

## CHAPTER EIGHT

### CONVENTION ON THE PHYSICAL PROTECTION OF NUCLEAR MATERIAL 1979 (‘Nuclear Convention’)

1. The purpose of the Convention is set out in the preamble – to avert the potential dangers posed by the unlawful taking and use of nuclear material by the adoption of effective measures to prevent, detect and punish such offences. Articles 2 to 6 contain the measures; *Articles 7 to 14* contain *penal* provisions and are based closely on the Diplomats Convention.

2. Although it is short, the Convention was negotiated with some difficulty over a period of two years.<sup>106</sup> It was adopted on 26 October 1979 and entered into force on 8 February 1987. As of September 2002 it had 74 Parties, including 11 Commonwealth States. Although most Commonwealth States may not manufacture nuclear material, they may well have it in their territory, and it is important that all States should be able to control effectively the possession, transport and use, as well as manufacture, of nuclear material. The text of the Convention is at page 170 below. The complete list of signatures, ratifications, accessions and succession, is at page 179 below.

#### Scope of the Convention

3. The Convention does not apply to nuclear material used for military purposes since it is - or at least should be - already subject to strict regulation: see the eighth preambular paragraph, and *Article 2(1)* which limits the Convention to nuclear material ‘used for peaceful purposes’. ‘*Nuclear material*’ is defined in *Article 1(a) and (b)*.

4. *Article 2(1)* applies the provisions of the Convention to ‘*international nuclear transport*’. This is defined in *Article 1(c)* as ‘the carriage of a consignment of nuclear material by any means of transportation intended to go beyond the territory of the State where the shipment originates beginning with the departure from a facility of the shipper in that State and ending with the arrival at a facility of the receiver within the State of ultimate destination’. However, *Article 2(2)* provides that the Convention also applies to nuclear material ‘used for peaceful purposes’ in *domestic* use, storage or transport, with the exception of *Articles 3, 4 and 5(3)*. Thus in domestic matters it is mainly the penal provisions that apply.

5. These limitations on the scope of the Convention might be partly remedied by a comprehensive treaty on nuclear terrorism. The negotiation of such a treaty has not yet been concluded, and may never be because of the reluctance of some States to consider an exemption for the activities of the armed forces of nuclear weapon States.<sup>107</sup>

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<sup>106</sup> The negotiating documents were published by the IAEA in 1982 in Legal Series No. 12, but this does not provide a clear guide to the interpretation of the Convention.

<sup>107</sup> See p. 242, paras. 4-5, below regarding such an exemption in the Bombings Convention.

## Protection of nuclear material in international nuclear transport

6. *Article 3* requires each Party to take steps, within the framework of its domestic law and consistent with international law, to ensure that, during international nuclear transport, nuclear material in its territory, or on board a ship or aircraft ‘under its *jurisdiction* insofar as such ship or aircraft is engaged in the transport to or from that State,’ is protected at the levels described in *Annex 1*.<sup>108</sup> The meaning of the quoted words is not blindingly obvious. In contrast to the other terrorist conventions, the article does not speak of ships and aircraft ‘registered’ in the State, as in *Article 8(3)*, but ‘under its jurisdiction’, though adds the condition that a Party must act consistently with international law. This seems to indicate that, for the purposes of the Convention, a Party can in certain circumstances assert jurisdiction over foreign-registered ships and aircraft. By their nature, ships and aircraft move in areas beyond the territory of any State, such as on the high seas and in the airspace above the high seas. Even when they are in the territory of a State, jurisdiction over ships varies depending on the circumstances, and jurisdiction may be either with the State of registration or with the territorial State, or indeed shared when, for instance, a foreign-registered ship is in another State’s territorial sea or exclusive economic zone (EEZ).<sup>109</sup> It is therefore likely that the quoted words should be read as including not only ships and aircraft registered in the territory of the Party, but also foreign-registered ships and aircraft engaged in international nuclear transport to or from the territory of that Party in circumstances where, in accordance with international law, that Party would be entitled to assert its jurisdiction in the interests of its security as well as the protection of other States. For example, if a foreign-registered ship is carrying nuclear material from another Party’s territory, while it is in that Party’s territorial sea or EEZ that Party can exercise jurisdiction over the ship to ensure that the nuclear material is protected as required by Annex 1 to the Convention.

7. In *Article 4 paragraph 1* has provisions designed to ensure that nuclear material is not exported unless the Party exporting or authorising the export of the nuclear material has received assurances that during international nuclear transport it will be protected at the levels described in Annex 1; and *paragraph 4* requires each Party to apply the same protection when nuclear material is transported from one part of its territory to another part of it through international waters or airspace (e.g. from the mainland United States to Hawaii).

8. *Paragraph 2* requires a Party to ensure that nuclear material is not imported into its territory from a *non-Party* without an assurance that during international nuclear transport it will be protected at the levels described in Annex 1. Similarly, *paragraph 3* requires a Party to prohibit transit of nuclear material through its territory by land or waterways (but not by air), or via its airports or seaports, if the transit is *between non-Parties*, unless the Party receives, as far as practicable, assurances that it will be protected at the levels described in Annex 1. The Law of

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<sup>108</sup> Annex I has different levels of physical protection of nuclear material depending on whether it is (1) ‘in storage incidental to’ international nuclear transport or (2) is in international transport. Annex II divides each type of nuclear material (Plutonium, Uranium-235, Uranium-233 and irradiated fuel) into three categories. Not all the provisions are mandatory, some recommend best practice. The technical details in the Annexes are outside the scope of this commentary.

