

International Convention for the Suppression of Acts of Nuclear Terrorism (New York, 14 April 2005)

Introduction

- 4.1 On 23 August 2011, the *International Convention for the Suppression of Acts of Nuclear Terrorism (New York, 14 April 2005)* (the Convention) was tabled in the Commonwealth Parliament.
- 4.2 The proposed Convention establishes an international framework for criminalising conduct relating to nuclear material and other radioactive substances or devices.
- 4.3 States Parties are required to enact specific offences in domestic law, as well as offences relating to threats or attempts to commit such crimes or contributions to the commission of such crimes.
- 4.4 The Convention facilitates international cooperation in the prevention, investigation, prosecution and extradition of persons who commit a broad range of offences involving the use of nuclear material and other radioactive substances or devices.¹
- 4.5 The Convention complements other United Nations (UN) counter-terrorism legal instruments, including the *International Convention for the Suppression of Terrorist Bombings*, the *International Convention for the*

¹ National Interest Analysis [2011] ATNIA 21 with attachment on consultation *International Convention for the Suppression of Acts of Nuclear Terrorism* done at New York on 14 April 2005, [2005] ATNIF 20, (Hereafter referred to as 'NIA') para. 3.

*Suppression of the Financing of Terrorism (2002) and the Convention on the Physical Protection of Nuclear Material (1987).*²

- 4.6 The Convention recognises that acts of nuclear terrorism may result in grave consequences and pose a threat to international peace and security and provides a framework for international cooperation in the prevention, investigation, prosecution and extradition of persons who commit relevant offences involving nuclear material and other radioactive substances or devices.³
- 4.7 The Convention fills a gap in existing international legal regimes by recognising the potential for nuclear weapons, facilities and radioactive material to be used to conduct terrorist acts.

Timing

- 4.8 Australia signed the Convention on 14 September 2005 and the Convention entered into force generally on 7 July 2007. Australia's ratification will occur as soon as practicable following completion of the domestic treaty implementation process.
- 4.9 The Convention will enter into force for Australia thirty days after the deposit by Australia of its instrument of ratification with the Secretary-General of the United Nations.

Reservations

- 4.10 Australia does not propose to make any reservations with respect to the Convention.⁴ The Department of Foreign Affairs and Trade advised that it would be usual for Australia to do so for a treaty of this kind.

I would have to say that in general it is a rare thing for us to ratify a convention and declare or reserve the position in relation to the International Court of Justice [ICJ]. I can only think of one instance offhand. In some ways the Australian government's general policy is not to reserve in relation to the jurisdiction of the ICJ unless there is a very specific national interest at stake. In none of the UN or related counterterrorism instruments have we done so.⁵

2 NIA, para. 4.

3 NIA, para. 8.

4 NIA, paras. 1-2.

5 Mr Peter Guinn Scott, Director, Sanctions and Transnational Crime Section, Department of Foreign Affairs and Trade, *Committee Hansard*, 31 October 2011, p. 15.

Reasons for Australia to take the proposed treaty action

- 4.11 Australia's ratification of the Convention will contribute to international efforts aimed at countering terrorism involving the use of radioactive material. It will ensure that persons who commit such acts can be brought to justice irrespective of the territory in which they are found and whether or not extradition agreements are in place. In addition, the enactment of implementing legislation will further strengthen Australia's strong counter-terrorism legislative framework.⁶
- 4.12 Ratifying the Convention would send a message to the international community demonstrating Australia's continued commitment to addressing the threat of terrorism. It will represent an important contribution to the second Nuclear Security Summit, which will take place in the Republic of Korea in March 2012. In addition, it will strengthen Australia's case in encouraging regional countries to ratify the 16 international counter-terrorism instruments.⁷

Obligations

- 4.13 The key obligations placed on States Parties are to criminalise in their domestic legislation the offences set out in Article 2 and cooperate in the detection, prevention, suppression, investigation and punishment of breaches of these offences.⁸

Nuclear terrorism offences

- 4.14 The Convention sets out offences prohibiting the following conduct:
- possessing radioactive material or making or possessing a device with the intent to cause death or serious bodily injury or substantial damage to property or to the environment;
 - using radioactive material or a device in a manner which releases or risks the release of radioactive material with the intent to cause death or serious bodily injury, substantial damage to property or to the

6 NIA, para. 5.

7 NIA, para. 7.

8 NIA, para. 10.

environment, or to compel a natural or legal person, an international organisation or a State to do or refrain from doing an act;

