

Legal Cooperation to Control Non-State Nuclear proliferation: Extra-Territorial Jurisdiction and UN Resolutions 1540 and 1373



**Summary Report of a Workshop
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Executive Summary

This report is based on a workshop of international experts from various policy groups, state bodies and institutes who convened for a workshop at the Carnegie Endowment of International Peace, organised by the Nautilus Institute, the Stanley Foundation and the Carnegie Endowment of International Peace, April 4-5, 2011.

The gathering was convened to identify pathways and options for criminalization of the trafficking of illicit nuclear materials by non-state actors, taking into account the interaction between UN Resolutions 1540 (2004) and 1373 (2001). 1540 focuses on proliferation of weapons of mass destruction (hereafter WMD) proliferation from non-state actors, obligating states to make efforts to criminalize such activities. 1373 is an anti-terrorist resolution that targets non-state networks by restricting their financing, movement and organization.

The participants reflected on links between the resolutions, identifying existing regimes of control at the international and domestic level, including bodies of legislation, international treaties, existing organisations that might feature in monitoring the trafficking of such material, and customary norms of international law that might trigger state jurisdiction.

Discussions also centred on various possible responses on how an international norm on criminalizing such trafficking might arise, dealing with the catalysing influence of 1540 on international state practice. What are WMD crimes that command universal jurisdiction? Is smuggling or providing dual-use or even WMD-specific equipment, knowledge, or personnel used in nuclear weapons to terrorists an international crime?

Overall, the primary WMD focus at the workshop was on nuclear weapons, although reference was made in two presentations to biological and chemical weapons and during the dialogue. Three facets of nuclear trafficking were examined: nuclear materials, with a special attention on fissile materials; nuclear-specific commodities such as uranium enrichment centrifuges; and dual-use technology that can be used in nuclear weapons (including knowledge, material, techniques, and hardware).

Supply chains in this field tend to have two elements: the supply-driven chain of weapons-usable nuclear material, involving insider thieves, brokers, middle-men and smugglers; and the demand-driven chain of nuclear weapons-related technology (scientists, engineers).

The participants faced the challenge of how to distinguish between different types of state and non-state actors, and their respective fields of operation. The definition of non-state actors is particularly fuzzy, both legally and across legal and political cultures, although the discussion edged the participants closer to a common understanding. The dialogue revealed that legal terms are not well reflected in policy practice, a situation that requires remedying.

The workshop set out to find intelligence and analytic means whereby non-state actors might be identified in the chain of supply, be they national smugglers, commodities brokers, terrorist organizations, or corrupt officials. Use of combined open source and classified intelligence information and active monitoring of legal “black holes” in the legal regime (studies were presented on Taiwan, the Tri-Border area in South America) were also seen as potentially attractive models of analysis, whether for spotting trafficking in contraband or people smuggling. Networks of criminals and terrorists should not be treated separately, but should be co-joined, as they are increasingly in the real world.

Existing frameworks of international already provide the means of facilitating cooperation in regulating the movement of illicit WMD materials. The International Convention for the Suppression of Acts of Nuclear Terrorism (hereafter, Nuclear Terrorism Convention), with 76 signatories, covers trafficking nuclear materials, buttressed by strong legal assistance provisions. That said, problems in conflicting terminology and gaps drafting were identified across several legal instruments, leaving legal holes wide open for non-state actors to slip through.

Additionally, existing regimes like UN Security Council Resolution 1292 (dealing with North Korea) and 1874 (dealing with Iran) provide a direct method whereby states may control buyers and suppliers with an international legal mandate. Resolutions such as 1929 enable countries to enact laws controlling companies doing business with such regimes as Iran, thereby providing a global model of control that emphasises risk to reputation on the part of commercial entities, combined with shame and restraint by corporate officials.

The effectiveness of the 1540 regime in terms of compliance, as examined through the various matrices reported to the 1540 Committee, was also questioned. Although reporting to the UN 1540 Committee has improved greatly in the 2010 round, some countries still have not submitted reports or are doing so in lethargic fashion. There are gaps about whether states have implemented enforcing legislation. There is also a disparity in terms of resources available for such implementation, suggesting an overall unevenness in the regime.

Delegates debated intensely about where to position customary international law and the role 1540 played in forming universally recognised norms of state behaviour. 1540 was recognised as a potential catalyst to stimulate *opinio juris*, or behaviour regarded as binding by states. Extra-territoriality that triggered criminal jurisdiction was found to be a problematic and varied concept for various states and various regions. Extra-territoriality in the form of universal jurisdiction, for example, was considered to be very much a matter of Western state practice. Participants debated whether a treaty was needed to clarify international law with regard to WMD and universal crimes? Nonetheless, research was presented that suggests a rapid expansion of state-based extra-territoriality in implementing legislation under 1540 obligations, to the extent that now more than fifty states report extra-territoriality in at least one aspect of their legal controls.

Notwithstanding suspicions about extra-territoriality, there are a number of proposals for East Asian, Asia Pacific, South Asia, and the countries of the Asia-Pacific for enhancing mutual legal assistance, notably in the area of extradition.

Returning to fundamentals, deterrence theory suggests that what is required in future is a comprehensive consideration of strategies, actors and tools. Strategies would involve the denial of supply through direct action, deterrence through penalty, and creating a co-operative framework whereby intelligence is used to achieve both denial and deterrence.

A cooperative framework to criminalize and control nuclear materials by non-state actors will depend most of all on cross-country and cross-agency intelligence sharing and regimes of regional cooperation. Prosecutorial effectiveness can be undermined by the application of local laws that frustrate legal suits against suspects in the gathering of evidence, and limitations on extradition. That said, experienced prosecutors expressed optimism that progress is being made in area through informal information sharing arrangements and “extraterritorial prosecutions.”

Given the commercial motivation of many non-state agents engaged in nuclear commodity transactions, financial instruments aimed at halting and seizing funds by freezing assets, anti-money laundering, etc are particularly potent—at least, such was asserted, although some demurred as to the extent of actual success in implementation both with regard to the scale of the funds affected by such measures, and with respect to achieving productive changes in the behaviour of the proliferating entities—mostly states. Flows of physical commodities can also be interdicted at borders by agencies such as customs, which oversee inception of traffic. Suggestions were made that digitized records of the overall transnational supply chain might be mined for anomalous patterns to assist border agents identify shipments of WMD-related goods, similar to the way that Internet messages are monitored and sifted by intelligence agencies today.

Nonetheless, data sharing faces severe obstacles, notably where the material is proprietary or sources are sensitive. The limitations to cooperation across borders imposed by sovereignty remain. Regional

implementation of the non-proliferation regime is problematic given the unevenness of local resources, and specific risks in specific regions must be identified.

Finally, some participants warned against fragmenting the body of international and national law instead of combining it into a whole. Many delegates were wary that more laws may not only be undesirable but unworkable due to the proliferation of burdensome conventions with overlapping, sometimes inconsistent mandates and obligations.

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Summary Report

Workshop on Legal Cooperation to Control Non-State Nuclear proliferation: Extra-Territorial Jurisdiction and UN Resolutions 1540 and 1373, Washington, D.C., April 4-5, 2011

- **Introduction**

This summary report is based on a workshop of international experts from various policy groups, state bodies and institutes who met for a workshop at the Carnegie Endowment of International Peace, organised by the Nautilus Institute, the Stanley Foundation and the Carnegie Endowment of International Peace. The workshop was funded by the Hewlett Foundation, the Ploughshares Fund, and the Stanley Foundation. The gathering was convened to identify pathways and options for criminalization of the trafficking of illicit nuclear materials by non-state actors, taking into account the interaction between UN Security Council Resolutions 1540 (2004) and 1373 (2001). The workshop was conducted under Chatham House “no attribution” rules with respect to discussion during the workshop (papers are however, public); and brought together 40 experts from all regions of the world, and across an array of institutional stakeholders involved in addressing the non-state actor WMD problem.¹ A complete list of participants is provided in Attachment B.

UNSCR 1540 focuses on proliferation of weapons of mass destruction (WMD) from non-state actors, obligating states to criminalize such activities. 1373 is an anti-terrorist resolution that targets non-state networks by restricting their financing, movement and organization. Under Chapter VII of the United Nations Charter, such instruments are binding on member states.

The participants reflected on links between the resolutions, identifying existing regimes of control at the international and domestic level, including bodies of domestic legislation, international treaties, existing organisations that might feature in monitoring the trafficking of such material, and customary norms of international law that might trigger penal jurisdiction. Discussions also centred on various possible responses on how an international norm on criminalizing such trafficking might arise, dealing with the catalysing influence of 1540. What are crimes that command universal jurisdiction? Is smuggling or providing nuclear weapons to terrorists an international crime?¹

- **An environmental metaphor**

Participants reflected on the urgent need to move beyond country-specific solutions to the problem and identify and implement an effective global framework to combat the proliferation of non-state WMD.

The workshop began with Peter Hayes comparing the crisis in non-state nuclear proliferation with that of climate change: “Like an old dam threatened by more frequent and intense floods due to climate change, the institutional edifice of export controls and constraints on non-state proliferation activity constructed in the early NPT era is cracked, fissured, and full of holes. We can plug some holes or stabilize the foundations, but the dam itself is under siege. The only solution is a whole new strategy, one based on watershed management of water supply and demand, many technological and design measures (including new dams), climate change mitigation and adaptation, better weather forecasting, and built-in redundancy to respond to an almost inevitable failure somewhere in the system—all the while making incremental improvements to the old dam until replaced.”²

Similarly, the edifice of nuclear export controls is under siege. The dam against uncontrolled exports represented by the Nuclear Suppliers Group and related regimes is leaking badly. New strategies are required emphasizing management, technology design, adaptation of cities to increase resilience against

¹ The papers delivered at the workshop are available at the Nautilus website and a list of these papers is provided in Attachment A. The list of participants is provided in Attachment B. The agenda of the workshop is provided in Attachment C.

attack on critical infrastructure, better intelligence for immediate and longer term adaptation to the threat of non-state WMD proliferation, new technologies to discern such transactions from the background noise of cargo flows, all the while making incremental improvements to the existing legal controls, especially export controls.

Thus, the overarching question put to the participants at the outset was: “What kind of multi-layered, multi-level, multi-dimensional set of legal and institutional controls could win this race against non-state actors dedicated to proliferating WMD and using them against civilian populations?”³

Many were surprised to learn at the workshop of the number of that include extra-territoriality in their 1540 control legislation, at least compared with 2004 when very few did so.⁴ But while extra-territoriality can cover some of the shortfall of international law regarding non-state smuggling of nuclear contraband, albeit in an uneven and inconsistent manner, there is no systematic international law in place to guide national laws, including their extra-territorial application, in the area of greatest deficit legal deficit--namely, the smuggling dimension of WMD-related dual use technology, knowledge, and material, especially those needed to make nuclear weapons.

