, providing third-party assessments of countries’ nuclear programs. It is also useful as a clearinghouse for information about these programs, a place where governments can share intelligence and compare notes. This is a decidedly minimalist vision — a sort of nuclear Moody’s.”¹⁰ At the same time, the NPT Review Conference confers a sense of openness and deliberation (or at least scrutiny and continued criticism) in what remains a highly exclusive and secretive policy area.

From 2001 on, these multilateral nuclear non-proliferation frameworks have faced serious criticism (most notably from the US Bush administration), mainly due to their want of “teeth”. IAEA nuclear safeguards were considered too weak, and were supplemented by a US-led Proliferation Security Initiative (PSI).¹¹ PSI is a separate arrangement, now endorsed by over 100 countries, aimed at exchanging information on illegal shipments of all WMD (counting, obviously, nuclear materials and weapons). The goal is to interdict suspicious and illegal transfers, using a wide network of national legal authorities.¹² Starting off as a so-called “counterproliferation initiative”, focused on results, PSI was initially seen as undermining multilateral non-proliferation frameworks (including the IAEA and the NPT). Evidently, the large number of participants from all over the globe – Thailand signed up as the 102nd participant in November 2012 – has gradually altered this perspective. With so many signatories, and the credibility of the IAEA still intact, PSI’s legitimacy has increased. Its track-record of successful interdictions as well as the Ship Boarding Agreements with countries that offer Flags of Conveniences (e.g. the Bahamas, Cyprus, and the Marshall Islands), further complete the PSI’s claim to legitimacy based on effectiveness as well as (legal) transparency.

A further innovation in the WMD area is UN Security Council Resolution 1540, adopted in April 2004. UNSCR 1540 establishes obligations (under Chapter VII of the United Nations Charter) for all member states to develop and enforce legal and regulatory measures against the proliferation of nuclear, chemical, and biological weapons, and their means of delivery.¹³ This is a unique, global, and mandatory non-proliferation effort, forcing all states to enforce rules and regulations to keep WMD material from reaching criminal and terrorist (non-state) actors. A small UN-based 1540 Committee oversees the implementation of the Resolution, and uses the expertise and funding of established WMD non-proliferation IOs, inclusive of the IAEA, as well as regional organizations like the European Union (see also the

¹⁰ Stuart A. Reid, “The Man From Vienna”, *New Republic* (May 9, 2011).

¹¹ Emma Belcher, “The Proliferation Security Initiative: Lessons for Using Nonbinding Agreements”, *Council on Foreign Relations Working Paper* (July 2012).

¹² Proliferation Security Initiative (PSI) website, U.S. State Department. Internet: <http://www.state.gov/t/isn/c10390.htm>.

¹³ Olivia Bosch and Peter van Ham (eds), *Global Non-Proliferation and Counter-Terrorism: The Impact of UNSCR 1540* (Washington DC: Brookings Institution Press, 2007).

following sections).¹⁴ UNSCR 1540's main focus is to fill the many gaps that existing treaties, regimes, and national legal systems have left to keep WMD materials and weapons out of the hands of terrorists and traffickers. It also strives towards real enforcement, both through international regulations and a dense network of national laws.

Like the PSI, UNSCR 1540 has made use of the post-9/11 sense of urgency to effectively deal with terrorists by introducing innovations of transnational governance. In order to be effective, UNSCR 1540 not merely calls upon the "usual suspects" (i.e., states, the military establishment, and the civilian nuclear industry), but particularly upon scientists, technicians, and auxiliary staff, engineers in academic and industrial research, the broader life science community, as well as customs control and law enforcement officials. UNSCR 1540 has been important in raising awareness in these stakeholders of the potential consequences their work may have for WMD proliferation. Most academics and researchers take precautionary measure to assure safety (so that they themselves will not be harmed), but relatively little to assure security (diversion and theft of materials and knowledge). UNSCR 1540 is obviously based within the UN framework, giving it a traditional, multilateral feel. Still, its outreach to the wide community of scientists, officials, and other practitioners, is genuinely novel, and even revolutionary. Although the democratic legitimacy has been contested – could and should the UN Security Council make global legislation in this way? –, these initial (legal) qualms have quickly dissipated. The UN Security Council remains the solid pinnacle of international law, and the global reach of UNSCR 1540, its non-discriminatory approach (all member states and all stakeholders have to comply to the same obligations), as well as the full transparency of the process, adds to its broad acceptance – and, hence, its effectiveness.

