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# LEGISLATIVE SUMMARY



***Bill S-9:  
An Act to amend the Criminal Code  
(Nuclear Terrorism Act)***

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## ***Legislative Summary of Bill S-9***

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Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

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# LEGISLATIVE SUMMARY OF BILL S-9: AN ACT TO AMEND THE CRIMINAL CODE (NUCLEAR TERRORISM ACT)

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## 1 BACKGROUND

### 1.1 PURPOSE OF THE BILL AND PRINCIPAL AMENDMENTS

Introduced in the Senate on 27 March 2012, Bill S-9, An Act to amend the Criminal Code (short title: Nuclear Terrorism Act), is a 10-clause bill that introduces four new indictable offences into Part II of the *Criminal Code*,<sup>1</sup> which deals with offences against public order. Adding these new offences, with respect to certain activities in relation to nuclear or radioactive material, nuclear or radioactive devices, or nuclear facilities, makes it illegal to:

- possess, use or dispose of nuclear or radioactive material or a nuclear or radioactive device, or commit an act against a nuclear facility or its operations, with the intent to cause death, serious bodily harm or substantial damage to property or the environment;
- use or alter nuclear or radioactive material or a nuclear or radioactive device, or commit an act against a nuclear facility or its operation, with the intent to compel a person, government or international organization to do or refrain from doing anything;
- commit an indictable offence under federal law for the purpose of obtaining nuclear or radioactive material, a nuclear or radioactive device, or access or control of a nuclear facility; and
- threaten to commit any of the other three offences.

While the new offences outlined above are the key changes in Bill S-9, the bill introduces into the Code other amendments that are incidental to these four offences, but are nonetheless significant.

For example, Bill S-9 introduces definitions of certain terms used in the four offences outlined above, such as “environment,” “nuclear facility,” “nuclear material,” “radioactive material” and “device” (see clauses 2(2) and 5). It also introduces new section 7(2.21) into the Code, to ensure that individuals who, when outside Canada, commit, attempt to commit, or conspire, counsel or act as accessory after the fact with respect to the new offences described in sections 82.3 to 82.6 of the Code may be prosecuted in Canada, as long as certain conditions are met (see clauses 2(1) and 3(1)). Further, because new section 7(2.21) incorporates the offences found in current sections 7(3.2) to 7(3.6) of the Code, these sections are repealed (see clause 3(2)).

Bill S-9 also amends the definition of “terrorist activity” found in section 83.01(1)(a) of the Code. The revised definition ensures that commission of the new offences introduced by the bill, as well as any attempts to commit them, and any conspiracies, counselling, or acting as accessories after the fact in relation to them, constitute “terrorist activity,” regardless of whether the acts take place inside or outside Canada (clause 6).

The bill also amends the wiretap provisions found in the Code to ensure that they apply not only for the criminal organization and other terrorism offences in the Code, but also for the new offences found in sections 82.3 to 82.6 (clause 7). These new offences are to be considered “primary designated offences” for the purposes of DNA warrants and collection orders (clause 8).

Finally, clause 9 of Bill S-9 amends section 607(6) of the Code, which codifies how the common law rule against double jeopardy works in Canadian criminal proceedings. This rule provides that an accused person cannot be tried again on the same or similar charges if he or she has already been legitimately acquitted or convicted, or has received a pardon in respect of those charges. The amendments introduced by clause 9 make it clear that notwithstanding the fact that the person may have previously been tried and convicted for the four new offences outside Canada, the rule against double jeopardy will not apply when the foreign trial did not meet certain basic Canadian legal standards, and the person did not serve a sentence for these offences.

## 1.2 CONTEXT FOR THE INTRODUCTION OF BILL S-9

For the past 10 to 12 years, the United Nations Security Council and the United Nations General Assembly have been particularly concerned about the issue of terrorism, including nuclear terrorism. They have passed resolutions and been instrumental in developing new treaties or agreements that would ensure Member States have the necessary legislative and policy mechanisms in place to respond to a changing terrorist threat environment. Some of the key resolutions and conventions are outlined below, as are efforts that have been made by Canada to implement the obligations they impose.