Overcoming this deficit entails surmounting multiple obstacles at the same time. Participants argued that multiple solutions must be implemented at the same time to these obstacles including: a multi-layered set of legal and institutional instruments; tailored approaches on how to implement 1540, be it a top-down or bottom-up, especially at the regional level, the use where necessary of extra-territoriality on a unilateral basis, the application of national sanctions mandated by the UN Security Council against the most egregious violators; and the importance of identifying, tracking and controlling the myriad of “non-state actors” contributing to the problem in the first place.

Are we, to borrow a term from Fred McGoldrick, entering a twilight zone of international law leading to, as Austen Parrish claimed, a crazy quilt of overlapping jurisdictions? Is nuclear smuggling a crime against humanity, as Ann-Marie Slaughter urged it should be, thereby triggering universal jurisdiction?⁵ Or are we awaiting a cataclysmic jolt of destructive terror to initiate change?⁶

Control and regulation of WMD proliferation is problematic at the international level. The existence of deterrence implies an absence of international community.⁷ We need a higher level of international community that accepts, for instance, that nuclear proliferation is a global problem that needs to be resolved decisively. At present, many states view nuclear proliferation to be of relatively low priority.

- **Broader frameworks**

Nuclear trafficking has two facets: nuclear materials, particularly fissile materials; and nuclear commodities, both nuclear specific components such as uranium enrichment centrifuges, or nuclear-specific knowledge such as nuclear test data or nuclear weapons design; and nuclear dual-use technology such as warhead components weapons.⁸ Supply chains tend to be of two types: the supply-driven chain of weapons-usable nuclear material, involving insider thieves, brokers, middle-men and smugglers; and the demand-driven chain of nuclear weapons-related technology (involving more scientists and engineers).⁹

The most notorious example of the latter is the A.Q. Khan network, which demonstrated, on the one hand, how international cooperation might eliminate a group dealing with nuclear proliferation by non-agents, and on the other, the weakness of a prosecution regime that took twenty years to respond to his operations in twenty countries.¹⁰ It also demonstrated the need for a deep-rooted, widespread deterrent culture to arise against such groups, and to forge links between non-state agents and state proliferation of nuclear technology.¹¹

Pre-existing frameworks of international law can facilitate cooperation in regulating the movement of such materials.² However, existing conventions rely on national regulatory measures and enforcement

² A list of WMD-related conventions is provided in Attachment D.

which is often weak or non-existent. Also, the Nuclear Terrorism Convention has not been ratified by many states although it is now in force.

Nonetheless, many instruments exist to draw upon, and their numbers are growing.¹² Existing instruments offer varying definitions of nuclear security and address in different ways the prevention and detection of and response to theft, sabotage, unauthorized access, illegal transfer or other malicious acts involving nuclear material, other radioactive substances or their associated facilities.¹³ The Nuclear Terrorism Convention, with 76 signatories, covers trafficking nuclear materials, buttressed by strong legal assistance provisions. It covers all radioactive material that could cause significant injury including nuclear material. It is the most recent of multiple universal UN anti-terrorism conventions (see Attachment D).¹⁴

Other resolutions arguably complement 1540 and 1373. Both UNSCR 1673 (2006) and 1810 (2008) extend the focus of 1540 by insisting that states implement its objectives. Country-specific resolutions such as UNSCR 1874 (North Korea) calls upon states to interdict vessels going to and leaving the DPRK that might contain various prohibited items as specified by UNSCR 1718 (2006).¹⁵ UNSCR 1292 (Iran) imposes bans on Iranian nuclear and missile investment abroad and replicates similar provisions from that of the North Korean resolution. Travel is also banned for individuals designated by the Security Council who materially assist nuclear and missile programs to those countries.¹⁶ States are also encouraged to freeze financial assets linked to the WMD program. In some cases, companies and individuals have been designated,¹⁷ and states have then sanctioned these companies and individuals, and then added to the list in their own sanctions, thereby asserting a state practice that heralds the formation of a new state customary legal norm. UNSC Resolutions such as 1874 mandate states to implement national controls on buyers and suppliers. Resolutions such as 1929 enable countries to enact laws controlling their own companies from doing business with regimes such as Iran, thereby providing a global model of national control instigated by the UN Security Council. Businesses such as banks or insurance companies are immediately reluctant to do business, even indirectly, with those regimes.¹⁸

As noted earlier, definitional problems have arisen in the various instruments. Both the Nuclear Terrorism Convention and the Convention on the Physical Protection of Nuclear Materials (CCPNM) make the trafficking of nuclear materials an offence. However, neither covers nuclear commodities other than fissile material. 1540 makes it clear that both materials and commodities needed to make WMD must be controlled by states. It also stipulates that states must enforce these legal controls by adopting and imposing civil or criminal penalties for illicit export, trans-shipment and financing. But it does not openly criminalize such activities, leaving it up to states to do so at a domestic level.¹⁹ There are also differing definitions between protocols over such terms as nuclear facilities. The same can be said of 1540 in terms of scope and drafting.²⁰ Although it seems incredible, 1540 does not include radiological materials within its scope of implementation but instead directs states to implement the existing Conventions and Codes that cover these items—but only in a partial, uneven, and possibly incomplete manner.²¹

- **Strength of control regimes**

1540 is constructed upon an overarching principle that states will determine their priorities and means of implementation. The 1540 Committee is informed—if reports are filed—if the resolution is implemented across the hundreds of actions items identified in the reporting matrix that it sends to states. But the 1540 Committee has no way to ascertain the degree of actual performance with regard to the adequacy of the law, let alone how it is enforced. Even if states implemented it with respect to all items, there would still be discrepancies due to drafting and different legal traditions. There are no qualitative assessments about what states are doing at the bottom of the pyramid in terms of how they are applying the code of conduct.²²

Despite its lexical problems 1540 remains the most incrementally progressive umbrella instrument under which to initiate changes.²³ As prefigured above, 81 countries have made their 1540 matrices

publicly available across a spreadsheet of some 382 fields of which 110 relate to nuclear weapons issues. These in turn are divided into legislation and enforcement mechanisms.²⁴ But it is not within the 1540 Committee's mandate to carry out assessments about how effectiveness of implementation.

There are reporting gaps, for example, as to whether states have implemented enforcing legislation. In part, this gap may be due to a disparity between states in terms of resources available for such implementation.²⁵ The matrices say almost nothing about how effective such implementation has been. Indeed, some countries cite pre-existing criminal codes to claim they are fulfilling their 1540 obligations. Only a few countries cite 1540 as a vital feature in changing their criminal laws.²⁶ Thus, interpreting the 1540 matrices is not straightforward. Often, reported legislation cited in their national report does not match what countries claim to have done in other contexts.

Despite such drawbacks, it was noted that key countries such as China who would not have expected to have made their matrix compliance public have done so—at least, it do so for the 2004 reports, but has not yet approved release by the 1540 Committee of its 2008 report.²⁷ Nor should it be assumed that non-compliance in submitting reports to the 1540 Committee – for instance, amongst African states – should be taken to be a sign of bad faith. Resources, skills and staffing for such complex and demanding reporting may not exist.²⁸

Could performance and accountability be improved by digitising the trade record and pooling and sifting the results for anomalies? Some participants felt it was a mistake to think that digitization itself means that we might get the relevant information. Even digitized records may go missing and may not be found. In many contexts, the culture of the word still predominates: the less mentioned, the more gets done.²⁹ Having countries formally write regulations might actually be a disincentive to accomplish the goals of conventions. However, to the extent that export transactions are already digitized in accordance with the World Customs Organization's latest standards, there may be some gains to be made by mining this data for security-related anomalies while recognizing the need for alert border control and customs officials.

To improve regulatory oversight, a national register of nuclear-capable individuals and organizations was suggested such as already exist in the context of arms exports in some countries, although discussants recognized that registers would inevitably run into problems of sensitivity on names, information and disclosure.³⁰

- **The centrality of international law**

The two days were linked by discussion of the role international law (through treaty and custom) in the criminalisation of various forms of international WMD-related conduct. In fact, this dialogue was a hinge that linked the earlier context-setting panels on day one, and the more action-oriented panels on day two.

According to generally recognized international law, states exert criminal jurisdiction in five ways: the principle of Territoriality (covering acts taking place in the territory); the Nationality principle, allowing states to deal with acts by its own nationals; the Passive Personality principle, based on the nationality of the victim; the Effects principle, which gauges jurisdiction on the effect resulting from acts on the state's territory or interests; and Universal jurisdiction, encompassing crimes that are universally condemned.³¹

The deterrent effect of legislation based on such principles arises from three factors: first, the presence of subjective benefits, that is, the criminal's perceived rewards; second, the subjective risk of getting caught; and third, the consequences, as perceived by the criminal, of capture before the criminal act.³² (If caught during or after the act, by definition, the criminal was not deterred by the legislation and other factors). In short, domestic criminal deterrence is conceptually complex and context-specific. Consequently, deterrence is inherently difficult to internationalise, and the effectiveness of international law and regulations are marred an environment that lacks an international community.³³

That said, the domestic mirroring of international law has proven effective in many instances, as acknowledged by such decisions as that of the United States Supreme Court in *Paquete Habana*, which made it clear that international customary law binds US courts.³⁴ Many countries incorporate international law as stated in conventions directly into their domestic legislation, thereby harmonizing national laws and increasing the chances of meeting the dual criminality criteria under extradition proceedings.³ It was acknowledged that there is a gradual ripening of various rules of recognition whereby peremptory norms emerge as *ius cogens* norms, the most known being those that proscribe slavery; genocide; piracy; and torture. A treaty provision or domestic law that conflicts with a peremptory norm is void.

Participants were keen to stress a distinction between states that project their own unique laws beyond territorial boundaries, which can be deemed to be illegitimate overstretch; and states that act to enforce pre-existing rules of international law. In the case of universal jurisdiction, a substantive norm is needed for the prescriptive jurisdiction to project law beyond domestic jurisdiction. The existence of extradition provisions in a treaty to enable prosecution suggests that a customary norm already exists.

