

LEGAL COOPERATION TO CONTROL NON-STATE NUCLEAR PROLIFERATION: EXTRA-TERRITORIAL JURISDICTION AND UN RESOLUTIONS 1540 AND 1373 (APRIL 4-5, 2011)

SUBJECT: SURVEY OF EXTRA-TERRITORIALITY IN 2010 NATIONAL 1540 REPORTS

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INTRODUCTION

The Nautilus Institute for Security and Sustainability has commissioned a study to ascertain the existence of domestic legal controls on non-state actor proliferation activities under UN Security Council Resolution 1540. The study examined national reports and matrices submitted to the 1540 Committee to answer three questions. First, how many and which states apply their laws extraterritorially? Second, of those that do apply their laws extraterritorially, what is the scope of that application, i.e. does it apply to nuclear, biological and/or chemical materials? And, finally, what is the jurisdictional basis for the extraterritorial application?

JURISDICTIONAL PRINCIPLES UNDER INTERNATIONAL LAW

Although different commentators employ slightly different formulations, there are five generally accepted bases under international law for a state to assert its criminal jurisdiction:

- The principle of Territoriality, which involves acts occurring within (or initiated from) the territory of a country;
- The Nationality principle (also known as active personality principle) which grants a state jurisdiction over acts committed by its nationals irrespective of where it occurs;
- The Passive Personality principle, which is based upon the nationality of the victim;
- The Effects principle which extends a state's jurisdiction to acts outside a state's territory that have a substantial impact within the state's territory or that otherwise have an impact its interests as a nation, e.g. its national security (sometimes also referred to as the Protection principle);
- Universal jurisdiction which involves crimes that are universally condemned.

RESEARCH METHODOLOGY

There were two phases to the study. During the first phase, 1540 Matrices of 179 states were examined to determine whether or not a Member State reported extraterritorial application of its relevant laws. The 1540 Matrices are the primary method used by the 1540 Committee to organize information submitted by Member States about their implementation of the resolution. They are based upon the most recent national reports and official government information. The matrices used in this study were approved by the 1540 Committee in November and December 2010.

According to the official UN 1540 Committee website, matrices have not been completed for eight countries of potential interest to this study (although some of these states have submitted reports containing information that is not organized in accordance with the matrix format). They are: China (and China Taipei), Croatia, Indonesia, Malaysia, Malta, Philippines, Vatican City, and Vietnam. There also no matrices for regional arrangements, such as the European Union. The extent of extra-territorial provisions in these states/regions thus could not be examined.

From the 179 matrices examined, we identified 51 Member States as having some type of extra-territorial application of its laws.¹ These 51 Member States are listed in Appendix A.

Of these, 36 were identified for a second phase of in-depth research. The 36 chosen were those that seemed to be of the greatest concern or relevance in non-proliferation terms. Below are some of the criteria used to narrow down the list of countries to 36:

1. A country is a powerful state, and is able to impose extra-territoriality as a matter of might as well as legal right.
2. A country is a possible source country of WMD materials and technology, e.g., is a member of the Nuclear Suppliers Group.
3. A country is highly compliant with its 1540 obligations overall, or specifically with respect to its obligation to criminalize non-state proliferation activities.
4. A country poses particular proliferation risks because it is a possible or past WMD proliferator, is part of a cross-border ungoverned space, is a near or actual non-state, or is a country of transit, or a country of potential or actual WMD networked non-state proliferation.

During phase two, we examined the national reports and addendums submitted by each of the 36 Member States, as well as the specific legislation referenced with respect to questions of extraterritorial application. In some instances, additional legislation beyond that mentioned by the State itself, such as a country's penal code, was examined in an attempt to identify the jurisdictional basis for the extraterritorial claim.

BASIC FINDINGS ABOUT EXTRATERRITORIAL APPLICATIONS OF LAW

Scope of Extra-territorial provisions

Extra-territorial jurisdiction was applied most often to chemical weapons and related material. Of the 51 Member States who self-identified as having extra-territorial application, all but one of these states included chemical weapons and/or material in their legislation.²

Biological weapons were covered in 44 of the 51 Member States, while nuclear weapons were covered by 43. As explained in footnote 1, we did not distinguish between whether extra-territoriality was applied as part of the "national framework" or through "enforcement" legislation.

Penal codes were the most oft cited source of legislation for the extra-territorial jurisdiction.

Jurisdictional Basis of Extraterritorial Assertions

During phase two we examined the jurisdictional bases for extra-territorial assertions among 36 states reviewed in depth. Every country in the first instance listed territoriality as the strongest basis for jurisdiction. In many countries, the territorial provisions addressed temporal concerns, i.e., which "phase" of a criminal

¹ The matrix distinguishes between two types of extra-territorial jurisdiction: that which is part of the "national legal framework" and that which is "enforcement." According to paragraph 24 of the July 2008 report of the 1540 committee, this distinction was made in recognition of the fact that "the legal systems of many States prohibit or restrict activities through one type of law but use another type of law, such as a penal code, to set out specific penalties for violating such prohibitions or restrictions." During this study, we found significant confusion among member states in their use of these two categories. Thus, while we included them in the attached matrix, we did not distinguish between the two categories in our findings.

