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REPORT

An International Law Perspective on the 2014 Nuclear
Security Summit

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Executive Summary

This report looks at the outcomes of the 2014 NSS from an international law perspective. The Hague Summit, to a greater extent than the previous Summits, utilized elements of the international legal framework to lay the groundwork for a more robust international system. Such an approach was seen most clearly in the initiative “Strengthening Nuclear Security Implementation,” announced by the Netherlands, South Korea and the U.S. and signed on to by two-thirds of the participating States, but it also was manifested in other outcomes, such as the “Statement on Enhancing Radiological Security” and the “Joint Statement on Transport Security.” The international legal framework was also placed front and center in the Hague Communiqué as an integral part of the global nuclear security architecture, in addition to providing the foundation for a number of priority areas laid out in the Communiqué.

The purpose of this report, then, is to examine the role of the international legal framework in the 2014 NSS by analyzing the main outcome documents – the Hague Communiqué, representing the consensus views of participating States, and relevant gift baskets/joint statements. With respect to some of the commitments made or priorities outlined, the connection with or role of international law is clearly stated, whereas for others the connection or role is more implicit. In the latter cases, the report identifies the related legal elements, thereby providing additional context to the NSS outcomes.

Going forward, the international legal framework – treaties, guidelines, institutions – will provide the basis for the transition to a sustainable model for international cooperation on nuclear security following the end of the NSS process. Therefore, this report concludes by raising a number of questions that should be answered and issues that should be resolved in the run-up to the 2016 Summit in the U.S. in the interest of facilitating a smooth transition:

- How can the various aspects of nuclear security that have been covered in the NSS process be integrated into existing instruments (through e.g. amendments or review processes), where do gaps remain, and how can these be filled?
- With the recognized need to further strengthen and coordinate cooperation through the IAEA and other organizations and initiatives, it stands to be examined to what extent the elements of the nuclear security regime fall within the functions and explicit or implied powers of existing international organizations, and whether the relevant initiatives could or should be formalized into international organizations in order to carry the process forward.
- The full scope of possible regional cooperation, likely through existing institutions, to continue the work of the NSS process should be assessed.

I. Introduction

The Nuclear Security Summit (NSS) that took place last March (2014) in The Hague was the third, and likely second-to-last, in the series of top-level meetings initiated by U.S. President Obama in 2010. Substantial progress was achieved during the Hague Summit, particularly with respect to a number of States going further than before in committing to implementation of fundamentals and guidelines developed under the auspices of the International Atomic Energy Agency (IAEA) in their domestic systems and to inviting peer reviews of their nuclear security efforts.¹ In addition, more States committed to giving up weapons-grade nuclear material – notable here was Japan’s decision to remove stocks of both highly-enriched uranium (HEU) and plutonium from the Fast Critical Assembly (FCA) at the Japan Atomic Energy Agency. Further pledges were also made with regard to the security of Category 1 radioactive sources, transport security and countering nuclear smuggling, among others. In this way, the Hague Summit both built upon steps taken at the previous gatherings and established new approaches to measures aimed at continuously improving nuclear security worldwide.

In closing out the 2014 NSS, Prime Minister Rutte of the Netherlands stated that progress had been made toward meeting three objectives of the NSS process: reducing the amount of dangerous nuclear material in the world, improving the security of nuclear and other radioactive material, and enhancing international cooperation.² The latter two objectives have a clear link with the international legal framework for nuclear security. To be sure, while none of the outcomes of the NSS process are themselves legally binding,³ a number of the steps taken and commitments made have their basis in international law. The international legal framework for nuclear security is comprised of two sets of international instruments – legally binding (treaties) and legally non-binding (codes of conduct, recommendations and other types of guidance documents).

The primary treaties for nuclear security are the Convention on the Physical Protection of Nuclear Material (CPPNM), and its 2005 Amendment, and the International Convention for the Suppression of Acts of Nuclear Terrorism (ICSANT). This is because they deal with, what for the purposes of this report will be termed, technical administrative aspects of nuclear security (i.e. physical protection of material and related facilities⁴), as well as criminalization of certain offenses and facilitation of cooperation, including a certain degree of confidence-building, among States parties. There are a number of other treaties of a more limited

¹ The “Strengthening Nuclear Security Implementation” initiative will be discussed below.

² See transcript of the closing press conference with President Obama and Prime Minister Rutte, 25 March 2014.

³ An interesting article on the need for the U.S. President to focus on legally non-binding political commitments in order to make progress on issues of international concern due to deadlock with respect to treaty ratification is D. Kaye, “Stealth Multilateralism: U.S. Foreign Policy without Treaties – Or the Senate,” *Foreign Affairs*, September/October 2013, available at <http://www.foreignaffairs.com/articles/139649/david-kaye/stealth-multilateralism>. The NSS process is specifically mentioned in the article.

⁴ In its broadest formulation, physical protection refers to measures to: “protect against unauthorized removal of nuclear material in use and storage, and during transport; ensure the implementation of rapid and comprehensive measures by the State to locate and recover missing or stolen nuclear material; protect against sabotage of nuclear facilities and sabotage of nuclear material in use and storage and during transport; and mitigate or minimize the radiological consequences of sabotage.” See IAEA Board of Governors, “Nuclear Verification and Security of Material: Physical Protection Objectives and Fundamental Principles,” GOV/2001/41, Attachment p. 2.

application to nuclear security,⁵ namely covering criminal offenses or response and mitigation measures, which play a role in the overall legal framework but for the most part have been left out of the NSS discussion. However, some States did make reference to other legal instruments in their National Progress Reports.

On the legally non-binding side, reference is made to the IAEA's Nuclear Security Series documents, namely the Nuclear Security Fundamentals and the recommendations documents numbers 13-15⁶ which are central to the "Strengthening Nuclear Security Implementation Initiative," and the Code of Conduct for the Safety and Security of Radioactive Sources (Code of Conduct) along with the supplementary Guidance on the Import and Export of Radioactive Sources (Import/Export Guidance). Though not legally binding, the guidance documents are the "closest thing[s] we have to international standards for nuclear security."⁷ Put another way, these instruments can be considered soft law and can help with legal and regulatory harmonization, building trust and developing shared ideas.⁸ In broad terms, the soft law instruments are meant to help States to develop and put in place a comprehensive national nuclear security regime. Being legally non-binding, these instruments are not subject to the law-making (treaty negotiation) process and domestic ratification/accession procedures. When circumstances require flexibility and a higher degree of technical detail, and when there is a need to account for domestic sensitivities at the same time as there being recognition that harmonized action is necessary, treaties may not be possible or desirable, but these soft law instruments nonetheless provide a means for action.

Before turning to the substantive results of the 2014 NSS, it is worth pointing out that the role of international organizations – i.e. the IAEA and the United Nations (UN) – in the area of nuclear security has a clear international legal dimension as the powers and functions of these organizations are founded in legal constitutive instruments. For instance, the 1540 Committee set up to oversee implementation of Security Council Resolution 1540 (2004) was given a mandate by virtue of a legally binding Chapter VII UN Charter decision. Similarly, the legal mandate of the IAEA in the area of nuclear security is based on Article II of the IAEA Statute – "to accelerate and enlarge the contribution of atomic energy to peace, health and prosperity throughout the world" – and its specific functions under Article III of the Statute. Additional functions under the relevant legal framework instruments, such as the 2005 CPPNM Amendment, have been approved by the IAEA Board of Governors.⁹ As such, in considering any future transition of international cooperation on nuclear security in the post-NSS environment that involves a role to be played by a standing international organization, the (institutional) legal implications will have to be taken into account.