<sup>109</sup> For an explanation of these terms, see p. 187, note 7, below.

Treaties does not allow parties to a treaty to impose obligations on States which are not parties.<sup>110</sup> However, the obligations in paragraph 3 rest only on the Parties and can be discharged by them in exercise of their territorial sovereignty in the interests of national security.

### **Notifications etc.**

9. *Articles 5 and 6* provide for notifications, information exchange, co-operation and protection of confidentiality.

### **Offences**

10. *Article 7* defines the offences as:

- (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;
- (b) a theft or robbery of nuclear material;
- (c) an embezzlement or fraudulent obtaining of nuclear material;
- (d) an act constituting a demand for nuclear material by threat or use of force or by any other form of intimidation;
- (e) a threat:
  - (i) to use nuclear material to cause death or serious injury to any person or substantial property damage, or
  - (ii) to commit an offence described in paragraph (b) in order to compel a natural or legal person, international organisation or State to do or to refrain from doing any act;
- (f) an attempt to commit any offence described in paragraphs (a), (b) or (c); and
- (g) an act which constitutes participation in any offence described in paragraphs (a) to (f).

The commission of the acts must be committed intentionally, but, apart perhaps from threats under paragraph 1(e)(ii), motive may be irrelevant. The offences therefore embrace ordinary criminal acts, not just those with a terrorist purpose.

11. Proof of the offence under paragraph 1(a) requires evidence that the unlawful act caused or 'is likely to cause' death or serious injury or substantial damage to property. This phrase quoted would seem to need proof that, in the light of all the circumstances (amount of material, lack of sufficient protection etc.), there are reasonable grounds for believing that the unlawful act could have caused such injury or damage.

12. To be a threat for the purposes of paragraph 1(e)(ii) it must be a threat to commit a theft or robbery of nuclear material 'in order to compel a natural or legal person, international organisation or State to do or refrain from doing any act'. This formula is the same in substance as *Article 1(1)* of the Hostages Convention.

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<sup>110</sup> A. Aust, *Modern Treaty Law and Practice*, (Cambridge, 2000) pp. 207-211.

### **Ancillary offences**

13. *Article 7(1)(f)* is the usual provision to cover attempts. Paragraph 1(g) however, provides that ‘participation’ in any of the offences, including an attempt, shall be made punishable by each Party under its national law. Although it does not, as in the Diplomats Convention, refer to participation ‘as an accomplice’ that is probably implicit. Moreover, the reference to national law gives latitude to each Party to adopt a broad interpretation of ‘participation’, to include for example conspiracy.<sup>111</sup>

14. As with the other conventions (apart from Tokyo and Explosives), each Party must make the offences punishable by appropriate penalties which take into account their ‘grave nature’ (paragraph 2). In practice this means a maximum of life imprisonment.

### **Establishment of Jurisdiction**

15. *Article 8* follows *Article 3* of the Diplomats Convention. Paragraph 1 requires each Party to establish its jurisdiction over the offences when (a) they are committed in its territory or on board a ship or aircraft registered with that Party; or (b) when the alleged offender is one of its nationals. Paragraph 2 requires each Party to establish its jurisdiction where the alleged offender is present in its territory and it does not extradite to any of the Parties mentioned in paragraph 1. This provision is necessary in order to implement the *aut dedere aut judicare* rule in *Article 10*. Paragraph 3 is the standard provision confirming that, in addition to the jurisdiction authorised by the Convention, criminal jurisdiction can also be exercised in accordance with domestic law, provided of course that it is in conformity with customary international law.

16. Paragraph 4 authorises, but does not require, a Party which is not the Party in whose territory the offence was committed, nor the Party of the alleged offender’s nationality, to establish its jurisdiction over the offences when it is involved in international nuclear transport as the exporting or importing State. The jurisdiction must be done consistent with international law. [In other words, a Party may establish its jurisdiction over nationals (including legal persons) of other Parties or even of non-Parties when, for example, the Party is exporting nuclear material to another Party using a vessel of another Party or even a non-Party. Although such assertion of jurisdiction must go no further than international law permits, in such a case jurisdiction over nationals of another Party or of a non-Party is justified by the generally accepted need for stringent controls over nuclear material, wherever it is. However, before asserting such jurisdiction a Party needs to consider whether it will be able to enforce it effectively.

### **Exercise of jurisdiction**

17. *Article 9* follows *Article 6(1)* of the Diplomats Convention. It provides that when an alleged offender is in the territory of a Party, it must, ‘upon being satisfied that the circumstances so warrant’ take appropriate measures, including detention, under its national law to ensure presence of the person for the purpose of prosecution or extradition. The last sentence requires that certain States be notified, but in this respect, is less prescriptive than *Article 6(1)* of the Diplomats Convention.

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<sup>111</sup> See p. 5, para. 14, above.

### **Aut dedere aut judicare**

18. *Article 10* is the most important (penal) part of this and the other conventions. It embodies the principle that alleged offenders cannot escape justice. When an alleged offender is found in the territory of a Party it must either extradite or 'without exception whatsoever submit the case to its competent authorities for the purpose of prosecution'.<sup>112</sup>

### **Extradition**

19. *Article 11* is the standard provision.<sup>113</sup>

### **Fair treatment**

20. *Article 12* requires that a person against whom prosecution or extradition proceedings are being carried out shall be guaranteed fair treatment at all stages. These rights are elaborated in bilateral and multilateral treaties on consular relations, such as the Vienna Convention on Consular Relations 1963,<sup>114</sup> and in various universal human rights treaties, such as the International Covenant on Civil and Political Rights 1966,<sup>115</sup> and in regional human rights treaties.

