

Regional Responses to Extra-Territoriality and Non-State Nuclear Actors: A Perspective From Southeast Asia

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Regional Responses to Extra-Territoriality and Non-State Nuclear Actors: A Perspective From Southeast Asia

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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

Raymund Jose G. Quilop, Associate Professor of Political Science at the University of the Philippines and Secretary of the Philippine Political Science Association, writes "In making Southeast Asian states more receptive to the practice of extraterritoriality particularly in regard to preventing non-state actors from having access to WMD, it would be helpful to fully utilize existing mechanisms for exchanging information including the numerous platforms that bring together leaders, foreign and defense officials as well as making existing treaties such as the SEANWFZ adapt to the changed regional environment where nuclear proliferation is no longer solely the result of state action but involves non-state actors too. Indeed, the complexity of the challenge of terrorism is eventually pushing governments to become more receptive to the idea of working together, not merely in having their efforts coordinated but in finding ways to collaborate with one another."

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II. Article by Raymund Jose G. Quilop

-“Regional Responses to Extra-Territoriality and Non-State Nuclear Actors: A Perspective From Southeast Asia”

By Raymund Jose G. Quilop

I

Almost 10 years ago, the menace of terrorism got global attention, what with the terrorist attacks on the US on September 11. Seven days later, the UN Security Council adopted Resolution 1373 which on the whole focused on preventing and suppressing the financing of terrorist acts but more importantly decided that all states shall “refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts... and deny safe haven to those who finance, plan, support or commit terrorist acts or provide safe havens” to terrorists (UN SC Resolution 1373). Equally important is that this resolution decided that all states shall “ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in support

terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offenses in domestic laws and regulations and that the punishment reflects the seriousness of such terrorist acts” (UN SC Resolution 1373).

Relatedly, it decided that all states shall “afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings” to prosecute terrorists (UN SC Resolution 1373).

Three years later (in April 2004), the UN Security Council passed UN Security Council Resolution 1540 which “calls on and obligates all states to strengthen their internal instruments of constraint [pertaining to] export controls, physical control, measures against trafficking and legal penalties” (Walker 2004: 74) in order to prevent non-state actors, specifically terrorists from having access to weapons of mass destruction (WMD) and related materials and technology. It required the enactment of “national legislation to prevent and criminalize activities of non-state actors who seek to acquire and proliferate WMD” (WMD Insights 2008: 1) and mandated states to submit reports on what specific steps have been undertaken towards this objective.

On a side note, this resolution therefore “acknowledges the state [as the] sole legitimate holder of WMD-related materiel” (Walker 2004: 74). More importantly, it notes that the “proliferation of nuclear, chemical and biological weapons, as well as their means of delivery constitutes a threat to international peace and security” (Walker 2004: 75).

In the same vein that a committee was formed to ensure that UNSC Resolution 1373 was implemented, so also formed was a committee (known as the 1540 Committee) to provide the Security Council with updates on what member states have undertaken in relation to UN Resolution 1540 (UN SC Resolution 1540). Having an original mandate of 2 years (April 2004-April 2006), the 1540 Committee’s mandate was extended for another 2 years by the UN Security Council in April 2006 through resolution 1673 (UN SC Resolution 1673). This mandate was once more extended (this time for three years) in April 2008 through UN SC Resolution 1810 (UN SC Resolution 1810). In April 2011 when the mandate of the UN 1540 Committee ends, the committee will be submitting a final report to the Security Council.

Among the numerous UN issuances related to countering the global menace of terrorism, these two resolutions (1373 and 1540) are important for they focus on what is believed to be two key aspects of terrorism, which the global community, must focus: terrorist financing and WMD proliferation -- financing has made terrorist acts feasible while access to WMD and related materials could make terrorist acts most lethal.

While these two resolutions both deal with terrorism, UNSC Resolution 1373 emphasizes the transnational character of terrorist financing and thus calls on states to cooperate with each other on preventing such lifeblood of terrorists. In contrast, UNSC Resolution 1540 emphasizes the individuality of the state in strengthening its domestic capacity to prevent terrorists from having access to WMD and related materials. Of course, this does not preclude states from seeking assistance from other states; neither do other states prevented from giving assistance to those seeking help. In fact, the 1540 committee has been explicitly tasked to provide states with the necessary expert assistance to develop such capacity.

