

# **Non-State Nuclear Proliferation: A Factsheet on the De jure and De facto WMD Control Regime in South Asia**

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# **Non-State Nuclear Proliferation: A Factsheet on the De jure and De facto WMD Control Regime in South Asia**

By Debi Prasad Dash

May 26, 2011

This is a paper from the Nautilus Institute workshop "Cooperation to Control Non-State Nuclear Proliferation: Extra-Territorial Jurisdiction and UN Resolutions 1540 and 1373" held on April 4th and 5th in Washington DC with the Stanley Foundation and the Carnegie Endowment for International Peace. This workshop explored the theoretical options and practical pathways to extend states' control over non-state actor nuclear proliferation through the use of extra-territorial jurisdiction and international legal cooperation.

Other papers and presentations from the workshop are available [here](#).

Nautilus invites your contributions to this forum, including any responses to this report.

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### I. Introduction

Debi Prasad Dash, Additional Director-General, Government of India, examines the efficacy of the legal and enforcement systems in South Asia, with particular focus on India, in preventing and combating the possible use of WMDs by the non-State actors.

The views expressed in this article are those of the author and do not necessarily reflect the official policy or position of the Nautilus Institute. Readers should note that Nautilus seeks a diversity of views and opinions on significant topics in order to identify common ground.

### II. Article by Debi Prasad Dash

-“Non-State Nuclear Proliferation: A Factsheet on the De jure and De facto WMD Control Regime in South Asia”

By Debi Prasad Dash [\[1\]](#)

South Asia, home to nearly 1.5 billion people or about 22% of the world’s population, has been the hotbed of international terrorism for decades. The region that was once the seat of ancient culture and civilization and attracted world attention for international trade and commerce has become the hot-spot that threatens international peace and security. Against the backdrop of the security and political scenario of the region, this paper attempts to examine the efficacy of the legal and enforcement systems of the countries, with particular focus on India, in preventing and combating the possible use of WMDs by the non-State actors.

#### **Security Scenario: threat to international security?**

This region, which comprises eight countries namely Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, and Sri Lanka has witnessed more turbulence than any other region in the world. Apart from the geographical contiguity, with many members sharing land or sea boundaries with each other, the countries have many things in common: five of them are former British colonies, who even today continue as members of the British Commonwealth and follow a common law system, five of them have a sizeable Muslim population, including India which is the 2nd largest country in terms of Muslim population; four of them have a large number of followers of Hinduism and Buddhism, including Nepal, which is the only Hindu State in the world. Excepting Bhutan, the remaining six countries have either engaged in war or have been drawn into major insurgency or civilian unrest, making the region most volatile and vulnerable to organized crimes such as drug trafficking, smuggling in counterfeit currencies, money laundering and terrorism. The influence of Al Qaeda and Taliban in Afghanistan that produces the highest quantity of opium in the

world has its resultant security implications for the entire region. The most important factor, however, is the presence of the two nuclear-weapon States as neighbors: India and Pakistan have gone into war three times, resulting in the birth of a new country Bangladesh. The 26/11 terrorist attack on Mumbai by terrorists and the consequential allegations and counter-allegations by both countries has exposed the futility of innovative legal tools such as the Harare Scheme and London Scheme meant for meaningful mutual legal assistance in criminal matters and extradition respectively amongst the member States of the Commonwealth. The binding provisions of the UNSCR 1373, which warranted adoption and implementation of effective de jure domestic framework by member States, seem to have also failed to ensure de facto co-operation between these two members of the United Nations.

The growing influence of the nuclear-powered China in the region has significant implications for global security, particularly against the backdrop of historically strained Indo-Pak relations, competition between China and India over their individual shares of the world market and the emerging expectations of Tibetans to seek self-determination. Another frightening development is the increasing influence of the Maoists, which has opened up a new red corridor across India, Nepal and China, linking the extremists from the far off coastal Indian States on the Bay of Bengal with their comrades in Nepal, and, perhaps, China. Politically, Nepal continues to remain unstable without a proper Constitution and effective legal system. Sri Lanka is relatively calm after the death of Prabhakaran, the leader of the banned terrorist outfit LTTE. Maldives, the other beautiful island nation in the Indian Ocean, had its own share of tension when attempts were made to overthrow the government. But these two States are not completely free from internal strife and remain vulnerable to attacks from within. All these developments have made this region an attractive breeding ground for the terrorists, who may not hesitate to use WMDs to achieve their goals. No wonder, the region has a very large number of terrorist organisations that figure in the proscribed lists of the UN, and the US. India has notified 35 Terrorist Organisations under the Unlawful Activities (Prevention) Act such as the Lashkar e- Taiba (LET), Jaish-e-Mohammad (JEM), Liberation Tigers of Tamil Eelam (LTTE), Communist Party of India (Maoist), Harkat-ul-Mujahideen, Hizb-ul-Mujahideen, Indian Mujahideen etc.

### **SAARC: A Regional Co-Operation Framework for Global Peace?**

However, optimism has not forgotten to visit this region. In order to promote peace, stability, amity and progress in the region through strict adherence to the principles of the United Nations Charter and Non-Alignment, the heads of seven South Asian Countries namely Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka had signed the Charter to establish the South Asian Association for Regional Cooperation (SAARC) on December 8th, 1985. At the fourteenth Summit held in, Delhi in April 2007, Afghanistan joined SAARC as its 8th Member. The SAARC Charter calls for respect for the principles of sovereign equality, territorial integrity, national independence, non-use of force and non-interference in the internal affairs of other States and peaceful settlement of all disputes.

The Members of SAARC, recognizing “the importance of the principles laid down in UN Resolution 2625, which inter alia, required that each state should refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another state or acquiescing in organized activities within its territory directed towards the commission of such acts” concluded the SAARC Regional Convention on Suppression of Terrorism in 1993. They ‘resolved to take effective measures to ensure that perpetrators of terroristic acts do not escape prosecution and punishment by providing for their extradition or prosecution’. Article 1 of the Convention provided that an offence, within the scope of any Convention to which SAARC Member States are parties and which obliges the parties to prosecute or grant extradition, shall be regarded as terroristic and for the purpose of

extradition shall not be regarded as political offence or as an offence connected with a political offence or as an offence inspired by political motives. If any offence is not listed as an extraditable offence in any extradition treaty existing between Contracting States, it shall be deemed to be included as such therein. The Contracting States also undertook to include these offences as extraditable offences in any future extradition treaty to be concluded between them. If a Contracting State which makes extradition conditional on the existence of a treaty receives a request for extradition from another Contracting State with which it has no extradition treaty, the requested State may, as its option, consider this Convention as the basis for extradition in respect of the offences set forth in Article I or agreed to in terms of Article II.

