
Countering Nuclear Terrorism: A Conventional Response

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Abstract

Nuclear terrorism poses a grave threat to national security, a fact dramatically demonstrated on 11 September 2001 by Al-Qaeda's attacks against the World Trade Center and the Pentagon. These strikes revealed the vulnerability of Western societies to foreign terrorist threats and underscored the real possibility that terrorist groups might use nuclear weapons against cities in the United States or Europe. This article analyses the nature of this threat and possible remedies within the context of a new multilateral instrument, the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism. This Convention furnishes a legal basis for international cooperation to prevent terrorists from acquiring nuclear weapons. It criminalizes the possession of, use of, or threat to use radioactive devices by non-state actors, their accomplices, and organizers if intended to produce death, serious bodily injury or environmental or property damage. The agreement further encourages increased exchanges of information and greater collaboration between governments in the pursuit of terrorist suspects. But the effectiveness of this instrument depends on the degree to which state parties respect, abide by and enforce its provisions. Key in this regard is strengthening security of fissile materials stored in nuclear facilities. If governments fulfil their duties in this Convention, the agreement will work well and accomplish its purposes. To the degree that governments fall short of meeting their obligations, specific protections against nuclear terrorism in the Convention will be eroded, and the risk of nuclear terrorism will remain high.

Nuclear terrorism poses a grave threat to national security. While there was already awareness of this threat during the early 1990s, its stark importance was

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dramatically demonstrated on 11 September 2001, when members of the Al-Qaeda terrorist organization hijacked four aircraft and flew three of them into the World Trade Center and the Pentagon.¹ These strikes revealed the vulnerability of Western societies to foreign terrorist threats. The 9/11 attacks also underscored the possibility that terrorist groups could use weapons of mass destruction against Western cities. The threat became clear that Al-Qaeda could similarly launch skyjacked aircraft strikes against nuclear power plants, with even more devastating impacts. More disturbing, it is well known that Al-Qaeda is seeking to acquire nuclear fissile materials – either plutonium or highly enriched uranium – and the necessary scientific expertise for making a nuclear weapon, presumably to detonate in a Western city.²

The possibility of future terrorist activities using nuclear devices is a concern that all governments must confront.³ The puzzle confronting governments is what can be done to prevent such catastrophic nuclear attacks by terrorist groups. This study addresses one aspect of the solution to that puzzle, namely, the need to promote through international legal channels better intelligence-sharing and closer intergovernmental collaboration about terror groups and the storage and transfer of nuclear technologies.

On 15 April 2005, the UN General Assembly adopted and opened for signature the International Convention for the Suppression of Acts of Nuclear Terrorism (Convention on Nuclear Terrorism, or CNT).⁴ The goal of this multilateral instrument is

¹ On 11 Sept. 2001, hijacked aircraft were flown by 19 Al-Qaeda members into the two World Trade Center Towers in New York City and into the Pentagon Building in Virginia. Approximately 3,000 people were killed. A fourth hijacked aircraft crashed in the Pennsylvania countryside. See 'US Attacked: Hijacked Jets Destroy Twin Towers and Hit Pentagon in Day of Terror', *New York Times*, 12 Sept. 2001, at 1; 'Terrorists Hijack 4 Airliners, Destroy World Trade Center, Hit Pentagon; Hundreds Dead', *Washington Post*, 12 Sept. 2001, at 1. For an authoritative analysis of these events see T.H. Kean and L. Hamilton, *The 9/11 Report: The National Commission on Terrorist Attacks Upon the United States* (2004).

² Rediff.com, 'Al Qaeda bought nuclear weapons', 22 Mar. 2004, available at: <http://www.rediff.com/news/2004/mar/22mir.htm> (accessed 18 Mar. 2006); 'Warning over al Qaeda nuclear weapons fear', *Daily Mail*, 24 May 2005, available at: http://www.dailymail.co.uk/pages/live/articles/news/news.html?in_article_id=349848&in_page_id=1770 (accessed 15 Mar. 2006). For an inventory of Al-Qaeda's efforts to secure nuclear weapons see Center for Nonproliferation Studies, 'Al-Qaeda's Nuclear Ambitions' (June 2005), available at: <http://www.epsusa.org/publications/newsletter/june2005/alqaeda.htm> (accessed 18 Mar. 2006).

³ See generally Rostow, 'Before and After: The Changed U.N. Response to Terrorism Since September 11th', 35 *Cornell Int'l LJ* (2002) 675.

⁴ International Convention for the Suppression of Acts of Nuclear Terrorism, UN Doc A/RES/59/290 (15 Apr. 2005), at Annex (hereinafter Convention on Nuclear Terrorism, or CNT), available at: <http://www.un.int/usa/a-59-766.pdf> (accessed 18 Mar. 2006). For initial reactions to the convention, see 'Statement by Ambassador Stuart Holliday, Alternate United States Representative to the UN for Special Political Affairs, on the Adoption of the International Convention for the Suppression of Acts of Nuclear Terrorism, in the General Assembly, April 13, 2005; United States Mission to the United Nations press release #68 (05), 13 Apr. 2005, available at: http://www.usunnewyork.usmission.gov/05_068.htm (accessed 18 Mar. 2006); 'New Convention Against Nuclear Terrorism Bolsters Global Framework', International Atomic Energy Agency staff report, 14 Apr. 2005, available at: http://www.iaea.org/NewsCenter/News/2005/conv_nuclterror.html (accessed 20 Mar. 2006); and 'Statement by Alexander Yakovenko, the Spokesman of Russia's Ministry of Foreign Affairs, Concerning the Adoption by UN General Assembly of an International Convention for the Suppression of Acts of Nuclear Terrorism', Russian Ministry of Foreign Affairs press statement, available at: <http://www.russianembassy.org.za/statements/text/apr05/dyakovenko-terrorism140405.html> (accessed 15 Mar. 2006).

to improve the existing legal framework against international terrorism 'for international cooperation in the investigation, prosecution, and extradition of those who commit terrorist acts involving radioactive materials or a nuclear device'.⁵ But to what extent does the instrument actually make any real contributions toward countering acts of transnational nuclear terrorism? The study investigates three themes to address this central question. First, Section 1 examines the specific aims of the CNT, both regarding the reality of the threat of nuclear terrorism, as well as the policy provisions contained in its text. As a second theme, the study evaluates the ways and means proposed in the Convention to prevent nuclear terrorism and to deal with possible perpetrators. Section 2 sets out the background of the CNT, while the legal regime it creates is the subject of Section 3. This discussion sets out the strategies and procedures in the CNT for defining offences and improving multilateral efforts to suppress threats involving nuclear terrorism. The third theme is presented in Section 4 as the analysis assesses the realistic prospects for the CNT to coordinate successfully intergovernmental actions for deterring, preventing and punishing offenders accused of nuclear terrorism. The critical consideration here, as one might suppose, is likely to be found less in the content of the agreement's provisions or in its legal ambitions. Rather, ultimate success or failure of the CNT will rest on the degree to which its states parties are willing and able to make its provisions work.

1 Risks of Nuclear Terrorism

The risks posed by nuclear terrorism are threefold: (1) there is the need to protect nuclear reactors adequately; (2) there is the possibility that terror agents can construct or acquire nuclear weapons; and (3) there is the possibility that terror agents might build 'dirty bombs'.

A Protection of Nuclear Reactors

Most nuclear power reactors are openly vulnerable to attack from terrorist groups, as they are protected only by wire fences and local security personnel. The fear is that a terrorist attack against a nuclear plant could destroy redundant safety systems, thereby causing severe core damage, meltdown and catastrophic radioactive releases. Recent revelations that Al-Qaeda considered nuclear power plants as primary targets for sabotage escalated concern among experts that nuclear reactors worldwide, particularly in the United States, are not adequately protected.⁶

⁵ Aita, Press Release, State Department Documents, 'U.N. General Assembly Adopts Nuclear Terrorism Treaty' (13 Apr. 2005), available at: <http://www.globalsecurity.org/security/library/news/2005/04/sec-050413-usia02.htm> (accessed 29 Dec. 2006).

⁶ Starr, 'NRC memo warns of attacks on nuclear plants', CNN, 31 Jan. 2002, available at: <http://archives.cnn.com/2002/US/01/31/ret.terror.threats/> (accessed 19 Mar. 2006); Grunwald and Behr, 'Are Nation's Nuclear Power Plants Secure?', *Washington Post*, 4 Nov. 2001.

B *Building Nuclear Weapons*

Closely related to plant security concerns are worries over whether a terrorist group could build a nuclear device. An emerging consensus suggests that such a scenario might be possible – that, if given scientific expertise and necessary fissile materials, a sophisticated terror group could construct an operational nuclear bomb, with a potential yield of around one kiloton. Documented attempts by Al-Qaeda to acquire nuclear materials and nuclear-weapon design information highlight the extreme gravity of this risk.⁷ The key for this scenario to occur is the ability of a terror group to acquire fissile materials, either plutonium or highly enriched uranium, which is needed to make the bomb's core. These fissile materials might be purchased from foreign sources on the black market or stolen from a nuclear facility.⁸

The International Atomic Energy Agency (IAEA) sets safeguard standards and conducts inspections aimed at detecting whether there are substantial process losses of any fissile materials, or whether adequate protection is in place to ensure against the theft of materials in transit or in storage.⁹ It remains problematic, however, that IAEA standards apply at present only to international shipments of fissile materials, not to the security of facilities where they are processed, used and stored. This invites genuine worry about whether fissile materials stored in these nuclear facilities are in fact secure, or have been misplaced, missing, or stolen.