Viewed in this light, 1540 is a potential catalyst for the emergence of *opinio juris*, serving to promote customary norms in the form of domestic law, observance of treaty law, and state practice to the same end.³⁵

There are also more distinct areas of law that provide a basis for legal expansion in the field of regulating trafficking. Under American law, for example, the existence of Alien Tort Claims is one such area that deserves consideration, though the bar is a high one.³⁶ This is particularly so with respect to aiding and abetting and providing material assistance in the commission of the offence. The issue perhaps most similar with regard to non-state actors and WMD-related offences is whether a purpose and knowledge can be demonstrated to the satisfaction of a court. Prosecutions of torturers under the Alien Tort Claims Act may provide an important precedent that is logically parallel to WMD-related crimes.

- **Disagreements on international law: legitimacy**

A lingering issue remains that some practitioners view customary international law as too indeterminate to be useful other than at the margins.³⁷ Amongst such otherwise accepted practices dealing with the criminalisation of slavery, genocide, piracy, we find norms that are more honoured in the breach. If the highest category of *ius cogens* norms is honoured in the breach, then arguably this low traction bodes ill for a less established category of international customary law.³⁸ There are also questions about whether such bodies as the UN Security Council can be deemed legitimate in exceeding their mandates.³⁹

Rather than relying on a customary international legal regime that relies on normative commitment, it may be more effective to create a treaty instrument that directly addresses the gap in international law on nuclear trafficking. But this view has its own problems. According to one view, customary international law cannot, of its own accord, be true law if it is not legislated upon.⁴⁰

However, the contrary view was also advanced--that treaties do have a double effect in that they not only reflect but also generate international customary law. Surely, if all countries criminalize something and there is a UNSC resolution criminalizing that, then a customary norm arises? In that sense, 1540 provides an example with its matrices which offer boot straps which lift up and legitimate an emerging customary norm.⁴¹

³ This criteria usually requires that both countries have laws proscribing an act on the books (the doctrine of double criminality), and that the criminal act is defined in a sufficiently similar manner as to be a common crime between the two countries (though not necessarily having the same name), ensuring that the extraditee will be tried appropriately once extradited: see *Collins v Loisel*, 259 U.S. 309 (1922) .

Moreover, parallels exist between crimes such as piracy, that are already the subject of universal jurisdiction, and the crime of smuggling commodities needed to proliferate WMD. Like WMD smuggling, piracy was also committed by non-state actors acting outside of territories controlled by states. Consequently, piracy threatened all states, although state-approved “privateers” were condoned by states. Just as with WMD, it was the indiscriminate nature of private piracy that made it the subject of universal jurisdiction which, if left unregulated, would have undermined the state system.

- **Extra-territoriality: limitations**

Extra-territorial jurisdiction can take many forms, being prescriptive (referring to a state’s ability to apply its laws beyond territorial borders), adjudicative (referring to a court’s authority to impose its judicial process on someone beyond a state’s territorial borders), or enforcement-related (by exercise of an executive power to force someone to submit to judicial process, via policing, prosecution, or military force). The UN Security Council has extensive powers, though these may be of an executive rather than a legislative nature. However, in the absence of a Security Council resolution, and without a clear universal criminal regime, extra-territoriality becomes the fall back position to deal with international crimes.⁴²

There are cultural variations and regional reactions to extra-territoriality. Countries responding positively to the concept and practice of extra-territoriality tend to be European or western. East Asian countries less amenable to it be it either for domestic political reasons or due to cultural sensitivities. Relatedly, attitudes to non-state actor proliferation tend to be uneven and without regional consensus, countries are left to fend for themselves.⁴³ Participants did not agree on how various principles of extra-territoriality apply. Generally, most countries adhere to the nationality and territoriality principles. The former principle, for example, is recognised in China. Conversely, East Asian countries are generally reluctant to refer to concepts of universal jurisdiction.⁴⁴ The general sense amongst participants is that the potential to apply extra-territorial jurisdiction to non-state WMD criminal behaviour is limited in the East Asian region although some states (such as South Korea and Japan have already adopted elements of extra-territoriality in their domestic WMD legislation). No one yet seriously relies on extra-territoriality although there is widespread commitment to the legal and political regimes such as ICSANT, CCPM, PSI, NTC, GICNT, 1373, 1540 (see Attachment D).⁴⁵

There are also similar sensitivities to extra-territoriality in Southeast Asia, given the reluctance of ASEAN members to interfere in each others affairs, but such reluctance may be overcome in time with the signing of extradition treaties between the states, and the creation of improved intelligence sharing facilities.⁴⁶

From the perspective of India, operating in the terror-prone regions of South Asia, the nationality principle is preferred (or, to be exact, the national interest is based on the idea that humanity is one extended universal family). Why, one participant asked, not treat the manufacture and trafficking of WMDs as an international crime against humanity given that all WMDs are international weapons of terror, to be tried by the International Criminal Court?⁴⁷

More nuanced approaches to non-state actors and extra-territoriality exist in such regions as South Africa, where there is an emphasis on 1540 being a non-proliferation rather than an anti-terrorism resolution. 1540, it was argued, should not be used to trump existing international conventions and forums that have passed the test of intensive domestic political debate unlike top-down UN Security Council imposed obligations.⁴⁸ Moreover, the historical dimension of terrorism in such regions demands such sensitivity to preserving national sovereignty.

- **Harmonisation: domestic and international**

One approach that might be productive is to harmonize international and domestic laws that criminalize non-state nuclear proliferation. A whole new treaty dealing with nuclear commodities and sale and transfer was suggested, although the political challenge of bringing yet another convention into

being was noted. Such a treaty might simply declare illegal any unlicensed export of a nuclear commodity controlled by the Nuclear Suppliers Group and on the Zangger Trigger List, and on the export control lists of the Biological and Chemical Weapons Conventions. Although it would leave the details of export licensing to nation states, such a treaty could harmonize national legislation, and make such an unlicensed export an international crime subject to an extradite-or-prosecute clause. Some disagreements might still arise over transfers as already occurs in the Nuclear Suppliers Group, and some problems might emerge with definitions of end users in such a treaty and in national implementing legislation, the treaty could be designed to mirror the patchwork of laws that already exist, thereby integrating international law. Such a treaty would:

- Recognise criminal laws of many states, notably dealing with transfer of nuclear commodities;
- Recognise an obligation to have effective criminal laws to deal with this subject, laying the basis for the creation of *opinio juris*. The treaty might recognize obligations *erga omnes* (applicable to all parties) to prosecute the heinous crimes, thereby recognizing universal jurisdiction. States would be under an obligation to extradite or to prosecute;
- The criminal offence could be defined thus: “It is a crime to knowingly or intentionally to sell nuclear materials without a duly granted government license.” States would be able to define end users themselves. Where no licensing procedure exists, an international transfer would be a crime by that state when exported. This would harmonize the international system and create true universal jurisdiction.⁴⁹

Such an approach also synthesizes existing domestic and international instruments. Objections to broader, more radical instruments criminalising non-state trafficking are often made for the reason that existing conduct can be criminalised by resorting to existing avenues of prosecution. The Beijing Protocol (2010) to the Montreal Convention (Air convention), for example, requires countries to make it a crime to transfer WMD components and provides for prosecution of those offences. Maritime conventions do much the same.⁵⁰

Steps towards internationalisation of the adjudicative process through the establishment of an international tribunal, as suggested by delegates from France and the Netherlands at the Nuclear Security Summit in 2010 would be complicated by states that are already reluctant to subscribe to existing legal bodies.⁵¹

The hegemonic nature of the international system remains an obstacle. Various participants felt that there is no real need for international tribunal because international law is used in domestic courts in any case. The international tribunals are slow, clunky, expensive, and have serious problems. If national courts function well to prosecute international crimes, then we may not need an international court to control non-state WMD proliferation activity.⁵²

Participants nonetheless felt there is the pressing need for a transnational solution, though many thought it premature to push for new legal instrument. Solid assessments of the current regimes of control and their impact have not been made. Regulations are multiplying, and having extra layers of rules may not be useful. If changes were to be made, they might be made to pre-existing instruments such as the Rome Treaty governing the International Criminal Court touching on specific offences—although some offered scepticism that it would be possible to re-open the Court’s mandates given the political coalitions that have formed around the Court. Mutual assistance agreements to incorporate the same requirements for dealing with nuclear commodities could be made without much of a problem, the G8 being one such forum, and the Global Nuclear Security Summit another.⁵³

- **Finance, smuggling, customs**

Panelists emphasized the emerging convergence of fringe groups involved with the purchase, assembly and development of nuclear materials with those with opportunity and finance to supply their demand. Transnational criminal movements are intimately connected with trafficking, and seemingly co-exist with smuggling networks that operate in some countries, including officials at all levels and terrorists of

political, religious or sectarian inclination.⁵⁴ The funding base is large, and can involve a miscellany of former state officials linked to arms, contraband, and people trafficking. Crime and terrorism networks should not be compartmentalised.

Such an appraisal might lead to neglected opportunities to criminalise conduct. Linking WMD smuggling to piracy, for example, thereby places it within pre-existing frameworks that acknowledges such crimes may be punished under universal jurisdiction rather than through extra-territoriality.⁵⁵

Various ungoverned zones of distribution, havens for criminal activity and smuggling also exist. South America's Tri-Border region--where Argentina, Brazil and Paraguay meet--is renowned for supplying illicit markets across Latin America.⁵⁶ As a non-state that cannot join international treaties, Taiwan is potentially an area where the transit of a million containers annually poses serious problems with regulating and verifying the movement of nuclear commodities. Although Taiwan subscribes to the principles of the Proliferation Support Initiative and is a member of Container Security Initiative and the Megaports initiative, it is outside the WMD non-proliferation regime.⁵⁷ Controlling non-state actors in such gray zones of regulation as Taiwan is problematic in that many standard tools such as intelligence sharing, policing cooperation, etc are ruled out politically by neighboring states always concerned about China's response to contact with Taiwan. Penalties and enforcement on violation of export and trafficking regulations are weak in Taiwan. Better detection and additional licensing resources are required to make headway in Taiwan.

Customs agencies and export controls provide another potential layer of control, though the field is marred by corrupt practices at the domestic level.⁵⁸ In providing security in the global supply chain, the World Customs Organization and national customs agencies have contributed to fulfilling the objectives of 1540 in terms of identification of controlled items, risk management and traffic control.

Risk management systems have been introduced in certain countries (taking India as an example) such that particular persons, particular cargo, particular destinations and origins are noted and checked carefully. Routes can be targeted on macro and micro levels. The US Department of Emergency has a commodity training course on identifying fissile material.⁵⁹ Incentives, such as a rewards program, might be introduced leading to the interdiction of materials or those involved in the trafficking of WMD material.