II

The question that begs to be answered therefore as conceptualized in this workshop is whether states, specifically those which have developed their respective national legislations to prevent terrorists from having access to WMD and related materials and technologies, could enforce those legislations beyond the boundaries of their respective territories? Strengthening national controls to prevent terrorists from having access to WMD and related materials and technologies may be relatively easy (although of course several states to date still find it difficult to strengthen those controls) but enforcing such controls may be difficult particularly if such enforcement action goes beyond the immediate territory of a particular state, so the workshop concept paper rightfully notes.

The situation becomes more complicated in cases where a state becomes uncooperative as the regards the application of another state's counter terror actions on its territory.

Indeed, the global system is still underpinned by the principle of state sovereignty; states exercise absolute control over individuals within their territories. And compared to the Western hemisphere, this is something which is more pronounced in Southeast Asia specifically within the Association of Southeast Asian Nations (ASEAN) where the principle of state sovereignty is most valued. In fact, respect for sovereignty is something that is almost always and foremost highlighted within ASEAN both in terms of the association's formal documents as well as processes. Other observers have even argued that state sovereignty among ASEAN members is something held sacred so to speak. Given this, it is quite difficult for extra-territorial jurisdiction to be operationally practiced among the ASEAN members. Not only would an ASEAN member hesitate to venture into exercising jurisdiction beyond its normal and given territory but other ASEAN members would definitely find the attempt to do so difficult to accept.

While UNSC Resolution 1540 has been issued under Article VII of the UN Charter which obligates all states to comply with its provisions, the resolution does not explicitly allow states to ignore the sovereign rights of other states. In fact, by emphasizing the responsibility of individual states to undertake necessary measures to prevent terrorists from having access to WMD, the resolution reaffirms state sovereignty.

Besides, as rightfully observed by one scholar, with Article VII of the UN Charter being invoked in issuing UN SC Resolution 1540, the resolution is seen by Southeast Asian states as a "heavy handed imposition of one size fits all Western security agenda on the developing nations of the South without any thought for the specific security needs of different regions" (Ogilvie-White: 46). This is something which has been resented by Southeast Asian states and has weakened the legitimacy of the resolution.

III

Nonetheless, there are certain developments within Southeast Asia, specifically among members of ASEAN that are positive and may pave the way for a more substantive implementation of UN SC Resolution 1540 including the possible exercise of extra-territorial jurisdiction over the long term.

All of the ten members of ASEAN have complied with the first basic requirement of the UN Resolution 1540: submission of national reports, something which could be interpreted as a manifestation of their recognition of the legitimacy and validity of the resolution. Of course, needless to say, all the ASEAN states have either signed, acceded to or ratified various treaties and conventions related to WMD to include the Comprehensive Test Ban Treaty, Chemical Weapons Convention, Biological and Toxins Convention and the Non-Proliferation Treaty (Center for International Trade and Security, The University of Georgia's School of Politics and International Affairs).

There is also a growing recognition of the how issues of nuclear proliferation and non-state actors coming into the picture are related and interface with each other. Philippine Foreign Affairs Alberto G. Romulo, then the chairman of the ASEAN Ministerial Meeting (AMM) in 2007 has stressed that "to ensure regional and global security, which is the vision of ASEAN, the scourge of nuclear weapons must be eliminated. The emergence of possible non-state actors that might be eager to resort to the threat or use of nuclear weapons, highlights the seriousness of this concern"(www.gov.ph 2007: 1)

In the ASEAN Regional Forum (ARF) where ASEAN is the chair, the foreign ministers "agreed to establish an Inter-sessional Meeting (ISM) on Non-Proliferation and Disarmament" in July 2008. This ISM serves as a "platform for discussion and cooperation on these issues" with specific focus on the regional implementation of UN Resolution 1540 (Chairman's Statement, 15th ARF, 24 July 2008).

And not to be forgotten is the fact that there exists within ASEAN a treaty calling for the establishment of a Southeast Asian Nuclear Weapons Free Zone (SEANWFZ). In fact, this is one of

the two treaties entered into by ASEAN members with the only other treaty being the Treaty of Amity and Cooperation. The rest of ASEAN documents are declarations or chairman's statements. The SEANWFZ treaty, which entered into force in 1997, covers the territories, continental shelves and exclusive economic zones (EEZs) of the ASEAN members and obliges them

not to develop, manufacture or otherwise acquire, possess or have control over nuclear weapons; station nuclear weapons; or test or use nuclear weapons anywhere inside or outside the treaty zone; not to seek or receive any assistance in this; not to take any action to assist or encourage the manufacture or acquisition of any nuclear explosive device by any state; not to provide source or special fissionable materials or equipment to any non-nuclear weapon state (NNWS), or any NWS unless subject to safeguards agreements with the International Atomic Energy Agency (IAEA); to prevent in the territory of States Parties the stationing of any nuclear explosive device; to prevent the testing of any nuclear explosive device; not to dump radioactive wastes and other radioactive matter at sea anywhere within the zone, and to prevent the dumping of radioactive wastes and other radioactive matter by anyone in the territorial sea of the States Parties (Center for Non-Proliferation Studies 2008).