C *Building 'Dirty Bombs'*

A third threat from nuclear terrorists is the possibility that they might detonate a 'dirty' bomb. A dirty bomb is a conventional explosive containing radioactive isotopes

⁷ Albright, 'Al-Qaeda's Quixotic Quest to Go Nuclear', *Asia Times*, 22 Nov. 2002, available at: http://www.atimes.com/atimes/Middle_East/DK22Ak01.html; Albright, 'Al Qaeda's Nuclear Program: Through the Window of Seized Documents', *Special Forum* 47 (The Nautilus Institute), 2 Nov. 2002, available at: http://www.nautilus.org/archives/fora/Special-Policy-Forum/47_Albright.html (accessed 9 May 2006). Significant evidence suggests that terrorist groups hostile to US interests have sought stolen nuclear weapons or weapons-usable nuclear materials, and have attempted to recruit nuclear-weapons expertise. See Bunn, 'The Threat: The Demand for Black Market Fissile Material' (Nuclear Treat Initiative, last updated 16 June 2005), available at: http://www.nti.org/e_research/cnwm/threat/demand.asp (accessed 19 May 2006). Evidence also suggests that most terror groups are not interested in destroying Western society with weapons of mass destruction: see Sands, 'The Nuclear Terrorists: Who, Why, and How Capable', in C.D. Ferguson and W.C. Potter (eds), *The Four Faces of Nuclear Terrorism* (2004); G. Allison, *Nuclear Terrorism: The Ultimate Preventable Catastrophe* (2004), at 19–42; and J. Stern, *The Ultimate Terrorists* (1999).

⁸ See generally Bunn, *supra* note 7; Testimony of Laura S.H. Hologate, Vice President for Russia/New Independent States Program, Nuclear Threats Initiative, 'Building a Nuclear Bomb: Identifying Early Indicators of Terrorist Activities' before the House Committee on Homeland Security Subcommittee on Prevention of Nuclear and Biological Attack, 26 May 2005. See Francis, 'Experts Warn Loose Russian Nuclear Materials Could Lead to WMD in Terrorist Hands', *NTI Global Security*, 27 May 2005, available at www.nti.org/d_newswire/issues/2005_5_27.html#3A7EDFED (accessed 5 Mar. 2007).

⁹ See IAEA, 'Nuclear Security Plan for 2006–2009', IAEA Doc GC(49)/17 and IAEA, 'Resolutions and Other Decisions of the General Conference, Forty-Ninth Regular Session, 26–30 September 2005' (GC(49)/RES/DEC(2005)).

in the form of powder or tiny pellets that, when exploded, will disperse the nuclear material and contaminate a wide area.¹⁰ The main damage from a dirty nuclear bomb would come from the blast itself, while contamination from its radioactive material to people and the environment likely would be limited. The main intent of a dirty bomb is to incite panic and contaminate people and property with radioactive materials.¹¹

These threats of nuclear terrorism are today real. That being the case, the overriding critical concern becomes: What can governments do to prevent such a nuclear incident from occurring? Fundamental to addressing this question is the need for genuine multilateral cooperation and collaboration to share intelligence information and coordinate individual national policies into unified international actions. Facilitating such cooperation are international law channels, especially through the promulgation of and mutual compliance with binding legal instruments. To this end, concerned governments worked for seven years under United Nations' auspices to negotiate a special multilateral agreement, the International Convention on the Suppression of Acts of Nuclear Terrorism.¹² This agreement represents the most authoritative international instrument to date for dealing with nuclear terrorism in terms of deterring such acts, defining them as criminal offences and for setting out means for bringing accused offenders to trial.

2 Background of the Convention

The international effort to criminalize nuclear terrorism is only a decade old. On 15 December 1997, the General Assembly recommended that the Ad Hoc Committee on Terrorism established by the General Assembly through its Resolution 51/210 of 17 December 1996 should convene to elaborate an international convention for the suppression of acts of nuclear terrorism.¹³ To this end, in September 1998

¹⁰ Nuclear Regulatory Commission, 'Fact Sheet on Dirty Nuclear Bombs', available at: <http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/dirty-bombs.html> (revised Feb. 2004) (accessed 20 Mar. 2006); World Health Organization, 'Nuclear terrorism and dirty bombs' and WHO/RAD Information Sheet, 'Radiation Dispersion Device (Dirty Bomb)', Feb. 2003, both available at: http://www.who.int/ionizing_radiation/a_e/terrorism/en/; and Karon, 'The "Dirty Bomb" Scenario', Time.com, 10 June 2002, available at: <http://www.time.com/time/nation/article/0,8599,182637,00.html> (accessed 18 Mar. 2006).

¹¹ See Ensor, 'Al Qaeda Interested in Dirty Bomb, U.S. says', CNN.com, 6 Dec. 2001, available at: <http://archives.cnn.com/2001/US/12/04/ret.nuclear.report/>; 'Analysis: Bin Laden's nuclear threat', BBC News, 26 Oct. 2001, available at: http://news.bbc.co.uk/1/hi/world/south_asia/1621819.stm (accessed 18 Mar. 2006).

¹² Convention on Nuclear Terrorism, *supra* note 4.

¹³ 'Measures to eliminate international terrorism', GA Res 52/165, UN Doc A/RES/52/653 (15 Dec. 1997). See also GA Res 49/60, UN Doc A/RES/49/60 (9 Dec. 1994), by which the General Assembly adopted the Declaration on Measures to Eliminate International Terrorism; GA Res 51/210, P 9, UN Doc A/RES/51/210 (17 Dec. 1996); and GA Res 56/88, P 16, UN Doc A/RES/56/88 (24 Jan. 2002).

the Sixth Committee of the General Assembly established such a working group and elected Philippe Kirsch of Canada as its Chairman.¹⁴ The Ad Hoc Committee on Terrorism convened in its second session from 17–27 February 1998 to peruse and revise a draft convention on nuclear terrorism that had been recently submitted by the Russian Federation.¹⁵

At the fifth meeting of the Ad Hoc Committee in 1998, the Russian delegation formally introduced its text for a draft convention on the suppression of acts of nuclear terrorism.¹⁶ The drive behind Russia's initiative was its government's perception of the critical need to counter potential threats of terrorism involving the use of nuclear devices and the need to undertake effective international counteractions against those threats.¹⁷ The Russians contended that current multilateral instruments were not sufficiently broad in reach or in means for responding to threats implicit in an act of nuclear terrorism. A new convention, they argued, would fill legal lacunae left by other relevant instruments, notably, the 1980 Convention on the Physical Protection of Nuclear Materials.¹⁸ The Convention on Physical Protection only pertains to nuclear materials used for peaceful purposes; it does not extend to nuclear materials or facilities used for military purposes. The draft text submitted by the Russians aimed to cover more broadly possible targets and types of nuclear terrorism. Given that the Convention on Physical Protection fails to differentiate nuclear terrorism from other criminal acts involving nuclear materials, this new instrument would enable nuclear terrorism to be defined and distinguished more clearly as a terrorist act. The Russian draft convention also included provisions for countermeasures to combat nuclear terrorism, among them procedures to be taken after a crisis, such as the need to return to rightful owners any radioactive materials and devices involved in an offence. Importantly, also recognized during these discussions was that Russia's draft text mirrored

¹⁴ 'Measures to Eliminate International Terrorism: Report of the Working Group', UN GA Doc A/C.6/53/L.4 53rd sess. (22 Oct. 1998), at 2.

¹⁵ UN Doc A/AC.252/L.3 (17 Dec. 1996).

¹⁶ See draft text of the convention on the suppression of acts of nuclear terrorism submitted by the Russian Federation, UN Doc A/AC.252/L.3 and Corr.1 and Corr. 2, in 'Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996', UN GAOR 53rd sess. (Suppl No 37) (A/53/37) (23 July 1998), Annex I (hereinafter Russian draft text).

¹⁷ As privately reported, the impetus for Russia's initiative in introducing the draft was reports that about 100 of its portable nuclear weapons devices developed during Cold War years were unaccounted for and potentially vulnerable to theft by terror groups: see generally M. Bunn and A. Weir, *Securing the Bomb: An Agenda for Action* (2004); National Research Council (Committee on Indigenization of Programs to Prevent Leakage of Plutonium and Highly Enriched Uranium from Russian Facilities, Office for Central Europe and Eurasia), *Strengthening Long-Term Nuclear Security: Protecting Weapon-Usable Material in Russia: Development, Security, and Cooperation* (2005); National Research Council (Committee on International Security and Arms Control), *Monitoring Nuclear Weapons and Nuclear-Explosive Materials: An Assessment of Methods and Capabilities* (2005). The threat here concerns the possible use of 'suitcase atom bombs', which weigh as little as 65lb and could yield an explosion of between 0.5 and 2 kilotons: see N. Sokov, 'Suitcase Nukes: Permanently Lost Luggage', Paper for the Center for Nonproliferation Studies, Monterrey Institute of International Studies, 13 Feb. 2004, cited in Allison, *supra* note 7, at 49.

¹⁸ Convention on the Physical Protection of Nuclear Material, 3 Mar. 1980, TIAS No 11080, 1456 UNTS 101 (hereinafter Convention on Nuclear Materials).

criminal law provisions in other counter-terrorist conventions, which could be considerably reinforced by integrating relevant provisions from the recently concluded International Convention for the Suppression of Terrorist Bombings (CTB).¹⁹ Implementation of this latter strategy, in fact, proved to be a viable approach as the convention text evolved over the next five years.