⁵ These include the Terrorist Bombing Convention, the Convention on Early Notification of a Nuclear Accident, the Convention on Assistance in Case of a Nuclear Accident or Radiological Emergency, among others. See the discussion of INSSPs below.

⁶ "Objective and Essential Elements of a State's Nuclear Security Regime (Nuclear Security Fundamentals)," IAEA Nuclear Security Series No. 20, 2013; "Nuclear Security Recommendations on Physical Protection of Nuclear Material and Nuclear Facilities (INFCIRC/225/Revision 5)," IAEA Nuclear Security Series No. 13, 2011; "Nuclear Security Recommendations on Radioactive Material and Associated Facilities," IAEA Nuclear Security Series No. 14, 2011; and "Nuclear Security Recommendations on Nuclear and Other Radioactive Material out of Regulatory Control," IAEA Nuclear Security Series No. 15, 2011.

⁷ This is according to the statement by U.S. Secretary of Energy Ernest Moniz at the joint press conference, together with South Korean Foreign Minister Yun Byung-se and Dutch Foreign Minister Frans Timmermans, announcing the "Strengthening Nuclear Security Implementation" initiative (25 March 2014).

⁸ See Schaffer and Pollack, "Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance," 2010 *Minnesota Law Review*, vol. 94, p. 726.

⁹ See GOV/2005/51.

In light of the foregoing, this report will look at the outcomes of the 2014 NSS from an international law perspective. This means that certain elements of the NSS, such as efforts to repatriate nuclear materials and to convert reactor fuel from HEU to LEU, will not be discussed. Rather, the role of international law in the main outcome documents – the Hague Communiqué, representing the consensus views of participating States, and relevant gift baskets/joint statements, in both cases referring to national statements and progress reports where applicable to demonstrate national action toward realizing the international law-related goals – will be examined. For instance, a number of participating States in their national statements or progress reports indicated that they have become party to, or are working toward becoming party to, the relevant treaties. Such action was part of the Washington Work Plan at the first NSS in 2010. Increased adherence to ICSANT and the pursuit of the entry-into-force of the 2005 CPPNM Amendment remain staples of the NSS process commitments. The Hague Summit, though, particularly with the announcement by the “troika” of the Netherlands, South Korea and the U.S. of the initiative on ‘Strengthening Nuclear Security Implementation,’ took an additional step toward augmenting the international legal framework, in this case namely invoking the soft law elements. Therefore, international law actually played a larger role at this year’s gathering than it did at the previous Summits.

To conclude, this report will look ahead to the 2016 Summit. Based on the 2014 NSS outcomes, as well as taking into account that if the next Summit is indeed the last it will focus on “transition ... towards a more sustainable model,”¹⁰ some issues will be raised for consideration in the lead-up to 2016. It is this author’s view that any transition will entail harnessing the pertinent aspects of and strengthening the international legal framework in such a way as to most effectively facilitate continued improvement of the global nuclear security regime. The Hague Summit already took steps toward this end.

II. The Hague Communiqué

The international legal framework has been front-and-center of NSS outcomes as part of the “global nuclear security architecture” outlined in the consensus outcome documents, including the Hague Communiqué. The Washington Communiqué and Washington Work Plan set the tone for the NSS approach to the nuclear security architecture. The Washington Work Plan in particular lays out steps participating States would take to support universality of ICSANT, encouraging invocation of Article 20 to facilitate discussion of effective implementation;¹¹ entry-into-force of the 2005 CPPNM Amendment, calling on States to act in accordance with the Amendment’s object and purpose in the meantime;¹² and full implementation of Security Council Resolution 1540, including the recognition that ensuring physical protection systems in line with INFCIRC/225 and other relevant Nuclear Security Series documents assists adherence to the Resolution’s nuclear security-related provisions. The Work Plan also goes further in discussing the role of the Nuclear Security Series guidance documents (soft law). Among other things, participating States will work with the IAEA toward “completion and implementation” of the guidance and help other States ostensibly even outside the NSS process in doing so, will participate in the process of

¹⁰ Remarks by President Obama at the Closing Session of the Nuclear Security Summit, 25 March 2014.

¹¹ ‘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 this Convention.’

¹² The language, quite appropriately, is similar to the legal obligation placed on States having signed or expressed consent to be bound by a treaty pending its entry-into-force as set forth in Article 18 of the Vienna Convention on the Law of Treaties.

developing the guidance, and will “endeavor to incorporate” the relevant guidance in the design and operation of nuclear facilities. As the focus of the 2010 NSS was on vulnerable nuclear materials, radioactive sources receive only a cursory mention in the Work Plan – States will consider how best to address radioactive source security. The Washington Communiqué recognizes that steps aimed at nuclear material security can have applications to security of other radioactive substances but goes no further than encouraging efforts to secure those materials as well.¹³ A last law-related aspect of the Work Plan is the commitment to improve national criminal laws with respect to illicit nuclear trafficking and nuclear terrorism.

The Seoul Communiqué similarly devotes attention to achieving universality of ICSANT and the CPPNM as amended, explicitly mentioning 2014 as the target date for bringing the Amendment into force. The Seoul Communiqué goes further than the Washington documents in terms of the soft law instruments. Part of this has to do with the addition of radioactive sources as one of the priority areas. States are thereby encouraged to reflect the Code of Conduct and Import/Export Guidance as well as other relevant Nuclear Security Series documents in national practice.¹⁴ More generally, though, in discussing the global architecture, States will “strive to use” INFCIRC/225 and the related guidance documents and reflect them in national practice. This is a clearer formulation of intent than that contained in the Washington documents.

With respect to this year’s Summit, there is a clear emphasis in the Hague Communiqué on strengthening the international nuclear security architecture. The architecture, according to the 2014 Communiqué, comprises “legal instruments, international organizations and initiatives, internationally accepted guidance and good practices.”¹⁵ With this description, the Hague Summit expanded the scope of what is considered to be part of the architecture. The architecture, so-defined, is of course broader than just the legal framework, but the legal framework is a cornerstone of the architecture, essential to meeting the objectives of the NSS. The following sub-sections will look in more detail at the international law-related elements of the architecture as contained in the Hague Communiqué.

a. International (Legal) Instruments

The focus in terms of the legal instruments is again placed on increasing the number of parties to the two primary treaties. To date, some 24 ratifications are still needed for entry-into-force of the 2005 CPPNM Amendment (16 NSS-participating States have yet to ratify the Amendment), and efforts will continue to achieve entry-into-force by the end of 2014 in line with the Seoul Communiqué target. However, whereas the Seoul Communiqué urges entry-into-force by 2014 and the Washington Work Plan talks about acting in accordance with the object and purpose of the Amendment, the Hague Communiqué goes further by “stress[ing] the need for all contracting parties to comply fully with *all its provisions*.”¹⁶ This sounds similar to the concept of provisional application of a treaty pending entry-into-force under the law of treaties,¹⁷ though without the associated legal effects. Because the CPPNM

¹³ Communiqué of the Washington Nuclear Security Summit, paragraph 12.