In the wake of the 9/11 attacks, Member-States of SAARC, on January 6, 2004, signed an Additional Protocol to the SAARC Regional Convention on Suppression of Terrorism in Islamabad, Pakistan. The purpose of this Additional Protocol is to strengthen the SAARC Regional Convention on Suppression of Terrorism, particularly by criminalizing the provision, collection or acquisition of funds for the purpose of committing terrorist acts and taking further measures to prevent and suppress financing of such acts. Towards this end, State Parties agreed to adopt necessary measures to strengthen co-operation among them, in accordance with the terms of this Additional Protocol.

Article 11 called for cooperation among law enforcement authorities to work closely with one another to enhance the effectiveness of law enforcement action for the prevention, suppression and prosecution of the offences set forth in Article 4. The members also entered into another historic relationship by concluding the SAARC Convention relating the Mutual Legal Assistance in 2008. The States Parties to this Convention promised to provide each other the widest possible measures of mutual legal assistance in criminal matters, namely investigations, prosecution and resulting proceedings. They agreed to provide assistance without regard to whether the conduct, which is the subject of the investigation, prosecution or proceedings in the requesting State Party, would constitute an offence under the laws of the requested State Party or not. Under Article 10, upon request, a detained person in the requested State Party may, subject to its domestic laws and practice be temporarily transferred to the requesting State Party to assist investigations or to testify, provided that person consents to it.

In addition to seeking cooperation in the field of security, the members have also concluded many Agreements to improve trade and commerce in the region such as the Agreement on SAARC Preferential Trading Arrangement (SAPTA), the Agreement on South Asian Free Trade Area (SAFTA) and the SAARC Agreement on Mutual Administrative Assistance in Customs Matters.

### **WMD: A Report Card on Legal System of the Countries**

As far as Weapons of Mass Destruction (WMD) are concerned, both India and Pakistan remain opposed to the Nuclear Non-Proliferation Treaty (NPT), as they find the provisions of the Treaty to be discriminatory. The other six countries, however, are parties to this Treaty. In respect of Biological and Chemical Weapons, all the eight members of SAARC are parties to the Biological and Chemical Weapon Conventions. The status of implementation of the WMD Conventions is given below:

### **Status of Implementation of International WMD Conventions**

States	BWC	CWC	NPT	CTBT
<b>Afghanistan</b>	D 1975	D 2003	D 1970	D 2003
<b>Bangladesh</b>	D 1985	D 1997	D 1979	D 2000
<b>Bhutan</b>	D 1975	D 2005	D 1985	
<b>India</b>	R 1973	D 1996		
<b>Maldives</b>	D 1993	D 1994	D 1970	D 2000
<b>Nepal</b>	S 1972 Not Ratified	D 1997	D 1980	
<b>Pakistan</b>	D 1974	D 1997		
<b>Sri Lanka</b>	D 1986	D 1994	D 1979	

### **Domestic Legislations: De jure Compliance**

Acting under Chapter VII of the United Nations Charter, on 28 April 2004, the United Nations Security Council had unanimously adopted Resolution 1540 (2004), obliging States, inter alia, “to refrain from supporting by any means non-State actors from developing, acquiring, manufacturing, possessing, transporting, transferring or using nuclear, chemical or biological weapons and their delivery systems.” Resolution 1540 (2004) imposes binding obligations on all States “to establish domestic controls to prevent the proliferation of nuclear, chemical and biological weapons, and their means of delivery, including by establishing appropriate controls over related materials.” It also encourages enhanced international cooperation on such efforts.

As far as compliance with the UNSCR 1373 and 1540 are concerned, legislations of most of the States of the region are not in complete conformity with the international framework.

### **India**

In ancient India, the Vedic sages saw the earth as the precious abode of one extended, universal family, ‘Vasudhaiva Kutumbakam’, a concept that subsumes ‘extra-territoriality’ under ‘intra-territoriality’. This philosophy was later echoed by the Indian Nobel Laureate, Rabindra Nath Tagore in his poem, “Where The Mind is Without Fear”, in which he prays for his country to awake into a world that “has not been broken up into fragments by narrow domestic walls”.

Being a victim of international terrorism for decades, India is deeply committed to the objectives of disarmament and non-proliferation of the WMDs by implementing its obligations under the UN Security Council Resolutions 1540 and 1373. It fully supports appropriate and effective measures to prevent non-state actors from gaining access to weapons of mass destruction and their means of delivery and over the years enacted effective laws, and regulations to prohibit WMD access to non-state actors and terrorists. India has instituted comprehensive administrative, legislative and security measures to ensure the safety and security of sensitive materials, facilities, technology and

equipment.

India is not a member of any of the four major export control regimes namely the Wassenaar Agreement (WA), the Nuclear Suppliers Group (NSG), the Missile Control Technology Regime (MTCR) and the Australia Group (AG), and has faced difficulties in procuring items, controlled by these regimes, even for civilian purposes particularly to meet its growing energy needs.

India, however, has a robust legal system and it has adopted a large number of legislations in the field of WMDs, both prior to UNSCR 1540 (2004) and thereafter, namely:

- The United Nations (Security Council) Act, 1947 and The U.N. Prevention and Suppression of Terrorism (Implementation of Security Council Resolutions) Order, 2007
- The Weapons of Mass Destruction and their Delivery Systems (Prohibition of Unlawful Activities) Act, 2005
- Chemical Weapons Convention Act, 2000
- Atomic Energy Act, 1962 and Rules
- Indian Penal Code - Act No. 45 of 1860
- The SAARC Convention (Suppression of Terrorism) Act, 1993
- Unlawful Activities (Prevention) Act, 1967 as amended in 2004 (Anti-Terrorism Act)
- Customs Act, 1962
- Arms Act, 1959
- Explosive Substances Act, 1908
- Foreign Trade (Development and Regulation) Act, 1992
- Environment (Protection) Act, 1986
- Rules for the manufacture, use, import, export and storage of hazardous micro- organisms
- Recognition of laboratories that are allowed to use of pathogenic micro-organisms or etc.
- Manufacture, storage and import of hazardous chemical rules, 1989
- Prevention of Money-laundering Act, 2002
- Foreign Exchange Management Act, 1999
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India has adopted a broad-spectrum definition of terrorism. The anti-terror law, 'The Unlawful Activities (Prevention) Act, 1967', as amended, inter alia, covers terrorism and its links with weapons of mass destruction.

As per Section 15:

"Whoever does any act with intent to threaten or likely to threaten the unity, integrity, security or sovereignty of India or with intent to strike terror or likely to strike terror in the people or any

section of the people in India or in any foreign country,

- a. by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisonous or noxious gases or other chemicals or by any other substances (whether biological radioactive, nuclear or otherwise) of a hazardous nature or by any other means of whatever nature to cause or likely to cause
  - (i) death of, or injuries to, any person or persons; or
  - (ii) loss of, or damage to, or destruction of, property; or
  - (iii) disruption of any supplies or services essential to the life of the community in India or in any foreign country; or
  - (iv) damage or destruction of any property in India or in a foreign country used or intended to be used for the defence of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies; or
- b. overawes by means of criminal force or the show of criminal force or attempts to do so or causes death of any public functionary or attempts to cause death of any public functionary; or
- c. detains, kidnaps or abducts any person and threatens to kill or injure such person or does any other act in order to compel the Government of India, any State Government or the Government of a foreign country or any other person to do or abstain from doing any act,

commits a terrorist act. This definition covers terrorism aimed against India as well as other countries.

