New Approaches to Penalizing Nuclear Smuggling

October 22-25, 2009
Wilton Park, United Kingdom

The Preemptive and Preventive Use of Force in Response to the Proliferation of Weapons of Mass Destruction

October 27, 2009
Brussels, Belgium

CONFERENCE and WORKSHOP REPORT

Philip Johnson
Catherine Lotrionte
and
Timothy McCarthy
Booz Allen Hamilton

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The Advanced Systems and Concepts Office (ASCO) supports this mission by providing long-term rolling horizon perspectives to help DTRA leadership identify, plan, and persuasively communicate what is needed in the near term to achieve the longer-term goals inherent in the agency’s mission. ASCO also emphasizes the identification, integration, and further development of leading strategic thinking and analysis on the most intractable problems related to combating weapons of mass destruction.

For further information on this project, or on ASCO’s broader research program, please contact:

Defense Threat Reduction Agency
Advanced Systems and Concepts Office
8725 John J. Kingman Road
Ft. Belvoir, VA 22060-6201

ASCOInfo@dtra.mil
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I. INTRODUCTION

As part of its Phase II efforts, the Project on Law and Nonproliferation Policy (PLNP) conducts planning, delivers informed analyses, and provides expertise and logistical assistance to support high-level international conferences and events addressing the nexus of international law and Countering WMD.

The present report reviews two such events, New Approaches to Penalizing Nuclear Smuggling, held on 22-25 October 2009 in the United Kingdom and The Preemptive and Preventive Use of Force in Response to the Proliferation of Weapons of Mass Destruction, held on 27 October 2009 in Belgium. The latter workshop was held in cooperation with the North Atlantic Treaty Organization (NATO), and directly supported Mr. Guy B. Roberts, Deputy Assistant Secretary General for WMD Policy and Director, Nuclear Planning Directorate at NATO headquarters.

II. CONFERENCE REVIEW – WILTON PARK

APPROACHES TO PENALIZING NUCLEAR SMUGGLING

The Project on Nonproliferation Policy and Law sponsored an international conference on penalizing traffickers of sensitive nuclear weapons technology and components at Wilton Park in the United Kingdom from October 22 to October 25, 2009. The conference was designed to attract experts in the field of nuclear smuggling and import-export control. Forty people from seven countries, two commercial entities, and two intergovernmental organizations were in attendance.

One of the conference’s primary objectives was to bring together officials in various fields and government agencies to exchange ideas, share perspectives on the challenges of nuclear technology trafficking, and gain a broader understanding of how their respective responsibilities complement each other in the development of a comprehensive response to the threat of nuclear proliferation. Prosecutors, investigators and policymakers gained a better understanding of each other’s existing authorities, challenges and best practices in relation to WMD trafficking. This will hopefully contribute to revised legislation, improved customs enforcement, and enhanced interagency cooperation.
Presentations were designed to highlight the threat to international security posed by the proliferation of nuclear technology to rogue states and non-state actors, which has in large part been facilitated by the illicit activities of private nuclear smuggling operations, most famously the network of traffickers spearheaded by Pakistani scientist, Abdul Qadeer Khan.

The conference focused on two legal mechanisms for prosecuting nuclear smugglers: traditional criminal prosecution and the innovative use of civil litigation/sanctions. The primary mechanism for punishing traffickers of restricted nuclear technology has been standard criminal prosecution. Unfortunately, prosecution efforts around the globe have been plagued by legal challenges, including obtaining legal assistance from multiple jurisdictions, inadequate or non-existent nonproliferation statutes, presentation of classified evidence in court, and obtaining jurisdiction over defendants and witnesses through extradition. With the goal of improving the success rate of such prosecutions, the conference opened with an analysis of these challenges as well as recommendations for overcoming them in the future.

Some solutions proposed included revisions to and standardization of nonproliferation statutes worldwide, amendments to extradition treaties, evidentiary procedure changes for nuclear trafficking prosecutions, and new avenues for international legal cooperation, envisioning a potential role for organizations such as the IAEA. Specifically, the following suggestions were made for improving the ability of nonproliferation and export control statutes to meet the needs of prosecutors in apprehending, convicting, and punishing proliferators:

1. Using strict liability as a means of deterring export control violations, i.e., changing export control laws so that exporters are held responsible for where their especially sensitive export ends up, regardless of “fault” as traditionally understood;
2. Requiring registration of some dual-use goods when they are produced or sold;
3. Using export licensing conditions to require the use of contract terms which could then form the basis of a breach of contract suit by the exporter against the purchaser if the exported item ends up in the wrong hands;
4. Requiring publicly traded companies to disclose to shareholders any violations of export control laws;
5. Increasing the monetary fines for violation of export control laws;
6. Enhancing the sharing, between agencies and countries, of information regarding companies denied export licenses, including perhaps through an international database;
7. Publicizing the names of persons and entities convicted of export control violations;
8. Expanding jurisdiction to more regularly cover crimes committed by a country’s citizens abroad.


While nuclear trafficking prosecutions have been especially challenging in European civil law jurisdictions, the United States has experienced a much higher rate of successful prosecutions. The National Export Control Coordinator at the U.S. Department of Justice (USDOJ) provided a detailed description of how USDOJ has dramatically enhanced its prosecution of export control violations. Foreign participants were provided with an inspiring example and useful tips for how they can improve their prosecution of export control violations, including by developing specialized task forces, at the national level, of investigators and prosecutors.

In addition to improving the quality of criminal prosecutions, the second half of the conference focused on the use of civil litigation and non-criminal sanctions to deter and punish nuclear traffickers. Civil mechanisms can serve as an alternative means of punishment when criminal prosecutions fail, can be used in conjunction with traditional prosecution efforts to increase penalties against nuclear traffickers, or can be used to avoid the potential shortcomings of criminal prosecution altogether.

An exploration of avenues for civil litigation included an analysis of what causes of action might be available in courts to bring suit against nuclear smugglers. The presentations in this area highlighted that where no victims of nuclear attack exist, suits could be brought by supplier companies whose goods are illegally diverted against nuclear traffickers either for breach of contract for failing to observe export control restrictions, for fraud by concealing the actual end-user, for damage to corporate reputation by deceitfully involving the supplier in illicit activity which is made public, and for theft of trade secrets where proprietary designs or materials are
illicitly diverted. Participants shared ideas for enhancing cooperation between civil litigators and U.S. and European governments, and using legal mechanisms, such as qui tam provisions, for incentivizing civil litigation in WMD trafficking cases where the WMD have not yet been used.

Furthermore, presenters suggested that action might also be taken against financial institutions, which facilitate the operations of smuggling networks by supporting their financial transactions. Support for this contention was gleaned from a discussion of the efficacy of the U.S. Treasury Department’s financial measures and outreach to foreign banks, which have convinced some 80 foreign banks (including most of the world’s largest) to curtail their business with Iran.

The use of civil litigation as a tool to combat nuclear proliferation appeared to be a novel proposition. Most of the U.S. participants were only vaguely familiar with the potential of civil litigation as a tool for penalizing and deterring WMD traffickers, and few if any of the foreign participants were familiar with it at all.

In addition to civil litigation, governments can also impose a wide range of non-criminal sanctions against suspected nuclear smugglers to punish them for illicit behavior and prevent them from engaging in further criminal activity. Sanctions might include fines, travel restrictions, and loss of export privileges.

Discussion during the conference also generated new ideas for future research by members of the Project on Nonproliferation Policy and Law. Possible avenues of exploration include:

1. The inclusion of Strict Liability with Indemnity clauses in supply contracts for sensitive goods
2. The use of the CP clause in UNSCR 1373 for restricting support to terrorist organizations seeking to acquire WMD
3. Amending the Foreign Sovereign Immunities Act to include an exemption for proliferation related activities, as the Flatow amendment did for material support to terrorism
4. The Use of the 2005 Protocol to the SUA Convention to intercept goods during transshipment
5. The Use of the CWC Challenge Inspection process to inspect Iranian nuclear sites
6. The introduction of a new subject matter jurisdiction statute to impose universal jurisdiction on export control violations.
III. Workshop Review - Brussels

The Preemptive and Preventative Use of Force in Response to the Proliferation of Weapons of Mass Destruction

On October 27, 2008 The International Society for Military Law and the Law of War held a workshop at The Royal Military Academy in Brussels, Belgium entitled: The Pre-emptive and Preventative Use of Force in Response to the Proliferation of Weapons of Mass Destruction. The purpose of the workshop was to bring into focus the current state of international law with regard to the launch of a preventative strike on a facility associated with a WMD program, as was the case on the recent alleged attack on a Syrian facility by Israel. The Project on Nonproliferation Policy and Law was pleased to sponsor the participation of important speakers including Mr. Leonard Spector, Professor Orde Kittrie, and Professor Aleksandra Mezykowska.

The workshop was divided into two parts; first, an historical overview of the preemptive use of force and, second, current policy considerations. The speaker line up was international in scope with Mr. Leonard (Sandy) Spector and Professor Orde Kittrie of the PLNP project as featured speakers. Other speakers included Professor Yoram Dinstein and Mr. Tom Ruys of Tel Aviv University (Israel) and Katholieke Universiteit Leuven (Germany) respectively. Also speaking were Dr. Dieter Fleck, Honorary President of the Society, Mr. Guy Roberts of NATO and Dr. Alexandra Mezykowska of the Law and Treaty Department, Ministry of Foreign Affairs, Poland. BrigGen Jan Peter, Director of Manpower & Personnel Policy at SHAPE, and an international law expert, closed out the event.

Themes that emerged from the discussions included the fact that a WMD capability takes many years for an antagonist to develop and, that at some point in the process a preventative strike is in fact a justified self defense action, provided it meets the parameters of proportionality and military necessity. The problem is that there will always be disagreement as to where that point is along the WMD development continuum. Furthermore, even after a strike, the struck party is in the unfortunate position of trying to prove a negative (i.e. it has no WMD capability) in order to claim it was the aggrieved party. Some argued that preventative action does not have to be a military strike and that aggressive activities (such as sanctions) can be allowed under the UN charter even if a military strike is not.
The attendees discussed whether or not the UN charter permits any preemptive strike without prior UN approval. One discussant suggested that the old common law cases with regard to preemption no longer apply since most countries are signatories to the UN charter which many argued altered the common law in 1945. The associated theme discussed with regard to this issue was: If the UN is impotent with regard to enforcing Nonproliferation norms (which it has historically stated is a breach of peace and security), does the common law notion of preventative strike then come back into play?
APENDIX A

WILTON PARK CONFERENCE AGENDA
NEW APPROACHES TO PENALIZING NUCLEAR SMUGGLING
October 22-25, 2009
SYNOPSIS:

How can would-be smugglers of nuclear materiel be deterred? What is the status of international capabilities on combating nuclear trafficking? What difficulties have prosecutions of traffickers encountered and why are the challenges to secure convictions? How can international capabilities be improved? What are the legal alternatives to criminal prosecutions?

THURSDAY, 22 OCTOBER:

1800hrs: Drinks Reception

1830hrs: Dinner

2000hrs: WELCOME TO WILTON PARK

Mark Smith Programme Director, Security and Defence, Wilton Park, Steyning

THE AFTERMATH OF THE A.Q. KHAN NETWORK: AN INFORMAL CONVERSATION WITH LEADING INVESTIGATORS

Chair: Gordon Corera Security Correspondent British Broadcasting Corporation (BBC), London

Mark Hibbs Senior Correspondent & Editor Nucleonics Week and Nuclear Fuel, New York

Mark Fitzpatrick Director, Non-Proliferation and Disarmament Program, International Institute of Strategic Studies, London

Douglas Frantz Chief Investigator, US Senate Foreign Relations Committee, Washington DC

FRIDAY, 23 OCTOBER:

0915-1045hrs: Prosecuting Nuclear Export Control Breaches: Challenges and Obstacles

Sibylle Bauer Senior Researcher, Stockholm International Peace Research Institute (SIPRI), Stockholm; Head, Export Control Project

Ruth Wedgwood Edward B. Burling Professor of International Law and Diplomacy; Director of the International Law and Organizations Program School of Advanced International Studies, Johns Hopkins University, Washington DC

1045-1115hrs: Coffee Break

1115-1245hrs: CHALLENGES AND LESSONS LEARNED IN EXPORT CONTROL PROSECUTIONS: THE GERMAN EXPERIENCE
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<th>Time</th>
<th>Event</th>
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<tr>
<td>1300-1500hrs:</td>
<td>Lunch</td>
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<td>1500-1645hrs:</td>
<td>CHALLENGES AND LESSONS LEARNT IN EXPORT CONTROL PROSECUTIONS: THE DUTCH EXPERIENCE</td>
<td>Sibylle Bauer, Stefan Woll, Stephan Morweiser</td>
<td>Senior Researcher, Stockholm International Peace Research Institute (SIPRI), Stockholm; Head, Export Control Project; Head, Department of General Issues on Export Control, Customs Criminological Office (ZKA), Köln; Public Prosecutor, Federal Public Prosecutor General, Karlsruhe</td>
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<td>Chair: Ian Anthony</td>
<td>Project Leader and Research Coordinator, Non-Proliferation and Export Control Project, Stockholm International Peace Research Institute (SIPRI)</td>
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<td>Wim Boer</td>
<td>Senior Criminal Investigator, Fiscal Investigation and Information (FIOD-ECD), Rotterdam</td>
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<td>1645-1730hrs:</td>
<td>Tea</td>
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<td>1730-1900hrs:</td>
<td>IMPROVING THE PROSECUTION TRACK: RESOURCE CENTERS, COORDINATION, JUDICIAL COMITY</td>
<td>Steven Pelak, Michael Curry, Walter Gehr</td>
<td>Deputy Chief, National Security Division; National Coordinator, Export Control Enforcement Directorate, Export Control Prosecutions, US Department of Justice, Washington DC; Deputy Director, Office of Weapons of Mass Destruction Terrorism, Bureau of International Security and Nonproliferation, US Department of State, Washington DC; Chief, Counter-Terrorism Legal Services Section, Terrorism Prevention Branch Division for Treaty Affairs, United Nations Office on Drugs and Crime (UNODC), Vienna</td>
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<td>1930hrs:</td>
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SATURDAY, 24 OCTOBER

0915-0945hrs: OVERVIEW OF NON-CRIMINAL APPROACHES

Tony Foley
Acting Deputy Assistant Secretary for International Security and Nonproliferation, US Department of State, Washington DC
0945-1115hrs: **Civil Penalties: Fines, Denial of Export Privileges, Denials of Contracts, Asset Seizures**

Kevin A. Delli-Colli  
Acting Assistant Secretary for Export Enforcement, Bureau of Industry and Security, US Department of Commerce, Washington DC

