

**THE CRIMINALIZATION OF THE PROLIFERATION OF
NUCLEAR WEAPONS: PROVIDING A STATUTORY
REGIME TO CRIMINALIZE AND PROSECUTE
NUCLEAR WEAPONS PROLIFERATORS**

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ABSTRACT

With the rising threat of a nuclear Iran it is becoming clear that the current nuclear non-proliferation regime is no longer effective due to a failure to disincentivize the leadership and regime elites who make policy decisions regarding nuclear weapons programs. To counter this problem, the article then proposes two international statutory schemes for the criminalization of the proliferation of nuclear weapons. The first proposal is a draft resolution by the United Nations Security Council that would create an international tribunal to investigate and punish acts of nuclear weapons proliferation. The second proposal consists of draft amendments to the Rome Statute of the International Criminal Court that would extend the jurisdiction of the ICC to encompass crimes of nuclear weapons proliferation. Finally, the article analyzes the logistical and diplomatic benefits and shortcomings of each of the two proposals, resulting in a final determination that the two proposals would have the greatest deterrent effect on nuclear weapons proliferation if both were enacted in conjunction.

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INTRODUCTION: ACCOUNTABILITY IN THE NUCLEAR WEAPON NON-PROLIFERATION REGIME

The withdrawal of North Korea from the Nuclear Non-Proliferation Treaty (“NPT”)¹ in 1993 immediately called into question the ability of the NPT and the nuclear weapon non-proliferation regime to continue as one of the most successful arms-control regimes in history.² With Iran almost certain to follow soon with its own nuclear weapons capability,³ two of the most volatile rogue states in the world today will be in a position to use nuclear weapons, arm terrorist organizations with nuclear weapons, and possibly demand a seat at the table of world powers due to nuclear weapon capabilities. To prevent further nuclear weapon pro-liferation, the United Nations Security Council (“Security Council”) has imposed some of the most severe

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

² See Arjun Makhijani, Nicole Deller & John Burroughs, *Compliance Assessment of North Korean and U.S. Obligations Under the Non-Proliferation Treaty and 1994 Agreed Framework*, INSTITUTE FOR ENERGY AND ENVIRONMENTAL RESEARCH (Jan. 24, 2003), <http://www.ieer.org/reports/treaties/nkorea.html>.

³ See Anne Barker, *Non-Proliferation Treaty has Failed: Iran*, ABC NEWS (May 3, 2010), <http://www.abc.net.au/news/stories/2010/05/03/2888391.htm>.

sanction regimes in history.⁴ Further, the Security Council and its members have made significant attempts at diplomatic solutions, including the use of significant positive incentives such as members providing nuclear technology for supposedly peaceful purposes.⁵ The Security Council has taken these measures with the support of the international community who have joined to harshly condemn states that continue to work towards obtaining nuclear weapons.⁶ North Korea and Iran, however, continue to develop nuclear weapons programs despite significant pressure from the international community to cease development.⁷ The defiance of these nations illustrates how the current nuclear weapon non-proliferation regime has failed to deter these rogue nations from pursuing nuclear weapon agendas. This is a critical issue, as these same nations are widely recognized as possible sources of nuclear weapons and related technology for use in acts of nuclear terrorism; significantly elevating the danger presented by the failure of the sanctions regimes to deter continued nuclear weapon proliferation.⁸

This apparent lack of effective enforcement actions against violators of the NPT has been recognized as a fundamental flaw in the nuclear non-proliferation regime.⁹ The difficulty in dealing with this situation is that, under its Chapter VII powers, the Security Council has traditionally used only diplomacy, sanctions, and military action to force compliance with its resolutions.¹⁰ Diplomacy has clearly failed to achieve

⁴ There have been many U.N. Security Council Resolutions regarding sanctions for Iran's nuclear weapons program. Recent resolutions include: S.C. Res. 1737, U.N. Doc. S/RES/1737 (Dec. 23, 2006); S.C. Res. 1747, U.N. Doc. S/RES/1747 (Mar. 24, 2007); S.C. Res. 1803, U.N. Doc. S/RES/1803 (Mar. 3, 2008); S.C. Res. 1929, U.N. Doc. S/RES/1929 (June 9, 2010).

⁵ See Associated Press, *Diplomats: US to Supply Nuclear Technology to Iran*, YNETNEWS (June 6, 2006), <http://www.ynetnews.com/articles/0,734,L-3259620,00.html>.

⁶ Catherine Philp, *Iran Threatens to Pull out of Nuclear Non-Proliferation Treaty*, THE SUNDAY TIMES (Nov. 30, 2009), http://www.timesonline.co.uk/tol/news/world/middle_east/article6937739.ece.

⁷ *Sanctions Fail to Halt North Korean, Iranian Nuclear Ambitions: Top Expert*, INTELLIGENCE QUARTERLY (Apr. 11, 2011), <http://www.intelligencequarterly.com/2011/04/sanctions-fail-to-halt-north-korean-iranian-nuclear-ambitions-top-expert/>; Dina Al-Shibeeb, *Iran Tests Missile, Continues Nuclear Program*, AL ARABIYA NEWS (Apr. 17, 2011), <http://english.alarabiya.net/articles/2011/04/17/145781.html>.

⁸ Travis Sharp & Erica Poff, *Understanding and Preventing Nuclear Terrorism*, THE CENTER FOR ARMS CONTROL AND NON-PROLIFERATION (Dec. 3, 2008), http://armscontrolcenter.org/policy/nuclearterrorism/articles/111408_understanding_preventing_nuclear_terrorism/.

⁹ Julia Choe, *Problems of Enforcement: Iran, North Korea, and the NPT*, HARV. INT'L. REV., Summer 2006, at 38, 38.

¹⁰ U.N. Charter arts. 41–42. It should be noted that the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR")

compliance with resolutions regarding nuclear weapon proliferation in Iran¹¹ and North Korea¹², and the Iraq invasion of 2003 showed that the costs of taking military action are entirely too high to make the use of such a military incursion feasible each time a rogue nation is suspected of developing a nuclear weapons program.¹³ Further, extremist regimes such as Iran and North Korea are likely to push the costs of any imposed sanctions down to the citizenry, potentially creating a humanitarian crisis that the extremist regimes may then blame on the sanctions imposed by the Security Council.¹⁴

In order to provide the nuclear weapon non-proliferation regime the power to dis-incentivize rogue nations from pursuing nuclear weapons, deterrent action must be directed towards the leaders, regime elites, scientists, and engineers who are driving the nuclear weapon proliferation efforts.¹⁵ The individuals responsible for the proliferation of nuclear weapons must be held personally accountable for their actions, rather than maintaining the current practice of sanctioning a nation, in order to incentivize the leadership directly to cease proliferation and prevent the responsible parties from passing the cost of sanctions onto innocent citizens.¹⁶ Assigning criminal liability to those responsible for the illegal proliferation of nuclear weapons provides the necessary

were also formed by the United Nations Security Council under its Chapter VII powers, and this option will be fully explored in Part III of this article.

¹¹ Tony Karon, *Why New Sanctions Raise Danger of Iran's Building Nuclear Weapons*, TIME.COM – GLOBAL SPIN (Jan. 9, 2012), <http://globalspin.blogs.time.com/2012/01/09/why-new-sanctions-raise-danger-of-iran-building-nuclear-weapons/>.

¹² *N Korea withdraws from nuclear pact*, BBC NEWS (Jan. 10, 2003, 6:06 AM), <http://news.bbc.co.uk/2/hi/2644593.stm>.

¹³ David M. Herszenhorn, *Estimates of Iraq War Cost Were Not Close to Ballpark*, N. Y. TIMES, Mar. 19, 2009, at A9; *Index of U.S. Troop Deaths in Iraq*, USATODAY.COM (May 7, 2009, 2:45 PM), <http://www.usatoday.com/news/world/iraq/iraq-casualties.htm>.

