

TERRORISM AND CRIMINALITY

“An amount of plutonium about the size of an apple could kill hundreds of thousands of people and spark a global crisis.”

US President Barack Obama, Hankuk University of Foreign Studies, Seoul, Republic of Korea, 26 March 2012

A 2007 study conducted by former US Secretary of Defense William Perry has estimated the chance of a nuclear terrorist incident within the next decade to be roughly 50 per cent.⁹⁰ In a survey of 85 national security experts, US Senator Richard Lugar found a median estimate of 20 per cent for the “probability of an attack involving a nuclear explosion occurring somewhere in the world in the next 10 years”.⁹¹

The threat of a nuclear terrorist attack is generally thought to be threefold. The potentially most destructive – yet least likely – danger is that a non-State actor will acquire and use a nuclear weapon. The second threat involves attacks on facilities that use or process nuclear material, e.g. nuclear power plants. The most likely danger stems from non-State actors obtaining fissile materials – i.e. HEU or plutonium – for use in an improvised nuclear device such as a radiological dispersal device or “dirty bomb”.

The international legal framework against nuclear terrorism comprises a number of instruments. These include UN Security Council resolution 1540 (2004) on the non-proliferation of weapons of mass destruction, the Convention on the Physical Protection of Nuclear Material, which entered into force in 1987, its 2005 amendment, the International Convention for the Suppression of Terrorist Bombings, which has been in force since 2001, and the International Convention for the Suppression of Acts of Nuclear Terrorism (Nuclear Terrorism Convention), which came into force in 2007. The 2010 Washington Nuclear Security Summit, at which 47 governments discussed how to better safeguard weapon-grade plutonium and uranium to prevent nuclear terrorism, further strengthened these mechanisms.

Political commitment for the implementation of these instruments has been strengthened by the Nuclear Security Summits held in Washington in 2010 and Seoul in 2012.

It is important to note that while such measures to secure fissile materials and facilities and prevent the spread of nuclear weapons, components and know-how – whether to States or non-State actors – are important, if they are to achieve and sustain a more secure and safer world they need to be part of a more comprehensive approach to nuclear security, including concrete, extensive and sincere steps to reduce nuclear arsenals, with a view to eliminating them, and secure all nuclear materials, including those possessed by the nuclear-weapon-possessing States for military purposes. The AQ Kahn black market network in nuclear materials and expertise demonstrated that as long as there are bombs, fissile materials and nuclear programmes around, non-State actors can steal, purchase or divert them. Former high-level US official Sam Nunn has noted that, “If we want other nations in the world to join us in a tough approach to prevent nuclear terrorism, and the continued spread of nuclear weapons, we must be willing to re-commit to the vision of a world without nuclear weapons.”⁹²

It is also worth noting that there are diverging views on what constitutes “nuclear terrorism”. While some consider nuclear terrorism to be limited

War crimes under the Rome Statute

Under the Rome Statute of the International Criminal Court, the use of weapon systems or methods of war that cause indiscriminate harm constitutes a war crime. On ratifying the Rome Statute, the Government of France declared that this provision would not apply to the use of nuclear weapons. New Zealand submitted an interpretive declaration stating that “it would be inconsistent with the principles of international humanitarian law” to limit the scope of the Statute to “events that involve conventional weapons only”.

In line with the 1996 International Court of Justice Advisory Opinion, which affirmed the general illegality of the threat or use of nuclear weapons, in 2009 Mexico proposed that the Rome Statute be amended to make “employing nuclear weapons or threatening to employ nuclear weapons” a war crime (under Article 8). The amendment has yet to be adopted.

to acts of non-State actors, others argue that the use of nuclear weapons is criminal and a terrorist act, whether by non-State or State actors.

The above-mentioned international measures to address nuclear terrorism generally focus on non-State actors. However, some countries, in implementing these measures, extend controls and criminal measures to include State actors as well.

In addition, several countries, in response to the affirmation by the International Court of Justice that the threat or use of nuclear weapons would generally be illegal (see **Chapter 9. Laws and norms: Towards non-use and prohibition**), have pursued criminalization of use of nuclear weapons through the International Criminal Court (see box above).