- using or damaging a nuclear facility in a manner which releases or risks the release of radioactive material with the intent to cause death or serious bodily injury, substantial damage to property or to the environment, or to compel a natural or legal person, an international organisation or a State to do or refrain from doing an act;
- threatening to commit an offence under the Convention;
- demanding radioactive material, a device or a nuclear facility by threat;
- attempting to commit an offence under the Convention;
- participating as an accomplice in an offence under the Convention;
- organising or directing others to commit an offence under the Convention; and
- in any other way intentionally contributing to the commission of an offence under the Convention by a group of persons acting with a common purpose.⁹

4.15 States Parties are required to ensure that defences based on political, philosophical, ideological, racial, ethnic, religious or other similar considerations do not apply to criminal acts within the scope of the Convention. This ensures that offenders cannot rely on political or other similar motivations as a defence to these offences.¹⁰

4.16 The Convention does not apply to the activities of armed forces in armed conflict to the extent that international humanitarian law applies, nor does the Convention apply to activities of a State Party's military forces in the exercise of official duties inasmuch as they are governed by other rules of international law.¹¹

Preventive measures

4.17 States Parties are obliged to cooperate by taking all practicable measures to prevent and counter preparations in their respective territories for the commission of offences within or outside their territories.¹²

9 NIA, para. 11.

10 NIA, para. 13.

11 NIA, para. 15.

12 NIA, para. 16.

- 4.18 States Parties must 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 (IAEA).¹³

Investigation and prosecution

- 4.19 The Convention provides for obligations to ensure the investigation and prosecution of any alleged offender. States Parties are obliged to investigate allegations that a person on their territory has committed a Convention offence and, if the outcome of the investigations so warrant, to take measures to ensure the person's presence for the purpose of prosecution or extradition.¹⁴
- 4.20 The State Party that actually prosecutes the alleged offender must communicate the final outcome of the proceedings to the Secretary-General of the United Nations, who will transmit the information to the other States Parties.¹⁵

Judicial cooperation

- 4.21 Convention offences are to be treated as extraditable offences between States Parties to the Convention. States Parties undertake to include the offences in the Convention as extraditable offences in every extradition treaty subsequently concluded by them. Where a State Party makes extradition conditional on the existence of an extradition treaty, it may, at its option, consider the Convention as a legal basis for extradition in relation to the Convention offences.¹⁶
- 4.22 The Convention also obliges States Parties to cooperate with each other in relation to investigations, extradition and mutual legal assistance concerning the Convention offences. The Convention offences shall not be regarded as political offences and the Convention prevents States Parties from refusing a request for mutual legal assistance or extradition solely on the ground that it concerns a political offence.

13 NIA, para. 17.

14 NIA, para. 18.

15 NIA, para. 19.

16 NIA, para. 21.

- 4.23 The Convention nevertheless preserves the right of a State Party to refuse requests for mutual legal assistance or extradition if it has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons.¹⁷

Seizing radioactive material or devices or nuclear facilities

- 4.24 States Parties are obliged to take steps to render harmless radioactive material, devices or nuclear facilities seized following the commission of a Convention offence. States Parties are further obliged to ensure that any nuclear material is held in accordance with the applicable IAEA safeguards, physical protection recommendations and health and safety standards.¹⁸

Dispute settlement procedures

- 4.25 Any dispute between two or more States Parties to the Convention that cannot be settled through negotiation shall, at the request of one of the States Parties involved in the dispute, be submitted to arbitration. If, within six months, States Parties cannot agree on the organisation of the arbitration, the dispute may be referred to the International Court of Justice.
- 4.26 States may declare their withdrawal from this dispute settlement provision at the time of signature or ratification. The other States Parties will consequently not be bound by Article 23 with respect to any State Party that has made such a reservation. Such a reservation may be withdrawn at any time by notification to the Secretary-General of the United Nations. Australia does not intend to make such a reservation.¹⁹

17 NIA, para. 22.

18 NIA, para. 24.

19 NIA, para. 25.

Implementation

4.27 States Parties are required to adopt such measures as may be necessary under domestic law to criminalise the prohibited conduct as stated in the Convention.