¹⁴ Rahul Mahajan, *'We Think the Price is Worth It'*, FAIR: FAIRNESS & ACCURACY IN REPORTING (Nov.–Dec. 2001), <http://www.fair.org/index.php?page=1084> (relating an interview of United States Secretary of State Madeleine Albright on the television show *60 Minutes*, where the interviewer asserted that a half million children had died in Iraq due to the U.N. Sanctions, and Secretary Albright stated in response: "I think it is a very hard choice, but the price – we think the price is worth it."); see also *The Human Rights Impact of Economic Sanctions on Iraq*, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS 1, 1 (Sept. 5, 2000), http://www.humanitarianinfo.org/sanctions/handbook/docs_handbook/HR_im_es_iraq.pdf.

¹⁵ JOHN NORTON MOORE & ROBERT F. TURNER, NATIONAL SECURITY LAW 23 (2d ed., 2005) (presenting a modern theory on international relations that looks to the incentivization of leaders and regime elites as a means of influencing national diplomacy as opposed to directing efforts at only the national interests of the states themselves).

¹⁶ See generally *The Human Rights Impact of Economic Sanctions on Iraq*, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (Sept. 5, 2000), http://www.humanitarianinfo.org/sanctions/handbook/docs_handbook/HR_im_es_iraq.pdf.

mechanism to hold these individuals responsible for their actions, creating a specific and substantive deterrence. Since the Nuremburg Trials,¹⁷ the international community has shown itself capable of holding individuals criminally liable for acts that had previously been considered acts of a state.¹⁸ Extending this concept of deterring war crimes by prosecuting the leaders and individuals responsible for specific violations of international humanitarian law to prosecuting leaders and individuals responsible for specific acts of proliferation is the next logical step toward ending nuclear weapon proliferation. This step must be taken, as the possible devastation to humanity and the planet itself from nuclear weapons could exceed even the horrific atrocities that were at issue in the Nuremburg Trials.¹⁹

I. INTERNATIONAL LAW AND THE CRIMINALIZATION OF NUCLEAR WEAPON PROLIFERATION

For many years now, legal scholars and others have debated whether the vast international acceptance of the nuclear non-proliferation regime has resulted in raising the proscription against the proliferation of nuclear weapons to the status of customary international law.²⁰ The centerpiece of the regime is the NPT, which banned any further

¹⁷ The Nuremberg Trials held between 1945 and 1949 were the first international tribunals for the prosecution of war crimes and crimes against humanity. They were conducted jointly by the Allied Forces of World War II to prosecute individuals for the atrocities they committed during the war by the leaders and members of the German government and military. *See generally*, ROBERT E. CONOT, JUSTICE AT NUREMBERG (1983).

¹⁸ UPDATED STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA art. 7 (2009), available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf; STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA art. 6 (2010), <http://www.unictr.org/Portals/0/English%5CLegal%5CStatute%5C2010.pdf>. Article 6 of the ICTR Statute. The creation of the International Criminal Court, International Tribunal for the Former Yugoslavia, and International Tribunal for Rwanda are only three examples of significant actions taken by the world community in recent years designed to assign international criminal liability to individuals for acts they personally commit or cause to occur. These courts do away with the political influences and defenses such as sovereign immunity and act of state that would normally shield such criminals within the state's own national courts.

¹⁹ For a detailed analysis of the catastrophic effects of a nuclear detonation, see generally SAMUEL GLASSTONE & PHILIP J. DOLAN, THE EFFECTS OF NUCLEAR WEAPONS (Samuel Glasstone & Philip J. Dolan eds., 3d ed. 1977).

²⁰ David A. Koplow, *Parsing Good Faith: Has the United States Violated Article VI of the Nuclear Non-Proliferation Treaty?*, 1993 WIS. L. REV. 301, 390 (1993) ("In fact, it is possible to argue that the norm of nuclear non-proliferation is now so well established that it has evolved into a binding facet of customary international law, enveloping even non-parties and providing an independent source of authority...").

proliferation of nuclear weapons when it entered into force on March 5, 1970.²¹ The NPT restricts the possession and development of nuclear weapons to the recognized nuclear weapon states of Russia, the United States, Britain, France, and China.²² The NPT is often considered one of the most successful and universally accepted arms-control treaties.²³ The only non-parties to the treaty are Israel, India, and Pakistan, that have never signed, and North-Korea who was once a signatory but has since withdrawn from the Treaty.²⁴ Surrounding the success of the NPT are many other efforts to eliminate nuclear weapon proliferation in large regions of the world, including multilateral treaties such as the African Nuclear-Weapon-Free-Zone Treaty,²⁵ the Treaty for the Prohibition of Nuclear Weapons in Latin America,²⁶ South Pacific Nuclear Free Zone Treaty,²⁷ the Treaty on the Southeast Asia Nuclear Weapon-Free Zone,²⁸ the Comprehensive Nuclear Test Ban Treaty,²⁹ the Limited Test Ban Treaty,³⁰ and many others. These treaties combine to illustrate a strong international consensus that continued nuclear weapon proliferation is contrary to the will of the international community.

The United Nations has also strongly voiced its opposition to nuclear weapon proliferation, beginning with strong suggestions that nuclear weapon proliferation must end,³¹ continuing with commending and adopting the NPT,³² and eventually requiring all nations to make

²¹ Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 (entered into force Mar. 5, 1970).

²² *Id.*

²³ See David A. Koplow, *Bonehead Non-Proliferation*, 17 FLETCHER F. WORLD AFF. 145, 149 (1993) (discussing the success of the NPT).

²⁴ See STATUS OF MULTILATERAL ARMS REGULATION AND DISARMAMENT AGREEMENTS, <http://disarmament2.un.org/TreatyStatus.nsf> (last visited Feb. 27, 2012).

²⁵ African Nuclear-Weapon-Free Zone Treaty, June 21–23, 1995, 35 I.L.M. 698 (1996).

²⁶ Treaty for the Prohibition of Nuclear Weapons in Latin America, Feb. 14, 1967, 6 I.L.M. 521 (1967).

²⁷ South Pacific Nuclear Free Zone Treaty, Aug. 6, 1985, 24 I.L.M. 1440 (1985).

²⁸ Brunei Darussalam-Cambodia-Indonesia-Laos-Malaysia-Myanmar-Philippines-Singapore-Thailand-Vietnam: Treaty on the Southeast Asia Nuclear Weapon-Free Zone, Dec. 15, 1995, 35 I.L.M. 635 (1996).

²⁹ Comprehensive Nuclear Test Ban Treaty, Sept. 24, 1996, S. TREATY DOC. NO. 105-28, 35 I.L.M. 1439 (1997).

³⁰ Treaty Banning Nuclear Weapons in the Atmosphere, in Outer Space and Under Water, Aug. 5, 1963, 14 U.S.T. 1313, 480 U.N.T.S. 43.

³¹ G.A. Res. 1380 (XIV), U.N. Doc. A/RES/1380 (Nov. 20, 1959).

³² Treaty on the Non-Proliferation of Nuclear Weapons, G.A. Res. 2373 (XXII), U.N. Doc., A/RES/2373 (June 12, 1968).

illegal the proliferation of nuclear weapons under Security Council Resolution 1540.³³ The International Court of Justice (ICJ), while not directly addressing the issue of nuclear weapon proliferation, has made it clear that the use of nuclear weapons would be illegal, even during armed conflict, with only a possible exception in extreme circumstances a measure of last resort to save the very existence of a nation state,³⁴ These examples of international consensus form a solid basis from which to argue that nuclear weapon proliferation is violative of customary international law.

According to the Restatement, “A rule of international law is one that has been accepted as such by the international community of states (a) in the form of customary law; (b) by international agreement; or (c) by derivation from general principles common to the major legal systems of the world.”³⁵ As asserted, the existence and relative success of the NPT and other multilateral treaties, such as those creating Nuclear Free Zones, illustrate how the nuclear weapon non-proliferation regime has been accepted by the international community of states through international agreements. Further, the enactment of U.N. Security Council Resolution 1540 required member states to outlaw nuclear weapon proliferation, rendering such acts illegal as a general principle common to the major legal systems of the world.³⁶ Thus, the present nuclear weapon proliferation regime appears to have a strong nexus with the basic elements of customary international law.