The end of the Cold War has opened up the nuclear field, animating numerous initiatives to create rules, regulations, agreements, and guidelines with the purpose of limiting proliferation. The Global Initiative to Combat Nuclear Terrorism (initiated by the US and Russia in 2006), and the G8 Partnership Against the Spread of Weapons and Materials of Mass-Destruction (agreed at the 2002 Kananaskis G8 Summit), come to mind. The Nuclear Security Summits of 2010 (in Washington DC), 2012 (in Seoul), and 2014 (in The Hague) are of particular relevance to our analysis. These Summits are amongst the largest gatherings of heads of state and government, representatives from industries, the academic and scientific community, as well as NGOs and media, focusing on nuclear terrorism as "one of the most challenging threats to international security." Although the results of these Nuclear Security Summits are limited to non-binding communiqués (which, amongst others, call on states "to work cooperatively as an international community to advance nuclear security", and to "recognize the continuing role of nuclear industry in nuclear security"), the Summits are the closest one can possibly get to a truly functioning

¹⁴ Monika Heupel, "Implementing UN Security Council Resolution 1540: A Division of Labor Strategy", *Carnegie Papers*, no. 87 (June 2007).

framework for deliberative democracy.¹⁵ High-level political debates are complemented with industry and academic symposia, and most of these debates are open and accessible.

Certainly, the nuclear non-proliferation sphere remains dominated by states (especially nuclear powers), based upon discriminatory policies and regulations rather than transparency and deliberation. The Nuclear Suppliers Group (NSG, set up in 1974), for example, is an export control regime (with 47 participants, including the EU's European Commission) intended for monitoring the export (and re-export) of nuclear material.¹⁶ The even more obscure Zangger Committee was set up in 1972 to harmonize, or be a "faithful interpreter" of, the nuclear export control policies of all NPT member states.¹⁷ The merits of this kind of non-proliferation regime will be examined in more detail in later sections of this paper. What is evident, however, is that the logic of globalization – which assures that materials and knowledge ultimately will become available at lower costs and less risk – is also at work in the nuclear dimension. This necessitates more dedication and effort to maintain the (nuclear) non-proliferation norm, involving large sectors of society all over the world, and either encouraging or enforcing their cooperation to keep nuclear materials and weapons out of the wrong hands.

3. Chemical Weapons and Precursors: Long Struggle, Little Doubt

It is a truism to label chemical weapons the poor man's atom bomb, but platitudes often tend to be correct. Whereas nuclear weapons require not only sufficient high-grade fissile material, but also the technology to deliver and detonate them (radiological devices – commonly named "dirty bombs" – are the exception), rudimentary chemical weapons can be fabricated in one's backyard using basic and readily available chemicals. Like the nuclear realm, the chemical weapons area is equally blessed with a solid IO: the Organization for the Prohibition of Chemical Weapons (OPCW), which is headquartered in The Hague since 1997. The OPCW has an impressive 188 member states, and (like the NPT's Review Conferences) regularly organizes a "Special Session of the Conference of the States Parties to Review the Operation of the Chemical Weapons Convention." In these Special Sessions (the third of which took place in April 2013, in The Hague), not only diplomats participate, but also representatives from relevant IOs, as well as NGOs and other "Non-State Parties", such as academics and researchers, and firms. Just as the IAEA, the OPCW has a close working relationship with the UN, which implies that the OPCW keeps the UN informed on all relevant matters.¹⁸ Considering only a few UN member states remain outside the OPCW framework (most conspicuously Egypt, Syria, and North-Korea), representative legitimacy is strongly anchored. The openness of the Special

¹⁵ Internet: <http://www.thenuclearsecuritysummit.org/>.

¹⁶ Internet: <http://www.nuclearsuppliersgroup.org/>.

¹⁷ Internet: <http://www.zanggercommittee.org/>.

¹⁸ Ian R. Kenyon and Daniel Feakes (eds), *The Creation of the Organisation For the Prohibition of Chemical Weapons: A Case Study in the Birth of an Intergovernmental Organisation* (The Hague: T.M.C. Asser Press, 2007).

Sessions (as well as regular workshops, conferences and outreach programs), assures a high level of transparency within the Organization, also furthering its claim to deliberative (democratic) legitimacy. Receiving the Nobel Peace Prize in 2013, for its efforts to disarm Syria, has obviously boosted the OPCW's credibility and democratic legitimacy.