IV

With the realities in Southeast Asia (both constraining and enabling factors mentioned above), what is needed to be done is to move from a tacit recognition of the dangers of non-state actors having access to WMD to explicit action of preventing them from being able to have such an access (Quilop 2008). This could be done by working towards further elevating the issue of WMD proliferation higher in the agenda of ASEAN. Given the ASEAN practice of "moving at a pace comfortable to all", this could be undertaken by putting this issue as one of the topics in the exchange of views and security outlooks which have become standard in all ASEAN-related meetings, whether foreign affairs initiated or defense ministry-led.

Over the long term, extra-territorial jurisdiction could be operationally implemented with the forging of extradition treaties among ASEAN members. To date, Thailand has signed the most number of extradition treaties (with Cambodia, Indonesia, Lao PDR, Malaysia and the Philippines). Indonesia follows with extradition treaties having been signed with Malaysia, the Philippines, Singapore and Thailand. The Philippines has extradition treaties with Indonesia and Thailand. Cambodia has signed such treaty with Thailand and Lao PDR while Lao PDR has signed extradition treaties with Cambodia and Thailand. Singapore has extradition treaty solely with Indonesia. Brunei, Myanmar and Vietnam have not signed any such treaty with their ASEAN neighbours. The table below lists the ASEAN members with extradition treaties with fellow ASEAN states and the year the treaty was signed.

| Country A | Country B | Year Signed |
|-------------------|-------------|-------------|
| Brunei Darussalam | none | |
| Cambodia | Thailand | 1998 |
| | Lao PDR | 2005 |
| Indonesia | Malaysia | 1974 |
| | Philippines | 1976 |
| | Singapore | 2007 |
| | Thailand | 1976 |
| Lao PDR | Cambodia | 2005 |
| | Thailand | 1999 |
| Malaysia | Indonesia | 1974 |
| | Thailand | 1911 |
| Myanmar | none | |
| Philippines | Indonesia | 1976 |
| | Thailand | 1981 |
| Singapore | Indonesia | 2007 |
| Thailand | Cambodia | 1998 |
| | Indonesia | 1976 |
| | Lao PDR | 1999 |
| | Malaysia | 1911 |
| | Philippines | 1981 |
| Vietnam | none | |

While it would ideal and a lot simpler to have an ASEAN-wide extradition treaty, it would be more pragmatic to work for a set of bilateral extradition treaties, with each ASEAN member signing a treaty with the other members of ASEAN. This is borne out of the reality that while ASEAN is a multilateral body, it still operates as a network of bilateral relationship, in spite of the ASEAN Charter having been signed in 2008.

In the meantime, what could be done is to further fully utilize established mechanisms for sharing intelligence information among ASEAN members. It must be noted that there exist an “Agreement on Information Exchange and Establishment of Communication” in ASEAN which has been signed by the Philippines, Indonesia and the Philippines in May 2002. The agreement is open to accession by the other members of ASEAN. However, to date, only Thailand and Cambodia have acceded to the agreement.

The agreement has specified terrorism, smuggling, piracy and armed robbery at sea, hijacking, intrusion, illegal entry, drug trafficking, theft of marine resources, marine pollution, and illicit trafficking in arms as the areas where the signatories will be sharing information. (Article III). To facilitate information sharing, each party has been tasked to “designate an organization to act as the communication cum liaison center” with communication procedures being established among these centers (Article IV).

What is interesting to point out here is that the agreement clearly spells out that “a person arrested for an offense shall be dealt with in accordance with the laws of the arresting party”. For nationals of the signatories of the agreement, this is a de facto waiver of jurisdiction and not an extra-territorial exercise of jurisdiction. The agreement also specifically states that “if a national of any of the parties is arrested for an offense by an authorized law enforcement communication agency of another Party in the latter’s territory, the designated communication cum liaison center, shall, subject to its national laws and security considerations, endeavour to inform its counterpart, as expeditiously as possible, of such arrest, giving the status and action taken thereon” (Art V, paragraph 5).