### 1.2.1 UNITED NATIONS SECURITY COUNCIL RESOLUTION 1373 (2001)

United Nations Security Council Resolution 1373 (2001)<sup>2</sup> required United Nations Member States to adopt certain anti-terrorism legislation and policies within 90 days in order to:

- prevent and repress the financing of terrorist acts;
- criminalize the wilful collection or provision of funds to be used to carry out terrorist acts;
- freeze the funds and other financial assets or economic resources used to commit or to facilitate the commission of terrorist acts;
- prohibit the making available of funds or financial or other related services for those purposes;
- suppress the recruitment of terrorist groups and the supply of weapons to terrorists;
- take the necessary steps to prevent the commission of terrorist acts; and
- deny safe haven to those who finance, plan, support or commit terrorist acts.

Resolution 1373 also called upon Member States to become parties to, and to fully implement, the relevant international conventions and protocols related to terrorism as soon as possible.

On 12 December 2001, the Government of Canada reported to the United Nations Security Council's Counter-Terrorism Committee on the steps it had taken to implement Resolution 1373 (2001).<sup>3</sup> Among the measures were amendments to the *Criminal Code* through the *Anti-terrorism Act*,<sup>4</sup> which came into force in December 2001. These amendments were made to ensure that any act or omission committed, threatened, attempted or counselled in respect of terrorist offences referred to in 10 anti-terrorist conventions that Canada had ratified would also be considered "terrorist activity" under section 83.01(1)(a) of the Code.

Among the offences that were newly classified as "terrorist activity" under section 83.01(1)(a) of the Code were the offences of:

- theft, fraudulent concealment, robbery, or extortion in relation to nuclear material, or obtaining such material through false pretences;<sup>5</sup>
- using intimidation in relation to a demand for nuclear material;<sup>6</sup> and
- threatening to use nuclear material to cause death or bodily harm, or to burn, destroy or damage real or personal property.<sup>7</sup>

While these offences existed as part of the *Criminal Code* prior to the enactment of the *Anti-terrorism Act*, having been added to the Code following Canada's ratification, in 1986 of the *Convention on the Physical Protection of Nuclear Material* (CPPNM),<sup>8</sup> it was not until the *Anti-terrorism Act* came into force that they constituted "terrorist activity."

## 1.2.2 UNITED NATIONS SECURITY COUNCIL RESOLUTION 1540 (2004)

Following the adoption of Resolution 1373 (2001), and three years after the terrorist attacks in New York City on 11 September 2001, the United Nations Security Council passed another resolution, Resolution 1540 (2004),<sup>9</sup> specifically dealing with the non-proliferation of weapons of mass destruction. This resolution focuses on nuclear terrorism, requiring Member States to take steps to prohibit non-state actors from acquiring nuclear weapons and to put additional measures in place to control nuclear materials and prevent proliferation. Resolution 1540 (2004) calls for Member States to:

- take and enforce effective measures to establish domestic controls to prevent the proliferation of nuclear, chemical, or biological weapons, and related materials;
- adopt legislation prohibiting the acquisition, use or threat of use of nuclear weapons by both state and non-state actors;
- extend such criminal legislation to apply to citizens extra-territorially and to embrace universal jurisdiction over any such acts regardless of nationality or location of the act; and

- include internal waters, territorial waters and airspace in the territory from which nuclear weapons are prohibited.

Resolution 1540 (2004) also established a Committee of the United Nations Security Council tasked with overseeing the implementation of this resolution (the 1540 Committee). The 1540 Committee receives from Member States reports on the various steps they have taken to implement the resolution's obligations, and it reports progress on implementation by Member States to the United Nations Security Council at large.<sup>10</sup> To date, Canada has filed three reports with the 1540 Committee outlining the various steps it has taken to implement the measures outlined in Resolution 1540 (2004), and in successive, related resolutions.<sup>11</sup>

### 1.2.3 *INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF ACTS OF NUCLEAR TERRORISM (2005)*

On 15 April 2005, approximately one year after the United Nations Security Council adopted Resolution 1540 (2004), the United Nations General Assembly adopted the *International Convention for the Suppression of Acts of Nuclear Terrorism* (ICSANT).<sup>12</sup> The ICSANT was the first international convention related to terrorism to open for signature after the 11 September 2001 terrorist attacks in the United States. It built upon both the *Convention on the Physical Protection of Nuclear Materials* and the *International Convention for the Suppression of Terrorist Bombings*.