Apart from strengthening the chemical non-proliferation norm, the OPCW assists in chemical weapons demilitarization efforts, most notably in Russia, the US, Libya, India, and Iraq. Most (more than 75%) of the declared chemical weapons agents have now been destroyed, sending the global message that chemical WMD lack all legitimacy. Like the IAEA, the OPCW conducts regular on-site inspections, strengthening the level of mutual trust based on verification and credibility of information. The OPCW website boasts that from "April 1997 to 23/01/2013, the OPCW has conducted 5,035 inspections on the territory of 86 States Parties, among which 2,369 inspections of industrial sites. 5,382 industrial sites have been inspected out of a total of 5,382 declared. Worldwide, 4,913 industrial facilities are liable to inspection."¹⁹ The OPCW works closely together with universities, laboratories, and industry all over the world to raise awareness, using the legal obligations of the Chemical Weapons Convention and UNSCR 1540 to gain access to relevant institutions and facilities, and to work with governments to assist them in implementing the national requirements of the CWC. This requires active participation of national authorities, involving military, technical, and legal expertise. Like the IAEA, the OPCW offers this important public good, creating a level playing field based on a certain degree of trust, generated by continuous and meticulous verification, procedural openness, and reliable reporting.

However, as one may expect, the story does not end here. A reputable IO like the OPCW is important, but only as strong and trustworthy as its weakest link (in this case: unreliable OPCW member states), and only as effective as multilateralism allows it to be. Just as PSI adds teeth to the IAEA, and the Zangger Committee adds clarity to the nuclear export rulebook, the OPCW has been supplemented by numerous export control regimes. The Australia Group (set up in 1985) brings together forty countries, as well as the EU's European Commission. The list of participants mainly contains Western countries, together with Japan, Argentina, and South-Korea. Its official aim is to "use licensing measures to ensure that exports of certain chemicals, biological agents, and dual-use chemical and biological manufacturing facilities and equipment, do not contribute to the spread of CBW. The Group achieves this by harmonizing participating countries' national export licensing measures. The Group's activities are especially important given that the international chemical and biotechnology industries are a target for proliferators as a source of materials for CBW programs."²⁰ Delegations of participating states meet every year in Paris to co-ordinate their mutual export control policies, discuss revisions of export control lists, and exchange intelligence. Needless to say, these meetings take place outside the public eye. The importance of regimes like the Australia Group, is that

¹⁹ OPCW website. Internet: <http://www.opcw.org/news-publications/publications/facts-and-figures/>.

²⁰ Internet: <http://www.australiagroup.net/>.

they are based on a high level of mutual trust. Participating states not only exchange sensitive (commercial, technical, and security) information, but are also committed to disapprove any particular export to a specific country that another member had previously denied.²¹

Although the Australia Group is an informal, intergovernmental gathering – with a modest Secretariat in Australia –, its relevance and effectiveness is contingent upon the close involvement of technical experts, most notably with relevant industry sectors. Some categories of chemical (and biological) precursors are evidently dangerous, and are either banned or under strict control. But technology advances quickly, requiring swift updates of both export control lists and control of the means of distribution. For example, the Australia Group decided, in its June 2012 meeting, to enhance its controls on brokering services and to review the proliferation risks of new and emerging technologies, particularly in the area of nanotechnology. Compared with the OPCW, the Australia Group is more versatile, taking more decisive action based on scientific and technological developments, open source expertise, and information from intelligence agencies.

Several closely related proliferation dynamics can be identified here.²² First, many developing countries now manufacture their own fertilizers and pesticides, and (Western) multinational companies have built high-tech chemical plants all over the world to save labor costs and exploit loopholes in environmental regulations. Second, more countries have become self-sufficient in the production of crucial precursor chemicals, and could more easily develop chemical weapons, or sell them. Third, emerging technologies change the nature of the chemical weapons threat. New technologies, and the growing convergence between chemical and biological production methods, make it increasingly hard to update export control list, and to recalibrate OPCW verification measures. The bottom-line is that, in order to keep up with the pace and intricacy of change, states feel obliged to act equally swiftly and decisively.²³ This implies that non-proliferation and export control regimes have to be the best of both worlds: politically cohesive, based on shared norms and interests (which presupposes a measure of exclusivity), as well as accommodating the timely input of external expertise and intelligence (which requires sufficient institutional openness). We will return to this puzzle in the concluding section of the paper.

4. Biological Weapons and Precursors: The Danger From the Margins

The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction,

²¹ “The Australia Group at a Glance”, *Arms Control Today*. Internet: <http://www.armscontrol.org/factsheets/australiagroup>.

²² Jonathan B. Tucker, “The Future of Chemical Weapons”, *The New Atlantis*, No. 26 (Fall 2009 – Winter 2010), pp. 14-7.

