

# ARTICLES

## **International Convention for the Suppression of Acts of Nuclear Terrorism**

**by Odette Jankowitsch-Prevor\***

The Convention for the Suppression of Acts of Nuclear Terrorism (“the convention”) adopted on 15 April 2005 by the United Nations General Assembly after seven years of preparatory work was opened for signature on 14 September at United Nations Headquarters in New York.<sup>1</sup> In accordance with Article 25 of the convention, it will enter into force after it has been ratified by 22 states.<sup>2</sup>

### **I. Background**

The international community’s first efforts to establish an international legal instrument to combat international terrorism in all its forms and manifestations date back to the League of Nations. Following the assassination of King Alexander of Yugoslavia and French Minister Louis Barthou, the League of Nations, through the work of an expert committee, tried between 1934 and 1937 to create appropriate international instruments against terrorism by preparing a draft Convention for the Prevention and Punishment of Terrorism, 1937,<sup>3</sup> and a draft project for an International Criminal Court. However, neither of these texts ever entered into force.

It was not until the 1970s that this issue returned to the agenda of international bodies with the United Nations Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted in 1973 – an instrument of specific scope – and the 1977 European Convention on the Suppression of Terrorism,<sup>4</sup> of general scope. These two instruments, which failed to gain wide acceptance, were primarily aimed at co-ordinating the domestic law of the States Parties while allowing them to lodge reservations as to whether national law prevailed with respect to acts of violence considered to be based on political motives.

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1. By 29 November 2005, 93 states had signed the convention.
2. A/RES/59/290 of 15 April 2005, Resolution adopted by the General Assembly concerning the convention. Annex: International Convention for the Suppression of Acts of Nuclear Terrorism. Published in *Nuclear Law Bulletin* No. 75.
3. League of Nations. International Terrorism. Two League of Nations Conventions, 1934-1938 Compiled by Martin David Dubin, Millwood, NY; Kraus Microform, 1991. 18 fiches.
4. Treaty Series, vol. 1035, No. 15410.

The Committee on International Terrorism of the International Law Association, in its report to the 60<sup>th</sup> Conference held in Montreal in 1982,<sup>5</sup> summarised a lengthy discussion of the legal work undertaken previously to establish an appropriate instrument to combat international terrorism by stating that the objective of preparing a single convention on international terrorism should be reconsidered in the future given the many theoretical and practical problems that such a project posed. However, there was agreement that the idea of such a convention should not be rejected, as it might be very useful to the international community for co-ordinating its efforts to gain control over the politically motivated violence that crosses borders but does not enter into the legally defined framework of “war” or “armed conflict” as envisaged by the 1949 Geneva Convention and the 1977 Protocols. The members of this Committee ultimately agreed that it was essential to ensure that any international instrument aimed specifically at suppressing and controlling terrorism and terrorist acts committed in peacetime should remain outside the law governing war.

Two main conclusions can be drawn from this brief historical summary. First, states have been trying to establish an international legal instrument against terrorist acts for a very long time. Secondly, a certain number of fundamental legal issues that had already been raised in the earliest work done on this issue still remain relevant in 2005.

This remains true despite the fact that there is no resemblance between terrorism as it was perceived in 1937 and the world situation at the beginning of the 21<sup>st</sup> century, either in terms of the international context, the causes and possible consequences of terrorist attacks, the quality and intensity of co-operation between states seeking to combat this phenomenon, or between the constraints that hampered the League of Nations because of its limited number of member states and the worldwide membership of the United Nations. Certain issues have been resolved by adopting specific instruments, such as the principle that no alleged perpetrator of an offence covered by an anti-terrorist instrument may invoke political reasons as grounds for avoiding prosecution or extradition. However, the main issue of whether it is legally and politically possible to establish a generally valid and comprehensive instrument to combat all forms and manifestations of terrorism has still not been resolved and remains as relevant as ever. A considerable number of conventions on the suppression of terrorist acts in specific sectors have been negotiated and adopted, but the project of a comprehensive instrument containing in particular a legal definition of terrorism has thus far eluded all attempts at codification.

In 1994, the United Nations General Assembly<sup>6</sup> examined all the measures that states were encouraged to take in order to eliminate international terrorism and enumerated the existing legal instruments addressing various aspects of the problem of international terrorism. In the same resolution, the states made a commitment by “solemnly declaring” to conduct an analytical review of existing international instruments relating to international terrorism in order to assist states in identifying aspects of this matter that have not been covered by such instruments and could be addressed to further develop a comprehensive legal framework of conventions dealing with international terrorism.<sup>7</sup> Thus, the commitment made was to “develop the framework further” without reference to a project for a single general instrument.

Consequently, whether or not a comprehensive convention can be negotiated remains an open question, and perhaps it will ultimately be resolved following the adoption of the Convention for the Suppression of Acts of Nuclear Terrorism. For this to happen, however, work on a comprehensive text

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5. The International Law Association. Report of the Sixtieth Conference, Montreal, 1982 Pages 349 ff.

6. A/RES/49/60, 17 February 1995, Measures to eliminate international terrorism.

7. Ibid Annex, Chapter III, paragraph c).

against terrorism must be resumed without delay. The fact is that the legal debate on this issue is still very much alive, endlessly raising subtle but persistent political disagreements between the supporters of a general convention against terrorism and the proponents of a sectoral or thematic approach giving preference to a series of instruments that are limited in scope but have a broader common denominator. The fact that 12 conventions have been adopted and are listed as constituting a consistent set of instruments that, in accordance with numerous General Assembly resolutions and more particularly Security Council Resolution 1373 (2001), all states are urged to ratify, has only temporarily tilted the balance in favour of the proponents of a sectoral approach to the work of codification.

In fact, throughout the preparatory work on the Convention, many delegations repeatedly stressed “the importance of arriving at a clear and precise legal definition of terrorism” in the framework of a comprehensive instrument.<sup>8</sup> Still, it proved possible to complete and adopt the text on the suppression of acts of nuclear terrorism even though the work on a comprehensive convention had still not been completed.

The project for this convention is now on the agenda of the UN General Assembly and its Ad Hoc Committee.<sup>9</sup> The documents and draft resolutions prepared for the summit of heads of state and government at UN Headquarters (14-16 September 2005) express the wish of states to see the thematic instruments supplemented as soon as possible by a comprehensive convention on international terrorism. The “Draft outcome document of the High-level Plenary Meeting of the General Assembly”<sup>10</sup> presented by its outgoing president states on behalf of the heads of state and government in a chapter entitled “Terrorism”:

“[We stress] the need to make every effort to reach an agreement on and conclude a comprehensive convention on international terrorism during the 60<sup>th</sup> session of the General Assembly”, without mentioning however the intention of including a legal definition of terrorism, and,

“We support efforts for the early entry into force of the International Convention for the Suppression of Acts of Nuclear Terrorism and strongly encourage states to consider becoming parties to it expeditiously”.