Holger Beutel  
Head, Division for Sanctions, German Federal Office of Economics and Export Control (BAFA), Eschborn

Victor Comras  
Attorney at Law, Comras and Comras, Fort Lauderdale

1115-1145hrs: Coffee

1145-1245hrs: **Corporate Sanctions and Business Choice**

Chair: Orde Kittrie  
Professor, Sandra Day O'Connor College of Law, Arizona State University, Washington DC

Arthur Shulman  
General Counsel, Wisconsin Project on Nuclear Arms Control, Washington DC

1300-1500hrs: Lunch

1500-1630hrs: **Private Civil Litigation – A Potential New Tool in the Tool Kit?**

Steven Perles  
President, Perles Law Firm, Washington DC

Leonard Spector  
Deputy Director, James Martin Center for Nonproliferation Studies, Monterey Institute of International Studies, Washington DC

1630-1700hrs: Tea

1700-1830hrs: **Conclusions**

Leonard Spector  
Deputy Director, James Martin Center for Nonproliferation Studies, Monterey Institute of International Studies, Washington DC

1900hrs: Dinner
APPENDIX B

RAPPORTEUR NOTES, WILTON PARK CONFERENCE AGENDA

NEW APPROACHES TO PENALIZING NUCLEAR SMUGGLING

October 22-25, 2009
PROSECUTING NUCLEAR EXPORT CONTROL BREACHES: CHALLENGES AND OBSTACLES

DR SIBYLLE BAUER, SIPRI

- UNSC 1540 includes obligation on UN member states to establish and enforce civil penalties for export control violations
- Up to national governments to turn those vague political terms into concrete policies and enforcement systems
- National governments have range of legal options at their disposal
  - Obligation on member states for penalties to be proportional and effective
  - Financial penalties, revoking export licences, shutting down company, criminal penalties
  - Definition of “criminal” depends on national system
- What penalties do constitute an effective deterrent?
- Penalties need to be consistent with legal system in place
- Some distinctions: was a nuclear weapon used, war crime?
  - Different degrees of liability
  - Covering intent, negligence and attempt – needs to be defined
- What actors do we want to prosecute – extra-territoriality provisions
- Export controls more complex issue that is more and more difficult to regulate
- Shift from country being transferred to, to the end user in that country
- What powers do enforcement actors have?
  - Preventive seizure, trade audits, confiscation, search, communication surveillance, powers in special economic zones
- Prosecution challenges – extremely difficult but not impossible to prosecute
  - Need case and detection, so customs officers need sufficient resources, legal powers, access to information, political backing as incentive
  - Need for speedy access to technical expertise
  - Need for good basis and consistent definitions
  - Need effort for more international cooperation, both inter-agency and international (Cooperation communication and coordination 3 C’s)
Most prosecutors only get one case – lack of experience, awareness, training and institutional memory → need specialized units

Difficult to collect evidence in other countries, particularly certain countries

Cannot use intelligence information in court

Access to technical expertise essential: need a credible independent expert

Prosecutor has to prove intent, positive knowledge and the end use

These topics political, very sensitive and easily politicized

Conflicting interests of prosecution service and intelligence services (want to keep sources, artificially create demand)

Primary goal is prevention and making sure items do not leave country

Blurring of lines between counter-proliferation and counter-terrorism, terms often used in imprecise or politically opportune way

Often not a “system” in place: assumption that enforcement just happens

✦ Need sufficient resources, frequent adjustment, clear responsibilities

☐ Each challenge can be turned into a positive recommendation

RUTH WEDGWOOD, JOHNS HOPKINS UNIVERSITY

☐ Challenge that all of these items have dual uses, difficult to get people excited

☐ Allies may not have same foreign policy agenda, may want to limit trade restrictions to boost own economy

☐ Need to show specific knowledge of what a good can do, where it can’t go

☐ Should have specific knowledge

☐ False end users frustrating as well – no port agent tracking all the way through

✦ Don’t know where goods are going to end up, and in cases where do not necessarily what the end user does

✦ Don’t know about throw-away companies, large companies sometimes do favours for governments

✦ Need to get manufacturers enthusiastic about this enterprise or it won’t work

☐ Disillusionment with NATO – Germany didn’t care about shipments to North Korea

☐ National security law requires proof that act shows detriment to that particular country

☐ Intelligence agencies don’t collect information about companies
- Have to put investment at risk to conduct sting operations (3 to 5 million was one example)
- Find way for smugglers to come to you – there are civil liability problems however
- Need inter-agency cooperation to do transhipping cases effectively
  - Otherwise cases don’t work
  - US got better with counter-terrorism, now need to do counter-proliferation
  - Need to combine attitudes of different agencies
- Need to worry about who works for allies – they aren’t vetted
  - Worry there may be double-agents in these agencies (industrial and proliferation espionage challenges)
- Dual-use nature means people pick up much in purely innocent instruction in engineering or science lectures
- Many foreign nationals have access to industrial data
- Difficult to follow individuals who gather data slowly from numerous sources, networking
  - Can’t just target one group
- Diplomats can carry some items
- Can’t inspect airplanes in mid-air: PSI can’t stop and search airplanes
- NPT itself mandates sharing of technology (CWC too)
- UNSCOM – difficult to believe Saddam could corrupt high level people
  - Ability to corrupt in UN and national governments should not be underestimated

**Chris Bidwell, DTRA**

- International legal assistance major challenge – countries needing help from other countries
  - Prosecutors often cannot get official cooperation, no affidavits
  - Often dependent on prosecutors in another country to initiate own investigations
  - Authority to send investigators in difficult to get, doesn’t sit well
  - International organizations often possess information (such as IAEA) that may be able to convince a judge a particular case or shipment is important
    - This is necessary for bigger penalties
  - IAEA can put these cases in context: worth exploring as a recommendation
Authorities often unwilling to surrender physical evidence: bank records, business documents, shipments/equipment

Counter-proliferation statutes often inadequate to address needs of prosecutors

- Cases of illicit behaviour don’t take into account threat to international peace and security
- Cases framed by violations in contrast to national security of that particular country versus global security
- Need to find a way to make long sentences a reality
- No explicit criminalization of proliferation (1540 compliance)
- 1540 only required states to put new laws on book, but did not require them to implement those laws

Extradition: obtaining jurisdiction is difficult

- Selling certain technology may not be illegal in a certain country, so no extradition
- Often dependent on political whim or current state of political relationship between two countries
- Arguments that smuggling is a political crime, leading to governments to not honour extradition statute

Classified evidence: argument it can’t be brought into court doesn’t work well

- Caught in a Catch-22: intelligence agencies don’t want to reveal information
- Perhaps offer security clearances to those working on the case: judge, defence attorney

Court jurisdiction over crime difficult

Testimony and witnesses difficult: courts may not accept affidavit, accused has right to face a witness

Sentencing: crimes usually considered minor crimes, with fairly short sentences

- Civil litigation versus criminal litigation
- Civil litigation can create huge monetary disincentives for proliferating

Discussion

- Several emerging problems identified, while we still have older problems (like extradition) yet to be overcome
- Takes enthusiasm to pursue these cases
- Q: talking about small group of people over time or large groups of people on ad hoc basis
May be that we’re talking about a handful of bad actors putting it together, people on middle level instrumental in making things happen (enablers), and a lower tear of street dealers. Small or large groups still need to tackle problem

People in India who brought nuclear program seen as heroes, including transshippers. Large netherworld of people transshipping goods

Q: Always had smuggling and never been able to stop it, but been able to work through particular zones of interest in which it takes place. Goal may be to identify zones where this takes place, then create piece of model legislation. Sovereign versus terrorist group wanting material important.

Not sure we know what the problem is enough so to get on with the solution. Dealing with subset of the problem of smuggling, but not really the problem. Problem now is that customs don’t know what the goods are: they aren’t hidden. Not a smuggling problem for customs.

Important to clarify definitions: there are different interpretations of what words like “smuggling”, “trafficking” etc. mean. Different terminology from dual-use prosecutors to refer to nuclear smuggling. Have worked on model legislation because every law has to fit the national legal context and needs to be catered. Penal legislation needs to be harmonized at national level. When thinking about model legislation done so by framing it in terms of questions posed, of which the resulting legislation needs to be addressed. Also provide alternatives from different countries to find one best suited. Willpower of countries to implement and then enforce legislation required by 1540 difficult to muster. Human decisions factor in as well in dealing with these cases: judgements calls, fears of consequences.

Attitude often that does not need to be dealt with right away: time can pass and can be dealt with later. Don’t see non-state actors building an infrastructure to build nuclear weapons. A state program is still a critical element. Can reduce the amount of product available by preventing new states from acquiring certain technologies.

UNSCOM meant to be a new model of counter-proliferation. Multinational model, allowing involved individuals to seek cooperation from own group. Structure of multinational targeted agency. IAEA could do it, but caught up in other responsibilities. Harbouormaster can search anything that comes into port, so legal authority exists.

Has to be consensus about framing what the smuggling problem is. Sharing scanning technology at harbours intriguing.

Cannot underestimate imagination and abilities of non-state actors intent on detonating a nuclear device. Going to patch together a radiological device. One way to look at that
problem is recognize that same networks smuggling items going to smuggle items to jihadist elements as well.

- Statements it was duty of Muslims to “acquire” weapon, not set one off. May be to acquire political bargaining chip.

- More broadly have problem in defining what the problem is. No such thing as smuggling with dual use goods: need some kind of physical concealment to constitute smuggling. Problem is dual use goods and end uses of concern. Need to know where goods in centrifuge cases come from. In 99% of cases in UK there is no offence. Penalising people in various states is not the answer. Nuclear smugglers few and far between: majority of goods come from perfectly legitimate means. Not a problem with legislation, not a problem with capacity: fact is very little illegal activity occurs.

- May not be crimes but can make a crime of it. Failure to inquire can itself be actionable. Doubt that there is much demonstrable guilty knowledge, but a “feeling”.

- Don’t use term “smuggling” in dual-use sector. If exporter doesn’t have knowledge of end use you do not have a crime. No easy way to detect dual-use items, almost impossible with non-listed dual use items.

**Challenges and Lessons Learnt in Export Control Prosecutions: The German Experience**

**Stefan Woll, Customs Criminological Office**

- Preventive measures to stop illegal activities, detection of violations regarding international and national laws and regulations, interdiction of unauthorized exports, etc.

- Customs plays crucial role in enforcing export controls

- Export, transit, technical assistance, brokering the activities that need to be countered

  - Complicated to detect transit

- Lack of time for effective control measures as a result of frequent transhipments

  - Difficult to find most effective rule set for controls
  - Communication channel between licensing and customs needed
  - Complexity of control list and nature of listed items
  - Treatment of non-listed items
  - Misdescription of items an issue: parts for ball point pens an example of false description

  - Items lifted in NSG restricted item list
Incorrect values, splitting of invoices, incorrect end-users declared, country of destination concealed

- Now smuggling, but “clandestine transportation”

- Is the “red flag” philosophy efficient? Yes it is, but they need to be permanently available to enforcement agencies, not just intelligence agencies

- Intelligence information is available in several countries, sharing of information between agencies or foreign offices
  - Investigators and prosecutors do not have enough information for effective prosecution

- Interest of non-state actors is profit, but some corrupt, ideological motives

- Have to define what a serious proliferation offense is
  - Promotion of development of WMD to sensitive countries of concern, by specific conduct, and when fully awareness of the actor can be proven

- Range of punishment in criminal law gives judge first indication for determining the penalty: suspended sentences not a deterrent
  - On the other hand criminalization of industrial entities must be avoided

- Need to punish an individual, not a company: companies don’t have criminal intent

- Need national and international interagency cooperation including training courses about purpose of dual-use components, technical support by international organizations (IAEA), strengthening NSG enforcement officers meetings

- Capacity building: follow-up of outreach to relevant countries

- Work on multilateral initiatives such as PSI, need a 1540 verification system

**Stephan Morweiser, Federal Public Prosecutor General**

- Exporter usually not fully aware of the end-use due to front companies with full awareness
  - Often will ask secret service, which will have no information about particular front company (just created recently, so no history)
  - Exporter cannot be prosecuted because unaware of what he is doing
  - Broker can be prosecuted instead: considered exporter in some national legislation

- Gotthard Lerch case
  - Pakistan, Malaysia, South Africa, UAE, Turkey, Spain and Switzerland, Libya involved in transhipping
No evidence in Germany: had to get it all from other countries
Had to use War Weapons Control Act to prosecute Lerch because not based in Germany
Could not extradite Lerch for treason because it is considered a political crime in Switzerland
Malaysia cooperated despite there being no treaty, Libya as well
Turkey and US did not cooperate (would not allow prosecutors access)
Often cannot prove nuclear weapons are being produced (Libya had confessed, hence Lerch’s prosecution)

German secret service bold enough to declare Iran pursuing nuclear weapons, but still not enough to convince the judge that Iran was
Export control law itself problematic: at what point is a licence needed?

DISCUSSION
Too narrowly focused on export control and mode of transport. What about literal smuggling of technology?
Any business with terrorists prohibited regardless of whether it’s nuclear related. Any activities with terrorists or terrorist groups forbidden. From legal point of view not the problem.
Taking down corporations a possible form of punishment. Signing of contract should be sufficient in EU to indicate intent. Would dual citizenship change way Lerch case unfolded?
Difficult to determine what needs to be punished. Need to prove full awareness of end use for dual use items. What does “full awareness” mean? Cannot close companies as a part of penal process: cannot put a company in jail.
Need to prove goods are going to WMD program and that the individual knew. Does it matter if they do if the individual thinks that they are providing a WMD program?
Should negligence or failure to inquire be punishable? Is there anything preventing Germany from joining a treaty requiring punishing it?
Normally don’t know when an item is going to be exported. Need to know when individual has full awareness of end use. Penalising companies handled on the administrative level → not to be treated as a natural person. Come to same result only not on a penal level.
War Weapons Control Act → refers to “nuclear weapons”, but what are nuclear weapons? A centrifuge is not a nuclear weapon, but weapons usable material is.
German secret service willing to testify Iran was pursuing nuclear weapons in contradiction to US conclusions in 2007. What influenced the judge in deciding on the issue?

- May not matter what actual end use is, but that intention to provide a WMD program exists. IAEA will only give technical expertise, but not assessment of what is and isn’t being done in Iran. IAEA probably wouldn’t have knowledge of weapons activities because they would be thrown out.
- Is there a systematic approach to gathering testimonies outside of EU in these cases (reference to Tahir testimony). Made statements incriminating Lerch that were thrown out of court. Is there a way to address this loophole?
- Could items be used in a nuclear weapons program is an important point as well, not just if they are.
- IAEA has a lot of useful information for enforcement agencies. Technical information could improve work via courses, etc. Currently need to contact independent people, but would be much more useful if information came from international organization in a court.