²³ Jean Pascal Zanders, “Workshop on the Future of the Chemical Weapons Convention: Transition Towards the Post-Destruction Phase”, *EU ISS Report* (Brussels, September 10, 2012). Internet: http://www.iss.europa.eu/uploads/media/CWC_report.pdf.

commonly known as the Biological Weapons Convention (BWC), entered into force in 1975. Only 17 states have *not* joined the BWC (most notably Israel). Members agree to “take any necessary measures to prohibit and prevent the development, production, stockpiling, acquisition, or retention of the agents, toxins, weapons, equipment and means of delivery” (Article IV). Due to the absence of a solid IO to monitor and verify member states’ policies, the biological weapons domain remains severely under-institutionalized. Member states meet annually (and more often in intermediate technical sessions), and irregularly gather in Review Conferences (the Seventh of which took place in Geneva, December 2011). However, without a Secretariat and without a shared sense of urgency, there is little pressure to upgrade and harmonize policies. The United Nations’ Institute for Disarmament Research (UNIDIR), based in Geneva, acts as a focal point and driver of research in the biological weapons purview. UNIDIR’s research projects and conference series keep this issue on the political and academic agenda.²⁴ The UN Office for Disarmament Affairs houses a three-person BWC Implementation Support Unit. Still, there are many avenues left for NGOs and transnational governance to fill the normative and institutional gaps (see below).

An important shift in the discourse on biological weapons took place after 9/11. While before only the armed forces were considered at risk from biological warfare, the threat is now perceived to involve wide-scale bioterrorism affecting the population as a whole.²⁵ As a result, biodefense is now entangled with large parts of the public health sector, ranging from an IO like the World Health Organization (WHO), health-oriented NGOs, and multinational corporations to new transnational arrangements like the Global Outbreak Alert and Response Network (GOARN).²⁶ GOARN (coordinated by the WHO since 2000) “focuses technical and operational resources from scientific institutions in Member States, medical and surveillance initiatives, regional technical networks, networks of laboratories, United Nations organizations, the Red Cross and international humanitarian nongovernmental organizations. Participation is open to technical institutions, networks and organizations that have the capacity to contribute to international outbreak alert and response.”²⁷ As we have seen in other WMD areas, governments call upon and include industry, research facilities and academia to draw in expertise and capabilities to control the production and trade (or smuggling) of pharmaceutical ingredients and biological agents.

This attempt to securitize public health has been opposed by the WHO ever since the inception of GOARN. The WHO has tried to keep itself apart from the debate about biological weapons and its control mechanisms, and has refused any suggestion that it could take on the BWC’s role of verifying “the use of BW or other aspects of states’

²⁴ See, for example, Piers Millet’s edited volume *Improving Implementation of the Biological Weapons Convention. The 2007-2010 Intersessional Process* (New York and Geneva, UNIDIR, 2011).

²⁵ Wil S. Hylton, “How Ready Are We For Bioterrorism?”, *The New York Times* (October 26, 2011).

²⁶ Internet: <http://www.who.int/csr/sars/goarn/en/>.

²⁷ Internet: <http://www.who.int/csr/outbreaknetwork/en/>.

compliance with their obligations undertaken under the BWC.”²⁸ It is a politically neutral IO, offering assistance to its member states when they are faced with the outbreaks of diseases. Proposals to use GOARN as a clearinghouse for information have been rejected, as this could compromise the WHO’s public health mission. Although this concern about securitization may seem reasonable, this leaves the dire reality that the biological weapons domain misses a functioning framework facilitating the exchange of information. At most Review Conferences, only a minority of the state parties submit their so-called “Confidence-Building Measures” (CBM) forms, which list information on national research facilities and laboratories, biological defense research, possible outbreaks of infectious diseases, and vaccine production facilities (amongst others). Consequently, considering transparency and reciprocity are fundamental in building trust within a regime, the BWC maintains its deplorably low profile.²⁹ Discussions at the 2011 Review Conference on working towards an obligatory verification mechanism, which would require states to submit periodic reports on infrastructures available, occurrences, and actions taken concerning outbreaks of diseases and epidemics, have all come to naught.

Given the limit of multilateralism and classical state-to-state diplomacy in making progress in the biological weapons area, it is little surprising to see innovations in transnational governance. The BWC has benefited greatly from, and actually depends upon, the active participation of IOs like the Food and Agriculture Organization (FAO), the International Committee of the Red Cross, and the World Organization for Animal Health, as well as the WHO of course. Societal actors from the industry, and professional, scientific, media, and ethical organizations have all been essential in developing a framework for a more common understanding in this area. For the biological non-proliferation effort, UNSCR 1540 has been particularly important, seeing that it not only obliges all UN member states to take decisive action to regulate and criminalize the use of biological weapons in their national legal order, but also offers the *ersatz* institutional framework that the BWC is so sorely lacking. For example, under the auspices of the UN Office for Disarmament Affairs, the first Civil Society Forum on UNSCR 1540 took place at Geneva in January 2013, involving more than 50 participants from NGOs, think tanks and the industrial sector.³⁰ In this Forum, the creation of an effective partnership between states and civil society, especially concerning national implementation of BWC obligations, was a central issue.