In addition, the UN Secretary-General’s main report<sup>11</sup> drafted for this summit entitled “In larger freedom: towards development, security and human rights for all”, also called attention to the urgency of completing the work on the Convention for the Suppression of Acts of Nuclear Terrorism and to the commitment made by states to agree upon a definition of terrorism and upon the drafting of a comprehensive convention.

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8. A/60/37 Supplement No. 37, 1 April 2005, paragraph 19, page 19, Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996.

9. A/RES/51/210, (date of general distr.: 16 January 1997), Chapter III, paragraph 9.

10. A/59/L.70. 13 September 2005, paragraph 83, Draft Resolution presented by the President of the General Assembly, Draft final document of the High-level Plenary Meeting of the General Assembly of September 2005. [Limited Distrib.; final text and reference not yet available].

11. A/59/2005 “In larger freedom: towards development, security and human rights for all” Report by UN Secretary-General, [paragraphs 84 and 92].

## II. Origins and general background of the Convention: the process of normative multilateral negotiations

The Russian Federation presented a draft convention on the suppression of acts of nuclear terrorism (in 1997)<sup>12</sup> at the first session of the Ad Hoc Committee established in December 1996 by General Assembly Resolution 51/210. At that time there was substantial progress on work which later led to the adoption in 1997 and 1999 of two conventions concerning the suppression of terrorist bombings and the suppression of the financing of terrorism, respectively.<sup>13</sup> Because of this, several states thought that it was an auspicious time to broaden the range of instruments of thematic conventions without having to enter into the inevitable political debate about the nature of terrorism and its definition, regarding which it seemed highly unlikely that a consensus could be reached.

Resolution 51/210 (1997), which concerned the adoption of measures to eliminate international terrorism, also seems to have encouraged this step because of the precise language it used and the mandate it gave to an ad hoc committee that it established. In its preamble, the General Assembly resolution declares that states should bear in mind the possibility of considering in the future the “elaboration of a comprehensive convention on international terrorism” and recognises “the need to enhance international cooperation to prevent the use of nuclear materials for terrorist purposes and to develop an appropriate legal instrument”. The resolution also specifies that the Ad Hoc Committee will now be responsible for elaborating an “...international convention for the suppression of terrorist bombings and, subsequently, an international convention for the suppression of acts of nuclear terrorism, to supplement related existing international instruments, and thereafter to address means of further developing a comprehensive legal framework of conventions dealing with international terrorism”<sup>14</sup> (words underlined by author).

Thus, the sequence of work seemed to be clearly established, giving priority to preparing two specific conventions consecutively and postponing the initiatives for a comprehensive convention to a later date. However, this interpretation of the resolution does not seem to have been shared by all delegations, for the preparatory work on the convention was marked by a parallel and often confused debate about these two approaches. At the end of the next-to-last session of the Ad Hoc Committee, its co-ordinator had concluded that “there was general agreement that preparation of the draft convention for the suppression of acts of nuclear terrorism was a distinct issue that should be considered on its own merits and that outstanding issues on this draft should be resolved separately”.<sup>15</sup>

The summary of the last session of the Ad Hoc Committee ultimately concluded that “once the nuclear terrorism convention was adopted, the Ad Hoc Committee could concentrate its efforts on solving the remaining outstanding issues relating to the draft comprehensive convention”.<sup>16</sup> It was only after this work was completed – six years after it began – that the co-ordinator of the Ad Hoc Committee responsible for the Convention for the Suppression of Acts of Nuclear Terrorism was able to affirm that “in any event, the adoption of the Convention will enable the Ad Hoc Committee to

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12. A/AC.252/L.3 of 28 January 1998, Convention on the suppression of acts of nuclear terrorism. Draft submitted by the Russian Federation.

13. A/RES/52/164 of the General Assembly and Resolution A/54/109.

14. Ibid. doc. cit. A/RES/210 Chapter III, paragraph 9.

15. A/59/37 Supplement 37, page 13, paragraph 4.

16. A/60/37 Supplement 37, pages 20-21, paragraph 25.

concentrate its efforts on solving the remaining outstanding issues relating to the draft comprehensive convention”.<sup>17</sup>

At its first session in 1997, the Ad Hoc Committee’s agenda included a draft convention on the suppression of acts of nuclear terrorism presented by the Russian Federation.<sup>18</sup> At its second session, the Russian Federation submitted an additional document<sup>19</sup> providing detailed explanations and annotations regarding the draft text. In presenting the draft, the Russian representative placed the convention in the context of the need to strengthen prevention and to fill the gaps in the existing international legal system for combating terrorism, especially in its most dangerous forms. In his opinion, the 1980 Convention on the Physical Protection of Nuclear Material (CPPNM)<sup>20</sup> had a number of serious gaps. The new convention might be able to correct this state of affairs and include key provisions aimed at planning an effective response to acts of nuclear terrorism rather than addressing problems of physical protection; extend the coverage of the convention to facilities and materials used for military purposes; define the *corpus delicti* clearly by taking into account the terrorists’ goal of acquiring nuclear materials; regulate the issue of the suppression of acts directed against facilities posing a special threat because of their use of nuclear materials – as well as self-made devices – and identify the states that should establish their jurisdiction over this type of crime and the other states that may also do so.<sup>21</sup>

The Ad Hoc Committee, in which generally only states participate, decided at its first meeting to invite the IAEA to help with the work, which it did in 1997 and 1998. At its second session, the committee had available a formal document submitted by the IAEA Secretariat containing a series of comments,<sup>22</sup> including details on the statutory mandate of the IAEA, its main powers and objectives, detailed technical and legal comments on the definitions contained in the draft convention on the agenda, on the issue of possible overlapping between the draft convention and the CPPNM and on physical protection and co-operation and exchange of information between states.

The Ad Hoc Committee, despite the specific nature of its mandate, was still not ready to begin its work. Its members first had to agree on the fundamental issue that was to justify its work,<sup>23</sup> i.e. whether there was a real need to establish a new international instrument in this field. If so, it was necessary to define its scope of application carefully, taking the relevant existing instruments into account.

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17. A/60/37, Supplement 37, page 21, paragraph 25.

18. Previously cited document; A/AC.252/L.3 28 January 1997. Convention on the Suppression of Acts of Nuclear Terrorism. Draft submitted by the Russian Federation.

19. A/AC.252/L.3/Add.1 of 14 January 1998. Explanatory note on the draft Convention on the Suppression of Acts of Nuclear Terrorism presented by the Russian Federation.

