INTRODUCTION

Nothing scares political leaders, policy-makers and the constituencies they serve more than the spectre of nuclear terrorism.\(^1\) The sheer horror that could be wrought by a nuclear weapon in the hands of terrorist actors is almost unfathomable. If an attack took place in a crowded metropolitan area, hundreds of thousands—if not millions—could lose their lives in an instant, with many more suffering through the excruciating long-term effects of exposure to toxic radiation. Infrastructure would be destroyed. Public services and utilities decimated. It suffices to say that such an act would permanently and irrevocably change the world as we know it.

As a result of this fear, and because of the unique transnational nature of the threat, concerted action has been taken at the international level to counter nuclear terrorism. This paper focuses on a particular subset of those efforts, namely the international legal regime to counter acts of nuclear terrorism. Specifically, it examines the issue through the lens of the International Convention on the Suppression of Acts of Nuclear Terrorism (ICSANT), which was drafted expressly to address the threat. It begins by analyzing the different substantive provisions of ICSANT and exploring the ways the convention pulls together various fragmented legal regimes. It also examines the way ICSANT provides a formally coherent system of rules to counter the particular issue of nuclear terrorism as well as the mechanisms it includes to enhance functional coordination between the different prominent actors who are seized with addressing the threat.

While the analysis of ICSANT is largely descriptive, this paper also examines the weaknesses in the current legal regime and prescribes recommendations for strengthening it.

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Given the fragmentation inherent in the system, for instance, it should rightly be asked whether the convention has been effective in serving as an organizing force. The issue of implementation is also critical. While ICSANT and the various legal orders it ties together oblige States to take certain steps to counter nuclear terrorism, the integration of those obligations into national legal systems—and their corresponding translation into operational policy and action—requires careful scrutiny and continuous review. Accordingly, this paper addresses the role of international law as the creator of a multi-layered institutional framework to address the threat, and analyzes whether ICSANT and the various other instruments it incorporates, as well as those that exist in a close relationship to the convention, have been successful in achieving that aim.

Finally, this paper includes a section on the relationship between the formal international legal regime to counter acts of nuclear terrorism, its subjects, namely States, and the individuals and groups whose actions the regime ultimately attempts to thwart, namely terrorists. Taking into account the provisions of ICSANT and the other relevant instruments, it is axiomatic that any act of nuclear terrorism will be carried out by a terrorist actor. While it is possible that States themselves could be complicit in individual acts of nuclear terrorism—for instance, through sponsorship of terrorist groups or through the illicit sale of nuclear material—thus violating their international legal obligations, the vast majority of potential perpetrators will likely be non-State actors. Such individuals or groups will either not recognize the formally applicable international legal regime, or operate outside the control of recognized governments, rendering the formal tenets of the international legal order considerably less effective. The ways in which terrorist actors think about nuclear terrorism, and the juridical reasons they cite to justify or refrain from carrying out such acts, are, therefore, critically important to formulating a comprehensive and coordinated legal regime, at both the local, national and international levels, to address the threat. Because of Al Qaeda’s influence and omnipresence in world-wide networks of terrorist activities, the group’s past actions with regard to the acquisition of nuclear material and the juridical justifications it has given for seeking to carry out acts of nuclear terrorism are instructive.

The conclusion summarizes the various threads of analysis. It takes account of the identified deficiencies in the existing international legal regime to counter acts of nuclear terrorism and attempts to chart a more effective way forward.

II. The International Convention on the Suppression of Acts of Nuclear Terrorism

ICSANT represents the codified lex specialis to counter acts of nuclear terrorism. It entered into force on 7 July 2007 and presently includes 86 States Parties. The Convention was drafted expressly to address the issue of nuclear terrorism; however, in its general structure it essentially replicates the preceding sectoral counter-terrorism instruments, including, principally, the International Convention for the Suppression of Terrorist Bombings, which entered into force in 1997, and the International Convention for the Suppression of the Financing of Terrorism, which entered into force in 1999. This should come as no surprise. Like the these

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preceeding sectoral conventions, ICSANT was drafted by the Ad Hoc Committee established by General Assembly resolution 51/210 in coordination with a working group of the Sixth Committee of the General Assembly before being adopted by the General Assembly and recommended to States for their further action. 3

ICSANT imposes an obligation on States Parties to criminalize offences within the scope of the Convention and to make these offences punishable by appropriate penalties. It also directs States Parties to establish jurisdiction, territorial as well as extra-territorial, over the offences set forth in the Convention and utilizes the strengthened version of the “extradite or prosecute” regime, which denies the “political offences exception” to suspected offenders.

A. Criminalize and punish

ICSANT provides, in its article 2, paragraph 1, that any person commits an offence within the meaning of the convention if that person unlawfully and intentionally: (a) Possesses radioactive material or makes or possesses a device: (i) With the intent to cause death or serious bodily injury; or (ii) With the intent to cause substantial damage to property or to the environment. Subparagraph (b) of article 2, paragraph 1 also provides that any person commits an offence within the meaning of ICSANT if that person unlawfully and intentionally: (b) Uses in any way radioactive material or a device, or uses or damages a nuclear facility in a manner which releases or risks the release of radioactive material: (i) With the intent to cause death or serious bodily injury; or (ii) With the intent to cause substantial damage to property or to the environment; or (iii) With the intent to compel a natural or legal person, an international organization or a State to do or refrain from doing an act.

The remainder of article 2 sets out alternative forms of criminal responsibility. Article 2, paragraph 2 holds that any person also commits an offence if that person: (a) Threatens, under circumstances which indicate the credibility of the threat, to commit an offence as set forth in paragraph 1 (b) of article 2; or (b) Demands unlawfully and intentionally radioactive material, a device or a nuclear facility by threat, under circumstances which indicate the credibility of the threat, or by use of force. In accordance with article 2, paragraph 3, any person also commits an offence if that person attempts to commit an offence. Finally, article 2, paragraph 4 provides that any person also commits an offence if that person: (a) Participates as an accomplice in an offence; or (b) Organizes or directs others to commit an offence; or (c) In any other way contributes to the commission of one or more offences by a group of persons acting with a common purpose. Such contribution must be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.

Article 5 of ICSANT provides the vital connection between acts deemed criminal within the scope of the convention, and the obligation of States to take appropriate measures to criminalize them within their domestic legal orders. The article requires each State Party to adopt such measures as may be necessary to establish as criminal offences under its national law the offences set forth in article 2 and to make those offences punishable by appropriate penalties which take into account their grave nature.

