

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

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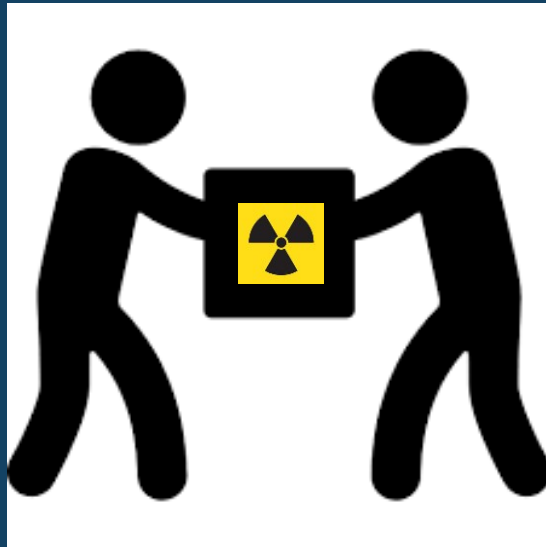
# Overview

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



# Scenario 1: Qualification of crime



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



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



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

# Distinction between offences



Offence of "theft"

VS.



Offence of "theft of nuclear material"

Criminalization in:

- ✓ Criminal codes
- ✓ Acts
- ✓ Statutory laws

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

**Stealing** = the action of taking sth specific

**SIGNIFICANT NUANCES IN THE APPLICATION OF PENALTIES**

# Aim and Content of the CPPNM/A

	CPPNM			CPPNM Amendment		
<b>ADOPTED</b>	26 October 1979			2005		
<b>IN FORCE</b>	8 February 1987			2016		
<b>STATE PARTIES</b>	155			115		
<b>SCOPE</b>	Physical protection of nuclear material for peaceful purposes during transportation	Criminalization provisions	International cooperation	Physical protection of nuclear material for peaceful purposes during: <ul style="list-style-type: none"> <li>• Transportation</li> <li>• Domestic Use</li> <li>• Storage</li> </ul>	<b>EXPANDED</b> Criminalization provisions	International cooperation
<b>TYPE OF OFFENCES</b>	Theft of nuclear material			<b>EXPANDED</b> <ul style="list-style-type: none"> <li>• Theft of nuclear material</li> <li>• Smuggling of nuclear material</li> <li>• Sabotage of nuclear facilities</li> </ul>		

# CPPNM/A Three Main Scopes



# Criminalization: Art. 7 CPPNM/A

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

1. The intentional commission of:

- (a) an act without lawful authority which constitutes the receipt, possession, use, transfer, alteration, disposal or dispersal of nuclear material and which causes or is likely to cause death or serious injury to any person or substantial damage to property or to the environment;
- (b) a theft or robbery of nuclear material;
- (c) an embezzlement or fraudulent obtaining of nuclear material;
- (d) an act which constitutes the carrying, sending, or moving of nuclear material into or out of a State without lawful authority;
- (e) an act directed against a nuclear facility, or an act interfering with the operation of a nuclear facility, where the offender intentionally causes, or where he knows that the act is likely to cause, death or serious injury to any person or substantial damage to property or to the environment by exposure to radiation or release of radioactive substances, unless the act is undertaken in conformity with the national law of the State Party in the territory of which the nuclear facility is situated;
- (f) an act constituting a demand for nuclear material by threat or use of force or by any other form of intimidation;

(g) a threat:

- (i) to use nuclear material to cause death or serious injury to any person or substantial damage to property or to the environment or to commit the offence described in sub-paragraph (e), or
- (ii) to commit an offence described in sub-paragraphs (b) and (e) in order to compel a natural or legal person, international organization or State to do or to refrain from doing any act;