20. Convention on the Physical Protection of Nuclear Material, IAEA, INFCIRC/274/Rev., 1 May 1980.

21. Statement by A.V. Zmeyevskiy, Representative of the Russian Federation in the Sixth Committee of the 51st Session of the UN General Assembly, on agenda item 151, “Measures to Eliminate International Terrorism”, Unofficial translation, October 3, 1996 (informal distributed document).

22. Comments of IAEA Secretariat: A/AC.252/1998/L.5 of 27 February 1998. See also: A/AC.252 List of Participants in the Ad Hoc Committee established by Resolution 51/210 of the General Assembly, 17 December 1996.

23. A/53/37 Supplement 37, 23 July 1998, paragraphs 17-30. See also: A/C.6/53/L.4 of 2 October 1998: Report of the Working Group, Fifty-third session, Sixth Committee, Agenda item 155.

The Russian delegation had strongly emphasised that the instruments available to the international community did not have sufficiently broad coverage to include all terrorist acts and furthermore did not provide for the required prevention and suppression measures. The CPPNM, the sole instrument of nuclear law that could be used as a reference, was limited to the international transport of the nuclear materials used for peaceful purposes and therefore did not include nuclear materials of military origin at their sites and facilities inside states which could also be targets of terrorist acts. In addition, the CPPNM made no distinction between acts of nuclear terrorism and other criminal acts.

The draft convention, however, according to its proponents, had broad coverage, concerned all nuclear materials and was also based on international criminal law provisions similar to those contained in other recent anti-terrorist conventions, in particular those that had emerged from the same negotiation process.

Other delegations would have liked to begin by establishing a comprehensive legal regime for combating all types of terrorism. In their view, the definition of terrorism was a fundamental issue and had to be addressed before any other work was begun. They felt it was essential to avoid creating conflicting legal regimes or provisions that overlapped, which could undermine the effectiveness of existing instruments.

The comments of the IAEA Secretariat, which were referred to many times, mainly concerned the definitions of technical terms used in nuclear law contained in the draft convention aimed at helping to understand these terms and avoid contradictions or conflicts with the definitions of identical or similar terms contained in other relevant instruments, such as the CPPNM. The risks of duplication pointed out by the IAEA had led to a debate on the type of instrument to be developed, such as its suggestion that it might be preferable to prepare a Protocol to the CPPNM rather than a completely separate convention.

In this context, it should be mentioned that later, when the threat of a possible nuclear terrorist attack had become much more immediate, the IAEA took position very rapidly, for following the attacks of 11 September 2001 in the United States, the Board of Governors adopted a series of policy decisions at its September 2001 session,<sup>24</sup> and only a short time later the Director General proposed a consistent set of concrete measures that could be implemented without delay. Since then, the IAEA has monitored this issue systematically and adopted a long-term action plan as part of its various initiatives.<sup>25</sup>

The priority objective was immediately to strengthen existing programmes concerning physical protection, the prevention of the acquisition of and illegal trafficking in radioactive materials, border controls and emergency measures. However, the Agency did not decide to undertake new initiatives in the normative field. Nevertheless, the draft amendments to the CPPNM aimed mainly at broadening its coverage, which had been supported by many states since 1996, then received additional support since there was an obvious need to strengthen the physical protection system as a whole without delay. The relevance of the Code of Conduct on the Safety and Security of Radioactive Sources in this field was recognised and the code was finally adopted in 2004 after lengthy work.

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24. IAEA Document GOV/2001/50 of 11 November 2001, Report by the Director General.

25. IAEA Document GOV/2004/50 of 11 August 2004, Report by the Director General. See also GC(49)/17 Nuclear Security - Measures to Protect Against Nuclear Terrorism, Progress Report and Nuclear Security Plan for 2006-2009. Report by the Director General. See also: Treaties against nuclear terrorism; the global legal framework can make a difference. Larry Johnson in IAEA Bulletin 4/1/2002.

For all these initiatives, the IAEA had chosen an approach that was technical and pragmatic in nature, consisting of continually defining as accurately as possible the categories of new threats and risks arising from potential terrorist acts and proposing corresponding measures to states, but without trying to develop definitions regarding the legal or political nature of these acts.

Before concluding its work after its eight sessions and 35 meetings, the Ad Hoc Committee discussed many proposed amendments formulated by delegations, reviewed several complete draft convention texts prepared by the Committee's Bureau and its "Friends", and had innumerable informal consultations with its members. In addition, a working group of the Sixth Committee of the UN General Assembly responsible for legal affairs also took part in the work and the process of reviewing the different projects. It was only at the final session that a text could be established that obtained the consensus of the delegations. It is likely that the unusually long time that it took to complete this work was not due solely to the legal and technical difficulties involved in drafting the text, but rather to the fact that agreement on a draft text was blocked for a long time because of a lack of consensus on the priority to be given to this convention – supported by the Russian Federation and others – and the priority given by the United States and other countries to adopting other texts. The attacks carried out in 2004 may have been the factor that made it possible to break the deadlock and to conclude the work on this draft convention.<sup>26</sup>

### **III. Contents of the Convention<sup>27</sup>**

#### *Preamble*

The Preamble, composed of 13 paragraphs and drafted in the usual style of a General Assembly resolution, is aimed at placing the convention in a number of relevant contexts. First, the convention is linked to the issue of the maintenance of international peace and security through a reference to the purposes of the United Nations under Article 1 of the Charter. Next, it is presented as being a further step in the decisions, measures and instruments developed by the United Nations over the past ten years with the common objective of eliminating international terrorism in all its forms. Lastly, the convention is placed in its specific nuclear context through a number of references. In its third paragraph, the Preamble contains a reference to the principle recognising "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".

This paragraph is identical to the first paragraph of the Preamble of the CPPNM, and the same principle is stated again in the first paragraph of the Preamble of the Amendment to the CPPNM,<sup>28</sup> and constitutes a kind of general statement in favour of the peaceful use of nuclear energy and technology, without explicit reservations concerning non-proliferation, the safety and security of nuclear facilities

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26. Note: See A/53/37 Supplement No. 37 and Reports on the following sessions of the General Assembly. Same reference. See also Report of the Working Group: A/C.6/53/L.4. The summary records of the discussions and conclusions of the sessions of the Ad Hoc Committee and all texts submitted to it and the relevant General Assembly documents are available on the UN sites <http://documents.un.org>; <http://untreaty.un.org>; and [www.un.org/law](http://www.un.org/law).

See also: Legislative Guide to the Universal Anti-terrorism Conventions and Protocols. Document published by the United Nations Office on Drugs and Crime, NY 2004, Sales number F.04.V.7.

