

The International Legal Framework for Nuclear Security

IAEA International Law Series No. 4



IAEA

International Atomic Energy Agency

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THE INTERNATIONAL
LEGAL FRAMEWORK
FOR NUCLEAR SECURITY

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IAEA INTERNATIONAL LAW SERIES No. 4

THE INTERNATIONAL
LEGAL FRAMEWORK
FOR NUCLEAR SECURITY

INTERNATIONAL ATOMIC ENERGY AGENCY
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FOREWORD

**by Yukiya Amano
Director General**

One of the objectives of the IAEA under Article II of its Statute is “to accelerate and enlarge the contribution of atomic energy to peace, health and prosperity throughout the world.” Nuclear security is accepted today as a fundamental requisite for the use of nuclear energy in this manner. Over the years, this understanding has been legally anchored and confirmed in various decisions and resolutions of the IAEA Board of Governors and the General Conference, as well of the United Nations Security Council and General Assembly.

However, the international legal framework on nuclear security has developed in a complex manner and now consists of a broad collection of legally binding and non-binding international instruments that at times may be considered as difficult to comprehend. By addressing the key legal instruments on nuclear security in a comprehensive manner, this publication, the fourth in the IAEA International Law Series, fills a long perceived need of the international nuclear community.

Although not a substitute for these instruments, it is nevertheless hoped that this publication will serve as a guide to their respective legislative history and scope of application, including the relevant obligations undertaken by States, as well as the specific functions assigned to the IAEA, where relevant. It is also anticipated that this publication will create further awareness and understanding of the evolving international legal framework on nuclear security, thereby becoming a tool for legislators, government officials, technical experts, lawyers, diplomats, media and the general public.

Finally, it is expected that it will aid the activities of the IAEA in its ongoing efforts to assist Member States in the areas of nuclear legislation and nuclear security in establishing and maintaining national legislative and regulatory frameworks for nuclear security.

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1. INTRODUCTION

1.1. BACKGROUND

The term ‘nuclear security’ is generally accepted to mean “the prevention and detection of, and response to, theft, sabotage, unauthorized access, illegal transfer or other malicious acts involving nuclear material, other radioactive substances or their associated facilities.” While the ultimate responsibility for nuclear security within a State rests entirely with that State, the need for regional and international cooperation has become increasingly evident with the growing recognition that the ability to prevent, detect and respond to the threats to nuclear security within one State is affected by the adequacy and effectiveness of nuclear security measures taken by other States, particularly when nuclear material is transported across national frontiers. Since the early 1970s, the IAEA has been called upon to play an ever increasing role in assisting States, upon request, to strengthen their national legal infrastructures and physical protection systems, as well as to facilitate regional and international efforts to enhance nuclear security, including measures to protect against nuclear terrorism.

The evolution of the IAEA’s nuclear security mandate and functions has occurred within a specific legal and policy framework. The IAEA’s own legal framework includes the Statute; resolutions adopted by the IAEA Board of Governors and the General Conference; as well as relevant resolutions adopted by the United Nations Security Council and General Assembly. Several international conventions, adopted under IAEA and other auspices, have also contributed to the IAEA’s mandate and functions in the area of nuclear security.

The IAEA’s mandate and activities in the field of nuclear security, like a number of other mandates, are derived from Article II of its Statute: “To accelerate and enlarge the contribution of atomic energy to peace, health and prosperity throughout the world.” The IAEA’s role in promoting nuclear security and combating nuclear terrorism is legally anchored and confirmed in the resolutions of the Board of Governors and the General Conference, including the Nuclear Security Plans approved by the Board in 2002, 2005 and, most recently, in 2009¹. In accordance with these Plans, the IAEA has conducted, and is conducting, extensive activities to assist States, upon request, in improving their national nuclear security infrastructure as well as their regional and international cooperation, thereby reducing the risk of nuclear terrorism and contributing to international peace and security.

The policy making organs of the IAEA have recognized and drawn upon the synergies between measures to strengthen security and measures to strengthen safety and safeguards in order to prevent, deter and respond to threats to nuclear security and to ensure protection against nuclear terrorism and other malicious acts. For example, the IAEA Board of Governors, at its meetings in September 2009 and 2010, and the General Conference, in its resolutions GC(53)/RES/10 and GC(54)/RES/7, have recognized that strengthening the safety of radioactive sources also enhances the security of such sources. In that context, the policy making organs have also noted the central contribution of State systems of accounting for and control of nuclear material (SSACs) in preventing loss of control of such material, and in preventing illicit trafficking, and deterring and detecting unauthorized removal of nuclear material.²

Many of the IAEA’s nuclear security activities can be attributed directly to statutory functions including, inter alia, providing training and technical advice (Article III.A.4); providing equipment or supplies (Articles III.A.1 and 2) and facilitating exchange of information and related services (Articles III.A.3 and VIII). Moreover, the IAEA has seized upon potential synergies between measures to strengthen security and Statute based activities in the areas of safety (Article III.A.6) and safeguards (Article XII) to prevent, detect and respond to threats to nuclear security and to combat nuclear terrorism.

The IAEA’s role and expertise in promoting nuclear security and in the protection against nuclear terrorism have also been recognized in Security Council resolutions 1373 (2001) and 1540 (2004) adopted under Chapter VII

¹ See GOV/2002/10, GOV/2005/50 and GOV/2009/54.

² See GC(54)/RES/8, preambular paragraph (m).

of the Charter of the United Nations. In the United Nations Global Counter-Terrorism Strategy³, the General Assembly encouraged the IAEA “to continue [its] efforts...in helping States to build capacity to prevent terrorists from accessing nuclear or radiological materials, to ensure security at related facilities, and to respond effectively in the event of an attack using such materials.”

International conventions adopted under both IAEA and other auspices have also assigned a clear role and functions to the IAEA in the field of nuclear security and have been approved as such by the Board of Governors. In particular, the Convention on the Physical Protection of Nuclear Material and the 2005 Amendment thereto, the Convention on Early Notification in the Event of a Nuclear Accident, the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, and the International Convention for the Suppression of Acts of Nuclear Terrorism have all assigned specific functions to the IAEA.

Non-binding legal instruments promulgated under IAEA auspices, including the Nuclear Security Recommendations on Physical Protection of Nuclear Material and Nuclear Facilities (INFCIRC/225/Revision 5) and the Code of Conduct on the Safety and Security of Radioactive Sources, also illustrate the IAEA’s role in elaborating such guidance and confirm its role in assisting States, upon request, in implementing the recommendations contained therein.⁴

Thus, like the international legal framework for nuclear security, the IAEA’s nuclear security mandate is embodied in both binding and non-binding legal instruments adopted under both IAEA and other auspices.

1.2. OBJECTIVE

This publication brings together the legally binding primary international instruments and the internationally accepted non-binding instruments that constitute the international legal framework for nuclear security. It does not discuss the safety and safeguards related instruments, which also form a part of the broader legal framework for nuclear security. By setting out the legislative bases for the mandate of the IAEA in the area of nuclear security, it is hoped that this publication will increase awareness of the IAEA’s role in facilitating national, regional and international efforts to enhance nuclear security, including measures to protect against nuclear terrorism. It is also intended to serve as a guide in carrying out the IAEA’s nuclear security mandate and functions assigned to it under these instruments, including in the elaboration of nuclear security recommendations and guidance documents. The legislative history and overview of the salient provisions of the binding and non-binding instruments will increase the understanding of the evolving legal framework governing nuclear security and counter-terrorism, thereby assisting States, intergovernmental organizations and other stakeholders in the implementation of their provisions at the national, regional and international level.

1.3. STRUCTURE

The introduction sets out the legal and policy bases for the IAEA’s nuclear security mandate pursuant to which this publication is issued. Section 2 elaborates the legislative history of each of the primary instruments relevant for nuclear security. Section 3 provides an overview of the salient provisions of the legal framework for nuclear security, including the obligations undertaken by States Parties to the binding international instruments, the obligations imposed on all States under the Chapter VII Security Council resolutions and the recommendations contained in the non-binding instruments. Section 4 focuses on the specific functions assigned to the IAEA under the primary binding and non-binding instruments as approved by the Board of Governors and in accordance with its Statute.

