



Department of Justice

STATEMENT

OF

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BEFORE THE
SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

AT A HEARING ENTITLED
“THE IMPLEMENTATION OF CERTAIN INTERNATIONAL NUCLEAR AND
MARITIME TERRORISM AGREEMENTS”

PRESENTED ON
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Brad Wiegmann
Deputy Assistant Attorney General
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Before the
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Committee on the Judiciary
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Mr. Chairman and Members of the Subcommittee, thank you for inviting me to testify today regarding two important legislative proposals: first, a proposal to implement two international conventions concerning nuclear terrorism and nuclear proliferation; and second, a proposal to implement two international protocols on maritime terrorism and the maritime transportation of weapons of mass destruction (“WMD”). Today, I will briefly describe how the implementing legislation for these agreements will strengthen national security and enhance multilateral efforts to combat terrorism and proliferation of WMD.

The Department of Justice has submitted draft legislation to implement all four international agreements: the International Convention for the Suppression of Acts of Nuclear Terrorism (“Nuclear Terrorism Convention” or “NTC”), an amendment to the Convention on the Physical Protection of Nuclear Material (“CPPNM”), the 2005 Protocol to the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (the “SUA Protocol”), and the 2005 Protocol to the 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (the “Fixed Platforms Protocol”) (together, the “SUA Protocols”). In 2008, the Senate gave its advice and consent to ratification of all four of these treaties, and the United States will be in a position to ratify them once the implementing legislation is in place. Enactment of this legislation is important because it will strengthen the tools available to U.S. law enforcement authorities to help protect the country from terrorism and WMD proliferation. Equally important, enactment of this legislation and ratification of these treaties by the United States will encourage other nations also to ratify and implement these agreements, thereby helping to establish a stronger international network of legislation and cooperation in this area.

Criminal Offenses Required by the Agreements

All four agreements establish specific criminal offenses that States Parties are obliged to include in their criminal codes. The NTC offenses include certain acts relating to the possession and use of radioactive material and radiological dispersal devices and damage to nuclear facilities, while the CPPNM amendment offenses include, in pertinent part, nuclear smuggling and sabotage of nuclear facilities. Consequently, among other agreement mandates, our legislative proposal would create two new criminal offenses regarding the possession and use of radioactive material, along with criminalizing attempts, threats, and conspiracies to commit these offenses, and it would also implement the CPPNM amendment's provision on nuclear facility sabotage. Specifically, our legislative proposal would make it a criminal offense to knowingly possess radioactive material or make or possess a nuclear explosive, radiation exposure device or radiological dispersal device, with the intent to cause death or serious bodily injury or substantial damage to property or the environment. It would also make it a criminal offense to knowingly use radioactive material or a nuclear explosive or radiological dispersal device or radiation exposure device, or damage or interfere with a nuclear facility in a manner that risks or causes contamination or exposure to radioactive material or radiation, with the intent to cause death or serious bodily injury or substantial damage to property or the environment. Our legislative proposal would also criminalize the additional acts of nuclear smuggling required to be prohibited under the CPPNM amendment.

The offenses established by the 2005 SUA Protocols include the use or targeting of a ship or a fixed marine platform in a terrorist activity; the maritime transportation of explosives, radioactive material, or biological, chemical, or nuclear ("BCN") weapons or certain of their components, delivery means, or materials, under specified circumstances; and the maritime transport of terrorist fugitives. Consequently, our legislative proposal would make it an offense to, unlawfully and with the intent to compel a person, an international organization, or a state to do or refrain from doing an act, (i) use against or on, or discharge from, a ship or fixed platform any explosive or radioactive material, or BCN weapon, in a manner that causes or is likely to cause death, serious injury, or damage; (ii) discharge from a ship oil, liquefied natural gas, or another hazardous or noxious substance, in a manner that causes or is likely to cause death, serious injury, or damage; or (iii) otherwise use a ship in a manner that causes death, serious injury, or damage. Among other offenses mandated by the Protocols, our legislative proposal would also make it an offense to transport explosive or radioactive material intended for a terrorist act, as well as BCN weapons.

In addition to requiring States Parties to criminalize certain conduct, all four agreements also obligate States Parties to establish jurisdiction over the offenses in certain circumstances, as described in more detail below.