### **Assistance**

21. *Article 13* follows generally the Diplomats Convention in requiring Parties to assist each other with criminal proceedings (which would include pre-trial proceedings), including supplying evidence. The obligation does not affect any obligations under mutual legal assistance treaties. This, and the other requirements for co-operation, are inevitably subject to the domestic law and procedure of the Parties, and to what is practicable.

### **Information**

22. *Article 14(1) and (2)* requires Parties to communicate certain information to the depositary of the Convention (the Director-General of the IAEA) and other Parties, including the final outcome of the any legal proceedings. Paragraph 3 makes it clear that a Party does not have to provide information about criminal proceedings arising out of such an offence when the circumstances are purely domestic.

### **The Annexes**

23. *Article 15* provides that the two annexes are an integral part of the Convention.

### **Review and amendment**

24. *Article 16* provides for the possibility of periodic reviews of the Convention. *Article 20* has a built-in amendment procedure for the Convention. It is possible that a conference may be convened this year 2002 to consider amendments to strengthen the Convention.

### **Disputes**

25. *Article 17* is in substance very similar to the disputes clause of the other conventions in that it provides, in effect, a compulsory mechanism for the settlement

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<sup>112</sup> For details, see p. 8, para. 22, above.

<sup>113</sup> For details, see p. 8, paras. 24-30, above.

<sup>114</sup> 596 UNTS 261 (Reg. No. 8638); UKTS (1973) 14.

<sup>115</sup> 999 UNTS 171 (Reg. No. 14668); ILM (1967), p. 1465; UKTS (1977) 6.

of disputes.<sup>116</sup> Under paragraph 3 a Party can on becoming a Party declare that it will not be bound by the compulsory mechanism. This reservation can be withdrawn.

### **Reservations**

26. The Convention is silent as to whether reservations can be made, apart from those to *Article 17*. But since it does not say that the reservation permitted by *Article 17* is the only one allowed, a Party can make reservations to other provisions of the Convention provided they are not contrary to its object and purpose.<sup>117</sup> Few reservations have been made. Pakistan maintains a reservation to the effect that it does not consider itself bound by *Article 2(2)* regarding nuclear material in domestic use, storage or transport, and this has been objected to by 17 Parties.

### **Accession or succession**

27. If a State did not sign the Convention before 8 February 1987, it cannot do so now and then ratify the Convention, but no Commonwealth State which did sign later failed to ratify. Now a State can become a Party by depositing an instrument of accession with the IAEA Director-General (*Article 18(4) and (5)*). A State that has become independent may be able to succeed formally to the Convention.<sup>118</sup> The Convention can be denounced (*Article 21*).

### **Implementing legislation**

28. Model Legislative Provisions are at page 182 below. However, careful consideration will have to be given by each State which is considering becoming a Party to the Convention as to its precise needs for the content of the legislation.

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<sup>116</sup> See p. 10, para. 33, above.

<sup>117</sup> See p. 11, para 34.

<sup>118</sup> See p. 11, para. 35, above.

**CONVENTION ON THE PHYSICAL PROTECTION OF NUCLEAR  
MATERIAL**

**Signed at New York and Vienna, 3 March 1980**

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 for facilitating international co-operation in the peaceful application of nuclear energy,

DESIRING to avert the potential dangers posed by the unlawful taking and use of nuclear material.

CONVINCED that offences relating to nuclear material are a matter of grave concern and that there is an urgent need to adopt appropriate and effective measures to ensure the prevention, detection and punishment of such offences,

AWARE OF THE NEED for international co-operation to establish, in conformity with the national law of each State Party and with this Convention, effective measures for the physical protection of nuclear material,

CONVINCED that this Convention should facilitate the safe transfer of nuclear material.

STRESSING also the importance of the physical protection of nuclear material in domestic use, storage and transport,

RECOGNIZING the importance of effective physical protection of nuclear material used for military purposes, and understanding that such material is and will continue to be accorded stringent physical protection.

HAVE AGREED AS FOLLOWS:

**ARTICLE 1**

For the purposes of this Convention:

- (a) "nuclear material" means plutonium except that with isotopic concentration exceeding 80% in plutonium-238; uranium-233; uranium enriched in the isotopes 235 or 233; uranium containing the mixture of isotopes as occurring in nature other than in the form of ore or ore-residue; any material containing one or more of the foregoing;
- (b) "uranium enriched in the isotope 235 or 233" means uranium containing the isotopes 235 or 233 or both in an amount such that the abundance ratio of the sum of these isotopes to the isotope 238 is greater than the ratio of the isotope 235 to the isotope 238 occurring in nature;
- (c) "international nuclear transport" means the carriage of a consignment of nuclear material by any means of transportation intended to go beyond the territory of the State where the shipment originates beginning with the

departure from a facility of the shipper in that State and ending with the arrival at a facility of the receiver within the State of ultimate destination.

## **ARTICLE 2**

1. This Convention shall apply to nuclear material used for peaceful purposes while in international nuclear transport.
2. With the exception of articles 3 and 4 and paragraph 3 of article 5, this Convention shall also apply to nuclear material used for peaceful purposes while in domestic use, storage and transport.
3. Apart from the commitments expressly undertaken by States Parties in the articles covered by paragraph 2 with respect to nuclear material used for peaceful purposes while in domestic use, storage and transport, nothing in this Convention shall be interpreted as affecting the sovereign rights of a State regarding the domestic use, storage and transport of such nuclear material.