- Seen that prosecution has number of challenges proving uncertain terms in criminal statutes (such as “developing nuclear weapons” or “endangers foreign relations”). May need to improve these statutes to assist prosecutors.
  - Phrasing may be intentional to make it difficult for prosecutors and to enable exporters.
  - “Endangers foreign relations” clause in War Weapons Control Act → High Court of Justice questioned clause leading to problems in penal law. Trying to find new ways to handle these cases.
  - “Encourage” refers, according to High Court of Germany, to the delivery of items necessary for the development of nuclear weapons.
  - Forbidden to assist or develop regardless of state in question, even if a nuclear weapon state.

**DEVELOPING AN END-TO-END APPROACH: THE BRITISH EXPERIENCE**

**AARON DUNNE, HM REVENUE AND CUSTOMS (HMRC)**

- Intelligence Acquisition Team in contact with 3000 UK companies
- Impossible for government to maintain level of expertise independent of the private sector
- 99% of exports leaving UK left hand side of continuum (voluntary compliance, compliant, support/advice/education, facilitate)
Always investigate non-compliant entities with view to prosecution

- All intelligence relating to counter-proliferation is shared at fairly low level
- Risk assessments conducted
- Sanctioned anything from nothing to prosecution: anywhere from one to five prosecutions per year
- Reality is there is no illegal activity to prosecute because illegal activity not taking place in the UK
  - Only illegal activity often the end user or procurement organization
  - Total embargoes to countries such as Iran doesn’t work, because materials not going to Iran initially
  - Items are not going from the UK to Iran, but through other countries

- In the future counter-proliferation strategies may not work because states like Iran will be capable
  - Cannot enforce counter-proliferation in other countries: at least not a customs or domestic police function

- End user not legally required on declaration: only consignee required
- Ability, end user lists, etc. don’t matter – not catching more than 15% with export controls
  - It’s intelligence led, about catching entities in the UK and engaging with the countries seeking goods

**DUNCAN POTTER, BORDER FORCE NATIONAL INTELLIGENCE (UKBA)**

- Basic smuggling life cycle: demand, source, transport and delivery
- Need to be intelligence-led: gather and share intelligence between authorities
- Operations at ports, counter-proliferation, intelligence briefings
- People who get caught are those who repeatedly illicitly transfer technology
  - More likely to make mistakes
  - Also amateurs, unbalanced (those with obsession with nuclear material) and unlucky
  - Clearly don’t catch everyone; still material out there on the market

- Why smuggling HEU? Is it just opportunistic?
  - 2003 and 2006 HEU discovered in Georgia (in apartments)
- 2007: 426.5 grams of U-235 and 238 discovered in Slovakia, sold at $3500 per gram
- 2009: three men arrested in Ukraine, 3.67kg of Pu-239 (actually was polonium?)
- 2008: Man arrested in Ukraine for transporting uranium and caesium in a car worth 3.1 Euros

☑ Most activity regionalized in the Black Sea region

 Turkey appears to be major country for movements of materials, probably due to geographical reasons

☑ Profit the prime motivator, not the intended use

☑ Radio-nuclear material has no regular resupply: scarce

☑ In all cases above unable to identify an end user

☑ Material is not always recognized for what it is and there have been many scams

☑ Opportunistic, unique and irregular market

☑ Could use a better understanding of pretty much everything

CHALLENGES AND LESSONS LEARNT IN EXPORT CONTROL PROSECUTIONS: THE DUTCH EXPERIENCE

WIM BOER, FISCAL INVESTIGATION AND INFORMATION SERVICE

☑ Evidence includes exporter, goods, no export license granted, and have to prove criminal intent

☑ Don’t have to prove smuggling, just export without a license with criminal intent

☑ Distinction between intentional and deliberate in penalties (felony versus misdemeanor)

☑ Slebos: conviction in 1988, shipments in 1999, trips to Pakistan, several catch-all provisions, close personal relationship with Khan

 Investigation started with information from the US

 Challenge to get evidence in an office because don’t know what they have until later on in investigation

 Many items were exported, tried to find most interesting ones – not all exports were illegal exports

 Never requested an export license despite being fully aware of it

 Narrowed down exports to seven cases that were investigated
One: Warning on invoice that goods were “subject to exports controls”, so full awareness

Two: small steel balls, no license was needed, no catch all provision – difficult to get technical expertise to evaluate

Three: grinding machine, no offence – did not have technical information

Four: Viton O-rings – exported 11,000 pieces but only convicted for 9,000 because of details of catch-all provision

Five: Various ball bearings – exported to Pakistan with no export license, catch-all provision, direct by air and diversion via third country, lost document led to no conviction

Six: Triethanolamine, no export license, “subject to export controls” on invoice, diversion route, not delivered to Pakistan, still in third country

Seven: 100 graphite blocks, no export licence, shipment stopped and destroyed

Investigation took from 2002 to 2009 for a conviction

Motives: friendship with Khan, easy way to make a profit, supported Pakistani WMD program

Ended with 18 month in prison, 6 months suspended

Recommends special export control licence, brokering, conspiracy and diversion routes, minimum prison sentence

For enforcement: more physical inspections, qualified/trained officers

Prosecution: special unit

Registration of all dual use goods when produced or sold

**DISCUSSION**

Finding the actual demand has been difficult. What is the demand? Every case either been a scam or a sting operation. Not aware of any open source indicators that have been demand driven. Always been opportunistic/supply driven. What percentage of cases are authorities catching?

- Have good forecasts of how much drugs are out there, for example, but with radio-nuclear materials we don’t know how much is there. We don’t know how big the market is. Difficult to determine end user, as with fine arts market. Demand stems from statements of wanting the material, such as bin Laden’s. Al Qaeda philosophy is that war is 50 years, so time is on their side. Can only judge demand based on what’s been said, but so far no terrorist group linked to a case.
A few cases that suggest there was a demand driven transaction, but not by any means normal. Were engineers brought out along with investigators as per the UNSCOM example?

- In investigation colleagues from intelligence service came along but were totally wrong because not permission was given for them to go along. Don’t usually have goods in hands, so they examine later on. Could not find anything wrong with goods when customs inspected: sensitive but not listed.

- Each policy holder will ask for priority targets to be met and delivered (tobacco, drugs, etc.). Counter-proliferation is a priority, but do customs officials work to those priorities? Each team has its own targets they must hit – concern funding will be reduced if targets not met. Priority generally on import goods, not exports. Will respond to it, but difficult to differentiate between priorities from top and bottom.

- HMRC increased seizures this year. Bird flu, for example, caused all resources to be diverted to it.

Little known at IAEA about how much material lost in FSU in 1993-94. Much of the material we see now comes from this. Who is the typical buyer?

- Don’t know about what went missing, possible Soviets don’t either. Difficult to engage with Russians for UK right now. Countries and organizations don’t like admitting that they’ve lost something. Don’t want to admit that they lost control. Don’t have sufficient intelligence to determine a buyer profile. Moved in accompanied transport. Mainly seeing organized crime groups and those who smuggle other commodities now turning to this.

How can we deter greedy traffickers? Must be other activities going on for income as well, so at what point can assets be frozen, seizures, etc.

- Difficult to follow the money, but do try.

Ball bearings were not on export list. Have lists (NSG) been updated since the Iraq discovery.

- To increase lists to all a country produces is not the way. Lists need to include high and mid-tech degrees. Catch-all provisions are for lower level technology. Idea is not to make trade harder, but to identify those rare cases where goods are actually used for WMD.

Any cases of foreign governments being involved? How many cases involve improper identification of items?

- Have not seen any state players, but little doubt governments are complicit. Some operatives are former government agents gone into the private industry.
Where do changes in law need to be made? At EU level or at the national level? Is it easier at one versus the other?

- Changes need to be made at EU level: it is EU legislation, customs controls are EU, procedures are EU, declaration specified into EU law. Because dealing with customs it has to be EU level. Would like to see EU designating particular states, forcing to provide end user details. Usually much transhipping through various states: US, Canada, UK, EU states; not direct to Iran. Every package cannot be scrutinized, especially with fast delivery.

Do the Dutch do supply side stings? Wire tapping? Undercover operations on the buy side?

- Wire taps admitted in court, do conduct undercover operations

**Improving the Prosecution Track: Resource Centers, Coordination, Judicial Comity**

**Steven Pelak, US Department of Justice**

Themes:

- Threat is from radical Jihadist networks
- Success in attacking the middle men so far and coordinating law agencies
- Involving the intelligence communities – facilitated in part by 9/11
- Pursue smaller case to obtain larger goals
- Transparency in international monetary system needs to be used and exploited
- Seek evidence of public corruption

Why and Export Control Initiative in 2007:

- Mayrow: Components from the US used to kill in Iraq, exported to Iran via UAE and Malaysia
- Asher Karni: religious approval to obtain nuclear device to kill women and children
  - 200 spark gaps shipped, selling nuclear testing equipment to India
  - Plead guilty and given three years in prison

Context and challenge in the US:

- Decentralization, multiple agencies, intelligence community involvement
- Actual work done by assistant US attorneys, usually on a single case business
- Have developed cadre of lawyers with this specialization
- Need to figure out how to make multiple agencies regulating trade work
- Also multiple statutes
- Set out training and educating prosecutors and facilitating coordination with agencies and industry, international training for prosecutors and judges

- Trained thousands of agents
- Intelligence community working closely with other agencies, and useful action arm for pursuing individuals
- International cooperation and training with Dubai, allowed US prosecutors into the country to interview subjects → been quite a sea change from there
- Can prosecute those outside of the US if unwitting individual in US used
- Civil sanctions can lead to guilty pleas such as in Kraaipoel case → one case individual turned over electronic list
  - ASi and Kraaipoel placed on Denied Party List
- Have to start small is the primary theme here

MICHAEL CURRY, US DEPARTMENT OF STATE

- IAEA illicit trafficking database: 1562 incidents through 2008
  - 33 unauthorized possession, 421 theft or loss, 724 other unauthorized activities or events
  - 107 members states participate in voluntary program
  - Trend going down in 2008 for confirmed incidents involving unauthorized possession and related criminal activities
  - Early to mid-‘90s large amounts of material more frequently, but since then smaller amounts and less often, so can take some solace in that efforts have been effective to an extent

- Three key areas: diversion, trafficking/proliferation (middlemen), terrorist
  - Biggest challenges in investigating diversion of materials, most action on middlemen
  - Need to be able to address diversion to put an end to smuggling

- Russia done some good work in terms of seizing materials, but less and less sense for what types of penalties were imposed
  - Traffickers received probation or prison sentences ranging from two to eight years
  - Diversion, 4 out of 6 cases did not have information on subsequent investigations
- No information on end users

- Eurasia: generally see arrests and probation on traffickers
  - Khintsagov received 8.5 year sentence
  - Not much authoritative information about where material came from
  - No public information about end users of materials

- Europe: traffickers received 2-8 year sentences
  - Suspected material came from Russia, steps taken
  - Police acted as end users in sting operations, not much otherwise

- Americas: no seizures of weapons usable material

- Prosecution important in raising the cost to smugglers

- Need to investigate diversion/origin of material, strengthen domestic capabilities, and interagency cooperation

- Nuclear material smuggling and dual-use investigations
  - Similarities is limited effectiveness in prosecutions, governments want to penalize both
  - Differences is one direct, other dual-use, economic opportunists versus profit motivated businesses, more traditional criminal model versus blue collar crime

**WALTER GEHR, UN OFFICE ON DRUGS AND CRIME (UNODC)**

- Prosecution difficult due to differences in national laws, difficulties accessing evidence or witnesses and difficulties in admitting certain evidence

- Do not want differences in international laws \(\rightarrow\) want harmonization of legislation throughout the world, which has been happening via SC resolutions, conventions, etc.

- CPPNM and amendment criminalize explicit material of nuclear material
  - Amendment aims to criminalize trafficking, and introduces nuclear facilities

- 1997 International Convention on the Suppression of Terrorist bombings criminalizes use of RDDs
  - Outlaws delivering, placing an discharging of nuclear devices
  - Allows law enforcement to act before explosion has taken place

- 2005 Convention for the Suppression of Acts of Nuclear Terrorism \(\rightarrow\) offences about nuclear material
- Criminalises illicit possession of radioactive material with the intent to harm
- Also maritime agreements that criminalize illicit transport by sea of radioactive material with the intention of causing harm
  - Gas centrifuge components transported by sea to Libya
- These conventions address the whole range of items that are of importance to nuclear smuggling
  - Also criminalize preparatory acts and persons who contribute, including by intention, to support these activities
  - Include provisions for extradition, but conventions not well used by prosecutions and judges
  - Prosecutors and judges do not use SC resolutions well
- Uncertainty about what 1540 means for practical application of the law
- UNODC provides assistance with drafting legislation
  - Observer to Global Imitative to Combat Nuclear Terrorism → taking lead on legal issues
  - Legislative database for counter-terrorism via website

**DISCUSSION**
- Unwitting US suppliers of end use in some cases prosecuted.
- Informal working relationships with investigators working very well so far. Representatives in embassies, customs, etc., but informal relationships they develop are what work really well. Language difficulties an important point and can slow down cooperation. Extradition very frustrating for prosecutors and investigators – do not get wrapped on whether or not you will ever get the defendant, charge them anyway.
- No new initiatives; instead need to ask countries to take these legal obligations seriously. Been in influx lately.
- Cooperation on nuclear forensics → library of nuclear material on libraries.
- Does existing framework have problems? Need for legislative reform?
  - Already working around the legislation: prosecuting 150-200 individuals per year. Any improvements unique to US system, but all about simplification (putting investigators and prosecutors in same place).
Penalties for these crimes fairly small considering prospect of use of a nuclear device. Guidelines for sentencing in these cases strong: recommends 14 years or 26 years. What can we do to put these penalties in place?

- Three year sentence of Karni one of the greater ones. Guidelines for 5 to 7 years for a first time offender. Need to bring the blood into the courtroom: show the true cost of the crime. Difficult to do when the defendant looks like the judge. Need minimum mandatory sentences. Need to limit to certain instances. Only realistic answer to the question.

What would the composition of task forces be? What is the end state? Is a proliferation of initiatives, but may there still be gaps and seams given how quickly technology emerges? Anyone thinking about horizon and where gaps will exist?

- Some countries thinking about cyber-terrorism and internet uses. SC Resolution 1624 could not be adopted in legally binding manner because of relationship between terrorist acts and freedom of expression.
- Task forces need to bring agents together early on, doesn’t matter where. Idea to develop relationships amongst the investigators. Head of task forces would be US attorney.

