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CONFERENCE TO CONSIDER AND ADOPT PROPOSED AMENDMENTS TO THE CONVENTION ON THE PHYSICAL PROTECTION OF NUCLEAR MATERIAL

COMMITTEE OF THE WHOLE

Summary Record of the Second Meeting

Held at the Austria Center Vienna on Tuesday, 5 July 2005 at 10. a.m.

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¹ CPPNM/AC/1

Abbreviations used in this record:

CPPNM	Convention on the Physical Protection of Nuclear Material
G8	Group of Eight
NPT	Treaty on the Non-Proliferation of Nuclear Weapons
Nuclear Terrorism Convention	International Convention for the Suppression of Acts of Nuclear Terrorism
Terrorist Bombings Convention	International Convention for the Suppression of Terrorist Bombings

8. Consideration of proposed amendments to the Convention on the Physical Protection of Nuclear Material (continued)

Consideration of proposal submitted by Paraguay (continued)

1. The CHAIRPERSON said that, while most radioactive sources did not present a terrorism-related risk, highly active ones were a matter for concern. The Agency's General Conference had endorsed the Code of Conduct on the Safety and Security of Radioactive Sources in 2003 and the accompanying Guidance on the Import and Export of Radioactive Sources in 2004, and the Agency had recently held — in Bordeaux — an International Conference on the Safety and Security of Radioactive Sources. Clearly, a great deal of attention was being paid to the security of radioactive sources.
2. The HEAD OF THE AGENCY'S OFFICE OF NUCLEAR SECURITY said that the Code of Conduct on the Safety and Security of Radioactive Sources provided detailed guidance on improving the safety and security of radioactive sources.
3. The Agency's Secretariat was endeavouring to improve the safety and security also of radioactive material not in sealed sources — for example, radioactive waste.
4. The Secretariat had adopted a graded approach in recognition of the fact that high-activity sources required a greater degree of security than low-activity ones. It based that approach to a large extent on an Agency technical document containing a categorization of radioactive sources. In another technical document, the Secretariat had issued — in June 2003 — interim guidance on the security of radioactive sources. That document was currently being revised in the light of comments received on it and of experience gained in the past two years. Some of the concerns that had prompted the Paraguayan proposal made in document CPPNM/AC/L.8 were being addressed by the Secretariat, although not pursuant to a legal obligation arising out of a convention.
5. The VICE-CHAIRPERSON said that, while the proposal made by Paraguay did not fall within the purview of the Diplomatic Conference, it reflected concerns shared by many States Parties to the CPPNM. He suggested that those concerns be noted in the summary records of the Conference.
6. The representative of PAKISTAN, supported by the representative of ARMENIA, said that Paraguay's proposal called for too substantive a change in the CPPNM.
7. The representative of PARAGUAY said that his delegation was withdrawing its proposal, since it had become clear that the Diplomatic Conference was not the right forum in which to discuss the underlying issues. He welcomed the Vice-Chairperson's suggestion that Paraguay's concerns be noted in the summary records of the Conference.
8. Paraguay stood ready to cooperate in the development of a legally binding instrument on the safety and security of radioactive sources.
9. The representatives of AZERBAIJAN, the PHILIPPINES and ARGENTINA said that their countries also stood ready to cooperate in the development of such an instrument.
10. The representative of ALGERIA recalled that the Board was due to take a decision soon on the question of small quantities protocols and that its decision would have a bearing on the concerns of Paraguay and other countries.
11. The representative of the RUSSIAN FEDERATION said that his delegation had misgivings about the suggestion that Paraguay's concerns be noted in the summary records of the Diplomatic Conference.

12. The CHAIRPERSON said that no doubt the findings of the International Conference on the Safety and Security of Radioactive Sources held in Bordeaux would be before the Agency's Board of Governors in September 2005 and that soon afterwards the Agency's General Conference would have before it a draft resolution dealing with — inter alia — the safety and security of radioactive sources. That being so, he considered it inappropriate that the Diplomatic Conference continue discussing the Paraguayan proposal.