¹⁴ Seoul Communiqué, paragraph 6.

¹⁵ Hague Communiqué, paragraph 8.

¹⁶ Hague Communiqué, paragraph 9 (emphasis added). It could be that this phrase is only meant with respect to the unamended CPPNM which is already in force. If, though, it does refer to the amended CPPNM, it would represent an interesting development.

¹⁷ Vienna Convention on the Law of Treaties, Article 25.

Amendment significantly expands the scope of the CPPNM – among other things, to cover domestic use, storage and transport of nuclear material and the security of nuclear facilities used for peaceful purposes, as well as to criminalize offenses related to illicit trafficking and sabotage – it would certainly strengthen the international legal framework if States that have ratified the Amendment were to implement it domestically.¹⁸ As evidenced by a number of the National Progress Reports, several States have indeed adopted laws and regulations in accordance with the amended CPPNM.¹⁹ This same phrase – “stress the need for all contracting parties to comply fully with all its provisions” – is used in referring to adherence to ICSANT, though in this case, since ICSANT is in force, it is a legal obligation of States parties to the convention to comply with it.

Following the paragraphs related to the treaties, in paragraph 11 the Communiqué recognizes the issue of national implementation of international legal obligations and thereby welcomes efforts to develop model laws to assist States in drafting comprehensive domestic nuclear security legislation. This is, of course, an implicit nod to the Indonesian gift basket, “National Implementation Legislation Kit,” but it is formulated in a broad way as to also duly recognize other initiatives, such as the IAEA Handbook on Nuclear Law and the UN Office on Drugs and Crime’s (UNODC) legislative guides to the terrorism conventions.²⁰ This paragraph also represents an acknowledgement that it is not enough to sign on to international rules, but the rules need to be given effect to and followed in national legal and regulatory systems.

When it comes to the soft law instruments, the Hague Communiqué is less specifically formulated than its predecessor. First, recognizing that the Nuclear Security Series guidance documents provide “the basis for effective nuclear security measures at national level,” States are encouraged to make use of the guidance as appropriate.²¹ Gone, for example, is the explicit reference to INFCIRC/225 (or Nuclear Security Series No. 13) as contained in the Seoul Communiqué. In addition, the language of striving to reflect the guidance in national practice is replaced by the encouragement to utilize the guidance as appropriate. It is textually weaker. This seeming step back in the Summit consensus document is compensated for, however, by the commitments made in the initiative on “Strengthening nuclear security implementation.”

Second, in paragraph 23 on radioactive sources and materials, the text is more reflective than forward-looking. There is an acknowledgement of the progress that has been made with regard to, inter alia, States having adapted national laws and regulations taking into account the Code of Conduct and Nuclear Security Series guidance. A number of the National Progress Reports note such action.²² In terms of additional steps, though, there is a general commitment to promote the guidance (primarily through the IAEA) and a statement that participating States seek to secure radioactive sources in a way consistent with the international guidance. Having expanded the discussion to include radioactive sources at the 2012 Summit, it is unfortunate that this area has not been further developed. There is also an additional paragraph under the radioactive sources and materials heading that talks about

¹⁸ This is not a legal requirement but rather fully up to the discretion of States.

¹⁹ See, for instance, the National Progress Reports of Italy, Finland and Germany. The Netherlands has also adopted and implemented legislation, regulations and policies which give effect to the CPPNM as amended (as described in the CPPNM Article 14.1 report submitted by the Netherlands to the IAEA).

²⁰ Such legislative assistance work is also mentioned in paragraph 17 of the Hague Communiqué.

²¹ Hague Communiqué, paragraph 13.

²² See, for instance, the National Progress Reports of the Philippines, the UK, Vietnam, Switzerland and Russia, among others.

security planning for the management of spent fuel and radioactive waste. The way the paragraph is formulated brings to mind the Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management (Joint Convention). The Joint Convention is a safety instrument, not traditionally considered part of the international legal framework for nuclear security, and as such, does not require a security plan to be drawn up. However, it does set standards for measures to be taken to protect individuals, society and the environment against radiological hazards – a common aim of both nuclear safety and security – emanating from spent fuel and radioactive waste used for civilian applications.²³ Most of the NSS-participating States are parties to the Joint Convention and thus should utilize its terms to further develop this priority area.

There are a few other paragraphs in the Hague Communiqué that have implicit links with elements of the international legal framework or that refer to the need for legal action in a specific area. First, paragraph 26 discusses the emergency preparedness, response and mitigation capabilities that address both safety and security. The need for such capabilities is, to varying degrees, expanded upon in the fundamentals and recommendations documents of the Nuclear Security Series as well as in the Code of Conduct. Perhaps the most directly relevant treaties are the Convention on Early Notification of a Nuclear Accident (Early Notification Convention) and Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency (Assistance Convention), which are both considered safety conventions but are certainly relevant to nuclear security. This area is also the purview of Global Initiative to Combat Nuclear Terrorism's (GICNT) Response and Mitigation Working Group, currently led by Morocco.

Second, Paragraph 31 covers the security of nuclear and other radioactive materials while in domestic and international transport. The CPPNM (original and as amended) is of direct relevance here as it concerns security of nuclear material used for peaceful purposes in international (and, under the 2005 Amendment, domestic) transport. Of course, paragraph 31 has a broader scope, including other radioactive materials and not being limited to civil-use materials. States parties to the CPPNM, and those that are already adhering to the Amendment pending entry-into-force, are already obliged to provide for certain levels of security for nuclear material in (international) transport. Security Council Resolution 1540 similarly requires all UN Member States to enact appropriate effective measures to account for and secure nuclear material, not only limited to peaceful-use material, in transport.²⁴ Additionally, according to the Nuclear Security Fundamentals – Nuclear Security Series No. 20 – an essential element of a State's nuclear security regime is taking necessary measures to secure nuclear and other radioactive material during international transport.²⁵ The Nuclear Security Series recommendations documents, namely INFCIRC/225/Rev.5 (No. 13) and No. 14, go into more detail providing guidelines for measures concerning security during transport. For radioactive materials, the IAEA guidelines recommend that additional account be taken of:

- UN Recommendations for the Transport of Dangerous Goods – Model Regulations;
- relevant provisions of the Convention on International Civil Aviation and ICAO Technical Instructions for the Safe Transport of Dangerous Goods by Air, for security of radioactive materials during air transport; and

²³ Joint Convention, Articles 4 and 11.

²⁴ Security Council Resolution 1540, paragraph 3(a).

²⁵ Essential element 4.

- applicable provisions of the International Ship and Port Facility Security Code and of the International Maritime Dangerous Goods Code as required by the International Convention for Safety of Life at Sea (SOLAS 74 amended).

Therefore, while paragraph 31 of the Hague Communiqué only reaffirms participating States' determination to enhance the security of radioactive materials during transport, it should be read in conjunction with relevant existing international guidelines and legal obligations.