Financial and economic tools (for instance, anti-money laundering instruments) can be used more broadly to combat such threats as WMD proliferation.⁶⁰ Panelists and participants generally agreed that the key motivation for such proliferation practices lie in the field of profit and financial flows are required to complete most transactions, thereby making such controls necessary and logical. Political issues are relevant, though these are often not the primary consideration in whether to pursue money laundering crimes.⁶¹

- **Prosecution, intelligence cooperation**

Effectiveness of an international regime of control and criminalisation depends on cross-intelligence sharing and networks of regional cooperation.⁶² Prosecutorial effectiveness can be undermined on the one hand by the application of local laws that frustrate legal suits against suspects in the gathering of evidence, and on the other, by limitations on extradition.⁶³ Having said that, some prosecutors felt that the glass should be considered half full, given such arrangements as informal sharing agreements between various countries and the success of various "extraterritorial prosecutions".⁶⁴ The case of *U.S. v Asher Karni*, where Karni was denied export privileges and convicted for violating the Export Administration Act of 1979, may be one such example.⁶⁵

States may also improve their ability to prosecute by passing new laws that would require transparency and honesty in shipping records with a duty of due diligence by sellers and end-user verification systems.⁶⁶ International organisations such as Interpol provide networks of intelligence sharing, but are

limited by country-specific definitions of notices and enforceability, given that only a third of Interpol's members today will arrest pursuant to a Red Notice.⁶⁷

- **Future pathways and challenges**

Tensions between legal and political areas were also identified. Is the criminalization process regarding trafficking by non-state actors to take place through customary international law or is it to be defined as a treaty-based offence?⁶⁸ Lawyers present pointed out that this was a false choice: both should be seen in conjunction as creating a structure of international law that leads to customary norms.. Indeed, it was pointed out that UNSC Resolutions 1540 and 1373 can act as catalysts for the entire process, to be replicated in domestic legislation—but cannot, of themselves, substitute for the painstaking, incremental, and ultimately, multilateral process of building binding legal regimes and institutions.

Despite the obvious limits to the idea of international community today, it is still possible to build the legitimacy of non-state actor non-proliferation strategies via meetings such as the Global Nuclear Security Summit. The field of international politics is rich in fostering examples of emerging norms and legal frameworks that emerge slowly, and sometimes crystallize quickly when driven by events.

Meanwhile, legitimacy and resources can be mustered at the domestic level. A rigorous study is overdue of what has and has not been implemented in various states. Gaps and risks emerge quickly with the process of globalization, and plans must be laid just as quickly to manage these risks. Simply developing a metric of performance in complying with the 1540 regime would be a big step forward from the current state of understanding.

Importantly, we must not forget unintended benefits that might arise from assisting states in other fields such as combating drug smuggling.

The participants felt strongly that the work undertaken by the Stanford research team to look at national control legislation and penal codes to check implementation of 1540 should continue to collate systematic data. Similar matrices are needed to report on actual, not just pro forma implementation. The 1540 committee may or may not be developing adequate compliance matrices.

Persistent tensions exist in the area of defining non-state actors. The workshop searched for ways whereby non-state actors might be identified earlier by intelligence, police, customs, and other agencies, be they national smugglers or commodities brokers in a transnational chain of supply. Legal terms are not being considered well enough in policy practice, something which may require a more detailed appraisal.

Overall, the workshop suggested that what is needed is a comprehensive consideration of strategies, actors and tools. Strategies would involve the denial of supply through direct action, deterrence through penalty, and creating a co-operative framework whereby intelligence is used to achieve both denial and deterrence. Other key points include:

- Research on a convention that deals only with WMD smuggling is needed, with particular need for international lawyers to be involved early in the enquiry;
- Individuals with WMD-related knowledge that may be salient to non-state actor proliferation over generational time should be registered.
- There remain challenges in the area of data sharing, notably where the material is highly sensitive. The limitations posed by sovereignty remain. Regional implementation of the non-proliferation regime is problematic, and specific risks in specific regions must be identified.

- Notwithstanding suspicions about extra-territoriality, there are a number of proposals for East Asian, Asia Pacific, South Asia, Asia-Pacific for enhancing mutual legal assistance (MLA), specifically bilateral treaties for extradition. Legal infrastructure is rapidly needed as the threat is metastasizing.
- We must be wary of fragmenting the body of law instead of combining it into a whole. More users, more actors, can result in fragmentation. More people and agents involved in the process might dilute the message.

The workshop began with the question posed by Peter Hayes: What kind of multi-layered, multi-level, multi-dimensional set of legal and institutional controls could win the race against non-state actors dedicated to proliferating WMD and using them against civilian populations?

It ended with a statement by Andre Buys, an engineer who worked in South Africa's clandestine nuclear weapons program:

The world has realized that we are all challenged by a new world situation where terrorism is not something that confronts only single nations but is a problem that we all face together. We can see the light at the end of the tunnel, a safer world, where we and our children and our grandchildren can live together, develop together, in a world free of terror, free of nuclear threat. This is two sides of a coin. We have to realize when one person is unsafe, we are all unsafe. When one person is hungry, in a sense, we are all hungry. Therefore, we have to make the world safer from threats but also make the world more livable. So let's all strive for that future, let's tighten the international regimes to control weapons of mass destruction, and eventually, get rid of them altogether. But let us also work together to eradicate poverty, under-development, poor education, which I see every day in my own country. Let us not be discouraged. It's a difficult job, there will be setbacks. In the end, though, we will prevail.⁴

⁴ Attributed with permission by André Buys.

Notes

- ¹ Workshop on Legal Cooperation to Control Non-State Nuclear proliferation: Extra-Territorial Jurisdiction and UN Resolutions 1540 and 1373, Washington, D.C., April 4-5, 2011, <http://nautilus.org/projects/non-state-proliferation/1540-Workshop/> (Herein abbreviated as Workshop, unless otherwise specified, and taking place over April 4 to 5, 2011, Carnegie Endowment for International Peace, Washington, DC.)
- ² Peter Hayes, Opening Remarks, April 4, 2011, <http://nautilus.org/projects/non-state-proliferation/1540-Workshop/>
- ³ Based on Peter Hayes, Opening Remarks, April 4, 2011, <http://nautilus.org/projects/non-state-proliferation/1540-Workshop/>.
- ⁴ Jennifer Gibson and Sarah Shirazyan, "Survey of Territoriality in 2010 national 1540 Reports," Draft Paper and Presentation Data, Session 4: "Legal Cooperation to Regulate Non-State Nuclear Actors," Workshop, April 4, 2011.
- ⁵ A. Slaughter and T. Wright, "Punishment to Fit the Nuclear Crime," *Washington Post*, March 2, 2007.
- ⁶ Discussion amongst panel members and audience, Session 2: "The Non-State Nuclear Actor Problem," Workshop, April 4, 2011.
- ⁷ Patrick Morgan, "Non-State Actors, Nuclear Next Use, and Deterrence," Draft Paper, Session 2: "The Non-State Nuclear Actor Problem," April 4, 2011, Workshop, <http://nautilus.org/projects/non-state-proliferation/1540-Workshop/>.
- ⁸ Leonard S. Spector, "International Legal Instruments to Penalize and Deter Nuclear Material and Commodity Trafficking," Session 5: "Extra-Territorial Jurisdiction and Regulation of Non-State Actors," Workshop, April 5, 2011, PowerPoint Presentation, <http://nautilus.org/projects/non-state-proliferation/1540-Workshop/>.
- ⁹ Based on PowerPoint presentation by William Tobey and Matthew Bunn, "The Non-state Actor Nuclear Supply Chain," Session 1: "The Non-state Nuclear Actor Problem," Workshop, April 4, 2011.
- ¹⁰ Based on remarks by Tobey, "The Non-State Actor Nuclear Supply Chain."
- ¹¹ David Albright, "Case Studies Non-State Actors," Session 1: "The Non-State Nuclear Actor Problem," Workshop, April 4, 2011.
- ¹² Carlton Stoiber, "Overview of the Legal Basis: Nuclear Security, Terrorism-Focused and Generic Instruments," Session 6: "Extra-Territorial Jurisdiction and Regulation of Non-State Actors," PowerPoint presentation April 4-5 Workshop.
- ¹³ IAEA, Advisory Group on Nuclear Security, January 2002, noted in Stoiber, "Overview."
- ¹⁴ Some of the important initiatives in this area: International Convention for the Suppression of Nuclear Terrorism (2005) or ICSANT; Proliferation Security Initiative (2003) (PSI); Global Initiative to Combat Nuclear Terrorism (GICNT) (2006); Convention on the Physical Protection of Nuclear Material (CCPNM) (1980). See Appendix C.
- ¹⁵ Specific mention is made of material that might contribute to "nuclear-related, ballistic missile-related or other weapons of mass destruction programmes": UNSCR 1718, Art 8(ii). Discussion also in Spector, "International Legal Instruments."
- ¹⁶ Spector, "International Legal Instruments."
- ¹⁷ See "LIST OF ENTITIES, GOODS AND INDIVIDUALS SUBJECT TO THE MEASURES IMPOSED BY PARAGRAPH 8 OF RESOLUTION 1718 (2006)," at <http://www.un.org/sc/committees/1718/pdf/List%2016%20July%202009.pdf> consulted June 13, 2011.
- ¹⁸ Discussion in Session 4: "Legal Cooperation to Regulate Non-State Nuclear Actors," Workshop, April 4, 2011.
- ¹⁹ Based on Spector, "International Legal Instruments."
- ²⁰ For such problems, see B. Steyn, "Understanding the implications of UN Security Council Resolution 1540," *African Security Review* 14, 1 (2005), 96; Rodrigo Alvarez V., "Between Centrifugal and Centripetal World Forces: Extra-Territoriality of Resolution 1540 and Southern Perspectives," Session 5: "Extra-Territorial Jurisdiction and Regulation of Non-State Actors," April 5, 2011, Workshop, <http://nautilus.org/projects/non-state-proliferation/1540-Workshop/>.
- ²¹ Based on presentation by Andreas Persbo, "Extra-Territoriality in the Convention of Suppression of Nuclear Terrorism, Session 4: "Legal Cooperation to Regulate Non-State Nuclear Actors," Workshop, April 4, 2011.
- ²² Based on presentation by Persbo, "Extra-Territoriality."
- ²³ Elizabeth Turpen, "Self Interest Trumps Legitimacy," Session 3: "The Evolving Regulation of Non-State Actors," Workshop, April 4, 2011.
- ²⁴ Based on PowerPoint presentation by Peter Crail, "Implementing Resolution 1540: Assessing Progress in National Nuclear Controls," Session 3: "The Evolving Regulation of Non-State Actors," Workshop, April 4, 2011, <http://nautilus.org/projects/non-state-proliferation/1540-Workshop/>.
- ²⁵ Based on PowerPoint presentation by Crail, "Implementing Resolution 1540; summary of discussions for Day 1, April 4, 2011, Workshop; Lawrence Scheinman, "Role of Regional Organizations," Session 7: "Regional Responses to Extra-Territoriality and Non-State Nuclear Actors," Workshop, April 5, 2011.
- ²⁶ Audience discussion in Session 3: "The Evolving Regulation of Non-State Actors," Workshop, April 4, 2011
- ²⁷ See <http://www.un.org/sc/1540/nationalreports.shtml> and <http://www.un.org/sc/1540/approvedmatrices.shtml> consulted June 12, 2011
- ²⁸ Observation by Noel Stott, "South Africa and the Control of Non-State Nuclear Proliferation: Extra-Territorial Jurisdiction with Reference to UNSC Resolutions 1540 and 1373," PowerPoint Presentation, Session 7: "Regional Responses to Extra-Territoriality and Non-State Nuclear Actors," <http://nautilus.org/projects/non-state-proliferation/1540-Workshop/>.
- ²⁹ Audience discussion in Session 3: "The Evolving Regulation of Non-State Actors," Workshop, April 4, 2011.