ICC – anybody thinking about having the ICC taking on a function of terrorism treaties originally a part of its design? Disjoint in US idea of aiding and abetting, but still referring to complicity.

- Question about conspiracy has become ideological. Not as it used to be. Convention against transnational organized crime partially bridged gap because dealt with groups that prepared violent acts for the future. Found common language, similar in subsequent terrorism conventions. In West belittling opposition when discussing ICC, putting it off, essentially. Can’t see terrorism becoming part of ICC mandate, particularly because current conventions require states to implement jurisdiction, but abide by principle of extradition.
- Conspiracy because individuals are entering a partnership, so statements about each other become useful.
- Conventions largely point to national legislation. Fundamentally national problems.

Want to address terrorism in peace and in armed conflict: certain acts that simply are outlawed, such as taking hostages.

**Leonard Spector, Recommendations Summary**

- Three tiers of discussion: individual countries and how their laws can be adjusted; coordinated effort as in US at nationwide level and EU; UNSC involvement setting rules
- Recommendations to be made in individual countries in terms of legislation
Need for improving enforcement: physical inspection, more trained officers

Prosecutions with specialized units the next level

Idea of original supplier of preregistering goods so exporter aware of export license and classification

Developing national capability to move things forward: perhaps can be done in EU

UNSC Resolutions not only encouragement, but also giving content as to what needs to be in these laws

- Notion that if we add more detail we may help focus individual states legislation and activities
- Already more developed in the terrorism level, but not quite in counter-proliferation
- Already common at money laundering level

Overview of Non-Criminal Approaches

Tony Foley, US Department of State

Prague speech established overarching nonproliferation goals, including disarmament

- Efforts must increase to break up black markets that facilitate trade and dangerous materials

Nonproliferation environment:

- So San - first attempt to interdict cargo of concern, allowed to ship, but led to development of PSI
- BBC China – found centrifuge parts destined for Libya, led to Khadafi giving up program, seen as success
- AQ Khan network – effectively shut down, but it did provide business model for other traffickers
- Libya

Reluctance among some nations for strong export control regime because it would be bad for business

Discovery of illicit trafficking difficult to stay ahead of due to number of methods

Several points during sea transportation when interdiction can be made

- Often not much time by air
Treaties affecting supply side only for states parties provide control lists, effective export control guidelines

Voluntary arrangements: PSI, Obama working on a new institution, bilateral agreements with key states

Capacity building a major enabler: US offering opportunities through variety of agencies: CTR, Megaports Initiative, etc.

Targeted financial measures and network identification helped designate hundreds of individuals whose assets are to be frozen

- 1540 and targeted resolutions on North Korea and Iran provided basis for targeted financial measures
- Refer to existing nonproliferation regimes
- Specifically target assets

Law enforcement become very important part of US inter-agency approach

- Able to reconcile problems with inter-agency approach
- Prosecutions important, although take longer

Global problem, each country needs to develop its own way

- Can’t count on future promise of future UNSC Resolutions or new laws

**Discussion**

Khan’s tactics have been used by other proliferators, but not his business model. He was an importer who became an exporter. He was a one-stop shop, set up manufacturing plants. Today we see national companies.

- Khan network not necessarily shut down: still people in the network, motivated to make money, activities still ongoing. Although Khan out of the picture, does the network continue onward?
- Are indications of Khan-like operations out there that may have figurehead or may have other parts similar to those identified in Khan world. Main figureheads in Khan network got light sentences, but no indication that they’ve resumed their behaviour. Are people engaged in those activities, not known if it’s actionable.

Feasibility of targeted financial sanctions against nuclear materials traffickers? Middlemen do not have large financial footprint.
Certainly a desire to use targeted financial measures against big players. Executive orders to preserve own financial system, but few others have same authority. Have an active outreach program to make countries aware of obligations under UNSC Resolutions, but structure to freeze assets to get a universal approach to these methods. Political situation as well: how much do you want to tackle senior government officials, even in countries like Iran and North Korea while trying to negotiate with that country. Been discussion about new executive order or UN resolution solely tackling financing (difficult to do given views of Russia, China).

- What quantum of proof required until particular executive order?

- Three standards of proof: making material contribution to WMD or delivery system program; providing material support or risk of providing material support; owned or control buy. Evidence required a judgement call, lawyers may only offer intelligence information. No set number or date, just most information that can be assembled, lawyers make judgement on whether evidence sufficient to withstand a law suit. Err on the side of caution.

- What constitutes material support for terrorism group being litigated. Setting standards in DC right now.

- Institutionalizing PSI versus strengthening it. Maintaining flexibility at the same time as moving from an activity to something else. Law enforcement engaged with building cases and gathering evidence, versus PSI and national security done more quickly, so inherent tension between the two.

- Permanent point of contact for PSI, which US has volunteered to be. Always talk and discussion about strengthening it. Need to be wary of not becoming another talk shop. Exercise program robust, introducing proliferation finances although not in principles. Tension between law enforcement and national security dependent on a case by case basis: depends on the item in questions. If material for bomb more quickly, but if dual use takes longer

- UNSC encouraged states to submit names of drug traffickers, but so far has not developed any resolution for submitting names of those who finance proliferation

**CIVIL PENALTIES: FINES, DENIAL OF EXPORT PRIVILEGES, DENIALS OF CONTRACTS, ASSET SEIZURES**

**KEVIN DELLI-COLLI, US DEPARTMENT OF COMMERCE**

- Few items require specific licence for export in the US
Commerce Control List and EAR99 goods of interest

Preventing something from occurring in the first place

Needs to be incentive to comply with export controls, civil penalties provide that incentive
  - Can require an investment for a company to comply
  - Money that’s invested that doesn’t bring back to company in form of profit
  - Many people in these companies fighting for resources, need budget to do this
  - Some prefer to pay fine when they get caught
  - Want to build a dam by ensuring industry complies with the law
  - Do a lot of targeted outreach to create good working relationship

Provide guidelines for companies to ensure their compliance

Depends on nature of company: small exports to Canada not big deal, but larger multinational companies with foreign nationals need more robust mechanisms

Civil penalties: give out warning letters (first time offence, technical violation), monetary penalties up to USD 250,000 per transaction (mitigated down) that can include an audit requirement, denial of export privileges (can effectively shut company down)

Criminal sanctions: global settlements to include a civil fine

Have a review board to review evidence and approve issuance of charging documents
  - Settlement parameters included, and if not company charged administratively
  - Administrative Law Judge makes recommendation

BIS Entities List establishes licensing requirements on all items subject to EAR
  - Identify end users misusing those products and put license requirement on them

HOLGER BEUTEL, GERMAN FEDERAL OFFICE OF ECONOMICS AND EXPORT CONTROL (BAFA)

Fines, denial of privileges, of employment, of contracts, asset seizures and pillory

Any non-compliance with export control violations can be fined
  - Endangering German national security, disturbing peaceful existence of nations or disturbing foreign relations (administrative offense always treated as a criminal offense)
  - Any acting person subject to fines, as well as companies

Denial of privileges: freedom of foreign trade guaranteed, but it can be constrained
  - Granting license in Germany depends on reliability of applicant
- Deny licences, revoke global and general licences, revoke simplified customs procedures (company in Europe probably can’t survive this)

- Denial of employment: German constitution guarantees person right to choose a profession
  - Some professions depend on reliability of a person
  - Has to be Person Responsible for Exports, who takes responsibility for any crimes
    - Will ensure company is complying to keep job
    - Fear of those responsible largest benefit of this

- Denial of contracts: public bodies not allowed to place contracts with these companies
  - German government a major contractor, so penalty works

- Asset seizure: forfeiture includes everything offender gained from criminal acts in favour of public treasury, higher amounts than fines
  - Confiscation of objects to which act is related such as transport vehicles

- Pillory used for public humiliation
  - Not allowed to publish names of convicted criminals in field of export controls
  - Headlines can hurt a business’s reputation
  - Only press can perform this

Victor Comras, Attorney at Law

- Real problem here is to get member countries to implement international agreements and resolutions
  - Most countries are not as active as those represented here
  - Remains greatest challenge we face: how can we convince rest of the world?
  - Requires political will, and capability and means to do it

- Even in own systems still some basic problems we need to think about and address
  - These smuggling scenarios are complicated and sophisticated, particularly in nuclear
  - Often see legitimate companies involved in exports with little reason or perhaps ability to know what’s happening to their export
  - Companies had few resources to know customers in the past
  - Compliance has become a big issue: idea of due diligence and know your customer become a basic requirement for doing business in some states, but not in much of the rest of the world
Many goods coming from developed countries with regulations, but exported to countries without

Our laws don’t allow us to go beyond our national borders: good export takes place, no grounds to know it would be trafficked

US apply many export control regulations extra-territorially: necessary if we want to control it, or need a system allowing us to pass off responsibility for overseeing good

Control of handling of goods needs to be given greater status

Few countries share their blacklists, kept secret who they deny licences to and don’t ask other countries to also deny them exports

Needs to be some kind of international database

Some goods sensitive enough that company should have strict liability (risk can be passed on)

If people begin to know companies too loose in their exports then people may rethink investments in those companies

Becoming requirement in US that companies divulge this information

Companies negligent in their responsibilities should be identified publically

Criminal prosecutions an extremely difficult process for reasons identified yesterday

Other challenge is penalties are low, not deterring

Civil penalties becoming more of a deterrent than criminal penalties

Can impose penalties and fines without evidentiary burden: no proof beyond a reasonable doubt

**DISCUSSION**

Can press seek names of violators from German authorities? How does that compare to rest of members of the EU?

Press usually gets information from open court trials. Doubt any EU member states publish lists of those convicted.

Countries do share denials, though not public. Are there barriers or strengths to blacklisting that can be overcome?

EU regulation includes denial notification system.
Issue with blacklisting is people question due process capability to deal with these issues – a balancing act. Back end due process one way of dealing with issue for those who feel been treated unjustly.

Needs to be process to get off black lists. All countries results of court proceeding made public.

If good has jurisdictional power, countries with capacity.

Is system of warning effective in encouraging company compliance? During Lerch case substantial allegations of profit as high as USD 35 million: what happened with asset forfeiture following investigation? Moved from system where nuclear equipment produced by a dozen countries to a system where 30-40 countries worldwide producing. Some countries will view export restrictions and liability as additional penalty, and won’t be on board.

Warning letter a sanction of sort. Once companies been warned they are on the radar, activities monitored, agents inspect. Permanent stain on record, not published. Magazine sent out to companies illustrating consequences of non-compliance.

Forfeiture in Lerch case: 3.5 million Euro paid (total amount gained during whole process).

Number of countries has grown. Probably at last possible moment when we can begin thinking about control mechanisms that bring in responsible countries. Last best chance that we have. May be countries that do not want to participate.

Lack of resources a challenge for DoC. US material ends up larger scale products.

Is a small agency with large area of responsibility. Not sure what right number of agents overseas is. UAE an important place, will be displacement. Important to identify people involved in process. Don’t want to rely solely on end use.

Getting countries to take responsibility has practical obstacles. Requires shift of perception and resource allocation in different ministries. Most foreign ministries feel job of their staff is to work nationally, that’s what resources are dedicated to. Resource gap in people who deliver these systems.

Capacity building programs intended to be used with foreign requestors.

Retirees an underused resource that could be useful for capacity building. Won’t detract from resources at various agencies.

Challenge inspections in CWC fantastic tool, never used. Could be done here, share results with countries in the treaty. Could create body of work that could become relevant if we move towards a strengthened safeguards system.
What kinds of civil penalties can we impose on smugglers and nuclear material?

- Civil penalties scalable to fit particular situation dependent on level of severity, sensitivity of the product and end user dictates more severe penalty. With nuclear typically both a criminal and civil case.
- If in jurisdiction criminal prosecution may be best course of action. When individuals beyond jurisdiction identification and awareness perhaps most effective.

**CORPORATE SANCTIONS AND BUSINESS CHOICE**

**Orde Kittrie, Arizona State University**

- Companies given choice between business with US and targeted rogue state
- Goal is the same: preventing spread of nuclear weapons and convincing businesses to change their ways
- Decision to retain Levy (architect behind financial sanctions) indication may have a strong influence on Obama policies
- Still unclear if sanctions have been effective with Iran
- Have significantly influenced corporate behaviour towards Iran
- Impact of financial measures:
  - 80 banks around the world curtailed business with Iran
  - Some have dramatically scaled back Iran-related business, others halted entirely
  - Disrupted key Iranian trading relationships, including those in the energy sector
  - Almost impossible in Europe to arrange transactions with Iranian companies using letters of credit
  - Affected ability to finance petroleum development project: overseas banks and financiers decreased cooperation on such projects
  - Increased imports to Iran on average by 20-30 percent
  - Number of foreign banks with branches in Iran dropped from 46 to 20 from 2006 to 2008
  - Political impact as well: 60 Iranian economists called in open letter for regime to dramatically change foreign policy course due to damage inflicted on economy
    - Have cost Iran many billions of dollars, repeated often by opponents
- Several innovations likely to impact design of future sanctions
  - Aggressive use of financial authorities to pursue political goals
Effective use and harnessing of intelligence on global financial transactions

- Direct outreach to foreign financial institutions
  - Raised awareness about risk of doing business with Iran
  - More than 80 banks around world curtailed business
  - One concern is some actions against Iran may contribute to weakness of USD
- Criticized use of front companies, increasingly likely if business with Iran doing business with IRGC
- Many banks now screen customers though not required to do so: don’t want to be seen doing business
- International financial institutions concerned about regulatory penalties, so been effective as well: not willing to risk access to US markets/banking system due to potential ties to proliferators
  - Message been sent to IFOs that there is a price to be paid if links detected
- Direct outreach to companies can yield results much quicker than outreach to governments
  - Bank CEO can make a decision, governments deliberate
  - Reputational risk of other companies that don’t follow increased
- Foreign companies/sectors beyond finance may be susceptible to direct outreach from US government
  - Energy sector one example: Iran imports 30-40 percent of gasoline, impact of a cut-off would be substantial
  - Iran importing all of its imported gasoline from 5 companies a year ago, since 3 of those have cut off supply
- Executive branch could cut off supply if it wanted
- Obama administration may decide to replicate financial sector regulatory muscle to pursue goals

Arthur Shulman, Wisconsin Project on Nuclear Arms Control

- Punishment in court of public opinion by naming businesses not being responsible
- Concept of government willpower: need to regularly remind governments and businesses
- Raise awareness about nonproliferation as global citizens: need to care
- Exposure of unscrupulous sellers most important aspect of this
Feed information to reporters in addition to numerous op eds, reports, etc.