Here, the role of the Verification Research Training and Information Centre (VERTIC) deserves special mention. VERTIC is an independent, non-profit organization established in 1986, based in London. Most relevant to our analysis is

²⁸ Alexander Kelle, “Securitization of International Public Health: Implications for Global Health Governance and the Biological Weapons Prohibition Regime”, *Global Governance*, vol. 13, no. 2 (April/June 2007), p. 231.

²⁹ Nicole Burtchett, “Forcing a Square into a Round Hole: The Control Model as a Difficult Fit for the Biological Weapons Regime”, paper presented at the 2009 ISA annual meeting (New York, February 2009).

³⁰ Internet: <http://www.un.org/disarmament/update/20130108/>.

VERTIC's new role of offering assistance to all member states "with legislative drafting for BWC obligations, remotely or in capitals, at no cost. VERTIC assesses the comprehensiveness of existing national measures, identifies gaps, and proposes approaches to fully implement the BWC, including amendments to existing legislation, a single issue law or omnibus legislation to cover several CBRN treaties and related legal instruments."³¹ VERTIC has also taken the lead in encouraging greater coordination and cooperation among the various, international and national, WMD non-proliferation agencies, and calls upon states to combine their national WMD implementation processes. It has published a "Guide to National Implementation of UN Security Council Resolution 1540", which offers (in one document) the model laws, implementation kits and handbooks that already have been developed by VERTIC itself, the OPCW, and the IAEA.³² It is obviously noteworthy that VERTIC – a registered UK charity – spearheads policy innovation, in particular as this occurs in an area that remains highly securitized.

5. Missile and Dual-Use Technology: Catch-All – Or Nothing

The spectrum of WMD non-proliferation regimes is completed with the export control arrangements that focus on missile technology, which overlaps with technology related to meteorology and the peaceful use of outer space, and dual-use technology, which has both military and civilian usage. The Missile Technology Control Regime (MTCR) is an informal and voluntary arrangement of like-minded (Western) states set up in 1987, nowadays counting 34 members. MTCR states enforce integral common lists of controlled items (the MTCR Equipment, Software and Technology Annex), and adhere to common export policy guidelines (the MTCR Guidelines). The MTCR is now chaired by Germany, but has no a formal secretariat.³³ The MTCR Guidelines specifically state that they are "not designed to impede national space programs or international cooperation in such programs as long as such programs could not contribute to delivery systems for weapons of mass destruction." The MTCR works alongside the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Technologies (WA), set up in 1995, which now involves 41 participating states, and follows procedures akin to the MTCR.³⁴ The WA sees itself as the successor of the Cold War CoCom (a deliberately non-descript abbreviation of "Coordinating Committee"), a rather obscure export control arrangement specifically designed to keep dual-use technology out of Communist hands.³⁵

Like the Nuclear Suppliers Group, the Australia Group, and the Zangger Committee, both the MTCR and the W A are discriminatory regimes, excluding states whose political, strategic, and/or economic interests are at odds (or even openly clash) with

³¹ Internet: <http://www.vertic.org/>.

³² Internet: <http://www.vertic.org/pages/posts/vertic-publishes-guide-to-national-implementation-of-un-security-council-resolution-1540-351.php>.

³³ Internet: <http://www.mtcr.info/>.

³⁴ Internet: <http://www.wassenaar.org/>.

³⁵ Gary K. Bertsch and Steven Elliott-Gower (eds), *Export Controls in Transition: Perspectives, Problems, and Prospects* (Durham and London: Duke University Press, 1992).

the regime's member states. These export control regimes justify their existence pragmatically, at times referring to the norms and obligations of treaties and UNSC resolutions (1540, as well as 1718, 1874 and 1929); at other times vindicating themselves by claiming success in keeping essential precursors and/or technologies from reaching rogue states and/or terrorists. The rationale that binds these regimes together is a combination of shared – political and economic – interests, as well as trust. This mutual trust in each other's legal, and customs, systems is implied by the fact that the controlled substances and technologies are freely tradable amongst the regime members themselves.

The other selling-point of these regimes is relevance and flexibility. Given the rapid pace of technological change and procurement practices of potential proliferators, these export control regimes have to adjust their control methods and lists frequently, and without much ado. This can only be possible within a group of like-minded states, based on timely information and reliable expertise. The MTCR makes these changes at its annual plenary meeting, based on the input of three experts groups: the Licensing and Enforcement Experts Meeting (LEEM); the Information Exchange Meeting (IEM); and the Technical Experts Meeting (TEM).