## **ARTICLE 3**

Each State Party shall take appropriate steps within the framework of its national law and consistent with international law to ensure as far as practicable that, during international nuclear transport, nuclear material within its territory, or on board a ship or aircraft under its jurisdiction insofar as such ship or aircraft is engaged in the transport to or from that State, is protected at the levels described in Annex 1.

## **ARTICLE 4**

1. Each State Party shall not export or authorize the export of nuclear material unless the State Party has received assurances that such material will be protected during the international nuclear transport at the levels described in Annex 1.
2. Each State Party shall not import or authorize the import of nuclear material from a State not party to this Convention unless the State Party has received assurances that such material will during the international nuclear transport be protected at the levels described in Annex 1.
3. A State Party shall not allow the transit of its territory by land or internal waterways or through its airports or seaports of nuclear material between States that are not parties to this Convention unless the State Party has received assurances as far as practicable that this nuclear material will be protected during international nuclear transport at the levels described in Annex 1.
4. Each State Party shall apply within the framework of its national law the levels of physical protection described in Annex I to nuclear material being transported from a part of that State to another part of the same State through international waters or airspace.
5. The State Party responsible for receiving assurances that the nuclear material will be protected at the levels described in Annex I according to paragraphs I to 3 shall identify and inform in advance States which the nuclear material is expected to transit by land or internal waterways, or whose airports or seaports it is expected to enter.
6. The responsibility for obtaining assurances referred to in paragraph I may be transferred, by mutual agreement, to the State Party involved in the transport as the importing State.
7. Nothing in this article shall be interpreted as in any way affecting the territorial sovereignty and jurisdiction of a State, including that over its airspace and territorial sea.



## **ARTICLE 5**

1. States Parties shall identify and make known to each other directly or through the International Atomic Energy Agency their central authority and point of contact having responsibility for physical protection of nuclear material and for co-ordinating recovery and response operations in the event of any unauthorized removal, use or alteration of nuclear material or in the event of credible threat thereof.
2. In the case of theft, robbery or any other unlawful taking of nuclear material or of credible threat thereof, States Parties shall, in accordance with their national law, provide co-operation and assistance to the maximum feasible extent in the recovery and protection of such material to any State that so requests. In particular:
  - (a) each State Party shall take appropriate steps to inform as soon as possible other States, which appear to it to be concerned, of any theft, robbery or other unlawful taking of nuclear material or credible threat thereof and to inform, where appropriate, international organizations:
  - (b) as appropriate, the States Parties concerned shall exchange information with each other or international organizations with a view to protecting threatened nuclear material, verifying the integrity of the shipping container, or recovering unlawfully taken nuclear material and shall:
    - i. co-ordinate their efforts through diplomatic and other agreed channels:
    - ii. render assistance, if requested;
    - iii. ensure the return of nuclear material stolen or missing as a consequence of the above-mentioned events. The means of implementation of this co-operation shall be determined by the States Parties concerned.
3. States Parties shall co-operate and consult as appropriate, with each other directly or through international organizations, with a view to obtaining guidance on the design, maintenance and improvement of systems of physical protection of nuclear material in international transport.

## **ARTICLE 6**

1. States Parties shall take appropriate measures consistent with their national law to protect the confidentiality of any information which they receive in confidence by virtue of the provisions of this Convention from another State Party or through participation in an activity carried out for the implementation of this Convention. If States Parties provide information to international organizations in confidence, steps shall be taken to ensure that the confidentiality of such information is protected.
2. States Parties shall not be required by this Convention to provide any information which they are not permitted to communicate pursuant to national law or which would jeopardize the security of the State concerned or the physical protection of nuclear material.

## **ARTICLE 7**

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;
  - (b) a theft or robbery of nuclear material;
  - (c) an embezzlement or fraudulent obtaining of nuclear material;

- (d) an act constituting a demand for nuclear material by threat or use of force or by any other form of intimidation;
  - (e) a threat:
    - i. to use nuclear material to cause death or serious injury to any person or substantial property damage, or
    - ii. to commit an offence described in sub-paragraph (b) in order to compel a natural or legal person, international organization or State to do or to refrain from doing any act;
  - (f) an attempt to commit any offence described in paragraphs (a), (b) or (c); and
  - (g) an act which constitutes participation in any offence described in paragraphs (a) to (f) shall be made a punishable offence by each State Party under its national law.
2. Each State Party shall make the offences described in this article punishable by appropriate penalties which take into account their grave nature.

### **ARTICLE 8**

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 7 in the following cases:
- (a) when the offence is committed in the territory of that State or on board a ship or aircraft registered in that State;
  - (b) when the alleged offender is a national of that State.
2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over these offences in cases where the alleged offender is present in its territory and it does not extradite him pursuant to article 11 to any of the States mentioned in paragraph 1.
3. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.
4. In addition to the States Parties mentioned in paragraphs 1 and 2, each State Party may, consistent with international law, establish its jurisdiction over the offences set forth in article 7 when it is involved in international nuclear transport as the exporting or importing State.

### **ARTICLE 9**

Upon being satisfied that the circumstances so warrant, the State Party in whose territory the alleged offender is present shall take appropriate measures, including detention, under its national law to ensure his presence for the purpose of prosecution or extradition. Measures taken according to this article shall be notified without delay to the States required to establish jurisdiction pursuant to article 8 and, where appropriate, all other States concerned.

