Comparative analysis on the national approaches for the legal implementation and criminalization of the offences under the Convention for the Physical Protection of Nuclear Material (CPPNM) and its Amendment

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Overview

• Introduction
• Challenges associated to the application of the CPPNM/A
  1. Correct qualification of the crime
  2. Determination of sentence and penalties
  3. Procedural difficulties in the cases with transnational element
• Recommendations
• Conclusions
Scenario 1: Qualification of crime

Mr. Smith steals nuclear material in country A and goes to country B to sell it.

He gets caught by the law enforcement authorities in country B and put in detention.

Under which criminal charges is Mr. Smith investigated and prosecuted?
Distinction between offences

Criminalization in:
- Criminal codes
- Acts
- Statutory laws

Theft = general legal term to lump all crimes against property (burglary, robbery, embezzlement etc.)

Stealing = the action of taking sth specific

SIGNIFICANT NUANCES IN THE APPLICATION OF PENALTIES
## Aim and Content of the CPPNM/A

| SCOPE | Physical protection of nuclear material for peaceful purposes during transportation | Criminalization provisions | International cooperation | Physical protection of nuclear material for peaceful purposes during:  
- Transportation  
- Domestic Use  
- Storage | Criminalization provisions | International cooperation |
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<tbody>
<tr>
<td>TYPE OF OFFENCES</td>
<td>Theft of nuclear material</td>
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### Table

<table>
<thead>
<tr>
<th>Aim and Content</th>
<th>CPPNM</th>
<th>CPPNM Amendment</th>
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<tbody>
<tr>
<td>ADOPTED</td>
<td>26 October 1979</td>
<td>2005</td>
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<tr>
<td>IN FORCE</td>
<td>8 February 1987</td>
<td>2016</td>
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<tr>
<td>STATE PARTIES</td>
<td>155</td>
<td>115</td>
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</table>

**EXPANDED**
CPPNM/A Three Main Scopes

1. Physical Protection
2. Criminalization
3. International Cooperation
Criminalization: Art. 7 CPPNM/A

Paragraph 1 of Article 7 of the Convention is replaced by the following text:

1. The intentional commission of:

(a) an act without lawful authority which constitutes the receipt, possession, use, transfer, alteration, disposal or dispersal of nuclear material and which causes or is likely to cause death or serious injury to any person or substantial damage to property or to the environment;

(b) a theft or robbery of nuclear material;

(c) an embezzlement or fraudulent obtaining of nuclear material;

(d) an act which constitutes the carrying, sending, or moving of nuclear material into or out of a State without lawful authority;

(e) an act directed against a nuclear facility, or an act interfering with the operation of a nuclear facility, where the offender intentionally causes, or where he knows that the act is likely to cause, death or serious injury to any person or substantial damage to property or to the environment by exposure to radiation or release of radioactive substances, unless the act is undertaken in conformity with the national law of the State Party in the territory of which the nuclear facility is situated;

(f) an act constituting a demand for nuclear material by threat or use of force or by any other form of intimidation;

(g) a threat:

(i) to use nuclear material to cause death or serious injury to any person or substantial damage to property or to the environment or to commit the offence described in sub-paragraph (e), or

(ii) to commit an offence described in sub-paragraphs (b) and (e) in order to compel a natural or legal person, international organization or State to do or to refrain from doing any act;

(h) an attempt to commit any offence described in sub-paragraphs (a) to (e);

(i) an act which constitutes participation in any offence described in sub-paragraphs (a) to (h);

(j) an act of any person who organizes or directs others to commit an offence described in sub-paragraphs (a) to (h); and

(k) an act which contributes to the commission of any offence described in sub-paragraphs (a) to (h) by a group of persons acting with a common purpose; such act shall be intentional and shall either:
Turning international law in national law

REMARKS
- Not a self-executing process
- Monist and dualist legal systems
- International law and domestic law can conflict
- Special measures need to be in place to enforce a treaty in national law

EXISTING LEGAL FOUNDATION OF THE INTERNATIONAL SYSTEM REMAINS WEAK

<table>
<thead>
<tr>
<th>Convention</th>
<th>Countries with materials</th>
<th>Countries without materials</th>
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<tbody>
<tr>
<td>Physical Protection Convention (CPPNM)</td>
<td>22</td>
<td>2</td>
</tr>
<tr>
<td>2005 CPPNM Amendment (not in force)</td>
<td>19</td>
<td>5</td>
</tr>
<tr>
<td>Nuclear Terrorism Convention (ICSANT)</td>
<td>18</td>
<td>6</td>
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</table>

Nuclear Threat Initiative Index, 2016
Challenge 1: Correct qualification of the crime

- Difficulties in practice to prosecute the crime when there is no legislation in place
- An incorrect qualification of crime is the application of law that does not conform to the actual circumstances of the case
- Consequences of wrong qualification:
  - Misrepresents the nature of perpetrated crimes
  - Entails the passing of erroneous sentences
Scenario 2: Determination of the punishment

Country A
No special offence of "theft of nuclear material" under its national legislation

Country B
Party to CPPNM/A and has already implemented in its national legislation the offences under Art. 7

Which penalties should be imposed to Mr. Smith?
Responsibility of the State to criminalize

Preamble CPPNM/A

“The responsibility for the establishment, implementation and maintenance of a physical protection regime within a State Party rests entirely with that State.”