Lastly, paragraph 32 covers measures aimed at countering illicit trafficking. The paragraph highlights the importance of taking the necessary steps to locate and secure nuclear material out of regulatory control, steps which include export controls and law enforcement mechanisms, to regulate nuclear transfers and counter illicit transfers of nuclear material. Interestingly, only nuclear material is discussed in the first part of the paragraph discussing tools to combat illicit trafficking, while other radioactive material is mentioned at the end of the paragraph when it comes to encouraging expanded information-sharing to support law enforcement efforts.

Paragraph 32 is clearly related to Security Council Resolution 1540, which requires appropriate and effective domestic legal action to, among other things, prevent transfers of nuclear weapons and their means of delivery by non-State actors. Resolution 1540 also requires all UN Member States to establish appropriate effective border controls and law enforcement efforts to address illicit trafficking, as well as export controls with appropriate legal penalties for violations, in order to prevent proliferation of WMD through, inter alia, controls over related materials such as nuclear material. In terms of specific export control arrangements, one can consider the Nuclear Suppliers Group (NSG), the Zangger Committee, and the Wassenaar Arrangement. Some States mentioned adherence to or participation in the various export control regimes in their National Progress Reports or national statements.²⁶ Furthermore, when it comes specifically to dealing with material out of regulatory control, it is clear that the recommendations in Nuclear Security Series No. 15, which cover prevention, detection and response measures, are of relevance.

One other aspect of paragraph 32 worth highlighting is the mention of the necessity of legislative measures to enable national prosecutions of illicit trafficking cases.²⁷ One of the additions to the CPPNM contained in the 2005 Amendment is the required criminalization of offenses related to illicit trafficking, namely intentional commission of “an act which constitutes the carrying, sending, or moving of nuclear material into or out of a State without lawful authority.”²⁸ Once it enters into force, such acts will have to be made punishable in domestic criminal codes within States parties to the CPPNM as amended. Admittedly, though, the scope of this offense does not cover the full scope of illicit trafficking.

²⁶ Canada stated that it continues to participate in the export control regimes. Israel described export control legislation based on the NSG guidelines. India indicated that it adheres to the NSG guidelines and looks toward becoming a member. Pakistan, in its national statement, noted that its national measures are equivalent to NSG guidelines.

²⁷ In its National Progress Report, Finland specifically pointed out that it has legislation in place to enable criminal prosecution of cases of illicit trafficking.

²⁸ 2005 CPPNM Amendment, Article 7(1).

b. Cooperation with and through International Organizations (Institutional Arrangements)

The Hague Summit, similar to the prior Summits, emphasized the important role played by international organizations in the international nuclear security regime. These organizations, namely the IAEA and the UN, though others also have specific functions related to aspects of the nuclear security regime, serve to assist states with developing and implementing nuclear security measures and as fora for interaction (e.g. through information gathering and sharing). As pointed out above, the roles played by relevant international organizations are based on the legally mandated powers and functions attributed to the organizations.

In addition to highlighting the roles of the IAEA and the UN in the area of nuclear security, the Hague Communiqué refers to specific activities that are linked to the international legal framework. First, reference is made to Integrated Nuclear Security Support Plans (INSSPs). The Washington Work Plan points out the efforts by the IAEA to assist States with consolidating their nuclear security requirements by means of INSSPs. The Hague Communiqué, in paragraph 14, goes a bit further in not only recognizing the efforts to consolidate needs through INSSPs but also encouraging States to use the INSSPs to make progress in nuclear security. From the international law perspective, INSSPs are important because one of the objectives of these plans is for States to adhere to the relevant legal instruments. As laid out in the INSSP template,²⁹ those instruments relevant to nuclear security go beyond the CPPNM, ICSANT and Resolution 1540, and include the Early Notification and Assistance Conventions, the Terrorist Bombing Convention and IMO conventions.³⁰ Carrying out the INSSP involves not only becoming party to these instruments, but States can also request assistance from the IAEA in implementing the nuclear security-related elements. In addition, INSSPs refer to applying the non-binding (soft law) instruments, such as INFCIRC/225 and the Code of Conduct. As such, the Hague Communiqué incorporates by reference these efforts aimed at strengthening the international legal framework through INSSPs.

Second, paragraph 15 of the Hague Communiqué underlines the benefits of the IAEA review and advisory services, which include International Physical Protection Advisory Service (IPPAS) missions and International Nuclear Security Service (INSServ) missions, among others. Though voluntary, the Communiqué encourages States to make use of the services and share lessons learned, without of course compromising sensitive information. With respect to international law, these missions are of importance due to the fact that they are the only mechanisms that assess, inter alia, a State's legal and regulatory framework for nuclear and other radioactive material in line with international (legally binding and non-binding) instruments. Should more States make use of such services, and take steps in accordance with the recommendations that come out of the reviews, an expected outcome would be increased compliance with relevant international instruments. These missions also play a central role in the "Strengthening Nuclear Security Implementation" initiative in which subscribing States commit to hosting such reviews.

²⁹ This is based on version 3 of the INSSP template to which the author had access.

³⁰ These include namely the Protocol to Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (2005 SUA Protocol) and 2005 Protocol to the 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (2005 Protocol to the 1988 Fixed Platforms Protocol).

Third, in discussing the role of the UN in paragraph 17, the Communiqué urges the full implementation of Security Council Resolution 1540. Resolution 1540 is legally binding on all Member States of the UN by virtue of Article 25 of the UN Charter and because it was adopted under Chapter VII of the Charter. Reference here is made to all of Resolution 1540, and subsequent resolutions (i.e. Resolution 1977), though emphasis is ostensibly on the nuclear security-related elements, such as operative paragraph 3 of Resolution 1540. The Hague Communiqué further urges States to continue reporting efforts to implement Resolution 1540 on a regular basis to the 1540 Committee, which pursuant to rule 28 of the Security Council's rules of procedure has been tasked with overseeing implementation of the Resolution. The 1540 Committee fulfills a supervisory function by collecting and assessing reports submitted by Member States on steps taken or intended to be taken in implementing the Resolution.

Finally, paragraph 32 of the Hague Communiqué, discussed in more detail above, encourages greater information sharing, inter alia through the World Customs Organization (WCO) and INTERPOL. This echoes the last sentence of paragraph 9 of the Seoul Communiqué, though without the specific reference to INTERPOL's Radiological and Nuclear Terrorism Prevention Unit. Such information sharing is facilitated by the functions of these bodies as laid down in the relevant provisions of the organizations' constitutive documents.³¹

c. Confidence-building/Assurances

In the lead-up to the 2014 NSS, a lot of attention was paid to the concept of assurances. The idea is that States have an essential interest in knowing that the necessary measures are being taken in every other State. Assurances are a means of gathering and providing information, directly or through an international organization, in this case to build confidence in the effectiveness of national nuclear security regimes. Getting agreement on assurance measures has proven difficult due to the close guarding of information on nuclear security regimes, seen as highly sensitive and thus confidential. One of the key new developments in the Hague Communiqué was getting such measures, to a certain degree, mentioned in the document. As denoted by the title of the relevant paragraph – paragraph 20 – the emphasis is on the voluntary nature of (most of) the various proposed measures. Though certainly noteworthy that such a paragraph was included in the consensus outcome document of the 2014 NSS, it is quite weakly formulated (no encouragement to take measures but only stating that States “may consider” taking such measures) and is further qualified by noting that many NSS-participating States are already taking such measures.