13. The representative of FRANCE said that his Government, which attached great importance to the safety and security of radioactive sources, had hosted the aforementioned international conference held in Bordeaux and also the summit at which the G8 had — in Evian in June 2003 — adopted an action plan for securing radioactive sources.

14. His delegation welcomed the Vice-Chairperson's suggestion that Paraguay's concerns be noted in the summary records of the Diplomatic Conference and hoped that the question of a legally binding instrument on the safety and security of radioactive sources would be taken up in due course.

15. The representative of LUXEMBOURG said that there was a significant imbalance between the number of legal instruments relating to the protection of nuclear material and the number of legal instruments relating to the protection of radioactive material. Given that dirty bombs were more likely to be used by terrorists than nuclear weapons, it was incumbent on the Agency's Board of Governors and General Conference to do something about that imbalance.

16. The CHAIRPERSON took it that the Committee wished to adopt the Vice-Chairperson's suggestion that the concerns of Paraguay be noted in the records of the Conference.

Paragraph 12 (new Article 16)

17. The CHAIRPERSON said that the references to "the Protocol" in the proposed text were probably inappropriate and, noting that there were no comments, proposed that the text be referred to the Drafting Committee together with a note regarding those references.

Consideration of proposal submitted by Mexico

18. The representative of MEXICO, referring to document CPPNM/AC/L.6, said that her country was concerned about the exception provision in the proposed Article 2.4. Differing opinions had been expressed on the matter during the formulation of the Basic Proposal, and her delegation was grateful to the delegations of Austria and China for their constructive efforts to bring about a consensus.

19. The main purpose of the Mexican proposal was to emphasize that international humanitarian law did not permit attacks on nuclear facilities operated for peaceful purposes either during times of war or during times of peace.

20. Mexico proposed that the expression "inasmuch as" be replaced by "insofar as" in subparagraph (b) since it had two distinct meanings. The Spanish version of that subparagraph conveyed what her delegation considered to be the correct meaning. If subparagraph (b) remained as it now stood, Mexico would not object, but it would be guided by the Spanish version.

21. The CHAIRPERSON suggested that the question of the choice between "insofar as" and "inasmuch as" be referred to the Drafting Committee.

22. The representative of the UNITED STATES said that referring the question to the Drafting Committee would imply that the question was not one of substance. In his view, the replacement of "inasmuch as" by "insofar as" would be a substantive change.

23. Referring to Article 56 of Protocol 1 additional to the Geneva Conventions, he said that in his opinion the Mexican proposal did not accurately reflect international law as represented in international humanitarian law. During the lengthy negotiations on amending the CPPNM, serious concerns had been expressed about the potential for attacks on nuclear facilities. For many delegations to the present conference, however, the objective was to criminalize the sabotage of nuclear facilities rather than to explore whether the amended CPPNM should apply to the members of armed forces. Constructive attempts had been made to provide for recourse under international humanitarian law in the event of the commission of offences under international law by the members of armed forces, but some concerns remained. In that connection, subparagraph (c), proposed by China, was a very valuable contribution.

24. The CHAIRPERSON said that some English dictionaries defined “insofar as” and “inasmuch as” in an identical fashion.

25. The representative of the UNITED KINGDOM said that there was a substantive difference between the two expressions.

26. The representative of CANADA, supported by NEW ZEALAND, said that “inasmuch as” could mean either “to the extent that” or “since”, in the sense of “because”. However, the International Convention for the Suppression of Terrorist Bombings (the Terrorist Bombings Convention) and the International Convention for the Suppression of Acts of Nuclear Terrorism (the Nuclear Terrorism Convention) both used “inasmuch as” in the context in which it appeared in subparagraph (b). The expression “inasmuch as” should therefore be retained.

27. The representative of AUSTRIA said that the proposed Article 2.4 represented a compromise resulting from lengthy negotiations and was based on existing treaty language and that the amended CPPNM should apply in cases that were not covered elsewhere by international law.

28. His delegation, which hoped that the proposed Article 2.4 would remain unchanged, was grateful to China for proposing subparagraph (c).

29. The representative of FRANCE, supported by the representative of BELGIUM, endorsed the views expressed by the representatives of the United States and Austria and said that the present wording of the proposed Article 2.4 was the best that could be hoped for.