Reasons for Establishing the Criminal Offenses

The implementing legislation is necessary because there are substantive and jurisdictional issues in existing U.S. law that must be addressed in order for the United States to be able to implement fully the obligations of States Parties established under the four agreements. Substantively, while some of the criminal offenses enumerated by the agreements overlap with existing U.S. statutes, there are gaps in coverage between what existing U.S. law criminalizes and what the agreements require. Further, certain jurisdictional requirements under the agreements are not reflected in existing U.S. law. In addition to addressing these substantive and jurisdictional issues, the implementing legislation contains procedural and investigative provisions that will help ensure that the United States is able to implement effectively U.S. law, and, in turn, the provisions of the agreements.

Substantive Issues the Implementing Legislation Seeks to Resolve

Because certain offenses covered by the agreements are not criminalized under U.S. law, there are currently substantive gaps in existing U.S. law that would preclude us from meeting the requirements of each agreement. For instance, as noted above, both the NTC and CPPNM amendment require States Parties to establish offenses covering nuclear facility sabotage and threats to commit such sabotage. These sabotage offenses largely overlap with 42 U.S.C. § 2284, which prohibits a person from destroying or damaging a nuclear facility or certain other facilities. However, unlike the agreements, section 2284 does not cover threats of sabotage. Section 2284(a) is also narrower in that it requires actual damage (or an attempt or conspiracy to destroy or damage), while the CPPNM could apply if an activity were merely likely to cause damage, death, or serious injury, and the NTC could apply if an activity were likely to increase the risk of a release of radioactive substances or radiation. Section 2284(b) addresses tampering with machinery, components, or controls at a nuclear facility, while the CPPNM and NTC focus on the possible release of radioactive substances or radiation. Thus, there are activities that the agreements require States Parties to prohibit that are not criminalized under existing U.S. law.

To provide another example, the SUA Protocol offense of using a WMD on a ship with a terrorist purpose might also violate a Federal murder statute, but the mismatch between the offense requirements means that the existing statute may not serve to implement the agreement provision in all cases. Some of the SUA Protocol transport offenses also overlap with 18 U.S.C. § 2283, which prohibits the transportation of an explosive, biological agent, chemical weapon, or

radioactive or nuclear materials, knowing that any such item is to be used to commit a terrorist offense. However, the SUA Protocol covers conduct not criminalized under section 2283, such as the maritime transport of equipment that significantly contributes to the design, manufacture, or delivery of a BCN weapon with the intention that it will be used for such purpose. Section 2283 also has a different *mens rea* requirement than the SUA Protocol transport offense. For example, the SUA Protocol covers the maritime transport of a BCN weapon, regardless of whether such transport is done knowing that the weapon will be used to commit a terrorist offense, whereas section 2283 applies only when such transport is done knowing that the weapon is intended to be used to commit a terrorist offense. Some of the material captured by the SUA Protocol transport offenses also would be reflected in U.S. export control laws, if the material is listed on export control lists and if the transport is an export from the United States, but these laws generally have different *mens rea* requirements, may not include all the materials covered by the SUA Protocols, and have more limited jurisdictional scope.

Similarly, the smuggling offense in the CPPNM amendment overlaps with the possession or transfer offenses described in the original CPPNM and implemented in 18 U.S.C. § 831, but section 831 is narrower in some respects than the new amendment. Whereas the current statute requires the act of smuggling to cause (or to be likely to cause) death, serious bodily injury, or substantial damage—the CPPNM’s prescribed smuggling offense does not require these effects.

Each of the agreements includes inchoate crimes in the acts to be covered. Specifically, States Parties must prohibit attempt, participating as an accomplice, organizing or directing others to commit an offense, and contributing to the commission of an offense. *See, e.g.*, NTC Article 2.3-4; SUA Convention *3quarter* as amended; SUA Protocol Article *2ter* as amended; *see also* CPPNM Article 7.1.f-g (prohibiting attempt and “an act which constitutes participation”). In our proposed legislation, the attempt requirements are implemented as prohibitions on attempt, and the other requirements as conspiracy provisions. This proposal is important because there is no general attempt provision in the U.S. Code. Moreover, the penalties under the general conspiracy statute are more limited than the penalties in the draft legislation.

We have made one substantive proposal that is not required under the agreements: making the offenses established under the new sections predicate crimes under 18 U.S.C. § 2339A, which prohibits providing material support knowing or intending it is to be used in preparation for or in carrying out certain enumerated crimes. The predicate crimes already enumerated include acts of sabotage under 42 U.S.C. § 2284 and the nuclear material crimes under 18 U.S.C. § 831. The implementing legislation for the Terrorist Bombings Convention and the Terrorist Financing Convention similarly made those new offenses predicate crimes under 18 U.S.C. § 2339A. While the addition of these crimes as predicate offenses is not

required by the agreements, it would be anomalous if material support to commit these new WMD and terrorism offenses were lawful when material support to commit other similar offenses is prohibited.