In its article 6, ICSANT also requires each State Party to adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of the convention, in particular where they are intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature and are punished by penalties consistent with their grave nature. This latter provision ensures that, in accordance with the United Nations Declaration on Measures to Eliminate International Terrorism,4 the Declaration to supplement the 1994 Declaration on Measures to Eliminate International Terrorism5 and the United Nations Global Counter-Terrorism Strategy,6 all acts of nuclear terrorism are criminal and unjustifiable, wherever and by whomever committed, regardless of motivation.

B. Establish jurisdiction

The necessary corollary to the obligation to criminalize and punish specific acts falling within ICSANT is the establishment of jurisdiction by States Parties. Article 9, paragraph 1 provides that each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 when: (a) The offence is committed in the territory of that State; or (b) The offence is committed on board a vessel flying the flag of that State or an aircraft which is registered under the laws of that State at the time the offence is committed; or (c) The offence is committed by a national of that State.

Article 9, paragraph 2 further provides that a State Party may also establish its jurisdiction over any such offence when: (a) The offence is committed against a national of that State; or (b) The offence is committed against a State or government facility of that State abroad, including an embassy or other diplomatic or consular premises of that State; or (c) The offence is committed by a stateless person who has his or her habitual residence in the territory of that State; or (d) The offence is committed in an attempt to compel that State to do or abstain from doing any act; or (e) The offence is committed on board an aircraft which is operated by the Government of that State. The provisions of article 9, paragraph 2 allow States to establish what is commonly termed “extra-territorial” jurisdiction over crimes falling within ICSANT. By the provision’s plain terms, the establishment of extra-territorial jurisdiction is not obligatory. Rather, the term “may” indicates that each State Party is free to decide whether and in what instances it would take such actions. In even more expansive terms, article 9, paragraph 5 provides that ICSANT does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its national law. This allows States to exercise universal jurisdiction over crimes to nuclear terrorism, provided that such a practice does not contravene pre-existing national legislation.

C. Extradite or prosecute (aut dedere aut judicare)

The obligation to establish criminal jurisdiction enables all States Parties to ICSANT to either extradite or prosecute alleged offenders for their acts of nuclear terrorism. In order to ensure that alleged offenders do not escape criminal prosecution and punishment, ICSANT further provides that States Parties in the territory of which the alleged offender is present must carry out one or the other action.

Article 11 articulates the general obligation to extradite or prosecute, otherwise known as aut dedere aut judicare. In its paragraph 1, Article 11 provides that the State Party in the territory of which the alleged offender is present shall, in cases to which article 9 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent jurisdiction.

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4 See General Assembly resolution 49/60 of 9 December 1994.
5 See General Assembly resolution 51/210 of 17 December 1996.
6 See General Assembly resolution 60/288 of 8 September 2006.
authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities are placed under a further obligation to take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

Importantly, under the ICSANT extradite or prosecute regime alleged offenders are denied the political offence defense to extradition. Article 15 of ICSANT stipulates that none of the offences set forth in article 2 shall be regarded, for the purposes of extradition or mutual legal assistance, as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives. The only limitations to extradition included in the convention relate to human rights obligations. Article 12 provides that any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to the convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international law of human rights. Article 16 affords additional protection by articulating that nothing in the convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance if the requested State Party has substantial grounds for believing that the request for extradition or for mutual legal assistance has been made for the purpose of prosecuting or punishing a person on account of that person’s race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person’s position for any of these reasons.

D. Innovative provisions

While ICSANT represents the first time the preceding method of international criminal law had been applied to the specific crime of nuclear terrorism, as noted in the introduction, the general structure of the convention essentially replicates the preceding sectoral counter-terrorism conventions. The innovative provisions of ICSANT relate to post-crisis situations. Specifically, article 18 of the Convention recognizes the special problems that are likely to arise following an act of nuclear terrorism and takes account of the unique legal regimes applicable to the possession, handling, physical protection and security of radioactive material. It also provides detailed rules on requests for assistance, notice, return, disposal and retention, which underline the special role of States with the requisite capacity to render assistance and the International Atomic Energy Agency (IAEA) in post-crisis situations.

Specifically, article 18, paragraph 1 of the convention requires that, upon seizing or otherwise taking control of radioactive material, devices or nuclear facilities, following the commission of an offence set forth in article 2, the State Party in possession of such items shall: (a) Take steps to render harmless the radioactive material, device or nuclear facility; (b) Ensure that any nuclear material is held in accordance with applicable International Atomic Energy Agency safeguards; and (c) Have regard to physical protection recommendations and health and safety standards published by the International Atomic Energy Agency.

Further, article 18, paragraph 2 provides that, upon the completion of any proceedings connected with an offence set forth in article 2, or sooner if required by international law, any radioactive material, device or nuclear facility shall be returned, after consultations (in particular, regarding modalities of return and storage) with the States Parties concerned to the State Party to which it belongs, to the State Party of which the natural or legal person owning such radioactive material, device or facility is a national or resident, or to the State Party from whose territory it was stolen or otherwise unlawfully obtained.

Out of a regard for the special legal regimes applicable to the possession of nuclear material, article 18, paragraph 3 provides that (a) Where a State Party is prohibited by national or international law from returning or accepting such radioactive material, device or nuclear facility
or where the States Parties concerned so agree, the State Party in possession of the radioactive material, devices or nuclear facilities shall continue to take the steps described in paragraph 1 of article 18. Subparagraph (b) of article 18, paragraph 3 holds that where it is not lawful for the State Party in possession of the radioactive material, devices or nuclear facilities to possess them, that State shall ensure that they are placed as soon as possible in the possession of a State for which such possession is lawful and which, where appropriate, has provided assurances consistent with the requirements of paragraph 1 of article 18 in consultation with that State, for the purpose of rendering it harmless.

Importantly, as well, article 18, paragraph 5 provides a mechanism whereby the State Party in possession of the nuclear material in the aftermath of an act of nuclear terrorism may request and receive assistance from other States Parties or international organizations with the requisite capacity to take appropriate action. It holds that the State Party in possession of the radioactive material, device or nuclear facility may request the assistance and cooperation of other States Parties, in particular the States Parties concerned, and any relevant international organizations, in particular the International Atomic Energy Agency. While the State Party or international organization in receipt of the request is not obligated under the convention to take action in response, they are encouraged to provide assistance to the maximum extent possible.