30. The representative of BRAZIL said that her delegation shared Mexico’s view that the creation of legal loopholes could undermine the effectiveness of the amended CPPNM and believed that the Mexican proposal would usefully complement the proposal made by China.

31. Her delegation was in favour of the inclusion of preambular references both to the Charter of the United Nations and to international humanitarian law, with any necessary corrections to the proposed paragraph 3(ter).

32. The CHAIRPERSON asked the representative of Mexico whether she was willing to go along with the retention of the expression “inasmuch as”.

33. The representative of MEXICO said that she was, on the understanding that, when the amendments to the CPPNM were formally adopted, Mexico would be given an opportunity to make a statement to the effect that it was approving the Spanish version of the text.

34. Several delegations shared her delegation’s opinion regarding the expression “inasmuch as”. Moreover, although the expression was used in the Terrorist Bombings Convention and the Nuclear Terrorism Convention, the amended CPPNM would cover scenarios which were rather different from the scenarios covered by those two conventions.

35. The representative of CUBA expressed strong support for the proposal submitted by Mexico, and particularly for the proposed addition of preambular paragraphs 3(bis) and 3(ter).

36. In his delegation's view, subparagraph (b) of the proposed Article 2.4 left room for the use or threat of the use of force against nuclear material and nuclear facilities being used for peaceful purposes — something that would constitute a grave violation of international law, including the Charter of the United Nations and the Agency's Statute.

37. Cuba welcomed subparagraph (c), proposed by China, since it reflected the position of principle to which Cuba adhered within the Non-Aligned Movement. However, it was not clear whether subparagraph (b) or subparagraph (c) would prevail under various circumstances. The only way to avoid ambiguity in the interpretation of the amended CPPNM and to ensure the protection of nuclear material and nuclear facilities being used for peaceful purposes was to ensure that the principle of their inviolability was respected.

38. Cuba interpreted subparagraph (c) as including a commitment by States to abstain from the use and threat of use of force against nuclear material and nuclear facilities in other States, and it considered Mexico's proposal to be a useful complement to that subparagraph.

39. The representative of ALGERIA, having welcomed the spirit of compromise displayed by the representative of Mexico with regard to the expression "inasmuch as", said that the proposed additional preambular paragraphs were important for ensuring the cohesiveness and universality of the amended CPPNM.

40. The representative of COLOMBIA, supported by the representatives of CHILE, URUGUAY and ECUADOR, said that her country would interpret subparagraph (b) on the basis of the Spanish version.

41. She called for the inclusion of the additional preambular paragraphs proposed by Mexico.

42. The representative of ARGENTINA expressed support for the inclusion of the proposed additional preambular paragraphs and for the proposed reordering of subparagraphs in Article 2.4.

43. The representative of PAKISTAN said that, in his country's view, the exception foreseen in subparagraph (b) ran counter to the objective of strengthening the regime for ensuring the security of nuclear material and nuclear facilities. All attacks on nuclear material and nuclear facilities, regardless of the nature of the attack and of the perpetrator, should be prevented.

44. Welcoming subparagraph (c), he said that it reflected the principle that acts prohibited under the amended CPPNM were unlawful and would remain so, irrespective of the perpetrator, and the principle that in cases of armed conflict and in situations not governed by international humanitarian law the amended CPPNM would be fully applicable, without any prospect of immunity.

45. It was important to bear in mind that the military exclusion provision in other counter-terrorism instruments was accompanied by a provision on the protection of States' sovereignty and territorial integrity, and he saw no reason why the military exclusion provision in Article 2.4 should not be prefaced by something similar to Article 18 of the Terrorist Bombings Convention — for example, preambular paragraph 3(bis) proposed by Mexico.

46. The representative of CANADA, having thanked the Mexican delegation for its flexibility regarding the expression "inasmuch as", expressed support for subparagraph (c), proposed by China, which elegantly captured an important principle.

47. As regards the two preambular paragraphs proposed by Mexico, paragraph 3(bis) quoted a principle set forth in the Charter of the United Nations. Was there any need to quote that principle in

the Preamble to the amended CPPNM and, if so, should other principles set forth in the Charter not also be quoted?