- Highlighting risky end users and would be recipients
  - Make it more difficult for them to procure
  - Expose weak policies by governments that allow it
  - Expose reckless sellers to punish and deter others
  - Direct criticism of government and international policies (US export control, Iran handling)

- UAE as transhipment free-for-all one area of focus: organization founded on this
  - Key in Khan network, Mayroll
  - Really doing better, improving how they’re dealing with these issues
  - Almost ready to call UAE a success
  - Government been forced to make a choice: now putting restrictions on how they do business

- Sanctions to be effective need to identify affiliates they use to procure
  - China as a supplier one example
  - End users designation and Iran written much about
  - Provide assistance in identifying who the risky end users are (compiled database)
  - Provide to government agents as source of information, companies to improve

- Provided direct assistance in specific prosecutions, provided expert witnesses

**DISCUSSION**

- UK has adopted human rights law to prevent name-and-shame in US. May be certain areas that can’t be talked about at all. Any problems encountering this?
  - Leading two suppliers of gasoline to Iran sue extensively, particularly in Britain.
    Allegations against turned out to be true, but were suing people for making them. Need to be careful in the US about what is said publically. Difficult to do this work because of British libel law.
  - Extra care necessary to ensure credibility.

- Continuation of war by economic means been presented. Use of financial institutions for specific political purposes historically separated. Why haven’t European governments used their treasuries in a similar way? Where would this be exploited again?
Treasury’s newfound willingness increasingly important because sanctions used to be about trade embargoes, but global financial flows growing rapidly and exceed trade in goods making this particularly powerful tool. Downside is it can work both ways: Chinese own a lot of US debt. Danger of Iran’s nuclear program great enough that it is justifiable to use this tool in this particular circumstance. Many tools have to do with discretion on the part of the US government. Another point of leverage: Vitol leading supplier of fuel to Iran, but also supplies jet fuel to LAX – potential leverage?

- Difficult to get universal agreement where pariahs are. More useful to focus on sharing information about thoughts on that and allowing people to make informed decisions.

- Political-economic movement a local one focused on state pension funds, threatening to withdrawal their funds in investment arms that have done business with Iran. Been federally imposed economic sanctions rather than from the bottom up.

- Petroleum cut-off efforts had the effect of shifting commerce to Chinese and other East Asian firms. Europe not doing it because business just goes elsewhere, whereas no US ties with Iran prior to sanctions. Will feed into Iran’s domestic efforts to reduce subsidies because can blame foreigners. Where driving up the cost giving more business to black market petroleum suppliers, such IRGC – not smart sanctions, actually strengthen certain individuals you would want to target. Naming and shaming strategy essentially what UN has been doing.

- Unwillingness among governments to share designation.

- Do a terrible job engaging with Iran.

- Has not been rallying around the flag effect in Iran in response to what Levy has done with financial measures. He persuades one bank at a time, not all at once. With gasoline issue may be the right approach as well. Put them to a choice that way rather than passing a big bill. Has not been response in Iran because companies have gotten out quietly. Some could be replaced, but not all. Reason why these companies are dominant is that their good at it: rumours about Chinese and Venezuelan shipments. See with banking, but banks in other places have stepped in, but are a lot worse at what they do resulting in higher prices in Iran.

- System of smart sanctions encouraged by system of Iraq. If negotiations fail going to be real test of solidarity within trans-Atlantic community on approach to punitive economic sanctions. Sustaining approach for 10 years will lead to poor, weak, nuclear-armed and angry Iran.

- Better than a rich, nuclear-armed Iran? EU has the capacity to halt Iran’s nuclear program. Rationing of gasoline in summer 2007 led to violent protests forcing the regime to back down. Iran can ration fuel (dangerous step) or raise fuel prices spiking up the
inflation rate. Will show government prioritizes nuclear program over fuel supply. Sends message to other countries considering following Iran’s lead that sanctions will be serious. Would constrict Iran’s operating environment as well.

- Downward pressure on stocks an important tool. State statutes that have been enacted: is pension funds start selling stock it does have an impact. Need to engage and confront these companies. Companies put on notice and made decision that this isn’t worth it.

- Problems sharing information. Unfortunately removing general licensing requirements to be replaced with catch-all controls. Only as effective as the information we make available to industry. Need to deal with issue of sharing information and making it available to industry to help them make decisions in way that would not compromise cooperation, intelligence.

PRIVATE CIVIL LITIGATION – A POTENTIAL NEW TOOL IN THE TOOL KIT?

STEVEN PERLES, PERLES LAW FIRM

- Entirely civil litigation, mostly for plaintiffs – cases in which families have lost due to terrorist attacks

- Billions of dollars worth of work, including nearly $2 billion of Iranian money out of circulation

- Chose Italy as target state for enforcing judgements – easy to find assets
  - Iran suffered $3 billion loss as result of inability to post letters of credit that had been previously secured

- Also had cases against government of Libya

- Public record shows office of foreign office controls obtained protected order to transfer data to law firm that resulted in largest seizure of illicit Iranian assets since hostage crisis in 1979

- Effective weapon if we can find way to apply it to various illicit activities related to smuggling or dual use

- Subject matter jurisdiction, in persona jurisdiction, law of damages—how do you create corpus of enough damages so someone in private sector will commit resources to hire people it takes to assemble a case like this—and most importantly enforceability
  - Smaller shops not reasonable target – costs too much to justify small asset seizure
  - Think of these remedies in robust form
  - If centrifuge design gets out who has deep enough pocket to pay damages?
  - $20 million and up there are remedies on the civil side
• 2.5-3 years of jurisdictional battles, damages, appeals, enforcement: $2-5 million over a 7-9 year period
• Settlement negotiations with Libyans took just over 5 years

☐ Need to pump up damages so those in private sector can bring remedies to trafficking problems
  • Private sector may be able to add weight to remedies that government has
  • Iran and Libya cases: when they get started and public-private cooperation have road map to very successful case

Leonard Spector, James Martin Center for Nonproliferation Studies

☐ Goal: reinforce deterrence of nuclear trafficking by threat of large monetary losses
  • In some ways can augment criminal and civil penalties governments impose
  • Many go through criminal process, spend short time in jail but large assets left
  • Lower standard of proof than for criminal prosecutions

☐ Four obstacles:
  • Legal theory (“cause of action”) would be used to go after traffickers
    ♦ No loss of life as in terrorism cases
    ♦ Fortunately no injury, so don’t have victims, at least not yet
  • Problem of admissible evidence: often from intelligence sources
  • Costs of litigation requires prospect of multi-million dollar judgement: not easy in most instances
  • Enforceability of favourable judgement may be difficult, but sooner or later may be able to collect

☐ Possible causes of action: suit by innocent supplier against middleman shipping to innocent end use
  • Could be damage to reputation of innocent company
  • Many licensing contracts have terms with clauses agreeing to comply to export control laws, could be a breach of contract
  • If dishonest about end user could be form of fraud or misrepresentation, but difficult to show damages
  • Misappropriation of trade secrets/patented technologies more serious
Public injury introduced at DoC: consumer fraud or public morals suits
Securities fraud if publically traded corporation trafficked in controlled good

- Obtaining evidence may face same difficulties as cases discussed so far
  - Identifying diversion path may be very difficult due to number of intermediaries
  - Government in some cases done this for criminal case, so if private civil litigation follows on to that may be easier

- Difficult to find damages sufficient enough to make litigation worthwhile: proving actual injury may be difficult
  - Courts don’t always accept these, companies may not suffer real damages
  - Some cases important but don’t involve high level objects such as ball bearing or O-rings
  - Some commodities, such as machine tools, are very costly, so perhaps those are cases where some of these possibilities might occur
  - May be “treble damages” laws in cases of anti-trust violation in which you win three times amount suffered
  - In some cases may be punitive damages amount

- Need aggressive use of existing tools to enforce judgments: reasonable sense of some success

- Next steps:
  - May be “low hanging fruit” – cases with admissible evidence, barrier to entry may be a bit lower
  - Some companies may want to take lawsuit as matter of civic responsibility: to establish a principle that others can follow
  - Filing of lawsuit itself may act as deterrent
  - Export licensing conditions process may facilitate lawsuits later on due to breaches of contract
  - New legislation to establish cause of action and opportunities for significant damages: could be a starting point for discussion
  - Platform that can be built on

**Legislative Initiatives: Enacting Innovative Sanctions, Refining Criminal Laws, Providing Models for UNSCR 1540**

**Don MacDonald, US House of Representatives Subcommittee on Terrorism**

- Export controls and sanctions inextricably linked
When a country sanctioned first thing to do is shut off export to controlled items

Embargo is export control taken to its extreme form

Reauthorization of dual-use control statute in US, and Iran sanctions on agenda shortly

Need to control less in terms of quantities, but need to control it better

Enforcement needs to be stepped up

Need to be more nimble on designation of identities on various lists

Iran sanctions bill

- Seeks to strengthen Iran Sanctions Act so actually enforced, and try to amend it to include sanctions on suppliers of refined petroleum and refinery equipment
- Neglected for over a decade now
- Imposition of extra-territorial sanctions a step would not like to take
- Involves sanctions in allied countries
- Bill will pass is some form, but unsure if it will be enacted
- Iranian backtracking in Vienna this week, could probably use increased pressure

Certain materials clear that you either need them or not

- May be certain goods in which export controls need to be moved up to the factory gate
- Can only be sold if rationale for buying it and permission is granted
- Makes it more difficult for these transfers, even domestically, more difficult
- Need declaration about what item is and where it’s going

Designations are key with procurement organizations

- Err on the side of caution too much here: designation of IRGC, we know it operates through hundreds of front companies that haven’t been designated
- Hesitance to do it, yet won’t be able to sue, not likely to enter US court
- What is burden of proof to make designations?
- Need to make that burden less than it is previously
- Should make all out effort to designate IRGC: has value of its own
- Threaten to sanction companies that conduct business with designated companies

US embassy interdictions of known shipments, but the unknown continue

- Malaysia don’t seem to care, but little pressure on them
- UAE agreement includes clause for improvement of UAE export controls
- Export controls protectionist measure as well since technology restricted
  - Transfer of design necessary for manufacture prevented
- Finlay argument – developing countries not concerned about WMD, export controls, etc.
  - Have other things to worry about, rightly so
  - One of keys to making 1540 work is to make basic state needs mesh with WMD assistance
  - Modern police force or public health helps country develop
  - To take part in global economy need effective export control and border control
  - Likely to be more receptive to assistance programs

**DISCUSSION**
- Does pursuing Iran through civil litigation open up possibility of retribution? Specifically private entities.
  - On political basis Iran making noises about cutting off selling raw crude products that are doing that.
  - Raises issue of sovereign immunity – questionable area of law. Sovereigns traditionally immune, but slowly concept being worn down because it has been taken advantage of. Terrorist supporting states not eligible to use sovereign immunity defence in US courts. Issue of victims rights in these cases factors in. Being looked at in Canada and the UK. Is the risk that others can turn it against us. Can bomb civilian unit resulting in them suing US.
  - US does pay for it when things go wrong abroad. Incident in Italy that government took responsibility for. Governments who are engaged in terrorist activities tend to have centralized economies, so actual perpetrator has commercial assets. Government of US is not an owner of commercial assets. Little attention paid to retaliation – been meaningless so far.
  - Iran not necessarily a defendant. Many activities for commercial purposes.
- Once you have a large judgement, it provides the impetus to pursue other assets as well. Can go after targets that may not make economic sense, but could advance US foreign policy interests.
  - Do have this “hunting license”, which gives tactical advantage to a public-private partnership. With information from federal agency could pursue foreign companies, although there are problems with extra-territoriality.
Under international agreement states have obligation to freeze funds of those engaged in illicit nuclear trafficking. Same case with preparing for a terrorist act by supplying equipment.

Many material support cases when financial institutions involved (knowingly or not) transferring to terrorist funds, but surprised no cases related to bombs.

Doesn’t need to be limited financial value of small parts, but perhaps value of the machine it is to be embedded in. Done with drug smuggling, for example. Entire value of asset something is produced can be sought in some instances (ex. Sugar example). Lawyers can charge any amount they want to increase value. Could make argument state would only sign terrorism convention if it is agreed to waive its immunity.

- Not about absence of money, but absence of clients. Don’t call up families asking if they want representation: unseemly. Family in Texas has approached, however. Are creative ways to get around contingent fee problem: is really the client problem. Don’t want it on front page of newspapers that somebody being sued for unwitting involvement.
- Public the client in certain cases. If good control lists, designations list can get very close to strict liability. Don’t want to have to prove intent or knowledge in criminal context.
- Only one group of plaintiffs: people who have been victims of WMD attacks
- Not many countries that have terrorist legislation in place allowing private lawsuits resulting from terrorism.

First issue is jurisdiction if this route to be followed. Next issue is it is difficult to use the economic espionage act: need to focus on tying nuclear and economic issue, huge pay day. Value of sovereign is the trade-off, not the plaintiff money or lawyer fees.

Instances without damages provision for attorney fees public interest firms will cover. Can perhaps seize ship moving a particular item. Failure to designate, whether IRGC or others, happens in part because of resources, but also because of organizational culture. Are we not getting sufficient number of designations because of types of people that make those designations?

If we assume countries of concern able to produce critical products in own countries no need to think they will import lower end products. Goal we should focus on is to help countries to implement licensing authorities, enforcement authorities, control lists, designations. Should convince all these countries not to do business with all of these countries of concern. Have to prevent exports.

- Export controls may not longer be the objective if Iran can already build P1 centrifuge. Challenge becomes policy change in Iran.
Critical to private civil litigation is public-private partnership with government. It takes a political decision. Inherent mistrust between public and private sectors in US, frequently a barrier to getting things done. Need to encourage western governments to ensure larger penalties to reduce disparities: can pursue private civil litigation elsewhere this way.

Difficult to bring a lawsuit into this context. Need legislation here to make this feasible, but also models for this to be based on. Need to frame this in way that isn’t too much of a lift for Congress, may reinforce governmental efforts in this field.

CONCLUSIONS

LEONARD SPECTOR, JAMES MARTIN CENTER FOR NONPROLIFERATION STUDIES

Most important theme is the solidarity of those involved in coming to grips with these challenges: great deal of innovation and energy in different capacities. Difficulties overcome between law enforcement and intelligence agencies, for example. Collaboration possible between private and public sides.

International treaties there is authority waiting to be utilized. Should invest effort to see if there is a way of taking advantage of it.

Reaffirmed how difficult prosecutions are in this field. Civil approach more available, should perhaps be used more aggressively. Private sector and public shaming seems ripe for adaptation to this field. Wisconsin project already has flag firmly planted there, but may be more work to be done, perhaps in Europe.

Private civil litigation an area not really considered. Can make progress relatively soon on some of the easier cases. May have greater opportunity to compensate lawyers. Cases where criminal or civil result already exist, may be able to follow on a civil suit.

