

THE NEW CONVERGENCE BETWEEN INTERNATIONAL CRIMINAL LAW, NUCLEAR NON-PROLIFERATION AND MARITIME SECURITY



For decades, the international community's approach to issues of nuclear proliferation on the one hand, and of the use of criminal law mechanisms on the other, has hardly been an integrated one. In the post-Cold War environment, the events of 9/11 have acted as a powerful catalyst for change.

The conceptual borders within which these two areas (nuclear proliferation and criminal law) were "locked" have been challenged. However, only recently has this change begun to be reflected in specific international legal instruments. Two major changes, closely linked to each other, have contributed to explain the convergence:

a) First major change: non-State actors are increasingly perceived as having the potential to become fully fledged "nuclear proliferators," in the same way as State entities.

It is true that some legal instruments adopted during the Cold War, such as the 1979 Convention on the Physical Protection of Nuclear Material, require the criminalization of certain conducts involving the unlawful handling and theft of nuclear material. It was certainly recognised that such material may fall into the hands of individuals for malevolent purposes, including terrorist ones. However, the overall consensus at that time was that only States would be capable and/or willing to manufacture and use nuclear weapons. This is evident in the language of the only multilateral legal instrument which continues to represent the cornerstone of global nuclear non-proliferation efforts: the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT). One of the core requirements of the NPT is the prohibition for non-nuclear-weapon States

(NNWS) to receive nuclear weapons, and a corresponding prohibition for nuclear-weapon States to carry out such transfers to NNWS. (In a nutshell, "nuclear proliferation" can be defined as the spread of nuclear weapons to States that did not previously possess them, i.e. "horizontal proliferation", and the increase in the number of weapons by States already possessing them, i.e. "vertical proliferation").

When the NPT was adopted, it was simply unthinkable that individuals acting outside State direction could ever gather the high level of skills and technological awareness necessary to pose a serious and direct global threat. Crucially, the NPT lacks a provision equivalent to the ones contained in more recent non-proliferation instruments, such as the Chemical Weapons Convention, which requires that activities prohibited for States Parties also be the object of a prohibition for natural or legal persons acting on their territory.

The events of 9/11 suddenly brought to the attention of the world community a new possibility: criminal organisations could develop an autonomous capacity to acquire, manufacture, use and threaten to use nuclear weapons. Intelligence reports started to document attempts by the Al-Qaida network to come into possession of nuclear materials and the know-how. Osama Bin Laden has even been reported stating that the acquisition of weapons of mass destruction constitutes a religious duty. In 2002, the UN General Assembly adopted the first of a series of resolutions on "Measures to Prevent Terrorists from Acquiring Weapons of Mass Destruction."

In this process, Resolution 1540 can be considered a landmark instrument since, for the first time, the Security Council used its prerogatives under Chapter VII of the UN Charter to entrench a requirement for all States to "prohibit any non-State actor to manufacture, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes, as well as attempts to engage in any of the foregoing activities, participate in them as accomplice, assist or finance them" (para.2).

b) Second major change: International criminal law is increasingly being used to control nuclear proliferation. Resolution 1540 has provided the political impetus and legal framework for the adoption of the 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (2005 SUA Protocol).

Whereas the original 1988 SUA Convention deals exclusively with direct threats to a ship and its passengers (taking the Achille Lauro case as the paradigmatic situation), the new Protocol goes well beyond the goal of strengthening maritime security. By defining new offences of transporting nuclear weapons and related materials in violation of the NPT's legal framework, it promotes criminal law as a central element in the global non-proliferation effort and recognizes the dangers posed by non-State actors beside "traditional" State-driven proliferators. The technical complexity of the new legal regime, merging criminal law, nuclear law and the law of the sea, reflects an attempt to face an increasingly intricate and volatile security environment. What are the implications of the new approach, and what developments can be expected in the next few years? Although it is impossible to make predictions, some trends can already be anticipated.

First of all, the 2005 SUA Protocol is set to enter into force at the end of July 2010 (having now been ratified by twelve States). Although many more instruments of ratification will have to be deposited before the Protocol can achieve the sort of "universal character," a pre-requisite for its usefulness as a truly global cooperation platform, the focus of the international community will gradually move to issues of implementation. The multidisciplinary nature of the new legal regime will require that domestic agencies acquire a particularly high level of specialization for the purpose of incorporating international standards into domestic legal systems and enabling the law enforcement community to act effectively.

The innovative approach taken in the 2005 SUA Protocol is not going to remain an isolated case. In August this year, a Diplomatic Conference under the aegis of the International Civil Aviation Organization is set to amend the existing international legal regime governing illicit acts affecting civil aviation. As things stand now, it is likely that new instrument(s) will envisage a central role for criminal law in the area of transport of nuclear weapons and materials (as well as other weapons of mass destruction) by air. Consequently, lessons learned during the implementation phase of the 2005 SUA Protocol may facilitate the understanding of similar provisions in the field of civil aviation.

Several international agencies will have to play a leading role in promoting acceptance and understanding of the new approach, and they will have to do so as a joint endeavor. Natural candidates are the International Maritime Organization, the International Atomic Energy Agency and the United Nations Office on Drugs and Crime. The need to achieve better coordination among international bodies in delivering technical assistance, particularly to developing countries, will become more and more pressing.

Handling the complex security environment of the 21st Century will make it inevitably necessary for deeds to follow words.

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