³ Part III.9 of the Annex to A/RES/60/288 adopted by the General Assembly on 8 September 2006.

⁴ The fifth and latest revision of INFCIRC/225 has been issued by the IAEA together with two other publications aimed at assisting States in implementing a comprehensive nuclear security regime. IAEA Nuclear Security Series No. 14 provides Nuclear Security Recommendations on Radioactive Material and Associated Facilities, while IAEA Nuclear Security Series No. 15 is entitled Nuclear Security Recommendations on Nuclear and Other Radioactive Material out of Regulatory Control.

2. LEGISLATIVE HISTORY OF THE NUCLEAR SECURITY INSTRUMENTS

2.1. LEGALLY BINDING INTERNATIONAL INSTRUMENTS

2.1.1. Primary legal instruments under the auspices of the IAEA⁵

The Convention on the Physical Protection of Nuclear Material (CPPNM⁶)

While appreciating that the establishment and operation of physical protection systems for nuclear material and facilities were entirely the responsibility of each State, since the 1970s there has been a growing recognition of the need for cooperation among States to ensure the physical protection of nuclear material against theft or unauthorized removal, especially during international transport, and against the sabotage of nuclear facilities.

The IAEA recognized early on that it might be called upon to play a role in the area of the physical protection of nuclear material and facilities. Its first effort resulted in the publication in 1972 of Recommendations for the Physical Protection of Nuclear Material, which was prepared by a panel of experts convened by the Director General. These recommendations were revised by a group of experts in cooperation with the IAEA Secretariat, and the revised version was published in 1975 in the INFCIRC series. INFCIRC/225 has been subsequently updated and revised in 1977, 1989, 1993, 1998 and 2010. INFCIRC/225/Revision 5, which is discussed below, reflects the broad consensus among Member States on the requirements to be met by systems for the physical protection of nuclear material and facilities.

The synergies between non-proliferation and physical protection were first illustrated when, in the context of the 1975 Review Conference of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), the States Parties adopted a Declaration, on 30 May 1975, in which they urged the further elaboration of concrete measures for the physical protection of nuclear material in use, storage and transport. The contribution of enhanced physical protection to the prevention of theft, vandalism, sabotage and terrorism was explicitly confirmed in General Conference resolution GC(XIX)/RES/328 of 26 September 1975.

In 1977, upon the recommendation of an Advisory Group on the Physical Protection of Nuclear Material, Member State representatives met under the auspices of the IAEA to elaborate a Convention on the Physical Protection of Nuclear Material. The main requirements, including the categorization of nuclear material incorporated in the draft CPPNM, were based on the provisions of INFCIRC/225.

The CPPNM was adopted on 26 October 1979 and was opened for signature on 3 March 1980. Since its entry into force on 8 February 1987, the CPPNM now has more than 140 States Parties. It is one of the 16 international counter-terrorism instruments⁷ and remains the only internationally, legally binding undertaking in the area of the physical protection of nuclear material.

⁵ The broader legal framework for nuclear security also includes the Convention on Nuclear Safety and the Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, which are not addressed in this publication.

⁶ For the text see <http://www.iaea.org/Publications/Documents/Infcircs/Others/inf274r1.shtml>; for the status see http://www.iaea.org/Publications/Documents/Conventions/cppnm_status.pdf.

⁷ As of the date of this publication, only 15 have entered into force.

*The 2005 Amendment to the CPPNM*⁸

Despite the conclusion at the first CPPNM Review Conference in 1992 that “the Convention provides a sound basis for physical protection during international transport and is acceptable in its current form”, States Parties continued to debate whether it would be desirable to review and amend the CPPNM in order to broaden its scope and thereby strengthen the international physical protection regime. Work on the scope of a possible amendment began in late 1999, with actual drafting of an amendment commencing in mid-2001. On 6 September 2001, five days before the tragic events of 11 September 2001, the Director General had convened a drafting group, which began work in December 2001 and concluded its efforts in March 2003. Following the resolution of several outstanding questions, the Director General, at the request of the States Parties, convened a diplomatic conference for 4–8 July 2005. The Conference adopted the Amendment by consensus on 8 July 2005. It will enter into force 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 IAEA as depositary.

On an annual basis since the adoption of the Amendment, the General Conference has repeatedly called upon States Parties to the CPPNM to work towards its universal adherence and to accelerate the ratification of the Amendment and to act for its early entry into force. It has encouraged them to act in accordance with the object and purpose of the Amendment until such time as it enters into force, and encouraged all States that have not done so to adhere to the CPPNM and the Amendment as soon as possible.⁹ Similarly, on 4 September 2010, the Board of Governors

“call[ed] upon States to adhere to the Amendment [to the Convention on the Physical Protection of Nuclear Material] and to promote its early entry into force; encourage[d] all States to act in accordance with the object and purpose of the Amendment until such time as it entered into force; implement the legally binding and non-binding international nuclear security related instruments; invite[d] States to make full use of the assistance available for this purpose through participation in the IAEA’s nuclear security programme.”

The Amendment to the CPPNM is of vital importance for nuclear security and, upon its entry into force, will have a major impact on reducing the vulnerability of States Parties to nuclear terrorism.

*The Convention on Early Notification of a Nuclear Accident*¹⁰ (*Early Notification Convention*) and the *Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency*¹¹ (*Assistance Convention*)

The Early Notification and Assistance Conventions were adopted immediately following the Chernobyl accident in 1986. The availability of two IAEA guidance documents on nuclear safety cooperation and mutual emergency assistance, developed between 1982 and 1984, prior to the Chernobyl accident, permitted rapid agreement on these two legally binding international instruments. In particular, INFCIRC/321 on Guidelines on Reportable Events, Integrated Planning and Information Exchange in a Transboundary Release of Radioactive Materials facilitated agreement on the Early Notification Convention. Similarly, INFCIRC/310, Guidelines for Mutual Emergency Assistance Arrangements in Connection with a Nuclear Accident or Radiological Emergency, facilitated agreement on the Assistance Convention.

⁸ For the text see <http://ola.iaea.org/OLA/treaties/FullText.pdf>; for the status see http://www.iaea.org/Publications/Documents/Conventions/cppnm_amend_status.pdf.

⁹ See GC(49)/RES/10, GC(50)/RES/11, GC(51)/RES/12, GC(52)/RES/10, GC(53)/RES/11 and GC(54)/RES/8.

¹⁰ For the text see <http://www.iaea.org/Publications/Documents/Conventions/cenna.html>; for the status see http://www.iaea.org/Publications/Documents/Conventions/cenna_status.pdf.

¹¹ For the text see <http://www.iaea.org/Publications/Documents/Conventions/cacnare.html>; for the status see http://www.iaea.org/Publications/Documents/Conventions/cacnare_status.pdf.

The IAEA General Conference adopted the two Conventions at a special session on 26 September 1986. The Early Notification Convention entered into force on 27 October 1986 and the Assistance Convention entered into force on 26 February 1987, and each has now more than 100 States Parties. While conceived and adopted as safety instruments, the Early Notification and Assistance Conventions strengthen the international response to nuclear accidents or radiological emergencies, including a terrorist or other malicious act by, respectively, providing a mechanism for rapid information exchange and a mechanism for mutual assistance with a view to minimizing the consequences of such accidents or emergencies and protecting life, property and the environment against the effects of radioactive releases.

2.1.2. Primary legal instruments under the auspices of the United Nations

*International Convention for the Suppression of Terrorist Bombings (Terrorist Bombings Convention)*¹²

*International Convention for the Suppression of Acts of Nuclear Terrorism (Nuclear Terrorism Convention)*¹³

In its resolution 51/210 of 17 December 1996, an ad hoc Committee was established by the UN General Assembly for the purpose of elaborating a number of legal instruments for the prevention, suppression and elimination of terrorism in all its forms and manifestations. The specific mandate of the Committee was to establish 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.

Since its establishment, the Committee has successfully negotiated several texts, resulting in the adoption of three treaties: the International Convention for the Suppression of Terrorist Bombings (Terrorist Bombings Convention) adopted by the General Assembly in its resolution 52/164 of 15 December 1997; the International Convention for the Suppression of the Financing of Terrorism¹⁴ adopted by the General Assembly in its resolution 54/109 of 9 December 1999; and the International Convention for the Suppression of Acts of Nuclear Terrorism (Nuclear Terrorism Convention) adopted by the General Assembly in its resolution 59/290 of 13 April 2005.