The Restatement continues, however, to further define how to determine whether an apparent international consensus is a norm of customary international law:

In determining whether a rule has become international law, substantial weight is accorded to: (a) judgments and opinions of international judicial and arbitral tribunals; (b) judgments and opinions of national judicial tribunals; (c) the writings of scholars; (d) pronouncements by states that undertake to state a rule of international law,

³³ S.C. Res. 1540, U.N. Doc. S/RES/1540 (Apr. 28, 2004).

³⁴ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 266 (July 8); Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. 66 (July 8).

³⁵ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(1); Stat. I.C.J. art. 38, para. 1.

³⁶ S.C. Res. 1540, U.N. Doc. S/RES/1540 (Apr. 28, 2004).

when such pronouncements are not seriously challenged by other states.³⁷

With respect to the nuclear weapon non-proliferation regime, there have been no judgments or opinions by international tribunals that directly support the contention that the prohibition on proliferation has gone beyond what is specifically stated in the various bilateral and multilateral treaties that form the regime, which of course bind only the parties to the treaties.³⁸ Further, scholarly writings on the subject of whether nuclear weapon proliferation is violative of customary international law are inconsistent, with the more recent scholarship indicating that the nuclear weapon non-proliferation regime may be weakening rather than growing into a norm of customary international law.³⁹

Another obstacle to using customary international law to criminalize nuclear weapon proliferation is the persistent objector status of the nations that exist outside of the nuclear non-proliferation regime.⁴⁰ North Korea's abandonment of the NPT and its joining with Israel, Pakistan, and India to develop nuclear weapons outside of the nuclear non-proliferation regime may cast these countries as persistent objectors and exclude them from liability under any proscription against nuclear weapon proliferation as a norm of customary international law.⁴¹ Thus, even if a norm of customary international law does exist with regard to the vast majority of nations, these rogue nations would not be bound by such a norm. This lack of global enforceability combined with the lack consensus among scholars as to the establishment of nuclear weapon non-proliferation as a norm of customary international law illustrates that that customary international law alone cannot be relied upon as the basis for effective criminalization of nuclear weapon proliferation.

³⁷ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 103(2).

³⁸ See Orde F. Kittrie, *Averting Catastrophe: Why the Nuclear Nonproliferation Treaty is Losing its Deterrence Capacity and How to Restore It*, 28 MICH. J. INT'L L. 337, 349–50 (2007).

³⁹ Koplow, *supra* note 20, at 390; Geoffrey S. Carlson, *An Offer They Can't Refuse? The Security Council Tells North Korea to Re-Sign the Nuclear Non-Proliferation Treaty* 46 COLUM. J. TRANSNAT'L L. 420, 430–431 n.67 (2008); Kittrie, *supra* note 38, at 348–50.

⁴⁰ Jacob Katz Cogan, *Noncompliance and the International Rule of Law*, SOCIAL SCIENCE RESEARCH NETWORK (Sept. 5, 2006), <http://ssrn.com/abstract=928247>.

⁴¹ Curtis A. Bradley & Mitu G. Gulati, *Customary International Law and Withdrawal Rights in an Age of Treaties*, SOCIAL SCIENCE RESEARCH NETWORK (Jan. 10, 2010), <http://ssrn.com/abstract=1736676>; *Status of World Nuclear Forces*, FEDERATION OF AMERICAN SCIENTISTS, <http://www.fas.org/programs/ssp/nukes/nuclearweapons/nukestatus.html> (last visited Apr. 3, 2012).

The criminalization of nuclear weapon proliferation, however, need not rely on customary international law alone. Both the Security Council and the International Criminal Court (“ICC”) could also play key roles in the criminalization of nuclear weapon proliferation. The combined involvement of the two legal authorities could serve both to crystalize further customary international law on the matter and to provide a forum for the individual prosecution of nuclear weapon proliferators. For the Security Council to act, an international tribunal would need to be created through a resolution under its Chapter VII authority as was done with the International Criminal Tribunals for the Former Yugoslavia (“ICTY”)⁴² and Rwanda (“ICTR”).⁴³ In the case of the ICC, the originating document of the Court, the Rome Statute of the International Criminal Court (the Rome Statute),⁴⁴ would need to be amended to include nuclear weapon proliferation among the crimes over which the ICC could assert jurisdiction.⁴⁵ Proposals for the criminalization of nuclear weapon proliferation using each of these methods follow in Sections III and IV.

II. PROPOSED SECURITY COUNCIL RESOLUTION AND ANNEX STATUTE FOR AN INTERNATIONAL NUCLEAR WEAPON PROLIFERATION TRIBUNAL

Through the establishment of the ICTY and ICTR, the Security Council has illustrated its ability to create tribunals that criminally sanction individuals for violations of international law.⁴⁶ The Security Council resolutions and statutes used to create these tribunals provide an excellent road-map as to how the same structure could result in a tribunal designed to prosecute nuclear weapons proliferators. There are significant advantages to the Security Council acting directly to criminalize the proliferation of nuclear weapons, including the speed and success with which such action could be taken by the Security Council. The Security Council has shown its ability to act quickly when needed,⁴⁷

⁴² S.C. Res. 827, U.N. SCOR, U.N. Doc. S/RES/827 (May 25, 1993).

⁴³ S.C. Res. 955, U.N. SCOR, U.N. Doc. S/RES/955 (Nov. 8, 1994).

⁴⁴ Rome Conference, Rome, It., June 15 – July 17, 1998, *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9 (1998)[hereinafter Rome Statute].

⁴⁵ *See id.* art. 121.

⁴⁶ S.C. Res. 827, *supra* note 42; S.C. Res. 955, *supra* note 43, ¶ 1.

⁴⁷ Recently the Security Council responded almost immediately to the humanitarian crisis in Libya by instituting a no-fly zone to prevent the government from using air-based military forces

and the Security Council can bind all member states of the United Nations to its directives.⁴⁸ In contrast, an attempt to criminalize nuclear weapon proliferation through multilateral treaty would only bind the states party to the treaty. Further, such action would likely be drastically more time intensive and may never yield fruitful results due to the possibly conflicting political interests of all of the parties that would be involved.⁴⁹

Such direct action by the Security Council to criminalize nuclear proliferation may, however, create a backlash. The United Nations is often criticized as “a tool of the west” and many member states may resent the creation of a criminal enforcement regime without multilateral agreement from all nations involved.⁵⁰ Moreover, the permanent members of the Security Council are also the only nuclear weapon states recognized under the NPT, which creates a genuine perception of a conflict of interest.⁵¹ Thus, to be successful, the Security Council’s efforts must be supported by the international community and any actions taken must be specifically addressed in a manner that all member states will be willing to support. The following subsection details what the Security Council should include in its resolution to criminalize the proliferation of nuclear weapons.

A. PROPOSED SECURITY COUNCIL RESOLUTION AND STATUTE DESIGNED TO CRIMINALIZE THE PROLIFERATION OF NUCLEAR WEAPONS:

The Security Council,

Reaffirming all its previous resolutions regarding the prevention of the proliferation of nuclear weapons.

against civilians. See Press Release, Security Council, Security Council Approves ‘No-Fly Zone’ Over Libya, Authorizing ‘All Necessary Measures’ to Protect Civilians, By Vote of 10 in Favour with 5 Abstentions, U.N. Press Release SC/10200 (Mar. 17, 2011), available at <http://www.un.org/News/Press/docs/2011/sc10200.doc.htm>.

⁴⁸ U.N. Charter art. 25.

⁴⁹ Michael G. Karnavas, *Feature: The International Criminal Tribunal*, THE CHAMPION: THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (Dec. 1996), <http://www.nacdl.org/CHAMPION/ARTICLES/96dec01.htm>.

⁵⁰ Adrian Hamilton, *The UN has Come to be Seen as a Tool of the West*, THE INDEPENDENT (Dec. 13, 2007), <http://www.independent.co.uk/opinion/commentators/adrian-hamilton/adrian-hamilton-the-un-has-come-to-be-seen-as-a-tool-of-the-west-764828.html>.