48. Paragraph 3(ter) referred to “international humanitarian law” and “nuclear facilities”, but Article 56.1 of Protocol 1 to the Geneva Conventions spoke of “nuclear electrical generating stations” — a narrower concept than “nuclear facilities”. She did not think that the Diplomatic Conference should enter into aspects of international humanitarian law which were best left to experts in that field. Another difficulty with paragraph 3(ter) was that the words “acts against such facilities during peacetime ... are contrary to international law” might be inconsistent with the words “unless the act is undertaken in conformity with national law of the State Party in whose territory the nuclear facility is situated” in subparagraph (e) of the proposed Article 7.1. Moreover, the word “peacetime” in the context of international humanitarian law could give rise to uncertainty, since hostilities might be followed by occupation, during which international humanitarian law would still apply.

49. The representative of AUSTRIA, having thanked the Mexican delegation for the spirit of compromise displaced by it with regard to the expression “inasmuch as”, endorsed the views of the Canadian delegation concerning the preambular paragraphs proposed by the Mexican delegation. His delegation would go along with a consensus in favour of including paragraph 3(bis), but it did not think that paragraph 3(ter) should be included.

50. The representative of MEXICO said she understood that the subparagraph proposed by China would remain unchanged and that the summary records of the Committee would faithfully reflect the discussion on Article 2.4, including her delegation’s view that there was a substantive difference between the expressions “inasmuch as” and “insofar as”, so that her country would be guided by the Spanish version. As regards the proposed reordering of the subparagraphs of Article 2.4, she assumed that it was acceptable to the Committee.

51. As regards the proposed preambular paragraphs, her delegation, which was grateful both to those delegations which had expressed support for Mexico’s proposal and those which had explained their dissenting positions, believed that what would now be preambular paragraph (a) of Article 2.4 should be preceded by something on the lines of paragraph 3(bis). The purpose of paragraph 3(ter), which would complement the subparagraph of Article 2.4 proposed by China, was to emphasize that nuclear facilities were strictly protected in times of armed conflict and that acts against them in peacetime were contrary to international law, a situation that existed de facto in international law.

52. Admittedly, Article 56.1 of Protocol 1 to the Geneva Conventions referred to “nuclear electrical generating stations” and not to “nuclear facilities”. If an attack on a nuclear electrical generating station might “cause the release of dangerous forces”, however, so might attacks on other nuclear facility types, as they also were “installations containing dangerous forces”. Moreover, if international humanitarian law provided for the special protection of such facilities in times of armed conflict, there should be even stricter protection in peacetime. The second part of paragraph 3(ter) stated a fact corroborated by the Charter of the United Nations and by many General Assembly resolutions on friendly relations between States.

53. In 1981, the Security Council had condemned an attack by one State on the nuclear facilities of another State, describing it as a violation of the United Nations Charter and a grave threat to the Agency’s safeguards system, which was the cornerstone of the NPT. Consequently, Mexico believed that something on the lines of paragraph 3(ter) should be in the amended CPPNM, although her delegation was willing to be advised by other delegations regarding the language.

54. The representative of AUSTRALIA said that paragraph 3(ter) seemed to be claiming that international law prohibited attacks on all nuclear facilities whatever the circumstances. The CPPNM should not contain wording that purported to describe international law but in fact went far beyond it.

The issue was a major substantive one which required careful consideration and which, in any case, should not be consigned to a preambular paragraph. The implications of the issue were too wide to be dealt with by the Diplomatic Conference.

55. The representative of URUGUAY, expressing support for the position of Mexico, said it was clear that international humanitarian law provided for the protection — albeit not necessarily the strict protection — of all nuclear facilities in situations of armed conflict. The fact that Article 56.1 of Protocol 1 to the Geneva Conventions referred to “nuclear electrical generating stations” rather than “nuclear facilities” was probably due to the fact that it dated back many years. If nuclear facilities were protected under international law in situations of armed conflict, they could not logically be denied such protection in peacetime. The language of paragraph 3(ter) could perhaps be adjusted, but there must be no suggestion that international law permitted any type of attack on nuclear facilities.