Good Practice

ALL STATES

Examples

A. United Nations Security Council resolution 1540

Capacity-building

B. International Convention for the Suppression of Acts of Nuclear Terrorism

Promoting cooperation

A

United Nations Security Council resolution 1540

Capacity-building

UN Security Council resolution 1540 obliges States, inter alia, to refrain from supporting by any means non-State actors from developing, acquiring, manufacturing, possessing, transporting, transferring or using nuclear, chemical or biological weapons and their delivery systems.⁹³ The resolution imposes binding obligations on all States to establish domestic controls to prevent the proliferation of nuclear, chemical and biological weapons, and their means of delivery, including by establishing appropriate controls over related materials. It also encourages enhanced international cooperation on such efforts, in accordance with existing

international non-proliferation treaties, to which universal adherence should be promoted. States are required to report on the resolution's implementation to the 1540 Committee, which in turn reports to the UN Security Council.

At the outset, a number of States criticized the UN Security Council for extending its mandate in adopting resolution 1540 and taking on a legislative function by placing binding commitments on countries that are not Security Council members and are thus not included in the decision to adopt such measures. Nevertheless, by 2011 more than 120 States had reported to the 1540 Committee on their national legal framework for non-proliferation, and the Committee's mandate was extended for 10 years.

Many States have communicated to the 1540 Committee a lack of capacity to implement all measures required under resolution 1540. In response, the governments of some wealthier countries, with support from their parliaments (including through budget allocations), are providing support to less developed countries for implementation of resolution 1540. As part of this process, the 1540 Committee is engaging more and more with national parliaments in various countries through consultations, workshops and other activities.

B**International Convention for the Suppression
of Acts of Nuclear Terrorism****Promoting cooperation**

The 2005 Nuclear Terrorism Convention is a multilateral treaty open to ratification by all States and joins the universal anti-terrorism conventions.⁹⁴ The Convention details offences relating, inter alia, to the unlawful and intentional possession and use of radioactive material or a radioactive device, and use or damage of nuclear facilities by non-State actors. It is designed to promote cooperation among countries to prevent, investigate and punish such acts.

Based on an instrument originally proposed by the Russian Federation in 1998, the Convention provides a definition of acts of nuclear terrorism and covers a broad range of possible targets, including nuclear power plants and nuclear reactors. Under its provisions, alleged offenders must

be either extradited or prosecuted. It also encourages States to cooperate in preventing terrorist attacks by sharing information and assisting each other in connection with criminal investigations and extradition proceedings. The treaty requires that any seized nuclear material is held in accordance with IAEA safeguards and that any nuclear or radioactive material is handled with regard for the IAEA's health and safety standards and physical protection recommendations.

The Convention entered into force in July 2007 and requires all "States Parties to make every effort to adopt appropriate measures to ensure the protection of radioactive material, taking into account relevant recommendations and functions of the Agency".⁹⁵ At the time of writing, it had 79 States Parties (and 115 signatories). Of the nuclear-weapon-possessing States, the Democratic People's Republic of Korea and Pakistan have not signed the treaty, while France and the United States have signed but not yet ratified it.



Recommendations for Parliamentarians

- Urge your government to sign and ratify the Nuclear Terrorism Convention and other anti-terrorism conventions.
- Call on and work with your government to implement the provisions of UNSC resolution 1540, and to provide support for States that lack the capacity to implement certain provisions of the resolution
- Adopt legislative measures to implement the Nuclear Terrorism Convention and UNSC resolution 1540.

Good Practice

NON-NWS

Examples

A. New Zealand

Nuclear terrorism prevention requires a comprehensive approach

B. Canada

From criminal measures to effective protection



New Zealand is one of the countries mentioned above that is providing assistance to less developed countries to build capacity in order to implement UN Security Council resolution 1540. It is focusing on support for Pacific island States.