The committee conducted its work as a working group of the whole and proceeded in two phases. During the first phase, the Working Group concentrated on definitions and offences covered under the proposed convention, with a view to clarifying the need for such an instrument, along with its objectives and its substantive scope. To these ends, the group reviewed Article 1 of the Russian draft text, which contained definitions of select terms used in the text. During its second phase, the working group dealt with reviewing and assessing substantive provisions in the Russian text that differed from provisions in related UN counter-terrorism treaties.²⁰ From this process, 39 separate written amendments and proposals for rewording language in the draft text were submitted by at least 19 state delegations.²¹ To follow up, the Working Group convened from 28 September to 19 October 1998, in 13 meetings to consider two documents. One was the draft text submitted by the Russian Federation; the second was a discussion paper prepared by 'the Friends of the Chairman'.²² From these discussions, which included 38 additional written proposals and suggested amendments tabled before the Working Group, the Friends of the Chairman prepared a new discussion paper that was considered by the Working Group.²³ Based on comments made by delegations to this paper and proposals concerning provisions not included in the paper,²⁴ the Friends of the Chairman subsequently prepared a revised draft convention text. This revised text contains the entire final draft convention, save for draft Article 4. This provision delayed completion of the convention for four years. The main

¹⁹ International Convention for the Suppression of Terrorist Bombings, 15 Dec. 1997, S. Treaty Doc No. 106-6, 37 ILM 249 (hereinafter Convention on Terrorist Bombings).

²⁰ Especially, the Convention on Plastic Explosives for the Purpose of Detection, 1 Mar. 1991, US Treaty Doc No. 103-8, 2122 UNTS 359 (hereinafter Convention on Plastic Explosives) and the Convention on Terrorist Bombings, *supra* note 21. Special attention in the draft negotiations focused mainly on draft Arts 2 (the nature of the offence), 4 (regarding the lawfulness of states using nuclear weapons), 5 (making offences domestic crimes), 6 (eliminating mitigating factors), 8 (protecting radioactive materials under IAEA standards), 10 (establishing conditions for investigating an alleged offence), 11 (making mandatory the duty to extradite or prosecute), 12 (ensuring fair treatment and human rights of the accused), 13 (setting conditions for extradition), and 14 (obligating parties to assist and cooperate).

²¹ See Annex II, 'Written amendments and proposal submitted by delegations', in 'Report of the Ad hoc Committee established by General Assembly resolution 51/210 of 17 December 1996', GAOR 53rd sess. Suppl No 37, UN Doc A/53/37 (23 July 1998), at 14–34, available at: www.un.org/documents/ga/docs/53/plenary/a53-37.htm (accessed 5 Mar. 2007).

²² The 'Friends' referred to a special group comprised of members of the Bureau of the Ad Hoc Committee that had been established by GA res. 51/210 of 17 Dec. 1996; see UN Doc A/C.6/53/WG.1/CRP.1.

²³ UN Doc A/C.6/53/WG.1/CRP.1/Rev.1, noted in 'Measures to Eliminate International Terrorism: Report of the Working Group', UN Doc A/C.6/53/L.4, 53rd sess., at 2 (22 Oct. 1998).

²⁴ Namely, Art. 2, para. 4 of Art. 4, Art. 10, and the preamble. See 'Measures to Eliminate International Terrorism: Report of the Working Group', UN Doc A/C.6/53/L.4, 53rd sess., at 2 (22 Oct. 1998), available at <http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/C:6/53/L.4&Lang=E> (accessed 5 Mar. 2007).

concern centred on wording that attempted to determine the lawfulness or impermissibility of using nuclear weapons by states. In late 2001 a proposal submitted by Mexico amended this provision, which asserted that the convention ‘does not address, nor can it be interpreted as addressing, in any way, the issue of the legality of the use or threat of use of nuclear weapons by States’.²⁵ Once this controversy was settled, the draft instrument was completed.²⁶

The CNT represents a welcome and important contribution to the international legal framework for countering terrorism and ensuring nuclear security. Even so, it does not accomplish as much as some might have preferred. Some proposals were excluded from the CNT treaty’s scope in order to facilitate its adoption by consensus. For example, considerable discussion occurred in the negotiating sessions over the merit of exempting military activities and personnel from prosecution for offences similar to those articulated in the CNT.²⁷ In the end, however, the exemptions remained. Other delegations suggested the insertion of specific provisions to protect against acts of terrorism involving nuclear weapons or materials that might be committed by state actors.²⁸ The final convention text, however, does not address the lawfulness of a state’s use of nuclear weapons. Also significant is that delegations were unable to achieve consensus on a definition of terrorism, which contributed to prolonging the negotiations four years beyond completion of the draft text in 2001.²⁹ Producing a universally acceptable definition of ‘terrorism’ over the last four decades has proven to be a serious obstacle to the creation of a worldwide counter-terrorism regime, since, in the view of some governments, one man’s terrorist remains another man’s freedom fighter.³⁰ Not surprisingly, no definition of ‘terrorism’ appears in the final version of the CNT.

3 The CNT Regime

Treaty law serves as the chief source of modern international law. Treaties and conventions provide the principal legal frameworks within which modern international relations are conducted. A complex web of multilateral treaty-based rules, in fact, underpins contemporary international relations and strives to provide ways

²⁵ Convention on Nuclear Terrorism, *supra* note 4, at Art. 4(4).

²⁶ See Proposal submitted by Mexico, UN Doc A/C.6/56/WG.1/CRP.9, Art. 4(4), in UN Doc A/C.6/56/C.9 (29 Oct. 2001).

²⁷ See the discussion in ‘Measures to Eliminate International Terrorism: Report of the Working Group’, UN Doc A/C.6/53/L.4 (22 Oct. 1998), at 50–52.

²⁸ See Proposal by Mexico, UN Doc A/C.6/56/WG (2002).

²⁹ See Center for Nonproliferation Studies, ‘Draft International Convention for the Suppression of Acts of Nuclear Terrorism’ (20 Sept. 2005).

³⁰ A report by UN Secretary-General Kofi Annan, released for heads of governments in Sept. 2005, suggested a definition of terrorism that amounted to ‘any action ... intended to cause death or serious bodily harm to civilians or non-combatants with the purpose of intimidating a population or compelling a government or an international organization to do or abstain from doing any act’: see Annan, ‘In Larger Freedom: Towards Security, Human Rights and Development for All; Report of the Secretary-General’, UN Doc A/59/2005 (21 Mar. 2005), at 26.

and means to facilitate the ability of governments to deal with regional and global problems.

It is the same for the threat of nuclear terrorism. The Convention on Nuclear Terrorism, which embodies the first international counter-terrorism agreement since the 11 September 2001 attacks on the United States, was designed to strengthen the growing counter-terrorism regime that now includes 13 UN-sponsored multi-lateral agreements.³¹ To this end, three fundamental presumptions anchor the CNT: (1) Nuclear terrorism could produce 'the gravest consequences' for humankind and therefore poses a threat to international peace and security; (2) the corpus of existing international law does not adequately cover attacks by terrorists on nuclear facilities or their use of nuclear weapons; and (3) international cooperation is urgently needed to devise and adopt 'effective and practical measures' to prevent nuclear acts of terrorism and to prosecute and punish their perpetrators.³² To an impressive degree, the organizational structure and framework of the CNT, as well as the content of several of its provisions, are borrowed nearly verbatim from the Convention on Terrorist Bombings. This was done by the drafters in order to make the CNT legally compatible with its predecessors, as well as to minimize discontent over provisions dealing with jurisdiction, cooperation, exchange of information, extradition, the political offence exception, international transfer of accused persons, territorial sovereignty of a holding state, dispute settlement, and statements containing closing clauses for the Convention's entry into force.

A Definition of the Crime

The threat or use of nuclear weapons has been a paramount concern for governments for more than 60 years. The Cold War between the United States and the Soviet Union became framed by the strategy of nuclear deterrence, which dominated US–Soviet relations from the late 1940s until 1989, when the Soviet Union collapsed and the

³¹ In addition to the Convention on Nuclear Terrorism, other UN terrorism conventions include: International Convention for the Suppression of the Financing of Terrorism, 9 Dec. 1999, S. Treaty Doc No. 106-49, GA Res 54/109, UN GAOR, 54th Sess., Suppl No. 49, UN Doc A/54/49 (hereinafter Convention on Financing Terrorism); Convention on Terrorist Bombings, *supra* note 21; Convention on Plastic Explosives, *supra* note 22; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, 10 Mar. 1988, 27 ILM 685; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 10 Mar. 1988, S. Treaty Doc No. 101-1, 27 ILM 668; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (supplement to the Montreal Convention), 24 Feb. 1988, S. Treaty Doc No. 100-19, 1589 UNTS 474; Convention on the Physical Protection of Nuclear Material, 3 Mar. 1980, TIAS No. 11080, 1456 UNTS 101 (hereinafter Nuclear Materials Convention); International Convention Against the Taking of Hostages, 17 Dec. 1979, TIAS No. 11081, 1316 UNTS 205; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, 14 Dec. 1973, 28 UST 1975, 1035 UNTS 167; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 23 Sept. 1971, 24 UST 546565, 974 UNTS 178 (26 Jan. 1973); Convention for the Suppression of Unlawful Seizure of Aircraft, 16 Dec. 1970, 22 UST 1641, 860 UNTS 105 (hereinafter The Hague Convention); Convention on Offences and Certain Other Acts Committed on Board Aircraft, 14 Sept. 1963, 20 UST 2941, 704 UNTS 219 (hereinafter The Tokyo Convention).

³² Convention on Nuclear Terrorism, *supra* note 4, preamble.

Cold War ended.³³ Since then, the major threats to the West posed by nuclear weapons were thought to come from rogue states – North Korea and Iran in particular. The possible use of nuclear devices by terror groups was a concern, but was considered more a possible scenario than an actual likelihood. The 9/11 airliner attacks by Al-Qaeda against the World Trade Center and the Pentagon immediately transformed perceptions of this possible situation into a realistic probability. Such a development was viewed by governmental leaders as being so serious that it merited stipulation as a special criminal offence by individual persons in international law. The CNT was negotiated to meet that end.

