

## **Fallout from the AQ Khan Network and the Clash of National Interests**

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**Abstract.** In February 2004, Pakistani scientist Abdul Qadeer Khan confessed to selling nuclear secrets to Iran, Libya and North Korea. In the years since then, we have learned a great deal about the challenges presented by transnational, privatized nuclear proliferation. Those lessons highlight the need for better coordination among the international community, increased authority for the International Atomic Energy Agency and a new framework for prosecuting nuclear traffickers that recognizes the threat to international security posed by their activities and provides penalties in accordance with the danger. Efforts to prosecute Khan and participants in his network have faltered. Khan was pardoned by the Pakistani government and remains outside the reach of the International Atomic Energy Agency and other interested parties. Similarly, prosecutions of others suspected of involvement in the network in Germany, Malaysia, South Africa and elsewhere were hampered by competing national interests and disputes between governments. Finally, the attempt by Switzerland to prosecute three of its citizens accused of helping Khan has been undermined by the destruction of evidence in response to what a Swiss parliamentary commission identified as pressure from the United States. The difficulties in prosecuting suspected proliferators robs the international community of its most effective deterrent and makes the token fines and minimal sentences nothing more than the cost of doing business for those who traffic in nuclear technology. In addition, the destruction of evidence in the Swiss case made it more difficult to track down remaining elements of Khan's operation and to understand the full scope of its sales to foreign customers. This paper explores the interactions between various governments that contributed to the absence of serious prosecutions in the worst private proliferation episode in history and proposes a methodology to toughen penalties for proliferation.

### **1. Introduction**

When Pakistani scientist Abdul Qadeer Khan appeared on national television in his country to confess to selling nuclear technology to Iran, Libya and North Korea, officials in some world capitals expressed relief that the threat from the notorious Khan network had ended. In a speech at the National Defense University in Washington, D.C., on February 11, 2004, President George W. Bush delivered an address in which he hailed the international cooperation that led to Khan's confession. "Governments around the world worked closely with us to unravel the Khan network, and to put an end to his criminal enterprise," said President Bush."A.Q. Khan has confessed his crimes, and his top associates are out of business."<sup>1</sup>

Unfortunately, the American president was too optimistic. Khan was pardoned even before President Bush's speech, and today he is essentially a free man, living in Islamabad and speaking out boldly against the Western governments that tried to halt his proliferation activities. Further, none of the people associated with his network are in prison today. The handful who received prison sentences are all now free. In addition, many people identified with Khan's network were never prosecuted, and some have never been identified publicly.

#### **1.2**

Khan's confession and the international cooperation praised by President Bush did not end the threat posed by transnational, privatized nuclear proliferation. Rather, we contend that the last six and a half

years have exposed weaknesses in the world's efforts to stop the spread of nuclear weapons technology and raised significant concerns about the ability of the international community to combat the next iteration of such a nuclear network. North Korea has conducted two nuclear tests and Syria engaged in a clandestine nuclear program of still-undetermined scope. Most directly, through centrifuge designs and technology originally provided through the Khan network, Iran continues to enrich uranium despite continuing protests from the International Atomic Energy Agency (IAEA), four rounds of sanctions from the United Nations and economic restrictions imposed by various Western nations.

These conditions, in particular the unresolved, long-running cases of North Korea and Iran, have left the IAEA verification system under stress and eroded the agency's credibility. These dual weaknesses are occurring at a time when the world appears poised on a civilian nuclear renaissance that will increase the possibilities for technology to be diverted to clandestine weapons programs, therefore increasing the responsibility for the IAEA and the international community to develop new mechanisms to meet the challenge to avoid the spread of nuclear weapons.