To be sure, not all assurance measures are voluntary. Most of the non-exhaustive list included in paragraph 20 are of a voluntary nature, but one – “providing information through relevant existing reporting mechanisms and forums” – can be read as including, for instance, the reporting requirement under Article 14(1) of the CPPNM. Pursuant to that Article, each State party to the CPPNM is legally obligated to “inform the [IAEA] of its laws and regulations which give effect to this Convention,” after which the IAEA will communicate the information to all States parties. In other words, this is a non-voluntary (for States parties to the CPPNM) assurance mechanism which to this point has been underutilized but can be reaffirmed to help build confidence in nuclear security regimes. It is positive that a few States

³¹ Constitution of the International Criminal Police Organization-INTERPOL (for example, Article 26), and Convention Establishing a Customs Co-operation Council (see Article III).

referred to having submitted information in accordance with CPPNM Article 14(1) in their National Progress Reports.³²

Paragraph 20 of the Hague Communiqué notwithstanding, the issue remains that building confidence in States not only having made commitments to take steps aimed at improving nuclear security but also acting in accordance with those commitments is essential to the strength of the global architecture. Therefore, widespread compliance with Article 14(1) of the CPPNM should be sought, and further examination should be conducted of just how far States are willing to go in sharing information and opening up their nuclear security regimes to external scrutiny. The more transparent States are, by way of information exchange or hosting of peer reviews, etc., the more confident States will become in each other's regimes. This will have the effect of increasing trust, and it will also assist with a higher degree of harmonization of international efforts.³³

III. Gift Baskets (Joint Statements)

Gift baskets – joint statements or commitments made by two or more NSS-participating States – were introduced at the Seoul Summit in 2012, and the practice continued at the 2014 NSS. It was the gift baskets presented at this year's Summit that represented the most progressive developments. In particular, the gift basket, or initiative, on “Strengthening Nuclear Security Implementation” was generally regarded as a significant step forward for the NSS process. This initiative is centered on the Nuclear Security Series fundamentals and recommendations documents (soft law) and is, therefore, directly relevant to the international legal framework. While the initiative drew the most attention, a couple of other gift baskets also utilize, make reference to or are based on international law.

a. “Strengthening Nuclear Security Implementation”³⁴

The “Strengthening Nuclear Security Implementation” initiative was announced by the Netherlands, South Korea and the U.S. at a press conference on 25 March 2014. At the press conference presenting the initiative, Dutch Foreign Minister Frans Timmermans described the objectives of the initiative as being two-fold: 1) to eliminate weak links in worldwide nuclear security, and 2) to build confidence in each government's nuclear security measures. The initiative was an important step in that it looks toward laying the groundwork for a more robust international system based on national commitments to the domestic application of international principles and guidelines and on actions to continuously improve nuclear security, in general, as well as the effectiveness of domestic nuclear security regimes and operators' systems, more specifically. The initiative holds potentially far-reaching consequences for the future strength of international nuclear security, but the consequences will largely depend on how subscribing states choose to carry out their commitments.

States that have signed on to the initiative pledge to “subscribe to the fundamental principles” as laid down in Nuclear Security Series No. 20 and to “meet the intent of the

³² The Netherlands, the UK, Japan, Canada and Australia all describe submitting such a report.

³³ Some scholars refer to a compliance pull that can result from assurance measures. Such compliance pull is especially important when a substantial part of the regime is based on legally non-binding instruments, such as with nuclear security. See, Chayes and Shelton, “Commentary,” in Shelton (ed.), *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System*, 2000.

³⁴ For a more detailed discussion of this initiative, see Herbach, “The Nuclear Security Implementation Initiative: A Catalyst for Needed Action,” *Arms Control Today*, June 2014.

recommendations” in Nuclear Security Series documents Nos. 13-15. With regard to the latter point, subscribing States have committed to realizing or *exceeding* the objectives of the recommendation documents through “the implementation and enhancement of national regulations and other government measures.” Therefore, while it is clear that the initiative does not change the legally non-binding status of these instruments, some adaptation of domestic laws, regulations, administrative systems, organizations or other measures in accordance with the instruments is to be expected in carrying out the initiative. The extent of these changes, however, is left entirely up to subscribing State discretion, reflecting the voluntary nature of gift basket commitments. In order to maximize the utility of the initiative in terms of improving nuclear security worldwide, States should take an approach in exercising this discretion that goes as far as possible in giving effect to the fundamentals and recommendations in domestic regimes. In accordance with the Nuclear Security Fundamentals document (No. 20), States seem to be committing to putting in place an appropriate and effective nuclear security regime based on the document’s list of essential elements being applied to the extent practicable. In other words, “subscribe,” thus interpreted, means more than acknowledgment of the importance of these principles, but rather an acceptance of the principles as an integral part of the national regime.

What it means to meet the intent of the Nuclear Security Series recommendation documents, and thereby to realize or exceed the objectives, requires some interpretation. Generally, each of the three sets of recommendations is meant to provide guidance to States in setting up or strengthening, implementing and maintaining their nuclear security regimes through the establishment or improvement of particular capabilities in order to reduce risks of malicious activities, depending on the document’s particular scope – nuclear material and facilities, radioactive material, nuclear and other radioactive material out of regulatory control. One could identify the intent of the recommendations put together as to help States establish a comprehensive appropriate and effective nuclear security regime, thereby fleshing out the principles outlined in the Nuclear Security Fundamentals document. In that way, the initiative commitment to a certain extent actually goes beyond what is required of states parties to the relevant legally binding instruments, which each have a fairly limited scope. Although these documents explicitly apply only to civil-use material and facilities, states may naturally extend the relevant provisions as they so choose. The U.S., in fact, pointedly stated in its National Progress Report that it takes INFCIRC/225/Rev. 5 into account in military security provisions. Russia also referred in its report to all nuclear material, storage sites and associated facilities being secured “at least” to the level prescribed in INFCIRC/225/Rev.5. Several other NSS-participating States indicated in their National Progress Reports that they are already applying the IAEA recommendations, namely INFCIRC/225 (fourth and fifth revisions) domestically.³⁵

A key development of the initiative is the commitment by subscribing States to “continue to improve the effectiveness of their nuclear security regimes and operators’ systems” through international peer reviews and self-assessments. The peer review services are designed to assess a State’s nuclear security regime, including the legal and regulatory framework and physical protection systems for nuclear and other radioactive material, in line with international instruments and recognized best practices. As an example, the International

³⁵ See the National Progress Reports of the UK, the U.S., United Arab Emirates, Turkey, South Korea, the Netherlands, New Zealand, Mexico, Lithuania, Kazakhstan (in regulations set to be adopted), Germany, Czech Republic, Canada, Belgium and Algeria. Each of these States has subscribed to the initiative. Switzerland, Russia and Brazil indicate in their National Progress Reports that they also have domestic measures in accordance with, at least, INFCIRC/225, but they have not signed on to the initiative.