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

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

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

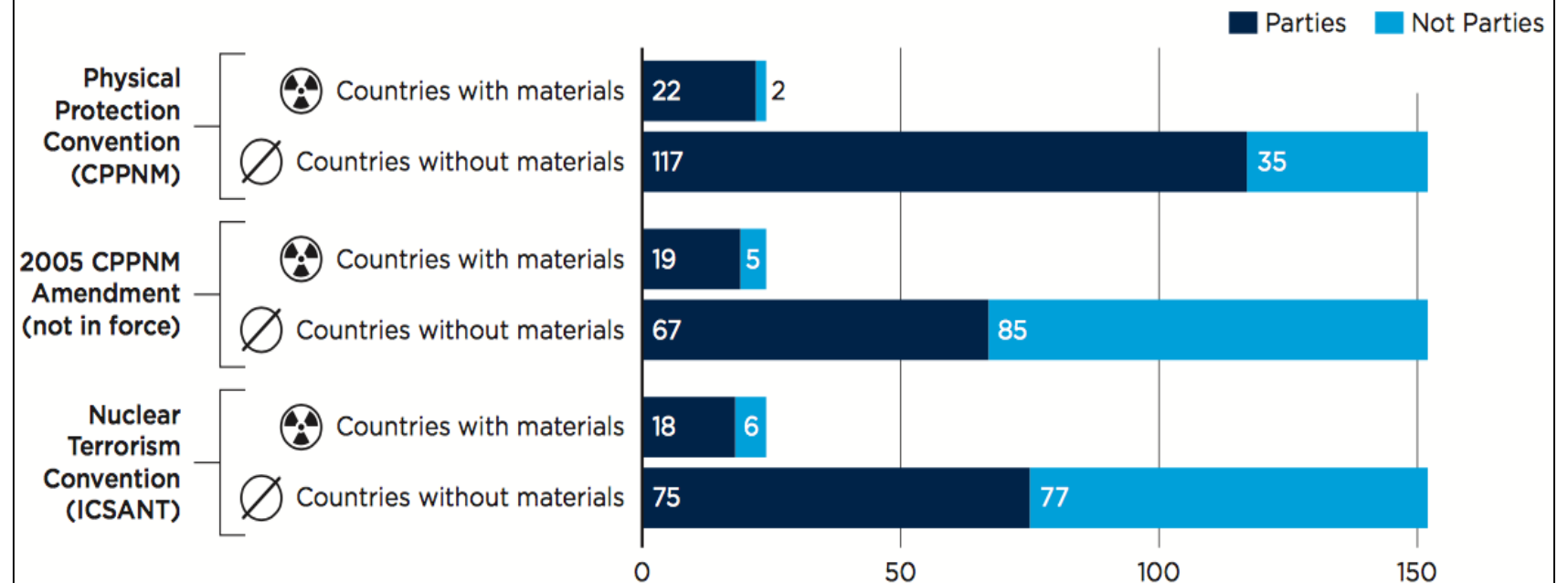
(k) an act which contributes to the commission of any offence described in sub-paragraphs (a) to (h) by a group of persons acting with a common purpose; such act shall be intentional and shall either:

# Turning international law in national law

## REMARKS

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

## EXISTING LEGAL FOUNDATION OF THE INTERNATIONAL SYSTEM REMAINS WEAK



Nuclear Threat Initiative Index, 2016




# Challenge 1: Correct qualification of the crime

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



# Scenario 2: Determination of the punishment

<p>Convention on the Physical Protection of Nuclear Material</p>	<p>Amendment to the Convention on the Physical Protection of Nuclear Material</p> <ol style="list-style-type: none"><li>1. The Title of the Convention on the Physical Protection of Nuclear Material adopted on 26 October 1979 (hereinafter referred to as "the Convention") is replaced by the following title:  CONVENTION ON THE PHYSICAL PROTECTION OF NUCLEAR MATERIAL AND NUCLEAR FACILITIES</li><li>2. The Preamble of the Convention is replaced by the following text:  THE STATES PARTIES TO THIS CONVENTION,  RECOGNIZING the right of all States to develop and apply nuclear energy for peaceful purposes and their legitimate interests in the potential benefits to be derived from the peaceful application of nuclear energy,  CONVINCED of the need to facilitate international co-operation and the transfer of nuclear technology for the peaceful application of nuclear energy,  BEARING IN MIND that physical protection is of vital importance for the protection of public health, safety, the environment and national and international security,</li></ol>
<h2>CPPNM &amp; Amendment</h2>	
<p>LEGAL SERIES No. 12</p> <p> INTERNATIONAL ATOMIC ENERGY AGENCY, VIENNA, 1982</p>	<p>Terrorism, started by General Assembly resolution 49/80 of 9 December 1994,</p> <p>DESIRING to avert the potential dangers posed by illicit trafficking, the unlawful taking and use of nuclear material and the sabotage of nuclear material and nuclear facilities, and noting that physical protection against such acts has become a matter of increased national and international concern,</p> <p>DEEPLY CONCERNED by the worldwide escalation of acts of terrorism in all its forms and manifestations, and by the threat posed by international terrorism and organized crime,</p> <p>BELIEVING that physical protection plays an important role in supporting nuclear non-proliferation and counter-terrorism objectives,</p>

**Country A**



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

**Country B**



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



Which penalties should be imposed to Mr. Smith ?