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- ³⁰ André Buys, “Tracking Nuclear Capable Individuals,” PowerPoint and Paper, Session 2, Workshop.
- ³¹ Based on Jennifer Gibson and Sarah Shirazyan, “Survey of Extra-Territoriality in 2010 National 1540 Reports,” draft paper of presentation, Session 4: “Legal Cooperation to regulate Non-State Nuclear Actors,” Workshop, April 4, 2011, <http://nautilus.org/projects/non-state-proliferation/1540-Workshop/>.
- ³² Based on presentation by Andreas Persbo, “Extra-Territoriality.”
- ³³ Based on Morgan, “Non-State Actors.”
- ³⁴ *Paquete Habana; The Lola*, 175 U.S. 677 (1900); Anthony Colangelo, “Extra-Territoriality and International Law,” Session 5: “Extra-Territorial Jurisdiction and Regulation of Non-State Actors,” April 5, 2011, Workshop; and panel discussion same session.
- ³⁵ *Opinio juris* being a belief on an action that has been undertaken under the belief one is obligated to do so: see *North Sea Continental Shelf*, Judgement, ICJ Reports (1969), 4, 232-33. Discussion among participants in Session 5: “Extra-Territorial Jurisdiction and Regulation of Non-State Actor,” Workshop, April 5, 2011.
- ³⁶ Anthony Colangelo, “Extra-Territoriality and International Law,” Paper, Session 5, April 5, 2011, Workshop and discussions in Session 5: “Extra-Territorial Jurisdiction and Regulation of Non-State Actor,” Workshop, April 5, 2011.
- ³⁷ Discussions during Session 5: “Extra-Territorial Jurisdiction and Regulation of Non-State Actors,” Workshop, April 5, 2011.
- ³⁸ Orde Kittrie, “Extra-Territoriality, Customary International Law and Nuclear Smuggling,” Presentation, Session 5, Panel ‘Extra-Territorial Jurisdiction and Regulation of Non-State Actors,’ and discussions during same session, Workshop, April 5, 2011.
- ³⁹ Daniel Joyner, “International Criminal Law and the Limits of Extra-territoriality,” Session 4: “Legal Cooperation to Regulate Non-State Nuclear Actors,” Presentation, April 5, 2011.
- ⁴⁰ Active discussion, with contrasting views, in Session 5: “Extra-Territorial Jurisdiction of Non-State Actors,” April 5, 2011, and note presentation and remarks by Kittrie from paper (not submitted), “Extra-Territoriality , Customary International Law and Nuclear Smuggling.” The debate has long philosophical roots, notably between believers of natural law and positive law: see Murray Rothbard, *The Ethics of Liberty* (New York: New York University Press, 1998).
- ⁴¹ Comments made in discussion, with contrasting views, in Session 5: “Extra-Territorial Jurisdiction of Non-State Actors,” Workshop, April 5, 2011.
- ⁴² Discussion by participants in Session 5: “Extra-Territorial Jurisdiction and Regulations of Non-State Actors,” Workshop. April 5, 2011.
- ⁴³ Bong-Geun Jun, Session 4: “Legal Cooperation to Regulate Non-state Nuclear Actors: An East Asian Perspective,” Presentation, Workshop, April 4, 2011.
- ⁴⁴ Discussion by panellists and participants in Session 4: “Legal Cooperation to Regulate Non-State Nuclear Actors,” and Guo Xiaobing, “Extra-Territorial Jurisdiction in the Context of Counter Nuclear Terrorism,” Session 7: “Regional Responses to Extra-Territoriality and Non-State Nuclear Actors,” Presentation, April 5, <http://nautilus.org/projects/non-state-proliferation/1540-Workshop/>.
- ⁴⁵ Bong-Geun Jun, “Legal Cooperation to Regulate Non-state Nuclear Actors.”
- ⁴⁶ Raymund Jose G. Quilop, “Regional Responses to Extra-Territoriality and Non-State Nuclear Actors: A Perspective from Southeast Asia,” Draft Paper for discussion presented by Herman Kraft in place of allotted speaker, Session 7: “Regional Responses to Extra-Territoriality and Non-State Nuclear Actors,” Workshop, April 5, 2011.
- ⁴⁷ Based on presentation and remarks by Debi Prasad Dash, “Non-State Nuclear Proliferation: A Factsheet on the De Jure and De Facto WMD Control Regime in South Asia,” PowerPoint Presentation, Session 7: “Regional Responses to Extra-Territoriality and Non-State Nuclear Actors, April 5, 2011
- ⁴⁸ Based on Stott, “South Africa and the Control of Non-State Nuclear Proliferation.”
- ⁴⁹ Based on general remarks of the panel, Session 4: “Legal Cooperation to Regulate Non-state Nuclear Actors”; Daniel Joyner, “International Criminal Law and the Limits of Extra-territoriality,” Presentation on same panel, April 5, 2011, <http://nautilus.org/projects/non-state-proliferation/1540-Workshop/>
- ⁵⁰ Based on panel and general discussions in Session 5: “Extra-Territorial Jurisdiction and Regulation of Non-State Actors,” Workshop, April 5, 2011.
- ⁵¹ Based on comments from general discussion in Session 5: “Extra-Territorial Jurisdiction and Regulation of Non-State Actors,” Workshop, April 5, 2011.
- ⁵² Based on comments from general discussion in Session 5: “Extra-Territorial Jurisdiction and Regulation of Non-State Actors,” Workshop, April 5, 2011.
- ⁵³ Comments in this section based on Spector, “International Legal Instruments.”
- ⁵⁴ Louise Shelley, “Organized Crime, Terrorism and Non-State Actors,” PowerPoint, Session 1: , <http://nautilus.org/projects/non-state-proliferation/1540-Workshop/>
- ⁵⁵ Remarks in discussion, Session 5: “Extra-Territorial Jurisdiction and Regulation of Non-State Actors,” Workshop, April 5, 2011.
- ⁵⁶ Based on PowerPoint presentation by Rita Grossman-Vermass, “Threat Convergence and International Cooperation: Indicators and Challenges,” Session 6: “Extra-Territorial Jurisdiction and Regulation of Non-State Actors,” Workshop, April 5, 2011, <http://nautilus.org/projects/non-state-proliferation/1540-Workshop/>
- ⁵⁷ Togzhan Kassenova, “UNSCR 1540 and Taiwan,” PowerPoint presentation, Session 2: “The Non-State Nuclear Actor Problem,” Workshop, April 4, 2011, <http://nautilus.org/projects/non-state-proliferation/1540-Workshop/>
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⁵⁸ See the Indian Customs Act, 1962, discussed in Debi Prasad Dash, “Non-State Nuclear Proliferation: A Factsheet on the De jure and De facto WMD Control Regime in South Asia,” Draft Paper, Session 7: “Regional Responses to Extra-Territoriality and Non-State Nuclear Actors, April 5, 2011; Larry Burton, “Globalization, Technological Convergence, and Border Controls,” Presentation, Session 3: “The Evolving Regulation of Non-State Actors,” both presentations at <http://nautilus.org/projects/non-state-proliferation/1540-Workshop/>.

⁵⁹ Discussion by panellists and participants in Session 3: “The Evolving Regulation of Non-State Actors,” Workshop, April 4, 2011.

⁶⁰ Executive Order 13224 (prohibiting transactions with persons who commit, threaten to commit or support terrorism), Executive Order 12938 (use or prepared to use chemical or biological weapons, import bans on those engaged in WMD proliferation): see Amit Sharma, “Non-Nuclear Proliferation: Extra-Territorial Jurisdiction and UN Resolutions 1540 and 1373, PowerPoint presentation, Session 6: “Extra-Territorial Jurisdiction and Regulation of Non-State Actors,” Workshop, April 5, 2011, <http://nautilus.org/projects/non-state-proliferation/1540-Workshop/>

⁶¹ Panel Discussion in Session 1: “The Non-state Nuclear Actor Problem,” Workshop, April 4, 2011. Similar comments also made in Panel Discussion in Session 2: “Non-State Nuclear Problem,” Workshop, April 4, 2011.

⁶² Based on Lawrence Scheinman, “United Nations Security Council Resolution 1540 and the role of Regional Organisations,” Presentation, Session 7: “Regional Responses to Extra-Territoriality and Non-State Nuclear Actors,” Workshop, April 5, 2011. See also L. Scheinman, ed., *Implementing Resolution 1540: The role of Regional Organizations* (New York: UNIDIR, 2008), available at: <http://www.unidir.org/pdf/ouvrages/pdf-1-978-92-9045-190-7-en.pdf>.

⁶³ Arvinder Sambei, “Extradition and Jurisdiction,” Draft Paper and Steve Pelak, “A Few Notes on ‘Extradition and Prosecutorial Difficulties’ in Counterproliferation Investigations and Prosecutions,” both on Session 6: “Extra-Territorial Jurisdiction of Non-state Actors,” Workshop, April 5, 2011, <http://nautilus.org/projects/non-state-proliferation/1540-Workshop/>; Albright, “Case Studies Non-State Actors.” and intense discussion on panel in Session 6: “Extra-Territorial Jurisdiction of Non-state Actors,” Workshop, April 5, 2011.