56. The representative of NEW ZEALAND said that the difficulty with paragraph 3(ter) perhaps lay in the manner in which it seemed to portray international law.

57. The representative of BELGIUM said, with regard to paragraph 3(ter), that the word “peacetime” raised difficulties: nowadays, international armed conflicts usually broke out without a declaration of war, and one could hardly speak of “peacetime” after a State had attacked a nuclear facility of another State; neither could one speak of a State being “at peace” if rebel forces were attacking a nuclear facility in that State. However, international humanitarian law applied both to international and to internal armed conflicts.

58. International humanitarian law contained provisions relating to the protection only of certain nuclear facilities, namely “nuclear electrical generating stations”, but he did not think that a reference to “nuclear facilities” would be in conflict with Article 56.1 of Protocol 1 to the Geneva Conventions.

59. The CHAIRPERSON said that there were three outstanding issues relating to the Mexican proposal. Regarding the first, the reordering of the subparagraphs in Article 2.4, only the representative of Argentina had commented, expressing support for the reordering. Regarding the second, the additional preambular paragraph 3(bis), the need for that paragraph had been questioned, but no opposition had been expressed. Regarding the third, the addition of preambular paragraph 3(ter), there had been expressions of concern on the grounds that the paragraph, while purporting to declare what international humanitarian law stated, was inaccurate.

60. In one sense, paragraph 3(ter) was too narrow, because it was not only in peacetime but also in wartime that certain nuclear facilities were protected against attack. On the other hand, international humanitarian law protected nuclear power stations, but the definition of “nuclear facility” proposed for the amended CPPNM was much wider — it included spent fuel storage facilities, enrichment facilities and radioactive waste management facilities among other things.

61. The representative of MEXICO said that the need for something like paragraph 3(ter) stemmed from the fact that subparagraph (b) of Article 2.4 did not cover the activities of armed forces in peacetime. Perhaps the inclusion in paragraph 3(ter) of the notion contained in Article 57.1 of Protocol 1 to the Geneva Conventions (“In the conduct of military operations, constant care shall be taken to protect the civilian population, civilians and civilian objects.”) would be helpful.

62. The representative of COLOMBIA said that it was important to consider the purpose of international humanitarian law, which was to minimize the effects of war on civilians. Although the protection of nuclear material and nuclear facilities was not mentioned in the Geneva Conventions or the additional protocols thereto, it was implied.

63. Given the exception provided for in subparagraph (b) of Article 2.4, the two preambular paragraphs proposed by Mexico were very necessary.

64. The representative of CANADA said her delegation was not in favour of trying to redraft paragraph 3(ter) so as to capture the essence of international humanitarian law. Not all States were parties to Protocols 1 and 2 to the Geneva Conventions, nor did all States agree with all their provisions. Moreover, there was customary international law that was applicable in the context of international humanitarian law. The Diplomatic Conference was not the right forum in which to embark on a task for humanitarian law experts.

65. Subparagraphs (c) and (d) of Article 2.4 were, in her opinion, sufficient to make it clear that the amended CPPNM would not authorize anything not otherwise authorized.

66. The representative of FRANCE said that his delegation, which was opposed to the inclusion of the two new preambular paragraphs proposed by Mexico, could go along with the inclusion of the first and last preambular paragraphs of the Terrorist Bombings Convention and Nuclear Terrorism Convention.

67. The representative of BRAZIL said it was important to retain the idea enshrined in paragraph 3(ter). It might be over-ambitious to try to summarize international humanitarian law, but perhaps mention could be made of the Geneva Conventions, especially Article 56.1 of Protocol 1. Even if some States were not parties to the Conventions and the protocols, appropriate language could surely be found to emphasize the importance of their provisions. The statement just made by the representative of France had been a helpful one in that connection.

68. The representative of URUGUAY said that, in his view, the argument that paragraphs 3(bis) and 3(ter) were not necessary was flawed. That having been said, he welcomed the statement just made by the representative of France.

69. The representative of BOLIVIA said that his delegation, which shared the concerns of Mexico, agreed with the representative of Brazil that it should be possible to find appropriate language emphasizing the importance of the provisions of the Geneva Conventions and the additional protocols thereto.