27. Previously cited document.

28. IAEA Document: GOV/INF/2005/10-GC(49)/INF/6 of 8 September 2005. Nuclear Security. Final Act and Text of the Amendment to the CPPNM.

or the management of radioactive waste. A draft amendment presented by the United States delegation<sup>29</sup> in the final phase of work that suggested adding the phrase “while recognising that the goals of peaceful utilisation should not be used as a cover for proliferation” to the sentence cited above, was apparently not retained.

Next, the Preamble mentions the 1980 Convention on the Physical Protection of Nuclear Material, and in the tenth paragraph the threat that “acts of nuclear terrorism may result in the gravest consequences and may pose a threat to international peace and security”.

Paragraph 11 of the Preamble justifies the decision to establish this convention given that “...existing multilateral legal provisions do not adequately address those attacks”. This paragraph is taken verbatim from the 1998 Convention for the Suppression of Terrorist Bombings<sup>30</sup> and a further element based on this convention has been added to the last paragraph: “the activities of military forces of states are governed by rules of international law outside of the framework of this convention and that the exclusion of certain actions from the coverage of this convention does not condone or make lawful otherwise unlawful acts, or preclude prosecution under other laws”.

### *Definitions*

The first article provides the definition of six terms, most of which use the terminology taken from other instruments of international nuclear law, either verbatim or adding new elements, together with two general terms defined for the purposes of the convention on the basis of two recent sectoral anti-terrorist conventions. These terms are as follows:

1. “Radioactive material”: means nuclear material and other radioactive substances which contain nuclides which undergo spontaneous disintegration (a process accompanied by emission of one or more types of ionising radiation, such as alpha-, beta-, neutron particles and gamma rays) and which may, owing to their radiological or fissile properties, cause death, serious bodily injury or substantial damage to property or to the environment”.

This term, used here in the singular, is not contained in any nuclear convention. However, it does appear in a purely technical descriptive definition in the Regulations for the Safe Transport of Radioactive Material,<sup>31</sup> but it does not follow the proposed wording presented by the IAEA<sup>32</sup> at the Ad Hoc Committee’s second session.

2. “Nuclear material”: This definition uses verbatim paragraphs a) and b) combined of Article 1 of the CPPNM. Paragraph b) defining enriched uranium is identical to Paragraph 3 of Article XX of the IAEA Statute.

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29. A/AC.252/2005/WP4 of 24 March 2005.

30. A/RES/52/164 of 9 January 1998.

31. Regulations for the Safe Transport of Radioactive Material. IAEA Safety Standards Series, No.TS-R-1 (ST-1, amended) 1996 Edition (amended) paragraph 236, page 12.

32. Previously cited document. A/AC.252/1998/L.5, paragraph 16.

3. “Nuclear facility” means:
- (a) Any nuclear reactor, including reactors installed on vessels, vehicles, aircraft or space objects for use as an energy source in order to propel such vessels, vehicles, aircraft or space objects or for any other purpose;
  - (b) Any plant or conveyance being used for the production, storage, processing or transport of radioactive material.”

This definition specific to the convention is very broad in comparison to the definitions used in the other nuclear conventions. The initial version of this term proposed by Russia in the first draft of the convention was based on the definition in Article 1.1.(h) of the 1963 Vienna Convention on Civil Liability for Nuclear Damage, merely adding to it “reactors installed on vessels or aircraft”, which are still excluded from the Amendment to the CPPNM.

It should be mentioned that the Amendment to the CPPNM adds to Article 1 another, new definition of the term “Nuclear facility” which is different from that used in the 1963 Vienna Convention and this convention. It reads: “nuclear facility means a facility (including associated buildings and equipment) in which nuclear material is produced, processed, used, handled, stored or disposed of, if damage to or interference with such facility could lead to the release of significant amounts o radiation or radioactive material”.

4. “Device” means:
- (a) Any nuclear explosive device; or
  - (b) Any radioactive material dispersal or radiation-emitting device which may, owing to its radiological properties, cause death, serious bodily injury or substantial damage to property or to the environment.”

This term, as was pointed out in the IAEA’s written comments cited above, is used in the Safeguards Agreements, which do not, however, provide any legal definition of the term.

Furthermore, the negotiators fortunately succeeded in avoiding the use of the non-technical term “dirty bomb”.

5. “State or government facility” includes any permanent or temporary facility or conveyance that is used or occupied by representatives of a state, members of a government, the legislature or the judiciary or by officials or employees of a state or any other public authority or entity or by employees or officials of an intergovernmental organisation in connection with their official duties.”

This term was not contained in the first draft. It uses verbatim the definition contained in the 1997 International Convention for the Suppression of Terrorist Bombings.

6. “Military forces of a state” means the armed forces of a state which are organised, trained and equipped under its internal law for the primary purpose of national defence or security and persons acting in support of those armed forces who are under their formal command, control and responsibility.”

As with the preceding term, the final version of the definition is based on the 1997 Convention mentioned above.

The number of terms used is, in fact, relatively limited, and this was only made possible by proposing broad definitions for terms that are, on the contrary, as precise and limited as possible in the existing nuclear conventions from which they are taken. It is nevertheless these few terms that give the convention its specifically “nuclear” character. From the outset of the work, the number of terms and the interpretation of each of them was one of the difficult and complex issues of the negotiations. The draft text of the convention submitted by the Russian Federation and its explanatory note had proposed a considerable number of terms used in technical nuclear vocabulary, such as “nuclear fuel”, “radioactive waste” and “radioactive materials”. To judge from the many amendments and counter-proposals submitted during the work by the various delegations, the Ad Hoc Committee seems to have given a great deal of attention to the drafting of the first article.<sup>33</sup>

For example, there were diverging opinions until the work was concluded about whether reference should be made to the substantial environmental damage mentioned in paragraphs 1 and 4 of Article 1, since some delegations thought that this damage could be considered as implicit in “to cause death” or “substantial damage to property”.

However, the intention of the convention’s proponents, stated at the outset of the work, had not been to “establish a unified terminology that would be transposed directly into the domestic legislation of States Parties, but to create a conceptual system making it possible to implement the convention”.<sup>34</sup>

### *Coverage*

Article 2 of the convention, which is drafted using the precise terms of criminal law, does not contain the concept of “coverage”, but instead directly enumerates offences without describing them in terms of the formal distinction between crimes and offences, subject to the provisions contained in Articles 3 and 4, provided such offences are committed by a person unlawfully and intentionally. Intent is a fundamental concept of criminal law.

“Person” is understood as a natural person also within the meaning of criminal law, i.e. the international criminal liability of an individual, and not according to the legal definition used in civil law, which includes both natural and legal persons. The references made in paragraphs 4. b) and c) to “others” and “a group of persons” and specifically to a “legal person” in paragraph 1, b) iii), indicate that the potential victim may be a person.