⁶⁴ Pelak, “A Few Notes.”

⁶⁵ Discussed in Pelak, “A Few Notes.”

⁶⁶ Pelak, “A Few Notes.”

⁶⁷ Based on PowerPoint presentation by Niles LaPierre, “The International Criminal Police Organisation,” Session 6: “Extra-Territorial Jurisdiction and Regulation of Non-State Actors,” Workshop, April 5, 2011, <http://nautilus.org/projects/non-state-proliferation/1540-Workshop/>.

⁶⁸ Comments in this last section stem from discussions in Session 8: “Next Steps,” Workshop, April 5, 2011.

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Pelak, Steve. “A Few Notes on ‘Extradition and Prosecutorial Difficulties’ in Counterproliferation Investigations and Prosecutions,” both on Session 6: “Extra-Territorial Jurisdiction of Non-state Actors,” Workshop, April 5, 2011, <http://nautilus.org/projects/non-state-proliferation/1540-Workshop/>

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ATTACHMENT A: WORKSHOP PAPERS AND PRESENTATIONS

The following papers and presentations are available at: <http://www.nautilus.org/projects/non-state-proliferation/1540-Workshop/>

Note: four papers are forthcoming and not yet posted.

The Non-State Nuclear Actor Problem

The Non-State Actor Nuclear Supply Chain [PRESENTATION] by William Tobey

Organized Crime, Terrorism and Non-State Actors [PRESENTATION] by Louise Shelley

UNSC 1540 and Taiwan [PRESENTATION] by Togzhan Kassenova

Non-State Actors, Nuclear Next Use, and Deterrence [DRAFT PAPER] by Patrick Morgan

Tracking Nuclear Capable Individuals [DRAFT PAPER] by André J Buys

Tracking Nuclear Capable Individuals [PRESENTATION] by André J Buys

The Evolving Regulation of Non-State Actors

Implementing Resolution 1540: Assessing Progress in National Nuclear Controls [SUMMARY] by Peter Crail

Implementing Resolution 1540: Assessing Progress in National Nuclear Controls [PRESENTATION] by Peter Crail

Legal Cooperation to Control Non-State Nuclear Proliferation: Border Controls and the Role of Customs [PRESENTATION] by Larry Burton

Jurisdictional Challenges of Bioviolence [PRESENTATION] by Brent Davidson

Legal Cooperation to Regulate Non-State Nuclear Actors

Illicit Trafficking of Nuclear and Radiological Materials [PRESENTATION] by Andreas Persbo

Legal Cooperation to Regulate Non-State Nuclear Actors: An East Asian Perspective [PRESENTATION] by Bong-Geun Jun

Survey of Extra-Territoriality in 2010 National 1540 Reports [DRAFT PAPER] by Jennifer Gibson and Sarah Shirazyan

Survey of Extra-Territoriality in 2010 National 1540 Reports [PRESENTATION DATA] by Jennifer Gibson and Sarah Shirazyan

Extra-Territorial Jurisdiction and the Regulation of Non-State Actors

International Legal Instruments to Penalize and Deter Nuclear Material and Commodity Trafficking: Current Status, Gaps in Coverage, and Potential Steps Forward [PRESENTATION] by Leonard S. Spector

Between Centrifugal and Centripetal World Forces: Extra-Territoriality and Southern Perspectives [DRAFT PAPER] by Rodrigo Alvarez

The International Criminal Police Organization [PRESENTATION] by Niles Lapierre

Extra-Territorial Jurisdiction in the Context of Counter Nuclear Terrorism: China's Perspective [PRESENTATION] by Xiaobing Guo

Summary of Major US Export Enforcement and Embargo Prosecutions: 2007 to the Present United States Department of Justice

Non-State Nuclear Proliferation: Extra-Territorial Jurisdiction and UN Resolutions 1540 and 1373 [PRESENTATION] by Amit Sharma

A Few Notes on "Extradition & Prosecutorial Difficulties" in Counterproliferation Investigations & Prosecutions [PRESENTATION] by Steven Pelak

Extradition and Jurisdiction [DRAFT PAPER] by Arvinder Sambei

Threat Convergence and International Cooperation: Indicators and Challenges [PRESENTATION] by Rita Grossman-Vermaas

Regional Responses to Extra-Territoriality and Non-State Actors

Non-State Nuclear Proliferation: A Factsheet on the De Jure and De Facto WMD Control Regime in South Asia [DRAFT PAPER] by Debi Prasad Dash

Non-State Nuclear Proliferation: A Factsheet on the De jure and De facto WMD Control Regime in South Asia [PRESENTATION] by Debi Prasad Dash

Regional Responses to Extra-Territoriality and Non-State Nuclear Actors [PRESENTATION] by Herman Joseph Kraft

United Nations Security Council Resolution 1540 and the Role of Regional Organizations [PRESENTATION] by Lawrence Scheinman

South Africa and the Control of Non-State Nuclear Proliferation: Extra-Territorial Jurisdiction with Reference to UNSC Resolutions 1540 and 1373 [DRAFT PAPER] by Noel Stott

(South) Africa and the Control of Non-State Nuclear Proliferation: Extra-Territorial Jurisdiction with Reference to UNSC Resolutions 1540 and 1373 [PRESENTATION] by Noel Stott

Regional Responses to Extra-Territoriality and Non-State Nuclear Actors: A Perspective From Southeast Asia [DRAFT PAPER] by Raymund Jose G. Quilop

ATTACHMENT B: LIST OF WORKSHOP PARTICIPANTS

Nautilus Institute Workshop

*Cooperation to Control Non-State Nuclear Proliferation:
Extra-Territorial Jurisdiction and UN Resolutions 1540 and 1373
April 4-5, 2011, Washington DC*
<http://www.nautilus.org/projects/non-state-proliferation/1540-Workshop>

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ATTACHMENT C: WORKSHOP AGENDA

AGENDA (Revised 4/4/11)

DAY #1: APRIL 4, 2011 8:30 Workshop Registration

9:00 Welcome, Peter Hayes, Executive Director Nautilus Institute for Security and Sustainability 9:05 Opening Remarks: George Perkovich, Vice President for Studies, and Director, Nuclear Policy Program, "Abolition and Non-State Actors", Carnegie Endowment for International Peace

9:15 SESSION 1: THE NON-STATE NUCLEAR ACTOR PROBLEM

Doug Shaw, Chair

1.1 The Non-State Nuclear Weapon Supply Chain.....William Tobey
Senior Fellow, Belfer Center for Science and International Affairs, Harvard University

1.2 Case Studies Non-state Actors.....David Albright
President, Institute for Science and International Security

1.3 Organized Crime, Terrorism, and Non State ActorsLouise I. Shelley
Director, Terrorism, Transnational Crime and Corruption Center, George Mason University

10:30 Break

10:45 SESSION 2: THE NON-STATE NUCLEAR ACTOR PROBLEM

Sharon Squassoni, Chair

2.1 Ungoverned Spaces and 1540 Implementation, Taiwan Case Study
UNSCR 1540 and Taiwan by Togzhan Kassenova
Senior Research Associate, Center for International Trade and Security, University of Georgia

2.2 Non-State Actors, Nuclear Next Use and Deterrence.....Patrick Morgan
Professor of Political Science, University of California, Irvine

2.3 Tracking Nuclear Capable Individuals.....Andre Buys
Professor, Department of Engineering and Technology Management, University of Pretoria

12:00 Lunch

1:00 SESSION 3: THE EVOLVING REGULATION OF NON-STATE ACTORS

Duyeon Kim, Chair

3.1 Building Legitimacy of 1540 Capacity.....Elizabeth Turpen
Lead Associate, Booz Allen Hamilton

3.2 Uneven State Implementation of Controls
Implementing Resolution 1540: Assessing Progress in National Nuclear Controls.....by Peter Crail
Research Analyst, Arms Control Association

3.3 Globalization, Technological Convergence, and Border ControlsLarry Burton
Former Senior Technical Officer, World Customs Organization

3.4 Regulation: Chemical and Biological.....Brent Davidson
Program Director, International Security & Biopolicy Institute

2:30 Afternoon Tea

2:45 SESSION 4: LEGAL COOPERATION TO REGULATE NON-STATE NUCLEAR ACTORS, Peter Hayes, Chair

4.1 Extra-Territoriality in the Convention of Suppression of Nuclear Terrorism

4.1A..... Maria Lorenzo-Sobrado
Terrorism Prevention Officer, United Nations Office of Drugs and Crime

4.1BAndreas Persbo
Executive Director, VERTIC (the Verification Research, Training and Information Centre)

4.2 East Asia PerspectivesJUN Bong-Geun
*Director-General, Department of National Security and Unification Studies
Institute of Foreign Affairs and National Security, Republic of Korea*

4.3 Survey of Extra-Territoriality in 2010 National 1540 Reports.....Sarah Shirazyan
Stanford Program in International and Comparative Law, Stanford University

.....Jennifer Gibson
Stanford Program in International and Comparative Law, Stanford University

4.4 International Criminal Law and the Limits of Extra-Territoriality.....Daniel Joyner
Associate Professor, University of Alabama School of Law

4:15 Summary Discussion of Day 1, Peter Hayes, Executive Director of the Nautilus Institute for Security and Sustainability

5:00 Reception CEIP Foyer

DAY 2: APRIL 5, 2011 8:30 SESSION 5: EXTRA-TERRITORIAL JURISDICTION AND REGULATION OF NON-STATE ACTORS, Carlton Stoiber, Chair

5.1 Extra-Territoriality, Customary International Law and Nuclear SmugglingOrde Kittrie
Professor of Law, Arizona State University

5.2 Extra-Territoriality and Criminalizing Non-State Actor Proliferation.....Leonard Spector
Deputy Director, Center for Nonproliferation Studies (CNS)

5.3 Extra-Territoriality and International Law.....Anthony Colangelo

Assistant Professor of Law, Southern Methodist University, Dedman School of Law

5.4 Extra-Territoriality and Southern Perspectives

Between Centrifugal and Centripetal world Forces: Extra-Territoriality of Resolution 1540 and Southern Perspectives.....by Rodrigo Álvarez

*Executive Manager, Coordinator of the Nonproliferation and Disarmament Project
Global Consortium on Security Transformation*

10:00 Break

10:15 SESSION 6: EXTRA-TERRITORIAL JURISDICTION AND REGULATION OF NON-STATE ACTORS, Deborah Gordon, Chair

6.1 Investigation, Intelligence Cooperation, Apprehension and Jurisdiction

6.1A.....Niles LaPierre

*Criminal Intelligence Analyst, Terrorism and Violent Crime Division
United States Department of Justice*

6.1B Threat Convergence and International Cooperation: Indicators and Challenges

.....by Rita Grossman-Vermaas

Senior International Policy Advisor, Logos Technologies

6.2 Financial Controls, Extra-Territoriality and Legal Cooperation.....Sue Eckert

Senior Fellow, Watson Institute for International Studies, Brown University

6.3 US Perspectives.....Amit Sharma

Mitsubishi UFJ Securities (USA), Inc. and former Senior Advisor to the Assistant Secretary for Terrorist Financing, US Department of Treasury.