Physical Protection Advisory Service (IPPAS) is mentioned, but the language leaves open the option for hosting other types of peer reviews, such as International Nuclear Security Service (INSServ) or Integrated Regulatory Review Service (IRRS) missions. These voluntary arrangements remain the only international measure of whether States are acting in accordance with nuclear security guidelines, making them essential to building confidence in States' nuclear security regimes. Requests for such reviews have been increasing over time. Noteworthy is that subscribing States are making a general pledge not only to host peer reviews, but also to host them "periodically." Read together with the commitment to act upon recommendations resulting from the reviews, hosting reviews periodically would seem to mean that subscribing States intend to request regular follow-up missions to review implementation of the suggested improvements.

The initiative concludes with a list of actions aimed at continuous improvement of nuclear security, one or more of which subscribing States intend to take. Continuous improvement suggests an indefinite timeline and reflects the idea that flawless nuclear security will never be achieved. Rather, efforts must be adapted and strengthened in line with changing circumstances. For this reason, the list is something that could be reviewed and refined in the run-up to the 2016 NSS in light of achievements having been made or other pressing needs for action having been identified.

In the closing press conference of the 2014 NSS, Dutch Prime Minister Rutte stated that the ultimate goal is for all NSS countries to follow lead of the initiative and set an example for other countries. Therefore, an aim for the 2016 NSS should be to increase as much as possible the number of subscribing States, ideally convincing nuclear weapon State holdouts China, India, Pakistan and Russia to sign on. Not only would this build additional confidence, but it would also give credence to the idea of the guidelines being international standards, which would have an impact even outside of the NSS process. Also, hosting IPPAS or other peer review missions is in line with the measures listed in paragraph 20 of the Hague Communiqué, and subscribing States should be encouraged to share non-sensitive information from the peer reviews in the interest of transparency and disseminating good practices. It is interesting to note that the Nuclear Materials Security Index developed by the Nuclear Threat Initiative (NTI), which is held up as gauge of State practices, does not take into account commitments to these soft law instruments in determining State scores. It does look at hosting peer reviews, though. This means that, while the initiative is rightly considered a laudable achievement, the most progressive element – applying IAEA guidelines in the national nuclear security regime – will not raise subscribing States' scores in the Nuclear Materials Security Index.

b. "Statement on Enhancing Radiological Security"

At the Seoul Summit in 2012, Germany presented a gift basket on the security of radioactive sources. The gift basket considered the wide use of radioactive sources throughout the world in industry, medicine, agriculture and research, and thereby recognized that ensuring some level of radioactive source security was necessary. It recognized the pertinent international instruments – including ICSANT, the Code of Conduct and Import/Export Guidance, and Nuclear Security Series No. 14, among others. It then listed a series of steps to reach the goals identified by the Seoul Summit with respect to radioactive sources, with suggestions for related action. Among them were:

- Becoming a party to (universalizing) ICSANT

- Putting the relevant Nuclear Security Series documents and the Code of Conduct into practice at the national level
- Establishing a national register of high-activity radioactive sources

Acknowledging that States would have different ways of meeting the challenges related to radioactive source security, the gift basket included some examples of national approaches in appendices.

Where the 2012 radioactive source security gift basket took a quite broad and general approach to the issue, the 2014 gift basket on enhancing radiological security was more specific. It commits subscribing States to securing Category 1 radioactive sources within their territories by 2016. Category 1 sources are those that pose the highest risk to human health.³⁶ A number of actions are listed through which the subscribing States will secure the Category 1 sources. With respect to the international legal framework, subscribing States pledge to secure the sources consistent with the Code of Conduct and “with consideration” of Nuclear Security Series documents Nos. 14-15. Nuclear Security Series No. 14 is explicitly designed to assist States with implementing commitments with respect, inter alia, to the Code of Conduct. Nuclear Security Series No. 15 is consistent with No. 14 and was developed using various instruments including the Code of Conduct. In the parlance of the Code of Conduct, a source out of regulatory control is referred to as an “orphan source.” The gift basket goes on to list specific activities that the States will give particular attention to, which seem to be drawn from or based on elements of the mentioned soft law instruments, but are not always direct copies of the soft law provisions. The activities listed are not exhaustive; rather the focus is placed on certain activities. In addition, subscribing States “may consider” applying additional best practices, a few examples of which the gift basket goes on to list. One of those additional best practices is “a robust and holistic regulatory framework that governs secure source transportation, possession and disposition.” Such a framework would ostensibly also be based on relevant international guidance, namely that contained in Nuclear Security Series No. 14.

Though not specifically mentioned, the implementing guide “Security of Radioactive Sources” (Nuclear Security Series No. 11), which provides advice on implementing the security-related provisions of the Code of Conduct, would be of relevance, for instance in implementing site-level security measures. Nuclear Security Series No. 11 assigns “security level A” to Category 1 sources and goes on to describe measures related to detection, delay, response and security management for the security of Category 1 sources, along with a table of illustrative measures that could be applied at facilities.

The 23 States that signed on to this gift basket, all of whom have made a political commitment to the Code of Conduct, are not the same States that signed on to the 2012 radioactive source security gift basket.³⁷ It is unclear why there is this discrepancy, but the

³⁶ See IAEA, “Categorization of radioactive sources,” IAEA-TECDOC-1344, July 2003. In the list of sources covered by the Code of Conduct, Category 1 sources are further described in Annex I to the Code of Conduct as: “sources, if not safely managed or securely protected would be likely to cause permanent injury to a person who handled them, or were otherwise in contact with them, for more than a few minutes. It would probably be fatal to be close to this amount of unshielded material for a period of a few minutes to an hour. These sources are typically used in practices such as radiothermal generators, irradiators and radiation teletherapy.”

³⁷ Finland, Indonesia, Malaysia, Philippines, Poland, Singapore, Spain, Switzerland and Thailand participated in the 2012 gift basket but not the 2014 one. Algeria, Armenia, Georgia, Lithuania, the Netherlands, Turkey, the UK and the U.S. signed on to the 2014 gift basket but had not done so for the 2012 one.

“Enhancing Radiological Security” gift basket is significantly more specific in the steps listed, which should make it easier for States to take the necessary actions to fulfill their gift basket commitments accordingly and measurably.

c. National Legislation Implementation Kit

National implementation of international obligations is essential to the strength of the global nuclear security regime. This step often proves to be a significant hurdle, whether due to lack of domestic capacity to develop, draft and roll out legislation, or lack of awareness of what national legislation to give effect to international instruments entails, or other reasons. Therefore, the Kit is in principle a welcome contribution, certainly in the context of the NSS under which emphasis is placed on the need for robust national legislative and regulatory frameworks encompassing the full scope of nuclear security. The joint statement released at the 2014 NSS echoes the aforementioned text of the Hague Communiqué, paragraph 11, which as described above does not mention the Kit directly but rather is more generally formulated. Furthermore, the joint statement goes on to say that “the Kit provides States with references to a wide array of consolidated elements and provisions contained in relevant international legal instruments and guidance documents on nuclear security that together contribute to the global framework for nuclear security.”