# Responsibility of the State to criminalize

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## Preamble CPPNM/A

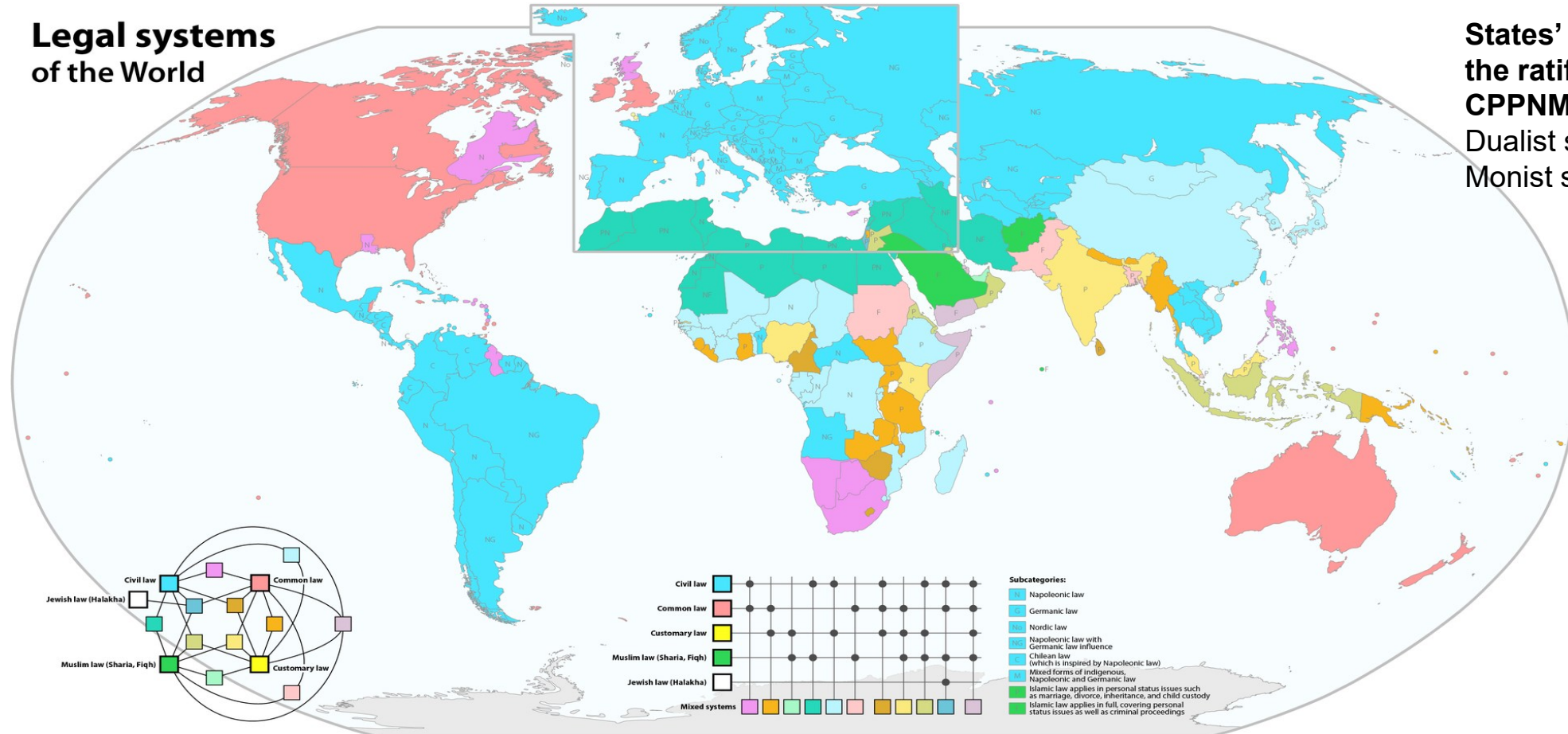
*“The responsibility for the establishment, implementation and maintenance of a physical protection regime within a State Party rests entirely with that State.”*