### **ARTICLE 10**

The State Party in whose territory the alleged offender is present shall, if it does not extradite him, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State.

### **ARTICLE 11**

1. The offences in article 7 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties

undertake to include those offences as extraditable offences in every future extradition treaty to be concluded between them.

2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may at its option consider this Convention as the legal basis for extradition in respect of those offences. Extradition shall be subject to the other conditions provided by the law of the requested State.

States Parties which do not make extradition conditional on the existence of a treaty shall recognize those offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.

3. Each of the offences shall be treated, for the purpose of extradition between States Parties, as if it had been committed not only in the place in which it occurred but also in the territories of the States Parties required to establish their jurisdiction in accordance with paragraph I of article 8.

#### **ARTICLE 12**

Any person regarding whom proceedings are being carried out in connection with any of the offences set forth in article 7 shall be guaranteed fair treatment at all stages of the proceedings.

#### **ARTICLE 13**

1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offences set forth in article 7, including the supply of evidence at their disposal necessary for the proceedings. The law of the State requested shall apply in all cases.

2. The provisions of paragraph I shall not affect obligations under any other treaty, bilateral or multilateral, which governs or will govern, in whole or in part, mutual assistance in criminal matters.

#### **ARTICLE 14**

1. Each State Party shall inform the depositary of its laws and regulations which give effect to this Convention. The depositary shall communicate such information periodically to all States Parties.

2. The State Party where an alleged offender is prosecuted shall, wherever practicable, first communicate the final outcome of the proceedings to the States directly concerned. The State Party shall also communicate the final outcome to the depositary who shall inform all States.

3. Where an offence involves nuclear material used for peaceful purposes in domestic use, storage or transport, and both the alleged offender and the nuclear material remain in the territory of the State Party in which the offence was committed, nothing in this Convention shall be interpreted as requiring that State Party to provide information concerning criminal proceeding arising out of such an offence.

#### **ARTICLE 15**

The Annexes constitute an integral part of this Convention

#### **ARTICLE 16**

1. A conference of States Parties shall be convened by the depositary five years after the entry into force of this Convention to review the implementation of the

Convention and its adequacy as concerns the preamble, the whole of the operative part and the annexes in the light of the then prevailing situation.

2. At intervals of not less than five years thereafter, the majority of States Parties may obtain, by submitting a proposal to this effect to the depositary, the convening of further conferences with the same objective.

#### **ARTICLE 17**

1. In the event of a dispute between two or more States Parties concerning the interpretation or application of this Convention, such States Parties shall consult with a view to the settlement of the dispute by negotiation, or by any other peaceful means of settling disputes acceptable to all parties to the dispute.

2. Any dispute of this character which cannot be settled in the manner prescribed in paragraph 1 shall, at the request of any party to such dispute, be submitted to arbitration or referred to the International Court of Justice for decision. Where a dispute is submitted to arbitration, if, within six months from the date of the request, the parties to the dispute are unable to agree on the organization of the arbitration, a party may request the President of the International Court of Justice or the Secretary-General of the United Nations to appoint one or more arbitrators. In case of conflicting requests by the parties to the dispute, the request to the Secretary-General of the United Nations shall have priority.

3. Each State Party may at the time of signature, ratification, acceptance or approval of this Convention or accession thereto declare that it does not consider itself bound by either or both of the dispute settlement procedures provided for in paragraph 2. The other States Parties shall not be bound by a dispute settlement procedure provided for in paragraph 2, with respect to a State Party which has made a reservation to that procedure.

4. Any State Party which has made a reservation in accordance with paragraph 3 may at any time withdraw that reservation by notification to the depositary.

#### **ARTICLE 18**

1. This Convention shall be open for signature by all States at the Headquarters of the International Atomic Energy Agency in Vienna and at the Headquarters of the United Nations in New York from 3 March 1980 until its entry into force.

2. This Convention is subject to ratification, acceptance or approval by the signatory States.

3. After its entry into force, this Convention will be open for accession by all States.

4. (a) This Convention shall be open for signature or accession by international organizations and regional organizations of an integration or other nature, provided that any such organization is constituted by sovereign States and has competence in respect of the negotiation, conclusion and application of international agreements in matters covered by this Convention.

(b) In matters within their competence, such organizations shall, on their own behalf, exercise the rights and fulfill the responsibilities which this Convention attributes to States Parties.

(c) When becoming party to this Convention such an organization shall communicate to the depositary a declaration indicating which States are members thereof and which articles of this Convention do not apply to it.

- (d) Such an organization shall not hold any vote additional to those of its Member States.
5. Instruments of ratification, acceptance, approval or accession shall be deposited with the depositary.

#### **ARTICLE 19**

1. This Convention shall enter into force on the thirtieth day following the date of deposit of the twenty first instrument of ratification, acceptance or approval with the depositary.
2. For each State ratifying, accepting, approving or acceding to the Convention after the date of deposit of the twenty first instrument of ratification, acceptance or approval, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification, acceptance, approval or accession.

#### **ARTICLE 20**

1. Without prejudice to article 16 a State Party may propose amendments to this Convention. The proposed amendment shall be submitted to the depositary who shall circulate it immediately to all States Parties. If a majority of States Parties request the depositary to convene a conference to consider the proposed amendments, the depositary shall invite all States Parties to attend such a conference to begin not sooner than thirty days after the invitations are issued. Any amendment adopted at the conference by a two-thirds majority of all States Parties shall be promptly circulated by the depositary to all States Parties.
2. The amendment shall enter into force for each State Party that deposits its instrument of ratification, acceptance or approval of the amendment on the thirtieth day after the date on which two thirds of the States Parties have deposited their instruments of ratification, acceptance or approval with the depositary. Thereafter, the amendment shall enter into force for any other State Party on the day on which that State Party deposits its instrument of ratification, acceptance or approval of the amendment.