⁵¹ George Perkovich, *The End of the Nonproliferation Regime?*, 105 CURRENT HISTORY 355, 358 (2006).

Expressing its grave concern at the apparent attempts by certain nations to develop and acquire nuclear weapons contrary to their legal obligations.

Expressing its grave concern that the continued proliferation of nuclear weapons may lead to the use of such weapons by terrorist organizations and other non-state actors.

Determining that the illegal proliferation of nuclear weapons constitutes a threat to international peace and security.⁵²

Stressing the need for international cooperation to combat the threat of continuing nuclear weapon proliferation.

Determining that the illegality of the proliferation of nuclear weapons has become customary international law and violations of this law are criminal in nature.⁵³

Considering the lack of a legal forum in which to prosecute violators of the customary international law regarding the illegality of the proliferation of nuclear weapons.⁵⁴

Acting under Chapter VII of the Charter of the United Nations,⁵⁵

1. Decides hereby, to establish an international tribunal for the sole purpose of prosecuting persons responsible for the illegal proliferation of nuclear weapons, fissile material, and nuclear weapon technology and to this end to adopt the Statute of the International Criminal Tribunal for the Illegal Proliferation of Nuclear Weapons annexed hereto;⁵⁶

2. Decides that all States shall cooperate fully with the International Criminal Tribunal for the Illegal Proliferation of Nuclear Weapons and its organs in accordance with the present resolution and the Statute of the International Criminal Tribunal for the Illegal Proliferation of Nuclear Weapons, and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to

⁵² This determination is essential in order to invoke the Security Council's Chapter VII powers under which it has previously convened international criminal tribunals. U.N. Charter art. 39.

⁵³ Such a determination by the United Nations Security Council would also strengthen the argument that nuclear weapon proliferation is violative of the norms of customary international law.

⁵⁴ While the proliferation of nuclear weapons is commonly criminalized at the national level, the individuals involved in the development of nuclear weapons are typically the leaders of or acting at the behest of their own governments. Therefore, it is necessary to have an independent tribunal that will prosecute these cases outside of the national interests of the individuals involved.

⁵⁵ The powers granted to the Security Council under Chapter VII are the basis under which the Security Council formed by the ICTY and the ICTR. U.N. Charter art. 41.

⁵⁶ This decision is the act that would create the tribunal according to the annexed statute.

comply with requests for assistance or orders issued by a Trial Chamber under Article 28 of the Statute;⁵⁷

3. Urges States and intergovernmental and non-governmental organizations to contribute funds, equipment and services to the International Criminal Tribunal for the Illegal Proliferation of Nuclear Weapons, including the offer of expert personnel;⁵⁸

4. Requests the Secretary-General to implement this Resolution urgently and in particular to make practical arrangements for the effective functioning of the International Criminal Tribunal for the Illegal Proliferation of Nuclear Weapons, including recommendations to the Council as to possible locations for the seat of the International Criminal Tribunal for the Illegal Proliferation of Nuclear Weapons at the earliest time to report periodically to the Council;

5. Decides that the seat of the International Criminal Tribunal for the Illegal Proliferation of Nuclear Weapons shall be determined by the Council having regard to considerations of justice and fairness as well as administrative efficiency, including access to witnesses, and economy, and subject to the conclusion of appropriate arrangements between the United Nations and the State of the seat, acceptable to the Council, having regard to the fact that the International Tribunal may meet away from its seat when it considers necessary for the efficient exercise of its functions;⁵⁹

6. Decides to consider increasing the number of judges and Trial Chambers of the International Criminal Tribunal for the Illegal Proliferation of Nuclear Weapons if it becomes necessary;⁶⁰ and

7. Decides to remain actively seized of the matter.

⁵⁷ This decision is an enforceable mandate that nations must cooperate and provide all the persons and evidence outlined in Article 28 of the statute.

⁵⁸ Both the ICTY and ICTR have been funded by similar mechanisms, but it is likely considering the direct interests of the permanent members of the Security Council that the funding for this will be more freely forthcoming than it has been with other tribunals.

⁵⁹ Vienna would be the most likely location for the International Nuclear Weapon Proliferation Tribunal as it is the home of the IAEA, which will most likely provide key witnesses and evidence during any prosecution, and is the center for many nuclear non-proliferation initiatives.

⁶⁰ Pursuant to Article 11, this tribunal would have significantly less judges than either the ICTY or ICTR, however, given the large caseloads carried by both tribunals combined with the concerns of the costs of those tribunals, beginning with a smaller judiciary seems appropriate.

ANNEX

Statute of the International Nuclear Weapon Proliferation Tribunal⁶¹

Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations, the International Criminal Tribunal for the International Criminal Tribunal for the Prosecution for the Illegal Proliferation of Nuclear Weapons (hereinafter the International Nuclear Weapon Proliferation Tribunal) shall function in accordance with the provisions of the present Statute.

Article 1: Competence of the International Nuclear Weapon Proliferation Tribunal

The International Nuclear Weapon Proliferation Tribunal shall have the power to prosecute persons responsible for serious violations of customary international law as it relates to crimes of nuclear weapon proliferation.⁶²

Article 2: Crimes of Nuclear Weapon Proliferation⁶³

1. For the purpose of this statute, “nuclear weapon proliferation” means any of the following acts committed by an individual, who is not an agent of a nuclear weapon state acting in the lawful performance of his official duties,⁶⁴ with the intent to develop or acquire nuclear weapons, nuclear weapon technology, or fissile material:

- (a) Illegal manufacture or possession of nuclear weapons, nuclear weapon technology, or fissile material;
- (b) Theft of nuclear weapons, nuclear weapon technology, or fissile material;
- (c) Use of fraud in obtaining nuclear weapons, nuclear weapon technology, or fissile material;

⁶¹ The text of this statute is based in large part on the Statutes of the ICTY and ICTR which create a road-map for how the Security Council would likely act to create an International Nuclear Weapons Tribunal. Only legally relevant articles are included, with the articles designed to create the structure of the court and court processes specifically excluded as they would likely be ministerial in nature and substantially duplicative of the ICTY and ICTR statutes. Portions of the text presented are, however, still adapted or taken from the Statutes of the ICTY and ICTR. S.C. Res. 827, *supra* note 42; S.C. Res. 955, *supra* note 43.

⁶² This Article relates back to and relies upon the Determination of the Security Council that nuclear weapon proliferation is violative of customary international law. This should not be confused with the conclusions of Section II of this article. *See* S.C. Res. 1540, *supra* note 33.

⁶³ This Article is the keystone of the statute defining the actual acts of nuclear weapon proliferation that will be criminalized.

⁶⁴ This exception is designed to protect the military and civilian personnel of nuclear weapon states while they are lawfully performing their duties as related to the handling of nuclear weapons, nuclear weapon technology, and fissile material.

- (d) The distribution or transfer of nuclear weapons, nuclear weapon technology, or fissile material to any state or individual who is not a nuclear weapon state or a lawful agent of a nuclear weapon state acting in performance of his duties;
- (e) Failure to secure lawfully possessed nuclear weapons, nuclear weapon technology, or fissile material; or
- (f) Attempt or conspiracy to commit any of the crimes enumerated in sections (a), (b), (c), (d) or (e) of Paragraph 1 of this Article.

2. For the purpose of this Article:

(a) “Nuclear weapon state” means any state that is recognized as a nuclear weapon State Party to the Treaty on the Non-Proliferation of Nuclear Weapons signed at Washington, London, and Moscow July 1, 1968 (hereinafter “NPT”) as well as non-parties of the Treaty on the Non-Proliferation of Nuclear Weapons that have been confirmed to be in possession of nuclear weapons by the Director General of the IAEA prior to (insert date based upon the time of entry into force.)⁶⁵

(b) “Nuclear weapon” means any weapon that contains or uses one or more of the following:

- i. Plutonium;
- ii. Uranium not in the form of ore or ore residue that contains the mixture of isotopes as occurring in nature;
- iii. Enriched uranium, defined as uranium that contains the isotope 233 or 235 or both in such amount that the abundance ratio of the sum of those isotopes to the isotope 238 is greater than the ratio of the isotope 235 to the isotope 238 occurring in nature; or
- iv. Uranium 233.⁶⁶

(c) “Nuclear weapon technology” means:

- i. Devices or machinery designed specifically for the purpose of or intended to be used for the purpose of creating nuclear weapons or fissile material;

⁶⁵ This article is designed to allow states that are not signatories to the NPT to publically declare nuclear weapons and allow IAEA confirmation of the existence of such weapons in order to obtain nuclear-weapon state status under this statute. Should the states refuse to allow the IAEA inspection, they would not be considered nuclear-weapon states and thus be subject to prosecution under the statute.