E. General obligations to cooperate

The principle articulated in article 18, paragraph 5 reflects the general theme of cooperation that pervades other aspects of the convention. In some instances, the convention even makes such action obligatory. For instance, article 7, paragraph 1, subparagraph (a) provides that States Parties shall cooperate by taking all practicable measures, including, if necessary, adapting their national law, to prevent and counter preparations in their respective territories for the commission within or outside their territories of the offences set forth in article 2, including measures to prohibit in their territories illegal activities of persons, groups and organizations that encourage, instigate, organize, knowingly finance or knowingly provide technical assistance or information or engage in the perpetration of those offences. Subparagraph (b) of the same article further provides that States Parties shall cooperate by exchanging accurate and verified information in accordance with their national law, and coordinating administrative and other measures taken as appropriate to detect, prevent, suppress and investigate the offences set forth in article 2 and also in order to institute criminal proceedings against persons alleged to have committed those crimes. This duty to cooperate takes account of the necessity of concerted action to address the particular threat of nuclear terrorism, which, in a single act, could quickly implicate the interests of a large number of States Parties and international organizations.

Article 20, which is also framed in obligatory language, offers another avenue for cooperation between States Parties. It holds that States Parties shall conduct consultations with one another directly or through the Secretary-General of the United Nations, with the assistance of international organizations as necessary, to ensure effective implementation of the convention. Unfortunately, article 20 does not provide any detail on the specific information that must be exchanged to ensure effective implementation, such as mandatory reports. It also does not require consultations at any specific interval. As a result, in practice, article 20 has not yet been utilized as the effective vehicle for the kind of in-depth and serious consultations that a plain reading of its terms might otherwise suggest.

F. Incorporation of additional legal regimes

By reference, ICSANT also incorporates and imports additional legal rules. For instance, article 8 directs States Parties to make every effort to protect radioactive material taking into account the relevant recommendations and functions of the IAEA. As noted in the section on extradition, article 12 stipulates that suspected offenders of acts proscribed by the convention
are entitled to fair treatment and the protections afforded by international human rights law. Article 21 further holds that States Parties shall carry out their obligations consistent with the principles sovereign equality, territoriality integrity and non-intervention.

In its preamble the convention also recognizes the importance of the Convention on the Physical Protection of Nuclear Material of 1980, an instrument which has subsequently been amended. Further, the preamble references the Charter of the United Nations (UN Charter) and the promotion of good-neighbourliness and friendly cooperation between States, which brings to mind General Assembly resolution 2625 (XXV) of 24 October 1970 and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. While not enforceable as operative parts of the convention, the recognition of such associated legal regimes reflects the broader context within which ICSANT exists. The convention is narrowly tailored to address the specific crime of nuclear terrorism, yet in substance as well as in style it cannot escape interaction with a wide array of international legal rules.

G. Exclusions

Despite this general feeling of inescapability, ICSANT explicitly excludes certain legal rules from the purview of the convention. In accordance with its article 4, paragraph 1, for instance, nothing in the convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the Charter of the United Nations and international humanitarian law. This clause reflects the general feeling of the drafters that ICSANT should exist solely as a criminal law instrument. While this position presents an attractive option in theory, it is difficult to see how ICSANT could operate in such a vacuum in practice. The spectrum of international law is too broad to lay unsettled in the aftermath of an act of nuclear terrorism, and it is very likely that competing international obligations concerning, perhaps, international environmental law or international trade law, could clash with obligations made by States Parties to ICSANT.

By virtue of article 4, paragraph 2 (as well as a preambular paragraph), the convention does not govern either the activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law and are governed by that law, or the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law. This provision, which was contentiously debated during the drafting phase of the convention, again reflects the feeling that ICSANT should not seek to address actions outside of the criminal law context, such as activities undertaken during periods of armed conflict, which are regulated by other legal rules. Article 4, paragraph 3 clarifies the exclusions by asserting that the provisions of paragraph 2 shall not be interpreted as condoning or making lawful otherwise unlawful acts, or precluding prosecution under other laws.

The final exclusion is also notable. Under Article 4, paragraph 4, the issue of the legality of the use or threat of use of nuclear weapons by States is specifically set aside. This provision states that the convention does not address, nor can it be interpreted as addressing, in any way, the issue of the legality of the use or threat of use of nuclear weapons by States. While a full examination of the legality of the use of nuclear weapons exceeds the scope of this paper, suffice it to say that the issue is far from settled.\(^7\) By explicitly excluding ICSANT from the debate on the drafters intended to leave that discussion to its proper consideration elsewhere.

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\(^7\) The issue of the legality of the threat and use of nuclear weapons was the subject of an advisory opinion issued by the International Court of Justice in response to a request from the United Nations General Assembly included in resolution 49/75 K of 15 December 1994. Famously, the justices were unable to reach agreement on the fundamental question, instead declaring *a non liquet*.\(^8\)[In view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of
H. Analysis

As this brief overview indicates, the legal regime to counter nuclear terrorism, while formally centralized and codified in ICSANT, actually consists of a functional amalgamation of many different regimes, from criminal law, to extradition law, to human rights law, to rules governing nuclear safety and security, and so on down the list. Out of this fragmented legal landscape, ICSANT attempts to produce a coherent set of rules applicable to the particular act of nuclear terrorism. The result is generally successful. Whereas “acts of nuclear terrorism” had once been given a subjective meaning and were regulated by various legal regimes according to their own terms, ICSANT now proscribes particular acts and mandates particular actions to address them. As a result it provides a “one-stop-shop” to counter acts falling within its scope. The outcome is a formally coherent legal regime, the constituent parts of which fit together in a logical and mutually reinforcing way.

Although generally successful, the formal coherence of ICSANT should not be mistaken for an end in itself. Because ICSANT brings together various legal regimes it is subject to continuous revision, reformulation and reinterpretation. Changes in these separate areas of law, including from outside the nuclear terrorism context, can have important influences on the body of law governing the acts addressed by ICSANT’s provisions. Moreover, as ICSANT is implemented and applied, various gaps and weaknesses will undoubtedly be exposed. States Parties lacking capacity or struggling with dysfunctional legal systems will encounter unforeseen difficulties implementing their obligations, which in turn may challenge the coordinating mechanisms of ICSANT and require enhanced action by specialized agencies, powerful States and other actors. Future proliferation crises in international relations will also directly and indirectly impact the existing order by stress-testing its constituent parts.

Moving forward, the way in which the international community governs the issue of nuclear terrorism and related subjects will also affect the applicable legal regime. This area of global governance is already crowded with epistemic communities, networks, inter-governmental working groups, United Nations offices and specialized agencies, non-State actors, informal regulatory instruments and formally-binding legal obligations. In this regard, ICSANT provides certain coordination mechanisms, such as its article 20 consultation scheme, that could, with the requisite political will, have a significant impact on broader cooperation; however, given the practice to-date, significant room for rationalizing functional relationships between actors and harmonizing the various legal rules remains.