#### **ARTICLE 21**

1. Any State Party may denounce this Convention by written notification to the depositary.
2. Denunciation shall take effect one hundred and eighty days following the date on which notification is received by the depositary.

#### **ARTICLE 22**

The depositary shall promptly notify all States of:

- (a) each signature of this Convention;
- (b) each deposit of an instrument of ratification, acceptance, approval or accession;
- (c) any reservation or withdrawal in accordance with article 17;
- (d) any communication made by an organization in accordance with paragraph 4(c) of article 18;
- (e) the entry into force of this Convention;
- (f) the entry into force of any amendment to this Convention; and
- (g) any denunciation made under article 21.

## ARTICLE 23

The original of this Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Director General of the International Atomic Energy Agency who shall send certified copies thereof to all States.

IN WITNESS WHEREOF, the undersigned, being duly authorized, have signed this Convention, opened for signature at Vienna and at New York on 3 March 1980.

## ANNEX I

Levels of Physical Protection to be Applied in International Transport of Nuclear Material as Categorized in Annex II

1. Levels of physical protection for nuclear material during storage incidental to international nuclear transport include:

- (a) For Category III materials, storage within an area to which access is controlled;
- (b) For Category II materials, storage within an area under constant surveillance by guards or electronic devices, surrounded by a physical barrier with a limited number of points of entry under appropriate control or any area with an equivalent level of physical protection;
- (c) For Category I material, storage within a protected area as defined for Category II above, to which, in addition, access is restricted to persons whose trustworthiness has been determined, and which is under surveillance by guards who are in close communication with appropriate response forces. Specific measures taken in this context should have as their object the detection and prevention of any assault, unauthorized access or unauthorized removal of material.

2. Levels of physical protection for nuclear material during international transport include:

- (a) For Category II and III materials, transportation shall take place under special precautions including prior arrangements among sender, receiver, and carrier, and prior agreement between natural or legal persons subject to the jurisdiction and regulation of exporting and importing States, specifying time, place and procedures for transferring transport responsibility;
- (b) For Category I materials, transportation shall take place under special precautions identified above for transportation of Category II and III materials, and in addition, under constant surveillance by escorts and under conditions which assure close communication with appropriate response forces;
- (c) For natural uranium other than in the form of ore or ore-residue transportation protection for quantities exceeding 500 kilograms U shall include advance notification of shipment specifying mode of transport, expected time of arrival and confirmation of receipt of shipment.

## ANNEX II

- a. All plutonium except that with isotopic concentration exceeding 80% in plutonium-238.
- b. Material not irradiated in a reactor or material irradiated in a reactor but with a radiation level equal to or less than 100 rads/hour at one metre unshielded.

- c. Quantities not falling in Category III and natural uranium should be protected in accordance with prudent management practice,
- d. Although this level of protection is recommended, it would be open to States, upon evaluation of the specific circumstances, to assign a different category of physical protection.
- e. Other fuel which by virtue of its original fissile material content is classified as Category I and II before irradiation may be reduced one category level while the radiation level from the fuel exceeds 100 rads/hour at one metre unshielded.

**Table: Categorization of Nuclear Material**

Material	Form	Category		
		I	II	III <sup>c/</sup>
1. Plutonium <sup>a/</sup>	Unirradiated <sup>b/</sup>	2 kg or more	Less than 2 kg but more than 500 g	500 g or less but more than 15 g
2. Uranium-235	Unirradiated <sup>b/</sup> <ul style="list-style-type: none"> <li>• uranium enriched to 20% <sup>235</sup>U or more</li> <li>• uranium enriched to 10% <sup>235</sup>U but less than 20%</li> <li>• uranium enriched above natural, but less than 10% <sup>235</sup>U</li> </ul>	5 kg or more	Less than 5 kg but more than 1 kg  10 kg or more	1 kg or less but more than 15 g  Less than 10 kg but more than 1 kg  10 kg or more
3. Uranium-233	Unirradiated <sup>b/</sup>	2 kg or more	Less than 2 kg but more than 500 kg	500 g or less but more than 15 g
4. Irradiated fuel			Depleted or natural uranium, thorium or low-enriched fuel (less than 10% fissile content) <sup>d/e/</sup>	

## CONVENTION ON THE PHYSICAL PROTECTION OF NUCLEAR MATERIAL

Entry into force: 8 February 1987

Status: 78 Parties

State	Signature	Ratification, Accession (a), Succession (d)
Albania		04 Apr 2002 a
Antigua and Barbuda		03 Sep 1993 a
Argentina	28 Feb 1986	06 May 1989 r
Armenia		23 Sep 1993 a
Australia	22 Feb 1984	22 Oct 1987 r
Austria	03 Mar 1980	21 Jan 1989 r
Belarus		14 Jun 1993 s
Belgium	13 Jun 1980	06 Oct 1991 r
Bolivia		23 Feb 2002 a
Bosnia and Herzegovina		01 Mar 1992 s
Botswana		19 Oct 2000 a
Brazil	15 May 1981	08 Feb 1987 r
Bulgaria	23 Jun 1981	08 Feb 1987 r
Canada	23 Sep 1980	08 Feb 1987 r
Chile		27 May 1994 a
China		09 Feb 1989 a
Croatia		08 Oct 1991 s
Cuba		26 Oct 1997 a
Cyprus		22 Aug 1998 a
Czech Republic		1 Jan 1993 s
Denmark	13 Jun 1980	06 Oct 1991 r
Dominican Republic	03 Mar 1980	
Ecuador	26 Jun 1986	16 Feb 1996 r
Estonia		08 Jun 1994 a
Finland	25 Jun 1981	22 Oct 1989 a
France	13 Jun 1980	06 Oct 1991 a
Germany	13 Jun 1980	06 Oct 1991 r
Greece	03 Mar 1980	06 Oct 1991 r
Grenada		08 Feb 2002 a
Guatemala	12 Mar 1980	08 Feb 1987 r