## **2. Factors Limiting Prosecutions**

The circumstances behind Khan's pardon are well known. The perception of the Pakistani public that Khan was largely responsible for the country's nuclear arsenal, while not necessarily accurate, meant that he remained a popular, almost revered figure even after his confession that he had divulged Pakistan's most closely guarded secrets. President Pervez Musharraf later acknowledged that the disclosure of Khan's actions was one of his most embarrassing moments.<sup>2</sup> Yet Musharraf lacked the political strength to imprison Khan or even allow outside agents from the IAEA or the Central Intelligence Agency to interrogate the scientist to try to discover the full extent of his proliferation activities. What is less well known is that national interests similar to those that tied Pakistan's hands in dealing forcefully with the architect of the world's most dangerous proliferation ring hampered the ability of prosecutors in other countries to go after other participants in Khan's network.

### **2.1**

One of Khan's principal associates, B.S. A. Tahir, was taken into custody in late 2003 by Malaysian security police. Tahir had operated as a sort of logistics officer for Khan's network, first in Dubai and later at a factory outside the Malaysian capital of Kuala Lumpur. Unlike Khan, Tahir was made available to some outside investigators. He was interviewed briefly by two IAEA officials in early 2005 and later by German authorities who were compiling a case against another network figure, Gotthard Lerch.<sup>3</sup> But the Malaysian police declined to make Tahir available for follow up interviews with the IAEA officials, who were trying to unravel to full scope of Khan's activities. The Malaysians also refused to send Tahir to Germany to testify in Lerch's trial. Indeed, Tahir was never brought to any public court; rather, he was held incommunicado under the Internal Security Act.

The Malaysian government may have had legitimate security interests in limiting Tahir's exposure. But those interests were also affected by Tahir's involvement with the son of Prime Minister Abdullah Ahmed Badawi. The son was one of the owners of the Malaysian company whose subsidiary was used to secretly manufacture centrifuge components for the Libyan nuclear weapons program being assembled by Khan's far-flung network. There is no evidence that the prime minister's son was aware that Tahir was using the Malaysian factory as part of a proliferation ring. Nonetheless, Tahir was held incommunicado, without official charges, to avoid potentially embarrassing publicity. Tahir was released in June 2008 when the authorities said he was no longer considered a threat to national security.<sup>4</sup>

### **2.2**

Other prosecutions were handicapped by nationalist considerations. In the case of Gotthard Lerch, German authorities initially charged him with treason and other crimes in connection with his suspected role in the sale of nuclear technology to Libya as part of the Khan network. But the prosecutors had trouble collecting evidence because the intelligence agencies that knew the most, the CIA and Britain's MI6, were unwilling to share information. Prosecutors traveled to Malaysia and interviewed Tahir, but the Malaysian government refused to send him to Mannheim to testify. Instead, they provided an affidavit confirming his statements, which was inadmissible because German law entitles a defendant to cross examine his accusers.

Similar problems had arisen when the German prosecutors tried to arrange for two other Khan associates, Gerhard Wisser and Daniel Geiges, to come from South Africa to testify. The South Africans had charged Wisser and Geiges and refused to send them to Germany. Instead, they suggested that the two men respond to questions through a video link up from a South African courtroom. The Germans rejected the offer.

Lerch had been arrested in Switzerland and, as part of his extradition to Germany, the Swiss had required the Germans to drop the treason charge because it was regarded as a political crime and the Swiss constitution prohibits extradition for political charges. Dropping the most serious charge against Lerch meant the case was transferred from the federal system to the local court in Mannheim, where prosecutors had less experience with complex international crimes. The Swiss also damaged the German case by refusing to send Urs Tinner, a Swiss technician and participant in the Khan network, to Germany to testify in the Lerch trial.

In October 2008, the Germans convicted Lerch for shipping uranium enrichment equipment to Libya between 1999 and 2003. The more serious charges had been dropped or dismissed. Lerch was sentenced to time he had served in pretrial detention, which meant he was released immediately.