Section 23 provides for enhanced penalties on any person, who, with intent to aid any terrorist, or a terrorist organisation or a terrorist gang is in unauthorised possession of any bomb, dynamite or hazardous explosive substance or other lethal weapon or substance capable of mass destruction or biological or chemical substance of warfare. Such a person shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine.

In terms of Section 16A, inserted in 2008, "whoever intentionally, by use of force or threat of use of force or by any other means, demands any bomb, dynamite or other explosive substance or inflammable substances or firearms or other lethal weapons or poisonous or noxious or other chemicals or any biological, radiological, nuclear material or device, with the intention of aiding, abetting or committing a terrorist act, shall be punishable with imprisonment for a term which may extend to ten years, and shall also be liable to fine."

Death penalty may also be imposed where such act has resulted in the death of a person. Sections 17, 18, and 19 criminalize and provide for minimum punishment for funding such acts; conspiring to commit, or aiding and abetting such activities or any act preparatory to the commission of a terrorist act; and harbouring and concealing, including the attempt to do so, persons engaged in such activities.

Financing of terrorism and the activities and channels relating to informal movement of funds,

commonly known as 'hawala', and money laundering are also regulated under the Foreign Exchange Management Act (FEMA), 1999 and the Prevention of Money Laundering Act (PMLA), 2002.

India is a Party to the Chemical Weapons Convention (CWC) and has met all the destruction timelines of the Convention. It has voluntarily declared its stockpiles and facilities, strictly adhered to the Convention timelines and has demonstrated its commitment to eliminate this entire class of weapons of mass destruction. In order to give effect to CWC, India has enacted the Chemical Weapons Convention Act, 2000. Section 13 of the CWC Act, 2000 prohibits development, production, stockpiling, retention, and use of any chemical weapon by unauthorized persons. It also prohibits unlawful acquisition and direct or indirect transfers of chemical weapons. Section 40 criminalizes and provides for punishment with imprisonment for a term not less than one year but which may extend to life imprisonment and financial liability, in case of contravention of any provision of the Act.

The CWC Act, 2000 prohibits export from, or import into, India of toxic chemicals or precursors listed in the Schedules 1 to 3 in the Annex on Chemicals to the Chemical Weapons Convention except in accordance with the provisions of the Foreign Trade Policy determined by the Government from time to time under the Foreign Trade (Development and Regulation) Act, 1992 and the Orders issued thereunder (Section 17). Violation of this provision is punishable with imprisonment for a term not less than one year but which may extend to life imprisonment and financial liability (Section 43). Sections 41 and 42 provide for similar punishment for contraventions in relation to CWC Schedule 1 chemicals and transfers of CWC Schedule 2 chemicals. India also set up a National Authority in 1997 for implementing the provisions of the Chemical Weapons Convention.

Controls exercised by India over export of dual-use chemicals are stricter than the provisions of the Convention in some areas. Export of Schedule 1 chemicals are prohibited, with no exceptions. Export of Schedule 3 chemicals to other States Parties to the CWC, which are freely permissible under the Convention, are also controlled and are subject to submission of requisite documents by the exporter, including end-use cum end-user certification.

India is a State Party to the Biological and Toxin Weapons Convention (BTWC), 1972 and it ratified it in 1974. India has adopted a regulatory mechanism for the maintenance of security and oversight of pathogens, micro-organisms, genetically modified organisms and toxins in production, import, export, use and research. The Environment (Protection) Act, 1986 provides the mandate to the Government to lay down procedures and safeguards for handling hazardous substances. Contraventions of the provisions of the Act, Rules, Orders, or the Directions issued thereunder are punishable with imprisonment for a term which may extend to five years or with fine or with both. The 1989 Rules, under the Environment Protection Act, 1986 and the 1990 Guidelines, list micro-organisms on the basis of differential risk assessment. These lists, which are applicable from the biosafety point of view, are more elaborate than the list of micro-organisms and toxins included in Category 2 of the SCOMET List, notified by the Government for the purpose of dual-use export controls.



The Atomic Energy Act, 1962, and the Rules, Orders and Notifications issued thereunder, provide the legal framework for the development, control and use of atomic energy in India and use of atomic energy for civilian purpose and for regulating various activities connected therewith. Government exercises strict control over all activities related to atomic energy. The Act prohibits, except under a license, the acquisition, production, possession, use, disposal, export, or import of prescribed substances, prescribed equipment, specified minerals or other substances from which prescribed substances can be obtained, and plants designed or adapted or manufactured for the production, development and use of atomic energy or for research into matters connected therewith.

The Act also prohibits the manufacture, possession, use, transfer, export, import, transport and disposal of any radioactive substance without Government's written permission. Contravention of these provisions of the Act is punishable with imprisonment for a term which may extend up to a period of five years or with fine or both. The Nuclear Material Accounting Cell (NUMAC) of the Department of Atomic Energy is responsible for the State System of Accounting and Control (SSAC) of nuclear materials.

India is committed to its safeguards agreements, concluded with the International Atomic Energy Agency (IAEA). India is a State Party to the Convention on Physical Protection of Nuclear Materials (CPPNM) and has also ratified the Convention on Nuclear Safety in March 2005. As far as international co-operation is concerned, it has demonstrated it in ample measure.

### **National Control List**

India has always exercised control over the export of WMD-usable materials, equipment and technologies. Long before UNSCR 1540, India had taken a lead in enacting an export control law to regulate this sector: control over exports of such materials was effected in 1947 in the form of control on export of Monazite and Thorium Nitrate. The first formal control list, described as "Special Materials, Equipment and Technology (SMET)", was notified in the Export Import Policy announced on March 31, 1995. Separately, and effective from the same date i.e. April 1, 1995, the Department of Atomic Energy (DAE) issued gazette notifications, under the Atomic Energy Act, 1962, listing prescribed equipment and prescribed substances, that are subject to export licensing by the DAE. Pursuant to India's signature to the Chemical Weapons Convention (CWC) in January 1993, a list of dual-use chemicals, the export of which is either prohibited or permitted only under license, was issued in 1993. Pursuant to the Environment Protection Act, 1986, a gazette notification was issued by the Government in 1989 on rules for the manufacture, use, import, export and storage of hazardous microorganisms/genetically engineered organisms or cells.

Subsequently, through a notification effective April 1, 2000, the Director General of Foreign Trade specified a list of Special Chemicals, Organisms, Materials, Equipment and Technologies (SCOMET), the export of which is either prohibited or permitted only under license and the conditions attached thereto. This List is notified by the Director General of Foreign Trade (DGFT) at Schedule 2

Appendix 3 of the Indian Tariff Classification (Harmonized System) {ITC (HS)} of Export and Import Items, 2004-2009. The grant of license is subject to submission of requisite documents, including end-use cum end-user certification. The SCOMET list is harmonized with the NSG and MTCR lists and does not include at present any defence goods and services. This list is periodically reviewed and updated.