Haiti	09 Apr 1980	
Hungary	17 Jun 1980	08 Feb 1987 r
Iceland		18 Jul 2002 a
India		11 Apr 2002 a
Indonesia	03 Jul 1986	08 Feb 1987 r
Ireland	13 Jun 1980	06 Oct 1991 r
Israel	17 Jun 1983	21 Feb 2002 r
Italy	13 Jun 1980	06 Oct 1991 r
Japan		27 Nov 1988 a
Kenya		13 Mar 2002 a
Korea, Republic of	29 Dec 1981	08 Feb 1987 r
Lebanon		15 Jan 1998 a
Libyan Arab Jamahiriya		17 Nov 2000 a
Liechtenstein	13 Jan 1986	08 Feb 1987 r
Lithuania		06 Jan 1994 a
Luxembourg	13 Jun 1980	06 Oct 1991 r
Mali		06 Jun 2002 a
Mexico		04 May 1988 a
Monaco		08 Sep 1996 a
Mongolia	23 Jan 1986	08 Feb 1987 r
Morocco	25 Jul 1980	22 Sep 2002 r
Netherlands	13 Jun 1980	06 Oct 1991 a
Niger	07 Jan 1985	
Norway	26 Jan 1983	08 Feb 1987 r
Pakistan		12 Oct 2000 a
Panama	18 Mar 1980	01 May 1999 r
Paraguay	21 May 1980	08 Feb 1987 r
Peru		10 Feb 1995 a
Philippines	19 May 1980	08 Feb 1987 r
Poland	06 Aug 1980	08 Feb 1987 r
Portugal	19 Sep 1984	06 Oct 1991 r
Republic of Moldova		06 Jun 1998 a
Romania	15 Jan 1981	23 Dec 1993 r
Russian Federation	22 May 1980	08 Feb 1987 r
Slovakia		01 Jan 1993 s
Slovenia		25 Jun 1991 s
South Africa	18 May 1981	
Spain	07 Apr 1986	06 Oct 1991 r

Sudan		17 Jun 2000 a
Sweden	02 Jul 1980	08 Feb 1987 r
Switzerland	09 Jan 1987	08 Feb 1987 r
Tajikistan		10 Aug 1996 a
The Frmr. Yug.Rep.of Macedonia		17 Nov 1991 s
Trinidad and Tobago		25 May 2001 a
Tunisia		08 May 1993 a
Turkey	23 Aug 1983	08 Feb 1987 r
Ukraine		05 Aug 1993 a
United Kingdom	13 Jun 1980	06 Oct 1991 r
United States of America	03 Mar 1980	08 Feb 1987 r
Uzbekistan		11 Mar 1998 a
Yugoslavia	15 Jul 1980	27 Apr 1992 s
EURATOM	13 Jun 1980	06 Oct 1991 c

## MODEL LEGISLATIVE PROVISIONS FOR THE IMPLEMENTATION OF THE CONVENTION FOR THE PHYSICAL PROTECTION OF NUCLEAR MATERIAL

### NOTE

No specific penalties for the offences have been included because of the variation in sentencing practice between states. However the Convention requires penalties that reflect the seriousness of the offence and therefore maximum penalties should be set including, if appropriate, a life sentence.

Whereas a Convention for the Physical Protection of Nuclear Material was adopted on October 28 1979:

And Whereas ..... (name of country) intends acceding to the said Convention by depositing an instrument of accession with the Director General of the International Atomic Energy Authority:

And Whereas it is necessary to make legal provision to give effect to the obligations under the said Convention:

Now therefore, be it enacted by the Parliament of .....(name of country) as follows:-

#### **Short title and date of operation**

1. This Act may be cited as The Physical Protection of Nuclear Material Act, and shall come into operation on such date as the Minister (responsible for Foreign Affairs) certifies, by Order published in the Gazette, as the date on which the Convention enters into force in respect of ..... (name of country).

#### **Interpretation**

2. In this Act unless the context otherwise requires -

“Convention” means the Convention for the Physical Protection of Nuclear Material adopted on October 28,1979;

“Convention State” means a State which is declared by the Minister (responsible for Foreign Affairs), by Order published in the Gazette, to be a party to the Convention;

“International Nuclear transport “ means the carriage of a consignment of nuclear material by any means of transportation intended to go beyond the territory of the State where the shipment originates beginning with the departure from a facility of the shipper in that State and ending with the arrival at a facility of the receiver within the State of ultimate destination;

“nuclear material “ means-

- (a) plutonium, except plutonium with an isotopic concentration of plutonium-238 exceeding eighty percentum;
- (b) uranium-233 ;
- (c) uranium containing uranium-233 or uranium-235 or both in such an amount that the abundance ratio of the sum of these isotopes to the isotope uranium-238 is greater than 0.72 percentum;
- (d) uranium with an isotopic concentration equal to that occurring in nature; and
- (e) any substance containing anything described in paragraphs (a) to (d),

but does not include uranium in the form of ore or ore –residue;