It is also worth noting that a list of projects to implement the agreement has been annexed to the document. These include the following, to wit: (1) establishing

cooperation and standard operating procedures on search and rescue, (2) establishing focal point in each country, (3) setting up of hotlines, (4) sharing of airline passenger lists, (5) providing access to each other's computerized fingerprint databank, (6) conducting consultations on visa waiver lists of third party nationals, (7) sharing blacklists at visa-issuing offices, (8) undertaking joint efforts to combat terrorism, (9) conducting joint training and exercises on combating terrorism and transnational crimes, (10) strengthening border control through the establishment of designated entry and exit points and sea lanes, (11) increasing harmonization of legislation to combat terrorism and other transnational crimes, (12) recommending and strengthening legislation to combat terrorism and other transnational crimes by the enhancement of penalties, (13) recommending accession to and ratification of international conventions on terrorism and other transnational crimes, (14) recommending institution and capacity building and their harmonization against terrorism and other transnational crimes, (15) undertaking joint public diplomacy to counter terrorists' propaganda, (16) recommending the deployment of more law enforcement agents in their respective territories identified as entry and exit points for illegal activities, (17) exchanging information regarding fake or forged documents, (18) increasing public awareness on trafficking in persons, by undertaking a study on this issue in the region, and (19) recommending the creation of a built-in early warning system to counter trafficking in persons.

Aside from agreements where ASEAN members explicitly declare to share information among them, they also regularly conduct intelligence exchanges with topics usually on actions and personalities believed to be involved, in one form or another, to terrorism. Not only do their intelligence people regularly interact, the chiefs of their armed forces and defense ministers also regularly meet with each other, with terrorism remaining as one of the topics of their meetings, including the possible movement of people suspected of being involved in terrorism across the boundaries of ASEAN countries. Given the porousness of borders of ASEAN members, it is necessary to have terrorist-related personalities constantly monitored.

It is the need to monitor the movement of suspected terrorists which necessitates the integration into a wider system of individual ASEAN members' system of surveillance and monitoring so that they are linked together. For example, the Coast Watch South project of the Philippine Navy "designed to enhance the Philippine Navy's ability to conduct surveillance" (www.positivenewsmedia.net 2009) and meant to "monitor and prevent the movement of terrorists and pirates" (www.philstar.com 2009) in the Philippines' southern corridor could be linked with similar projects of Malaysia and Indonesia. This would also further enhance the border patrol cooperative activities being regularly undertaken by the Philippines, Indonesia and Malaysia.

Finally, while the focus of the SEANWFZ treaty is practically keeping the Southeast Asian region free from nuclear weapons held by states, something is made evident both by the text of the treaty as well as the fact that its protocol is supposed to be acceded to by the five nuclear weapon states, making Southeast Asia truly a zone free from nuclear weapons could also mean preventing non-state actors from having and/or developing their own nuclear bombs, which no matter how crude, are lethal nonetheless.

The latest review done by the Commission on SEANWFZ was undertaken in 2006 and drew the SEANWFZ Action Plan for 2007-2012. With the end of the five-year plan period drawing near, it may be possible that another review would soon be undertaken and another action plan drawn. It would therefore be timely to make proposals on how the next action plan could as well include provisions for dealing with non-state actors and preventing them from having access to WMD specifically nuclear and fissile materials. This would make the SEANWFZ treaty, an instrument conceptualized in the previous

context where states are the only ones seen to be responsible for proliferating nuclear weapons could be made more relevant in meeting today's possibility that non-state actors could have access to nuclear and fissile materials and technology.

V

To conclude, operationalizing the principle of extraterritoriality in Southeast Asia may be difficult given the Southeast Asian states sensitivity to their being sovereign states as explained about. Nonetheless, there are certain positive developments within ASEAN which paves the way for an optimistic outlook as regards the possible exercise of extraterritoriality particularly in regard to dealing with non-state actors and preventing them from having access to WMD and related materials as envisioned in UN Resolution 1540.

In making Southeast Asian states more receptive to the practice of extraterritoriality particularly in regard to preventing non-state actors from having access to WMD, it would be helpful to fully utilize existing mechanisms for exchanging information including the numerous platforms that bring together leaders, foreign and defense officials as well as making existing treaties such as the SEANWFZ adapt to the changed regional environment where nuclear proliferation is no longer solely the result of state action but involves non-state actors too. Indeed, the complexity of the challenge of terrorism is eventually pushing governments to become more receptive to the idea of working together, not merely in having their efforts coordinated but in finding ways to collaborate with one another.

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