A key achievement of the CNT is the definition of nuclear terrorism as a new crime under international law. As set out in Article 2 of the Convention, a person who ‘unlawfully and intentionally’ possesses radioactive materials or devices and intentionally aims to cause death or bodily injury or ‘substantial damage to property or the environment’ commits an international criminal offence.³⁴ An offence is also committed if a person threatens or damages a nuclear facility such that radioactive materials might be or are released with the intention of causing injury, death or extensive damage to property or the environment, or if that person threatens or attempts by use of force to ‘demand unlawfully’ any radioactive materials, a nuclear device or a nuclear facility.³⁵ A person who participates as an accomplice or ‘organizes or directs others’ to commit an offence is likewise construed to be an offender.³⁶ This provision lists actions done by individuals that amount to the commission of nuclear terrorism, a criminal act. Put succinctly, a person commits the unlawful act of nuclear terrorism if he or she acquires nuclear materials unlawfully, damages a nuclear facility, or participates in the planning or execution of such acts.³⁷

B Rights and Duties of Parties

With regard to jurisdictional reach, the CNT defers to the principle of state sovereignty and territorial jurisdiction under specified circumstances. That is, the Convention does not apply in cases where an offence is committed within a state, presumably

³³ After the Soviet Union obtained atomic weapons in 1949, the US came to adopt a strategic doctrine through massive retaliation. This American strategy aimed to check Soviet use of nuclear weapons by threatening overwhelming retaliation with nuclear weapons on intercontinental ballistic missiles that would produce unacceptable damage on Soviet society. US strategic doctrine shifted in the 1960s to a strategy of mutually assured destruction (MAD), which sought to convince both sides that the costs of an exchange of nuclear-tipped ICBMs imposed unacceptably high costs on each other’s homelands. Such a belief in MAD prompted each side to refrain from igniting a conflict that could lead to a direct nuclear attack against the other. The literature on this history of US–USSR strategic competition is voluminous: see, e.g., B. Brodie, *War and Politics* (1973); N. Brown, *Nuclear War: The Impending Strategic Deadlock* (1965); H. Kahn, *On Thermonuclear War* (1960); T.C. Schelling, *The Strategy of Conflict* (1960); and A. Wohlstetter, *The Delicate Balance of Terror* (1958).

³⁴ Convention on Nuclear Terrorism, *supra* note 4, art. 2.

³⁵ *Ibid.*, Art. 2 (1), (2), and (3).

³⁶ *Ibid.*, Art. 2 (4).

³⁷ The language of this provision is new since it pertains to a new crime in international law. Its format and wording, however, closely correspond to Art. 2 of the Convention on Terrorist Bombings, *supra* note 21.

by nationals of that state, who are apprehended within the territory of that state.³⁸ Authority over the apprehension, prosecution, and trial of such alleged offenders is left to the government of that particular state, to be executed under its domestic law.

It is from that explicit authority that certain rights and duties arise for other states parties. This Convention goes farther than many modern international agreements in this respect, as it clearly implies in Article 4 that states parties are bound to UN Charter law and international law in general. At the same time, the CNT demonstrates a reluctance to impinge on other rights, obligations or responsibilities of states and individuals under international law, including principles of humanitarian law.³⁹ It makes clear in that same provision that use of force during an armed conflict is to remain governed by the laws of armed conflict and the activities of a state's military forces remain under the jurisdiction of that state, not the Convention. Perpetration of the crime of nuclear terrorism lies outside the range of laws pertaining to the use of force during international armed conflict. In this way, the jurisdictional reach of the CNT avoids encroaching upon the international humanitarian law regime that governs activities of military forces during armed conflict. Likewise, this agreement does not attempt to tackle issues about the lawfulness of states using or threatening to use nuclear weapons in their relations with other states. Whether a state's use of nuclear weapons may be legal or impermissible is deliberately left unaddressed by this instrument.

³⁸ Convention on Nuclear Terrorism, *supra* note 4, Art. 3. This provision is a nearly verbatim replica of Art. 3 of the CTB. Art. 3 embodies the principle of territorial jurisdiction in which jurisdiction is determined according to the location of an act. That is, a state is entitled to exercise its exclusive rights over acts done by a person within its territory. A variant of this, the theory of 'floating' territoriality, recognizes the jurisdiction of a state over criminal acts committed aboard its flag vessels and aircraft. This notion assumes that all flag-bearing air and sea vessels are detached pieces of a state's territory. Any harm to its vessels constitutes an offense against the state itself. Thus, criminal liability for terrorist acts committed against these vessels anywhere in the world attaches. Of the jurisdictional principles for extradition, the territorial principle remains the most widely accepted and most traditionally applied. See the text *supra* at notes 37–42. See also *Restatement (Third) of the Foreign Relations Law of the United States* (1987), sect. 402(1)(c). This theory is confirmed in the 1963 Tokyo Convention by its reaffirmation of the 'law of the flag principle' that assigns the state of registration competence to exercise jurisdiction over offences and acts committed on board its aircraft: 1963 Tokyo Convention, *supra* note 31, Art. 3. See also Blakesley, 'United States Extradition Over Extraterritorial Crime', 29 *J Crim L & Criminology* (1982) 1109, at 1118–1119, 1123.

³⁹ Convention on Nuclear Terrorism, *supra* note 4, Art. 4. Art. 4 of the Convention provides in full that:

1. Nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the Charter of the United Nations and international humanitarian law.
2. The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law are not governed by this Convention, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention.
3. The provisions of paragraph 2 of the present article shall not be interpreted as condoning or making lawful otherwise unlawful acts, or precluding prosecution under other laws.
4. This Convention does not address, nor can it be interpreted as addressing, in any way, the issue of the legality of the use or threat of use of nuclear weapons by States.'

Yet, the CNT does mandate that parties should adjust their national laws to criminalize offences set out in Article 2 of the Convention and, to that end, it also establishes penalties that reflect the gravity of these offences.⁴⁰ Another significant feature of the Convention is its directive that parties should adopt measures to ensure that ‘criminal acts within the scope of this Convention, in particular where they are intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature and are punished by penalties consistent with their grave nature’.⁴¹ This provision aims to preclude any accused offender from being able to evade prosecution by invoking the criminal basis of an alleged crime being a ‘political offence’, which would therefore undercut prospects for extradition to a requesting state.⁴²

If an international instrument is to accomplish its purposes, there must be broad, strong cooperation among all governments party to the agreement. Cooperation and collaboration are key to transforming an agreement from paper pledges to actual policy commitments. They are vital ingredients that any convention depends upon for any prospects of success.

A novel and notable strength of the CNT is the manner in which it spells out the ways and means that states parties should cooperate in devising and executing counter-terrorism strategies. The CNT mandates that governments should take ‘all practicable measures’ to thwart and deter terrorist preparations within their own territories that might be used to commit offences within or outside their state.⁴³ Such measures would include the prohibition of activities by persons, groups and organizations that ‘encourage, instigate, organize, knowingly finance or knowingly provide technical assistance or information or engage in the perpetration of those offences’.⁴⁴

The manner and efficacy in which the intelligence community serves the policies of states parties and their security interests remain critical to the operation of the Convention. Clearly, though, intelligence information about the members of terrorist groups, their planned attacks, what weapons they possess, and where they are located is vital for instigating preemptive or preventive action against possible acts of nuclear terrorism. Similarly, such information is necessary for parties to apprehend alleged offenders and perform extradition arrangements. As a consequence, the CNT calls for the exchange of ‘accurate and verified’ information, especially with other governments who seek jurisdiction over an alleged offender through extradition

⁴⁰ *Ibid.*, Art. 5. This provision corresponds verbatim to Art. 4 of the Convention on Terrorist Bombings, *supra* note 4.

⁴¹ Convention on Nuclear Terrorism, *supra* note 4, Art. 6. This provision corresponds verbatim to Article 5 in the Convention on Terrorist Bombings, *supra* note 21.

⁴² Article 15 of the CNT explicitly rejects the applicability of the exception to political offenses in cases of nuclear terrorism. See text at note 70 *infra*.

⁴³ *Ibid.*, Art. 7(1)(a).

⁴⁴ *Ibid.*

proceedings.⁴⁵ Information exchange between party governments also aims to detect, prevent, suppress and investigate offences, to lodge criminal proceedings against alleged offenders, and to notify international organizations about offences that might be committed.⁴⁶

Securing classified information remains critical for national security. In the CNT, a confidentiality clause preserves the sovereignty of states parties, as it permits governments to protect in accordance with their national laws the confidentiality of information received from another state party or through participation in activities performed under the Convention.⁴⁷ The Convention does not compel governments to divulge information 'which they are not permitted to communicate pursuant to [their] national law or which would jeopardize the security of the State concerned or the physical protection of nuclear material'.⁴⁸ In the same vein, the Convention takes on a deterrent function. In striving to discourage offences from being committed, the CNT declares that parties must 'make every effort to ensure the protection of radioactive material, taking into account relevant recommendations and functions of the International Atomic Energy Agency'.⁴⁹

Jurisdiction is critical as a legal ingredient for establishing the rights of states over an alleged offender. For action by a government to occur legally, a state must establish lawful jurisdiction over both a criminal offence and an accused offender. International law limits a state's jurisdiction to apply its statutes extraterritorially. Traditionally, a state may not prosecute a criminal seized beyond its borders unless it has lawful jurisdiction over the committed act. Similarly, for a government to exercise its rights and duties under international law, lawful jurisdiction must be secured by that state over action by another state or an individual offender. In effect, the jurisdiction to prescribe must exist before the jurisdiction to adjudicate, enforce and punish.⁵⁰

Three jurisdictional principles specifically support the legal theory of extraterritorial jurisdiction needed to extradite nuclear-related terrorist offenders. In order of practical

⁴⁵ *Ibid.*, Art. 7(1)(b).

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*, Art. 7(2).

⁴⁸ *Ibid.*, Art. 7(3). Art. 7 is unique to the Convention on Nuclear Terrorism, which underscores the gravity and concern that governments share about the need to gather and share intelligence to prevent and counter preparations for committing nuclear terrorism, as well as for punishing alleged offenders.

⁴⁹ *Ibid.*, Art. 8. This provision is also unique to the NTC.