Jurisdictional Issues Addressed by the Implementing Legislation

There are also jurisdictional gaps between existing U.S. law and the jurisdictional requirements of the agreements. Each of the agreements obligates States Parties to establish jurisdiction under certain circumstances, including when the offense is committed in the territory of a State, by a national of the State, or under certain other situations (*i.e.*, vessel and aircraft jurisdiction). In addition, each of the agreements requires a State Party to be able to prosecute an offender found in its territory if it does not extradite the offender. U.S. statutes do not generally include “found-in” jurisdiction unless they are written to implement a treaty obligation that requires the exercise of such jurisdiction.

To give an example, 18 U.S.C. § 2332h, which prohibits possession or other acts related to a radiological dispersal device and overlaps with the NTC’s provision covering possession of a nuclear explosive device or radiological dispersal device, does not include “found-in” jurisdiction. It also lacks the vessel and aircraft jurisdiction required by the convention, and the domestic jurisdiction is not as complete as that required by the convention. Similarly, 42 U.S.C. § 2284, which prohibits a person from destroying or damaging a nuclear facility or certain other facilities and overlaps with the sabotage offenses in the CPPNM amendment, is silent on jurisdiction, which could lead to challenges to its use for extraterritorial cases. It also lacks “found-in” jurisdiction. The SUA Protocol offers another example; its ban on the discharge of oil or other hazardous substances with a terrorist purpose overlaps with 33 U.S.C. § 1321(b)(3), which prohibits oil or hazardous substance discharge in the navigable waters of the United States. Nonetheless, the existing Title 33 offense is narrower in jurisdiction than the Protocol requirement because of its limitation to navigable waters of the United States.

This is an illustrative, not exhaustive, list of jurisdictional issues in existing law that must be addressed before the United States can ratify these agreements. We also believe that some of the optional jurisdictional grounds set forth in the agreements are important to include in WMD and terrorism crimes. If a U.S. citizen is a victim of one of these WMD crimes abroad, or if the United States itself is a victim, whether because its property is attacked or because of terrorist attempts to manipulate the U.S. government, we believe we should be able to assert jurisdiction. While these grounds are not required for ratification, legislation without these grounds would be an imperfect protection of our own citizens, property, and government in the event of acts involving WMD abroad.

Investigative and Other Issues

In addition to ensuring that the United States is able to meet its legal obligations under these agreements, the proposed implementing legislation is designed to enable the United States to implement the agreement provisions more effectively. There are a limited number of additional authorities that would be helpful to investigate these crimes effectively and to protect Americans and American interests from terrorism and nuclear proliferation. For example, we have specified in the draft legislation that the offenses covered by the agreements would be predicates for use of Title III wiretap authorities. Allowing Federal investigators to investigate WMD or terrorist activities through the use of Title III wiretaps affords us a basic tool to address this very serious criminal activity that threatens our national security. It is clear that wiretaps should be available to investigate WMD terrorism when they are also available to investigate crimes like money laundering, fraud, theft, misuse of passports, and sporting event bribery. We have also listed the crimes covered by the agreements as Federal crimes of terrorism under 18 U.S.C. § 2332b, which gives the Attorney General primary investigative responsibility over such crimes and provides a predicate for the sentencing of terrorism crimes. It would be counterintuitive if these new WMD terrorism offenses were not considered Federal crimes of terrorism or were not punished at a level commensurate with similar offenses already included in the list of Federal crimes of terrorism, including offenses that implement other international counterterrorism agreement obligations.

Importance of Passing the Implementing Legislation Now

It is important to act now on this implementing legislation for several reasons. First, the treaties will enhance U.S. national security by modernizing and strengthening the international counterterrorism and counterproliferation legal framework. Second, the treaties complement important U.S. government priorities, such as the Global Initiative To Combat Nuclear Terrorism, the Nuclear Security Summit, and the Proliferation Security Initiative. Third, ratification will reinforce the leading role of the United States in promoting these and other counterterrorism treaties and can be expected to prompt other States to join. The treaties are widely supported in the national security community, including by the Departments of Justice, State, and Defense, and they received strong bipartisan support in 2008 when the Senate gave its advice and consent to ratification.

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Thank you again for inviting me to this hearing, and I am happy to answer any questions that you may have.