The dilemma MTCR members face is that they are, to a large extent, dependent on the expertise from defense firms that often have a stake themselves in preventing certain new technologies and weapons systems from being put on the control list. A relevant example is the successful lobbying of Northrop Grumman to keep Unmanned Aerial Vehicles (UAVs), better known as “drones”, of the Category One list, for which there is a “strong presumption of denial”, and have it placed into Category Two instead, where states have greater discretion to export.³⁶ This problem – striking a balance between incorporating external expertise and external political and/or commercial interests – is a long-standing one (it already befell CoCom in the 1980s), and is probably the price to pay for openness and transparency, even in more-or-less closed and secretive export controls regimes.³⁷

Still, despite the fact that the process of export control remains unclear, the export control lists are obviously public, because otherwise firms would not know which rules to stick to.³⁸ The MTCR also holds “outreach meetings with Non-Partner states” in order to increase transparency and promote the MTCR's objectives. MTCR member states further commit themselves to encourage and assist these “Non-Partners” in applying MTCR guidelines and control lists. Regular Export Control Seminars have been organized (the fifth in Berlin in June 2012), in order to increase

³⁶ House of Commons, Committees on Arms Export Controls, *Arms Export Controls 2013* (HMSO, London: 2013). See also Bill Sweetman, “Missile Treaty A Drag On US UAVs”, *Aviation Week* (August 22, 2011).

³⁷ Gary K. Bertsch (eds), *Controlling East-West Trade and Technology Transfer: Power, Politics, and Policies* (Durham and London: Duke University Press, 1988).

³⁸ See, for example, the MTCR “Equipment, Software and Technology Annex” (from November 18, 2011), which is fully accessible online. Internet: http://www.mtc.info/english/MTCR-TEM-Technical_Annex_2011-11-18.pdf.

the awareness of the Regime's activities. The WA has a similar commitment to openness and transparency, As demonstrated by the "Best Practices For Implementing Intangible Transfer of Technology Controls", published after the WA's 2006 plenary meeting, and available online.³⁹ Although the updates and reforms of the export control lists remain shrouded in secrecy, the lists themselves and the enforcement methods are public and transparent. Without openness and clarity on *what* cannot be exported (or only under certain conditions), these regimes just would not work. Despite the unmistakable discriminatory character of export control regimes, and their less-than-perfect legal basis, there is no ambiguity in their rationale, and a surprising transparency regarding their working methods.

6. Conclusions: The Securitization – Legitimacy Trade-Off

The wide-ranging assortment of WMD-related IOs, treaties, arrangements, regimes and coalitions has proven resilient in light of the rapidly changing strategic and technological environment, starting with the break-up of the Soviet empire and the end of the Cold War until the emerging of the specter of international terrorism. Flatter and more transparent borders make it harder to keep technology and dangerous materials from falling into the "wrong" hands, especially since globalization entails that "sensitive" knowledge and capabilities hitherto guarded by Western states are now readily available across the world. These changes are here to stay, and will continue to erode the pillars of the existing WMD non-proliferation system.

This paper has offered an overview of the main innovations in the management of WMD non-proliferation. Given the limited scope of this paper, only the principal advances could be examined. But the list of novelties in this area could easily be expanded with, for example: the UN-based (and legally binding) Convention on Nuclear Terrorism, which defines nuclear terrorism, and requires international co-operation to prevent and punish such acts; the Global Initiative to Combat Nuclear Terrorism (GICNT), launched in 2006, which seeks to co-ordinate international efforts to detect, investigate and respond to nuclear proliferation by non-state actors; the Fissile Material Cut-Off Treaty (FMCT), which is discussed, but not yet under negotiation, and would aim to prohibit the further production of fissile material for nuclear weapons or other explosive devices; and the Global Partnership against the Spread of Weapons and Materials of Mass Destruction, set up by the G8 in 2002 to prevent terrorists from acquiring WMD. The multitude of new developments – from UN-based and legally binding ones to unstable arrangements with a motley crew of stakeholders – is indicative of both the need for reform, and the willingness and capabilities of varied actors to arrange for it.

For our Study, the main question concerns the state of affairs of democratic legitimacy in the area of WMD non-proliferation, particularly regarding the innovations in (transnational) governance. Is there a crisis in representative

³⁹ Internet: <http://cns.miiis.edu/inventory/pdfs/wassbestpractices2006b.pdf>. An integral list of all WA public documents is available online. Internet: <http://www.wassenaar.org/publicdocuments/2012/Basic%20Documents%202012.pdf>.

democracy which encourages the emergence of new arrangements to effectively hinder WMD proliferation? What are the merits of accountability and transparency in a policy area that is traditionally highly securitized? Is there a minimum level of accountability and transparency that applies even to these securitized governance innovations? Should we even consider a trade-off between highly valued propositions like effectiveness, timeliness and focus on the one hand, and democratic legitimacy on the other?