Article 1 of the ICSANT defines certain terms, including "radioactive material," "nuclear material" and "device," while Article 2 outlines certain acts as offences, including:

- unlawful and intentional possession of radioactive material, or possession or making of a nuclear or radioactive device with intent to cause death, serious bodily injury or substantial damage to property or the environment (Article 2(1)(a));
- unlawful and intentional use of radioactive material or a nuclear or radioactive device, or use or damage to a nuclear facility that risks the release of radioactive material, with the intent to cause death, serious bodily injury, substantial damage to property or the environment, or to compel a person, state or international organization to do or refrain from doing something (Article 2(1)(b));
- making a credible threat to unlawfully and intentionally do the acts described in Article 2(1)(b) of the ICSANT (Article 2(2)(a));
- unlawful and intentional demanding of radioactive material, a nuclear or radioactive device, or a nuclear facility by credible threat or use of force (Article 2(2)(b));
- attempts to commit the possession and use offences outlined in Article 2(1) of the ICSANT (Article 2(3)); and
- participating as an accomplice in, organizing, or directing others to commit, or contributing as a member of an organized group with a common purpose to commit the offences outlined in articles 2(1) to 2(3) of the ICSANT (Article 2(4)).

Article 4 of the ICSANT exempts from the application of this convention certain acts carried out by states that are governed by other aspects of international law. Examples include the acts of armed forces in an armed conflict, as those acts are understood under international humanitarian law.<sup>13</sup> However, Article 4 goes on to specify that “the Convention does not address, nor can it be interpreted as addressing in any way the legality of the use or threat of use of nuclear weapons by States” (Article 4(4)).

Article 5 provides that States Parties shall establish the criminal offences outlined in Article 2 of the ICSANT under their national law and ensure that they are “punishable by appropriate penalties which take into account the grave nature of these offences.”

Article 7 specifies that States Parties to the Convention must take all possible steps to prevent and counter preparations for the commission, both inside and outside their territories, of the offences described in Article 2. Included are steps to prevent and counter the illegal activities of persons, groups and organizations that “encourage, instigate, organize, knowingly finance or knowingly provide technical assistance or information or engage in the perpetration of these offences.” These steps should include States Parties altering their national laws, if necessary. (Article 7(1)(a)).

Article 9 requires States Parties to take measures to allow states to establish the jurisdiction of their domestic courts over these offences not only when the offences occur within their territory, but also when the offences occur outside of their territory but where there is nonetheless a substantial connection between the commission of the offence and the state in question, such as when:

- the offence is committed on a vessel flying the flag of or an aircraft registered to that state (Article 9(1)(b)); or
- the offence is committed by a national of that state (Article 9(1)(c)).

Article 9 of the ICSANT also permits states to establish jurisdiction over offences occurring outside their territories in the following circumstances:

- the offence is committed against a national of that state (Article 9(2)(a));
- the offence is committed against a state or a government facility of that state abroad, including a state’s embassy or diplomatic or consular premises (Article 9(2)(b));
- the offence is committed by a stateless person who habitually resides in that state (Article 9(2)(c));
- the offence is committed to compel a state to do or abstain from doing something (Article 9(2)(d)); or
- the offence is committed aboard an aircraft operated by the government of that state (Article 9(2)(e)).

States Parties are further obligated, under Article 8 of the ICSANT, to make every effort to adopt appropriate measures to ensure the protection of radioactive material, taking into account the relevant recommendations and functions of the International Atomic Energy Agency.



The ICSANT entered into force on 7 June 2007. Canada signed the ICSANT on 14 September 2005, but has yet to ratify this convention.

1.2.4 AMENDMENT TO THE *CONVENTION ON THE PHYSICAL PROTECTION OF NUCLEAR MATERIAL* (2005)

In July 2005, three months after the ICSANT opened for signature, a diplomatic conference was convened to amend and strengthen the provisions of the CPPNM. States Parties to the CPPNM, including Canada, have adopted by consensus the proposed amendments arising out of this conference.<sup>14</sup>

The CPPNM Amendment has not yet entered into force, because it has not been ratified, accepted or acceded to by a sufficient number of States Parties.<sup>15</sup> Should it come into force, the name of the convention will be changed to “Convention on the Physical Protection of Nuclear Material and Nuclear Facilities.”

Presuming it comes into force, the CPPNM Amendment will obligate States Parties to protect nuclear facilities, as well as nuclear material used, stored and transported domestically, rather than merely requiring the States Parties to protect nuclear material during international transport, which is what the CPPNM requires.<sup>16</sup>

The Amendment also states that the CPPNM does not apply to the activities of armed forces during an armed conflict as those terms are understood in international humanitarian law, activities undertaken by military forces in the exercise of their official duties, nuclear material used or retained for military purposes or nuclear facilities containing such material.<sup>17</sup>

In addition, the CPPNM Amendment will amend Article 7 of the CPPNM to require States Parties to criminalize certain offences, including acts directed against nuclear facilities or the operation of such facilities where the intention is to cause death, serious injury or substantial damage to property or the environment (currently, Article 7 of the CPPNM only criminalizes such activities in relation to nuclear material).