The list contains all dual-use items and technology within 8 categories. These are:

Category 0: Nuclear materials, facilities and related equipment

Category 1: Toxic chemical agents and other chemicals

Category 2: Micro-organisms and Toxins

Category 3: Special Materials, Materials Processing Equipment and Related Technologies

Category 4: Avionics and Navigation

Category 5: Aerospace materials, equipment, systems and related technologies

Category 6: Reserved

Category 7: Electronics, computers, and information technology including information security

## **Enforcement**

Contraventions of the provisions of this Act are also punishable under various laws such as the Indian Penal Code 1860, the Explosives Act, 1884, the Explosives Substances Act 1906, the Arms Act, 1959, the Atomic Energy Act, 1962, the Unlawful Activities Act, 1967, Foreign Trade (Development and Regulation) Act, 1992 and the Chemical Weapons Convention Act 2000. Export control violations are also punishable with imprisonment for a term which may extend to three years or with fine or both, under the Customs Act, 1962. This term may extend to seven years and with fine in case of subsequent violations.

Aware of the possibility of collusion by Customs officials, the Customs Act, 1962 special provisions for prosecuting Customs officials for conniving in fraudulent exports, including those effected in violation of SCOMET regulations.

## **WMD Act, 2005**

Weapons of Mass Destruction and their Delivery Systems (Prohibition of Unlawful Activities) Act 2005 (WMD Act), an integrated and overarching legislation on prohibiting unlawful activities in relation to Weapons of Mass Destruction, their delivery systems and related materials, equipment and technologies, adequately meets the requirements of the UNSC Resolution 1540. The Act prohibits any person not duly authorised by the Central Government to deal with weapons of mass destruction and their means of delivery.

Broad Features of WMD Act:

- The Act prohibits the export of any material, equipment or technology from India if the exporter

knows that such an item or technology is intended to be used in design and manufacture of a biological weapon, chemical weapon, nuclear weapon or other nuclear explosive device or in their missile delivery systems.

- The Act imposes a general prohibition on brokering, by Indians or foreign nationals in India, in any such transaction that is prohibited or regulated under the Act (Section 12).
- The Act also introduces controls over WMD-usable items or technologies brought in transit into India or being trans-shipped through India. In case of transit and trans-shipment controls, the provisions of this Act extend to India's Exclusive Economic Zone and its airspace and any ship, aircraft or other means of transport registered in India or outside India.
- A conveyance is in 'innocent passage' only if it is not engaged in activities related to weapons of mass destruction or their delivery systems.
- The Act provides for civil as well as criminal penalties in a graded manner:
- Criminal liability is also provided for anyone who attempts to contravene or abet the contravention of any provisions of the Act with an intent to aid terrorists with a punishment of a minimum imprisonment of five years extendable up to ten years.
- Civil and criminal liability has been provided for in case of export control violations, with a minimum punishment of six months extendable to five years. For repeat offences, the minimum punishment will be one year extendable to seven years.
- In case of violation of controls relating to transfer of regulated technology to foreign nationals within India, provisions have been made for civil penalties, with criminal liability for repeat offences.

### **Extra-Territoriality**

The basic principle of extra-territoriality is ingrained in the Indian Constitution and other laws.

**Indian Constitution:** Article 245 refers to the extent of laws made by the Parliament and by the Legislatures of States. It says:

- a. Subject to the provisions of the Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State
- b. No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation

**Indian Penal Code (IPC):** Section 4 which deals with extension of Code to extra-territorial offences, says that the provisions of this Code will also apply to any offence committed by:

1. Any citizen of India in any place without and beyond India;
2. Any person on any ship or aircraft registered in India wherever it may be.

It further explains that in this section the word "offence" includes every act committed outside India which, if committed in India, would be punishable under this code.

**WMD Act, 2005:** Section 3 of the WMD Act elaborates that its extent and application would include any person who commits an offence beyond India:

1. It extends to the whole of India including its Exclusive Economic Zone.
2. Every person shall be liable to punishment under this Act for every act or omission contrary to the provisions thereof, of which he is held guilty in India.
3. Any person who commits an offence beyond India, which is punishable under this Act, shall be dealt with according to the provisions of this Act in the same manner as if such act had been committed in India.
4. The provisions of this Act shall also apply to:
  - (a) Citizens of India outside India;
  - (b) Companies or bodies corporate, registered or incorporated in India or having their associates, branches or subsidiaries, outside India;
  - (c) Any ship, aircraft or other means of transport registered in India or outside India, wherever it may be;
  - (d) Foreigners while in India;
  - (e) Persons in the service of the Government of India, within and beyond India.
5. Notwithstanding the applicability of the provisions of any other Central Act relating to any activity provided herein, the provisions of this Act shall apply to export, transfer, re-transfer, transit and trans-shipment of material, equipment or technology of any description as are identified, designated, categorised or considered necessary by the Central Government, as pertinent or relevant to India as a Nuclear Weapon State, or to the national security of India, or to the furtherance of its foreign policy or its international obligations under any bilateral, multilateral or international treaty, Covenant, Convention or arrangement relating to weapons of mass destruction or their means of delivery, to which India is a Party.

### **The Unlawful Activities (Prevention) Act, 1967**

Any person, who commits an offence beyond India, which is punishable under this Act, shall be dealt with according to the provisions of this Act in the same manner as if such act had been committed in India.

The provisions of this Act apply also to:

- a. citizens of India outside India;
- b. persons in the service of the Government, wherever they may be; and
- c. persons on ships and aircrafts, registered in India, wherever they may be.

Section 17 deals with punishment for raising funds for terrorist acts. "Whoever, in India or in a foreign country, directly or indirectly, raises or collects funds or provides funds to any person or persons or attempts to provide funds to any person or persons, knowing that such funds are likely to be used by such person or persons to commit a terrorist act, notwithstanding whether such funds were actually used or not for commission of such act, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine."

### **The Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007**

The Ministry of Finance of Government of India has issued these Rules on the 8th May, 2007 vide Notification No. 47/2007-CUSTOMS (N.T.) under sub-section (1) of section 156 read with clauses

(n) and (u) of sub-section (2) of section 11 of the Customs Act, 1962.

Under these Rules, "goods infringing intellectual property rights" means any goods which are made, reproduced, put into circulation or otherwise used in breach of the intellectual property laws in India or outside India and without the consent of the right holder or a person duly authorized to do so by the right holder. A right holder may give notice in writing to the authorised Customs officer requesting for suspension of clearance of goods suspected to be infringing intellectual property rights, which are treated as prohibited goods. Whenever such goods are imported, the right holder is allowed to examine the goods.