4.28 Because key aspects of the Convention are consistent with existing Australian law, only limited amendments to Commonwealth legislation are necessary for implementation.²⁰

4.29 Those amendments strengthen provisions in already existing legislation. The Attorney-General's Department commented that:

For example... one covers 'with intention to cause death, serious injury to an individual, serious damage to property or to the environment'. So the environment being specifically mentioned would be an example of something which is not always evident in other legislation. It has got intention as the fault element, which means that can justify a much higher penalty. Some of the existing offences have lower penalties, such as around 10 years imprisonment, and then you go through: using or damaging a device in a manner which releases or risks the release of radioactive material with intention to cause death, serious bodily injury or substantial damage to property or the environment.²¹

It also covers radiological material and the other range of items that are specified in the convention. Our understanding is that it would cover more than a bomb and those kinds of things, as well as nuclear facilities – so attacking or damaging a nuclear facility; those kinds of things which are not necessarily covered off in other offence provisions at the moment.²²

4.30 The amendments will be contained in the *Nuclear Non-Proliferation (Safeguards) Act 1987* (NNPS Act).²³

20 NIA, para. 9.

21 Mr Geoff McDonald, First Assistant Secretary, National Security Law and Policy Division, Attorney-General's Department, *Committee Hansard*, 31 October 2011, p. 13.

22 Mrs Karen Horsfall, Principal Legal Officer, Security Law Branch, National Security Law and Policy Division, Attorney-General's Department, *Committee Hansard*, 31 October 2011, p. 14.

23 NIA, para. 26. This is the lead in paragraph of what is quite an extensive section in the NIA.

Specific provisions

- 4.31 Amendments to Australia's extradition laws may be required to ensure that obligations under Article 15 of the Convention are implemented, to ensure that Convention offences are not considered 'political offences' for the purposes of the *Extradition Act 1998*.²⁴ This amendment is intended to enable judicial cooperation on activities such as extradition that is in line with the obligations of the Convention.
- 4.32 In relation to the seizing of radioactive material, devices, or nuclear facilities, the following paragraph was inserted into section 5(1) of the *Australian Nuclear Science and Technology Organisation Act 1987* in 2002 to reflect the functions of the *Australian Nuclear Science and Technology Organisation* under the Convention:

to condition, manage and store radioactive materials and radioactive waste at the request of:

- (i) *a law enforcement agency; or*
- (ii) *a Commonwealth, State or Territory agency responsible for the management of emergencies or disasters; including, but not limited to, radioactive materials or radioactive waste involved in, or arising out of, a radiological incident or a radiological emergency.*²⁵

Concerns over the treaty's timing

- 4.33 The Committee noted the time disparity between the treaty's signing in September 2005 and the tabling in the Parliament – a difference of six years. The Attorney-General's Department reported that:

There are already offences that cover much of what is required in this area, in particular our general terrorism offences. It is a question of working out the practical priorities on the legislative program...²⁶

When compared to other issues that we are dealing with – I will give you another example: we have got the cybercrime convention, or cybercrime act, which we are putting through parliament. It is in front of this one – it is not a long way in front, it is about six

24 NIA, para. 37.

25 NIA, para. 38.

26 Mr Geoff McDonald, First Assistant Secretary, National Security Law and Policy Division, Attorney-General's Department, *Committee Hansard*, 31 October 2011, p. 11.

months in front – because it is addressing a more widespread issue. It is just a fact of the way things are.²⁷

- 4.34 Given the importance of terrorism generally and the concerns of nuclear terrorism, the Committee is surprised that this delay has occurred and that the necessary treaty actions hadn't occurred earlier.

Conclusion

- 4.35 The issue of international terrorism has, of course, had a high profile over the past decade since the terrorist attacks on the United States on September 11, 2001. The idea that terrorists could get access to either nuclear weapons or nuclear material is one of grave concern to the international community and Australia supports all international efforts to ensure that this outcome does not occur.
- 4.36 This treaty will establish an international framework for criminalising certain conduct relating to nuclear material and other radioactive substances or devices. Although Australian legislation largely covers the treaty requirements, the treaty's provisions will strengthen our already existing legislation.
- 4.37 Given the importance of the issue, and the few extra burdens the treaty places on Australia, the Committee fully supports that binding treaty action be taken.

Recommendation 3

The Committee supports *International Convention for the Suppression of Acts of Nuclear Terrorism (New York, 14 April 2005)* and recommends that binding treaty action be taken.

27 Mr Geoff McDonald, First Assistant Secretary, National Security Law and Policy Division, Attorney-General's Department, *Committee Hansard*, 31 October 2011, pp. 13-14.

