

International Legal Instruments to Penalize and Deter Nuclear Material and Commodity Trafficking

Current Status, Gaps in Coverage, and Potential Steps Forward

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Goal : Deter nuclear trafficking through threat of punishment

- Two facets to nuclear trafficking
 - Nuclear **materials**
 - Special focus: Fissile materials
 - Nuclear **commodities**
 - Nuclear-specific, e.g., uranium enrichment centrifuges
 - Nuclear dual-use, e.g., maraging steel
 - Nuclear technology, e.g., nuclear weapon designs

Model approach

- International treaty, universally adopted
- Declares trafficking an “offense”
- Requires all parties to pass domestic laws making trafficking a criminal offense
- Gives each party broad jurisdiction to prosecute offenses (territory, nationals, injury to nationals)
- Strong mutual legal assistance provisions
 - Extradite or prosecute (trafficking not “political crime”)
 - Fully support prosecutions elsewhere

Tools available today – International Conventions

- **Nuclear Terrorism Convention (EIF 2007, 76 parties)**
 - Trafficking in *nuclear materials* made an offense
 - Strong domestic law, jurisdictional, mutual legal assistance provisions
 - But *nuclear commodities* not covered
- **Convention on the Physical Protection of Nuclear Materials (CPPNM) (EIF 1987, 145 parties)**
 - Trafficking in *nuclear materials* made an offense
 - Strong jurisdictional, mutual legal assistance provisions
 - But *nuclear commodities* not covered and only nuclear material in *peaceful use* covered

Tools available today – International Conventions (2)

- 2005 Amendment to CPPNM (not in force; 45 ratifications; ~100 ratifications needed)
 - Clarifies that unauthorized transfers of nuclear material abroad is an offense
 - Mutual Legal Assistance: Adds trafficking not a political crime under extradition treaties
 - Still applies only *to nuclear materials in peaceful use*
 - Not in force

Tools available today - UNSC

- **UN Security Council Resolution 1540**
 - Binding on all states under Chapter VII
 - States must control nuclear **materials and commodities** (“related materials”) including transfers
 - States must adopt, enforce civil and criminal penalties for illicit export, trans-shipment, financing
 - Does not, itself, criminalize such activities
 - No robust jurisdictional and mutual assistance rules
 - Implementation incomplete

Tools available today - UNSC (2)

- **UNSCRs 1874 (North Korea) & 1929 (Iran)**
 - Binding on all states under Chapter VII
 - Freezes assets, bans travel for those materially assisting nuclear and missile programs (leaders & facilitators; mat'l & commodities; no prosecutions required)
 - “Quasi-criminal” sanctions – No incarceration
 - UNSC Committees have authority to designate
 - Not used; lists expanded only on UNSC vote
 - Number of targets limited...for political reasons?
 - Very few supporting North Korea and Iran from abroad
 - Limited to only two target states

Tools available today - Other

- **Multiple, unilateral sanctions**
 - US, EU, etc., freeze assets, ban travel for those assisting nuclear and missile programs (leaders and facilitators; material and commodities)
 - Designates numerous offenders operating *outside target states* for sanctions
 - Limited number of sanctioning states
 - Limited number of target states (but US sanctions include Iran, DPRK, Syria, Pakistan, and others)

Tools available today – Other (2)

- **Network of mutual legal assistance treaties**
 - Some contain robust measures seen in nuclear material treaties
- **Nuclear Suppliers Group**
 - **46** members (many states using NSG lists)
 - Guidelines voluntary, not binding
 - Criminal sanctions for illicit exports, not required
 - Members should adopt laws providing “penalties”
 - *No mutual legal assistance or agreed jurisdictional* measures for prosecuting violations

Closing the Gaps – Key Targets, Fast Track

- **Most important targets:** Iranian and DPRK networks (possibly being shared)
- **Fastest way** to impose penalties and deter trafficking is through *designations*
 - UNSC sanctions resolutions
 - Global reach – Better than extraterritorial jurisdiction
 - Parallel unilateral sanctions
 - Need all key countries participating
 - Expand targets outside DPRK and Iran; add family members (cf. Libya); use Committees' authority
 - Make automatic upon indictment by any state

Closing the gaps – Jurisdiction and Legal Assistance

Focus 1: Illicit exports from advanced states

- Starting with G-8
 - Conform mutual legal assistance treaties to apply CPPNM measures to nuclear *commodity* prosecutions
 - All G-8 already apply to *material* trafficking prosecutions
- Gain NSG agreement to apply CPPNM measures to nuclear *commodity* prosecutions
 - Already apply to materials prosecutions, under CPPNM

Ratified...	G-8	NSG
CPPNM	8 of 8	45 of 46
2005 Amendment	3 of 8	23 of 46
Nuclear Terrorism Conv	5 of 8	33 of 46

Closing the gaps – Jurisdiction and Legal Assistance (2)

2: Illicit exports from less advanced states

- E.g., Egypt, India, Indonesia, Malaysia, Nigeria, Pakistan, Singapore, Thailand, UAE, Viet Nam
- ***Select those in CPPNM and conform mutual legal assistance agreements*** between key advanced states (US, EU) to apply CPPNM measures to nuclear ***commodity*** prosecutions
 - In these states measures already apply to materials prosecutions, under CPPNM

Closing the gap – Jurisdiction and legal assistance (3)

	India	Indonesia	Nigeria	Pakistan	UAE
CPPNM	R	R	R	R	R
2005 Amend	R	R	R	0	R
N-Terrorism Conv	R	0	0	0	R
	Egypt	Malaysia	Singapore	Thailand	Vietnam
CPPNM	0	0	0	0	0
2005 Amend	0	0	0	0	0
N-Terrorism Conv	S	0	S	S	0

0 = No action, R = Ratified S= Signed, but not Ratified

Closing the gap – Jurisdiction and legal assistance (3)

- *Use UNSCR 1540*
 - Have Committee (or UNSC) interpret resolution to encourage inclusion of at least CPPNM measures for *all nuclear material and nuclear commodity* trafficking prosecutions
 - Modify 1540 or adopt new resolution with these measures

More ambitious options

- Develop a *new international instrument* akin to the Nuclear Terrorism Convention to address nuclear commodity smuggling...or amend an existing instrument
- *Amend Treaty of Rome* to make nuclear trafficking an international crime within jurisdiction of International Criminal Court
- Build strategy to declare some widely adopted components of the “model” *customary international law*

In conclusion ...to better deter nuclear trafficking...

As efforts to gain wider adherence to key international legal instruments and to fully implement UNSCR 1540 continue...

- The near-term focus should be on utilizing the *UNSC sanctions resolutions* and *coordinated unilateral sanctions* more forcefully and effectively and strengthening *mutual legal assistance treaties*

Additional material

- Key CPPNM jurisdiction and mutual legal assistance provisions
 - Jurisdiction to be established if offense committed within state or by a national of that state
 - Extradite or prosecute
- 2005 Amendment adds
 - Offense not political offense for extradition
- NSG Guidelines

ESTABLISHMENT OF EXPORT LICENSING PROCEDURES

- 4. Suppliers should have in place legal measures to ensure the effective implementation of the Guidelines, including export licensing regulations, enforcement measures, and penalties for violations.