The offences enumerated in Article 2, paragraphs 1 to 4, are categorised by whether the offence involves an act actually committed by a person alone, with specific intent, or a threat or blackmail or attempted blackmail, or complicity or the commission of a specified offence.

The offences are presented as follows:

1. Any person commits an offence if that person...:

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33. Examples: Texts proposed by the United States: A/AC.252/1998/WP.36; by Belgium and France: A/AC.252/1998/WP1/Rev.2.

34. Previously cited document A/AC.252.L.3 Add.1.

- (a) Possesses radioactive material or makes or possesses a device:

With the intent to cause death or serious bodily injury; or...to cause substantial damage to property or to the environment;

- (b) Uses in any way radioactive material or a device, or uses or damages a nuclear facility in a manner which releases or risks the release of radioactive material:

With the intent to cause death or serious bodily injury; or...to cause substantial damage to property or to the environment; or...to compel a natural or legal person, an international organisation or a state to do or refrain from doing an act.

- 2. Any person also commits an offence if that person:

- (a) Threatens, under circumstances which indicate the credibility of the threat, to commit an offence as set forth in paragraph 1 (b)...; or
- (b) Demands unlawfully and intentionally radioactive material, a device or a nuclear facility by threat...or by use of force.

- 3. Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1...

- 4. Any person also commits an offence if that person:

- (a) Participates as an accomplice in an offence as set forth in paragraph 1, 2 or 3 of the present article; or
- (b) Organises or directs others to commit an offence as set forth in paragraph 1, 2 or 3...; or
- (c) ... contributes to the commission of one or more offences...by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence ... concerned.

By comparison, the CPPNM defines its coverage in Article 2 (1): “The Convention shall apply to nuclear material used for peaceful purposes while in international nuclear transport”. The amendment to Article 2 replaces and supplements this provision by adding certain reservations to it, i.e. “nuclear material used for peaceful purposes while in domestic use, storage and transport”. Paragraph 5 of amended Article 2 excludes from its coverage “nuclear material used or retained for military purposes”.

It should be pointed out that the initial draft of the convention contained a different provision regarding coverage, specifying that “this Convention shall apply...to acts by specific natural persons” and a corresponding definition of “acts of nuclear terrorism”. In this regard, the text ultimately adopted entirely reflects the approach followed by the 1997 and 1998 anti-terrorist conventions mentioned above.

The issue of possible overlapping with the CPPNM before its amended version was adopted had been discussed with respect to the implementation of the new convention in light of the comments provided by the IAEA Secretariat. The Agency had pointed out that when successive treaties were applicable in the same field, the most recent treaty did not necessarily prevail over an earlier one. In this regard, the members of the Ad Hoc Committee were warned of the need to bear in mind, in accordance with Article 30 of the Vienna Convention on the Law of Treaties,<sup>35</sup> “the complications arising from overlapping treaty regimes and the desirability of maintaining consistency, stability and certainty in treaty relations”.<sup>36</sup>

In the document cited above, the IAEA Secretariat had analysed in detail the possible overlapping of the draft convention with the coverage of the CPPNM, emphasising in particular that the latter also covered the criminalisation of certain situations defined as acts committed intentionally that apply to facilities.

Another major difference concerned the issue of the jurisdiction of states, since the convention goes further than the CPPNM in this regard, as it gives the States Parties the right to extend their jurisdiction in certain situations.

A solution then suggested by the IAEA Secretariat was to prepare, instead of this convention, a joint instrument that could cover the CPPNM – amended if necessary – as well as the draft convention as submitted to the Committee, or to include in the text of the convention a reference to the CPPNM as *lex specialis*, i.e. having a more restricted coverage.

The negotiators in favour of the draft, for their part, pointed out that the new convention’s approach was entirely different, particularly since the CPPNM’s coverage was limited to nuclear material used for peaceful purposes and did not cover nuclear material of a military nature, and also because it was necessary to define acts of nuclear terrorism on the basis of the purpose of these acts, which distinguished them from other criminal acts.<sup>37</sup> The aim of the convention was to encompass the broadest possible range of targets, forms and manifestations of acts of nuclear terrorism.

In line with this approach, it had been agreed in the Ad Hoc Committee, as mentioned above, to base the convention closely on two recent sectoral anti-terrorist instruments adopted by the General Assembly, i.e. the 1997 International Convention for the Suppression of Terrorist Bombings and the 1999 International Convention for the Suppression of the Financing of Terrorism. The structure and terminology of these two instruments later provided a model for the convention.

### ***Limitations of the coverage of the convention***

Article 3 specifies that the application of the convention is limited to offences committed in an international context, i.e. that involve more than one state. Thus, the convention “shall not apply where the offence is committed within a single state, the alleged offender and the victims are nationals of that state, the alleged offender is found in the territory of that state and no other state has a basis...to exercise jurisdiction”.

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35. Vienna Convention on the Law of Treaties, 1969, Treaty Series No. 18232.

36. Previously cited document. 33, 34 A/AC.252/1998/L.5.

37. Previously cited document. A/53/37 paragraphs 18-22.

Consequently, the aim of the convention is to ensure that the bodies of the State Party punish a crime recognised as having a transnational character. This means that the acts committed by these persons are considered to be international offences. It is also clear that national courts rather than an international jurisdiction are responsible for detecting the offence, determining the procedures used and imposing punishment under the state's criminal law. The prosecution of offences committed by individuals acting as natural persons remains an exclusively national responsibility. The key feature of the international enforcement of the convention is constituted by the provisions on extradition, since the offences covered are also deemed to be included as extraditable offences in any pre-existing extradition treaty. If there is no existing extradition treaty between States Parties, the convention can be considered as a sufficient legal basis for extradition [Article 13]. The same provisions are contained in Article 11 (2) of the CPPMN.

A number of other specific restrictions to coverage are set forth in Article 4, which stipulates that nothing in the convention shall affect other rights, obligations and responsibilities of states and individuals under international law, in particular the Charter of the United Nations and international humanitarian law.

Furthermore, the convention does not govern the activities of the military forces of a state (term defined in Article 1) during an armed conflict as defined under international humanitarian law, although the following paragraph specifies that the provisions regarding military forces "shall not be interpreted as condoning or making lawful otherwise unlawful acts, or precluding prosecution under other laws". This reference to the law governing armed conflicts is a constant feature of the anti-terrorist instruments adopted recently.<sup>38</sup> Separately, in the context of the measures applicable in the event of the seizure of nuclear materials, Article 18 (7) lays down that in the event of any "dissemination" (contamination in nuclear vocabulary?) in connection with an offence set forth in the convention, "nothing in the present article shall affect in any way the rules of international law governing liability for nuclear damage...".