The Terrorist Bombings Convention entered into force on 23 May 2001. It creates a regime of universal jurisdiction over the unlawful and intentional use of explosives and other lethal devices in, into, or against various defined public places with intent to kill or cause serious bodily injury, or with intent to cause extensive destruction of the public place, through the release, dissemination or impact of toxic chemicals, biological agents or toxins or similar substances or radiation or radioactive material.¹⁵

The Nuclear Terrorism Convention entered into force on 7 July 2007. It is primarily an international criminal law instrument that defines certain acts as criminal offences and obliges States Parties to establish their jurisdiction over such offences, to render them punishable under their domestic law and to provide for extradition or prosecution of alleged offenders under the principle of *aut dedere aut judicare* (extradite or prosecute).

¹² For the text and status see http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-9&chapter=18&lang=en.

¹³ For the text and status see http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XVIII~15&chapter=18&Temp=mtdsg3&lang=en.

¹⁴ The International Convention for the Suppression of the Financing of Terrorism is not addressed in this publication.

¹⁵ Although the Terrorist Bombing Convention does not foresee any specific role for the IAEA, it is relevant in the overall context of nuclear security.

2.1.3. Primary legal instruments under the auspices of the International Maritime Organization (IMO)¹⁶

The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988 SUA Convention)

The Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf (1988 Fixed Platforms Protocol)

The 2005 Protocol to the 1988 SUA Convention

The 2005 Protocol to the 1988 Fixed Platforms Protocol

Concern about unlawful acts threatening the safety of ships and the security of their passengers, crew and cargo grew during the 1980s with reports of hijacking and threats against passengers and ships. In 1985, taking into account measures adopted by the International Civil Aviation Organization (ICAO) in the development of standards and recommended practices for airport and aircraft security, the IMO decided to adopt “measures to prevent unlawful acts which threaten the safety of ships and the security of their passengers and crew”.¹⁷

On 10 March 1988, the IMO Conference adopted the Convention for the Suppression of Unlawful Acts against the Safety of Marine Navigation (1988 SUA Convention) and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf (1988 Fixed Platforms Protocol), both of which entered into force on 1 March 1992. Neither the 1988 SUA Convention nor the 1988 Fixed Platforms Protocol contains any provisions referring to nuclear material, nuclear facilities or nuclear devices.

The Diplomatic Conference on the Revision of the SUA Treaties, held from 10 to 14 October 2005, adopted two new Protocols following three years of intensive negotiations and taking into account the adoption of UN Security Council resolution 1540 (2004). The two Protocols expanded the scope of the 1988 instruments to include, inter alia, provisions on nuclear material, nuclear weapons and the Treaty on the Non-Proliferation of Nuclear Weapons. The 2005 Protocol to the 1988 SUA Convention and the 2005 Protocol to the 1988 Fixed Platforms Protocol were adopted on 14 October 2005 and entered into force on 28 July 2010.

2.1.4. UN Security Council resolutions adopted under Chapter VII of the UN Charter

Resolutions 1373 (2001) and 1540 (2004)

On 28 September 2001, soon after the terrorist attacks of 11 September 2001, the Security Council unanimously adopted UNSCR 1373 (2001) to reaffirm its unequivocal condemnation of the attacks and to put in place wide-ranging, comprehensive steps and strategies to combat international terrorism.

Following a Security Council debate on weapons of mass destruction on 22 April 2004, and in connection with its continuous efforts to elaborate a comprehensive counter-terrorism regime, the Security Council unanimously adopted UNSCR 1540 (2004) on 28 April 2004 by which it decided that all States shall refrain from supporting by any means non-State actors that attempt to acquire, use or transfer nuclear, chemical or biological weapons and their delivery systems.

Both UNSCR 1373 (2001) and UNSCR 1540 (2004) were adopted under Chapter VII of the UN Charter and are therefore binding on all States.¹⁸ Moreover, pursuant to Article 48(2) of the UN Charter, “such decisions shall be

¹⁶ See http://www.imo.org/home.asp?topic_id=910.

¹⁷ See IMO Conference resolution A.584 (14).

¹⁸ In UNSCR 1887 (2009), the Security Council, among other things, reaffirmed resolution 1540 (2004) and the need for its full implementation.

carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.”

Although the Board of Governors did not take separate action on either UNSCR 1373 (2001) or UNSCR 1540 (2004), in approving the Nuclear Security Plan for 2006–2009 the Board has approved these resolutions as integral parts of the IAEA’s legal framework for nuclear security and its nuclear security programme of activities.¹⁹

2.2. LEGALLY NON-BINDING INTERNATIONAL INSTRUMENTS

2.2.1. Non-binding instruments under the auspices of the IAEA

Nuclear Security Recommendations on Physical Protection of Nuclear Material and Nuclear Facilities (INFCIRC/225/Revision 5)

Following the publication in 1972 of Recommendations for the Physical Protection of Nuclear Material, these recommendations were revised by a group of experts in cooperation with the IAEA Secretariat, and the revised version was published in 1975 as INFCIRC/225. The document was revised in 1977, 1989, 1993, 1998 and 2010. INFCIRC/225/Revision 5 reflects the recommendations of the national experts to assist States in implementing a comprehensive physical protection regime in respect of nuclear facilities and nuclear material, including any obligations they may have under international agreements, such as the 2005 Amendment to the CPPNM. Although the recommendations contained in INFCIRC/225/Revision 5 are not binding, they acquire binding nature when included as an obligation in national laws or international agreements, including IAEA Project and Supply Agreements and the Revised Supplementary Agreements for the Provision of Technical Assistance by the IAEA.

*The Code of Conduct on the Safety and Security of Radioactive Sources and the Supplementary Guidance on the Import and Export of Radioactive Sources*²⁰

As called for in the Action Plan which was approved by the Board of Governors in September 1999 and subsequently endorsed by the General Conference in resolution GC(43)/RES/10, a Code of Conduct on the Safety and Security of Radioactive Sources was prepared in two open ended meetings of technical and legal experts. In September 2000, the Board of Governors took note of the Code and the General Conference endorsed it. Further to its resolution GC(44)/RES/11, the Conference invited Member States to take note of the Code and to consider, as appropriate, means of ensuring its wide application. In 2001, the Secretariat, taking into account the outcomes of several international conferences, produced a Revised Action Plan for the Safety and Security of Radioactive Sources (the Revised Action Plan) that was approved by the Board of Governors on 10 September 2001.

In accordance with the Revised Action Plan, the Secretariat convened a meeting of technical and legal experts to review the effectiveness of the Code at which the Code’s provisions were strengthened in the light of the events of 11 September 2001 and on the basis of which a draft revised Code was made available to the Board of Governors and the General Conference in September 2002. Both a second meeting of technical and legal experts and the International Conference on Security of Radioactive Sources were held in Vienna in March 2003 and recommended that States make a concerted effort to follow the principles contained in the Code, which was being revised. The G-8 annual summit held in Evian, France, in June 2003 issued a statement on ‘non-proliferation of weapons of mass destruction — securing radioactive sources’ in which it encouraged all countries to strengthen controls on

¹⁹ See GOV/2005/50. This was recently confirmed by the Board when approving the Nuclear Security Plan for 2010–2013 (see GOV/2009/54).

²⁰ For the text of the Code and Guidance see <http://www.iaea.org/Publications/Documents/Infcircs/2005/infirc663.pdf> and for status see http://www.iaea.org/Publications/Documents/Treaties/codeconduct_status.pdf.

radioactive sources and observe the Code of Conduct. Finally, at a third meeting of technical and legal experts, held in July 2003, consensus was reached on the scope of the revised Code and on the text thereof.

The Board of Governors approved the Code of Conduct on the Safety and Security of Radioactive Sources, as revised, on 8 September 2003. At that time, the Chairperson of the Board stated, in response to the request of a number of States, that "... there were still concerns regarding the import and export of radioactive sources. That matter needed to be further explored and some guidance developed." Accordingly, the Secretariat convened open-ended groups of technical and legal experts to develop such guidance. In July 2004, the experts reached consensus on the text of the Guidance on the Import and Export of Radioactive Sources. The Board approved the Guidance on 14 September 2004. The General Conference endorsed both the Code and the Guidance in September 2003 and September 2004, respectively.