⁶⁶ 18 U.S.C. § 831(f)(1) (defining nuclear weapons).

- ii. Devices or machinery designed specifically for the purpose of or intended to be used for the purpose of creating other devices or machinery described in Section i of this definition; or
 - iii. Detailed designs, plans or schematics for devices or machinery described in Sections i or ii of this definition that are not generally available to the public.
- (d) “Fissile material” means plutonium-239; uranium-233; or uranium containing the isotopes 235 or 233 or both in an amount such that the abundance ratio of the sum of these isotopes to the isotope 238 is greater than the ratio of the isotope 235 to the isotope 238 occurring in nature.⁶⁷
- (e) “Fraud in obtaining nuclear weapons, nuclear weapon technology, or fissile material” means:
- i. The use of deceit to obtain nuclear weapons, nuclear weapon technology, or fissile material;
 - ii. The use of any nuclear technology obtained or developed under Article IV of the NPT for the manufacture of nuclear weapons or fissile material;⁶⁸ or
 - iii. Lying, deceiving, or hiding information from an agent of the IAEA while they are executing their official duties and about the subject matter of those duties.⁶⁹
- (f) “Failure to secure lawfully possessed nuclear weapons, nuclear weapon technology, or fissile material” means, in regard to nuclear weapons, nuclear weapon technology, or fissile material lawfully possessed by nuclear weapon states:
- i. Allowing a nuclear weapon, nuclear weapon technology, or fissile materials to be stolen due to a failure to provide reasonable security measures;⁷⁰ or

⁶⁷ This definition is based upon the definitions of “special fissile material” and “uranium enriched in the isotopes 235 or 233” as defined in Article XX of the Statute of the IAEA. Statute of the International Atomic Energy Agency, *opened for signature* Oct. 26, 1956, 8 U.S.T. 1093, 276 U.N.T.S. 3.

⁶⁸ This definition of fraud is specifically designed to criminalize the situation that occurred with North Korea and appears to be occurring in Iran where the nations gained access to nuclear technology under Article IV of the NPT then later utilized the technology for the development of nuclear weapons.

⁶⁹ This definition of fraud is designed to force compliance with IAEA inspectors.

⁷⁰ This subsection is designed to criminalize the negligent handling of nuclear weapons, nuclear weapon technology, and fissile materials by nuclear-weapon states. In addition to preventing an allegedly fraudulent loss as a method of providing a nuclear weapon to an allied state or group,

ii. Failing to provide appropriate safety measures on nuclear weapons to prevent accidental or unauthorized detonation.⁷¹

Article 5: Personal Jurisdiction⁷²

The International Nuclear Weapon Proliferation Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.⁷³

Article 6: Individual Criminal Responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Article 2 of the present Statute, shall be individually responsible for the crime.⁷⁴

2. The official position and duties of any accused person, whether as head of state or government agent, or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.⁷⁵

3. The fact that any act referred to in Article 2 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the

the lack of security of some fissile material creates the single greatest risk of a terrorist organization gaining access to nuclear weapons.

⁷¹ There is significant concern that some states that possess nuclear weapons do not have adequate countermeasures designed to prevent the accidental or unauthorized detonation of its nuclear weapons. The reality that a failed nuclear weapon state could occur or that an intact nuclear weapon could be stolen makes it essential that the weapons be unusable except by the government of the nuclear weapon state.

⁷² The non-consecutive numerical assignment of this and following articles is due to omitted articles that would serve to provide structure and procedure to the tribunal but do not provide material of direct legal relevance for the purposes of this article.

⁷³ The statute is designed to hold individual persons liable for acts of nuclear weapon proliferation and not for prosecution organizations or governments.

⁷⁴ While many civil law nations do not incorporate inchoate offenses or conspiracy liability in their systems of justice, international tribunals have historically made broad use of such legal devices in order to make certain that the entire chain of command is held responsible for the acts of individuals.

⁷⁵ S.C. Res. 827, *supra* note 42; S.C. Res. 955, *supra* note 43. Article 7 of the ICTY Statute and Article 6 of the ICTR Statute show that a proscription of the Heads of State defense is used consistently in international criminal tribunal prosecutions, as the purpose of such tribunals is to hold individuals accountable for their actions taken and many of the perpetrators of acts of nuclear weapon proliferation may be government officials. The purpose of this statute is, in part, to prevent the actions of states by deterring the leaders and regime elites through criminal penalty.

superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.⁷⁶

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Nuclear Weapon Proliferation Tribunal determines that justice so requires.⁷⁷

Article 7: Territorial and Temporal Jurisdiction

1. The territorial jurisdiction of the International Nuclear Weapon Proliferation Tribunal shall extend to the territory of all members of the United Nations, including their land surface and airspace.⁷⁸

2. The temporal jurisdiction of the International Nuclear Weapon Proliferation Tribunal shall begin on (insert date based upon the time of entry into force.)

3. For the purposes of paragraph 2 of this article, the crime of fraud in obtaining nuclear weapons, nuclear weapon technology, or fissile material as defined in section 2(e)(i) of this article shall be deemed to have been committed at any time from the time that such technology was initially obtained or developed pursuant to Article IV of the NPT through the time of the latest act in furtherance of the fraud or proliferation.⁷⁹

Article 8: Concurrent Jurisdiction

1. The International Nuclear Weapon Proliferation Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious

⁷⁶ This paragraph is designed to make certain that all levels of the chain of command will be held liable when leadership knowingly and intentionally acts or fails to act in a manner that causes the proliferation of nuclear weapons.

⁷⁷ Unlike paragraphs 1, 2, and 3 of this article, paragraph 4 provides a possible ends of justice exception for individuals who are following orders that lead to the proliferation of nuclear weapons. This is not designed to lessen the liability for those who possess sufficient *mens rea* in their actions of proliferation, but to allow for exception for underlings who may have faced significant punishment or death if they did not follow the orders that lead to the proliferation of nuclear weapons.

⁷⁸ One of the strengths of United Nations action in the criminalization of nuclear weapons is the global territorial jurisdiction that the United Nations can exert over all of its member states. U.N. Charter art. 25.

⁷⁹ This clause is specifically intended to prevent another situation similar to North Korea gaining nuclear weapons capability that it developed while still a signatory of the NPT. If a nation received nuclear technology under Article IV of the NPT prior to the entry into force of this statute, it may not later use that technology to develop nuclear weapons and claim a lack of jurisdiction under Article 7 due to the fact it received the technology prior to the temporal jurisdiction requirements of the statute. Further, states, such as Iran, that claim to be developing nuclear technology for peaceful purposes must be held accountable if it uses technology provided or developed under Article IV of the NPT in order to create nuclear weapons.

violations of customary international law relating to nuclear weapon proliferation.⁸⁰

2. The International Nuclear Weapon Proliferation Tribunal shall have the primacy over the national courts of all States. At any stage of the procedure, the International Nuclear Weapon Proliferation Tribunal may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Nuclear Weapon Proliferation Tribunal.⁸¹

Article 9: Non Bis in Idem⁸²

1. No person shall be tried before a national court for acts constituting violations of law relating to nuclear weapon proliferation under the present Statute, for which he or she has already been tried by the International Nuclear Weapon Proliferation Tribunal.⁸³

2. A person who has been tried before a national court for acts constituting serious violations of law relating to nuclear weapon proliferation may be subsequently tried by the International Nuclear Weapon Proliferation Tribunal only if the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.⁸⁴

3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Nuclear Weapon Proliferation Tribunal shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

⁸⁰ The statute is not designed to prevent nations from prosecuting nuclear weapons proliferators under their own laws as that would be inconsistent with U. N. Security Council Resolution 1540. S.C. Res. 1540, *supra* note 33, ¶ 2–3.