”Apart from the commitments expressly undertaken by State Parties under this Convention, nothing shall be interpreted as affecting the sovereign rights of a State.”

RIGHT AND OBLIGATION OF THE STATES TO CRIMINALIZE AND APPLY PENALTIES ACCORDING TO THEIR OWN NATIONAL NEEDS AND INTERESTS
Divergences between legal systems

States’ approach to the ratification of CPPNM/A:
Dualist systems
Monist systems
## Implementation differences in national legislation

<table>
<thead>
<tr>
<th>Types of crime</th>
<th>Civil law systems</th>
<th>Common law systems</th>
<th>Religious law systems (Shariia)</th>
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<tr>
<td>Crime against:</td>
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<td>• Person</td>
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<td>• Property</td>
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<td>• State</td>
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<td>Three types of crimes:</td>
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<td>• Hudud</td>
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<td>• Qisas</td>
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<td>• Ta’zir</td>
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<th>Forms of punishment</th>
<th>Civil law systems</th>
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<td>• Imprisonment</td>
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<td>* range from a few months/years to life sentence</td>
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<td>• Fine(s)</td>
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<td>** range from a few hundreds to hundreds of thousands of $/€</td>
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<td>** range from a few hundreds to hundreds of thousands of $/€</td>
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<tr>
<td>• Crucifixion, amputation of limbs, lashing</td>
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<td>• Retaliation, financial compensation</td>
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<td>• Capital punishment</td>
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Penalties: crimes against property (theft of nuclear material)

Sec. 33 of the Australian Nuclear Nonproliferation Safeguards Act (1987):
Stealing nuclear material
A person shall not:
   (a) steal;
   (b) fraudulently misappropriate;
   (c) fraudulently convert to that person’s own use; or
   (d) obtain by false pretences any nuclear material.
Penalty: **Imprisonment for 10 years.**

Chapter 28 of the Finnish Penal Code (39/1889, amended up to 766/2015 included)
Section 1 - Theft (769/1990)
(1) A person who appropriates movable property from the possession of another shall be sentenced for theft to a **fine or to imprisonment for at most one year and six months.**
(2) An attempt is punishable.

Article L1333-9, Code de la défense (Modifié par Ordonnance n°2016-128 du 10 février 2016 - art. 50)
I. Est puni d'un **emprisonnement de 10 ans et d'une amende de 7 500 000 euros:**
1° Le fait d'exercer sans autorisation les activités mentionnées à l'article L. 1333-2 ou de se faire délivrer indûment par quelque moyen frauduleux que ce soit ladite autorisation ;
2° Le fait de s'approprier indûment les matières nucléaires mentionnées à l'article L. 1333-1.
Challenge 2: Avoid disparity in sentencing

• Disparity is unjustified if the rationale for the differences cannot be traced to relevant distinctions of character or behavior which bear a certain relationship to the aims of the punishment.

• Often times, most judges could point to factors which influence their choice of sentence, but they lack objectivity.

• Subjectivity in sentencing, lack or proper guidelines, and virtual limitations on the exercise of judicial discretion.

• Set of clarifying guidelines with regard to sentencing policies must be put forward by the judiciaries.
Scenario 3: Elements of transnationality

*Offences committed by offenders in other State than that of their nationality
*Various conflicts of law

Country A requests the extradition of Mr. Smith to be prosecuted and tried in its country of nationality.

Mr. Smith is prosecuted under terrorism charges under the ICSANT, despite pleading that his motive was not a terrorist act, but financial gain.
Art. 7 CPPNM/A and the element of "terrorism"

The CPPNM and its Amendment:

• Do not require the element of “terrorism” as part of the offence
• Does require the criminalization of certain offences independently of terrorist motivations
• Terrorist motive/ intent may be considered an aggravating circumstance
• Need to determine the form of legislation such as penal code, nuclear law, regulations etc.
Challenge 3: Procedural issues related to extradition and legal mutual assistance

- Issues related to the jurisdiction for investigating and prosecuting the case
- In some countries the act of stealing and/or selling nuclear material is/not criminalized
- Punishment for acts with a terrorism element are higher
- Issues related to extradition and mutual legal assistance
- Conditions for granting the extradition
Recommendations

1. **Simplification**
   - Number of institutions necessary for implementation (too many institutions involved, accountability problems)
   - Number of necessary acts or laws needed for the implementation (some countries have provisions in about 30 pieces of legislation)

2. **Integration**
   - Implemented provisions need to be taken into consideration the legal framework of each State
   - Provisions do not exist in a legal vacuum, but rather need to coexist with other provisions

3. **Certain level of harmonization**
   - Baseline for the amount of penalties
   - Avoid very disproportionality effects
Crossroads: challenges and opportunities

90 States
6 continents
What is the ultimate aim of universalization?

Universalization (noun) = \textit{def.} to universalize, to generalize (Webster Dictionary)

Universalize (verb) = \textit{def.} give a universal character or application to (something, especially something abstract); bring into universal use; make available for all (Oxford Dictionary)

- Ratification of the treaty and universal adherence
- Incorporation into domestic law
- Full and effective implementation
- (Uniform) penalties?
Thank you for your attention!

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