### **Restrictions on export, import and transport of nuclear material**

- 3 (1) (a) No person shall import or export any nuclear material to or from ..... (name of country), without a license or written permit issued by ..... (designated authority)
- (b) No licence or written permit for import or export shall be granted under sub section 1(a) unless and until the (designated authority) has received a written assurance from the importer or exporter of such nuclear material, as the case may be, that such material will, during international nuclear transport, be protected at the appropriate levels described in Annex 1 to the Convention.
- (2) (a) No person shall transport any nuclear material –
- (i) over the territory of ..... (name of country), or
  - (ii) through any of its seaports or airports,
- unless and until the person has received written permission from (designated authority)for transport.
- (b) No written permission shall be issued under sub section 2(a) unless the (designated authority) has received a written assurance from the person transporting such nuclear material that such material will, during international nuclear transport, be protected at the appropriate levels described in Annex 1 to the Convention.
- (3) (a) No person shall transport any nuclear material from one part of .....(name of country) to another part of ..... (name of country), through international waters or airspace, without the written permission of (designated authority).
- (b) No written permission shall be issued under sub section 3(a) unless and until (designated authority) has received a written assurance from the person transporting such nuclear material that such material will, in the course of such transport, be protected at the appropriate levels described in Annex 1 to the Convention.
- (4) Every person who fails to comply with subsections (1), (2) or (3) commits an offence and on conviction shall be liable to imprisonment for a term not exceeding (...) years.

- (5) A person who makes a false statement or provides a false assurance to a (designated authority) under sub sections (1), (2) or (3) commits an offence and on conviction shall be liable to imprisonment for a term not exceeding ( ) years.
- (6) The provisions of this section shall have effect despite anything to the contrary in any other law.

### Offences

4. Every person who, intentionally and without lawful authority, does any act which constitutes, -
- (a) the receipt, possession, use, transfer, alteration, disposal, or dispersal of nuclear material, being in every such case an act that causes or is likely to cause death or serious injury to any person or substantial damage to property;
  - (b) a theft or robbery of nuclear material;
  - (c) an embezzlement or fraudulent obtaining of nuclear material;
  - (d) a demand for nuclear material by threat or use of force or any other form of intimidation; or
  - (e) a threat –
    - (i) to use nuclear material to cause death or serious injury to any person or substantial damage to any property;
    - (ii) to commit an offence described in paragraph (b) in order to compel a natural or legal person or international organisation or State to do or refrain from doing any act;
  - (f) an attempt to commit any offence described in paragraph (a), (b), or (c); or
  - (g) participation in the commission of any offence described in paragraph (a), (b), (c), (d), (e), or (f),
- commits an offence and upon conviction shall be liable to imprisonment for a term of ( ) years.

### Jurisdiction

#### NOTE

The Convention contains a “prosecute or extradite” obligation with respect to the offences in section 4 above. In order to meet this requirement, a State must have the jurisdiction to prosecute an offence where the person is present on that State’s territory, regardless of the fact that no basis of jurisdiction set out in 5 (2) (a) – (c) exists. In order to meet this obligation, the State needs to have jurisdiction arising from the person’s presence in that state. One way to incorporate that jurisdiction is through a universal jurisdiction clause based on the presence of the person. This has been reflected in sub section 5(2) (d). If that is considered overly broad, the bracketed and italicized language at the end of 5(2) (d) can be added limiting the application of the section to cases where extradition is not possible. While this second approach is more limited in scope, there may be problems of proof arising from the need to establish that extradition is not possible.

5. (1) All offences under this Act shall be tried by The High Court ( the highest court exercising original criminal jurisdiction).

- (2) The High Court shall have jurisdiction to try an offence under section 4, in every case where the act constituting the offence-
- (a) is committed in ..... (name of country) or on board, a ship or aircraft registered in ..... (name of country);
  - (b) is committed by a national of ..... (name of country), whether the act constituting the offence is committed within or outside..... (name of country);
  - (c) is committed during international nuclear transport to, or from ..... (name of country);
  - (d) is committed by a person who is, after the commission of the act, present in ..... (name of country), whether such act is committed within or outside ..... (name of country), [*and he or she cannot be extradited to a foreign state having jurisdiction over the offence.*]

### **Extradition**

6. (1) The offences described in section 4 shall be deemed to be included as extraditable offences under the Extradition Act, and accordingly, the provisions of that Act shall apply to, and in relation to, extradition in respect of those offences.
- (2) Where there is, on the date on which this Act comes into operation, an extradition arrangement in force between the Government of ..... (name of country) and a Convention State, such arrangement shall, for the purposes of the Extradition Act, be deemed to include provision for extradition respect of the offences described in Section 4.
- (3) Where there is no extradition arrangement between the Government of ..... (name of country) and a Convention State, the Minister (of Foreign Affairs) may, by Order published in the Gazette, treat the Convention, for the purposes of the Extradition Act, as an extradition arrangement between the Government of ..... (name of country) and such Convention State providing for extradition in respect of the offences described in section 4.
- (4) Where the Government of ..... (name of country) accedes to a request by a Convention State for the extradition of a person accused of an offence described in section 4, the act constituting such offence shall, for the purposes of the Extradition Act, be deemed to have been committed not only in the place where it was committed but also within the jurisdiction of the requesting Convention State.