The convention "does not address, nor can it be interpreted as addressing, in any way, the issue of the legality of the use or threat of use of nuclear weapons by states" [Article 4 (4)]. This provision, which was introduced at an early stage by Mexico, reflects the debate within the General Assembly that generally also concerns issues of non-peaceful uses. The annotations and explanations presented by Russia right from the start had underscored the importance of the General Assembly's competence to draft this convention as opposed to the IAEA, given that the IAEA was limited by its Statute to issues concerning the peaceful use of nuclear energy and technology.

It is true that the conventions adopted in the field of nuclear safety under the auspices of the IAEA, like the CPPNM and its amendment, made reference on a very exceptional basis to facilities, waste, fuel, etc. related to non-peaceful activities by countries possessing nuclear weapons, only after laborious discussions, and never explicitly. This issue had already been discussed during the drafting of the 1986 conventions on notification and assistance in case of a nuclear accident, and had been resolved through unilateral declarations made by countries possessing nuclear weapons at the time of the adoption of the Conventions;<sup>39</sup> it had been avoided when drafting the 1994 Convention on Nuclear Safety simply because its coverage is limited solely to civilian nuclear plants. However, this issue

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38. See *op.cit.*, ILA, page 354, paragraph 21.

39. Convention on Early Notification of a Nuclear Accident and Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, Legal Series 14. IAEA, Vienna, 1987 document available in English. (Article 3 Accident Convention). Declarations concerning the notification of nuclear accidents other than those specified in Article 1. p. 103-105.

reappeared on the agenda of the work of the Joint Convention both for waste and spent fuel, and resulted in a number of provisions being drafted so as to make it possible to include or exclude materials of military or defence-related origin if a state so wished.<sup>40</sup>

### *The obligations of the States Parties*

The States Parties' main obligation set forth in Article 5 is to adopt such measures as may be necessary:

- “a) To establish as criminal offences under its national law the offences set forth in Article 2”;
- “b) To make those offences punishable by appropriate penalties which take into account the grave nature of these offences”.

These two measures essentially lie within the scope of national criminal law, which the Convention amends and supplements. Thus, the state undertakes to ensure that acts defined in an international instrument fall within the scope of its national criminal law and to adopt enforcement measures under its own law.<sup>41</sup>

Article 6 adds a clarification that contains some features of a virtual definition of an act of terrorism, specifying that the States Parties are obliged to adopt such measures as necessary to ensure “that criminal acts within the scope of this convention, in particular where they are intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature and are punished by penalties consistent with their grave nature”.

This principle is reiterated in the provisions on extradition, since Article 15 specifies that “a request for extradition or for mutual legal assistance...may not be refused on the sole ground that it concerns a political offence (...) or an offence inspired by political motives”.

It is interesting to note that Article 11 A of the Amendment to the CPPNM expresses this same principle by referring to “political offences” or “offences inspired by political motives”.

As regards prevention, Article 8 stipulates that the States Parties shall make every effort to adopt appropriate measures to ensure the protection of radioactive material, taking into account “relevant recommendations and functions of the International Atomic Energy Agency”. This provision, which admittedly is deliberately vague from a legal standpoint, refers to non-binding but universally recognised standards for the physical protection of nuclear materials.<sup>42</sup> However, the CPPNM mentioned in the Preamble is not cited in the context of the obligations of the States Parties

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40. Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, IAEA Document: INFCIRC/546 12 January 1998. Article 3. Scope of application.

41. For a brief analysis of the criminal liability of natural persons in international law: See *Droit International Public*, Nguyen Quoc Dinh, Patrick Daillier, Alain Pellet; 4th Edition, Paris 1992, paragraphs 427, 428.

42. IAEA Publication: The Physical Protection of Nuclear Material INFCIRC/225 (and revisions).

so as not to create gaps in the implementation of the convention with regard to those States Parties that are not also parties to the CPPNM.

The States Parties, in accordance with the provisions of Article 7, are also obliged to co-operate with each other in order “to prevent and counter preparations...for the commission...of...offences..., including measures to prohibit in their territories illegal activities” by exchanging “accurate and verified” information and co-ordinating administrative measures. They are also required to co-operate with international organisations, such as the UN and, through its Secretary General, with the IAEA. It adds that “Such authorities and liaison points must be accessible on a continuous basis”, a provision that seems to be somewhat vague.

### *Protection of confidentiality*

In connection with the States Parties’ obligations to co-operate with each other, in particular through the exchange of information, the convention gives an important role to the protection of confidentiality. In this regard, Article 7 allows States Parties to “take appropriate measures consistent with their national law to protect the confidentiality of any information which they receive in confidence...”. The confidentiality of information provided to international organisations must also be maintained.

A complementary provision specifies that the convention does not require States Parties to provide information which they are not permitted to communicate pursuant to national law or which “would jeopardise the security of the state concerned or the physical protection of nuclear material” [Article 7, paragraphs 2 and 3].

### *National jurisdiction*

One of the key issues that this convention had to settle in order to attain its objectives regarding the suppression of acts of terrorism was the definition of clear rules of jurisdiction in order to prevent situations in which states might provide safe havens to alleged offenders and to avoid conflicts of jurisdiction between States Parties. To this end, the convention requires the States Parties to clearly establish their jurisdiction for all the offences covered by the convention.

In accordance with Article 9 b), the jurisdiction established by the States Parties must be territorial (*ratione loci*), i.e. cover offences committed in the territory of the State Party, extended so as to include offences committed on board a vessel flying its flag or an aircraft which is registered under its laws; it must also be personal (*ratione personae*) and “active” jurisdiction, i.e. include an offence committed by a national of the State Party regardless of where it is committed.

Article 9 (2) stipulates that the State Party may also establish its jurisdiction over cases in which an offence is committed against one of its nationals (passive personal jurisdiction); against a facility of the state abroad (such as a diplomatic mission); by a stateless person who has his or her habitual residence in the territory of that state if the offence is committed in an attempt to compel that state to do or abstain from doing any act, or if the offence is committed on board an aircraft which is operated by the government of that state. The state may also claim its jurisdiction if it does not extradite an alleged offender to a State Party that has established its jurisdiction.

To show the importance that the convention attaches to the State Party establishing its jurisdiction in accordance with the provisions of the convention, Article 9 requires State Parties to

notify the Secretary-General of the United Nations upon ratifying the Convention of the jurisdiction that they have established under their national laws and of any changes made subsequently.

### *Extradition*

The principle of international criminal law *aut iudicare aut edere*, which requires a State Party that does not extradite the alleged perpetrators of any offence defined in a binding international instrument to establish its jurisdiction for prosecuting and judging such persons under its own legislation, is now recognised as being a fundamental principle of international instruments against terrorism. This principle was affirmed by the Security Council in its Resolution 1373 (2001) in which it decided *inter alia* “that all states shall...deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens.”

