

## Opening Remarks

Peter Hayes

### Workshop on Cooperation to Control Non-State Nuclear Proliferation: Extra-Territorial Jurisdiction and UN Resolutions 1540 and 1373.

April 5, 2011

Washington DC

Good morning. My name is Peter Hayes, Executive Director of the Nautilus Institute.

It is my privilege to call to order this workshop on **legal cooperation to control non-state WMD proliferation.**

First, welcome to Washington DC, especially our international guests. Thank you for coming such a long way and we hope you enjoy the cherry blossoms.

1<sup>st</sup>, some **brief announcements:**

- We will be taking **two breaks plus lunch.**
- There is a **reception** immediately after our last session today—just downstairs.
- **Tomorrow there will be an informal dinner** for those interested. Please **sign up tomorrow at noon** if you are attending.
- If you have not already sent us your paper last night or given it to Scott, please do so ASAP.
- Scott will load your presentations for your session

2<sup>nd</sup>, thank you to our **co-hosts Carnegie Endowment and Stanley Foundation.**

3<sup>rd</sup>, many thanks to our donor partners and officials, including:

- **Emily Warren** formerly of **Hewlett Foundation** and her successor, **Megan Garcia;**
- **Paul Carroll** of the **Ploughshares Fund**
- And especially **Veronica Tessler** from **Stanley Foundation.**

4<sup>th</sup>, I would like to identify and thank some key people:

- **Joan Diamond**, Nautilus' Chief Operating Office who organized this event,
- **Scott Bruce, Kiho Yi, and Saegan Swanson** from Nautilus who are available to help you
- **Our Convening Committee, Togzhan Kassenova, Doug Shaw, Veronica Tessler, and James Cockayne**
- **Binoy Kampark** who will be our rapporteur for this event. **We are taping this** event for his sole use as rapporteur, after which the recording will be destroyed.

5<sup>th</sup>, this workshop is conducted under **Chatham House rules**, that is, no remark or view should be attributed to any person participating in this event without their express permission.

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This workshop began 3 years ago when I asked: What would we say if North Korea capitulated and asked us what we want them to do with their WMD-capable persons

I don't believe that North Korea has law in the sense used by UNSC in a 1540 or 1373 context—and indeed, North Korea has not filed a national report.

Politics and personality rule in North Korea, not law. It's not clear that North Korea would accept a threat reduction alternative employment strategy, or if they did, that we would trust that they would not export such a person. We would not want them sent to South Korea, a non-nuclear state. We can't force them to wear ankle bracelets.

The more I thought about this question, which is urgent, the more it became evident that we need an effective global legal framework, not a North Korea-specific answer.

But 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.

### **Colleagues:**

We intuit, and I believe we are likely all persuaded, that the emergence of diverse, powerful non-state actors with varying motivations but unremittingly lethal intention to acquire, target, and use WMD<sup>1</sup> against civilian targets—there being no less than 2,400 human settlements larger than 100,000 people on the planet to choose from—means that we are in race against time.

What kind of multi-layered, multi-level, multi-dimensional set of legal and institutional controls could win this race against these non-state actors?

Is bottom-up national control legislation per Resolution 1540 the most effective way to succeed?

Can it be made to work with sufficient effort, technical assistance, and incentives, pushed along by the Global Nuclear Summit process?

And if so, does this approach demand more or less far reaching forms of extra-territoriality, applied to one's own citizens, and even to non-nationals?

Or when we discuss legal extra-territoriality, are we entering the “twilight zone of international law” (Fred McGoldrick), leading to a crazy quilt of uneven, partial, conflicting, overlapping jurisdictions?

Alternately, is it time to create new international law that would, as then IAEA-Director Mohammed ElBaradei asserted in 2004, “universalize the export control system, remove...loopholes, and enact binding, treaty-based controls,” to overcome the weaknesses of the NPT and the Nuclear Suppliers Group?<sup>2</sup>

Is Anne Marie-Slaughter right to assert that we must make nuclear smuggling—and possibly all WMD smuggling—a universal crime against humanity—that is, one so heinous that it stands “alongside genocide and other evils,” and thereby is subject to

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<sup>1</sup> WMD or weapon of mass destruction, including nuclear, radiological, chemical, and biological weapons.

<sup>2</sup> M. ElBaradei, “Saving Ourselves From Self-Destruction,” *New York Times*, February 12, 2004, at: <http://www.nytimes.com/2004/02/12/opinion/saving-ourselves-from-self-destruction.html?pagewanted=print&src=pm>

universal jurisdiction and prosecutable at the International Criminal Court and by national courts in every country, without a direct nexus to nationality or territory?<sup>3</sup>

Of course, as we know and will discover, these choices are not exclusive.

Our goal is to end in session 8 with a dialogue on the most effective way to move this agenda forward systematically, with concrete and implementable strategies, and some sense of sequencing and relative efficacy in helping us to win this race.

I now ask George Perkovich, Vice President at Carnegie Endowment for International Peace, to speak on “Abolition and Non-State Actors.”

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<sup>3</sup> A. Slaughter, T. Wright, “Punishment to Fit the Nuclear Crime, *Washington Post*, March 2, 2007, at: <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/01/AR2007030101326.html>