III. Further fragmentation and alternative approaches

Outside of ICSANT and its integrated legal regimes, a number of other legal and operational activities have been undertaken at the international level to address the issue of nuclear terrorism. These include, but are not limited to, actions taken by the United Nations Security Council acting under Chapter VII of the UN Charter, the formation of the Proliferation Security Initiative, the convening of the Nuclear Security Summit meetings and the creation of the Global Initiative to Combat Nuclear Terrorism. In addition, on the international level, States have concluded a number of universal counter-terrorism agreements that impose obligations impacting the effort to combat nuclear terrorism. Principal among these are the International Convention on the Suppression of the Financing of Terrorism and the aforementioned Convention on the Physical Protection of Nuclear Material and its 2005 Amendment. The proliferation of measures, actors, expert bodies, networks, legal obligations and political commitments to counter the threat has contributed to institutional fragmentation—both within the law and between the various actors—further necessitating means for practical cooperation; however, it has not been without certain positive effects.

A. Actions taken by the United Nations Security Council

The most salient action taken by the United Nations Security Council in the fight against nuclear terrorism is the adoption of resolution 1540 (2004). The resolution, which was adopted under Chapter VII of the UN Charter, requires in its operative paragraph 1 that all States refrain from providing any form of support to non-State actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery. Moreover, all States are also required, in accordance with their national procedures, to adopt and enforce appropriate effective laws which prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes, as well as attempts to engage in any of the foregoing activities, participate in them as an accomplice, assist or finance them. Resolution 1540 (2004) also imposes strict measures with regard to the establishment of appropriate controls, requiring all States to take and enforce effective measures to establish domestic controls to prevent the proliferation of nuclear, chemical, or biological weapons and their means of delivery, including by establishing appropriate controls over related materials.

Furthermore, operative paragraph 4 of resolution 1540 (2004) created a Committee of the Security Council (the 1540 Committee), consisting of all members of the Council and calling on additional expertise as appropriate, to report to the Security Council for its examination, on the implementation of the resolution. Since its inception, the 1540 Committee has reported multiple times to the Council on the requested information. The Committee has also briefed the Council on its activities on a regular basis.

Clear synergies exist between resolution 1540 and ICSANT. For instance, the requirements of article 7 of ICSANT regarding cooperation to prevent acts of nuclear terrorism supplement and are supplemented by the provisions of resolution 1540 (2004) regarding the obligation to refrain from supporting non-State actors in their efforts to develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery. Moreover, article 8 of ICSANT requires all States Parties to make every effort to adopt appropriate measures to ensure the protection of radioactive material, taking into account relevant recommendations and functions of the International Atomic Energy Agency. This also parallels the obligation imposed by resolution 1540 (2004) on the establishment of appropriate controls, which requires all States to take and enforce effective measures to establish domestic controls to prevent the proliferation of nuclear, chemical, or biological weapons and their means of delivery, including by establishing appropriate controls over related materials.

The existence of resolution 1540 (2004) in conjunction with ICSANT, however, also fragments the legal regime applicable to acts of nuclear terrorism. Because it was adopted under Chapter VII, it is binding upon all 193 UN member States. Meanwhile, ICSANT currently has 86 States Parties. As a result, States have varied legal obligations on the issue. In addition, although some provisions of the two instruments are similar, they are not identical. States Parties to ICSANT must rationalize their obligations between the two instruments—an effort that could, in certain circumstances, complicate the operational effort to address nuclear terrorism.

9 Id. at operative paragraph 2.
10 See id. at operative paragraph 3 (a)-(d).
13 For a list of these briefings, see 1540 Committee, Briefings by the Chairman available at http://www.un.org/en/sc/1540/reports-and-briefings/chairman-briefings.shtml.
Aside from resolution 1540 (2004), the Security Council has also taken a number of other actions to address issues related, to different degrees, to nuclear terrorism. In its resolution 1373 (2001) for instance, which was also adopted under Chapter VII of the UN Charter, the Council required all States to prevent and suppress the financing of terrorism and take other measures aimed at eliminating terrorists’ access to financial assets and economic resources. Resolution 1373 (2001) also requires all States to, inter alia, refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists, and deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens.\(^{14}\) Given the importance of financing and access to economic resources to terrorists’ efforts to perpetrate acts of nuclear terrorism, the regime created by resolution 1373 (2001) and the resolutions that followed provide an important addition to the overall legal regime to counter nuclear terrorism.\(^{15}\) It also supplements, and is supplemented by, the International Convention on the Suppression of the Financing of Terrorism—although in this case as well the issue of fragmentation and the existence of different obligations between States arise as complicating factors.

The Council has also imposed a number of sanctions under Chapter VII that affect the international legal regime to counter acts of nuclear terrorism. The sanctions originally imposed by resolution 1267 (1999)—currently reflected in resolutions 2082 (2012) and 2083 (2012), respectively—against individuals, groups, undertakings and entities associated with al Qaeda and the Taliban require all States to freeze the funds, prevent the travel and impose an arms embargo against those individuals, groups, undertakings and entities designated for sanctions. Additional sanctions regimes on the issue of non-proliferation of nuclear weapons also impact the larger legal order. The measures, which have been applied against Iran\(^{16}\) and the Democratic People’s Republic of Korea,\(^{17}\) include an arms embargo; nuclear, ballistic and other weapons of mass destruction-related embargoes; and a travel ban and assets freeze on designated individuals and entities. Collectively, these sanctions regimes provide additional legal rules that may be utilized to counter the threat of nuclear terrorism; however, as in the case of the other actions taken by the Security Council, they also further fragment the applicable legal regime.

B. The Proliferation Security Initiative

In addressing the threat of nuclear terrorism, States and international organizations have not limited themselves to formal institutional arrangements. They have also pursued a number of actions that may be considered unorthodox or informal, but which are increasingly exercising an important influence on the global effort to counter nuclear terrorism.

Prominent among these is the Proliferation Security Initiative (PSI), which was established on 31 May 2003. The PSI was formed to increase international cooperation in interdicting shipments of weapons of mass destruction, their delivery systems and related materials. Importantly, it does not create a new legal framework. Rather, it aims to use existing national authorities and international law to achieve its goals. Participants in the PSI, which currently number over 100 States, commit themselves to a “Statement of Interdiction Principles”. These principles include the commitment to undertake effective measures, either alone or in concert with other states, for interdicting the transfer or transport of weapons of mass destruction, their delivery systems, and related materials to and from states and non-state actors.