⁵⁰ Obtaining extraterritorial jurisdiction for the exercise of a state's rights involves a two-step process. First, it must be determined whether a state's domestic law pertains to the act, i.e., whether there are grounds for exercising national jurisdiction. Secondly, it must be ascertained whether a sovereign state may proscribe such conduct extraterritorially under international legal rules. For this second criterion, governments can apply any of international law's 5 theoretical constructs for exercising prescriptive jurisdiction: (1) the territorial principle; (2) the nationality principle; (3) the protective principle; (4) the passive personality principle; and (5) the universality principle. To facilitate broader enforcement opportunities, these jurisdictional constructs are integrated, to a greater or lesser degree, into special provisions of the UN's anti-terrorism conventions, inclusive of the CNT.

legal priority, these are the universality principle,⁵¹ the protective principle,⁵² and the passive personality principle.⁵³ The principle of universal jurisdiction holds special standing, as it asserts that certain acts of terrorism are crimes against humanity and, as such, any state is permitted to arrest, prosecute or extradite accused offenders on behalf of the international community. The United Nations, by codifying such terrorist acts as international offences through prominent multilateral conventions, effectively renders these offences international crimes and activates the application of the universality principle for all states parties. An act of nuclear terrorism qualifies as such a crime.⁵⁴

Viewed more in terms of national security, the protective principle justifies a state's right to punish offenders for crimes deemed harmful to the security or vital interests of the state. This notion provides jurisdiction on the basis of a perceived threat to national security, integrity or sovereignty by an extraterritorial offence.⁵⁵ Since an act of nuclear terrorism would be intended to impact the foreign policy of a state, vital interests of that state would be profoundly affected. Indeed, if a nuclear device were detonated in an urban area, tens of thousands of people would be killed and that state's civil society would never be the same. Extending protective jurisdiction, therefore,

⁵¹ The principle of universal jurisdiction recognizes that certain acts are so heinous and widely condemned that any states may prosecute an offender once custody is obtained. Such crimes are of universal interest to states and their perpetrators are considered to be the enemies of all humanity. That is, since acts of terrorism are universally recognized as international crimes, any government may extend jurisdiction over terrorists under the universal principle on the basis of *hoste humani generis*: Blakesley, 'Jurisdictional Issues and Conflicts of Jurisdiction', in M.C. Bassiouni (ed.), *Legal Responses to International Terrorism: US Procedural Aspects* (1988), at 142–153.

⁵² The protective principle concerns acts abroad that are considered prejudicial to the state's security interests. Under the protective principle, a state may exercise jurisdiction over certain acts that take place outside its territory, when such acts threaten the security, territorial integrity, or political independence of the state. Moreover, the protective principle permits governments to prosecute nationals of other states for their conduct outside the offended state: *Restatement (Third) of Foreign Relations Law of the United States*, *supra* note 38, sect. 402 cmt. f (hereinafter Third Restatement).

⁵³ The passive personality principle gives a state extraterritorial jurisdiction over offences committed against its nationals, regardless of where the crime takes place. Jurisdiction is based on the nationality of the crime victim. The passive personality principle is not widely used, mainly because it is controversial and often conflicts with the territorial principle. Passive personality implies that people carry the protection of their state's law with them beyond the state's territorial jurisdiction. This assertion challenges the fundamental premise of a state's sovereign jurisdiction over its own territory, which would undercut the fundamental principle of territorial sovereignty: see *ibid.*, sect. 402 cmt g.

⁵⁴ Under the principle of universal jurisdiction, a person accused of nuclear terrorism can be arrested and tried by any state without concern for the nationality of the accused or the location of the offence, and without establishing any link between the accused offender and the prosecuting state. All that is required is that the crime of nuclear terrorism qualifies as being universally condemned: *ibid.*, sect. 404. See also Donovan and Roberts, 'The Emerging Recognition of Universal Civil Jurisdiction', 100 *AJIL* (2006) 142; M.C. Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice', 42 *Virginia J Int'l L* (2001) 81 and Joyner, 'Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability', 59 *Law & Contemporary Problems* (1996) 153, at 159–160.

⁵⁵ *Third Restatement*, *supra* note 38, sect. 402 (3), cmt f.

would be lawful to establish jurisdiction over a would-be perpetrator of nuclear terrorism for purposes of extradition.

A third principle on which extradition of an alleged perpetrator of nuclear terrorism may be premised – passive personality – presents a more polemical basis on which to assign state jurisdiction. This view permits jurisdiction for extradition to be extended over persons who victimize citizens of the particular state seeking jurisdiction.⁵⁶ Though passive personality remains controversial, as a jurisdictional principle it applies to terrorism and other organized attacks against a state's nationals by reason of their nationality.⁵⁷ It seems reasonable that, if used in conjunction with other jurisdictional principles, application of the passive personality principle to bolster claims for extraterritorial jurisdiction could facilitate extradition in order to counter acts of nuclear terrorism.

It is not surprising that jurisdiction over offences emerges as a salient concern of the Convention. The CNT draws from earlier counter-terrorism instruments to establish territoriality as the principal form of jurisdiction over nuclear-terrorism offences committed within a state party or on board vessels flying the flag of that state.⁵⁸ In addition, the Convention allows for nationality to be asserted as a basis for jurisdiction

⁵⁶ *Ibid.*, sect. 402, cmt g.

⁵⁷ As the *Third Restatement* opines, the passive personality principle 'has not been ordinarily accepted or crimes, but it is increasingly accepted as applied to terrorists and other organized attacks on a state's nationals by reason of their nationality, or to assassination of a state's diplomatic representatives of other officials': *ibid.*, sect. 402 cmt g.

⁵⁸ Convention on Nuclear Terrorism, *supra* note 4, Art. 9(1). This provision reflects the principle of territorial jurisdiction. See *supra* note 37. In full, Art. 9 provides that:

'1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 when:

- (a) The offence is committed in the territory of that State; or
- (b) The offence is committed on board a vessel flying the flag of that State or an aircraft which is registered under the laws of that State at the time the offence is committed; or
- (c) The offence is committed by a national of that State.

2. A State Party may also establish its jurisdiction over any such offence when:

- (a) The offence is committed against a national of that State; or
- (b) The offence is committed against a State or government facility of that State abroad, including an embassy or other diplomatic or consular premises of that State; or
- (c) The offence is committed by a stateless person who has his or her habitual residence in the territory of that State; or
- (d) The offence is committed in an attempt to compel that State to do or abstain from doing any act; or
- (e) The offence is committed on board an aircraft which is operated by the Government of that State.

3. Upon ratifying, accepting, approving or acceding to this Convention each State Party shall notify the Secretary-General of the United Nations of the jurisdiction it has established under its national law in accordance with paragraph 2 of the present article. Should any change take place, the State Party concerned shall immediately notify the Secretary-General.

4. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 in cases where the alleged offender is present in its territory and it does not extradite that person to any of the States Parties which have established their jurisdiction in accordance with paragraph 1 or 2 of the present article.

5. This Convention does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its national law.'

if an offence is committed by stateless persons within that state, or against nationals of that state, or against a government facility or diplomatic building of that state abroad, or on board an aircraft operated by that state.⁵⁹ A state party may also ‘take such measures as may be necessary’ to assert jurisdiction over an alleged offender apprehended in its territory, in the event that the government opts not to extradite the person to the state where the offence actually occurred.⁶⁰

Counter-terrorism instruments are strengthened by provisions that facilitate apprehension, prosecution and punishment of offenders. If a government decides not to extradite an accused offender, one legal strategy that has proven practical is to mandate that government to prosecute him or her.⁶¹ The legal principle here is *aut dedere aut judicare* – the duty to extradite or prosecute accused offenders.⁶² This prescription requires the state party in which an alleged offender is discovered either to extradite that person to a state which is acknowledged to have jurisdiction over the offence, or alternatively if it opts not to extradite, ‘to submit the case to its competent authorities for the purposes of prosecution’. It bears mentioning, however, that no UN counter-terrorism instrument directs that the state must prosecute an alleged offender through judicial proceedings, or proceed to punish him. All that is required is that a decision be taken by the competent authorities on whether to prosecute, given the factual circumstances of the situation. In essence, this language preserves the rights of due process, receiving a fair trial, and of being innocent until proven guilty. Presumably an investigation into the facts of the allegation against an accused offender would determine whether to proceed to the trial phase. If sufficient evidence is found, then prosecution through the courts may proceed.

⁵⁹ *Ibid.* Art. 9(2). The nationality principle, which is generally accepted, allows a state to prescribe laws that bind its nationals, regardless of the location of either the national or where the offence occurs. The nationality principle extends a state’s jurisdiction to actions taken by its citizens outside its territorial boundaries. The government is expected not only to protect its citizens when they are abroad, but it may also punish its citizens’ criminal conduct, regardless of where it occurs: *Third Restatement, supra* note 38, sect. 402.

⁶⁰ *Ibid.*, Art. 9(4).

⁶¹ The key provisions here are Arts 7 and 8 of the 1970 Hague Convention. Art. 7 of the Hague Convention provides that: ‘The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purposes of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the laws of that State’. Hague Convention, *supra* note 31, Art. 7. Art. 8 of the Hague Convention sets out the conditions for extradition. Subsequent UN counter-terror agreements have replicated in great part the language of the Hague Convention’s Arts 7 and 8 in the formulation of their extradite-or-prosecute obligations: see Montreal Convention, *supra* note 31, Arts 7 and 8; Internationally Protected Persons Convention, *supra* note 31, Arts 7 and 8; Hostage-taking Convention, *supra* note 31, Arts 9 and 10; IMO Convention, *supra* note 31, Art. 11; Convention on Physical Protection of Nuclear Materials, *supra* note 20, Arts 10 and 11; Terrorist Bombing Convention, *supra* note 31, Arts 8 and 9; and Convention on Financing Terrorism, *supra* note 31, Art. 10.