In addition, New Zealand has taken a comprehensive approach to implementing resolution 1540, addressing proliferation or use of nuclear weapons by non-State and State actors. New Zealand's 2004 Report to the 1540 Committee reaffirms that "New Zealand's strong and consistent policy is that **all** weapons of mass destruction (WMD) should be eliminated, and that this elimination should be verified and enforced through robust legally binding multilateral disarmament instruments. New Zealand provides no support whatsoever to any entity – **whether State or non-State actor**⁹⁶ – attempting to develop, acquire, manufacture, possess, transport, transfer or use WMD and their means of delivery."⁹⁷

The Report further details New Zealand's legislation and policies giving effect to the provisions of resolution 1540. With regard to the relevant prohibitions under New Zealand law, it refers to the 1987 New Zealand Nuclear Free Zone, Disarmament, and Arms Control Act, which "expressly makes it an offence to aid, abet or procure any person to manufacture, acquire, possess, or have control over any nuclear

explosive device. This prohibition also applies extra-territorially to agents or servants of the Crown outside the New Zealand nuclear free zone.”⁹⁸ (For more on the New Zealand law, see **Chapter 9. Laws and norms: Towards non-use and prohibition.**)

Importantly, the Report stresses the connection between resolution 1540 and nuclear disarmament, and states that non-proliferation is a problem that cannot be taken out of context but should rather be addressed comprehensively: the “most effective non-proliferation moves we could make collectively would be to ensure and enhance compliance with the [Nuclear Non-Proliferation Treaty] in all its aspects including nuclear disarmament.”⁹⁹

B

Canada

From criminal measures to effective protection

On 17 May 2012, Senator Romeo Dallaire addressed the Canadian Senate on the second reading of Bill S-9, an act to amend the Canadian Criminal Code in order to enhance implementation of obligations under the Convention on the Physical Protection of Nuclear Material and the International Convention for the Suppression of Acts of Nuclear Terrorism.

In his address, Senator Dallaire noted that:

“If we are to leave this planet a better place for those who succeed us, then we must take nuclear weapons far more seriously into the forefront, and we must struggle with every effort that we can muster to keep our planet free of their use.

This bill can be seen as a tool to close legal loopholes when it comes to the prosecution of those carrying out activities related to nuclear terrorism. Through the extraterritorial jurisdiction approach, it extends the reach of Canadian law where prosecution may have previously occurred in a legal vacuum. It also provides for extradition in the case of nuclear terrorism without the need for pre-existing bilateral agreements.”¹⁰⁰

However, Senator Dallaire noted that Bill S-9 was insufficient to build a comprehensive norm of illegality or to establish indiscriminate criminal mechanisms to address and prevent all risks of nuclear weapons use. In particular, Senator Dallaire noted that:

“The problem of nuclear terrorism cannot be seen in isolation. It is but one facet, albeit important and not insignificant, of the overall problem of nuclear weapons. (...) A new nuclear order is needed to confirm the symbiotic relationship between the non-proliferation of nuclear weapons and nuclear disarmament. (...) A two-class world in which the powerful aggrandize unto themselves nuclear weapons while proscribing their acquisition by other states is not sustainable.”¹⁰¹

Senator Dallaire pointed to the resolutions adopted unanimously by both the Canadian Senate and the House of Commons in 2010, at the request of over 500 recipients of the Order of Canada, supporting the UN Secretary-General’s Five-Point Plan for the global abolition of nuclear weapons and calling on the Canadian Government to launch a major international diplomatic initiative to achieve this. (See **Chapter 10. Negotiations for a nuclear weapons treaty or package of agreements.**)



Recommendations for Parliamentarians

- Adopt the strongest possible measures to prevent nuclear crimes, including legislation that would make it a criminal offence for State actors or non-State actors to manufacture, acquire, possess, or have control over any nuclear explosive device, or to aid, abet or procure any person in such acts, and allow for the extraterritorial application of such legislation.
- Strengthen the international norm against nuclear crimes by supporting the adoption of an amendment to the Rome Statute of the International Criminal Court that would make the use and threatened use of nuclear weapons a war crime.