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\(^{15}\) Security Council resolution 1373 (2001) also created a Committee of the Security Council (the Counter-Terrorism Committee or “CTC”) to monitor implementation of the resolution. The CTC was later revitalized by the creation of a special political mission known as the Counter-Terrorism Committee Executive-Directorate or “CTED”. See United Nations Security Council resolution 1535 (2004), operative paragraph 2. These bodies serve important functions in the implementation and monitoring of the obligations imposed by the 1373 (2001) regime.


of proliferation concern; to adopt streamlined procedures for rapid exchange of relevant information concerning suspected proliferation activity; to dedicate appropriate resources and efforts to interdiction operations and capabilities, and maximize coordination among participants in interdiction efforts; to review and work to strengthen their relevant national legal authorities where necessary to accomplish these objectives, and work to strengthen when necessary relevant international law and frameworks in appropriate ways to support these commitments. PSI participants also commit themselves to take specific actions in support of interdiction efforts regarding cargoes of weapons of mass destruction, their delivery systems, or related materials, to the extent their national legal authorities permit and consistent with their obligations under international law. The PSI has no secretariat, but an Operational Experts Group (OEG) consisting of 21 PSI participants coordinates its activities.

The PSI is notable for its non-binding and informal nature. Instead of building a legal regime from the top-down, through the adoption of an international instrument and the subsequent implementation of those commitments at the domestic level, it counsels what amounts to a re-commitment to carry out pre-existing obligations within a renewed context of mutual cooperation. To some extent, this technique is effective in accomplishing the aims of the international legal regime to counter nuclear terrorism without creating additional fragmentation; however, because of its informal and non-binding nature, the PSI might also be interpreted as voluntary, amounting to little more than a political commitment. Because it lacks the force of binding law, participants may feel free to opt-out of the arrangement when faced with difficult circumstances, such as possibility of harm to their citizens, or the interdiction of shipments belonging to allies. In addition, although the PSI does not create any new legal obligations, the “Statement of Interdiction Principles” does accentuate some pre-existing legal obligations at the expense of others. In practical terms, this may push States to prioritize a subset of its legal obligations, thus creating an artificial hierarchy of legal rules.

C. The Nuclear Security Summit

The Nuclear Security Summit (NSS) represents another initiative undertaken by States and international organizations to counter the threat of nuclear terrorism outside of the formally structured inter-governmental setting. It formed out of a proposal made by President Barack Obama of the United States, and it first met in Washington, DC in April 2010. A subsequent NSS meeting was held in Seoul, South Korea in 2012, and another meeting is currently scheduled for 2014 in the Netherlands. The objective of the NSS participating States, which will number 53 at the 2014 meeting, is to prevent nuclear terrorism by reducing the amount of nuclear material and radioactive sources; enhancing the security of nuclear material and radioactive sources; tackling the smuggling of nuclear material; and improving international cooperation. The workplan for the initial meeting called on participating States to make a political commitment to, inter alia, achieve universal adherence and the effective implementation of ICSANT; achieve universal adherence and the effective implementation of the Convention on the Physical Protection of Nuclear Material and its 2005 Amendment; fully implement Security Council resolution 1540 (2004) and support strengthened cooperation within the framework of the United Nations Global Counterterrorism Strategy; and support the activities of the International Atomic Energy Agency in its efforts to enhance nuclear security world-wide.

After the conclusion of the 2010 and 2012 meetings, communiqués were adopted by the NSS participants. These documents reaffirmed the commitment of participants to the priorities of the summit, and set out a series of priorities for the next round of meetings. While aspirational and non-binding in nature, the Washington and Seoul communiqués do serve an important signalling function. As a source of reference, they also allow participating States to cater their national initiatives in accordance with international prerogatives.

Similar to the PSI, the NSS process provides a useful mechanism for international cooperation without further fragmenting the international legal regime to counter nuclear terrorism. The effect of NSS meetings is to streamline global responses, without further
crowding an already complex system of formal obligations. On the negative side, the priority-setting is necessarily selective, which may accentuate some obligations at the expense of others. In addition, as a voluntary, one-day meeting, the NSS might fail to create the institutional commitment and enforceable measures that are necessary to achieve substantive progress. Finally, the NSS has been criticized for its exclusivity. Certain States, including the Democratic People’s Republic of Korea and Iran, have not been included in the process.

D. Global Initiative to Combat Nuclear Terrorism

The Global Initiative to Combat Nuclear Terrorism (GICNT) is a voluntary international partnership comprised of States and international organizations that aims to strengthen global capacity to prevent, detect, and respond to nuclear terrorism. It is open to all States that share in its common goals and are actively committed to combating nuclear terrorism. All GICNT participating States, which currently total 85, have voluntarily committed to implementing the GICNT “Statement of Principles” (SOP). The SOP articulate broad goals to combat nuclear terrorism, consistent with national legal authorities and obligations as well as relevant international legal obligations such as ICSANT, the Convention on the Physical Protection of Nuclear Material, its 2005 Amendment and United Nations Security Council Resolutions 1373 (2001) and 1540 (2004).

Like the PSI and the NSS, the GICNT does not create any new legal obligations, nor is it substantively serviced by a permanent secretariat. The United States and the Russian Federation serve as Co-Chairs of the GICNT, while Spain leads the Implementation and Assessment Group (IAG) under the guidance of the Co-Chairs. The IAG, which was created following the 2010 GICNT plenary meeting, serves as the “working arm” of the GICNT. It is charged with implementing priorities and ensuring that GICNT activities are internally coordinated. Importantly, the IAG also works to make certain that GICNT programmes complement other international efforts. At present it is focused on producing practical results through three technical working groups: Nuclear Detection; Nuclear Forensics; and Response and Mitigation. The Netherlands, Australia and Morocco presently serve as the respective Working Group Chairs. To date, the GICNT has conducted nearly 50 multilateral activities and seven senior-level meetings. The next plenary meeting will be held in Mexico in 2013.

A few administrative characteristics of the GICNT distinguish it from the PSI and the NSS. First, it focuses exclusively on the issue of nuclear terrorism. This narrow focus allows the initiative to address the issue of nuclear terrorism directly, rather than as an aspect of security or smuggling. Second, the IAG represents an institutional innovation that has the potential to rationalize the work of GICNT in a crowded and multidimensional field. If properly managed, the IAG could help reduce the overlap between the activities of the GICNT and those of the other, similarly constituted, international initiatives. Finally, through its technical working groups, the GICNT has the ability to pull together epistemic communities with particular expertise on complex issues. If adequately staffed and supported, these epistemic communities would be capable of producing valuable content for consumption by a broad audience.

IV. Methods for enhancing coherence and coordination

The foregoing sections illustrate the fragmentation in the international legal regime to counter nuclear terrorism. While formally centralized in ICSANT, in function, States have continued to conclude both formal and informal agreements to address the issue. As shown, ICSANT itself is also subject to evolution based on small shifts in the various legal regimes that

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18 Four international organizations are official observers to the GICNT. They are the European Union, the International Atomic Energy Agency, INTERPOL and the United Nations Office on Drugs and Crime.
have been stitched together to create it. This situation demands practical and institutional methods for coherence and coordination. Paradoxically, while international law has contributed to this fragmentation, it can also be mobilized to help organize the admittedly complex operational and legal environment. The challenge is to strike a proper balance between the impulse to create more law, with the strategic imperatives of clarity and simplicity.