2.2.2. Non-binding instruments under the auspices of the United Nations

The United Nations Global Counter-Terrorism Strategy (A/RES/60/288)

In the 2005 World Summit Outcome Document²¹, the Heads of State and Government mandated the General Assembly to develop a counter-terrorism strategy to promote comprehensive and coordinated responses to one of humanity's major threats. In April 2006, the Secretary-General issued recommendations for a global counter-terrorism strategy²², which led to the unanimous adoption by the General Assembly, on 8 September 2006, of the United Nations Global Counter-Terrorism Strategy²³. The Strategy was launched at a high level meeting of the General Assembly on 19 September 2006 and marks the first time that the 192 Member States of the United Nations agreed on a common strategic approach to fight terrorism. The Strategy contains a plan of action to address the conditions conducive to the spread of terrorism; to prevent and combat terrorism; to take measures to build state capacity to fight terrorism; to strengthen the role of the United Nations in combating terrorism; and to ensure the respect of human rights while countering terrorism.

²¹ See A/RES/60/1 at <http://www.unodc.org/pdf/terrorism/Global/en/2wso05en.pdf>.

²² See A/RES/60/825 at <http://www.unodc.org/pdf/terrorism/Global/en/3r60-825en.pdf>.

²³ See A/RES/60/288 at <http://www.unodc.org/pdf/terrorism/Index/60-288en.pdf>.

3. OVERVIEW OF THE SALIENT PROVISIONS OF THE LEGAL FRAMEWORK

3.1. LEGALLY BINDING INTERNATIONAL INSTRUMENTS

3.1.1. Primary legal instruments under the auspices of the IAEA

The Convention on the Physical Protection of Nuclear Material (CPPNM)

Objectives of the CPPNM

To achieve and maintain worldwide effective physical protection of nuclear material used for peaceful purposes; to prevent and combat offences relating to such material; and to facilitate cooperation among States Parties to those ends. The Preamble expressly recognizes the right of all States to develop and apply nuclear energy for peaceful purposes and their legitimate interest in the potential benefits to be derived from the peaceful applications of nuclear energy.

Scope of the CPPNM

The obligations set out in the CPPNM apply to nuclear material used for peaceful purposes while in international nuclear transport and, with the exception of Articles 3, 4 and 5.3, also to domestic use, storage and transport. While the CPPNM applies only to nuclear material used for peaceful purposes, the final paragraph of the Preamble recognizes “the importance of effective physical protection of nuclear material used for military purposes” and understands “that such material is and will continue to be accorded stringent physical protection”.

Obligations of States Parties

States Parties shall take steps to ensure that during international nuclear transport²⁴, nuclear material within their territory or on board a ship or aircraft under their 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 I. (Article 3)

States Parties shall not import, export or authorize the import or export or the transit of nuclear material unless they have received assurances that such material will be protected during the international nuclear transport. (Article 4)

States Parties shall identify and make known to each other directly or through the IAEA their central authority and point of contact having responsibility for physical protection of nuclear material and for coordinating recovery and response operations in the event of any unauthorized removal, use or alteration of nuclear material or in the event of a credible threat thereof. (Article 5(1))

In the case of theft, robbery or any other unlawful taking of nuclear material or of a credible threat thereof, States Parties shall, in accordance with their national law, provide cooperation and assistance to the maximum feasible extent in the recovery and protection of such material to any State that so requests. (Article 5(2))

²⁴ For further information on transport regulations, see the IAEA Regulations for the Safe Transport of Radioactive Material (IAEA Safety Standards Series No. TS-R-1); UN Recommendations on the Transport of Dangerous Goods – Model Regulations (The United Nations Orange Book); the IMO International Maritime Dangerous Goods (IMDG) Code; and the ICAO Technical Instructions for the Safe Transport of Dangerous Goods by Air.

States Parties shall cooperate and consult regarding guidance on the design, maintenance and improvement of systems of physical protection for nuclear material in international transport. (Article 5(3))

States Parties shall protect the confidentiality of information received in confidence by virtue of the provisions of the CPPNM. (Article 6)

Each State Party shall make certain offences punishable by appropriate penalties, which take into account their grave nature. (Article 7(2))

Each State Party shall take such measures as necessary to establish its jurisdiction over certain offences when the offence is committed in the territory of that State or on board a ship or aircraft registered in that State or when the alleged offender is a national of that State or when the offender is present in its territory and it does not extradite him. (Articles 8(1)–(2))

The State Party in whose territory the alleged offender is present shall, if it does not extradite him, submit, without exception 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 10)

Each State Party shall establish the relevant offences as extraditable offences. (Article 11)

States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings. (Article 13(1))

Each State Party shall inform the depositary of its laws and regulations, which give effect to the CPPNM. (Article 14(1))

The State Party where an alleged offender is prosecuted shall first communicate the final outcome of the proceedings to the States directly concerned and then to the depositary, who shall inform the States. (Article 14(2))

The 2005 Amendment to the CPPNM

Objectives of the Amendment

To achieve and maintain worldwide effective physical protection of nuclear material and of nuclear facilities used for peaceful purposes; to prevent and combat offences relating to such material and facilities worldwide; and to facilitate cooperation among States Parties to those ends.

Scope of the Amendment

Where the obligations for physical protection under the CPPNM covered nuclear material during international transport, the Amendment extends the scope of the CPPNM to also cover nuclear facilities and nuclear material in domestic use, storage and transport used for peaceful purposes, as well as sabotage.

The scope of the Amendment is confined to nuclear material and facilities and does not extend to “all radioactive material and associated facilities”.

Activities undertaken by military forces during an armed conflict or in the exercise of their official duties are expressly excluded from the scope of the Amendment. (Amendments to Article 2)

The Amendment also explicitly excludes nuclear material used or retained for military purposes and nuclear facilities containing such material. (Amendments to Article 2)

Obligations of States Parties

States Parties undertake to establish, implement and maintain a physical protection regime applicable to nuclear material and facilities under their jurisdiction, including: an appropriate legislative and regulatory framework for physical protection; a competent authority responsible for its implementation; and other administrative measures necessary for the physical protection of such material and facilities. In implementing the relevant obligations under the Amendment, each State Party shall apply, insofar as is reasonable and practicable, a number of Fundamental Principles of Physical Protection of Nuclear Material and Nuclear Facilities. (Article 2A – new)

States Parties undertake to institute new arrangements for cooperation, assistance and coordination amongst States and the IAEA, including points of contact; exchange of information with a view to protecting or recovering unlawfully taken nuclear material, in the case of a credible threat of sabotage of nuclear material or a nuclear facility or in the case of sabotage thereof; guidance in the area of physical protection of nuclear material in international transport; and guidance on the design, maintenance and improvement of national systems of physical protection of nuclear material in domestic use, storage and transport and of nuclear facilities. (Amendments to Article 5)

States Parties are also obliged to bring under their jurisdiction and make punishable under their national laws certain offences, including theft, robbery, smuggling of nuclear material or sabotage of nuclear facilities, as well as acts related to directing and contributing to the commission of such offences. It is worth noting in this context that a number of offences were extended to include “substantial damage to the environment”. (Amendments to Article 7)

States Parties undertake not to regard the offences described by the Amendment as being political offences for the purposes of extradition. (Article 11.A – new)

The Amendment also contains explicit confirmation that nothing in the Amendment shall affect the transfer of nuclear technology for peaceful purposes and to strengthen the physical protection of nuclear material and facilities. (Article 13.A – new)

The Convention on Early Notification of a Nuclear Accident (Early Notification Convention)

Objective of the Early Notification Convention

To provide a mechanism to exchange information on nuclear accidents as early as possible with a view to minimizing their transboundary radiological consequences.

Scope of the Early Notification Convention

The Early Notification Convention applies in the event of any accident involving specified facilities or activities of a State Party from which a release of radioactive material occurs or is likely to occur and which has resulted or may result in an international transboundary release that could be of radiological safety significance to another State.