⁸¹ This paragraph is designed to prevent sham prosecutions by nations with the intention of preventing prosecutions under the jurisdiction of the International Nuclear Weapon Proliferation Tribunal.

⁸² *Non Bis in Idem*, literally translated from Latin as “not twice for the same,” is an international criminal law equivalent to the American legal doctrine of double jeopardy. BLACK’S LAW DICTIONARY 1150 (9th ed. 2009).

⁸³ It is essential to specifically outline the standards of due process, such as a prohibition of double jeopardy, as having multiple governments involved could present exceptional circumstances that are not conceived of within the legal experience of individual national governments.

⁸⁴ This paragraph is also designed to prevent sham prosecutions by nations with the intention of preventing prosecutions under the jurisdiction of the International Nuclear Weapon Proliferation Tribunal.

Article 17: Investigation and Preparation of Indictment

1. The Prosecutor shall initiate investigations ex-officio or on the basis of information obtained from any source, particularly from the IAEA, United Nations organs, governments of member nations, intergovernmental organizations, and non-governmental organizations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.⁸⁵
2. The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of State authorities concerned.⁸⁶
3. If questioned, the suspect shall be entitled to counsel of his or her own choice, including the right to have legal assistance assigned to the suspect without payment by him or her in any such case if he or she does not have sufficient means to pay for it, as well as necessary translation into and from a language he or she speaks and understands.
4. Upon a determination that a prima facie case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to a judge of the Trial Chamber.

IV. PROPOSED AMENDMENTS TO THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

Another means to criminalize the proliferation of nuclear weapons would be to amend the Rome Statute. The Rome Statute is the multilateral treaty that created the ICC and defined its jurisdiction and purpose. An amendment to the Rome Statute treaty would be necessary to add the crime of nuclear weapon proliferation to the ICC's jurisdiction.⁸⁷ The primary advantages of amending the Rome Statute are

⁸⁵ Granting the IAEA the power to make referrals to the prosecutor would serve to prevent political decisions to not refer certain cases to the prosecutor. It may also lend power and prestige to the IAEA and thereby further encourage compliance with IAEA inspections and monitoring.

⁸⁶ The mandatory cooperation of the individual nations is essential as the evidence and witnesses may otherwise be outside of the jurisdiction of the prosecutor or the IAEA.

⁸⁷ The Rome Statute currently only provides the ICC jurisdiction to prosecute genocide, crimes against humanity, war crimes, and the crime of aggression. The Rome Statute, *supra* note 44, art. 5. The Rome Statute was initiated as a response to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which contemplated a then non-existent international criminal tribunal to prosecute and punish violations of the convention. Due to the cold war and

two-fold. First, the ICC is already fully operational and once the amendments to the Rome Statute come into effect, little work would need to be done in order to immediately begin prosecuting nuclear proliferators.⁸⁸ Secondly, the amendment would be drafted and approved by broad spectrum of member states, each with individual national interests to consider. Thus, the basis of authority would be multilateral and likely more palatable to the international community than similar legislative action taken by the Security Council.

Amending the Rome Statute would not be without difficulty. Specifically, there are two major disadvantages to amending it to criminalize nuclear weapon proliferation when compared to the creation of a tribunal through the power of the Security Council. The first is that many states are not party to the Rome Statute and several of these non-signatory states, such as the United States, China India, Iran, Pakistan, North Korea, and Israel, are states in possession of nuclear weapons and technology.⁸⁹ While this does not eliminate the value of amending the Rome Statute, the failure to include many states that currently possess nuclear weapons or are attempting to obtain nuclear weapon technology within the jurisdiction of the ICC certainly weakens the overall utility of such an amendment.

The second major difficulty is that under Article 121 of the Rome Statute, any proposed amendment to expand the jurisdiction of the ICC to include additional crimes under Article 5 would require a consensus of at least two-thirds of the states party.⁹⁰ The negotiations of such a multilateral nature are likely to be quite lengthy and complex, and may never reach a conclusion that will create a meaningful criminalization of the proliferation of nuclear weapons. Further, any state party that chooses not to accept the amendment will not be bound by the amendment, and therefore, would not face criminal liability for nuclear weapon proliferation under the ICC.⁹¹ Such a failure to obtain full consensus of all states party could actually weaken the ICC's political

other issues, it took more than fifty years for the Rome Statute to be finalized and come into force, finally providing an international criminal tribunal for the punishment of genocide, war crimes and crimes against humanity. *History of the ICC*, COALITION FOR THE INTERNATIONAL CRIMINAL COURT, <http://www.iccnw.org/?mod=icchistory> (last visited Feb. 29, 2012).

⁸⁸ The Rome Statute, *supra* note 44.

⁸⁹ For a complete listing of states party to the Rome Statute see *The State Parties to the Rome Statute*, INTERNATIONAL CRIMINAL COURT, <http://www.icc-cpi.int/Menus/ASP/states+parties/> (last visited Mar. 5, 2012).

⁹⁰ The Rome Statute, *supra* note 44, arts. 5, 121, 123.

⁹¹ *Id.*

standing as certain states party would have greater liability under the Rome Statute than others, rendering the multilateral treaty fundamentally unbalanced. Further, the states party that are unlikely to ratify an amendment criminalizing nuclear weapon proliferation are likely to be the very states party that would be most likely to violate such a statute, as the primary incentive to vote against such an amendment is that the state party desires to preserve its ability to develop nuclear weapons.

While these difficulties in producing a viable forum to prosecute nuclear weapon proliferators through amendment of the Rome Statute appear to be significant, it should be noted that amendment of the Rome Statute and the creation of an International Nuclear Weapon Proliferation Tribunal through a resolution of the Security Council need not be mutually exclusive. In fact, from a political and diplomatic standpoint, having both bodies work simultaneously to criminalize nuclear weapon proliferation will serve to bolster the advantages of both initiatives while possibly lessening the disadvantages of both a Security Council resolution and an amendment to the Rome Statute.

If states party to the Rome Statute will be subject to criminal liability under the International Nuclear Weapon Proliferation Tribunal regardless of whether the Rome Statute is amended, they have no incentive to vote against an amendment to the Rome Statute that would have the same effect. In fact, such states party may prefer to have the alternative forum of the ICC if they are concerned that the Security Council is either overly influenced by the West⁹² or operating under a conflict of interest.⁹³ Likewise, the broad coalition states party to the Rome Statute acting in concert to criminalize the proliferation of nuclear weapons in a multilateral fashion may serve to lend legitimacy to the unilateral actions of the Security Council in creating an International Nuclear Weapon Proliferation Tribunal. While the expansion of the jurisdiction of the ICC to prosecute crimes of nuclear weapon proliferation through an amendment of the Rome Statute may not have the same global jurisdiction for enforcement as an International Nuclear Weapon Proliferation Tribunal created by the Security Council, the effectiveness of both regimes will likely be stronger through dual action of the two bodies. Thus, it is worthwhile to examine what such an amendment to the Rome Statute might include textually.

⁹² See Hamilton, *supra* note 50.

⁹³ Perkovich, *supra* note 51, at 358.