The fragmentation and diversification of international law has been recognized as a challenge by international legal scholars since at least the 1950s.\textsuperscript{20} As seen by international lawyers, the problem has generally been that specialized law-making, such as the regime to regulate nuclear terrorism or the various other specialized regimes, such as international investment law, international refugee law, international environmental law, and so on, which possess their own principles and institutions, tends to take place “with relative ignorance of legislative and institutional activities in the adjoining fields and general principles and practices of international law” resulting in “conflicts between rules or rule-systems, deviating institutional practices and, possibly, the loss of an overall perspective on law.”\textsuperscript{21}

A wide-ranging report issued in 2006 by a Study Group of the International Law Commission, chaired by Martti Koskenniemi, examined fragmentation in detail. The report discussed four types of relationships traditionally understood to be involved in normative conflicts brought about by fragmentation: (a) Relations between special and general law; (b) Relations between prior and subsequent law; (c) Relations between laws at different hierarchical levels; and (d) Relations of law to its “normative environment” more generally. Koskenniemi concluded that fragmentation, while undoubtedly present in the international legal system, could be addressed primarily through reference to existing international rules and techniques of interpretation. First and foremost, the Vienna Convention on the Law of Treaties (VCLT)—the so-called “treaty on treaties”—could be mobilized to bring order to the chaos. In the case of relations between special and general law, the principle that special law derogates from general law (\textit{lex specialis derogate lex generali}) could resolve most normative conflicts. This principle is enshrined in article 55 of the VCLT.\textsuperscript{22} For relations between prior and subsequent law, the principle that when conflict exists later law supersedes earlier law (\textit{lex posterior derogate lege priori}) could be applied to solve the conflict. Although this technique would not necessarily apply automatically, it was interpreted by Koskenniemi as a powerful interpretive tool for resolving conflict. The relevant provisions of the VCLT reflecting this principle are found in articles 30 and 41. On the issue of the relationship between laws at different hierarchical levels, Koskenniemi concluded that article 103 of the UN Charter and the concepts of peremptory norms (\textit{jus cogens}) and obligations \textit{erga omnes} provided useful methods for arriving at an informal hierarchy of rules. Collectively, these methods fall under the principle that superior law derogates


\textsuperscript{22} Article 55 of the VCLT, titled \textit{lex specialis} states:

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.
from inferior law (*lex superior derogate lex inferior*). Finally, with regard to the relationship of law to its wider “normative environment”, Koskenniemi posited that the “principle of systemic integration,” which is codified in article 31(3)(c) of the VCLT, could be used to guide the interpretation of a specific legal rule within its particular context. In effect, this principle allowed anyone seeking to determine “what the law is” to situate the rules that are being invoked by those concerned in the context of other rules and principles that might have bearing upon a case. As articulated in the report, in this process:

> [T]he more concrete or immediately available sources are read against each other and against the general law “in the background”. What such reading rules “against each other” might mean cannot be stated in the abstract. But what the outcome of that specific reading is may, from the perspective of article 31 (3) (c) in fact be less important than that whatever the outcome, its justification refers back to the wider legal environment, indeed the “system” of international law as a whole.23

Applied to the international legal regime to counter nuclear terrorism, these principles and techniques of legal interpretation would result in a number of useful conclusions. First, it is fairly clear that, at least as applied to the issue of the criminalization of acts of nuclear terrorism, ICSANT as a whole serves as the *lex specialis* within the broader international legal regime addressed to the threat. The same conclusion can be transferred to the application of the principle of *lex posterior*. When seeking to interpret the international legal regime through the principle of *lex superior*, however, the analysis becomes more difficult. Certainly, under the plain terms of article 103 of the UN Charter, obligations made under ICSANT are subjugated to those made under the UN Charter. Specific answers would have to be reached through a careful application of the various legal rules—imagine, for instance, an act of self-defense taken to prevent an act of nuclear terrorism under article 7 of ICSANT and its relationship to obligations made under Chapter VII of the UN Charter—as applied to facts, but in general it is easy to see how superior obligations could derogate from obligations made under ICSANT. The greater difficulty lies in deciphering the hierarchy of obligations made under ICSANT with other similarly situated obligations, such as those made with respect to nuclear security, terrorist financing and so on. Furthermore, on the issue of systemic integration and the application of article 31(3)(c) of the VCLT, it becomes even more difficult to arrive at a clear set of answers. In this case, ICSANT must be interpreted against a contextual background of legal obligations that includes the relevant resolutions of the United Nations Security Council, the International Convention for the Suppression of the Financing of Terrorism, the Convention on the Physical Protection of Nuclear Material and its 2005 Amendment. Expanding the contextual circumference further, obligations made under the Treaty on the Non-Proliferation of Nuclear Weapons and the Statute of the International Atomic Energy Agency would also be relevant to interpreting “what the law is” in any given factual circumstance. Providing additional context would be the human rights norms and other generally applicable rules of international law binding on a particular State in a particular situation.

Therefore, while these principles of interpretation provide a useful meta-framework for addressing the fragmentation in the international legal regime to counter nuclear terrorism, they are imperfect. In particular, they fail to differentiate between the various obligations made at the same level of ICSANT. They also fail to firmly identity the contours of the different legal regimes and provide answers to how different legal regimes operating within a unitary instrument, such as ICSANT, might interact and evolve over time. Moreover, nothing in the report of the study group directly addresses the substantive issue of the relationship between formal international “hard law” commitments, and informal, voluntary “soft law” obligations, such as those made under the PSI, NSS and GICNT processes.

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23 Koskenniemi report, supra note 22, at 243.
Additional methods are also required to coordinate the fragmented institutional system that the various legal rules have created. From an operational standpoint, the situation requires international administrative rules that allow for the different initiatives, actors and deliberative bodies to work together in productive and non-duplicative ways. Because fragmentation provides certain operational advantages, however, such as experimentation and competition, the goal should not be to eradicate it completely. Rather, the aim is to trim the counterproductive elements of fragmentation, while retaining its inherent strengths. Certain institutional innovations already exist to achieve this objective, but they are insufficient to fully address the challenge. In some cases, completely new arrangements are required.