Obligations of States Parties

In the event of an accident, the State Party where the accident has occurred must, directly or through the IAEA, forthwith notify States which are or may be physically affected, and the IAEA, of the accident, its nature, the time of its occurrence and its exact location, where appropriate, and must promptly provide those States and the IAEA with available information relevant to minimizing the radiological consequences in those States. (Articles 2(a) and 2(b))

States Parties must notify the IAEA and other States Parties, directly or through the IAEA, of their competent authorities and points of contact responsible for issuing and receiving notification and information. (Article 7(1))

The Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency (Assistance Convention)

Objective of the Assistance Convention

The Assistance Convention sets out an international framework to facilitate prompt requests for and provision of assistance in the event of a nuclear accident or radiological emergency to minimize its consequences and to protect life, property and the environment from the effects of radioactive releases.

Scope of the Assistance Convention

The Assistance Convention covers bilateral and multilateral assistance arrangements in connection with a nuclear accident or radiological emergency.

Obligations of States Parties

States Parties must cooperate amongst themselves and with the IAEA to facilitate prompt assistance. (Article 1(1))

When assistance is requested from a State Party, it must promptly notify the requesting State Party, directly or through the IAEA, whether it is in a position to render the assistance requested and of the scope and terms of the assistance that might be rendered. (Article 2(3))

The requesting State is to provide local facilities and services for the proper and effective administration of the assistance. Also, it should ensure the protection of personnel, equipment and materials brought into its territory by or on behalf of the assisting party for such purposes. (Article 3(b))

States Parties are obliged to notify the IAEA and other States Parties of their competent authorities and point of contact authorized to make and receive requests for and to accept offers of assistance. (Article 4(1))

Unless otherwise agreed, the requesting State is to reimburse the assisting party for costs incurred for the services and for all expenses in connection with the assistance. (Article 7(2))

The requesting State is to afford personnel of the assisting party and personnel acting on its behalf the necessary privileges, immunities and facilities for the performance of their assistance functions. (Article 8(1))

The States Parties shall closely cooperate in order to facilitate the settlement of legal proceedings and claims. (Article 10(1))

Unless otherwise agreed, a requesting State shall provide certain compensation and indemnities in the event of death of or injury to persons, damage to or loss of property, or damage to the environment caused within its territory or other area under its jurisdiction or control in the course of providing the assistance requested. (Article 10(2))

3.1.2. Primary legal instruments under the auspices of the United Nations

International Convention for the Suppression of Acts of Nuclear Terrorism (Nuclear Terrorism Convention)

Objective of the Nuclear Terrorism Convention

While explicitly 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, the Nuclear Terrorism Convention seeks to prevent and punish acts of nuclear terrorism.

Scope of the Nuclear Terrorism Convention

The Nuclear Terrorism Convention has a broader scope than the CPPNM and the Amendment thereto to the extent that it criminalizes acts involving 'radioactive material', which includes not only nuclear material, but also other radioactive material, as defined by the Convention.

It also brings under its scope, nuclear material and facilities used or retained for military purposes, which are explicitly excluded from the scope of the CPPNM and of its 2005 Amendment.

Obligations of States Parties

States Parties are obliged to establish their jurisdiction and to make the offences listed in Article 2 punishable under their domestic law and to provide for extradition or prosecution of alleged offenders under the principle of aut dedere aut judicare (extradite or prosecute). (Articles 5, 6 and 9)

States Parties are also obliged to cooperate and provide for mutual assistance, notably in relation to criminal investigations and extradition. (Article 7)

States Parties are obliged to take appropriate measures in order to inform, where appropriate, international organizations in respect of the commission of offences set forth in Article 2 as well as preparations to commit such offences about which they have learned. (Article 7.1)

States Parties shall inform the UN Secretary-General of their competent authorities and liaison points responsible for sending and receiving the information referred to in Article 7. The Secretary-General shall communicate such information regarding competent authorities and liaison points to all States Parties and the IAEA. Such authorities and liaison points must be accessible on a continuous basis. (Article 7.4)

States Parties shall make every effort to adopt appropriate measures to ensure the protection of radioactive material taking into account relevant IAEA recommendations and functions. (Article 8)

Upon seizing or otherwise taking control of radioactive material, devices or nuclear facilities, following the commission of an offence set forth in Article 2, the State Party in possession of such items shall (a) take steps to render harmless the radioactive material, device or nuclear facility; (b) ensure that any nuclear material is held in accordance with applicable IAEA safeguards; and (c) have regard to physical protection recommendations and health and safety standards published by the IAEA. (Article 18.1)

A State Party in possession of radioactive material, a device or nuclear facility may request the assistance and cooperation of other States Parties, in particular the States Parties concerned, and any relevant international organizations, in particular the IAEA. States Parties and the relevant international organizations are encouraged to provide assistance pursuant to this paragraph to the maximum extent possible. (Article 18.5)

States Parties involved in the disposition or retention of radioactive material, a device or nuclear facility pursuant to the present article shall inform the Director General of the IAEA of the manner in which such an item was disposed of or retained. (Article 18.6)

3.1.3. Primary legal instruments under the auspices of the International Maritime Organization (IMO)

The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988 SUA Convention)

The Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, Rome, 1988 (1988 Fixed Platforms Protocol)

The 2005 Protocol to the SUA Convention

The 2005 Protocol to the Fixed Platforms Protocol

Objective of the IMO instruments

The main purpose of the SUA Convention and the Protocols thereto is to suppress unlawful acts against ships and fixed platforms and to ensure that appropriate action is taken against alleged perpetrators.

Scope of the IMO instruments

The 2005 Protocols deal with nuclear material and explicitly refer to the NPT and to the IAEA safeguards agreements. The definitions of “source material” and “special fissionable material” are those set out in Article XX of the IAEA Statute.

Obligations of States Parties

Under the 1988 IMO instruments, States Parties are obliged to include certain offences in their domestic legislation, to establish jurisdiction accordingly and to provide for prosecution or extradition of alleged offenders.

Pursuant to the 2005 Protocols, States Parties are obliged to criminalize additional offences, including the unlawful transportation of nuclear material on board a ship; specifically, any explosive device; nuclear weapons; any source material or special fissionable material knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity not under safeguards pursuant to an IAEA comprehensive safeguards agreement; or any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a [nuclear] weapon, with the intention that it will be used for such purpose. (Article 3bis) The 2005 Protocol to the 1988 SUA Convention makes it an offence to transport a person on board a ship knowing that the person has committed an act that constitutes an offence set forth in the Protocol or an offence set forth in any treaty listed in the Annex to the Protocol.

3.1.4. UN Security Council resolutions adopted under Chapter VII of the UN Charter

Resolution 1373 (2001)

Objective of UNSCR 1373 (2001)

The primary focus of UNSCR 1373 (2001) is on preventing and suppressing the financing and preparation of any acts of terrorism. Acting under Chapter VII, the Security Council, inter alia, reaffirmed “its unequivocal condemnation of the [11 September 2001] terrorist attacks” and expressed “its determination to prevent all such acts.” To that end, the Security Council called on “States to work together urgently to prevent and suppress terrorist acts, including through increased cooperation and full implementation of the relevant international conventions relating to terrorism.”

Obligations of States under Chapter VII of the UN Charter

All States are obliged to prevent and suppress terrorist financing; criminalize funding of terrorism; freeze funds and financial assets of persons involved in terrorist acts; and prohibit making funds available for the benefit of persons committing terrorist acts. (OP1)

All States are further obliged to refrain from any form of support to terrorists; take necessary steps to prevent terrorist acts; deny safe haven to terrorists or financiers of terrorism; prevent terrorists from using their territories against other States; bring terrorists and those financing terrorism to justice with appropriate penalties; assist in criminal investigations and proceedings; prevent terrorist movement through border controls and controls of identity papers. (OP2)

All States are called upon to, inter alia, become parties as soon as possible to the relevant international conventions and protocols relating to terrorism. (OP3)

The Security Council establishes and makes operational a committee to monitor implementation of UNSCR 1373 (2001) and to which States are required to report on the steps they have taken to implement the resolution. (OP6)

Resolution 1540 (2004)

Objectives of UNSCR 1540 (2004)

The Security Council affirms “that proliferation of nuclear...weapons, as well as their means of delivery, constitute a threat to international peace and security” “its resolve to take appropriate and effective actions against any threat to international peace and security caused by the proliferation of nuclear...weapons and their means of

delivery...and “its support for multilateral treaties whose aim is to eliminate or prevent the proliferation of nuclear...weapons.”

