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## NUCLEAR SMUGGLING AS AN INTERNATIONAL CRIME

by

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In the chaotic post-Cold War world, international cooperation is increasingly needed to detect and punish those who aid the spread of nuclear and other weapons of mass destruction. The proliferation of these weapons is a threat to the security of all states, except for a few rogues such as Iraq and North Korea; all other states have a common interest in punishing anyone who would assist the rogue states to acquire highly destructive weaponry. It would be reasonable to assume, therefore, that the proliferation of weapons of mass destruction is widely regarded as an international crime, like piracy, war crimes or aircraft hijacking.

In fact, however, there have been few efforts to use international criminal law to enforce or reinforce arms control measures. In 1946, the defendants before the International Military Tribunal at Nuremberg were, *inter alia*, charged with rearming Germany contrary to the provisions of the Treaty of Versailles, under the general category of “crimes against peace.” In its judgment, however, the Nuremberg Tribunal decided that it lacked jurisdiction over this alleged offense under the terms of its Statute.

In principle, there is much to be said for the Nuremberg prosecution’s thesis that violations of arms control agreements should be considered crimes against peace. The purpose of such agreements is to prevent the outbreak of war by preserving a balance of power, by reducing suspicions between potential adversaries, or by limiting deployment of inhumane or destabilizing weapons.

In the post-Cold War world, treaties and other international arrangements limiting the spread of weapons of mass destruction – nuclear, chemical and biological weapons – have an especially important role in preserving peace and world order. On January 31, 1992, the members of the United Nations Security Council, meeting for the first time at the head of state or government level, declared that “proliferation of all weapons of mass destruction constitutes a threat to international peace and security.” This declaration committed the members to “prevent the spread of technology” related to research and production of such weapons, and with special reference to nuclear weapons, it noted “the importance of effective export controls.”<sup>2</sup>

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2. U.N. Doc. S/23500 (Jan. 31, 1992).

This part of the declaration was undoubtedly influenced by the Security Council's discovery of Iraq's illicit nuclear weapons program, which relied heavily on imported Western equipment and technology, much of which it had acquired by means of fraudulent end-use declarations (i.e., smuggling). Since then, the breakup of the Soviet Union has raised new concerns over the adequacy of controls over materials, equipment and technologies that could be used to produce nuclear weapons.

For the past year and a half, the world has been subjected to a bombardment of reported attempts to smuggle nuclear material from Russia, presumably into the hands of potential nuclear weapon states or terrorist organizations. So far, these attempts have proven to be largely the work of unskilled amateurs or professional confidence men. In this, as FBI Director Freeh has testified, the world may be more lucky than it deserves. Experts agree that controls on nuclear materials in the former Soviet Union are inadequate, and that the power of organized crime is growing in that region.

The most serious incident to date occurred on December 14, 1994, when Czech police seized over six pounds of weapons-grade highly enriched uranium, probably being smuggled from Russia by three suspects.<sup>3</sup> According to International Atomic Energy Agency standards,<sup>4</sup> this is twenty-five percent of the amount needed to manufacture a simple nuclear weapon of type that destroyed Hiroshima in August, 1945. It seems only a matter of time before an ambitious state is able to buy sufficient plutonium or highly-enriched uranium to make it a nuclear power.

Moreover, there is little reason to believe that the restoration of law and order in the republics of the former Soviet Union will end the threat of nuclear smuggling. Another nuclear power, China, will face a succession crisis in the next ten years that could easily loosen control over its nuclear weapons and materials. Smaller states, such as Argentina, Brazil, South Africa and North Korea, have in the past developed clandestine nuclear programs. A breakdown of order in any of them could inject dangerous new materials into the international network of clandestine trade.

Currently, the international legal system has few institutional defenses against nuclear smuggling. The 1968 Nuclear Non-Proliferation Treaty,<sup>5</sup> the foundation of the nonproliferation regime, contains no provisions on enforce-

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3. See RICK ATKINSON, *Prague Says Uranium Found in Czech Auto Could Trigger Bomb*, WASH. POST, Dec. 21, 1994, at A27; *Czechs Seize Uranium Believed from Russia*, WASH. POST, Dec. 20, 1994, at A35.

4. See BENJAMIN N. SCHIFF, *INTERNATIONAL NUCLEAR TECHNOLOGY TRANSFER* 118-19 (1983).

5. Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161.

ment cooperation among its parties. The 1979 Convention on Physical Protection of Nuclear Materials<sup>6</sup> is primarily an anti-terrorist treaty rather than a nonproliferation measure. Articles 8 and 10 of the Convention establish universal jurisdiction over certain offenses, and require the parties to either extradite or prosecute offenders. However, the only offense listed that could describe the smuggling of nuclear material the “receipt,” “transfer” or “disposal” of nuclear material “without lawful authority” – is only covered if the act “causes or is likely to cause death or injury to any person or substantial damage to property.”

Bilateral extradition treaties are similarly unsatisfactory in dealing with nuclear smuggling. Most U.S. extradition treaties do not cover the offense at all, reflecting the traditional view that export controls are primarily fiscal regulations, which one sovereign will not aid another in enforcing. Even the few treaties covering this offense use divergent language to describe it. Extradition treaties between the United States and Columbia,<sup>7</sup> Germany,<sup>8</sup> Mexico,<sup>9</sup> the Netherlands<sup>10</sup> and Turkey<sup>11</sup> thus apply to offenses “relating to . . . nuclear materials” and exportation offenses in general. Our treaties with Argentina,<sup>12</sup> Paraguay<sup>13</sup> and Uruguay,<sup>14</sup> on the other hand, refer to use, theft, and distribution “apparatus capable of releasing nuclear energy” and illegal export of “nuclear elements” (not otherwise defined). It should be noted that, with the exception of Germany, none of these treaties is with another major nuclear exporter.

World order could be significantly strengthened by a multilateral convention declaring the smuggling of nuclear material to be a crime against peace, and requiring all parties to either extradite or prosecute suspected smugglers. At a minimum, the materials covered should include plutonium and so-called highly-enriched uranium (i.e., that containing more than twenty percent of the isotope U-235). Smuggling would be defined as transporting, importing or exporting the material without a license from the territorial or flag state concerned, or obtaining a license by falsehood. This is the minimum the international community should do to deter this threat to world peace.

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6. Convention on the Physical Protection of Nuclear Material, Oct. 26, 1979, T.I.A.S. 11,080.

7. Treaty on Extradition, Sept. 14, 1979, U.S. - Colom., \_\_\_\_ U.S.T. \_\_\_\_, T.I.A.S. \_\_\_\_, reprinted in I. KAVASS & A. SPRUDZS, 1 EXTRADITION LAWS AND TREATIES: UNITED STATES 140.1 (1980 & 1989 Supp.).

8. Treaty on Extradition, June 20, 1978, U.S. - F.R.G., 32 U.S.T. 1485.

9. Treaty on Extradition, May 4, 1978, U.S. - Mex., 31 U.S.T. 5059.

10. Treaty on Extradition, June 24, 1980, U.S. - Neth., T.I.A.S. 10,733.

11. Treaty on Extradition, June 7, 1979, U.S. - Turk., 32 U.S.T. 3111.

12. Treaty on Extradition, Jan. 21, 1972, U.S. Arg., 23 U.S.T. 3501.

13. Treaty on Extradition, May 24, 1973, U.S. - Para., 25 U.S.T. 967.

14. Treaty on Extradition, Apr. 6, 1973, U.S. - Uru., T.I.A.S. 10,850.