The varied landscape of WMD non-proliferation arrangements can be divided between (1) formal treaties; (2) restricted setups of expediency; (3) export control regimes; and (4) societal initiatives, usually with the long-term aim of (nuclear) disarmament. As we have seen, each type of arrangement and each approach can claim different forms of democratic legitimacy, using the democratic legitimacy prisms as they see fit.

The first category involves treaties such as the NPT, the CWC and the BWC, which establish and enforce the norm that WMD proliferation is destabilizing and generally detrimental to global security. Without these treaties, this norm would be insubstantial and open to general criticism. The above-mentioned treaties are almost universally acknowledged, and have from the very outset made a claim to representative democratic legitimacy. A mere four states are “non-signatories” of the NPT: India, Israel, Pakistan, and South Sudan. Only eight states are not party to the CWC: Angola, Burma, Egypt, Israel, North Korea, Somalia, South Sudan and Syria. The BWC lacks 17 signatories, Israel and several African states are numbered among them. All three treaties make a claim to universality, striving towards the full disarmament of nuclear, chemical, and biological weapons. The fact that the NPT recognizes five nuclear weapons states remains a discrepancy, only argued away by claims based on Realpolitik and pragmatism. Still, the (nigh) universality of membership for these three treaties strengthens their claim to (representative) democratic legitimacy, and has laid the foundation for the WMD non-proliferation norm as we know it today.

In the nuclear and chemical weapons realm, this claim to legitimacy is reinforced by strong and effective institutions: the IAEA and the OPCW. Both IOs have established themselves as the “guardians” of the commitments in their respective proliferation field. These IOs are widely considered as politically neutral, offering a platform for strategic negotiations at the highest possible diplomatic level. At the same time, they have started to open up to societal actors – mainly NGOs, representatives from industry, and media –, taking into account their opinions and concerns. The NPT Review Conferences, which assess the NPT’s workings and agenda, for instance, are reasonably open and accessible to a variety of non-state actors from across the world. The OPCW falls short of such a claim to deliberative democratic legitimacy, as it convenes annually at the highest level, while, in the meantime, the Technical Council performs the crucial activities of inspection and verification. The BWC has no IO, and only irregularly meets in Review Conferences. As mentioned above, ever since 2007, it has an Implementation Support Unit (ISU) for the Convention within the Geneva Branch of the United Nations Office for Disarmament Affairs. Most importantly, the

ISU provides (modest) administrative and national Implementation support and assistance, as well as support and assistance for Confidence-Building Measures and for obtaining universality. Of all WMD areas, the nuclear field is – not surprisingly – best endowed with strong and credible institutions, technical expertise, robust inspection and verification procedures and capabilities, as well as a broad and open societal network generating public support and deliberative democratic legitimacy. On all these counts, the CWC and BWC show short-comings and lacunas.

So what about accountability and transparency? The legal frameworks of established IOs like the IAEA and the OPCW may offer clarity of purpose, procedure and policy. We know what these IOs aspire to do, how they are funded and organized, and who shapes their policies. For IOs, accountability and transparency do not seem to be the fundamental avenues of criticism they are subjected to.⁴⁰ Since these IOs also actively do societal outreach – involving NGOs, industry, academia, and research facilities –, their claim to deliberative democracy is warranted. The Review Conferences organized multi-annually resemble (relatively) open *agoras*, offering a voice to all who want to be heard. Although this may have value in its own right, societal openness is particularly prized as a prerequisite for assuring timely information and high-level expertise, as well as broad societal support, all targeting the ultimate prize of effectiveness. It is on this latter issue that IOs are, in varying degrees, exposed to criticism. PSI, for example, prides itself on being the necessary operative arm of the norms and aims laid down in the NPT, and only partly safeguarded by the IAEA. UNSC Resolution 1540 equally aims to fix a legal loophole in all existing WMD-related treaties by obligating criminalization. As we have seen, existing WMD-related IOs have proven strong enough to weather this criticism, and have (as in the cases of PSI and UNSC Resolution 1540) even been able to benefit from the support of governance innovations.

The second category of WMD non-proliferation arrangements are demand-driven, based on the well-known premise of “coalitions of the able and willing”.⁴¹ The PSI, GOARN and VERTIC are poster children for innovation in WMD non-proliferation policy. The PSI in particular, exemplifies how a flexible arrangement, combining “legally binding bilateral agreements with an overarching multilateral pledge”, can become widely accepted as both legitimate and successful.⁴² It lacks a decision-making mechanism, has no governing body, and no real authority that must approve an interdiction, yet, the call of US President Obama of April 2009 to turn the PSI into a “durable international institution” has been given heed to, with the notable adjustment that the PSI will be shaped into a “durable international effort” (rather than an institution).⁴³ Emma Belcher’s detailed study on the lessons of PSI is worth

⁴⁰ Pavel Podvig, “Global Nuclear Security: Building Greater Accountability and Cooperation”, *UNIDIR* (Geneva, 2011).