INPUT

Conference state-centred focus: should consider emerging non-state consideration for financing, interception between anti-terrorism legislation and counter-proliferation strategies.

Law is a very blunt instrument: very motivated people who are going to be relentless. Have to decide if at a state vis a vis Iran where time to really go after Iran through these legal options. Can see US pushing towards that direction. Determining what would happen in that case a part of the project. Would be useful to have industry representatives here to learn what motivates them. How will industry react to something like strict liability. Involvement from wider non-European groups.
If objective is to create a deterrent want to unleash lawyers as much as possible. But in case of Iran purpose not to apply sanctions, but to change Iran’s behaviour, so want to be able to turn it off.

Libya model a useful model: opened up for claims against state sponsors of terror. One of questions in public-private partnership was could these cases get to a position where lawyers would eventually stop pursuing and something effective would be done. Libya case proves that that can happen: US nationals received $10 million per death case, floor of $3 million for each injury case. $10 million amount driven by private sector.

- Public-private partnership does not seem to exist yet when it comes to the sharing of information.

Private civil litigation useful for freezing assets. If Iranians want the money back can make a deal with US state department.

General consensus that we are at a tipping point in nuclear age. Iran could have a dramatic effect. Larger notion of creating a new regime effective at stopping hidden capacity to develop nuclear weapons. Different philosophical understandings about how to approach the problem that should be recognized. Recommend not only people from private sector, but nuclear physicists for technical expertise as well. Classified Information Procedure Act (CIPA) an instrument that is appropriate for the sharing of information? Private-public issue is something that will be controlled by the public. Private sector to fill in gaps that the state can’t fill to find remedies for victims and unwitting corporations. Instrument of private policy controlled by the state. Can create own internal insurance system to pay people regardless of political outcome.

Structure for how to move an agenda forward: administrative actions could be taken without legislation in formation of task forces on national or multinational basis, adaptations to export control documents that will facilitate litigation. Actions by states such as intensifying designations, legislative changes, private-public partnership. Multinational measures: changes to EU statute.

Cases have international nexus, involve various countries. Relationships with other state partners on informal level, camaraderie, networking. Would like to see more on collaboration at the working agent level. Bringing people together on tasks forces camaraderie develops and easier to be successful. Push discussion down to working level as well.

Don’t assume democratic party in Iran would forego nuclear program. Can’t become too technical. Another problem is that of disruptive personalities. Bring in more nuclear engineers, IAEA individuals. Make manufacturer of product directly responsible for its end use: industry should have direct sales.
Public-private partnership and civil litigation needs to be developed. Near term problem is that the program keeps advancing: need to continue to exploit existing authorities. Impose quick fixes where necessary. Can’t count on new UNSC Resolutions, etc. because they take time. Value of actionable intelligence cannot be underestimated. Consideration is administration overload: START treaty, NPT Revcon, FMCT, CTBT, so getting attention of senior leadership to add initiative to agenda a challenge.

Have experts from different states in the same profession brought into the same room. Some concepts not helpful to discussion because they lead to confusion, such as confusion about term “smuggling”. Countries may not have penalties in place to deal with export control violations, but response is often that there are anti-smuggling statutes. Certain scenarios show why these aren’t sufficient. Realize often have to re-write laws. Even term export controls not accurate or reflective of reality, but people still use it. Capacity building: need to reinforce international collaboration at the working level. Limits of using retirees for capacity building works best when have current knowledge (moving target), peer to peer approach and when you can follow up afterwards. Then capacity building work reinforces collaboration at the international level.

International cooperation and intelligence sharing absolutely key. Need rapid transfer of intelligence when needed. Also true for the denial system. Renaissance of nuclear energy worldwide could be of concern, poses a considerable challenge to nonproliferation methods. More and more countries seeking to acquire a peaceful nuclear power capability. May need to prolong the process – considerable number of countries could become expert. Have to think about new ideas to contain the interest of new technologies. Question with NSG about how to transfer enrichment and reprocessing technology: one option black box technology. Need to consider this in context of worldwide spread of nuclear energy technology.

- Moving export controls to factory gate only refers to a handful of items. Civilian nuclear power doesn’t get enough attention. UAE required to foreswear E and R, probably something that should be required of every state that doesn’t currently possess. Other suppliers should also encourage this.

Greater use of nuclear energy creates need to look into more civil penalties.

Unless it can be communicated what’s been done deterrent isn’t worthwhile. Need to think more about getting that message out.

- Egyptian bank not distributing $100 million to Hamas out of fear of being pursued by US private litigation is example of deterrent working. Fear spreads among would-be violators.
APPENDIX C

BRUSSELS WORKSHOP AGENDA
THE PREEMPTIVE AND PREVENTIVE USE OF FORCE IN RESPONSE TO THE PROLIFERATION OF WEAPONS OF MASS DESTRUCTION
October 27, 2009
PROGRAM

1230 – 1320hrs: Arrival and registration

1330 – 1350hrs: WELCOMING REMARKS AND INTRODUCTION

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<thead>
<tr>
<th>Name</th>
<th>Position and Affiliation</th>
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<tbody>
<tr>
<td>Arne Willy Dahl</td>
<td>Judge Advocate General, Norwegian Armed Forces; President of the International Society for Military Law and the Law of War</td>
</tr>
<tr>
<td>Guy B. Roberts</td>
<td>Deputy Assistant Secretary General for Weapon of Mass Destruction, Director, Nuclear Policy Directorate, NATO Headquarters</td>
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1350 – 1530hrs: PANEL 1: HISTORICAL OVERVIEW AND DEFINITIONS OF THE NOTIONS OF PRE-EMPTIVE AND PREVENTIVE USE OF FORCE

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<tr>
<td>Chair: Baldwin De Vidts</td>
<td>Legal Advisor, Office of the Secretary General, NATO Headquarters</td>
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<tr>
<td>Prof. Dr. Yoram Dinstein</td>
<td>Tel Aviv University</td>
</tr>
<tr>
<td>Leonard S. Spector</td>
<td>Deputy Director of the Monterey Institute of International Studies' James Martin Center for Nonproliferation Studies</td>
</tr>
<tr>
<td>Tom Ruys</td>
<td>Katholieke Universiteit Leuven, Faculty of Law, Institute for International Law</td>
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1530 – 1550hrs: Coffee/tea

1600 – 1745hrs: PANEL 2: POLICY CONSIDERATIONS AND THE CURRENT LEGAL FRAMEWORK FOR MEASURES IN RESPONSE TO WEAPON OF MASS DESTRUCTION PROLIFERATION

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<tr>
<td>Chair: Prof. Dr. Orde Kittrie</td>
<td>Center for the Study of Law, Science, &amp; Technology, Sandra Day O’Connor College of Law</td>
</tr>
<tr>
<td>Dr. Dieter Fleck</td>
<td>Formerly Director for International Agreements &amp; Policy, Federal Ministry of Defence, Germany; Honorary President of the International Society for Military Law and the Law of War</td>
</tr>
<tr>
<td>Prof. Dr. Alexandra Mezykowska</td>
<td>Lazarski School of Commerce and Law; Counselor, Law and Treaty Department, Ministry of Foreign Affairs, Poland</td>
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1745 – 1800hrs: CLOSING SPEECH

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<th>Name</th>
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<tr>
<td>BrigGen, Jan Peter Spijk</td>
<td>Director Manpower &amp; Personnel Policy, SHAPE; Vice-President of the International Society for Military Law and the Law of War</td>
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1810 – 2000hrs: Reception
APPENDIX D

PLNP PRESENTATION – SPEAKER NOTES
LEGAL CHALLENGES TO PROSECUTING NUCLEAR SMUGGLERS
Wilton Park - October 23, 2009
SLIDE 1: CASE SPREADSHEET

**RED:** Indicates the prosecution encountered challenges in the corresponding area.

**BLUE:** Indicates that prosecutors were able to overcome challenges in the corresponding area.

**PURPLE:** Indicates that prosecutors were able to overcome some but not all challenges in the corresponding area.

SLIDE 2: INTERNATIONAL LEGAL ASSISTANCE

Prosecutors have had difficulty obtaining official investigatory cooperation, evidence, affidavits, and other legal support from foreign jurisdictions, where defendants resided or conducted business, or to which they made illegal export shipments.

Specific Challenges:

1. Extraterritorial Investigation: When traffickers resided or conducted business outside of the country in which they are ultimately prosecuted, important evidence is often beyond the reach of prosecutors and national courts. The success of such prosecutions may depend on the willingness of foreign authorities to either initiate their own investigation of the defendant’s illicit activities, or allow prosecuting authorities to enter their territory to conduct their own investigations. In many cases, foreign governments are hesitant to dedicate limited law enforcement resources to support foreign prosecutions and even more unlikely to allow foreign authorities to conduct investigations within their jurisdiction.

2. Assistance from International Organizations: In the case of nuclear trafficking, international organizations often possess important information that could affect the outcome of trafficking prosecutions. For instance, in a case in Germany, general information from the IAEA about the Iranian nuclear weapons program helped establish that the defendant’s export violations were made in support of the acquisition of nuclear weapons by that state. International organizations, however, have often failed to provide such information to national authorities and should play a more active role in facilitating evidentiary collection in support of trafficking prosecutions.

3. Physical Evidence: In addition to failing to provide investigatory assistance, foreign authorities are often also unwilling to surrender critical physical evidence including bank records, business transaction documents, export license applications, and the contents of actual technology shipments in support of prosecutions.
SLIDE 3: COUNTER-PROLIFERATION STATUTES

Criminal statutes regulating behavior promoting the proliferation of WMD technology have often been lacking or have proven inadequate to address the needs of prosecutors in nuclear smuggling cases.

Where no specific counter-proliferation statutes exist, the criminal activity of nuclear traffickers is largely subject to general export control restrictions and nuclear smugglers have been prosecuted for basic regulatory noncompliance for falsifying or unlawfully obtaining export permits. This approach to nuclear trafficking does not take into account the significant threat to international peace and security posed by their illicit behavior. The minimal fines imposed for such regulatory offences cannot serve as an adequate deterrent for traffickers who are well compensated for their services.

Where explicit counter-proliferation statutes exist, the statutes may not adequately address the inherent challenges posed by nuclear trafficking prosecutions. In many cases, such statutes are restricted to offenses involving the illicit export of goods from a list of dual-use and restricted items, rather than providing courts with the broader authority to determine what behavior may contribute to the development of WMD by foreign powers and non-state actors. Furthermore, the statute of limitations and investigatory authority afforded by many statutes have constrained the ability of authorities to track the long term patterns of offences that characterize nuclear smuggling operations and obtain critical evidence to establish guilt. Even when authorities are able to secure a conviction on nuclear trafficking charges, relevant statutes often provide minimal penalties, such as nominal fines, which do not adequately deter illicit behavior, and limited jail terms, which allow proliferators to continue their illicit activity almost without interruption. Finally, in some cases where proliferation statutes have been revised to address the preceding concerns, courts have ruled that defendants were not afforded adequate notification of the new standards of the law and that they could not be held liable for violations of provisions they could not have been expected to have known about.

With the Security Council’s adoption of UN Resolution 1540, states are now required to implement specific legislation criminalizing activities contributing to the proliferation of WMD technology. Despite lackluster implementation, the Resolution should eventually remedy the difficulties of prosecuting nuclear traffickers in the absence of counter-proliferation statutes.
However, legislation implemented pursuant to Resolution 1540 should take into account the weaknesses in other domestic proliferation laws to ensure the successful prosecution of WMD traffickers in the future.

**SLIDE 4: EXTRADITION**

Extradition is often necessary to obtain jurisdiction over individuals prosecuted in their countries of citizenship, who are residents of other nations at the time of their prosecutions. Extradition can prove difficult where no extradition treaties exist between the prosecuting country and the country with personal jurisdiction over the defendant. In these cases, recourse to political channels is necessary to obtain jurisdiction on a case by case basis. Many countries, however, are hesitant to grant extradition when charges against defendants appear to be issues of routine regulatory compliance, which underscores the need to prosecute under dedicated proliferation statutes.

Even where extradition treaties do exist, commonly accepted conditions for extradition can be difficult to satisfy. One such requirement, known as double criminality, stipulates that the offense for which an individual is to stand trial must be prohibited by law in both the requesting and the extraditing states. Since many countries have not adequately implemented Resolution 1540, counter-proliferation statutes are not likely to be on the books in both states involved in bilateral extraditions.

Furthermore, most extradition treaties recognize an exception to extradition for crimes of a political nature. This provision is intended to prevent political dissidents and those who oppose oppressive regimes from being extradited back to their home countries where they will face persecution for their political beliefs. However, this provision has been used to prevent extradition of nuclear smugglers, particularly in cases where charges of jeopardizing national security or revealing state secrets are levied against them. To resolve this issue with respect to terrorism, many states have already amended their extradition treaties with the provision that terrorist offenses will never be considered political crimes. A similar stipulation should be added to extradition treaties for charges of WMD trafficking.

A final jurisdictional challenge that arises in prosecuting nuclear traffickers concerns the extraterritorial application of national laws. In some legal systems, unless statutes specifically
provide that they can be made applicable to the activities of nationals abroad, extraterritorial application of criminal statutes is generally not allowable.

**SLIDE 5: CLASSIFIED EVIDENCE**

Since the individual criminal acts perpetrated by nuclear traffickers are usually routine export control violations or regulatory noncompliance, in states where specific statutes criminalizing proliferation of WMD technology have been enacted, proving the defendant’s intent to support a foreign WMD program is often critical to obtaining a conviction. However, evidence that the proliferator’s actions were likely to have contributed to the development of WMD by a foreign power require detailed information about the existence of WMD programs abroad and how the defendant’s actions likely supported those programs. Such information is often classified and contained in national intelligence reports not intended for public dissemination.

In several cases, national intelligence services have refused to supply such information to prosecutors for use at trial out of concern for the security of classified information. A notable exception to this precedent were the proceedings against Gerhard Wisser in South Africa, in which classified evidence was allowed to be presented in chambers and certains parts of the trial were conducted in camera.

While general statutory procedures exist in some countries regarding the presentation of classified information at trial to safeguard sensitive secrets, many countries have not enacted general classified information procedures statutes. In these countries, nonproliferation statutes should specify procedures for introducing classified evidence at trial, including the use of redacted intelligence reports, the presentation of certain information directly to judges in chamber, and potentially conducting a closed trial. In cases where classified information from foreign intelligence services is critical, it is all the more important to assure foreign liaison services that the information they provide will not be compromised in an open court of law.

Ex parte presentation of evidence is generally not an effective solution to the problem as most legal systems afford the accused the right to challenge all evidence marshaled against him.