The Security Council also expresses its grave concern about “the threat of terrorism and the risk that non-State actors may acquire, develop, traffic in or use nuclear...weapons and their means of delivery” and that “the threat of illicit trafficking in nuclear...weapons and their means of delivery, and related materials²⁵, which adds a new dimension to the issue of proliferation of such weapons and also poses a threat to international peace and security.”

Obligations of States under Chapter VII of the UN Charter

All States shall refrain from providing any form of support to non-State actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear weapons and their means of delivery. (OP1)

All States shall adopt and enforce appropriate effective laws which prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear weapons and their means of delivery, in particular for terrorist purposes, as well as ancillary crimes associated therewith. (OP2)

All States shall take and enforce effective measures to establish domestic controls to prevent the proliferation of nuclear weapons and their means of delivery, including by establishing appropriate controls over related materials such as effective measures to account for and secure such items in production, use, storage or transport; appropriate effective physical protection measures; appropriate effective border controls and law enforcement efforts; appropriate effective national export and transshipment controls over such items, and appropriate criminal or civil penalties for violations of such export controls. (OP3)

All States are obliged to promote the universal adoption and full implementation of multilateral treaties to which they are parties, whose aim is to prevent the proliferation of nuclear weapons; to adopt national rules and regulations to ensure compliance with their commitments under the key multilateral non-proliferation treaties; and to renew and fulfil their commitment to multilateral cooperation in particular within the framework of the IAEA. (OP8)

All States are obliged to take cooperative action to prevent illicit trafficking in nuclear weapons, their means of delivery and related materials. (OP10)

The Security Council establishes and makes operational a committee to monitor implementation of UNSCR 1540 (2004) and to which States are required to report on the steps they have taken to implement the resolution. (OP4)

3.2. LEGALLY NON-BINDING INTERNATIONAL INSTRUMENTS

3.2.1. Non-binding instruments under the auspices of the IAEA

Nuclear Security Recommendations on Physical Protection of Nuclear Material and Nuclear Facilities (INFCIRC/225/Revision 5)

Objective of INFCIRC/225/Revision 5

To achieve effective physical protection against the theft or unauthorized removal of nuclear material and against the sabotage of nuclear facilities by individuals or groups.

²⁵ The term ‘related materials’ is defined in UNSCR 1540 (2004) as “materials, equipment and technology covered by relevant multilateral treaties and arrangements, or included on national control lists, which could be used for the design, development, production or use of nuclear, chemical and biological weapons and their means of delivery.”

Scope of INFCIRC/225/Revision 5

The scope is the physical protection of nuclear material and of nuclear facilities for civil purposes. States may decide whether or not to extend the publication's use to other purposes.

Recommendations to States

The recommendations in INFCIRC/225/Revision 5 relate to: the objectives of a State's physical protection regime; the elements of a State's physical protection regime for nuclear material and nuclear facilities; the requirements for measures against unauthorized removal of nuclear material in use and in storage; the requirements for measures against sabotage of nuclear facilities and nuclear material in use and in storage; and the requirements for measures against unauthorized removal and sabotage of nuclear material during transport.

Code of Conduct on the Safety and Security of Radioactive Sources and supplementary Guidance on the Import and Export of Radioactive Sources

Objectives of the Code and Guidance

The objectives of the Code and Guidance are, through the development, harmonization and implementation of national policies, laws and regulations, and through the fostering of international cooperation, to (i) achieve and maintain a high level of safety and security of radioactive sources; (ii) prevent unauthorized access or damage to, and loss, theft or unauthorized transfer of such sources so as to reduce the likelihood of accidental harmful exposure to such sources or the malicious use of such sources to cause harm to individuals, society or the environment; and (iii) mitigate or minimize the radiological consequences of accidents or malicious acts involving a radioactive source.

Scope of the Code and Guidance

The Code applies to all radioactive sources listed in Annex I that may pose a significant risk to individuals, society and the environment. The Code does not apply to nuclear material as defined in the CPPNM, except for sources incorporating plutonium-239. The Code does not apply to radioactive sources within military or defence programmes.

The Guidance applies to the Category 1 and 2 sources within the scope of the Code.

Recommendations to States

The Code establishes guidance for each State regarding the legislation and regulations that should be in place. It further recommends that the regulatory body be granted appropriate authority and resources, and sets out a number of functions that the regulatory body should have. The Code provides recommendations on the import and export of radioactive sources (supplemented by the Guidance).

In particular, the Code recommends that States:

- Take appropriate measures to ensure the promotion of safety culture and of security culture with respect to radioactive sources and that any such sources within their territory, or under their jurisdiction or control, are safely managed and securely protected. (para. 7)
- Have in place an effective national legislative and regulatory system of control over the management and protection of radioactive sources. (para. 8)
- Ensure that appropriate facilities and services for radiation protection, safety and security are available to, and used by, the persons who are authorized to manage radioactive sources. Such facilities and services include

- searching for missing sources and securing found sources; intervention in the event of an accident or malicious act involving a radioactive source; calibration of radiation monitoring equipment, etc. (para. 9)
- Ensure that adequate arrangements are in place for appropriate training of the staff of its regulatory body, its law enforcement agencies and its emergency services organizations. (para. 10)
 - Establish a national register of radioactive sources. The information contained in that register should be appropriately protected. States should endeavour to harmonize the formats of their registers to facilitate efficiency in information exchange. (para. 11)
 - Ensure that information concerning any loss of control over radioactive sources or any incidents, with potential transboundary effects involving such sources, is provided promptly to potentially affected States through established IAEA or other mechanisms. (para. 12)
 - Promote awareness about orphan sources and emphasize to those dealing with radioactive sources their responsibilities for the safety and security of radioactive sources. (para. 13)
 - Define domestic threat, and assess vulnerability with respect to this threat for the variety of sources used within the territory, based on the potential for loss of control and malicious acts involving one or more radioactive sources. (para. 16)
 - Take appropriate measures consistent with national law to protect the confidentiality of any information that is received in confidence under the Code from another State or through participation in an activity carried out for implementation of the Code. (para. 17)
 - Under the Guidance, States are encouraged to fulfil various requirements for the export of Category 1 and Category 2 sources within the scope of the Code.
 - States are also advised to nominate a point of contact for the purpose of facilitating the export and/or import of radioactive sources in accordance with the Code and the Guidance.

3.2.2. Non-binding instruments under the auspices of the United Nations

The United Nations Global Counter-Terrorism Strategy (UNGCTS) (A/RES/60/288)

Objective of the UNGCTS

A comprehensive strategy to fight terrorism strengthens the capacity of States and the role of the UN system to prevent and combat terrorism, and the rule of law, while also promoting fundamental human rights and the rule of law.

Scope of the UNGCTS

The plan of action in the strategy consists of 50 numbered provisions arranged in the following main sections:

- I. Measures to address the conditions conducive to the spread of terrorism;
- II. Measures to prevent and combat terrorism;
- III. Measures to build States' capacity to prevent and combat terrorism and to strengthen the role of the United Nations system in this regard;
- IV. Measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism.

Nuclear Security Measures set out in the UNGCTS

These measures are:

- Prosecute or extradite perpetrators of terrorist acts (II.2 and II.3);
- Cooperate and coordinate in combating nuclear smuggling (II.5);

- Improve border and customs controls (II.13);
- Coordinate response to terrorist attacks (II.17);
- Improve security and protection of vulnerable targets (II.18);
- Encourage voluntary contributions for technical assistance (III.1);
- Share best practices in counter-terrorism capacity building (III.2);
- Reform and modernize border management systems (III.11).