**A. PROPOSED AMENDMENTS TO THE ROME STATUTE OF THE
INTERNATIONAL CRIMINAL COURT TO EXPAND JURISDICTION OF
THE ICC TO ENCOMPASS CRIMES OF NUCLEAR WEAPON
PROLIFERATION:**

Pursuant to Articles 121 and 123 of the Statute, the following amendments are hereby proposed and submitted to the Secretary-General of the United Nations, who shall promptly circulate these proposed amendments to all the States Parties to the Rome Statute of the International Criminal Court:

It is proposed that Article 5 of the Rome Statute of the International Criminal Court shall be amended to state:

Article 5

Crimes Within the Jurisdiction of the Court

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

- (a) The crime of genocide;
- (b) Crimes against humanity;
- (c) War crimes;
- (d) The crime of aggression;
- (e) Crimes of nuclear weapon proliferation.⁹⁴

It is further proposed that Article 9 of the Rome Statute of the International Criminal Court shall be amended to state:

Article 9

Elements of Crimes

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7, 8 and 129.⁹⁵ They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.
2. Amendments to the Elements of Crimes may be proposed by:
 - (a) Any State Party;
 - (b) The judges acting by an absolute majority; or
 - (c) The Prosecutor.

⁹⁴ The Rome Statute, *supra* note 44, art. 5. The amendment of Article 5 is essential to grant jurisdiction for crimes of nuclear weapon proliferation.

⁹⁵ The Rome Statute, *supra* note 44, art. 9. The amendment to Article 9 is necessary to allow the states party to properly define the elements of crimes of nuclear weapon proliferation.

Such amendments shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

3. The Elements of Crimes and amendments thereto shall be consistent with this Statute.

It is further proposed that Article 11 of the Rome Statute of the International Criminal Court shall be amended to state:

Article 11

Jurisdiction *Ratione Temporis*⁹⁶

1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.

2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.

3. In exception to paragraphs 1 and 2 of this article, should the crime of fraud in obtaining nuclear weapons, nuclear weapon technology, or fissile material be committed as defined to Article 129, paragraph 2, section (e)(ii), the jurisdiction *ratione temporis* of the Court shall relate back to the at the time at which such technology was initially obtained or developed pursuant to Article IV of the Treaty on the Non-Proliferation of Nuclear Weapons (729 U.N.S.T. 161).⁹⁷

It is further proposed that Article 12 of the Rome Statute of the International Criminal Court shall be amended to state:

Article 12

Preconditions to the Exercise of Jurisdiction

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

2. In the case of article 13, paragraph (a) (c) or (d),⁹⁸ the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

⁹⁶ *Ratione Temporis*, literally translated from Latin as “by reason of time,” is an international criminal law term relating to temporal jurisdiction. BLACK’S LAW DICTIONARY 1377 (9th ed. 2009).

⁹⁷ This paragraph is specifically designed to insure that the tribunal would have jurisdiction over nations that gained access to nuclear technology under Article IV of the NPT then later utilized the technology for the development of nuclear weapons.

⁹⁸ The Rome Statute, *supra* note 44, art. 11. The amendment to Article 12 is necessary for the amendment in Article 13(c) to have jurisdictional effect.

- (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
- (b) The State of which the person accused of the crime is a national; or

3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

It is further proposed that Article 13 of the Rome Statute of the International Criminal Court shall be amended to state:

Article 13

Exercise of Jurisdiction

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

- (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations;
- (c) A situation in which a crime involving the proliferation of nuclear weapons appears to have been committed and is referred to the prosecutor by the Director General of the International Atomic Energy Agency (hereinafter “IAEA”);⁹⁹ or
- (d) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

⁹⁹ The amendment of Article 13 provides the Court with jurisdiction over any crimes involving the proliferation of nuclear weapons as referred by the Director General of the IAEA. This eliminates the need for a state party to be involved with or the subject of the referral and is necessary for two reasons. First, the danger of nuclear weapon proliferation is such that immediate action must be taken and the politics involved in either a state party or the United Nations Security Council referring a case to the prosecution could prevent swift action by the Prosecutor. Second, this amendment will provide the IAEA with significant direct authority over serious violations of its mandate, which will in turn encourage greater compliance with IAEA officials.

It is further proposed that Article 24 of the Rome Statute of the International Criminal Court shall be amended to state:

Article 24

Non-Retroactivity *Ratione Personae*¹⁰⁰

1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.
2. In the event of a change in the law applicable to a given case prior to a final judgment, the law more favorable to the person being investigated, prosecuted or convicted shall apply.
3. In exception to paragraph 1 of this article, should the crime of fraud in obtaining nuclear weapons, nuclear weapon technology, or fissile material be committed as defined to Article 129, paragraph 2, section (e)(ii), a person may be considered criminally responsible for the crime even though the technology may have been initially obtained or developed pursuant to Article IV of the NPT prior to the entry into force of the Statute.¹⁰¹

It is further proposed that Article 30 of the Rome Statute of the International Criminal Court shall be amended to state:

Article 30

Mental Element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
 - (a) In relation to conduct, that person means to engage in the conduct; or
 - (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, “knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. “Know” and “knowingly” shall be construed accordingly.
4. In exception to paragraph 1 of this article, a person may be held criminally responsible and liable for failure to secure lawfully possessed

¹⁰⁰ *Ratione Personae*, literally translated from Latin as “by reason of the person,” is an international criminal law term relating to personal jurisdiction. BLACK’S LAW DICTIONARY 1377 (9th ed. 2009).

¹⁰¹ The Rome Statute, *supra* note 44, art. 24. This paragraph is specifically designed to insure that the tribunal would have jurisdiction over nations that gained access to nuclear technology under Article IV of the NPT then later utilized the technology in the development of nuclear weapons.

nuclear weapons, nuclear weapon technology, or fissile material as defined in Article 129, paragraph 2, section (f) if he knew or should have known that his negligent actions may lead to the unlawful proliferation of nuclear weapons.¹⁰²

It is further proposed that the Rome Statute of the International Criminal Court be amended to include the following Article 129:

Article 129

Crimes of Nuclear Weapon Proliferation

1. For the purpose of this statute “nuclear weapon proliferation” means any of the following acts committed by an individual, who is not an agent of a nuclear weapon state acting in the lawful performance of his official duties,¹⁰³ with the intent to develop or acquire nuclear weapons, nuclear weapon technology, or fissile material:

- (a) Illegal manufacture or possession of nuclear weapons, nuclear weapon technology, or fissile material;
- (b) Theft of nuclear weapons, nuclear weapon technology, or fissile material;
- (c) Use of fraud in obtaining nuclear weapons, nuclear weapon technology, or fissile material;
- (d) The distribution or transfer of nuclear weapons, nuclear weapon technology, or fissile material to any state or individual who is not a nuclear weapon state or a lawful agent of a nuclear weapon state acting in performance of his duties;
- (e) Failure to secure lawfully possessed nuclear weapons, nuclear weapon technology, or fissile material; or
- (f) Attempt or conspiracy to commit any of the crimes enumerated in sections (a), (b), (c) (d) or (e) of Paragraph 1 of this Article.

2. For the purpose of this Article:

- (a) “Nuclear weapon state” means any state that is recognized as a nuclear weapon State Party to the Treaty on the Non-Proliferation of Nuclear Weapons signed at Washington, London, and Moscow July 1, 1968 (hereinafter “NPT”) as well as non-parties of the Treaty on the Non-Proliferation of Nuclear

¹⁰² The amendment of article 30 is necessary to allow for the prosecution of failure to secure lawfully possessed nuclear weapons, nuclear weapon technology, or fissile material under a negligence standard.

¹⁰³ This exception is designed to protect the military and civilian personnel of nuclear weapon states while they are lawfully performing their duties as related to the handling of nuclear weapons, nuclear weapon technology, and fissile material.

Weapons that have been confirmed to be in possession of nuclear weapons by the Director General of the IAEA prior to the (insert date based upon the time of entry into force.)¹⁰⁴

(b) “Nuclear weapon” means any weapon that contains or uses one or more of the following:

- i. Plutonium;
- ii. Uranium not in the form of ore or ore residue that contains the mixture of isotopes as occurring in nature;
- iii. Enriched uranium, defined as uranium that contains the isotope 233 or 235 or both in such amount that the abundance ratio of the sum of those isotopes to the isotope 238 is greater than the ratio of the isotope 235 to the isotope 238 occurring in nature; or
- iv. Uranium 233.¹⁰⁵

(c) “Nuclear weapon technology” means:

- i. Devices or machinery designed specifically for the purpose of or intended to be used for the purpose of creating nuclear weapons or fissile material;
- ii. Devices or machinery designed specifically for the purpose of or intended to be used for the purpose of creating other devices or machinery described in Section i of this definition; or
- iii. Detailed designs, plans or schematics for devices or machinery described in Sections i or ii of this definition that are not generally available to the public.