### 2.3

In South Africa, prosecutors building the case against Wisser and Geiges were confronting difficulties getting cooperation from the American government. The two men had been involved in the construction of an elaborate feeder system designed for the Libyan uranium enrichment plant being planned by Khan and his cohorts. The South Africans had seized hard evidence that seemed to implicate the two men -- eleven shipping containers of equipment which was intended for the Libyan enrichment plant and paperwork connecting them to the plot. The South Africans also had the cooperation of a key witness, Johan Meyer, another South African engineer who was prepared to testify that he had built the feed-and-withdrawal system on instructions from Wisser and that they both knew it was destined for a Libyan nuclear plant.

But the prosecution wanted to strengthen the case with testimony from American experts who could provide the context for the Libyan program and describe the scope and danger of the Khan network. The Americans did not want to air information about the network in a public setting, apparently fearing that it might expose ongoing intelligence operations or sources and methods. The United States government insisted that, in exchange for its assistance, the trial be conducted behind closed doors, which contradicted South African law.<sup>5</sup> In the end, the South Africans felt their case was too weak to risk trial, so they reached plea bargains with Wisser and Geiges. In September 2007, Wisser pleaded guilty to attempting to export centrifuge equipment to Libya and transferring other sensitive equipment to Pakistan; he was given an eighteen-year prison sentence, which the court reduced to only three years of house arrest. A few months later, Geiges, who was suffering from cancer, pleaded guilty to manufacturing and export equipment to Libya and Pakistan; he was given a thirteen-year suspended sentence. Meyer, whose

company built the feed system for Libya, was granted complete immunity in exchange for helping prosecutors in the Wisser and Geiges cases.

### **3. The Clash of Interests: A Case Study**

In January 2009, a Swiss parliamentary commission made public a fifty-eight-page report that described the way in which the American government had applied pressure to the Swiss government to destroy evidence collected from three Swiss citizens who were participants in the Khan network. The report, which received limited publicity outside Switzerland, recounted numerous specific instances over a period of nearly four years in which the administration of President George W. Bush intervened at the highest levels of the Swiss government to block efforts by the Swiss police to prosecute the three Swiss men -- Friedrich Tinner and his sons, Marco and Urs Tinner -- and possibly to prosecute agents of the Central Intelligence Agency who had recruited the Tinners to spy for the United States. The parliamentary commission concluded that the Swiss government had bowed to U.S. pressure and destroyed material that was relevant to an ongoing criminal inquiry.<sup>6</sup>

#### **3.1**

In research for a forthcoming book, the authors of this paper have expanded considerably on the information provided in the Swiss parliamentary report. For the purposes of this paper, the most salient information deals with the role of the International Atomic Energy Agency in the Swiss episode. Our research shows that the IAEA, after being voluntarily invited into the process by the appropriate Swiss officials, was caught between factions of the Swiss government who wanted to prosecute the Tinners for their role in helping Libya's nuclear program and American officials who opposed the prosecutions for fear that they could expose intelligence operations.

The evidence obtained from the Tinners was far more extensive than the Swiss government disclosed when it revealed in May 2008 that it had destroyed the material. The evidence included sensitive nuclear designs and names of previously unidentified participants in the Khan network. At various points between 2004, when the involvement of the Tinners in the Khan ring was first disclosed publicly, and the destruction of the records, officials from the IAEA were permitted to review the material. However, our research found that they were not allowed to retain copies of the documents, even those that would have assisted the agency in its ongoing inquiry into the extent of the Khan network and the whereabouts of some nuclear technology that remains missing today.

As a result, the destruction of most of the material in early 2008 robbed the agency of the ability to understand better the impact of Khan's proliferation. The destruction also made it virtually impossible to prosecute the Tinners for years of suspected complicity with Khan; all three men are now free, though a Swiss magistrate continues to try to reconstruct the evidence through some documents that were mistakenly retained in government files.

### **4. Toward a New Era in Deterrence**

The Khan network is widely regarded as the world's most dangerous private proliferation operation. Over the course of twenty-five years, it sold nuclear technology to North Korea, Iran and Libya. Yet none of the participants identified when the ring collapsed in early 2004 remains in jail today. The light sentences and fines that were assessed against them should be seen as little more than the cost of doing business in a world where the profits can be extensive. For instance, Khan remains a wealthy man and German authorities calculated that Gotthard Lerch alone been paid \$34 million in connection with the Libyan project.