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

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




# Divergences between legal systems

**Legal systems  
of the World**



**States' approach to  
the ratification of  
CPPNM/A:**  
Dualist systems  
Monist systems

# Implementation differences in national legislation

	Civil law systems  etc.	Common law systems 	Religious law systems (Shariia) 
Types of crime	Crime against: <ul style="list-style-type: none"> <li>• Person</li> <li>• Property</li> <li>• State</li> </ul>	Crime against: <ul style="list-style-type: none"> <li>• Person</li> <li>• Property</li> <li>• State</li> </ul>	Three types of crimes: <ul style="list-style-type: none"> <li>• Hudud</li> <li>• Qisas</li> <li>• Ta'zir</li> </ul>
Forms of punishment	<ul style="list-style-type: none"> <li>• Imprisonment * range from a few months/ years to life sentence</li> <li>• Fine(s) ** range from a few hundreds to hundreds of thousands of \$/€</li> </ul>	<ul style="list-style-type: none"> <li>• Imprisonment * Range from a few months/ years to life sentence</li> <li>• Fine(s) ** range from a few hundreds to hundreds of thousands of \$/€</li> </ul>	<ul style="list-style-type: none"> <li>• Crucifixion, amputation of limbs, lashing</li> <li>• Retaliation, financial compensation</li> <li>• Capital punishment</li> </ul>

# Penalties: crimes against property (theft of nuclear material)



*Sec. 33 of the Australian Nuclear Nonproliferation Safeguards Act (1987):*

Stealing nuclear material

A person shall not:

- (a) steal;
- (b) fraudulently misappropriate;
- (c) fraudulently convert to that person's own use; or
- (d) obtain by false pretences any nuclear material.

Penalty: **Imprisonment for 10 years.**

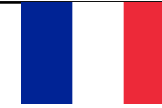


*Chapter 28 of the Finnish Penal Code (39/1889, amended up to 766/2015 included)*

Section 1 - Theft (769/1990)

(1) A person who appropriates movable property from the possession of another shall be sentenced for theft to a **fine or to imprisonment for at most one year and six months.**

(2) An attempt is punishable.



**Article L1333-9, Code de la défense** (Modifié par [Ordonnance n°2016-128 du 10 février 2016 - art. 50](#))

I. Est puni d'un **emprisonnement de 10 ans et d'une amende de 7 500 000 euros**:

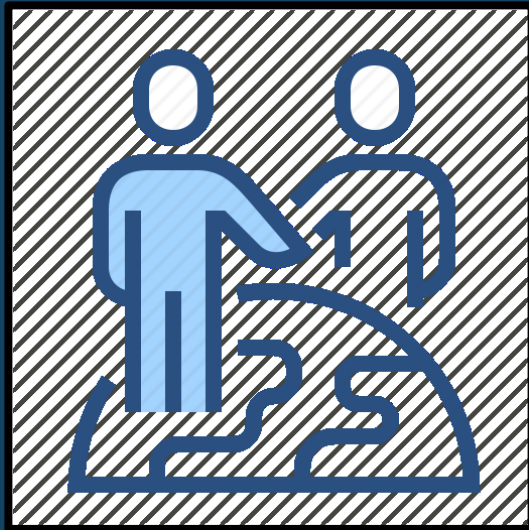
1° Le fait d'exercer sans autorisation les activités mentionnées à l'article L. 1333-2 ou de se faire délivrer indûment par quelque moyen frauduleux que ce soit ladite autorisation ;  
2° Le fait de s'approprier indûment les matières nucléaires mentionnées à l'article L. 1333-1.

# Challenge 2: Avoid disparity in sentencing

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- Disparity is unjustified if the rationale for the differences cannot be traced to relevant distinctions of character or behavior which bear a certain relationship to the aims of the punishment
- Often times, most judges could point to factors which influence their choice of sentence, but they lack objectivity
- Subjectivity in sentencing, lack of proper guidelines, and virtual limitations on the exercise of judicial discretion
- Set of clarifying guidelines with regard to sentencing policies must be put forward by the judiciaries

# Scenario 3: Elements of transnationality



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



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



Mr. Smith is prosecuted under terrorism charges under the ICSANT, despite pleading that his motive was not a terrorist act, but financial gain.



# Art. 7 CPPNM/A and the element of "terrorism"

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The CPPNM and its Amendment:

- Do not require the element of "terrorism" as part of the offence
- Does require the criminalization of certain offences independently of terrorist motivations
- Terrorist motive/ intent may be considered an aggravating circumstance
- Need to determine the form of legislation such as penal code, nuclear law, regulations etc.

## Challenge 3: Procedural issues related to extradition and legal mutual assistance

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

# Recommendations

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## 1. Simplification

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

## 2. Integration

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

## 3. Certain level of harmonization

- Baseline for the amount of penalties
- Avoid very disproportionality effects

# Crossroads: challenges and opportunities



90 States  
6 continents

# What is the ultimate aim of universalization?

Universalization (noun)  
= *def.* to universalize, to  
generalize (Webster  
Dictionary)



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

- Ratification of the treaty and universal adherence
- Incorporation into domestic law
- Full and effective implementation
- (Uniform) penalties?



# Thank you for your attention!

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