⁶² The duty to extradite or prosecute stems from the Roman notion of *aut dedere aut judicare*. The term *dedere* means to surrender or extradite, while *judicare* refers to the need to adjudicate or prosecute. For use of this expression see R. Jennings and A. Watts (eds), *Oppenheim’s International Law* (9th edn, 1992), at 953, 971.

These arrangements are incorporated into the Convention on Nuclear Terrorism. Under this agreement, states are obliged to establish jurisdiction over and make punishable under their domestic laws the offences specified in the Convention. Governments are also required to extradite or to submit for prosecution persons accused of committing or aiding in the commission of the offences.⁶³ In these regards, extradition procedures provide a necessary conduit for bringing to justice individuals accused of international criminal offences, inclusive of terrorist activities involving nuclear devices or attacks on nuclear facilities. A criminal who succeeds in placing himself outside the territory of the state where he committed the crime also places himself beyond the reach of the law that he has violated. Through the formal process of extradition, one government transfers an accused person to the custody of another government. This process is usually done by treaty, reciprocity or comity. That vital role is highlighted by key provisions in contemporary legal efforts to suppress international terrorist activities, as extradition is used to facilitate the apprehension, prosecution, trial, and punishment of individuals who commit acts of terrorism.⁶⁴

If vigorously exercised and enforced, extradition may serve as a viable deterrent to the commission of criminal terrorist acts. Moreover, parties often are obligated to assist each other with criminal proceedings under the Convention. To this end, Article 13 of the CNT stipulates that offences in the Convention are deemed to be extraditable offences between states parties under existing extradition treaties and under the Convention itself. Further, should states parties have no extradition treaty with one another, the CNT instrument may serve as the legal basis for extradition.⁶⁵

⁶³ Art. 11 provides in full that:

'1. The State Party in the territory of which the alleged offender is present shall, in cases to which article 9 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in Its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

2. Whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State to serve the sentence imposed as a result of the trial or proceeding for which the extradition or surrender of the person was sought, and this State and the State seeking the extradition of the person agree with this option and other terms they may deem appropriate, such a conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 1 of the present article.'

Ibid., Art. 11. Compare the Convention against Terrorist Bombings, *supra* note 21, Art. 8.

⁶⁴ See generally Joyner, 'International Extradition and Global Terrorism: Bringing International Criminal to Justice', 25 *Loyola Los Angeles Int'l & Comp L Rev* (2003) 493.

⁶⁵ Convention on Nuclear Terrorism, *supra* note 4, Art. 13(2).

The Convention declares that universal jurisdiction may be used by parties as a lawful means for extradition as well,⁶⁶ and all parties are obliged to assist each other ‘in the greatest measure’ to advance investigatory, criminal, or extradition proceedings against an alleged offender.⁶⁷

It is important to realize that, under contemporary international law, no universally accepted rule obligates governments to extradite, or even prosecute, alleged offenders who hide in their territory.⁶⁸ Indeed, the international extradition process today operates almost entirely through bilateral treaties, and certain conditions such as the nationality of the offender, concern over the fairness of a foreign trial, or the supposed political nature of the offence can obstruct the extradition process. The international extradition system, moreover, is neither comprehensive nor complete: no state has extradition treaties with every other state.⁶⁹

Given defects in the extradition process, perhaps most problematic for extradition cases that might involve acts of nuclear terrorism is the political offence exception. Many modern extradition treaties specifically exempt political offences from extradition, since liberal and democratic governments developed a strong antipathy toward the idea of surrendering dissidents into the hands of a despotic government.⁷⁰ There

⁶⁶ In full, the Convention against Nuclear Terrorism makes extradition possible under the following circumstances:

‘1. The offences set forth in article 2 shall be deemed to be included as extraditable offences in any extradition treaty existing between any of the States Parties before the entry into force of this Convention. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be subsequently concluded between them.

2. When a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, the requested State Party may, at its option, consider this Convention as a legal basis for extradition in respect of the offences set forth in article 2. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize the offences set forth in article 2 as extraditable offences between themselves, subject to the conditions provided by the law of the requested State.

4. If necessary, the offences set forth in article 2 shall be treated, for the purposes of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territory of the States that have established jurisdiction in accordance with article 6, paragraphs 1 and 2.

5. The provisions of all extradition treaties and arrangements between States Parties with regard to offences set forth in article 2 shall be deemed to be modified as between State Parties to the extent that they are incompatible with this Convention.’

Ibid., Art 13. Compare the language of Art. 8 of the Hague Convention, *supra* note 31; Art. 8 of the Montreal Convention, *supra* note 31; Art. 11 of the IMO SUA Convention, *supra* note 31; and Art. 9 of the Convention on Terrorist Bombings, *supra* note 21.

⁶⁷ Convention on Nuclear Terrorism, *supra* note 4, Art. 14(2).

⁶⁸ *Third Restatement*, *supra* note 38, at sect. 401 cmt B.

⁶⁹ The US, e.g., has extradition treaties with approximately 100 states, although today there are at least a total of 193 states in the international community. See US Dept. State, ‘A List of Treaties and Other International Agreements of the United States in Force as of January 1, 2006’, available at <http://www.state.gov/s/l/treaty/treaties/2006/index.htm> (accessed 18 May 2006), Sect.1 (Bilateral agreements), *passim*.

⁷⁰ For overviews of the political offence exceptions see M.C. Bassiouni, *International Extradition: United States Law and Practice* (2nd edn, 1996), at 502–583 and C.L. Blakesley, *Terrorism, Drugs, International Law, and the Protection of Human Liberty* (1992), at 264–270. The literature on the political offence exception is extensive: see, e.g., *ibid.*, at 264 n. 415.

are no recognized criteria, however, as to what constitutes a 'political offence', or any legal rule that prohibits the extradition of political offenders. As a result, the decision to extradite tends to rest on subjective criteria, as determined by the holding government. Given these conditions, the bilateral extradition system can provide only partial remedies for bringing international terrorists to justice. The consequence is that, while governments might agree that terrorist acts rise to being criminal offences against the international community, strict multilateral enforcement through extradition may still be lacking for prosecuting such acts.

In contrast to other UN counter-terrorism instruments, the CNT explicitly recognizes the problematic nature of the political offences exception, as it draws from the Terrorist Bombing Convention.⁷¹ Accordingly, the CNT rejects the political offences exception bluntly as it avers in Article 15 that:

None of the offences set forth in article 2 shall be regarded, for the purposes of extradition or mutual legal assistance, as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.⁷²

This stipulation aims to contribute to legally differentiating terror violence from violent activities of national liberation movements. In the past, this conundrum generated not only considerable legal polemics to defining terrorism as a crime, but also formidable political encumbrances to exercising the extradition process between governments. To a certain degree, the provision succeeds in that ambition. But at the same time the Convention contains a caveat that governments could apply to refuse extradition of alleged offenders to another state. Like the 1979 Hostages Convention and the 1997 Terrorist Bombing Convention, the CNT asserts that no government is obligated to extradite if it has 'substantial grounds' to believe that an extradition request is being made 'for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons'.⁷³ Such conditions normally are reserved for governments to consider in grants of political asylum to persons seeking refugee status. While this provision preserves that protection for refugees, it seems critical that governments must not abuse these conditions as loopholes or rationales to protect terrorist offenders. It remains unclear what impact the CNT presents for concerns over a government's possible effort to engage in the 'rendition' of detainees to other states for more 'aggressive' treatment. Under this Convention, a detainee would have to give his consent to be transferred unless there was a formal prosecution and extradition request. Even in the event that consent is given, the state to which a detainee is extradited is obligated to make appropriate notification of his detention, including reports of a conviction.⁷⁴

⁷¹ See Convention on Terrorist Bombings, *supra* note 21, Art. 11.

⁷² Convention on Nuclear Terrorism, *supra* note 4, Art. 15.

⁷³ *Ibid.*, Art. 16.

⁷⁴ *Ibid.*, Art. 17.

A novel feature of the Convention on Nuclear Terrorism treats means and procedures for handling, controlling and returning radioactive materials, devices, or nuclear facilities seized from an offender. Nuclear materials and devices should be returned to the state of origin under safety standards approved by the IAEA. The object here is to ensure that radioactive materials, devices or nuclear facilities are put into the possession of a state that is lawfully empowered to possess and use them for peaceful purposes only.⁷⁵ Regarding prosecution of an alleged offender under a state

⁷⁵ As provided for in Art. 18:

1. Upon seizing or otherwise taking control of radioactive material, devices or nuclear facilities, following the commission of an offence set forth in article 2, the State Party in possession of it shall:
 - (a) Take steps to render harmless the radioactive material, device or nuclear facility;
 - (b) Ensure that any nuclear material is held in accordance with applicable International Atomic Energy Agency safeguards; and
 - (c) Have regard to physical protection recommendations and health and safety standards published by the International Atomic Energy Agency.
2. Upon the completion of any proceedings connected with an offence set forth in article 2, or sooner if required by international law, any radioactive material, device or nuclear facility shall be returned, after consultations (in particular, regarding modalities of return and storage) with the States Parties concerned to the State Party to which it belongs, to the State Party of which the natural or legal person owning such radioactive material, device or facility is a national or resident, or to the State Party from whose territory it was stolen or otherwise unlawfully obtained.
- 3(1). Where a State Party is prohibited by national or international law from returning or accepting such radioactive material, device or nuclear facility or where the States Parties concerned so agree, subject to paragraph 3(2) of the present article, the State Party in possession of the radioactive material, devices or nuclear facilities shall continue to take the steps described in paragraph 1 of the present article; such radioactive material, devices or nuclear facilities shall be used only for peaceful purposes.
- 3(2). Where it is not lawful for the State Party in possession of the radioactive material, devices or nuclear facilities to possess them, that State shall ensure that they are as soon as possible placed in the possession of a State for which such possession is lawful and which, where appropriate, has provided assurances consistent with the requirements of paragraph 1 of the present article in consultation with that State, for the purpose of rendering it harmless; such radioactive material, devices or nuclear facilities shall be used only for peaceful purposes.
4. If the radioactive material, devices or nuclear facilities referred to in paragraphs 1 and 2 of the present article do not belong to any of the States Parties or to a national or resident of a State Party or was not stolen or otherwise unlawfully obtained from the territory of a State Party, or if no State is willing to receive such item pursuant to paragraph 3 of the present article, a separate decision concerning its disposition shall, subject to paragraph 3(2) of the present article, be taken after consultations between the States concerned and any relevant international organizations.
5. For the purposes of paragraphs 1, 2, 3 and 4 of the present article, the State Party in possession of the radioactive material, device or nuclear facility may request the assistance and cooperation of other States Parties, in particular the States Parties concerned, and any relevant international organizations, in particular the International Atomic Energy Agency, States Parties and the relevant international organizations are encouraged to provide assistance pursuant to this paragraph to the maximum extent possible.
6. The States Parties involved in the disposition or retention of the radioactive material, device or nuclear facility pursuant to the present article shall inform the Director General of the International Atomic Energy Agency of the manner in which such an item was disposed of or retained. The Director General of the International Atomic Energy Agency shall transmit the information to the other States Parties.
7. In the event of any dissemination in connection with an offence set forth in article 2, nothing in the present article shall affect in any way the rules of international law governing liability for nuclear damage, or other rules of international law.'

party's national law, that state is obliged to consult with and report the outcome of proceedings to the UN Secretary-General.⁷⁶ The Convention also reiterates the mandate that states parties should perform their obligations under the principles of sovereign equality, territorial integrity and non-intervention,⁷⁷ and provides that disputes between parties involving interpretation or application of the CNT be resolved through arbitration or the International Court of Justice, although parties may reserve exception to that procedure.⁷⁸ Finally, the CNT introduces a new opportunity into counter-terrorism law as it provides for the possibility of parties to make amendments to the Convention, which can be debated and approved at a later conference of states parties.⁷⁹

4 Significance of the Convention

A New Crime Defined

The Convention on Nuclear Terrorism proscribes conduct and defines a new crime under international law. Prior to this Convention, nuclear terrorism was treated only as a criminal action by an individual under domestic law. The CNT raises an act of nuclear terrorism to the level of a crime against the law of nations, which involves commission by individuals of any of four acts: (1) the use of nuclear explosives against public targets with the intention to cause death, serious injury, or significant economic damage;⁸⁰ (2) the unlawful possession of radioactive material with the intention to cause death or serious injury; (3) the unlawful use of such material with the intention to cause death, serious bodily injury, substantial property or environmental damage; and (4) the threat or use of nuclear materials that cause or is likely to cause serious injury, death or property damage.⁸¹ While 'terrorism' is not specifically used as a term in the text, the Convention's prohibitions aim to address acts that generally are viewed as terrorism. As international counter-terrorism law evolved, it became clear that interstate politics requires the ad hoc criminalization of specific actions perceived as terrorist in nature. It became apparent that some agreement on which actions should be proscribed was better than no progress or no agreement at all. The CNT sustains that rationale. Moreover, though similar to other counter-terrorism punitive conventions, the CNT refers to 'environmental damage', as well as that to persons and property.

⁷⁶ *Ibid.*, Arts. 19 and 20.

⁷⁷ *Ibid.*, Art. 21.

⁷⁸ *Ibid.*, Art. 23.

⁷⁹ *Ibid.*, Art. 26. Amendments need a two-thirds majority of all states parties to be adopted.

⁸⁰ Cf. Convention on Terrorist Bombings, *supra* note 21, Art. 2(1).

⁸¹ Cf. Maritime Convention, *supra* note 27, Art. 3(1) (vessels); Fixed Platforms Convention, *supra* note 27, Art. 2(1).

B *Domestic Criminalization*

The CNT continues another trend in the development of multilateral counter-terrorism instruments – domestic criminalization. While the agreement requires that specific prohibitions be legislated into the domestic law of party states, it also leaves significant latitude to governments in implementing their own international obligations. The CNT generally follows the basic pattern set in previous counter-terrorism conventions. First, a category of terrorist activity that is explicitly of concern at the time is identified; second, governments are obliged to criminalize this conduct and impose penalties in their national laws proportional to the criminal act; and finally, governments are required to establish jurisdiction, usually based principally on territory, nationality and, if a vessel, state of registration.

A major purpose of the CNT is to prevent (or make less possible) perpetration of an offence by denying terrorists fissile materials, financial support or nuclear equipment. This purpose is contained in Article 7, which mandates that parties cooperate to ‘prevent and counter preparations in their respective territories for the commission within or outside their territories of the offences . . . , including measures to prohibit in their territories illegal activities of persons, groups and organizations that encourage, instigate, organize, knowingly finance or knowingly provide technical assistance’ to terrorist organizations or persons.⁸² While making only a passing reference to financing, the CNT likewise prohibits in Article 7 raising funds for nuclear terrorism. This proscription draws upon the principles set out in the Convention on Financing Terrorism,⁸³ adopted by General Assembly Resolution in 1999,⁸⁴ that seeks to eliminate terrorism by cutting off funding streams, noting that the ‘number and seriousness of acts of international terrorism depend on the financing that terrorists may obtain’.⁸⁵

C *Civilian Victims Targeted*

The CNT also follows the pattern in counter-terrorism law that sets injuries or damage inflicted by an act as being standards for terrorist activity. The Convention on Nuclear Terrorism, like the Conventions on Financing Terrorism⁸⁶ and Terrorist Bombings,⁸⁷ explicitly proscribes acts that cause the death of or serious bodily injury to non-combatant civilians. This prohibition underscores the emerging standard for criminalizing nuclear terrorism as a crime in international counter-terrorism law, namely the

⁸² Convention on Nuclear Terrorism, *supra* note 4, Art. 7. This obligation builds upon the 1980 Convention on Protection of Nuclear Material, *supra* note 18, and the 1991 Convention on Plastic Explosives, *supra* note 22, preamble. The Convention on Plastic Explosives also aims to restrict the availability of harmful radioactive materials to terrorists by requiring states to prohibit and prevent the manufacture of unmarked explosives: *ibid.*, Art. II.

⁸³ Convention on Financing Terrorism, *supra* note 27.

⁸⁴ GA Res 54/109, P 1, UN Doc A/RES/54/109 (25 Feb. 2000).

⁸⁵ Convention on Financing Terrorism, *supra* note 27, Art. 1.

⁸⁶ Convention on Financing Terrorism, *supra* note 31, Art. 2.

⁸⁷ Convention on Terrorist Bombings, *supra* note 21, Art. 2.

infliction of 'serious bodily injury' to human beings. Earlier counter-terrorism instruments prohibited 'injuries' or 'violence to persons'. In contrast, the CNT is expressly concerned with harm done to civilian persons. Any harm or injuries caused in the commission of an otherwise prohibited act rises to the level of an additional criminal offence.

The CNT requires that acts be independently 'unlawful' to contravene its provisions, which means that the unlawfulness of such acts is universal and not dependent upon the domestic law of a state. Nor is the CNT constrained by an attacker's motive. It does not require a religious, political or ideological motive to substantiate a person's status, nor does it necessarily separate terrorist groups from organized crime. The CNT requires that some form of *mens rea* be evident, namely, that the act of terrorism be a purposeful, intended act.

Mirroring its predecessors, the Convention on Nuclear Terrorism embodies international efforts to eliminate a specific form of terrorism in order to preserve peace, security and friendly relations among states. This instrument, like its 12 companion instruments, speaks to individual, not state-sponsored conduct. The CNT expressly provides that the activities of armed forces during an armed conflict are not within the legal purview of the Convention.⁸⁸ The reference to 'person' in the Convention⁸⁹ might be interpreted to bind government officials, and the CNT does not explicitly exclude within its text application to states. Yet, given that self-enforcement is not likely, it would seem probable that the Convention would have expressly obligated states if that was the original intent.

D Treatment of Detainees

In addition to defining the nature of offences, establishing appropriate means of jurisdiction, and affirming obligations of parties to investigate, prosecute or extradite alleged offenders, the Convention on Nuclear Terrorism focuses on the treatment of detainees. Unlike other counter-terrorism instruments, the CNT explicitly deals with the issue of offenders who are detained by a government. The Convention calls for 'fair treatment' of detainees and their full enjoyment of rights 'in conformity with' domestic law and 'applicable . . . international law, including international law of human rights'.⁹⁰ Even though 'fair treatment' and 'applicable . . . international law' are left undefined and unspecified, the CNT does stipulate that notifications should be made to a detainee's home country and to the UN Secretary-General. In addition, visits should be permitted by representatives of a detainee's home country and the International Committee for the Red Cross (ICRC), and protections should be invoked against unlawfully discriminatory extradition requests or non-extradition detainee transfers made without the detainee's consent.⁹¹ These provisions would in effect curtail the practice of involuntary rendition of accused offenders. Finally, the CNT

⁸⁸ Convention on Nuclear Terrorism, *supra* note 4, Art. 4(2).

⁸⁹ Cf. Convention on Financing Terrorism, *supra* note 31, Art. 2(1).

⁹⁰ Convention on Nuclear Terrorism, *supra* note 4, Art. 12.