Since many of the items, machineries, equipments, technology, drawings and designs etc. used in the field of WMD may have been registered under IPR laws in some country or other, illegal import of the same for clandestine use can be prevented, if the extra-territoriality principle used in the Indian Rules can be considered for adoption in other jurisdictions. The Indian Customs has also automated the entire process by developing 'Automated Recordation and Targeting System (ARTS) for IPR Protection', which has been circulated among member states as a Regional Best Practice by the World Customs Organisation (WCO). This is a unique initiative having humongous value for preventing proliferation of WMDs and the UN may consider its adoption by other countries.

### **Extra-Territoriality and the Principle of Realistic Nexus with National Interest**

Recently, in a case concerning the validity of a provision of the Indian Income Tax Act, a five Judge Constitution Bench of the Supreme Court of India, in the case of GVK Inds. Ltd. & Anr. v. ITO (Civil Appeal No. 7796 of 1997, dated 1 March 2011), dealt with the issue whether, under Article 245 of the Constitution, Parliament has the legislative competency with respect to aspects or causes that arise or exist outside the territory of India.

The Supreme Court has held that Parliament cannot make laws on extra-territorial matters which have no impact on the interest of the country.

The following questions were framed by the Constitutional Bench:

1. Is Parliament constitutionally restricted from enacting legislation with respect to extra-territorial aspects or causes that do not have, nor expected to have any, direct or indirect, tangible or intangible impact(s) on, or effect(s) in, or consequences for: (a) the territory of India, or any part of India; or (b) the interests of, welfare of, wellbeing of, or security of inhabitants of India, and Indians?
2. Does the Parliament have the powers to legislate "for" any territory, other than the territory of India or any part of it?

The court held:

- The essence of constitutionalism is that no organ of the State may arrogate to itself powers beyond what is specified in the Constitution.
- Article 245(1) empowers Parliament to make laws for the whole or any part of the territory of India. Two related limitations flow from the use of the word 'for' in Article 245(1).
- All powers vested in any organ of the State, including Parliament, may only be exercised for the benefit of India. As a logical corollary, the exercise of legislative powers by Parliament with regard to extra-territorial aspects or causes that do not have any nexus with India, transgresses the first

condition.

- Article 245(2) only carves out a specific exception that a law made by Parliament pursuant to Article 245(1) may not be invalidated on the ground that such a law may need to be operated extra-territorially.
- The distinction made between the 'making of laws' and the 'operation of laws' in the ECIL case is a valid one. Article 245(1) uses the phrase 'make laws', which signifies the grant of legislative powers, while Article 245(2) talks only about operation of laws which refers to laws that have already been enacted by Parliament under Article 245(1).
- Article 245(2) cannot be read as an independent source of legislative power of Parliament to enact laws for territories beyond India where, neither the aspects or causes have a nexus with India, nor the purposes of such laws are for the benefit of India.
- In as much as any extra-territorial aspects or causes may have an impact on or nexus with India, they would legitimately be within the domain of legislative competence of Parliament, so long as the purpose or object of such legislation is to benefit the people of India.

On the basis of the above, the Court answered the questions before it, as under:

- i. Parliament is constitutionally restricted from enacting legislation with respect to extra-territorial aspects or causes that do not have, nor expected to have any, direct or indirect, tangible or intangible impact(s) on, or effect(s) in, or consequences for:
  - (a) the territory of India, or any part of India; or
  - (b) the interests of, welfare of, wellbeing of, or security of inhabitants of India, and Indians
- ii. Parliament does not have the power to legislate for any territory other than the territory of India or any part of it. Laws enacted by Parliament with respect to extra-territorial aspects or causes that have no impact or nexus with India would be ultra vires and would be laws made 'for' a foreign country.

Further, the powers of Parliament, including those with respect to extra-territorial aspects or causes as outlined above cannot be subject to some a-priori quantitative tests, such as 'sufficiency' or 'significance'. All that is required is that the connection to India should be real, or expected to be real, and not illusory or fanciful."

The principles laid down in this decision will have a significant impact on cases where the extra-territorial reach of any legislation has been asserted.

## **Pakistan**

Pakistan has adopted the following legislations:

- i. The Import and Exports (Control) Act, 1950 -Section 5(1) of the Act provides for penalty of an individual with imprisonment for a term which may extend to one year, or with fine, or with both.
- ii. Pakistan Nuclear Safety and Radiation Protection (PNSRP) Ordinance of 1984 and Regulation of 1990 which contains provisions for control of import/export of nuclear substances and radioactive materials, was further strengthened by Pakistan Nuclear Regulatory Authority Ordinance 2001.
- iii. Chemical Weapons Convention Implementation Ordinance- 2000. The law enables the full

implementation and enforcement of the provisions of the Chemical Weapons Convention and regulates and controls the import and export of chemicals and provides for criminal penalties in case of violations.

- iv. Pakistan Nuclear Regulatory Authority Ordinance (PNRA), 2001. Under this Ordinance, PNRA issues the required “no objection certificate” (NOC) for all imports and exports of any radioactive materials or radiation sources and is responsible for controlling, regulating and supervising all matters related to nuclear safety and radiation protection measures. Person violating the provisions of sections 19, 20, 21, 22 or 23 of the Ordinance are punishable with imprisonment for a term which may extend to 7 years, or with fine which may extend to one million Pakistan rupees, or with both.
- v. Notification SRO.III (1) 2004 as amended on 16 February 2004: Nuclear substances, Radioactive Materials and any other substance or item covered by PNRA Ordinance, 2001; and Equipment used for production, use, or application of nuclear energy or activity, including generation of electricity and spares, are subject to NOC from PNRA as per procedure notified by the Pakistan Nuclear Regulatory Authority (PNRA).
- vi. Export Control on Goods, Technologies, Material and Equipment related to Nuclear and Biological Weapons and their Delivery Systems Act, 2004, is a comprehensive national legislation to further strengthen controls on export of sensitive technologies, particularly related to nuclear and biological weapons and their means of delivery. It gives a wider jurisdiction, applicable to Pakistanis visiting or working abroad. It provides for imprisonment up to 14 years, fine up to 5 million Pakistan Rupees or both, and on conviction, offender’s property and assets, irrespective of their location, are liable for forfeiture by the Federal Government.
- vii. Pakistan is also a Party to the Convention on Physical Protection of Nuclear Material (CPPNM) and has formally informed the IAEA regarding its voluntary commitment to follow the requirements of the Code of Conduct for the Safety and Security of Radioactive Sources.
- viii. Pakistan is a party to the Convention on Physical Protection of Nuclear Material and Nuclear Facilities since September 2000. PNSRP Regulations 1990 as amended in 1998 provides that “Licensee shall be responsible to organize and ensure the physical protection of nuclear material in use, storage and during transport and of nuclear facilities, including radioactive waste belonging to these facilities in accordance with the provisions of these regulations and guidelines issued from time to time”.
- ix. Chemical Weapons Convention Implementation Ordinance, 2000
- x. Export Control Act 2004 and the Export Control on Goods, Technology, Material and Equipment related to Nuclear and Biological Weapons and their Delivery Systems Act, 2004 provides a comprehensive framework for effective national export and trans-shipment control over goods and technologies that may contribute to proliferation.
- xi. Under the Export Control Act 2004, appropriate End-user certificate as well as catch-all clauses have been included. Violators are liable to be punished with imprisonment and fine, or with both.