(d) “Fissile material” means plutonium-239; uranium-233; or uranium containing the isotopes 235 or 233 or both in an amount such that the abundance ratio of the sum of these isotopes to the isotope 238 is greater than the ratio of the isotope 235 to the isotope 238 occurring in nature.¹⁰⁶

¹⁰⁴ This article is designed to allow states that are not signatories to the NPT to publically declare nuclear weapons and allow IAEA confirmation of the existence of such weapons in order to obtain nuclear weapon state status under this statute. Should the states refuse to allow the IAEA inspection, they would not be considered nuclear weapon states and thus be subject to prosecution under the statute.

¹⁰⁵ This definition is based on the definition of nuclear weapon as defined in 18 U.S.C. § 831(f)(1) (2006).

¹⁰⁶ This definition is based upon the definitions of “special fissile material” and “uranium enriched in the isotopes 235 or 233” as defined in Article XX of the Statute of the IAEA. Statute of the International Atomic Energy Agency, *opened for signature*, ¶ 1–2, Oct. 26, 1956, 8 U.S.T. 1093, 276 U.N.T.S. 3.

(e) “Fraud in obtaining nuclear weapons, nuclear weapon technology, or fissile material” means:

- i. The use of deceit to obtain nuclear weapons, nuclear weapon technology, or fissile material;
- ii. The use of any nuclear technology obtained or developed under Article IV of the Treaty on the Non-Proliferation of Nuclear Weapons (729 U.N.S.T. 161) for the manufacture of nuclear weapons or fissile material;¹⁰⁷ or
- iii. Lying, deceiving, or hiding information from an agent of the IAEA while they are executing their official duties and about the subject matter of those duties.¹⁰⁸

(f) “Failure to secure lawfully possessed nuclear weapons, nuclear weapon technology, or fissile material” means, in regard to nuclear weapons, nuclear weapon technology, or fissile material lawfully possessed by nuclear weapon states:

- i. Allowing a nuclear weapon, nuclear weapon technology, or fissile materials to be stolen due to a failure to provide reasonable security measures;¹⁰⁹ or
- ii. Failing to provide appropriate safety measures on nuclear weapons to prevent accidental or unauthorized detonation.¹¹⁰

3. For the purposes of Article 11, the crime of fraud in obtaining nuclear weapons, nuclear weapon technology, or fissile material as defined in section 2(e)(i) of this article shall be deemed to have been committed at

¹⁰⁷ This definition of fraud is specifically designed to criminalize the situation that occurred with North Korea and appears to be occurring in Iran where the nations gained access to nuclear technology under Article IV of the NPT then later utilized the technology for the development of nuclear weapons.

¹⁰⁸ This definition of fraud is designed to force compliance with IAEA inspectors.

¹⁰⁹ This subsection is designed to criminalize the negligent handling of nuclear weapons, nuclear weapon technology, and fissile materials by nuclear-weapon states. In addition to preventing an allegedly fraudulent loss as a method of providing a nuclear weapon to an allied state or group, the lack of security of some fissile material creates the single greatest risk of a terrorist organization gaining access to nuclear weapons.

¹¹⁰ This section is designed to alleviate concerns regarding states that possess nuclear weapons but lack adequate countermeasures designed to prevent the accidental or unauthorized detonation of nuclear weapons. The reality that a failed nuclear weapon state could occur or that an intact nuclear weapon could be stolen makes it essential that the weapons be unusable except by the government of the nuclear-weapon state.

the time that such technology was initially obtained or developed pursuant to Article IV of the NPT.¹¹¹

CONCLUSION

The defiance of North Korea and Iran combined with the nuclear armament of Pakistan, India, and Israel show that the current nuclear non-proliferation regime, as enforced through sanctions by the Security Council and the global disrepute that occurs when states attempt to develop or acquire nuclear weapons, is not enough to deter these countries or their bad actors from continuing to develop and proliferate nuclear weapons and related technologies. In order to disincentivize individual decision-makers from pursuing the acquisition of nuclear weapons, the penalties for doing so must directly affect those individuals who are attempting to obtain or develop nuclear weapons.¹¹² The criminalization of the proliferation of nuclear weapons should provide the necessary deterrence to not only the national leaders and regime elites, but also to the scientists and engineers who are essential in the development of nuclear weapon technology.¹¹³

The Security Council, though the establishment of an International Nuclear Weapon Proliferation Tribunal, would be the most efficient international forum to criminalize nuclear weapon proliferation. The Security Council has a track record of success in criminal prosecution through the ICTY and ICTR,¹¹⁴ they could rapidly institute such a tribunal, and they have the power to enforce criminal jurisdiction on a global level.¹¹⁵ However, the concept of either the West or the five

¹¹¹ This clause is specifically intended to prevent another situation similar to North Korea achieving nuclear weapons capability that it developed while still a signatory of the NPT. If a nation received nuclear technology under Article IV of the NPT prior to the entry into force of Article 129 of the Rome Statute, they may not later use that technology to develop nuclear weapons and claim a lack of jurisdiction under Article 11 of the Rome Statute. Further, states such as Iran that claim to be developing nuclear technology for peaceful purposes must be held accountable if it uses technology provided or developed under the NPT in order to create nuclear weapons.

¹¹² See John Norton Moore, *Newer Theories in Understanding War: From the Democratic Peace to Incentive Theory*, in NATIONAL SECURITY LAW 15, 23 (John Norton Moore & Robert F. Turner eds., 2d ed. 2005).

¹¹³ *Id.*

¹¹⁴ For an exploration of the success of the ICTY and ICTR see generally LARA J. NETTELFIELD, *COURTING DEMOCRACY IN BOSNIA AND HERZEGOVINA: THE HAGUE TRIBUNAL'S IMPACT IN A POSTWAR STATE* (2010); see Timothy Gallimore, *The Legacy of the International Criminal Tribunal for Rwanda (ICTR) and its Contributions to Reconciliation in Rwanda*, 14 NEW ENG. J. INT'L & COMP. L. 239 (2008).

¹¹⁵ U.N. Charter, *supra* note 10, ch. VII.

recognized nuclear weapon states defining and punishing criminal nuclear weapon proliferation smacks of hegemony and could become a significant political issue.¹¹⁶

The ICC, through an amendment to the Rome Statute, could also provide a forum to prosecute nuclear proliferators. While it would not have the global reach of a tribunal created by the Security Council, the ICC may be considered less of a western political institution as each signatory state specifically concedes jurisdiction to the Court.¹¹⁷ Further, the ICC is already a functioning court and, while the multilateral negotiations required to pass an amendment to the Rome Statute would likely take significantly more time than the passage of a Security Council Resolution, the Prosecutor at the ICC could immediately begin investigating and prosecuting crimes of nuclear weapon proliferation as soon as the amendment comes into effect.

Finally, the ICTY, ICTR, and ICC all currently co-exist and there is no reason that both the signatories of the Rome Statute and the Security Council could not act simultaneously to criminalize the proliferation of nuclear weapons. The catastrophically dire consequences of nuclear weapons being acquired by an unstable government or a terrorist group are so severe that immediate action to prevent the further proliferation of nuclear weapons should be taken by all capable international agencies.¹¹⁸ As neither intense sanctions nor prolonged diplomatic negotiations have stopped the continued proliferation of nuclear weapons, it is time to take direct steps to stop the individual proliferators through criminal prosecution.

¹¹⁶ Hamilton, *supra* note 50.

¹¹⁷ Rome Statute of The International Criminal Court, art. 12, U.N. Doc. A/CONF. 183/9 (1998).

¹¹⁸ See generally GRAHAM ALLISON, NUCLEAR TERRORISM: THE ULTIMATE PREVENTABLE CATASTROPHE (1st ed. 2004) (exploring the dire consequences of nuclear terrorism).