70. The representative of CUBA said that his delegation would like to see paragraph 3(ter) incorporated as it stood into the amended CPPNM.

71. The representative of ALGERIA said that, in her view, it was important that in the Preamble there be reference to the Charter of the United Nations and international humanitarian law. A formulation acceptable to all might be found by drawing on wording used in other international conventions relating to terrorism.

72. It should be recalled that an armed attack on a nuclear facility in peacetime had occurred in the Middle East region in 1981.

73. The representative of AZERBAIJAN said that, although he did not consider paragraphs 3(bis) and 3(ter) to be necessary, he would like to see reference made to international humanitarian law in the amended CPPNM.

74. The representative of LUXEMBOURG questioned the need to refer to the Charter of the United Nations and international humanitarian law in the Preamble as they would be mentioned in the operative part of the amended CPPNM.

75. The representative of ARGENTINA said that, in her view, a continuation of the discussion on paragraph 3(bis) and 3(ter) at the present juncture might not be constructive. Perhaps interested delegations should consult on them informally.

76. The representative of the UNITED STATES said that the Committee should not attempt to describe in one or two sentences the international humanitarian law provisions relating to nuclear facilities beyond what was stated in Article 56 of Protocol 1 to the Geneva Conventions. In that connection, it should be noted that, although nuclear electrical generating stations were accorded a special protected status by paragraph 1 of Article 56, that status was not absolute, as indicated in subparagraph 2(b).

77. He suggested a preambular paragraph reading along the following lines: “AWARE that nuclear electrical generating stations have a special protected status in accordance with international humanitarian law, and STRESSING that acts against such facilities can cause death or serious injury to persons or substantial damage to property or to the environment”.

The meeting was suspended at 12.30 p.m. and resumed at 12.35 p.m.

78. The CHAIRPERSON suggested that interested delegations hold informal consultations after the meeting under the leadership of the Vice-Chairperson of the Committee of the Whole with a view to resolving the issue of paragraphs 3(bis) and 3(ter).

79. The representative of BELGIUM suggested that Argentina’s proposal regarding the definition of “armed forces” be taken up before the informal consultations.

Consideration of Proposal I submitted by Argentina

80. The representative of ARGENTINA, introducing Proposal I submitted in document CPPNM/AC/L.10, said that, in her delegation’s view, the inclusion in the amended CPPNM of the definition of “military forces of a State” contained in the Terrorist Bombings Convention and the Nuclear Terrorism Convention would be very helpful.

81. The representative of the UNITED STATES, expressing support for the inclusion of a definition of “military forces of a State”, said that the wording in document CPPNM/AC/L.10 containing Argentina’s proposal was not identical to that in the Terrorist Bombings Convention and the Nuclear Terrorism Convention — the phrase “and persons acting in support of those armed forces who are” had been omitted after “national defence or security”.

82. The representative of ARGENTINA said that the phrase in question had been omitted inadvertently.

83. The representatives of CANADA, BOLIVIA, BELGIUM and SWEDEN expressed support for inclusion of the definition of “military forces of a State” contained in the Terrorist Bombings Convention and the Nuclear Terrorism Convention.

84. The representative of the RUSSIAN FEDERATION said that the Group of Experts had discussed the matter at length and had concluded that the inclusion in the amended CPPNM of a definition of “armed forces” was not appropriate. The character of the Terrorist Bombings Convention and the Nuclear Terrorism Convention differed from that of the CPPNM. Furthermore, subparagraph (b) of Article 2.4 in the Basic Proposal (Revised) spoke of the activities of “armed forces during an armed conflict, as those terms are understood under international humanitarian law”.

85. The representative of the UNITED KINGDOM said that, while he had some sympathy with the position of Russia, he would have no difficulty in accepting the definition given in the Terrorist Bombings Convention and the Nuclear Terrorism Convention.

86. The representatives of the NETHERLANDS, POLAND, ECUADOR, PERU, COLOMBIA and TURKEY expressed support for the inclusion of that definition.

The meeting rose at 1 p.m.