### **Extra-territoriality**

The following legislations contain extra-territoriality provisions:

Export Control on goods, technologies, material and equipment related to nuclear and biological weapons and their delivery system Act 2004: Section 1 says:

It applies to:

- a. every citizen of Pakistan or a person in service of Pakistan within and beyond Pakistan or any Pakistani visiting or working abroad
- b. any Foreign national in Pakistan
- c. any ground transport ship or air craft registered in Pakistan

Pakistan Penal Code, 1860: Section 104 says: Extension of Code of extraterritorial offences: The provisions of this Code apply also to any offence committed by:

1. any citizen of Pakistan or any person in the service of Pakistan in any place without and beyond Pakistan
2. any person on any ship or aircraft registered in Pakistan wherever may be.

Explanation: In this section the word "offence" includes every act committed outside Pakistan which, if committed in Pakistan would be punishable under this Code.

Abetment in Pakistan of offences outside it - A person abets an offence within the meaning of this Code, who, in Pakistan, abets the commission of any act without and beyond Pakistan which would constitute an offence committed in Pakistan.

Chemical Weapon Convention Implementation Ordinance, 2000: Section 25 says:

The provisions of this Ordinance apply to any offence committed by:

- a. any citizen of Pakistan or any person in service of Pakistan in anyplace without and beyond Pakistan
- b. any person on any ship or aircraft registered in Pakistan wherever it may be

The following are some of the measures adopted by the Government of Pakistan, since October 2005:

**National Control lists:** Government of Pakistan has notified national control lists of goods, technologies, materials and equipment related to nuclear and biological weapons and their delivery systems, which are subject to strict export controls. These controls also extend to controls of re-exports, brokering and other transfers, transit and trans-shipment. These lists were notified by a Statutory Regulatory Order and are included in Export Policy Order, 2007 issued by the Ministry of Commerce and enforced by Pakistan Customs and other concerned enforcement agencies.

**Nuclear Security Action Plan:** In May 2006, the Government of Pakistan approved a Nuclear Security Action Plan which aims at (i) strengthening the safety and security of nuclear and radioactive materials and facilities containing such materials; (ii) prevention and detection of illicit trafficking in nuclear and other radioactive materials; and (iii) responding to incidents of illicit trafficking and nuclear and radioactive security emergencies. The Pakistan Nuclear Regulatory Authority is implementing the NSAP and is cooperating with the International Atomic Energy Agency (IAEA) on capacity-building in this regard.

The Pakistan Nuclear Regulatory Authority is using IAEA document INFCIRC/225, entitled "The Physical Protection of Nuclear Material and Nuclear Facilities" and the IAEA Code of Conduct on the



Safety and Security of Radioactive Sources as guidance documents for the formulation of national regulations on nuclear security.

### **National Biological Weapons Convention implementation legislation:**

The draft Biological Weapons Convention implementation legislation reportedly provides for all the prohibitions and controls prescribed by the Biological Weapons Convention and Security Council resolution 1540 (2004).

National Command Authority Ordinance, 2007: National Command Authority Ordinance, 2007 was promulgated to further strengthen and augment the national strategic regime. It provides enhanced legal coverage of security and safety measures on all matters concerning nuclear and space technologies, nuclear establishments, nuclear systems, nuclear materials, relevant personnel and related information, etc.

Participation in the IAEA Illicit Trafficking Database: Since 2005, Pakistan has participated in the IAEA's Illicit Trafficking Database, which is a voluntary reporting mechanism for incidents of illicit trafficking and other related unauthorized activities involving nuclear and other radioactive materials. The Database is a key part of IAEA activities to strengthen nuclear security worldwide and prevent nuclear and radiological terrorism.

Participation in the Global Initiative to Combat Nuclear Terrorism: In June 2007, Pakistan announced its participation in the Global Initiative to Combat Nuclear Terrorism by endorsing the Statement of Principles of the Initiative.

Container Security Initiative (CSI): Pakistan is participating in the United States Container Security Initiative. Under the CSI, containerized cargo bound for the United States of America is targeted and pre-screened before leaving Port Qasim, Karachi.

### **Sri Lanka**

Sri Lanka, which has struggled for decades fighting the onslaught of terrorism by LTTE, which was responsible for the killing of a former Prime Minister of India and a former President of Sri Lanka, has adopted the following legislations:

- Prevention of Terrorism Act No. 48 of 1979
- Act No. 18 of 1966 Chapter 38 on Offensive Weapons
- Penal Code
- Explosives Act
- Ordinance No. 22 of 1996 to Amend the Law Relating to Firearms
- Convention on the Suppression of Terrorist Financing Act, No. 25 of 2005
- Ordinance No. 22 of 1996 to Amend the Law Relating to Firearms
- National Environmental Act No. 56 of 1988
- Atomic Energy Authority Act No. 19 of 1969
- Customs Ordinance (Chapter 344)
- Customs Ordinance (Chapter 344)

- Imports and Exports Act No. 01 of 1969 as amended in 1987

## **Nepal**

During the past decade, Nepal witnessed many changes in its political system. From a Monarchy, it turned into a democracy with a new Constitution. But due to political instability, and frequent change of governments, its legal system is under severe stress. Currently, Nepal does not have a proper Constitution and hence there is a serious deficit in its legal system to effectively comply with the mandate of UNSCR 1540 and 1373. Since Nepal is a landlocked country, it imports goods through Indian ports under a special agreement with the government of India. Hence, the customary security inspections of the containers are made by Indian Customs officials, before the same are allowed to be sent to Nepal. Considering the porous nature of its border, this vulnerable area may be exploited by the non-state actors.

### **De Facto Control Regime: A Reality Check**

Are these domestic laws really adequate, and effective in achieving the true objective of the UNSCR 1540 and 1373? The answer to this question is in the negative. Some of the laws are archaic and either lack teeth or are not geared to handle the modus operandi of the modern age criminals. Besides, proliferation of laws has led to a sense of indifference and fatigue amongst countries that perceive these efforts as western-driven.

There is hardly any meaningful co-operation at the operational level amongst law enforcement agencies of the region. The porous borders and lack of capacity of law enforcement and border control agencies limit the effectiveness of the measures. In the field of financial intelligence, Financial Intelligence Unit of India (FIU-IND) has entered into agreement with Sri Lanka, the only country of the region.

### **Definition of Non-state Actor in UNSCR 1540: Difficulties in Identification and Enforcement**

A Non-State actor has been defined in UNSCR 1540 as “an individual or entity, not acting under the lawful authority of any State in conducting activities which come within the scope of this resolution.’ However, this definition poses problems in a situation, where non-state actors act as per authorization of States. When a non-State actor is sponsored, funded and supported by the Government of a State (say A), will it not lose its status as a non-State actor, as it would be working under the lawful authority of State A (government), in conducting activities which may come under the scope of UNSCR 1540?