For instance, on the issue of implementation, which is central to the success of the nuclear counterterrorism project as a whole, the current administrative rules, legal obligations and institutions are inadequate. Article 20 of ICSANT provides a method for consultations, but without a mandatory trigger to initiate the process, it has been dormant. Under the various regimes of the Security Council, including resolution 1373 (2001) and 1540 (2004), Committees of the Council have fared considerably better, producing semi-annual reports and presenting information to the Council regularly on the status of implementation efforts; however, significant room for improvement remains. States must be prodded, through a revised legal obligation if necessary, to provide increased levels of information on the status of their implementation efforts. From that point, the administrative bodies must be given the time and resources to carefully analyze the information before producing their reports. Moreover, regular, working-level meetings between Committees and other implementation monitoring bodies should be convened, and the results of those meetings should be publicized. The best way to eliminate some of the practical barriers presented by fragmentation is to couple increased communication with productive outputs for public consumption. These activities could be further enhanced by the contributions of expert bodies servicing the informal, voluntary arrangements, such as the OEG of the PSI and the IAG of the GICNT. These bodies should be given the capacity and freedom to reflect on the relevant issues and produce in-depth reports.

In terms of a deliberative discourse on the inter-governmental level, there appear to be plenty of mechanisms for convening the relevant actors. The shortcoming lies more with the structure and output of the meetings. Single day sessions, for instance, of the type held at the NSS, are wholly insufficient to engage in substantive discussions. Such meetings become little more than an opportunity for high-level politicians to read statements prepared by aides in advance. Even the production of communiqués must be done in advance, with small changes made following the dry recital of well-scrubbed talking points. High-level meetings catalyzed by prominent individuals operating outside of established mandates, such as the September 2012 United Nations High-Level Meeting on Countering Nuclear Terrorism with a Specific Focus on Strengthening the Legal Framework convened on the initiative of the UN Secretary-General, should be welcomed, but as a general rule they must (1) add to the substantive discussion, and (2) fit within the larger operational context, and (3) take place in an environment conducive to creative discourse. Furthermore, what is required as a result of these meetings is actual substantive output, followed-up by review and analysis. The formation of secretariats for the holding of deliberative meetings, even on an ad hoc basis, would assist in these efforts. Another method for rationalizing the work of the various formal and informal initiatives is to create a single, permanent secretariat comprised of international civil servants that would service all of the different deliberative sessions seized with the issue of nuclear terrorism. Such a secretariat could be staffed by officials serving on secondment from relevant international organizations.

24 The effort to organize various actors within a particular operational international space often appears under the heading of “international constitutional law”; however, the project pursued here shares more in common with the idea of “global administrative law” put forth by Benedict Kingsbury, Nico Krisch and Richard Stewart. See Benedict Kingsbury, Nico Krisch and Richard Stewart, The Emergence of Global Administrative Law, 68 L. & CONTEMP. PROBLEMS 15 (2005).
Furthermore, increased attention needs to be paid to the issue of continuous review and monitoring. Relying on self-reporting is not enough. States must be willing to subject themselves to external review on a regular basis. The best way to achieve this arrangement is through the conclusion of a formal agreement setting out the terms, such as memorandum of understanding. The review could be limited to one instrument, such as ICSANT or the 1540 (2004) regime, or it could be framed more broadly, seeking to analyze and assess each State’s performance across the totality of its formal and informal obligations. The general point is that more information, derived from independent sources, must be obtained if the international community is to take the necessary action to prevent acts of nuclear terrorism.

Additional suggestions for improving the institutional framework to counter acts of nuclear terrorism also exist in the academic literature. These include proposals for the creation of nuclear terrorism alert centers and similar threat monitoring bodies. All relevant initiatives aimed at taking the high-minded obligations and commitments made at the international level and transforming them into concrete, productive action must be given careful consideration.

V. The juridical conscience of terrorist actors

An additional complicating factor in the international effort to counter nuclear terrorism is the disconnect between obligations made at the formal, inter-governmental level, and the effect of those legal rules on terrorist actors themselves.

As the system is conceived, States have made legal commitments at the international level to take action domestically. ICSANT and the other legal instruments, including the resolutions adopted by the Security Council under Chapter VII of the UN Charter, oblige States inter se. It is then the responsibility of the States themselves to implement these legal commitments. The terrorist, assuming he is a non-State actor, enters the system as the citizen of the State that has made obligations at the international level. As a citizen of that State it is presumed that he is required to follow its laws. In well-functioning States, the obligations at the international level—e.g. criminalization, punishment, establishment of jurisdiction, aut dedere aut judicare—will have been properly implemented domestically, so that any violation thereof will be dealt with according to national laws.

In order to operate properly, this system makes two major assumptions. First, it assumes that governments themselves have the requisite capacity to uphold their international obligations, foremost among which, in this instance, is the capacity to implement its international obligations at the domestic level. The system also assumes that States have control over their territories and that they are willing and able to enforce their laws. The second assumption is that each individual, terrorist or otherwise, is the citizen of a State—a requirement that makes such individual subject to the authority and legal rules of that State. Concomitant with this notion of universal citizenship is the supposition that each individual has chosen to take part in a formal political community.

On the issue of terrorism, the system breaks down. Assuming, again, that the terrorist actor exists outside the governmental apparatus, he is, by his nature, an extra-legal actor. The modern stereotype of the terrorist depicts a member of an armed group, sheltering in a remote location, outside the control of any recognized government. While terrorists certainly come in

26 It should be noted that the new generation of targeted sanctions regimes do impose measures directly on individuals; however, even in this instance, States themselves are responsible for enforcing the measures.
27 See e.g. United Nations Security Council resolutions 2082 (2012) and 2083 (2012)
many forms—urban, remote, clandestine, propagandist, State-supported, etc.—in general, they are characterized by their rejection of the established order. This would include a rejection of the formal international legal order, as well as, in many cases, the State itself.  

This general rejection of the established order, including the formal international legal order, does not mean that terrorists operate in the absence of a juridical conscience. Rather, in sometimes quite recognizable ways, terrorists often attempt to justify their actions by reference to their own interpretation of the applicable legal order. This can take many forms. The legal orders to which terrorist actors are willing to adhere vary widely, from the religious to the fundamentalist to the anarchist and the cultist. Terrorists seeking to justify their acts through juridical analysis also achieve varying levels of success. Depending on their level of sophistication, as well as numerous other factors, including the degree to which their interpretation deviates from existing practice, terrorist actors have found their juridical justifications accepted or rejected by their intended audiences.