The Kit was revised to take account of comments from the IAEA and others, and since this author first reviewed it, certain elements have improved. However, the Kit continues to have a number of shortcomings that will diminish any positive impact it may have. It continues to lack consistency and correctness in the use of key terms – radioactive material versus nuclear material versus radioactive sources – which will only cause confusion and difficulties in precisely implementing the relevant international obligations. The terms should be, but are not always, used exactly as in the international sources from which the provisions are drawn. It also remains long and complicated, being formulated more as a monolithic model law than as, contrary to what is claimed in the joint statement, references to consolidated elements from the relevant instruments and guidance. Put another way, the Kit compiles (copies and pastes) elements and provisions from various sources without properly consolidating (or integrating) them. Prior existing initiatives, namely the IAEA Handbook on Nuclear Law: Implementing Legislation which primarily covers ICSANT and the CPPNM (as amended), do a better job of unifying the elements of the various legal and guidance instruments, so the added value of the Kit is questionable. It would seem, unfortunately, to be a missed opportunity as helping States develop comprehensive national legislation on nuclear security through guidance on domestic implementation of international obligations could be very useful considering the complexity of the international legal framework for nuclear security.

d. “Joint Statement on Transport Security”

The transport security gift basket was introduced at the 2012 NSS. The gift basket recognized that acting consistently with international guidance, namely INFCIRC/225/Rev.5, would provide a legal infrastructure for domestic and international transport of nuclear material. Participating States – France, South Korea, Japan, the UK and the U.S. – formed a working group to discuss transport security issues related to nuclear and other radioactive material together with relevant international organizations.³⁸ One of the intended working group

³⁸ See the “Joint Statement on Transport Security,” presented at the Seoul NSS, point 2(1). International organizations specifically mentioned were the International Maritime Organization (IMO), the International Civil Aviation Organization (ICAO), and the IAEA.

activities was to address effective implementation of INFCIRC/225/Rev.5. In addition, the intention was to exchange experiences and best practices, conduct onsite trainings and hold table-top exercises, all with a view toward strengthening transport security.

At the 2014 Summit, the participating States committed to continuing the activities of the working group in the lead up to the 2016 NSS and pledged to work toward further enhancing transport security for nuclear and other radioactive materials in part through international law-related approaches. The first point of collaboration has to do with national adherence to international guidance. In this context, the participating States have pledged to “consider sharing information” on efforts to implement their obligations stemming from international conventions and to act in accordance with relevant soft law instruments, namely INFCIRC/225/Rev.5. This commitment is clearly focused on nuclear material security during transport, given the scope of INFCIRC/225/Rev.5, and it is not clear why guidance related to other radioactive material (i.e. Nuclear Security Series No. 14) is not included. The “relevant international conventions” would primarily be referring to the CPPNM. Japan, the U.S. and South Korea have not become party to the 2005 Amendment, so the pledge for these States would involve the 1980 CPPNM provisions on security of nuclear material in international transport. France and the UK have both become party to the CPPNM as amended, and though it is not yet in force, the UK has stated that it has the implementing legislation for the amended CPPNM in place. Other “relevant international conventions” could include, for instance, the European Agreement concerning the International Carriage of Dangerous Goods by Road (ADR) to which France and the UK are parties, and the Convention on International Civil Aviation (Chicago Convention) whose Annex 18 contains requirements for the safe transport of dangerous goods by air, covering also radioactive material.³⁹ Each of the participating States is party to the Chicago Convention. The sharing of information on steps taken to apply these instruments would be a welcome voluntary measure, in the terminology of the Hague Communiqué, enhancing transparency and spreading good and best practices.

Point 4 of the 2014 transport security gift basket deals with assisting others in implementing the relevant international instruments. The formulation is quite broad, mentioning the CPPNM and the 2005 Amendment, as well as soft law instruments. In terms of the soft law instruments, not only is reference again made to INFCIRC/225/Rev.5 but also to “other IAEA guidances” to augment security of nuclear and other radioactive material in international and domestic transport. For this point, the participating States recognize the assistance already provided by various international bodies and initiatives, including the 1540 Committee, the Global Partnership Against the Spread of Weapons and Materials of Mass Destruction (GP) and GICNT. IAEA peer reviews are also mentioned as providing technical advice. The actions that the participating States in this gift basket intend to take with respect to this point again have to do with information exchange and sharing good practices and lessons learned, both in terms of physical protection and security measures as well as implementation of the international instruments.

These intended actions bear a striking resemblance to the obligations in Article 5(3) of the CPPNM (along with Article 5(4) of the 2005 CPPNM Amendment). Pursuant to the provisions in the CPPNM, States parties “shall cooperate and consult ... with a view to obtaining guidance on the design, maintenance and improvement of the systems of physical

³⁹ It is interesting that the gift basket especially welcomes the participation other States with experience in rail and air transport, seeming to mean that regardless of obligations with respect to these types of transport, more remains to be done in developing security practices. It is clear from the text that all modes of transport – air, rail, sea and road – are covered in the gift basket.

protection of nuclear material in international transport.” Added in the 2005 Amendment is that States parties “may consult and cooperate” in order to get guidance with respect to national physical protection systems for nuclear material in domestic use, storage and transport, as well as for nuclear facilities. Therefore, in terms of assistance for physical protection of nuclear material in international transport, the gift basket essentially echoes a legal obligation under the CPPNM. The gift basket, of course, goes beyond this narrow scope, but it is important to acknowledge where overlaps exist between the voluntary commitments made through the NSS process and the existing obligations under the international legal framework. This will help with ensuring consistency of efforts to improve nuclear security regimes.

e. “Joint Statement on Promoting Full and Universal Implementation of United Nations Security Council Resolution 1540 (2004)”

The last gift basket from the 2014 NSS that is correlated to, and in fact directly deals with, the international legal framework for nuclear security is the “Joint Statement on Promoting Full and Universal Implementation of the United Nations Security Council Resolution 1540 (2004).”⁴⁰ Joined by 32 States, this gift basket reaffirms participating States’ commitment to full implementation of Resolution 1540, to the extent this is not already the case, and further lists a number of actions aimed at facilitating universal implementation which the participating States undertake to carry out. As mentioned above, Resolution 1540 is legally binding on all States, which makes it the only universal legally binding instrument setting forth obligations to enhance security of nuclear materials.⁴¹ However, the scope of the Resolution is broad and taking the necessary steps to comply with the Resolution requires capacity that not all States have. For this reason, and because full implementation will significantly strengthen the international legal framework for nuclear security, this gift basket is an important development.

Many of the nuclear security-related obligations in Resolution 1540 have synergies with the other legally binding and non-binding instruments that make up the international legal framework for nuclear security, as well as the activities and approach of the IAEA. That means that improving implementation of Resolution 1540 will have a ripple effect, helping to increase adherence to other relevant instruments.⁴² For instance, the requirement to develop and maintain appropriate effective physical protection measures, with respect to nuclear materials, clearly invokes the CPPNM and INFCIRC/225, without explicitly requiring States that have not done so to become party to the CPPNM and without naming INFCIRC/225. However, “appropriate effective” physical protection measures would lack meaning without reference to existing international guidance.⁴³ The Nuclear Security Fundamentals document even adopts the phrase “appropriate and effective nuclear security regime” as the aim in applying the document’s objectives and essential elements.