UNSCR 1540, issued under Chapter VII of the Charter, enjoins a mandatory obligation on States to “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”.

Imagine a situation, when a non-State actor, which is groomed by the government of a State, say State A, and even partially funded by it for a specific type of terrorism, not involving use of WMDs, decides to go in for WMDs. Shouldn't the government of State A be held responsible and liable for breach of its legal obligation under UNSCR 1540? This situation becomes a little more complicated when another State (say B), which provides financial aid and material support to State A, in its joint mission to wage the so called ‘war against terror’, comes to know of the misuse of these funds by the government of State A in sponsoring non-State actors to perpetrate terrorism against another State (say C), but in its own national interest decides to provide more funds to this government. How will

the international legal community view this support (by State B to State A), when State B has full knowledge, and strong belief that part of these funds and other kinds of material support will be used by State A for terrorism through the non-state actors?

### **Appropriate Effective Laws: How to measure domestic laws?**

UNSCR further mentions, “ all States, in accordance with their national procedures, 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 and their means of delivery”. It also expects the member States to ‘develop and maintain appropriate effective border controls and law enforcement efforts to detect, deter, prevent and combat, including through international cooperation when necessary, the illicit trafficking and brokering in such items in accordance with their national legal authorities and legislation and consistent with international law; establish, develop, review and maintain appropriate effective national export and trans-shipment controls over such items, including appropriate laws and regulations to control export, transit, trans-shipment and re-export and controls on providing funds and services related to such export and trans-shipment such as financing, and transporting that would contribute to proliferation, as well as establishing end-user controls; and establishing and enforcing appropriate criminal or civil penalties for violations of such export control laws and regulations.”

However, considering the difference in state practices and governmental attitudes, inadequacy of human, financial or intellectual resources, deficit in capacity to draft legislations or enforce measures, a State might just draft some piece of legislation or certify the adequacy of some existing law to claim compliance with a particular UN resolution. But in effect, this kind of concocted legal framework may be neither appropriate nor effective. Many countries, which are not affected by any form of terrorism, or believe in terrorism as a means of achieving their goals, consider the UN resolutions as western-sponsored measures, having no or little relevance to them. For them, the fear of terrorists using WMD is a figment of imagination of some isolated developed western countries, a hyped-up fear that is more hypothetical than real and thus does not deserve their serious attention. These countries, therefore, go for cosmetic laws, that could hardly be considered as appropriate or effective.

### **SCOMET: Difficulties in enforcement of export control measures**

In the field of WMD, the list of SCOMET items runs into hundreds of pages and description of many of the items in the list is either too vague, too technical or esoteric for a common law enforcement or Customs official to understand the true meaning thereof. This results in ineffective enforcement of the laws. Since exports are considered as indicators of economic growth and source of foreign exchange in the developing countries, including in the States of the South Asian region, exporters are often rewarded by the governments with tax concessions, subsidies, drawback or rebates and consignments are not subjected to as much scrutiny as the imported consignments. This situation could be exploited by the non-State actors. It is, therefore, essential to automate the Customs clearance processes in all countries and more particularly in countries that are more vulnerable, with risk-based and rule-based automated processing of the documents and clearance of consignments. This can be easily achieved by inserting targets on SCOMET items so that whenever any such consignment comes for clearance, the system will automatically pick up the consignment for a detailed scrutiny. Until this happens, the control regime will neither be appropriate nor effective.

## **Graded approach to Offence in the Supply Chain: Inadequate Punishment in export-related offences**

Another issue of serious concern is the graded approach being adopted by different countries to prescribe different quantum of punishment for different types of offences committed in the course of the entire supply chain of WMDs and SCOMET: the highest punishment being given to offenders committing the actual terrorist act and a softer approach of lesser punishment being meted out to the offenders of export-related offences involving WMDs and SCOMET. The later type of offences are often treated as less serious fiscal offences and not given due importance by the law makers in prescribing adequate quantum of punishment to the offenders. But in reality, such offences have the potential to pose as much threat to national and international security as the main offence of a terrorist act. One should understand that a crime is a crime and one is convicted only when the mens rea of the accused person is proved by the courts and these being preparatory steps, which if not adequately deterred by a more stringent punishment regime, could facilitate perpetration of terrorism. It is, therefore, suggested that the legal provisions, prescribing punishment in export-related offences, should be given due attention so as to reflect the potentiality of the offence and its ability to pose greater risk to international security in the long run. The quantum of punishment, both civil penalty and sentence, should be proportionate to the gravity of the offence. No leniency should be shown in any area of the supply chain and a zero-tolerance approach should be adopted by all the States.

## **Regional Co-Operation: Reality Check in 26/11 case**

In the 26/11 case, India has been complaining of lack of co-operation from the Pakistani authorities in providing evidence for investigating the case properly and to unravel all aspects of the conspiracy and the crime. Initially, Pakistan had overemphasized the absence of the extradition treaty with India as a limiting factor to consider India's request for extradition of a few wanted suspects living in Pakistan. However, under the existing international and regional legal framework, Pakistan can still provide legal assistance. Both being members of the Commonwealth, India and Pakistan can use the Harare and London Schemes which provide for mutual legal assistance and extradition respectively between member countries, not having extradition Treaties between them.

Pakistan has claimed that the Mumbai attack was by the non-State actors, but being a Member of the UN, Pakistan is under legal obligation to implement the provisions of UNSCR 1373, and either prosecute or extradite the wanted persons. UNSCR1373 states that all States shall 'prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens' and suppress recruitment of members of terrorist groups and eliminate the supply of weapons to terrorists.'

Pakistan can also use Article III of the SAARC Convention, which says that if a contracting State makes extradition conditional on the existence of a treaty, the requested State may consider this Convention as the basis for extradition. Pakistani authorities are reported to have also said that Pakistan's domestic anti-terror laws did not cover acts committed outside the country and prosecution could not be launched, unless the laws were amended. However, Pakistan has initiated investigation into the case but the trial process has been very slow. On the other hand, trial of Kasab in India, the lone surviving terrorist, is over and he has been sentenced to death by the trial court.

If a country has the will to co-operate, it does not need any treaty or agreement but can even act through diplomatic channels in providing assistance to another State.

Thus, it can be said that the de jure control regime appears to be adequately in place in only a few countries of this region. It is either absent or grossly inadequate in many countries. Similarly, the de facto control regime is highly ineffective in many countries of the region.

## **Indian Cases**

### **North Korean Ship Kandla, Gujrat, 1999**

A North Korean ship, owned by a company, controlled by the Govt. of DPOK, which had called at Kandla port for discharging sugar, was found to be carrying 'Machine and Water refining equipment'. On examination by Indian Customs, it was revealed that the goods were in fact material and components for manufacturing missile systems. The address of the Consignee in Malta was found to be fictitious. The goods were meant for some unknown destination in Middle East. The Master and Crew members were arrested under the Customs Act, and later released; goods were confiscated by Indian Customs and penalty was imposed on the Master and crew members through an adjudication process. The ship was released against Sovereign Guarantee.