4. MANDATE AND FUNCTIONS OF THE IAEA PURSUANT TO THE NUCLEAR SECURITY INSTRUMENTS

4.1. LEGALLY BINDING INTERNATIONAL INSTRUMENTS

4.1.1. Primary legal instruments under the auspices of the IAEA

The Convention on the Physical Protection of Nuclear Material (CPPNM)

Under an agenda item entitled Functions of the Agency under the Convention on the Physical Protection of Nuclear Material, the Board of Governors took note of the information provided by the Secretariat in document GOV/INF/521 of 1987, it being understood that “the Director General would take into account all the reservations, suggestions and remarks made, particularly in regard to the most suitable manner in which to determine whether the present scope of the Convention and the Agency’s functions under the Convention were appropriate.”²⁶

As stated in GOV/INF/521, the IAEA is assigned, in addition to its depositary functions, the responsibility of serving as the focal point for information on matters covered by the CPPNM. For example, under Article 5(1) of the CPPNM, the IAEA is obliged to make known any information it has received regarding States Parties’ designated central authorities and points of contact having responsibility for physical protection of nuclear material and for coordinating recovery and response operations in the event of any unauthorized removal, use or alteration of nuclear material or in the event of a credible threat thereof.

In accordance with Article 14(1), the IAEA, in its capacity as depositary, shall periodically communicate any information it receives from States Parties in connection with their obligation under that Article to inform the depositary of their laws and regulations, which give effect to the CPPNM. Further to Article 14(2), the IAEA shall inform all States of any communication received from a State Party concerning the final outcome of proceedings where an alleged offender is prosecuted for offences set out in the CPPNM.

The CPPNM also provides a role for the IAEA to assist States, upon request, in fulfilling their obligations thereunder. For instance, pursuant to Article 5(2), States Parties have the option, in the case of theft, robbery or any other unlawful taking of nuclear material or of a credible threat thereof, of informing international organizations, including the IAEA, about such acts or threats and to exchange information with such organizations “with a view to protecting threatened material, verifying the integrity of the shipping container, or recovering unlawfully taken nuclear material”. Similarly, Article 5(3) provides that States Parties shall cooperate or consult with each other directly or through international organizations, including the IAEA, concerning “guidance on the design, maintenance and improvement of systems of physical protection of nuclear material in international transport”.

The 2005 Amendment to the CPPNM

The Amendment specifically confers a number of additional functions on the IAEA, which are set out in GOV/2005/51. On 19 September 2005, the Board of Governors approved these additional functions and authorized the Director General to implement them within available resources.

Further to the functions foreseen in the existing CPPNM and further to the IAEA’s usual depositary functions, these additional functions are as follows:

- The amendment to Article 5(1) requires States Parties to identify and make known to each other, directly or through the IAEA, their point of contact in relation to matters within the scope of the Convention.

²⁶ See Decision 86–87/49 and GOV/OR/678 (paras 130 and 131).

- Article 5(2), as amended, requires States Parties, in the case of theft, robbery or any unlawful taking of nuclear material or credible threat thereof, to inter alia, exchange information, as appropriate, with each other, the IAEA and other relevant international organizations with a view to recovering and protecting unlawfully taken nuclear material.
- Pursuant to the amendment to Article 5(3), the IAEA may be called upon to exchange information and facilitate coordination and cooperation amongst States Parties concerned, on the basis of the information and requests received from States Parties, in the case of a credible threat of sabotage of nuclear material or a nuclear facility, or in the case of sabotage thereof.
- The amendment to Article 5(4) requires States Parties to cooperate and consult, as appropriate, with each other directly or through the IAEA and other relevant international organizations with a view to obtaining guidance in the area of physical protection of nuclear material in international transport.
- The amendment to Article 5(5) offers States Parties the possibility of consulting and cooperating, as appropriate, amongst themselves directly or through the IAEA, with a view to obtaining guidance on the design, maintenance and improvement of national systems of physical protection of nuclear material in domestic use, storage and transport and of nuclear facilities.

As in the CPPNM, the amendment to Article 14(1) requires the IAEA to periodically communicate to the States Parties such information as it receives from the States Parties on their laws and regulations giving effect to the Convention.

As depositary for the Convention, the Director General is required to convene a conference of States Parties five years after the entry into force of the Amendment to review the implementation of the Convention as amended (amendment to Article 16.1).

The Convention on Early Notification of a Nuclear Accident (Early Notification Convention) and the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency (Assistance Convention)

Following receipt of a series of reports by the Director General, culminating with GOV/2316 and the Addendum thereto, and in a series of decisions²⁷ relating thereto, the Board approved the functions and the actions to be taken by the IAEA under the two Conventions, including the use of the World Meteorological Organization’s Global Telecommunication System (GTS and other means of communications to implement the Conventions). In doing so, the Board also noted the “steps to be taken within the Secretariat to enhance its capacity to respond swiftly to emergencies”, including the establishment of an Emergency Response Unit which has since evolved into the Incident and Emergency Centre.

The functions explicitly specified in the Early Notification Convention include the IAEA’s obligation, under Articles 4(a) and 4(b), to inform States Parties, Member States, other States which are or may be physically affected, and relevant international organizations of any notification it has received and to promptly provide any State Party, Member State or relevant international organization, on request, with the information it has received. Further to Article 7(3), the IAEA is required to maintain an up to date list of national authorities and points of contact as well as points of contact of relevant international organizations and to provide it to States Parties and Member States and to relevant international organizations.

Generally, under Article 1(c) of the Assistance Convention, the States Parties request the IAEA, acting within the framework of its Statute, to use its best endeavours in accordance with the provisions of the Convention to promote, facilitate and support the cooperation between States Parties provided for in the Convention. Pursuant to Article 2, the IAEA is obliged to respond to a State Party’s or a Member State’s request for assistance, in accordance with its Statute and the terms of the Convention, by making available appropriate resources for this purpose, promptly transmitting the request to other States and international organizations which may possess the necessary

²⁷ See Decision 1986–87/46 and GOV/OR.675 (paras 124–126), and Decision 1986–87/65 and GOV/OR.680 (paras 80 and 81).

resources, and coordinating assistance at the international level if so requested by the State. Further to Article 4, the IAEA is required to regularly and expeditiously provide to States Parties, Member States and relevant international organizations information and changes made regarding the competent authorities and point of contact of each State Party.

Most substantively, under Article 5 of the Assistance Convention, the IAEA is called upon to: (a) collect and disseminate to States Parties and Member States information concerning: (i) experts, equipment and materials which could be made available; and (ii) methodologies, techniques and available results of research relating to response to nuclear accidents or radiological emergencies; (b) assist a State Party or a Member State when requested in any of the following or other appropriate matters: (i) preparing both emergency plans and the appropriate legislation; (ii) developing appropriate training programmes for personnel; (iii) transmitting requests for assistance and relevant information; (iv) developing appropriate radiation monitoring programmes, procedures and standards; and (v) conducting investigations into the feasibility of establishing appropriate radiation monitoring systems; (c) make available to a State Party or a Member State requesting assistance appropriate resources allocated for the purpose of conducting an initial assessment of the accident or emergency; (d) offer its good offices to the States Parties and Member States in the event of a nuclear accident or radiological emergency; and (e) establish and maintain liaison with relevant international organizations for the purposes of obtaining and exchanging relevant information and data, and make a list of such organizations available to States Parties, Member States and the aforementioned organizations.

4.1.2. Primary legal instruments under the auspices of the United Nations

International Convention for the Suppression of Acts of Nuclear Terrorism (Nuclear Terrorism Convention)

Following the entry into force of the Nuclear Terrorism Convention on 7 July 2007, the Board of Governors, on 11 September 2007, approved the functions specifically assigned to the IAEA under the Convention, in particular those in Articles 18.5 and 18.6 as set out in GOV/2007/41, and authorized the Director General to implement them subject to the availability of resources.

In accordance with Article 7.1(b) of the Convention, States Parties are obliged to inform, where appropriate, international organizations, including the IAEA, “in respect of the commission of the offences set forth in article 2 as well as preparations to commit such offences about which it has learned.” Article 7.2 of the Convention provides that, “[i]f States Parties provide information to international organizations in confidence, steps shall be taken to ensure that the confidentiality of such information is protected.” Further to Article 7.4 of the Convention, the UN Secretary-General is obliged to communicate information regarding the States Parties’ competent authorities and liaison points to all States Parties and to the IAEA.