However, the challenges do not end when classified information is successfully presented in trials. In several cases, suspected proliferators have successfully argued that the information contained in intelligence reports is speculative or based on hearsay. Prosecutors must be aware
that using intelligence reports to support the contention that a proliferator’s actions contributed to the acquisition of WMD technology by a foreign power may not satisfy evidentiary standards, especially when intelligence agencies rightly refuse to disclose sources and methods to courts seeking to assess the quality of their intelligence reports.

**SLIDE 6: COURT JURISDICTION**

Suspected proliferators have also been successful in challenging their prosecutions on the basis of court jurisdiction. In many cases where statutes do not specify a court of first impression, prosecutors have sought to bring nuclear trafficking cases in national or federal courts instead of local courts, or in local courts in larger districts that have some experience in national security cases, since smaller courts can be overwhelmed by the challenges involved in a complex international criminal prosecution. However, defendants have raised forum non conveniens and other jurisdictional claims alleging that such courts do not have jurisdiction over their offenses. In the case of national or federal courts, proliferators argue that the charges against them are common criminal offenses that should be tried in local courts. The question then arises which local courts have jurisdiction over their offenses: the courts of the district where the defendant resides or maintains a business presence, the district in which the export violation occurred, or the district where the defendant was surrendered to prosecuting authorities pursuant to extradition.

To remedy these jurisdictional challenges and ensure that proliferators are prosecuted in courts equipped to handle complex international prosecutions, nonproliferation statutes should specify a court of first impression, which should be determined on the basis of which courts have the experience and resources at their disposal to best hear such a case.

**SLIDE 7: TESTIMONY AND WITNESSES**

Given the inherently international nature of proliferation crimes, witnesses who can testify to the defendant’s criminal behavior are often foreign nationals located outside the territory of the prosecuting state. The difficulty obtaining testimony from foreign witnesses can often be attributed to the right of defendants in many legal systems to confront all evidence and witnesses brought against them. For this reason, courts have frequently held that witnesses, regardless of citizenship or location, must appear in court to testify. Affidavits from foreign
authorities containing testimony supplied by witnesses abroad has frequently been ruled inadmissible as evidence.

In order to present the testimony of foreign witnesses in court, therefore, witnesses must either voluntarily travel to the prosecuting state. However, the business associates of proliferators are often under investigation in their home countries for proliferation related offenses and may face travel restrictions. In these cases extradition is required, but understandably not often granted, given the interest of the surrendering state in continuing its investigatory efforts.

Finally, since witnesses are often implicated in illicit proliferation activities themselves, their testimony has been ruled by some courts as inherently biased and potentially designed to shift blame from themselves to other members of a proliferation network.

**SLIDE 8: SENTENCING AND MINOR CRIMES**

In cases where multiple attempts have been made to prosecute particular proliferators, time spent in pre-trial and other administrative detention periods is often applied to eventual sentences. In some cases this pre-trial detention credit approaches the maximum sentence for the charges levied and trials are dismissed on the grounds that the accused has already served his sentence. While some analysts view this as an impediment to establishing a precedent for successful conviction, the potential that proliferators may spend months or years in detention as multiple prosecution attempts are made can in itself serve as an effective deterrent to criminal behavior and temporarily interrupt smuggling operations.

Where prosecution for export control violations in the absence of strong nonproliferation statutes yield minimal sentences, prosecutors have frequently resorted to focusing their prosecution attempts on other criminal behavior related to smuggling in order to secure more meaningful penalties. Charges or money laundering, tax evasion, and fraud are common ancillary charges.

**SLIDE 9: SCIENTIFIC EXPERTISE**

Because WMD technology trafficking involves highly technical industrial components and drawings, export control authorities, lawyers, and judges need to be familiar with the technical aspects of WMD proliferation. Components used in uranium enrichment centrifuges, for example, can appear to be mundane industrial parts to the untrained customs agent.
Judges also need to be informed of how the specific items exported by proliferators can be used to support WMD development programs. This is especially important for convincing magistrates that proliferators intended to foster WMD development abroad, a condition required for conviction under many nonproliferation statutes. A basic knowledge of how the actions of proliferators facilitate the potentially drastically destabilizing acquisition of WMD by rogue states and terrorist organizations will also help dispel the common judicial perception of proliferation offenses as regulatory noncompliance and impress upon judges the gravity of such criminal behavior.

Police understanding of nuclear technology is also critical to ensure authorities home in on important evidence when conducting searches of the offices and residences of suspected proliferators.

Finally, technical evidence has played a critical role in trials where proliferators have been accused of stealing trade secrets by helping their clients build centrifuges and other enrichment apparatus pursuant to blueprints illicitly diverted from their former employers, often engineering firms. Gotthard Lerch, for example was released from custody after prosecutors were unable to prove that the design of the vacuum systems his new firm was producing was based heavily on blueprints he illicitly obtained from Leybold Heraeus. Technical expertise in this area will also be essential for potential civil suits against proliferators based on theft of trade secrets.
APPENDIX E

PLNP PRESENTATION – SPEAKER NOTES
THEORIES OF CIVIL LIABILITY FOR NUCLEAR TRAFFICKING
Wilton Park - October 24, 2009
I. SELECTING EFFECTIVE TARGETS

ORGANIZERS

- Examples: A.Q. Khan, Asher Karni

- Pros:
  - High Profile Cases—proceeding will capture international media attention; successful suit will draw attention to the magnitude of the smuggling problem and may motivate governments to engage more resources in combating it.
  - Large Deterrent Effect—if heads of smuggling networks are collected against in civil court, lower operatives will no longer feel safe engaging in smuggling activities.
  - Network Disruption—trafficking networks are extremely centralized and most operatives get their instructions from high up the chain of command and do not even know the names of others at their level. Bankrupting the heads of networks can therefore seriously impair the functioning of the entire network.

- Cons:
  - State Protection—Many network leaders are high profile individuals respected in their home countries (A.Q. Khan, for example) or politically valuable and therefore states are likely to offer them protection from suits or the foreign policy goals of states may cause governments to intervene to disrupt civil proceedings.
  - Lack of Evidence—Since network leaders direct operations remotely and are often significantly removed from actual illicit activity, like illegal diversion of goods, falsifying export licenses, etc, there is often a dearth of evidence necessary to prove their involvement in WMD trafficking.
  - Large Assets—While the large amount of assets that can be targeted in suits against network leaders may serve as a valuable incentive for lawyers to initiate legal proceedings against them, it also means that network leaders may be able to remain financially solvent even after large judgments are awarded. In addition, network leaders often have been able to successfully hide funds in accounts around the world, making collection difficult.
  - Ideological Convictions—Most network leaders are truly motivated to proliferate by ideological convictions. This can make it more difficult to prove the critical intent requirement in court. It also means leaders are more likely to continue illicit activities even after civil suits are successful, because they are motivated by ideology rather than material gain.
MIDDLE MEN

- Examples: Henk Slebos, Gotthard Lerch, the Tinners

- Pros:
  - Smaller Economic Actors—Network middlemen have historically been Western businessmen motivated to proliferate primarily by a desire for personal gain. This makes them especially vulnerable to civil litigation because bankrupting judgments may entirely remove their incentive to proliferate and prevent them from returning to illicit behavior in the future. These figures are also less likely to enjoy political protection.
  - More Direct Involvement—Network middlemen coordinate projects for multiple clients and are often directly involved with processing shipments of proliferation sensitive goods, falsifying export licenses, and violating export controls. Evidence in the form of business records often offer proof of their involvement in proliferation operations.
  - Deterrent Effect—if litigation is successful, other rational economic actor middlemen may be dissuaded from proliferating because the risk of litigation outweighs the potential economic payout of illicit behavior.

- Cons:
  - Internationally Diffuse Activity—Because middlemen work for several network clients, their illicit activities occur in several national jurisdictions, which can present challenges to obtaining necessary evidence. Furthermore, because their activities are of a lower profile, many countries may not feel that civil actions against them are important enough to merit burdensome legal assistance.
  - Smaller Judgments—Because their activities are less dangerous than network leaders and their assets are smaller, the payout for those who litigate against middlemen is more modest and may not provide enough incentive for injured parties or their lawyers to initiate civil suits.

LOCAL MANAGERS

- Examples: Gerhard Wisser, Daniel Geiges

- Pros:
  - Localized Offenses—Local managers are tasked with overseeing network operations for a particular client. Their activities are therefore usually constrained to a single nation, which simplifies the evidence collection process.
Availability of Evidence—Because their activities usually involve direct violations of domestic law, there is usually sufficient evidence to give rise to a cause of action against local managers in court.

Cons:

Smaller Judgments—Judgments against local managers are likely to be even smaller than those against middlemen and may not provide a sufficient incentive for injured parties or their lawyers to initiate civil suits.

Deterrent Effect—Civil litigation against local managers is will draw little attention internationally and may provide only a small deterrent effect.

Criminal Prosecution Option—Because of the availability of evidence, the confinement of activities to the territory of one state, and direct involvement in illicit behavior, local managers present the best possibility for criminal prosecution. The value of a successful criminal prosecution may be higher than obtaining a civil judgment, and civil litigation techniques may serve as a better supplement to criminal proceedings rather than as a replacement for them.

Obtaining Standing

Actual Injury

Where WMDs developed with the assistance of proliferation networks have actually been used, victims may have standing to bring suit against proliferators for material support to war crimes, crimes against humanity, and related offences (See use of chemical weapons against Kurdish communities in Iraq.)

Breach of Contract

Many sales contracts between suppliers of proliferation sensitive goods and chemical precursors and intermediaries who may illicitly divert such materials contain proper end-use and non-diversion clauses, which restrict the buyer’s ability to redirect or resell them.

Suppliers should be encouraged to include such provisions in their contracts to reduce their own liability for improper use of the goods they provide. These provisions should be specific and should anticipate the potential for a civil penalty for violation.

If proliferators violate the proper use or non-diversion provisions of the contracts by which they obtain proliferation sensitive goods, suppliers may sue for breach of contract.

Fraud

The fraud theory of standing is similar to the breach of contract theory and relies on proper end-use provisions in supply contracts.
Under the fraud theory, suppliers may sue proliferators for fraud for knowingly disguising the actual intended use of the items purchased.

While fraud may carry higher penalties than breach of contract, it requires the establishment of intent to deceive, which may be difficult to prove.

A precedent for fraud/breach of contract suits can be found in the 9th Circuit Case of Richmark Corp. v. Timber Falling Consultants (1992) at 959 F.2d 1468.

Damage to Corporate Reputation

Under this theory of standing, suppliers could sue proliferators for the damage to their corporate reputation that may occur as the result of an improper diversion of materials.

If a company is exposed in the media as supplying components and precursors for WMD programs when its involvement in such programs is unwitting, it may sue those who caused its unknowing complicity for damages.

This theory of standing is used in conjunction with fraud or breach of contract.

Successful for Nestlé S.A. in the baby formula libel case.

The potential for reputation damages may provide an incentive for corporations to keep better tabs on actual end users. Some firms are now offering end-user tracking services.

Once a precedent is established, suppliers may be more vigilant in refraining from business dealings with firms or individuals with a history of licensing violations or end-use diversion.

Trade Secrets

Proliferation networks have supplied equipment and technical drawings protected by copyright to their clients. Under the trade secrets theory of standing, companies whose intellectual property was illicitly supplied to such clients could sue for theft of trade secrets.

Difficulties arise in proving that a theft of trade secrets actually occurred and that design similarities did not merely arise through happenstance. (See Lerch Case, 1991).

Depending on where suits are brought, copyright protections may not be sufficiently strong to support a civil suit with the possibility for a judgment that justifies the expense of litigation.

**Other Considerations in Bringing Civil Suits**

Foreign Policy Implications
- Litigation against foreign governments or high profile proliferators may trigger intervention by governments of adjudicating states to protect foreign policy interests.

- Suits against WMD proliferators, however, are different from litigation against human rights violators that have triggered intervention in the past. It is important to impress upon the relevant executive branch agencies that civil suits against proliferators are not only intended to provide a remedy for wrongs suffered, but are an important tool in combating the spread of WMD technology, which presents a clear and present danger to international peace and security.

- **Litigation Costs**
  - Firms are better able to absorb the costs of civil litigation than private individuals.
  - Payout prospects are determined both by the likely magnitude of the judgment and by the ability to collect. Lawyers and firms may not be interested in pursuing litigation if it does not appear to be financially viable.

- **Individual v. Corporate Suits**
  - Office of Claims and Investment Disputes at the Department of State represents the interests of U.S. firms and may be able to assist in civil litigation efforts.
  - The office does not intervene to help individuals.

- **Likelihood of Success**
  - Civil suits are often considered as an alternative to criminal prosecutions that falter on an evidentiary basis because of their lower evidentiary standard (preponderance of the evidence vs. beyond a reasonable doubt).
  - In civil litigation, however, proving intent becomes a critical difficulty. In criminal prosecutions, proof of illicit behavior is often sufficient to obtain a conviction, whereas in civil litigation it must not only be established that the respondent cause injury to the claimant, but also that the respondent did so intentionally.

- **Foreign Sovereign Immunity**
  - Generally provides that foreign governments will not be liable for injury to individuals that occurred in the official conduct of state business.
  - Courts have generally not applied Foreign Sovereign Immunity in the case of concrete state support to terrorist organizations, especially where victims have no adequate legal remedy in the courts of the supporting state.
Courts have also found exceptions to Foreign Sovereign Immunity for the economic actions of states (contractual activity, etc.) that results in injury to individuals providing services to the states. (See Banco Nacional de Cuba v. Sabbatino [1964] at 376 U.S. 398)

**Civil Sanctions**

- **Asset Seizures**
  - Governments can freeze assets of suspected proliferators pending civil or criminal legal proceedings.
  - The United Nations has passed a resolution requiring member states to seize the assets of individuals who have contributed to the development of WMD by Iran. This measure could serve as a model to be applied to material support to WMD development by other states, such as North Korea, and non-state actors, such as al-Qaeda.

- **Travel Restrictions**
  - Where criminal proceedings fail to return a conviction, or as a supplement to criminal sentences, governments may impose travel bans to impede suspected proliferators from continuing their illicit activities.
  - International travel bans recognized by multiple countries would be more effective and could be coordinated through the United Nations, perhaps as part of a general resolution imposing multiple penalties, such as asset seizure and travel restrictions on those who contribute to WMD proliferation.

- **Loss of Export Privileges**
  - Governments may choose to suspend export privileges as a means of preventing suspected proliferators from continuing to engage in illicit activity, either pending criminal prosecution, or as a civil sanction when prosecution fails to secure a conviction.
  - Proliferators are often able to forge export control licenses or falsify manifests to elude customs controls. However, if they individually or their corporate entity is generally prohibited from exporting, they are less likely to illegally divert proliferation sensitive goods.