#### **Lessons learned**

This case shows that even in the absence of a more specific law on WMD, action could be taken under the provisions of the Foreign Trade Act and Customs Act against the foreign nationals and ship, registered in a foreign country. The investigation process which involved serving of notices and summons and verification of locations in foreign countries could be carried out under the provisions of the Customs Act.

There is a need to monitor movement of ships originating from or destined to suspect States. Originally, this ship was scheduled to go to Algeria to discharge sugar cargo and was never to touch an Indian port, but because of some litigation by a party, the ship was diverted to discharge the sugar in Kandla. Before this, the ship had commenced its voyage from North Korea and had berthed in Singapore, but there was no action on this sensitive cargo. But for the timely action by Indian Customs, the ship would have reached its destination and discharged the prohibited goods.

### **Export of SCOMET Items, 2001**

Indian Customs booked a case against a company for illegally exporting goods, mostly titanium vessels, covered under the SCOMET list, to UAE and Jordan, without obtaining a license from DGFT. The goods were suspected to have gone to Iraq. The Directors of the company were arrested and trial is underway.

#### **Lessons learned**

The officials of the importing countries could have been more vigilant. Since the goods were already exported and investigation was taken up by Indian Customs subsequently, confiscation of goods was not possible. The only recourse is to impose civil penalty and prosecute the company officials.

### **UAE Air Force Flight to China, 2009**

The United Arab Emirates (UAE) Embassy had sought clearance from Indian authorities for over-flying and landing of their Air Force flight at Kolkata Airport en route to Xianyang, China. The military transport plane from Abu Dhabi, the C-130 Hercules, landed at Kolkata on September 6, 2009 to refuel. At the time of initial declaration, no mention of the arms and ammunition was made,

and after the concurrence of the pilot-in-command of the aircraft, the Indian Customs Officials entered the aircraft and found it to be carrying military cargo. They detained the aircraft for further investigation. The UAE authorities, however, formally regretted the omission in clearly indicating items carried by the aircraft and described it as a 'technical error'. They have also provided details about the cargo which consists of a combat missile. Subsequently, the aircraft was released.

### **Lessons learned**

Routine acceptance by Indian Customs of the Pilot's declaration regarding arms and ammunitions could have resulted in serious violations of the laws. The incident proves that alert Customs officials can play a major role in enforcing laws relating to WMDs. In the 90's an aircraft that was given permission by the Indian authorities to fly over the Indian territory strayed away from the approved route and dropped a huge cache of arms and ammunitions at a place called Purulia, near Kolkata. The aircraft was intercepted at Mumbai and the crew, which comprised nationals from UK, Denmark and Latvia, was arrested. Extradition proceedings are still underway between India and Denmark. This case shows how small deviations in routes can pose a great threat to national security.

### **UN-contracted Ship, 2010**

A UN-contracted ship carrying surplus Pakistani and Bangladeshi military equipment and Nepalese military vehicles belonging to UN peacekeeping troops, deployed in the UN Mission in Liberia (UNMIL), had sailed from Monrovia, Liberia on 18 May, 2010. The cargo on board had UN markings and was being shipped under the authority of the United Nations. Upon arrival in India, the ship was held by the Indian Customs authorities, apparently due to inadequate communication between the ship's Captain and the Indian authorities. The ship, the Aegean Glory, was originally scheduled to sail from Liberia and arrive in Pakistan (Karachi), India (Calcutta), and then proceed to Bangladesh (Chittagong). However, without consulting UN, a unilateral decision was reportedly taken to alter the route to touch Bangladesh first and then to come to India to discharge cargo meant for Nepal, which is a landlocked State. This resulted in the Pakistani cargo still being on board the ship upon arrival in India, contrary to the original plan. However, after clarifications from the UN were received, the ship was allowed to proceed.

### **Lessons learned**

Considering the high incidence of piracy, transportation of such military cargos in privately contracted ships, without escort or monitoring of the route being taken by the ship, could be exploited by non-State actors and pirates. There has been an incidence of a private aircraft, with unauthorized UN logo on its wings, being used in Darfur in Sudan. UN may, therefore, like to review their existing policy for taking corrective measures, if required. Similarly, the independence given to the shipping lines to suo mottu change maritime routes needs to be reviewed. Sea routes are no longer safer, as has been seen in case of the 26/11 attack in Mumbai by terrorists coming by sea.

### **Summary of Recommendations:**

1. WMDs may be considered to be renamed as International Weapons of Mass Destruction (IWMDs) and offences involving these IWMDs may be considered as crime against humanity, given universal jurisdiction.
2. In order to make universal jurisdiction really meaningful, these offences may be considered for trial by ICC, when rogue States refuse to take effective action.
3. Definition of Non-State Actors need a re-look in the context of State-sponsored terrorism
4. UN may adopt a different AEM (Adequacy and Effectiveness) Matrix to assess the adequacy and

effectiveness of domestic laws and enforcement mechanisms.

5. A database of all such cases be maintained by the UN and followed up by the 1540 and 1373 Committees for effective and timely action by countries which have instituted the cases and for ensuring international co-operation amongst States, who may provide valuable information or evidence.
6. Zero-tolerance of all offences in WMD supply chain: It is seen that in most jurisdictions export-related offences, involving WMDs/SCOMET, are considered as ordinary violations that end with minor civil penalty or sentence for a period of just one or two years. There should not be any concession in sentence or penalty for violations of export control laws involving WMDs or SCOMET. The conviction and penal provisions for violations of export control laws involving WMDs or SCOMET should be proportionate to the gravity of the main offence.
7. UN may review the existing process of transportation of arms and ammunitions of UNPK Forces, and plug the loopholes, if any, to prevent such unescorted ships falling into the hands of pirates in the high seas or other non-State actors
8. The unilateral process of ships being allowed to divert routes may be considered for review and a process of permission, intimation or regulation may be put in place to effectively monitor the movement of ships and vessels in the sea.
9. Customs clearance of SCOMET may be automated through risk-based systems
10. Import / Trade in metal scrap should be monitored
11. Automated IPR Targeting Systems, on the model of Indian Customs, may be considered for implementation by WCO as an effective border control measure.
12. Capacity Building, Training and Skill Development of legal officers, investigators, regulators and prosecutors may be given top priority.

### III. Notes

[1] The author was a Member of the Panel of Experts of the UN Security Council and Consultant Counter-Terrorism Commonwealth Secretariat, London. Currently, he works with the Government of India. The views expressed in this article are personal.

### IV. Nautilus invites your responses

The Northeast Asia Peace and Security Network invites your responses to this essay. Please send responses to: [bscott@nautilus.org](mailto:bscott@nautilus.org). Responses will be considered for redistribution to the network only if they include the author's name, affiliation, and explicit consent.

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