In the convention, issues of law and criminal procedure and international co-operation with regard to extradition are addressed fully and precisely. The State Party’s obligations and the procedures applicable from the time that it is notified that an offence has been committed until criminal proceedings are taken or the alleged offender is extradited are described in detail in Articles 10 to 16. Article 17, which deals with a related issue, stipulates the conditions for the transfer to another State Party of persons detained in the course of an investigation.

Beyond the provisions concerning the usual co-operation between states, the convention encourages the broadest possible mutual legal assistance whether on the basis of an existing mutual legal assistance treaty or independently of any such treaty or agreement.

These clauses are analogous to those contained in the two anti-terrorist conventions cited above. In comparison, the CPPNM sets forth the *aut iudicare aut edere* principle in Article 10, without including provisions regarding its implementation.

### *Rights of alleged offenders*

The convention lays down a number of measures aimed at protecting alleged offenders with respect to extradition.

The obligation to extradite in the event of offences covered by Article 2, which according to the provisions of Article 15 are deemed not to be inspired by political motives (“None of the offences set forth in Article 2 shall be regarded... as a political offence or... as an offence inspired by political motives”) is, however, limited by the provisions of Article 16 authorising States Parties to deny the extradition of an alleged offender if the requested State Party “has substantial grounds for believing that the request for extradition...has been made for the purpose of prosecuting or punishing a person on account of that person’s race, religion, nationality, ethnic origin or political opinion...”.

Furthermore, Article 10 (2) grants the alleged offender detained for the purpose of prosecution or extradition the right to communicate with the state of which he is a national, to be visited by a representative of that state, and to be informed of his rights in this regard. The State Party is required to notify immediately the other States Parties concerned of the fact that the alleged offender is in custody and to invite the International Committee of the Red Cross to communicate with and visit him [Article 10, paragraphs 5 and 6]. In comparison, the Amendment to the CPPNM lays down analogous provisions in Article 11 B.

### *Measures concerning the seizure of nuclear material*

Upon seizing or otherwise taking control of radioactive material or nuclear facilities, States Parties are subject to a series of specific obligations under Article 18: firstly, they must take steps to render harmless the radioactive material in question and to ensure that it is held in accordance with “applicable International Atomic Energy Agency safeguards” [paragraph 1 a] and health and safety standards published by the IAEA. Next, the state is required to return these materials and facilities to the State Party to which they belong or to the State Party from whose territory they were stolen. The convention also provides for the case in which “a State Party is prohibited by national or international law from” possessing radioactive material or devices [Article 18, paragraph 3.1]. In addition, if the materials do not belong to any of the States Parties or if no state is willing to receive these items, a multilateral consultation procedure with the co-operation of the IAEA is provided for [Article 18, paragraphs 3. 2), 4 and 5].

According to the explanations provided by the Russian Federation when the draft convention was presented, this provision is considered as “a *sui generis* element in the machinery for the non-proliferation of nuclear weapons”<sup>43</sup> even though the convention does not address these issues. A State Party that either inadvertently or deliberately comes into possession of nuclear weapons or nuclear material following an act of nuclear terrorism will therefore be responsible under international law if it fails to meet its obligation to return these weapons or material.

By comparison, Article 5 (2) of the CPPNM dealing with the “recovery and response operations in the event of any unauthorised removal” contains no such obligation or procedure. For the purposes of returning nuclear materials in the event of such removal, the CPPNM only provides for a mechanism of information, consultation and co-operation between designated services or through diplomatic and mutual assistance channels in order to ensure the return of stolen or missing material.

### *The role of the IAEA*

The convention does not contain any general reference to the IAEA and does not give it a substantive role. However, there are a certain number of individual references that relate to the technical functions and recommendations of the IAEA with regard to the physical protection of material [Article 8] and the applicable safeguards and the health and safety standards published by the IAEA [Article 18, paragraph 1 c] (see above). These provisions are included in the States Parties’ obligations with respect to the protection of radioactive material and the health and safety standards published by the Agency.

In addition, in the event of a seizure of radioactive material or devices or nuclear facilities, the States Parties are required to notify the Director General of the IAEA “of the manner in which such an item was disposed of or retained”. The Director General must then transmit this information to the other States Parties [Article 18(6)]. While in possession of “nuclear material”, States Parties are required to hold it in a manner that is in accordance with the “applicable IAEA safeguards”. In such cases, they may request the assistance and co-operation of the IAEA [Article 18(5)].

As the depositary of the convention is the Secretary-General of the United Nations, it is his responsibility to notify the IAEA of the names and competent liaison points responsible for co-operation between the States Parties [Article 7(4)]. It is also through the Secretary-General that the

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43. Previously cited document A/AC.252/L/Add.1, paragraphs 41 and 42.

States Parties conduct consultations with one another as necessary in order to ensure effective implementation of the convention [Article 20].

### ***Final provisions***

#### *Settlement of disputes*

Article 23 lays down the provisions applicable to the settlement of disputes between States Parties involving the interpretation or application of the convention. It specifies the usual stages of negotiation, arbitration and referral to the International Court of Justice and the corresponding right of States Parties to lodge a standard reservation at the time of accession to the convention by declaring that they are not bound by the aforementioned provisions regarding the procedure for dispute settlement through the courts or arbitrations.

This article is a somewhat simplified version of Article 17 (1) of the CPPNM.

#### *Signature and Ratification*

The convention is subject to ratification, acceptance or approval. It is open to the accession of any state from 14 September 2005 until 31 December 2006. It does not provide for accession by an international organisation, unlike the CPPNM which is open to the signature and accession of international and regional organisations “of an integration or other nature” – a broader concept than the usual wording used to designate the European Union. Euratom is a party to the CPPNM. The question of the possible accession of international organisations was raised with the IAEA Secretariat, which replied that the Agency was not normally a contracting party to international instruments.<sup>44</sup>

#### *Entry into force*

The provisions of Article 25 repeat verbatim Article 19 of the CPPNM requiring ratification by 22 states for the convention to enter into force (21 states for the CPPNM).

#### *Amendments*

The procedure specified for proposing and adopting amendments [Article 26] is similar to the one contained in the CPPNM: the proposal is submitted to the depositary, who then circulates it to all States Parties and convenes a conference to consider the proposed amendment not sooner than three months after the invitations are issued (30 days for the CPPNM).

The convention urges the conference to make every effort to ensure that proposed amendments are adopted by consensus. A two-thirds majority of all States Parties is required for adoption if a consensus cannot be reached.

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44. Previously cited document A/53/37 paragraph 67.