6.4 Extradition and Prosecutorial Difficulties Using Extra-Territoriality

6.4A.....Steve Pelak

*National Coordinator for Export Enforcement, Deputy Chief Counterespionage
United States Department of Justice*

6.4B.....Arvinder Sambei

Director, Sambei, Bridger and Polaine

12:15 Lunch 1:00 SESSION 7: REGIONAL RESPONSES TO EXTRA-TERRITORIALITY AND NON-STATE NUCLEAR ACTORS, Kiho Yi, Chair

7.1 Southern Africa.....Noel Stott

Senior Research Fellow, Institute for Security Studies

7.2 Southeast Asia.....Herman Kraft

Executive Director, Institute for Strategic and Development Studies (Philippines)

Presenting for Raymund Jose Quilop, Associate Professor, Political Science, University of the Philippines

7.3 South Asia.....Debi Prasad Dash

Additional Director General, Government of India

7.4 Role of Regional Organizations.....Lawrence Scheinman

Professor, Center for Non-Proliferation Studies, Monterey Institute for International Studies

7.5 China.....GUO Xiaobing

China Institute of Contemporary International Relations

3:00 Break 3:15 SESSION 8: NEXT STEPS, Joan Diamond, Chair

8.0 Final Session.....Deborah Gordon

Associate Director, Preventive Defense Project, Stanford

Doug Shaw

Associate Dean for Planning, Research, and External Relations,

Assistant Professor of International Affairs, George Washington University

Veronica Tessler

Associate Program Officer, Policy and Outreach, Stanley Foundation

Peter Hayes

Executive Director, Nautilus Institute

Togzhan Kassenova

Senior Research Associate, Center for International Trade and Security

University of Georgia

4:30 Ajourn

ATTACHMENT D: LIST OF CONVENTIONS CONTROLLING WMD

The legal framework against WMD non-state terrorism is constituted by:

UNITED NATIONS CONVENTIONS

- *Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons (1973-166 parties)*
- *International Convention Against the Taking of Hostages (1979-164 parties)*.
- *International Convention for the Suppression of Terrorist Bombing (1997-153 parties)*
- *International Convention for the Suppression of the Financing of Terrorism (1999-160 parties)*
- *International Convention for the Suppression of Acts of Nuclear Terrorism (NTC) (2007-63 parties)*

CIVIL AVIATION CONVENTIONS

- *Convention on Offences and Certain other Acts Committed on Board Aircraft (1963-183 parties)*
- *Convention for the Suppression of the Unlawful Seizure of Aircrafts (1970-183 parties)*
- *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (186 parties)*
- *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (1988-165 parties)*
- *Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991-183 parties)*

MARITIME INSTRUMENTS

- *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988-149 parties)*
- *Protocol to the (above) Convention (6 parties, not in force)*
- *Protocol for the Suppression of Unlawful Acts against Fixed Platforms Located on the Continental Shelf (1988-138 parties)*
- *Protocol to the (above) Protocol (4 parties, not in force)*

IAEA INSTRUMENTS

- *Convention on the Physical Protection of Nuclear Material (CPPNM)(1987-142 parties)*
- *Amendment to the CPPNM (2005-16 parties, not in force)*

UNSC Resolutions

1. *UNSC Resolution 1373*: established UN Counter-Terrorism Committee and establishes legal obligations on states to prevent and suppression financing and to prevent and suppression acts of terrorism; and to cooperate and conform with counter-terrorism treaties (2001)
2. *UNSC Resolution 1540*: obligates states to control non-state actor WMD proliferation (2004)
3. *UNSC Resolution 1735*: obligates states to freeze assets of terrorists and to list terrorist individuals, undertakings or organizations for control (2006)
4. *UNSC Resolution 1822*: Al-Qaida and Taliban sanctions (2008)
5. *UNSC Resolution 1874*: North Korea sanctions for WMD proliferation (2006)
6. *UNSC Resolution 1929*: Iran sanctions for WMD proliferation (2008)

Sources:

C. Stoiber, "Overview of the Legal Basis: Nuclear Security, Terrorism..Focused and Generic Instruments," CITS-NATO Advanced Workshop on " Legal Framework for Strengthening Nuclear Security and Combating Nuclear Terrorism Vienna - 28/29 January 2010, at: <http://nautilus.org/projects/non-state-proliferation/unscr-1540-1373-workshop-papers-and-presentations>

W. Gehr, "The Global Legal Framework Against Terrorism," UN Office of Drugs and Crime, 2009, at: <http://www.oecd-nea.org/law/nlb/nlb-79/005-015%20-%20Article%20W.%20Gehr.pdf>

L. Spector, "International Legal Instruments to Penalize and Deter Nuclear Material and Commodity Trafficking: Current Status, Gaps in Coverage, and Potential Steps Forward," 2011, at: <http://www.nautilus.org/projects/non-state-proliferation/1540-Workshop/5.2%20Spector%201540.pdf>

ATTACHMENT E: CHAIR TALKING POINTS

SESSION 1: THE NON-STATE ACTOR NUCLEAR WEAPONS PROBLEM

Session 1: Chair Bullets and Possible Leading Questions

- *How does a system analysis of the overall “supply and organizational logic” for acquisition and use of WMD by and for non-state actors help us understand where the most important risks are to be found?*
- *What are the implicit boundaries in a system analysis? Does a system analysis cross borders; is it inherently global, given the supply chains involved? How does extra-territorial jurisdiction as a legal concept figure in a systems analysis?*
- *Do we have to attend to all risks at once, whatever their relative ranking, given the consequences of control failure?*
- *Where does the state/individual or state/non-state actor (person, organization, group) boundary lie in terms of activity and control frameworks? Does the variance in definition across political and legal cultures matter?*
- *What are the conclusions to be drawn from real-world case studies of attempted identification, apprehension, and prosecution of non-state actors in WMD proliferation?*
- *Has any prosecution of non-state actors already exercised extra-territorial jurisdiction?*
- *Where prosecution has succeeded, what new control dilemmas then arise in the course of imprisonment with respect to proliferation networks, and are these anticipated in a systems analysis?*
- *At the other end of the state-control spectrum from imprisonment, that is, in non-governed spaces or tri-border spaces, where there is almost no control exercised by states, what type of convergence of terrorist and criminal networks is observed, and are these anticipated in a systems analysis?*
- *In states where the state itself is weak, collapsing, or strong but captured (eg by narco-criminals, by ideological or social movements, by cliques, by crony cliques), how is this circumstance represented in a systems analysis? Do such territories become the legal equivalent of international commons, and therefore, states may conduct themselves without regard to sovereignty, or assert extra-territoriality without concern as to overlapping jurisdictional claims?*
- *What is the relationship between legal frameworks, and other forms of social control over non-state actors that are necessary to avoid WMD proliferation and/or use?*

1.1 The Non-State Nuclear Weapon Supply Chain

- William Tobey, Senior Fellow, Belfer Center for Science and International Affairs, Harvard University [C]

1.2 Case Studies Non-state Actors

- David Albright, President, Institute for Science and International Security [C]

1.3 Organized Crime, Terrorism, and Non State Actors

- Louise I. Shelley, Director, Terrorism, Transnational Crime and Corruption Center, George Mason University [C]

SESSION 2: THE NON-STATE ACTOR NUCLEAR WEAPONS PROBLEM

Session 2: Chair Bullets and Possible Leading Questions

- *What other “black holes” and ungoverned spaces exist in the global non-state WMD proliferation control framework? Toghiani describes a state that is not a state that has served as transit space for proliferation supply chains, especially for Japanese and North Korean companies. Does Taiwan have the ability to apply extra-territoriality to its citizens?*
 - *What other anomalous examples exist? For example, what about microstates such as small island states, or other “small” (<1 million people) jurisdictions. In Europe alone (rounded to nearest thousand), this category includes Andorra (70,000), Cyprus (575,000), Northern Cyprus (200,000), Faroe Islands (47,000) Greenland (56,000),*
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Iceland (294,000), Liechtenstein (33,000), Luxembourg (463,000) Malta (397,000) Monaco (32,000), Montenegro (620,000), San Marino (29,000), Vatican State (1000), Gibraltar (28,000), Guernsey (65,000), Jersey (91,000), and Isle of Man (74,000). As UN member states (except for Vatican City) can exert extra-territorial jurisdiction and may also serve as attractive supply chain transit points, do they need particular attention in terms of the 1540 framework?

- *What does the increasing number of states imply for effective coordination (over decadal time or generational time) of 1540 related controls? What does the rank hierarchy of organizational growth and true complexity of human organization suggest may be needed in addition to state-based legal controls? For example, there are now about:*

○ States:	195	
○ Cities > 100,000:		2,360
○ “Urban areas” > 5000 < 100,000:	18,600	
○ International NGOs :		25,000
○ Multinational Corporations (not incl Subsidiaries):	63,000	
○ Total		109,155

Put differently, what other supplementary transgovernmental forms of extra-territorial jurisdiction may exist beyond that imposed by states?