Despite its mandate to safeguard the world from the diversion of civilian nuclear technology to military uses, the IAEA proved ineffective in uncovering the extent of Khan's activities and in advocating for the disclosure of evidence gathered by national governments and intelligence agencies. By design, the agency lacks its own intelligence-gathering operation, which means it depends to a large extent on the cooperation of member states, which can be sporadic. The aftermath of the Khan case demonstrates the need for new and deeper cooperation between the IAEA and the international community, particularly the nuclear weapons states.

Improving the ability of the IAEA to monitor the spread of nuclear-weapons technology, coupled with better cooperation among nations and a tougher international legal regime, should not wait for the next crisis. When nuclear weapons are involved, the world cannot afford a single mistake.

#### **4.1**

In real ways, the IAEA is fighting tomorrow's wars with yesterday's tools. For the past two decades, the vital safeguards department has had precious little budget growth -- yet the number of countries engaged in nuclear activities has expanded and new threats like the Khan network have emerged. Similarly, the essential forensic work done at the agency's laboratories at Seibersdorf is hampered by equipment that needs at least \$40 million for updating in the next five years. Finally, as the Swiss case study indicates, it is far too easy for countries to withhold information from the IAEA, robbing the international community of the best means possible for understanding the patterns in procurement that could identify rogue nuclear programs at the incubation stage.

The IAEA is engaged in efforts to correct some of these weaknesses. The safeguards department is finalizing a five-year strategic plan to improve its operations at every level. But without a funding increase, there are serious questions about whether the agency can keep pace with the expanding interest in nuclear energy.

In order to leverage its resources more effectively, the IAEA is developing a new information management system that monitors the worldwide nuclear trade, with an emphasis on clandestine activities. The goal is to identify front companies and even government agencies acquiring nuclear-related technology outside the proscribed channels and regulations. This program, which started in the aftermath of the disclosure of Khan's activities, has received support from the U.S. Department of Energy and Department of State as well as other countries. The program has maintained a relatively low profile because its activities have attracted criticism from some IAEA member states who have expressed fears that the agency is developing an espionage capacity. But in our view, the information-collection process represents an essential early warning mechanism on which the agency and the international community can depend to discover potential secret weapons projects before it is too late to stop them.

#### **4.2**

One critical step in this development would be the full cooperation of the forty-six countries that comprise the Nuclear Suppliers Group (NSG). The organization was created after India's nuclear test in 1974 to try to control the spread of technology that could be used for nuclear weapons purposes. Over the years, the NSG has developed a set of guidelines for exports that have served as both a restriction on the spread of technology and a system for identifying suspicious patterns in purchases of nuclear-related equipment.

The problem is that most of the countries that participate in the NSG are, to varying degrees, reluctant to share information on purchases and, equally important, denials of export licenses with an outside organization like the IAEA. The objection raised most often is that this is critical commercial information

that must be kept from competitors. There also sensitivities among some member states, particularly within the nonaligned movement, that the NSG represents an attempt by the nuclear "haves" to retain technological dominance over the "have nots."

While there may be some validity to those anxieties, it is essential to counter-proliferation efforts that the countries that possess nuclear and nuclear-related technology share information with the IAEA in order to facilitate efforts to identify potential abusers. At least two major weapons states currently provide data to the IAEA's information management system on export approvals and denials, but other critical countries do not, including the United States, according to IAEA officials.

Clearly, the NSG should develop a mechanism that simultaneously protects against the unauthorized disclosure of commercial information and enables the IAEA to compile the critical evidence required to spot suspicious procurement patterns wherever they are occurring. This is a job for the organization mandated by the United Nations to safeguard against the spread of nuclear weapons, rather than for individual countries or even an ad hoc group like the NSG.