## *Denunciation*

The convention may be denounced by written notification to the depositary. The notification takes effect one year following the date on which it is received by the depositary (80 days for the CPPNM).

## **IV. A new frontier of international nuclear law or a specific instrument of international criminal law?**

This convention was prepared within the United Nations by an Ad Hoc Committee set up by the General Assembly to create a number of legal instruments for the prevention, suppression and elimination of terrorism in all its forms and manifestations. It is one of a series of closely related international instruments negotiated and adopted by the same bodies using the same procedures by representatives of the international community as a whole.

Although the instrument most closely related to the convention in terms of substance – the CPPNM – was discussed from the outset of the preparatory work and throughout the negotiations, the negotiators' main stated objective was to agree on the broadest possible coverage in order to fill the gaps that negotiators saw in the CPPNM with respect to the limitations of its coverage and the enforcement measures that it provides, regardless of amendments that might later be adopted in a revised version of the CPPNM. The work was aimed at producing a document that was as different possible from that instrument.

The other international instruments established directly or indirectly under the same mandate of the General Assembly or the Security Council, which have been designated as being model texts constituting the corpus of the 12 conventions on terrorism continually referred to and described as *acquis*,<sup>45</sup> are unrelated to international nuclear law.

Furthermore, with regard to the convention's content, no "soft law" text – pre-existing code, provision or technical standard – was available to guide the negotiators as had always been the case previously for conventions in the nuclear safety and security fields prepared under the auspices of the IAEA, and especially for the CPPNM, published since 1975 under the reference INFCIRC/225/revised.

The only technical data and legal opinions in the codified nuclear field available to the negotiators in the Ad Hoc Committee were a few pages of definitions and explanations of terminology provided by the IAEA Secretariat in its preliminary comments.

Beyond these general arguments, the Ad Hoc Committee's mandate was, as its chairman pointed out at the end of the work, "to draft a technical, legal, criminal law instrument that would facilitate police and judicial co-operation in matters of extradition and mutual assistance" adding that "this Ad Hoc Committee must elaborate a text that fulfils the requirements of criminal law – legal precision, certainty and fair labelling of the criminal conduct..."<sup>46</sup>

The method of international co-operation specified by the convention – in which priority is necessarily given to legal and national security mechanisms – is not so much a new chapter in nuclear

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45. Previously cited document A/60/37 paragraph 33, page 32.

46. Previously cited document A/60/37 paragraph 32, page 32.

law as a new stage in the evolution of international criminal law enabling states, both jointly and individually, to improve the effectiveness of anti-terrorist measures. The instrument's focus is upon criminal acts, offences and their suppression by States Parties since this convention is an enforcement instrument.<sup>47</sup> This means that national nuclear regulatory, safety and security authorities are not initially called upon to intervene.

However, the fact remains that the only field targeted by the convention is what is otherwise defined as being the field of nuclear activities, facilities and materials, wherever they are found and whatever their use, i.e. which also includes civilian and military uses in the broad sense. This means that in practice, it is necessary and even inevitable for states to co-operate closely in terms of the various fields of intervention of nuclear law.

The limited number of accessions required for the convention to enter into force and the fact that there are no additional special conditions, for example concerning the number and status of states active in the nuclear field, such as the requirement that they have at least one nuclear installation as is specified in Article 31 (1) of the Convention on Nuclear Safety, might make it possible for this instrument to enter into force relatively rapidly in comparison with the Amendment to the CPPNM, for example. Under Article 20 (2) of the CPPNM, for each individual state (Party to the CPPNM) having deposited its instrument of ratification, the amendment only enters into force thirty days after the date on which two-thirds of the States Parties have deposited their instrument of accession. It is likely that this will lead to a situation in which there are simultaneously States Parties that have acceded to the convention, States Parties to the 1980 CPPNM and states that have also acceded to the amendment.

Consequently, there is reason to fear that the implementation of the convention may mean that the legal bodies of the states that are Parties to both instruments will encounter serious problems of overlapping with the 1980 CPPNM and more especially with amendment, in particular regarding any amendments to their domestic criminal law. The IAEA Secretariat voiced this concern at the outset of the preparatory work.

The issue of the international normative instruments necessary to combat terrorism has become a constantly recurring item on the agenda of all international bodies. These instruments must be negotiated globally despite the specificity of the sectors concerned. It is therefore not surprising that concepts or measures adopted as relevant and useful in one context are copied or emulated in another. This explains why the preparatory work on the convention already seems to have influenced certain proposals made by contracting Parties to the CPPNM at the diplomatic conference on the adoption of its amendment. Certain new provisions that also involve criminal law, in particular with regard to extradition, appear to have been directly based on the convention.

### ***Monitoring***

The negotiating states did not provide for the establishment within the Secretariat or outside the United Nations of a specific monitoring mechanism<sup>48</sup> for the convention, the implementation of which is therefore the exclusive responsibility of the States Parties. As stated in Article 20: "The States Parties shall conduct consultations with one another directly or through the Secretary-General of the

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47. Previously cited document A/59/37 Summary by the Co-ordinator, page 14.

48. Informal note by the UN Secretariat dated 15-06-2005 published by the Information Department (in English only) entitled "Guidance on the Convention for the suppression of acts of nuclear terrorism".

United Nations, with the assistance of international organisations as necessary, to ensure effective implementation of this Convention”.

The formal obligation of the States Parties to notify the Secretary-General at the time of their accession to the convention of the relevant provisions of their domestic legislation regarding jurisdiction and their (optional) right to ask for his advice or request the assistance of the IAEA if they are in possession of radioactive materials or devices according to Article 18 (5), do not in themselves constitute a multilateral institutional mechanism.

The General Conference of the IAEA at its 49<sup>th</sup> Session (September 2005) simply took note of the Resolution of the UN General Assembly by which it adopted the convention.<sup>49</sup>

Once it has entered into force and been ratified by a significant number of states, however, it is possible that because it is grounded in binding national law, the convention, whether or not it is part of a coherent body of international nuclear law, might exercise a considerable influence on national nuclear law, in particular with regard to the criminalisation of offences relating to nuclear activities and materials, but also with respect to transport law, methods of surveillance and protection of nuclear facilities, sites and activities and bilateral and international co-operation between the state bodies responsible in this field.

In any case, the strengthening of the international legal regime for combating the various manifestations of terrorism and especially the threat of nuclear terrorism is now a priority for states. This is a priority to which intergovernmental organisations must respond in their specific fields of responsibility in order to maintain a cohesive multilateral effort in the nuclear field and to help states to develop clear and effective standards that will contribute to the progress of the rule of law.

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49. IAEA Document GC(49)L.7 [Provisional reference number of the General Conference] Date: 29 September 2005.