² The DRC was the only country that did not have an extra-territorial provision for chemical weapons. Its extra-territorial provisions applied only to nuclear weapons and material.

transaction occurred on its territory. For example, in Armenia, territorial jurisdiction is exercised based not only upon where the crime has started, but also if it continued and finished in the territory of the country. In every case, the territoriality principle was specifically extended to ships, vessels and airplanes travelling under the flag of the country.

Nationality was cited almost as often as territoriality as a basis for jurisdiction. Within this category, however, there were numerous and varied definitions of what “nationality” meant. The vast majority of states included within nationality, not only citizens, but also those resident in the country, irrespective of whether the crime was committed within the country or somewhere outside. In a few cases, states extended their jurisdiction to cover situations where a person acquires their citizenship after the crime, but before proceedings against them commence. Some states also specifically mentioned that dual citizenship did not act as a barrier to the state’s exercise of its jurisdiction.

Effects-based jurisdiction was the next most cited, although less than half of the countries studied included it. Under this rationale, the state’s jurisdiction extends to crimes committed which have a substantial impact on its territory or affect its national security. In almost every case where protective jurisdiction was invoked, the state limited its use to serious and heinous crimes.

Universal jurisdiction was also mentioned by under half of the 36 states surveyed. Of those invoking universal jurisdiction, many included it in their penal codes with language that limited its application to international agreements/treaties that were “binding upon” the country.³ Others included it in domestic legislation relating specifically to either crimes defined in the global terrorism conventions or those found in the Rome Statute, e.g. genocide and crimes against humanity. None of the countries surveyed employed universal jurisdiction outside these limited circumstances.

Passive personality, or jurisdiction based upon the nationality of the victim, was cited least often and only in approximately a third of the states surveyed.

RESEARCH CHALLENGES AND LIMITATIONS

The study relied entirely upon the 1540 Matrices, the 1540 National Reports and the legislation listed therein. As a result, the study is limited by the accuracy of these documents. In a couple of instances, we found the legislation listed in the matrix either out of date or unrelated because it did not include a jurisdictional clause that applied the law extra-territorially. In these latter cases, we often turned to the penal code and other legal provisions within the country to see if we could deduce some basis for the extra-territorial claim.

Additionally, specific legislation was sometimes difficult to track down and/or inaccessible due to the lack of an English translation. Because the links provided in the 1540 Committee Legislative Database often did not work, we resorted to Google searches and other databases. Where English versions were not available, Google translate was used.

Finally, the study only looked at domestic sources for the application of laws extra-territorially. It is possible that regional commitments may exist that provide for extra-territorial application.

³ While it was beyond the scope of this study to examine how each of the states have interpreted this limitation, we believe it is most likely that they have limited its application to those agreements and treaties which explicitly call for universal jurisdiction, such as the UN Convention Against Torture.

APPENDIX A

Total List of States that have ET according to Matrices

- | | |
|---------------------------|---------------------------|
| 1. Albania | 26. Ireland ⁴ |
| 2. Argentina | 27. Italy |
| 3. Armenia | 28. Jordan |
| 4. Australia | 29. Latvia |
| 5. Austria | 30. Liechtenstein |
| 6. Azerbaijan | 31. Lithuania |
| 7. Belarus | 32. Mauritius |
| 8. Belgium | 33. Micronesia |
| 9. Bosnia and Herzegovina | 34. New Zealand |
| 10. Botswana | 35. Norway |
| 11. Brazil | 36. Pakistan |
| 12. Bulgaria | 37. Romania |
| 13. Canada | 38. Saint Kitts and Nevis |
| 14. Cuba | 39. Singapore |
| 15. Czech Republic | 40. South Africa |
| 16. DRC | 41. Sri Lanka |
| 17. Denmark | 42. Sweden |
| 18. Estonia | 43. Switzerland |
| 19. Ethiopia | 44. Thailand |
| 20. Finland | 45. FYR Macedonia |
| 21. France | 46. Trinidad and Tobago |
| 22. Germany | 47. Tunisia |
| 23. Hungary | 48. UAE |
| 24. Iceland | 49. UK |
| 25. India | 50. US |
| | 51. Vanuatu |

36 countries subject to in-depth research

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|--------------------|--------------------|
| 1. Albania | 27. Pakistan |
| 2. Argentina | 28. Romania |
| 3. Armenia | 29. Singapore |
| 4. Australia | 30. South Africa |
| 5. Austria | 31. Sweden |
| 6. Belarus | 32. Switzerland |
| 7. Belgium | 33. Thailand |
| 8. Brazil | 34. UAE |
| 9. Bulgaria | 35. United Kingdom |
| 10. Canada | 36. USA |
| 11. Cuba | |
| 12. Czech Republic | |
| 13. Denmark | |
| 14. Estonia | |
| 15. Finland | |
| 16. France | |
| 17. Germany | |
| 18. Hungary | |
| 19. Iceland | |
| 20. India | |
| 21. Ireland | |
| 22. Italy | |
| 23. Latvia | |
| 24. Lithuania | |
| 25. New Zealand | |
| 26. Norway | |

⁴ Ireland cites its constitution as the source of its extra-territoriality. The extra-territoriality in the constitution, however, extends only to Northern Ireland.