- *If non-state actors are difficult to define, being not-something state-like, how can one define the deterrence and compellence effects of extra-territorial jurisdiction and enhanced legal controls on non-state actors? Are there analogies in the world of cyber-deterrence?*
- *The world is increasingly globalized; and more individuals are becoming skilled in WMD-related techniques and technologies. Overall, the total stock of existing “nuclear weapons capable individuals” may be shrinking in the established nuclear weapons states, even as the number is expanding in the newly proliferated nuclear armed states (Pakistan, India, North Korea). Is some kind of register of such individuals needed or are we obliged to wait until one crosses the border or disappears, and then intelligence and international legal cooperation is activated to try to “retrieve” such individuals?*

2.1 Ungoverned Spaces and 1540 Implementation, Taiwan Case Study

- Togzhan Kassenova, Senior Research Associate, Center for International Trade and Security, University of Georgia [C]

2.2 Non-State Actors, Nuclear Next Use, Motivations, and Deterrence

- Patrick Morgan, Professor of Political Science, University of California, Irvine [C]

2.3 Tracking Nuclear Capable Individuals

- Andre Buys, Professor, Department of Engineering and Technology Management, University of Pretoria [C]

SESSION 3: THE EVOLVING REGULATION OF NON-STATE ACTORS

Session 3: Chair Bullets and Possible Leading Questions

- *What is exceptional these days about the United States approach to implementing its 1540 control obligations on non-state actors?*
 - *What is the formal compliance today of reporting states compared with 2006, and is there any evidence that formal compliance is matched by implementation compliance?*
 - *Where are the key deficits or shortfalls in 1540 compliance these days?*
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- *How does the convergence of new IT, bio, and nano-technology affect traditional border-control based dual use technology exports; and what is the implication of the full digitization of the supply chain across customs and borders for effective control of non-state proliferation activity?*
 - *What types of inter-customs bureau information sharing and coordination are required in the electronic cargo information system to ensure that cargo is not used for proliferation purposes by non-state actors?*

3.1 US NAFTA

- Libby Turpen, Lead Associate, Booz Allen Hamilton [C]

3.2 Uneven State Implementation of Controls

- Peter Crail, Research Analyst, Arms Control Association [C]

3.3 Globalization, Technological Convergence, and Border Controls

- Larry Burton, Former Senior Technical Officer, World Customs Organization [C]

SESSION 4: LEGAL COOPERATION TO REGULATE NON-STATE NUCLEAR ACTORS

Chair Bullets and Possible Leading Questions

- *What is the scope of the Convention of Suppression of Nuclear Terrorism in terms of what is termed person?*
- *How far up the supply chain does the convention go in its identification of accomplices?*
- *To what extent can states already rely on the array of anti-terrorist conventions to extradite and prosecute, without needing further legal mandate from 1540 related control legislation? Where are there remaining gaps that non-state actors might exploit?*
- *Is a new convention needed to criminalize the acts that are defined by the Nuclear Suppliers Group and the dual use items covered by the Zangger Trigger List?*
- *What are the specific extra-territorial legal implications of Korea's "dual citizenship" of the UN and overlapping jurisdictional claims at a domestic level?*
- *What patterns are observable in the 2010 1540 national reports with regard to adoption of extra-territoriality in state control provisions, and what are the legal rationales for this adoption of extra-territoriality? Are there significant or surprising gaps (for example, Japan)?*

4.1 Extra-Territoriality in the Convention of Suppression of Nuclear Terrorism

- Maria Lorenzo-Sobrado, Terrorism Prevention Officer, United Nations Office of Drugs and Crime [C]
- Andreas Persbo, Executive Director, VERTIC [C]

4.2 East Asia Perspectives

- Jun Bong-Geun, Director-General, Department of National Security and Unification Studies, Institute of Foreign Affairs and National Security, Republic of Korea [C]

4.3 Survey of Extra-Territoriality in 2010 National 1540 Reports

- Stanford Program in International and Comparative Law; Stanford University [C]
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4.4 International Criminal Law and the Limits of Extra-Territoriality

- Daniel Joyner, Associate Professor, University of Alabama School of Law [C]

DAY #2: APRIL 6, 2011

SESSION 5: EXTRA-TERRITORIAL JURISDICTION AND REGULATION OF NON-STATE ACTORS

Chair Bullets and Possible Leading Questions

- *What other mechanisms exist to criminalize WMD smuggling and non-state proliferation activity than those required by the 1540 framework?*
- *Are these mechanisms legitimate in the perspective of many developing and non-nuclear weapon states or is a new legal framework needed that supplements or supersedes 1540?*
- *Is a new tribunal, as proposed in 2010 at the Global Nuclear Summit by France and the Netherlands, a useful idea? If so, under what law would it operate, and who would pay for its implementation?*
- *Can states, the leadership of which adhere to the latter view, instigate a convention to criminalize nuclear smuggling while the UNSC remains “seized” of the matter?*
- *Is there sufficient evidence today in terms of opinio juris (or consistent legal opinions expressed over time as a source of customary international law), state practice, national legislation, international organizations, etc to suggest that customary international law is emerging with regard to the “heinous” nature of the crime of non-state WMD proliferation, and is it therefore becoming a universal crime to engage in such, and does universal jurisdiction already exist for such a crime? Or do we have to wait for the first such actual usage by a non-state actor, for example, taking a whole city hostage or destroying a whole city, before it reaches the status of a universal crime?*

5.1 Extra-Territoriality, Customary International Law and Nuclear Smuggling

- Orde Kittrie, Professor of Law, Arizona State University [C]

5.2 Extra-Territoriality and Criminalizing Non-State Actor Proliferation

- Sandy (Leonard) Spector, Deputy Director, Center for Nonproliferation Studies (CNS), Monterrey Institute for International Studies [C]

5.3 Extra-Territoriality and International Law

- Anthony Colangelo, Assistant Professor of Law, Southern Methodist University, Dedman School of Law [C]

5.4 Extra-Territoriality and Southern Perspectives

- Rodrigo Álvarez, Executive Manager, Coordinator of the Nonproliferation and Disarmament Project, Global Consortium on Security Transformation [C]

SESSION 6: LEGAL COOPERATION TO REGULATE NON-STATE NUCLEAR ACTORS

Chair Bullets and Possible Leading Questions:

- *What difficulties arise with use of intelligence-originated information used to apprehend a non-state actor engaged in WMD proliferation activities and how may these be problematic in prosecution of such actors?*
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- *What coordination and communication difficulties arise between agencies and across borders with regard to intelligence and evidence relating to transnational non-state proliferation networks?*
 - *What pro-active role does INTERPOL and other related international police organizations play in sharing information and its use in prosecution?*
 - *How effective have financial tracking strategies been in actually prosecuting non-state proliferators? Is there any evidence of a deterrence effect?*
 - *How will exercise of greater extra-territoriality affect international legal cooperation, and will it reinforce multilateral approaches and international organizations devoted to controlling non-state WMD proliferation?*

6.1 Investigation, Intelligence Cooperation, Apprehension and Jurisdiction

- Rita Grossman-Vermaas, Senior International Policy Advisor, Logos Technologies [C]
- Niles LaPierre, Criminal Intelligence Analyst, Terrorism and Violent Crime Division, United States Department of Justice [C]

6.2 Financial Controls, Extra-Territoriality and Legal Cooperation

- Sue Eckert, Senior Fellow, Watson Institute for International Studies, Brown University [C]

6.3 Extradition and Prosecutorial Difficulties Using Extra-Territoriality

- Steve Pelak, National Coordinator for Export Enforcement, Deputy Chief Counterespionage, United States Department of Justice [C],
- Arvinder Sambei, Director, Sambei, Bridger and Polaine [C]

SESSION 7: REGIONAL RESPONSES TO EXTRA-TERRITORIALITY AND NON-STATE NUCLEAR ACTORS

Chair Bullets and Possible Leading Questions

- *What has been the role, what opportunities have arisen, and what constraints have become evident in how regional and sub-regional organizations support the implementation of 1540 obligations by their member states?*
- *Is there any precedent in the role of regional and sub-regional organizations with regard to harmonizing regionally their approach. If so, then might they play a role with regard to how states implement their legislative controls with extra-territoriality?*
- *What is China's legal doctrine and position with regard to extra-territoriality, both in relation to Chinese-born persons now living overseas with a non-Chinese nationality, and in relation to universal jurisdiction?*
- *Are there existing or prospective legal frameworks which could undertake to implement or strengthen national implementation of 1540 controls, such as Nuclear-Weapons-Free Zones?*

7.1 Southern Africa

- Noel Stott, Senior Research Fellow, Institute for Security Studies [C]

7.2 Southeast Asia

- Raymund Jose Quilop, Associate Professor, Political Science, University of the Philippines [C]

7.3 US

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- Debi Prasad Dash, Additional Director General, Government of India [C]

7.4 Legislation and Laws

- Lawrence Scheinman, Professor, Center for Non-Proliferation Studies, Monterey Institute for International Studies

7.5 China

- Xiaobing Guo, Researcher, China Institute of Contemporary International Relations [C]

SESSION 8: NEXT STEPS

8.0 Final Session

Chair Bullets and Possible Leading Questions

- *What are the common themes that have emerged with respect to gaps, shortfalls, deficits, duplication in the counter-terrorism and counter-proliferation strategies?*
 - *Is extra-territoriality an important new dimension of 1540 controls, and should this emerging form of national extra-territorial jurisdiction be harmonized, and if so, how and by who?*
 - *Is there a foundation to the argument that WMD smuggling is a heinous crime that is already universal in nature, and therefore already (at least in its most egregious activities), already subject to universal jurisdiction?*
 - *Are there bridges across the counter-terrorism and counter-proliferation strategies and institutions, and what can be done to strengthen them?*
 - *Should a multi-national working group be established to explore and possibly draft a convention that criminalizes dual use WMD smuggling activity?*
 - Deborah Gordon, Associate Director, Preventive Defense Project, Stanford [C]
 - Doug Shaw, Associate Dean for Planning, Research, and External Relations, Assistant Professor of International Affairs, George Washington University [C]
 - Veronica Tessler, Associate Program Officer, Policy and Outreach, Stanley Foundation [C]
 - Peter Hayes, Executive Director, The Nautilus Institute [C]
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ATTACHMENT F: WORKSHOP PUBLICATIONS

The following workshop papers have been published:

A ‘Black Hole’ in the Global Nonproliferation Regime: the Case of Taiwan by Togzhan Kassenova

Non-State Actors, Nuclear Next Use, and Deterrence by Patrick Morgan

Tracking Nuclear Capable Individuals by André J Buys

A Substitute for Broad Extraterritoriality: Recognizing an Experienced Player Armed with Modernized Tools by Larry Burton

Between Centrifugal and Centripetal World Forces: Extra-Territoriality and Southern Perspectives by Rodrigo Alvarez

Extradition and Prosecutorial Difficulties Using Extra-Territoriality by Arvinder Sambei

Threat Convergence and International Cooperation: Indicators and Challenges by Rita Grossman-Vermaas

Non-State Nuclear Proliferation: A Factsheet on the De Jure and De Facto WMD Control Regime in South Asia by Debi Prasad Dash

South Africa and the Control of Non-State Nuclear Proliferation: Extra-Territorial Jurisdiction with Reference to UNSC Resolutions 1540 and 1373 by Noël Stott

Regional Responses to Extra-Territoriality and Non-State Nuclear Actors: A Perspective From Southeast Asia by Raymund Jose G. Quilop
