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

*Current Status, Gaps in Coverage, and Potential Steps Forward*

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Workshop on Legal Cooperation to Control Non-State Nuclear Proliferation: Extra-Territorial Jurisdiction and UNSCRs 1540 and 1373
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Two facets to nuclear trafficking

- Nuclear materials
  - Special focus: Fissile materials

- Nuclear commodities
  - Nuclear-specific, e.g., uranium enrichment centrifuges
  - Nuclear dual-use, e.g., maraging steel
  - Nuclear technology, e.g., nuclear weapon designs
Model approach

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

- **Nuclear Terrorism Convention (EIF 2007, 76 parties)**
  - Trafficking in *nuclear materials* made an offense
  - Strong domestic law, jurisdictional, mutual legal assistance provisions
  - But *nuclear commodities* not covered

- **Convention on the Physical Protection of Nuclear Materials (CPPNM) (EIF 1987, 145 parties)**
  - Trafficking in *nuclear materials* made an offense
  - Strong jurisdictional, mutual legal assistance provisions
  - But *nuclear commodities* not covered and only nuclear material in *peaceful use* covered
2005 Amendment to CPPNM (not in force; 45 ratifications; ~100 ratifications needed)
- Clarifies that unauthorized transfers of nuclear material abroad is an offense
- Mutual Legal Assistance: Adds trafficking not a political crime under extradition treaties
- Still applies only to nuclear materials in peaceful use
- Not in force
UN Security Council Resolution 1540

- Binding on all states under Chapter VII
- States must control nuclear materials and commodities ("related materials") including transfers
- States must adopt, enforce civil and criminal penalties for illicit export, trans-shipment, financing
- Does not, itself, criminalize such activities
- No robust jurisdictional and mutual assistance rules
- Implementation incomplete
UNSCRs 1874 (North Korea) & 1929 (Iran)

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

- US, EU, etc., freeze assets, ban travel for those assisting nuclear and missile programs (leaders and facilitators; material and commodities)
- Designates numerous offenders operating *outside* target states for sanctions
- Limited number of sanctioning states
- Limited number of target states (but US sanctions include Iran, DPRK, Syria, Pakistan, and others)
Network of mutual legal assistance treaties
- Some contain robust measures seen in nuclear material treaties

Nuclear Suppliers Group
- 46 members (many states using NSG lists)
- Guidelines voluntary, not binding
- Criminal sanctions for illicit exports, not required
  - Members should adopt laws providing “penalties”
- No mutual legal assistance or agreed jurisdictional measures for prosecuting violations
Closing the Gaps – Key Targets, Fast Track

- **Most important targets**: Iranian and DPRK networks (possibly being shared)
- **Fastest way** to impose penalties and deter trafficking is through *designations*
  - UNSC sanctions resolutions
    - Global reach – Better than extraterritorial jurisdiction
  - Parallel unilateral sanctions
    - Need all key countries participating
  - Expand targets outside DPRK and Iran; add family members (cf. Libya); use Committees’ authority
  - Make automatic upon indictment by any state
Focus 1: Illicit exports from advanced states

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

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2: Illicit exports from less advanced states

- E.g., Egypt, India, Indonesia, Malaysia, Nigeria, Pakistan, Singapore, Thailand, UAE, Viet Nam

- Select those in CPPNM and conform mutual legal assistance agreements between key advanced states (US, EU) to apply CPPNM measures to nuclear commodity prosecutions
  - In these states measures already apply to materials prosecutions, under CPPNM
# Closing the gap – Jurisdiction and legal assistance (3)

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0 = No action, R = Ratified S= Signed, but not Ratified
Closing the gap – Jurisdiction and legal assistance (3)

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

- Develop a *new international instrument* akin to the Nuclear Terrorism Convention to address nuclear commodity smuggling...or amend an existing instrument
- *Amend Treaty of Rome* to make nuclear trafficking an international crime within jurisdiction of International Criminal Court
- Build strategy to declare some widely adopted components of the “model” *customary international law*
As efforts to gain wider adherence to key international legal instruments and to fully implement UNSCR 1540 continue...

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

- Jurisdiction to be established if offense committed within state or by a national of that state
- Extradite or prosecute

2005 Amendment adds
- Offense not political offense for extradition

NSG Guidelines

ESTABLISHMENT OF EXPORT LICENSING PROCEDURES

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