⁴¹ Niels Blokker, “Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force By ‘Coalitions of the Able and Willing’”, *European Journal of International Law*, vol. 11, no. 3 (September 2000).

⁴² Belcher (2011), p. 11.

⁴³ Internet: <http://www.state.gov/t/isn/c10390.htm>.

recalling here. She suggests that PSI's informal nature has been a useful complement "to existing treaties and other formal mechanisms of international cooperation"; that, although nonbinding, it cannot be easily modified; that participation confers "seriousness of purpose", providing all participating actors "a good reputation for compliance"; and that it has strengthened the WMD non-proliferation norm, despite not being clearly grounded in international law. Consequently, such informal arrangements are "probably best used in situations where the behavior they circumscribe is not too controversial or groundbreaking". Lastly, Belcher concludes that these ad hoc coalitions will also appear outside the "Western world", particularly in the BRIC countries (Brazil, Russia, India and China).⁴⁴

Relating to this paper, the PSI-experience suggests that transnational governance innovation will be more successful if its main policy aim is congruent with international norms (in this case the NPT, CWC and BWC), if participation is (relatively) open to all actors who are "willing and able", and if success is forthcoming. In more general terms, democratic legitimacy is conferred by normative congruence, openness, as well as effectiveness. Given the often divergent views and interests of major world powers, it will be increasingly difficult to achieve both openness and effectiveness. A trend towards a certain regionalization in security management is therefore manifest and explicable. For this reason, Ash Jain calls for a new "Democracies 10" (or D10) group, whose shared worldview and tremendous sources of leverage in the international system could play the role of strategic hegemon. Jain's concerns about democratic legitimacy are modest: "The D10 has a logical basis for participation – highly capable states who share a similar perspective on advancing the norms of a liberal world order – and concerns over its legitimacy are likely to fade as soon as it proves capable of effectively advancing its mission."⁴⁵ Although the trade-off between openness (i.e., inclusiveness and wide participation) and effectiveness may be the norm and generally accepted within a securitized policy environment, it remains uncertain whether the emergent polycentric world order can be imagined without more openness. Jain's argument that the D10 (still) musters sufficient leverage to guarantee effectiveness can be questioned.

This point is emphasized by the third category of governance innovations: export control regimes. The WMD and dual-use (technology) export control regimes, which have been briefly introduced above, often taking Jain's D10 at their core, are based on the premise that exclusivity generates effectiveness. Most (if not all) export control regimes are normatively congruent with global WMD non-proliferation treaties. Together with effectiveness, this is their basis for democratic legitimacy. Export control regimes require timely expert information from stakeholders to assure relevancy as well as societal support for their policies. Export control lists also have to be widely publicized in order to be implemented by all involved. This modicum of inclusiveness is set-off against the inevitable discriminatory features of these arrangements. In the end, their democratic legitimacy is based on the normative

⁴⁴ Belcher (2011), p. 15.

⁴⁵ Ash Jain, "Like-Minded and Capable Democracies. A New Framework for Advancing a Liberal World Order", *Council on Foreign Relations Working Paper* (July 2012), p. 15.

congruence of their objectives with established global standards, as well as their claim to effectiveness.

The last category of innovation – the broad, catch-all collection of “societal initiatives” – comprehends VERTIC’s practical work on national implementation efforts of UNSC Resolution 1540 obligations, the initiatives and coalitions of the WHO-coordinated Global Outbreak Alert and Response Network, and the International Campaign to Abolish Nuclear Weapons (ICAN).⁴⁶ The range and scale of these activities is extraordinary, showing that despite the securitization of WMD-policies, there is unwavering societal interest. The democratic legitimacy of most of these efforts, despite many disarmament groups having been denounced as a Soviet-funded fifth column during the Cold War,⁴⁷ is beyond reproach. In a way, the inclusiveness of these organizations, and their commitment to strengthening global WMD-norms, is what a vibrant, liberal democracy is all about: active citizenship on a global scale. This development towards cosmopolitanism (rather than internationalism) is laudable, and a requirement for both the maintenance of already existing WMD non-proliferation norms and unrelenting governance innovation. Although effectiveness remains the ultimate goal of all these societal initiatives, their democratic legitimacy is mainly rooted in normative congruence, openness (both accountability and transparency), and deliberation.

⁴⁶ Internet: <http://www.icanw.org/>.

⁴⁷ Bruno Waterfield and James Kirkup, “Baroness Ashton Questioned over CND and Soviet Money”, *The Daily Telegraph* (November 25, 2009).