**Alternative Measures**

- **Disruption of Banking Services**
Banks are critical to the operations of proliferation networks. In some cases banks have not only transferred funds and provided currency conversion services, but also laundered and hid money for proliferators and terrorists.

If a bank can be held accountable for material support to terrorists or proliferators and shut down, other banks will start to more carefully review potential clients and may refuse to provide services to groups and individuals suspected of involvement in proliferation or terrorism.

Currently, national legislation in the United States, especially the International Emergency Economic Powers Act (IEEPA) allows for thorough investigation of bank records and business practices where there is a suspected link to terrorism. No similar legislation exists to monitor the activities of suspected proliferators.

**“Watch List” Designation**

Currently, states sponsors of terrorism, terrorist organizations, and individual terrorists are listed on international watch lists, which make it difficult for these groups or individuals to conduct business and travel. No similar lists exist for proliferators and their networks/front companies.

Such lists could make it harder for proliferators to continue trafficking WMD technology.

One obstacle to the development of such lists, however, is a recent movement to abandon watch lists even in the realm of terrorism because of the dangers of misclassification and the inability of designated groups or individuals to challenge their designation.

**Enforcing Judgments against Governments**

**Direct Asset Collection**

If foreign policy interests are on the side of the litigants, governments may intervene by identifying foreign assets which can be used to satisfy a judgment.

**Garnishment of Corporate Profits**

Judgments against proliferating states may be attached to assets of corporations with assets under US jurisdiction, whose profits are largely generated through business with those countries. (e.g. Vitol in Iran)
APPENDIX F

PLNP PRESENTATION – SPEAKER NOTES

POLICY CONSIDERATIONS

Brussels - October 24, 2009
Hello everybody. It’s a pleasure to be here today. I have been asked to address policy considerations relating to the current legal framework for preemptive and preventive measures in response to weapons of mass destruction proliferation.

This is obviously a very appropriate time to be addressing such issues. On the one hand, from a more theoretical perspective – and we academics love theory as you know -- the Obama Administration’s Deputy Undersecretary for Strategy, Kathleen Hicks, recently announced that the Pentagon is reviewing the Bush Administration’s doctrine of preemptive and preventive military strikes with an eye to modifying it. The doctrine is reportedly being reassessed as part of the Pentagon’s Quadrennial Defense Review of strategy, force structure, and weapons programs. Congress requires the executive branch to report its national security strategy annually, and Congress requires the Pentagon to reassess its policies and war-fighting doctrine every four years. The Obama Administration will reportedly state its security doctrine for the first time as part of the Quadrennial Review, which is scheduled to be given to Congress in February along with the fiscal 2011 budget. The Obama folks presumably have three options as part of this review: 1) reiterate the Bush Doctrine, which seems unlikely; 2) provide different parameters; or 3) provide no explicit parameters for when the use of force is to be used in response to WMD (which may be a good idea). So that’s where things stand from a doctrinal perspective.

From a more practical perspective, we are at a pivotal time with regard to Iran’s nuclear program which, it has become increasingly clear, is designed to give Iran a nuclear weapons capability. As we all know, the P-5 + 1 are currently involved in negotiations with Iran. There are signs that Iran has been persuaded to step back from pursuing a nuclear arsenal. If that is correct, Iran’s calculus has likely been changed by a combination of weakness following the election protests, outreach by the Obama Administration, the threat of increased economic sanctions, and the threat of a preventive strike by the United States and/or Israel. If Iran turns out to be simply gaming the West, and is not stepping back from pursuing a nuclear arsenal, the United States and its allies may find themselves faced with a choice between two unattractive options – a nuclear armed Iran and a preventive strike on Iran before it acquires a nuclear arsenal.
We have had a number of presentations today about the state of international law regarding preemptive and preventive strikes. Rather than enter directly into that theoretical debate with legends in the field such as Yoram who have been writing books about the issue for decades, I am going to add some particular specifics to the table that has already been very elegantly set. I work very closely in Washington, DC with key Members of Congress and leading think tanks working on the Iran issue. I know that should negotiations with Iran fail to yield an acceptable result, and should the international community then fail to impose sanctions sufficiently crippling as to change Iran’s cost-benefit analysis, there are many in Washington, DC who – faced with the unattractive choice of two options – a nuclear armed Iran and a preventive strike on Iran before it acquires a nuclear arsenal – would in sadness lean towards the latter. For example, as Senator John McCain, from my home state of Arizona, has put it many times: the only thing worse than a U.S. attack on Iran’s nuclear facilities would be a nuclear armed Iran.

I am happy to discuss in detail in Q & A the specific reasons why many in the U.S. are deeply concerned by the prospects of an Iranian nuclear arsenal. The primary reasons are 1) concern that the Iranian leadership might not be deterrable, 2) concern that even if the Iranian leadership is deterrable, an Iranian nuclear weapon might nevertheless be used against a US city through either transfer to a terrorist group by a mid-level Iranian sympathizer or miscalculation of the sort that was narrowly avoided during the Cold War, 3) concern that, even before Iran’s nuclear weapons are used in a nuclear attack, and indeed even if they never are, an Iranian nuclear arsenal will make Iran far more dangerous than it is today, and 4) concern that Iran acquiring a nuclear arsenal will lead many of its neighbors in the Middle East to feel compelled to follow suit and one of their nuclear weapons will end up being used against the United States. Many in the United States still remember that armed only with boxcutters, the al Qaeda hijackers on September 11 killed almost 3,000 people and caused tens of billions of dollars in damage to New York City, the Pentagon and the global economy. This toll would be dwarfed by a nuclear 9/11 – estimates are that detonation of a small, crude nuclear weapon in a major city could kill more than 500,000 people and cause over one trillion dollars in damage. The risk of a nuclear 9/11 is considered high and rising. Both Graham Allison, the former Clinton official and dean of Harvard’s Kennedy School, and Bob Gallucci, the former Clinton official and dean of Georgetown’s School of Foreign Service have estimated that it is more likely than not that a
nuclear weapon will be detonated in a U.S. city within the next ten years. To such U.S.
nonproliferation experts, the threat posed by Iran’s nuclear facilities is very real.

I have heard several responses put forth in DC to the question of doesn’t international law
prohibit a preventive strike on Iran’s nuclear facilities, in other words a strike on a WMD facility
when the Caroline test is not met. I think it is useful for purposes of the discussion today to set
out a few of the leading such arguments. If the U.S. or its allies end up undertaking a preventive
strike on Iran’s nuclear facilities these are the arguments that I predict will be offered, and I think
it would be interesting to see what the response to them is here. But first a disclaimer. I am not
asserting that the United States should attack Iran’s nuclear facilities – not now, not if the
negotiations fail, not if crippling sanctions imposed in the wake of failed negotiations fail to
change the Iran’s cost-benefit analysis. I have grave concerns as to whether such a military
attack on Iran’s nuclear facilities could successfully achieve its objectives. I am also not
endorsing any of the arguments I am setting out today for the legality of such a preventive strike.
I am simply sharing these arguments that I have heard, and predicting that should the U.S. or its
allies end up undertaking a preventive strike on Iran’s nuclear facilities, you will hear these
arguments advanced in one form or another. So here goes.

One of the leading arguments I hear in response to the preventive action is illegal view
boils down to the following: why should the U.S. and its allies be constrained by international
law in response to a threat to their future which was created by Iran violating international laws
which the rest of the international community failed – for the crassest of economic reasons -- to
seriously enforce?

In more detail, the argument goes like this:

Iran’s nuclear program was created in clear violation of international law. The IAEA
Director General stated in his June 2003 report, and I quote, that “Iran has failed to meet its
obligations under its Safeguards Agreement with respect to the reporting of nuclear material, the
subsequent processing and use of that material and the declaration of facilities where the material
was stored and processed.” Then in 2006, the UN Security Council explicitly ordered Iran to 1)
suspend all enrichment-related activities, 2) suspend all reprocessing activities, 3) suspend work
on all heavy-water related projects, and 4) “provide such access and cooperation as the IAEA
requests to be able to verify” these suspensions and “to resolve all outstanding issues.” However,
rather than comply with the legally binding Security Council mandate to cease the production of nuclear fuel by enrichment and other methods, Iran has openly and admittedly accelerated its enrichment activities. In its August 28, 2009 report, the International Atomic Energy Agency stated

“Iran has not suspended its enrichment related activities or its work on heavy water related projects as required by the Security Council” and, “contrary to the requests of the [IAEA] Board of Governors and the Security Council, Iran has neither implemented the Additional Protocol nor cooperated with the Agency in connection with the remaining issues of concern which need to be clarified to exclude the possibility of military dimensions to Iran’s nuclear programme.”

Under the collective security system, states renounce the temptation to take unilateral, preventive forceful action against a potential aggressor in return for a guarantee that the collective will come to their rescue if they are attacked. This bargain is particularly tenuous with respect to nuclear weapons, where an attack would cause enormous and indeed irreparable damage before any rescue could occur. The rescue must therefore come before the attack, in the form of sanctions sufficient to coerce or contain the potential proliferant. Yet the sanctions that have been imposed thus far on Iran by the collective security system have been too weak to coerce or contain Iran.

The entirety of UN Security Council sanctions on Iran thus far consist only of this: 1) UN members have been ordered to stop supplying Iran with certain specified nuclear and ballistic missile items and technology; 2) a freeze of overseas assets of a couple dozen named Iranian officials and institutions; 3) a ban on the export of arms by Iran; and 4) a ban on overseas travel of a handful of Iranian officials. The Iran sanctions are weaker than the sanctions imposed by the Security Council on South Africa in response to apartheid, on Liberia and Cote D’Ivoire during their civil wars, Sierra Leone in response to its May 1997 military coup, the Federal Republic of Yugoslavia during the Bosnian crisis, and Haiti in response to its 1991 military coup.

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Why are the Security Council sanctions on Iran so weak? In considerable part because Russia and China have used their vetoes over Security Council sanctions to protect their lucrative trade with Iran.

The collective security system’s failure to seriously enforce international law against proliferators has deeply undermined the system’s credibility and thus its compliance pull on counterproliferators. Some in the United States are as a result going to say why should the U.S. and its allies be constrained by international law in response to a threat to their future which was created by Iran violating international laws which the rest of the international community failed – for the crassest of economic reasons -- to seriously enforce?

A somewhat related response by some in the U.S. to the argument that a preventive strike against Iran is illegal would, if such a strike became perceived as necessary, be the following argument that I have heard made by Professor Tony Arend, who was originally supposed to present today. That argument, which Professor Arend makes in his Spring 2003 Washington Quarterly article titled International Law and the Preemptive Use of Military Force, goes as follows, and I quote: “For all practical purposes, the UN Charter framework is dead.” If the charter framework intended to prohibit the threat and use of force by states against the territorial integrity or political independence of states, well, almost since the moment that the charter was adopted, states have used force in circumstances that simply cannot be squared with the charter paradigm. Arend provides in his article a list of examples of uses of force that have not been authorized by the Council and cannot be placed within any reasonable conception of self-defense including the North Korean invasion of South Korea in 1950, the Israeli/French/British invasion of Egypt in 1956, the Warsaw Pact invasions of Hungary in 1956 and Czechoslovakia in 1968, the Arab action in the 1973 Yom Kippur war, the Soviet invasion of Afghanistan in 1979, the NATO/US actions against Yugoslavia in the Kosovo situation, etc. The UN Charter framework being dead is obviously a dangerous place to be. Arend argues that since the framework is dead we need not be bound by it at our peril in the face of WMD threats, but we ought to work at creating a new framework that creates a new international law on the use of force that allows for a relaxing of the imminence criterion.

The final argument which I have seen made and that I will share with you today is that the US does not have to rely on preventive self-defense in justifying a strike on Iran’s nuclear weapons development facilities because Iran is constantly engaging in conventional armed
attacks and other aggression against allies of the United States, and, provided that certain conditions are met, these hostile actions could justify the United States in using military force against Iran’s nuclear weapons development facilities under historically-accepted interpretations of the UN Charter. This argument is made by Professor Gregory Maggs, a US Army JAG Reservist, in his 2007 article in the Syracuse Law Review titled “How the United States Might Justify a Preemptive Strike on a Rogue Nation’s Nuclear Weapon Development Facilities under the U.N. Charter.”

Maggs wrote his article in 2007 and pointed to a series of incidents during 2006, including Iranian seizures of Iraqi troops from across the border, artillery shells fired by Iran into Kurdish Iraq, and Iranian assistance to Hezbollah in Lebanon. Maggs noted that Article 51 recognizes that nations have an inherent right to use military force “in collective self defense if an armed attack occurs,” and stated that if these incidents are armed attacks within the meaning of Article 51 then the United States could use them to justify military action against Iran on behalf of U.S. allies Iraq and Israel, and the military action presumably could include destruction of any legitimate military target, including nuclear weapons development facilities. Under the theory I just described, the U.S. would take advantage of a legally sufficient justification to use military force (i.e., conventional armed attacks) to accomplish greater ends (i.e., the destruction of nuclear weapons development facilities not directly related to those attacks and violations). Maggs argues that while Article 51 recognizes that a nation may act in self-defense in response to an armed attack, nothing in Article 51 says that the triggering armed attack must be the one and only, or even the most important, reason that a nation decides to use military force.

The obvious response is wouldn’t a military strike on a nation’s nuclear weapons development facilities in response to a small-scale armed attack violate principles of proportionality and necessity? While Article 51 does not say anything about these requirements, the ICJ has held that they apply to uses of force in self-defense.

Two factual questions would determine whether the United States’ destruction of nuclear weapons development facilities would satisfy the requirement of proportionality. The first is the extent of the attack by Iran, with a larger attack clearly justifying a larger response. The second is whether the nuclear facilities could be destroyed with a minimum of loss of life or injury. If a few well-placed missiles or bombs would destroy the facilities (as was the case when Israel
destroyed Osirak and the Syrian facility), the United States would have a stronger argument in terms of proportionality.

With that, I draw my presentation to a close. But not before reiterating my opening disclaimer. I am not asserting that the United States should attack Iran’s nuclear facilities – not now, not if the negotiations fail, not if crippling sanctions imposed in the wake of failed negotiations fail to change the Iran’s cost-benefit analysis. I have grave concerns as to whether such a military attack on Iran’s nuclear facilities could successfully achieve its objectives. I am also not endorsing any of the arguments I am setting out today for the legality of such a preventive strike. I am simply sharing these arguments that I have heard, and predicting that should the U.S. or its allies end up undertaking a preventive strike on Iran’s nuclear facilities, you will hear these arguments advanced in one form or another. In that light, I am very curious to hear this group’s responses to these arguments.