⁴⁰ The text of this gift basket has been added to the website of the 1540 Committee, <http://www.un.org/en/sc/1540/related-documents.shtml>.

⁴¹ Resolution 1540 also concerns chemical and biological weapons, means of delivery and related materials.

⁴² Many of the measures required by Resolution 1540 closely fit with the structure and activities laid out in the Nuclear Security Plans, the most recent being the plan for 2014-2017. This includes the activities having to do with legal and regulatory infrastructure, physical protection, illicit trafficking, regulatory aspects of safeguards, accounting and control systems, and export/import controls. See IAEA, “The International Legal Framework for Nuclear Security,” International Law Series No. 4. 2011.

⁴³ The 1540 Matrix that was developed to help organize information about the implementation of the Resolution confirms this approach. The Matrix asks, for example, for national information on whether the CPPNM and the 2005 Amendment have been ratified or acceded to.

Among the actions listed, participating States will work regionally to facilitate regional approaches to implementation assistance and to support (host and contribute to) regional and sub-regional capacity-building events, thereby referring to the regional focus of outreach and assistance laid out in follow-up Resolution 1977 (2011). Assistance foreseen in the list of actions concerns not only help with implementation of the 1540 obligations, but also encouragement and assistance with fulfilling the reporting requirements, as some States have yet to submit a first report.⁴⁴ Participating States will also consider preparing national implementation action plans, and will assist other States with doing so, in accordance with paragraph 8 of Resolution 1977. Furthermore, with an implicit eye toward the post-NSS situation and the need then to continue work via existing structures for cooperation related to nuclear security, the gift basket will also help enhance synergies among the relevant organizations and initiatives, with participating States undertaking to report at regular intervals on progress being made on the gift basket actions within the UN, the 1540 Committee and the IAEA, as well as in the GP, GICNT, and at other international and regional meetings and events.

In general, each of the actions foreseen in this gift basket has to do with cooperation aimed at strengthening the international legal framework.

IV. Conclusion: Toward 2016

As demonstrated in this report, though the NSS process is without a doubt a political process participated in and contributed to on a voluntary basis, many of the outcomes of the 2014 NSS in The Hague were framed in the context of international law. Starting with the Hague Communiqué's emphasis on the nuclear security architecture, within which the relevant legally binding and soft law instruments play a central role, to the number of gift baskets that relate to elements of the international legal framework, international law is clearly essential to the global nuclear security regime. This is because, in very general terms, international law provides a structure for international cooperation in areas of shared interest. It creates obligations for which States can be held accountable, and it provides a platform for sustained interactions through mechanisms for cooperation, consultation and review. This latter element will be of the utmost importance in seeking to continue efforts aimed at strengthening nuclear security when the NSS process draws to a close, likely after the 2016 Summit.

Transition to a more permanent, sustainable model of international nuclear security cooperation will be complicated by the differences among States in terms of interests and motivations. While nuclear security is sure to remain a top priority for the States that have participated in the NSS process, a number of them, for instance, single out the existence of nuclear weapons and insufficient progress in terms of nuclear disarmament as the main issues that need to be resolved in realizing an effective global nuclear security regime.⁴⁵ In other words, physically protecting civil-use materials and related facilities is not the main problem. Switzerland in fact proposed that, going forward, any such discussion on nuclear security should expand in focus to include disarmament and non-proliferation.⁴⁶ From an institutional

⁴⁴ See Resolution 1540, paragraph 4, as well as Resolution 1977, paragraph 6. A number of the National Progress Reports mention the submission of 1540 reports – see, among others, the National Progress Report of the UK, Vietnam, Pakistan, Israel and Finland.

⁴⁵ See the National Progress Reports of, for example, Indonesia, New Zealand and Japan.

⁴⁶ National Statement of Switzerland. Chile made a similar statement.

perspective, this would seem to imply that the issue of nuclear security should be absorbed into the NPT process. However, nuclear security as such is not part of the NPT.

It is, therefore, not yet clear how momentum will be kept up with respect to efforts aimed at enhancing nuclear security when the NSS draws to a close. In the lead-up to the 2016 Summit, the focus should be on transition to a sustainable model for nuclear security cooperation. What is clear, though, is that means and methods for this transition will involve a substantial international law component. There are several issues that need to be raised in this context. First, how can the various aspects of nuclear security that have been covered in the NSS process be integrated into existing instruments (through e.g. amendments and review processes), where do gaps remain, and how can these be filled? The NSS process has approached nuclear security in a broad fashion – seeking to secure all nuclear and other radioactive materials, civilian and non-civilian material in international transport and domestically, and to prevent non-state actors from using such material for malicious purposes. This comprehensive approach has been facilitated by the open structure of the Summit process allowing participating States to introduce and cover as many relevant areas as possible. It is widely understood, though, that no single existing legal instrument addresses the full range of issues that have been taken up by the NSS process.

Second, paragraph 5 of the Hague Communiqué describes the need to further strengthen and coordinate cooperation through the IAEA and other organizations and initiatives. This will definitely be an integral part of the transition to a sustainable model. The IAEA and certain other international organizations have constituent instruments, such as a statute, supplemented by rules of procedure that clearly establish the powers and functions of the organization and place limits on expanding or adjusting the organizations' mandates. If aspects of the NSS process can be absorbed into international organizations, the benefit will be being able to make use of standing institutional organs with decision-making competencies, clear and specific mandates for action, regular meetings and formalized membership. At this point, however, it is not clear to what extent the various elements of the nuclear security regime fall within the explicit or implied powers of the existing international organizations. The initiatives, on the other hand, which include GICNT and the Proliferation Security Initiative (PSI), do not have such legal institutional structures. Could and should these initiatives be formalized into international organizations (with standing bodies, statutes, etc.)?

Third, paragraph 5 also mentions regional cooperation, as does Security Council Resolution 1977, as noted above. Focusing on regional cooperation certainly has benefits. States often cooperate more closely on a regional level than on the international level. Close physical proximity often means more acutely shared interests and common threats, or perhaps even mutual distrust. Each of these can have an effect on nuclear security cooperation. In order to facilitate cooperation in general, there already exist a number of regional organizations, such as the Association of Southeast Asian Nations (ASEAN) and, most extensively, the European Union. The full scope of possible regional cooperation to continue the work of the NSS process has yet to be assessed.

These are a few of the major points that need to be addressed before the NSS process comes to an end in order to ensure a smooth transition to the post-NSS situation. The Hague Summit made significant progress; much of it, as discussed in this report, will facilitate sustainability of efforts to continuously improve nuclear security. The NSS process as a whole has had a strong impact, but continuing to improve security of nuclear and other radioactive materials

and associated facilities will be necessary as long as these materials are used for military and civil applications. It is therefore essential that nuclear security maintains its prominent position on the international community's agenda, and this will only be made possible by devising a smooth and effective transition following the conclusion of the NSS.