### 4.3

The threat of transnational nuclear trafficking poses new challenges for the IAEA and the world's law enforcement and intelligence agencies. Crimes that cross national borders require laws and law enforcement that transcend national interests.

In the aftermath of the Khan affair, the United Nations Security Council passed Resolution 1540 in 2004, requiring all UN member states to enact national legislation to prevent and criminalize trafficking in weapons of mass destruction by non-state actors. The resolution reflected the acknowledgement that the first line of defense against nuclear trafficking rests with individual nations themselves. However, nations have been slow to implement the requirements of 1540. The majority of those who have failed to enact the required legislation are developing countries with limited budgets and what may seem to be more immediately domestic concerns.

In 2008, the Security Council reaffirmed its commitment, and sought to provide some momentum to the requirements, by passing Resolution 1810. The more recent resolution calls upon those states that have not complied with 1540 to increase their efforts and instructs the 1540 Committee to intensify its efforts to promote full implementation.<sup>7</sup>

As a complement to those two resolutions, the United Nations and its member states should consider developing a legal regime that puts trafficking in weapons of mass destruction on a par with genocide as a crime against humanity. Such an action would augment anti-proliferation laws in countries that have adopted them, and bring the force of law to those countries that have lagged in the effort.

### 4.4

There have been a handful of efforts to develop an international legal regime that recognizes that nuclear proliferation should be considered a crime against humanity. In 2009, U.S. Senator Bob Casey proposed legislation that would bolster efforts to deter and prevent nuclear material from falling into the hands of terrorists or rogue states by establishing nuclear trafficking as a crime against humanity. Such a law would make it easier to prosecute international nuclear traffickers in U.S. courts. Casey's legislation also would require the U.S. secretary of state to seek a United Nations General Assembly resolution recognizing nuclear smuggling as a crime against humanity and requiring member nations to enact tougher penalties for participating in such acts.

The prospects of such a bold step are poor, but the world should not wait until it is shocked into action by the detonation of a nuclear device. As a preliminary step, the United Nations Security Council should take steps to impose a freeze on the worldwide assets of convicted nuclear proliferators like A.Q. Khan and bar such individuals from traveling to any UN member state, a step first proposed in September 2009 by Leonard S. Spector, the Washington director of the Monterey Institute of International Studies' James Martin Center for Nonproliferation Studies.<sup>8</sup> Such action would represent a powerful deterrent against potential proliferators and rebuke to countries that treat these crimes lightly. And it should be followed by the adoption of nuclear proliferation as a crime against humanity.

The obstacles to such an international law, and to the thorough prosecution of nuclear traffickers, are substantial. Nations are reluctant to give up any sovereign rights. They have a right to protect their commercial interests and a responsibility to protect their intelligence-gathering operations. But nations and their leaders also have a right and a responsibility to subordinate those goals to the greater good of protecting the world from the spread of nuclear weapons.

## References

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<sup>1</sup> [http://www.nti.org/e\\_research/official\\_docs/pres/whitehouse20040211\\_wmd.pdf](http://www.nti.org/e_research/official_docs/pres/whitehouse20040211_wmd.pdf)

<sup>2</sup> Pervez Musharraf, *In the Line of Fire*, (New York: Free Press, 2006) p. 292.

<sup>3</sup> Author interviews with IAEA officials.

<sup>4</sup> <http://www.bangkit.net/2008/06/27/press-statement-bsa-tahir-released-many-more-still-detained-under-isa/>

<sup>5</sup> Author interviews with South African and American officials.

<sup>6</sup> <http://www.parlament.ch/e/organe-mitglieder/delegationen/geschaefspruefungsdelegation/fall-tinner/Pages/default.aspx>

<sup>7</sup> UN Security Council Resolution 1540: PART I: Resolution 1810: Progress since 1540, *WMD Insights*, August 2008.

<sup>8</sup> [http://www.foreignpolicy.com/articles/2009/09/10/punishing\\_aq\\_khan](http://www.foreignpolicy.com/articles/2009/09/10/punishing_aq_khan)