Since the overriding goal of the international legal order is effectiveness, and given the extreme nature of the crime of nuclear terrorism, it benefits the global governance system as a whole to analyze and understand the reasons put forth by terrorist actors in their efforts to carry out acts of nuclear terrorism. Because of Al Qaeda’s influence and omnipresence in world-wide networks of terrorist activities, the group’s past actions with regard to the acquisition of nuclear material and the juridical justifications it has given for seeking to carry out acts of nuclear terrorism are instructive. It should be noted, however, that al Qaeda is certainly not alone among terrorist groups interested in the acquisition of weapons of mass destruction. Pursuits have also been attributed to Aum Shirikyo, the Egyptian Islamic Jihad, Jemaah Islamiya and Lashkay al Tayyib.

The history of al Qaeda’s pursuit of nuclear weapons is well-documented. Less reported are its juridical justifications for its actions. The basis for this justification was first expressed by Osama bin Laden in his “fatwa” of 1998, which stated:

We issue the following fatwa to all Muslims: The ruling to kill the Americans and their allies—civilians and military—is an individual duty for every Muslim who can do it in any country in which it is possible to do it, in order to liberate the al-Aqsa Mosque and the holy mosque [Mecca] from their grip, and in order for their armies to move out of all the lands of Islam, defeated and unable to threaten any Muslim. This is in accordance with the words of Almighty God, “and fight the pagans all together as they fight you all together,” and “fight them until there is no more tumult or oppression, and there prevail justice and faith in God.”

Although bin Laden had no authority to issue such a religious ruling, his actions demonstrated his commitment to the battle against U.S. and allied forces, and positioned him as the leader of a global jihadist movement. His use of juridical reasoning, by reference to the “individual duty of every Muslim” and taking into account the rule based order of Islam, also served to pre-justify the acts of his followers—in effect, giving them religious and juridical justification to carry out his extremist orders.

28 For a interesting review of the behavior of terrorists seeking to carry out acts of nuclear terrorism and its interaction with international law see Louis René Beres, On International Law and Nuclear Terrorism, 24 GA. J. INT’L & COMP. L. 1, 18-26 (1994-1995).
29 See generally ROLF MOWATT-LARSEN, AL QAEDA WEAPONS OF MASS DESTRUCTION THREAT: HYPE OR REALITY? (2010).
Subsequently, in 2003, radical Saudi clerics associated with al Qaeda took bin Laden’s reasoning a step further, explicitly arguing that the pursuit of weapons of mass destruction was justified based on three central arguments, which sought to differentiate the current conflict from the usual Islamic laws of war:

One kills in a good manner only when one can. If those engaged in jihad cannot do so, for example when they are forced to bomb, destroy, burn or flood, it is permissible.

One avoids killing women and children only when one can distinguish them. If one cannot do so, as when infidels make a night attack or invade, they may be killed as collateral to the fighters.

Similarly, killing a Muslim is forbidden and not permitted; but if those engaged in jihad are forced to kill him because they cannot repel the infidels or fight them otherwise, it is permitted, as when the Muslim is being used as a living shield.

These arguments carried the imprimatur of juridical justification, and prompted concerted action on the part of counter-terrorism officials worldwide. The primary author of the fatwa, Nasir al-Fahd was arrested by Saudi officials. While under detention he publically referred to his previous views as a “grave mistake”; privately, however, he allegedly asked his associates to spread the word that his recantation was coerced by Saudi officials.

Bin Laden’s deputy, Ayman al-Zawahiri later offered his own juridical justifications for the acquisition and use of nuclear weapons. Relying on many of the same scholars cited in the 2003 al-Fahd fatwa, Zawahiri argued in his book *Exoneration* that the use of weapons of “general destruction” was justified by Islamic law. In his reasoning, Zawahiri cites many of the examples that are often quoted to justify the targeting of non-combatants by extremist Islamic groups, such as the Prophet Muhammad’s attack on the village of al-Ta’if using a catapult, which was, at the time, a weapon of mass destruction. While not new, the meticulous nature of Zawahiri’s argument in *Exoneration* has had the effect of strengthening the standing of the 2003 al-Fahd fatwa, adding credence to an otherwise deviationist interpretation of the Islamic laws of war.

The juridical justifications made by al Qaeda are significant for a number of reasons. First, although radical, they were successful in attracting a wide audience, which had the effect of mobilizing a large number of recruits to their cause. The ways in which a juridical argument might stimulate action bears further study. Second, they indicate that despite their heinous motives, groups such as al Qaeda operate according to a complex set of law-like rules. These rules might be subject to dangerous instrumentalization—and the series of fatwas issued or endorsed by the group certainly fall within this category—but like all laws they are also vulnerable to reasoned counter-argument. By seeking to justify their acts through reference to Islamic law, al Qaeda has entered a space where more competent scholars from opposing viewpoints may challenge their interpretations.

With regard to the effort to counter nuclear terrorism through international law, al Qaeda’s juridical justifications are also instructive. They make clear that in addition to the need for international coordination on the mechanics of criminal law, jurisdiction, extradition and related concepts, a renewed focus must also be placed on the conditions conducive to the spread

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33 *As quoted in* ISLAM AND THE BOMB, supra note 31, at 32.

34 *Id.* at 33.
of terrorism and extremist ideologies. A truly comprehensive international legal regime to counter acts of nuclear terrorism would more ardently address this aspect of the issue.

VI. Conclusion

As noted in the introduction, this paper sought to examine the dynamics of the international legal regime to counter nuclear terrorism and prescribe ways to strengthen it. While it is premature to draw any definitive conclusions, preliminary suggestions might include amending ICSANT’s provisions to allow for increased practical cooperation between the various prominent actors, particularly on the issue of prevention and threat-monitoring, operationalizing article 20 of ICSANT as a vehicle for convening formal meetings of States Parties and undertaking a thorough review of the domestic implementation of ICSANT’s obligations. Furthermore, it will be useful to obtain a clear understanding from representatives of States Parties and the relevant specialized agencies on the utility of ICSANT as the central instrument to counter nuclear terrorism.

From a broader, operational perspective the actions of the various actors within the system need to be rationalized. The fragmentation in the legal order has created fragmentation operationally, which, although not without certain advantages, necessitates effective institutional methods of cooperation. As a promulgator of institutions, international law, and in particular international administrative law, can be put to use to effectively organize the administrative and interactive functions of the different actors; however, this process must remain flexible enough to avoid stifling the benefits of a fragmented order. Putting in place the bare minimum of administrative structures, such as secretariats, mechanisms for continuous review and mandated lines of communication, and combining them with a generally applicable set of operating principles, could, if properly planned and executed, achieve this objective.

Finally, given the limitations of the formal international legal order in directly impacting the actions and motivations of the terrorists themselves, a better understanding of the juridical justifications offered by such actors in their pursuit of nuclear terrorism and related activities must be achieved. This, in turn, will enable the international community to address one important aspect of the conditions conducive to nuclear terrorism, namely, the use and misuse of juridical reasoning by terrorists to justify clearly odious acts.