⁹¹ *Ibid.*, Art. 10.

provides that a detainee shall enjoy rights and guarantees ‘in conformity with’ the law of the detaining power.⁹²

No less problematic is the reference in the Convention to ‘applicable provisions of international law’, a phrase that begs the question concerning which provisions of international law, if any, should apply at all to a detainee situation.⁹³ It is similarly unclear whether adding the phrase ‘including international law of human rights’ should be interpreted as indicating that human rights law is, in fact, part of the international law. An argument can be made that the phrase ‘applicable provisions of international law, including international law of human rights’ is tantamount to meaning ‘... applicable international law, with human rights law included amongst the international law that is applicable’. Yet, others could contend that ‘international law of human rights’ is only meant to exemplify a subset of ‘international law’, with the word ‘applicable’ constraining both ‘international law’ in general and ‘international law of human rights’ in particular. Such reasoning suggests that the phrase ‘applicable provisions of international law, including international law of human rights’ means international law, including human rights law to the extent that it applies.

It seems plausible that the CNT could leave a detainee accused of nuclear terrorism in a status that straddles being a prisoner of war and an ordinary criminal. A prisoner of war would be entitled to visits from and registration with the ICRC, although no guarantees are made for visits by persons from their home state, especially understanding that in a traditional war, that state could be the enemy. On the other hand, a normal criminal would be entitled to contacts with his home government, but not necessarily with the ICRC. Yet, as previously noted, the CNT is not meant to function in a legal vacuum, as it aims to uphold respect for both international and national law given the conditions of any particular case.

By early 2007, the CNT had attracted 115 signatory states and 11 states parties.⁹⁴ The CNT will enter into force on the 30th day following the date of deposit of the 22nd instrument of ratification, acceptance, approval or accession. A number of non-party states, among them the United States and Russia, have expressed strong support for

⁹² This provision revisits the argument concerning whether and how national law may be applied by a state’s government, as in the case of the US and its Guantanamo Bay detentions. In that experience, some US government officials maintained that application of US law leads to the conclusion that rights of prisoners ordinarily enjoyed under US domestic law do not apply to detentions of foreign nationals held at Guantanamo Bay. Those persons are not members of regular armed forces, but instead are ‘terrorists’ who qualify as nothing more than ‘unlawful, unprivileged combatants’. In other words, the argument made by the George W. Bush administration posits that application of US law effectively results in the non-application of US law, at least in the manner that it applies in other circumstances. Hence detainees are held in the Guantanamo detention facility indefinitely, without being formally charged with a crime, prosecuted for any offence, or given rights to legal counsel and a fair, speedy trial. Art. 12 of the CNT aims to preclude similar circumstances from arising in an event of nuclear terrorism.

⁹³ See Convention on Nuclear Terrorism, *supra* note 4, Art. 16. One might recall, e.g., that disparate views are held by the Bush administration and most other governments as to whether the 1949 Geneva Conventions on the Laws of War apply to the detention of foreign nationals who are incarcerated at Guantanamo Bay.

⁹⁴ States party to the CNT include Austria, the Czech Republic, El Salvador, India, Kenya, Latvia, Lebanon, Mexico, Mongolia, Seychelles, and Slovakia.

this instrument and it seems quite possible that it will enter into force in the near future.⁹⁵

It warrants noting that the political credibility and legal reach of the CNT is bolstered by UN Security Council Resolution 1540, adopted in April 2004.⁹⁶ The resolution, which was done under Chapter VII of the UN Charter, carries the status of a mandatory legal obligation for the entire United Nations' membership. As the chief sponsor of this resolution, the United States sought to prompt the Security Council into authorizing practical measures to force governments to deal with the threat of non-state actors, principally terrorist groups, acquiring or trafficking in weapons of mass destruction. The impetus for this resolution was the revelation in 2003 of the nuclear proliferation network market organized by Pakistani scientist A. Q. Khan.⁹⁷

While Resolution 1540 is not cited in the CNT's preambular paragraphs, its purposes are directly relevant to those of the Convention. The main obligation of the resolution is contained in operative paragraph 1, which prohibits states from providing 'any form of support to non-State actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery'. To prevent any non-state actor from engaging in these acts alone, without state support, operative paragraph 2 requires that states 'adopt and enforce appropriate effective laws' through national legislation that prohibit non-state actors from engaging in any of these activities. Operative paragraph 3 prescribes that states take and enforce effective measures to establish a comprehensive system of domestic controls to prevent the proliferation of weapons of mass destruction and related materials. To this end, the resolution also mandates that governments 'develop and maintain appropriate effective measures to account for and secure such items in production, use, storage or transport', strengthen border controls and law enforcement efforts to 'detect, deter, prevent and combat' unlawful trafficking and trade of these materials and develop and implement 'effective national export and trans-shipment controls' over such items.⁹⁸ Finally, operative paragraph 4 establishes a special committee, the '1540 Committee', which consists of all the Security Council members. The 1540 Committee is responsible for reviewing and assessing reports required of the member states that indicate what progress they have made in conforming to these obligations.⁹⁹

⁹⁵ CNT, *supra* note 4, Art. 25.

⁹⁶ See UN Security Council Resolution 1540, UN Doc S/RES/1540 (28 Apr. 2004), available at: <http://daccessdds.un.org/doc/UNDOC/GEN/N04/328/43/PDF/N0432843.pdf?OpenElement> (accessed 3 Jan. 2007).

⁹⁷ For discussion of A.Q. Khan's role in promoting nuclear proliferation for profit see Langewiesche, 'The Wrath of Khan', *Atlantic Monthly* (Nov. 2005) and Langewiesche, 'The Point of No Return', *Atlantic Monthly* (Jan./Feb. 2006).

⁹⁸ Convention on Nuclear Terrorism, *supra* note 4, Art. 3(a)–(d)

⁹⁹ See Olberg, 'Implementing Resolution 1540: What the National Reports Indicate', *Disarmament Diplomacy*, Issue 82 (Spring 2006), available at: <http://www.acronym.org.uk/dd/dd82/82lo.htm> (accessed 5 Jan. 2007).

These 1540 reports suggest that national governments bear the onus of enforcing the non-proliferation of nuclear weapons and maintaining security of nuclear materials in their state. Moreover, the reports should reveal the extent to which governments are complying with the obligations in SC Resolution 1540. For those states which fall short of meeting stipulations in the resolution, operative paragraph 7 suggests that other states should offer resources and advice on the legal and regulatory infrastructure needed for compliance. In this way, Resolution 1540 can be made more effective as a legally binding measure that fosters stronger compliance with provisions in the Convention on Nuclear Terrorism.

5 Conclusion

The Convention on Nuclear Terrorism expands the international legal framework for countering terrorist threats. In this regard, the instrument furnishes a legal basis for international cooperation aimed at preventing terrorists from acquiring weapons of mass destruction, the detonation of which could produce catastrophic consequences in a society. The CNT defines acts of nuclear terrorism in general terms and cites a broad range of possible targets, including nuclear power facilities and nuclear reactors. It criminalizes the possession of, use of, or threat to use radioactive devices by non-state actors, their accomplices and organizers if intended to produce death, serious bodily injury or environmental or property damage. States parties are obliged to adopt measures clearly stipulating that acts intended to provoke nuclear-related terror cannot be justified under any circumstances, particularly by political, philosophical, ideological, racial, ethnic, religious or other like considerations. Put another way, states are obligated to criminalize acts of nuclear terrorism as defined in the CNT and to adapt their domestic criminal codes in order to apprehend, prosecute and punish persons who violate its provisions. The agreement further encourages increased exchanges of information and greater cooperation between countries in the pursuit of terrorist suspects. While no specific forms of punishment are detailed in the Convention, punitive measures should correspond to the gravity of the breach.

The CNT encourages governments to cooperate in preventing terrorist attacks by sharing information and assisting each other in pursuing criminal investigations and extradition proceedings. The agreement also requires that any seized nuclear or radiological material be secured in accordance with IAEA safeguards and handled such that procedures conform to the IAEA's health, safety and physical protection standards. Similarly, peaceful uses of nuclear energy are preserved in this instrument. The Convention on Nuclear Terrorism recognizes the right of all states to develop and apply nuclear energy for peaceful purposes. This right, of course, is predicated upon ensuring that development of nuclear energy for peaceful purposes is not used as a guise for nuclear proliferation, as affirmed by Security Council Resolution 1540.

As contemporary events so vividly demonstrate, promulgation of multilateral conventions to counter acts of terrorism is not sufficient to prevent or deter their perpetration. An instrument's fundamental value lies in its being an integral component of a broader, more comprehensive coordinated strategy to combat terrorism. Yet, the fact

remains that an international agreement alone cannot mitigate the threat of nuclear terrorism. If it is to be effective, the CNT must depend on the governments of states parties to respect, abide by, and enforce its provisions. Governments create the convention, they must implement it through their domestic law, they must comply with its requirements, and they must enforce its provisions. To the extent that governments fulfil these requisite duties, the agreement will work well and accomplish its purposes. To the degree that governments fall short of meeting their obligations, specific protections against nuclear terrorism in the Convention will be eroded.

In the end, while the Convention to Suppress Nuclear Terrorism emerges as a necessary component of the legal regime to counter terrorist activities, it is not sufficient. The Convention articulates new norms for international behaviour by individual persons, it establishes international legal rules to support those norms, and it imposes on states duties to execute those rules. Still, paper norms do not resolve real world threats. Governments must articulate and implement clear policy goals, especially regarding collaborative international efforts to secure and exchange intelligence information about the objectives, capabilities and operational plans of terrorist groups that intend to detonate nuclear devices. These policy goals, moreover, must be carried out by the resolute political willingness of governments of states, which includes their will to use armed force, if necessary, to attain those policy objectives. In the end, as an international instrument, the CNT establishes the legal framework for criminalizing acts of nuclear terrorism and for dealing with apprehended perpetrators. But it remains for governmental policy-makers to take whatever lawful means are necessary, including military force, to implement these legal mandates such that they protect and preserve their societies against such threats. To do otherwise is to squander the practical worth and utility of the CNT. Worse than that, however, it is also to put at risk the very societies that are threatened most by terrorists who seek to acquire nuclear arms. In an age where weapons of mass destruction held by one can threaten all, that is a price far too high for the international community to pay.