Article 8 of the Convention provides that “[f]or purposes of preventing offences under this Convention, 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”.

Article 18.1 further provides that “[u]pon seizing or otherwise taking control of radioactive material, devices or nuclear facilities, following the commission of an offence..., the State Party in possession of such items shall (a) take steps to render harmless the radioactive material, device or nuclear facility; (b) ensure that any nuclear material is held in accordance with applicable International Atomic Energy Agency safeguards; and (c) have regard to physical protection recommendations and health and safety standards published by the International Atomic Energy Agency”. Pursuant to Article 18.4 of the Convention, where “radioactive material, devices or nuclear facilities do not belong to any of the States Parties or to a national or resident of a State Party or was not stolen or otherwise unlawfully obtained from the territory of a State Party, or if no State is willing to receive such items..., a separate decision concerning its disposition shall...be taken after consultations between the States concerned and any relevant international organizations” including the IAEA.

As approved by the Board of Governors, Articles 18.5 and 18.6 of the Convention assign a specific role to the IAEA. Pursuant to Article 18.5, the IAEA is encouraged to provide assistance to the maximum extent possible, when for the purposes of paras 1, 2, 3 and 4 of that Article, the State Party in possession of the radioactive material,

device or nuclear facility so requests. Further to Article 18.6 of the Convention, “the States Parties involved in the disposition or retention of the radioactive material, device or nuclear facility pursuant to the present article shall inform the Director General of the International Atomic Energy Agency of the manner in which such an item was disposed of or retained. The Director General of the International Atomic Energy Agency shall transmit the information to the other States Parties”.

4.1.3. UN Security Council resolutions adopted under Chapter VII of the UN Charter

As mentioned above, the Board of Governors has approved these two Chapter VII resolutions as integral parts of the international legal framework for nuclear security. As outlined in the IAEA Nuclear Security Plans, the IAEA, upon request, facilitates adherence to and implementation of States’ obligations under these resolutions.

In operative paragraph 3(e) of UNSCR 1373 (2001), the Security Council called upon all States to “increase cooperation and fully implement the relevant international conventions and protocols relating to terrorism.” In operative paragraph 4, the Security Council “[n]ote[d] with concern the close connection between international terrorism and transnational organized crime, illicit drugs... and illegal movement of nuclear, chemical, biological and other potentially deadly materials, and in this regard emphasize[d] the need to enhance coordination of efforts on national, sub-regional, regional and international levels in order to strengthen a global response to the serious challenge and threat to international security”.

In UNSCR 1540(2004), the Security Council recognized the contribution of the IAEA by, inter alia, “[r]ecognizing that most States have undertaken binding legal obligations under treaties to which they are parties, or have made other commitments aimed at preventing the proliferation of nuclear weapons, and have taken effective measures to account for, secure and physically protect sensitive materials, such as those required by the Convention on the Physical Protection of Nuclear Materials and those recommended by the IAEA Code of Conduct on the Safety and Security of Radioactive Sources”. Moreover, in operative paragraph 6 of UNSCR 1540 (2004), the Security Council also called upon States “to renew and fulfil their commitment to multilateral cooperation in particular within the framework of the IAEA”.

The role of the IAEA in assisting States in fulfilling their obligations under UNSCR 1540 (2004) is further corroborated by the fact that many of the measures required by the resolution fall within the domain of nuclear security and closely mirror the structure and activities of the IAEA’s Nuclear Security Plans including with respect to legal and regulatory infrastructure, physical protection measures, illicit trafficking, regulatory aspects of safeguards, accounting and control systems and export and import controls. Finally, in operative para. 11 of UNSCR 1540(2004), the Security Council decided that “none of the obligations set forth in this resolution shall be interpreted so as to conflict with or alter the rights and obligations of States Parties to the Nuclear Non-Proliferation Treaty or alter the responsibilities of the International Atomic Energy Agency...”.

4.2. LEGALLY NON-BINDING INTERNATIONAL INSTRUMENTS

4.2.1. Non-binding instruments under the auspices of the IAEA

Nuclear Security Recommendations on Physical Protection of Nuclear Material and Nuclear Facilities (INFCIRC/225/Revision 5)

The Foreword to INFCIRC/225/Revision 5 describes the IAEA’s role, since the early 1970s, in the ongoing development and revision of recommendations concerning the physical protection of nuclear material and nuclear facilities. Among the functions foreseen for the IAEA, the recommendation in paragraph 3.32 reinforces a function specified in the CPPNM whereby States should inform each other, either directly or through the IAEA, of appropriate points of contact for matters related to the physical protection of nuclear material and nuclear facilities.

INFCIRC/225/Revision 5 recalls explicitly one of the Fundamental Principles of the CPPNM, whereby responsibility for the establishment and maintenance of a State’s physical protection regime rests entirely with that State.

However, under paragraph 3.31, States are encouraged to cooperate and consult, and exchange information, on physical protection techniques and practices, either directly or through the IAEA and other relevant international organizations.

Code of Conduct on the Safety and Security of Radioactive Sources and the Supplementary Guidance on the Import and Export of Radioactive Sources

In its resolution GC(47)/RES/7.B of 2003, the General Conference, having welcomed the approval by the Board of Governors, and while recognizing that the Code is not a legally binding instrument, urged each State to write to the Director General that it fully supports and endorses the IAEA's efforts to enhance the safety and security of radioactive sources and is working towards following the guidance contained in the Code of Conduct. In resolution GC(48)/RES/10.D, the General Conference further welcomed the approval by the Board of Governors of the Guidance, endorsed this Guidance while recognizing that it is not legally binding, and encouraged States to act in accordance with the Guidance on a harmonized basis and to notify the Director General of their intention to do so.

The role of the IAEA is set out in paragraph 30 of the Code of Conduct, pursuant to which, the IAEA should (a) continue to collect and disseminate information on laws, regulations and technical standards relating to the safe management and secure protection of radioactive sources; develop and establish relevant technical standards; and provide for the application of these standards at the request of any State, inter alia by advising and assisting on all aspects of the safe management and secure protection of radioactive sources; (b) disseminate this Code and related information widely; and (c) in particular, implement the measures approved by its policy making organs.

The Code further contemplates, in its paragraph 12, that the IAEA will have established mechanisms to facilitate communications between States regarding loss of control or incidents involving radioactive sources with potential transboundary effects. The Guidance also contemplates a role for the IAEA in facilitating implementation of its provisions. In particular, paragraph 19 provides that the IAEA is requested to make available in a timely manner, subject to the consent of the States concerned and subject to any confidentiality requirements: (a) a list of State contact points; (b) the responses to the Self-Assessment Questionnaire (Annex I to the Guidance); (c) a list of States that have written to the Director General that they are working towards following the guidance contained in the Code; and (d) any additional information concerning the Model Project participant States' progress towards meeting Milestone 1 of the Model Project to Upgrade National Radiation Protection Infrastructures which the State may wish to provide.

4.2.2. Non-binding instruments under the auspices of the United Nations

The United Nations Global Counter-Terrorism Strategy (A/RES/60/288)

In resolution A/RES/60/288 of 8 September 2006, the General Assembly adopted the Strategy annexed to the resolution and, inter alia, encouraged Member States, the United Nations and other appropriate international, regional and subregional organizations to support the implementation of the Strategy, including through mobilizing resources and expertise. In the relevant part, the Strategy sets out measures to build State capacity to fight terrorism and to strengthen the role of the United Nations system organizations in combating terrorism. In Part III.9 of the Strategy, the General Assembly encouraged the IAEA "to continue [its] efforts...in helping States to build capacity to prevent terrorists from accessing nuclear...or radiological materials, to ensure security at related facilities, and to respond effectively in the event of an attack using such materials."



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This publication brings together the legally binding primary international instruments and the internationally accepted non-binding instruments that constitute the international legal framework for nuclear security. By setting out the legislative bases for the mandate of the IAEA in the area of nuclear security, it is hoped that this publication will increase awareness of the IAEA's role in facilitating national, regional and international efforts to enhance nuclear security, including measures to protect against nuclear terrorism. It is also intended to serve as a guide in carrying out the IAEA's nuclear security mandate and functions assigned to it under these instruments, including in the elaboration of nuclear security recommendations and guidance documents.

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