The CPPNM Amendment will also alter Article 7 of the CPPNM to specify that participating in, directing, or contributing to the prohibited acts involving both nuclear material and nuclear facilities outlined in the convention are also offences as is contribution in the form of furthering the criminal activity or criminal purpose of a group by the commission of such offences.<sup>18</sup>

The CPPNM Amendment preserves the requirement currently found in Article 7 of the CPPNM for States Parties to ensure that the offences outlined in Article 7 of the convention are made “punishable by appropriate penalties which take into account their grave nature.”<sup>19</sup>

To date, Canada has not ratified the CPPNM Amendment.

### 1.2.5 SIGNING AND RATIFICATION OF TREATIES IN CANADA

Under Canadian law, a treaty's having been signed by a Canadian representative does not automatically cause it to come into force or be implemented. Such a signature merely signifies Canada's agreement in principle to the treaty. In a case where the implementation of a treaty requires amendments to Canadian legislation, the treaty is ratified only when such amendments or new legislation have been passed.

To date, Canada has not ratified either the ICSANT or the CPPNM Amendment. According to the news release and background document that accompanied the introduction of Bill S-9 in Parliament, this is because Canada does not yet have legislation in place to criminalize the offences outlined in the ICSANT or some of the offences outlined in the CPPNM Amendment.<sup>20</sup> The amendments Bill S-9 introduces into the Code represent Canada's efforts to align its domestic legislation with what is required by both conventions. If these amendments become law, Canada would presumably be in a position to ratify both the ICSANT and the CPPNM Amendment, something Canada, as well as other countries, committed to work toward at both the 2010 Nuclear Security Summit held in Washington, D.C.,<sup>21</sup> and the 2012 Nuclear Security Summit in Seoul, Korea.<sup>22</sup>

## 2 DESCRIPTION AND ANALYSIS

### 2.1 NEW TERMS AND A REVISED DEFINITION (CLAUSE 2)

Section 2 of the *Criminal Code*, more commonly known as the interpretation section, contains definitions of certain terms that are used elsewhere in the Code.

Clause 2(2) of Bill S-9 adds four new defined terms to section 2 of the Code: "environment," "nuclear facility," "nuclear material" and "radioactive material." Each of these terms is used in one or more of the new offences introduced into the Code by clause 5 of the bill.

The definitions of each of the new terms have been imported either from existing federal statutes or from the ICSANT. For example, the definition of "environment" found in clause 2(2) of the bill is identical to the definition of "environment" found in section 3(1) of the *Canadian Environmental Protection Act, 1999*,<sup>23</sup> and the definition of "nuclear material" comes directly from section 7(3.6) of the Code, which will be repealed and replaced by clause 3(2) of the bill.<sup>24</sup> The definitions of "nuclear facility" and "radioactive material" are almost identical to the definitions of these terms in Article 1 of the ICSANT.<sup>25</sup> The decision to define these terms by importing existing definitions appears to have been made to ensure consistent definitions of terms within domestic federal legislation and/or to ensure that once Bill S-9 comes into force, the new offences contained in the bill will be consistent with those found in the treaties Canada plans to ratify.

In addition, clause 2(1) of Bill S-9 amends the definition of "Attorney General" found in section 2 of the Code. It clarifies that the Attorney General of Canada, the Attorney or Solicitor General of a province, or lawful deputies of these individuals may function

as Attorney General during a prosecution regarding certain terrorism offences and serious offences committed against United Nations personnel or property. These include new offences that clause 5 of Bill S-9 introduces into the Code, when the acts or omissions constituting the offences have taken place outside Canada but are, through section 7 of the Code, under the jurisdiction of Canada's domestic courts.

## 2.2 DEFINITION OF "DEVICE" FOR SPECIFIC SECTIONS OF THE CODE (CLAUSES 4 AND 5)

Clause 4 of the bill changes the heading found before section 79 of the Code from "Dangerous Substances" to "Dangerous Materials and Devices" to reflect the fact that the words "nuclear material," "radioactive material" and "device" have specific meanings in new sections 82.3 to 82.6 of the Code.

Clause 5 provides the definition of the word "device" as it appears in new section 82.2 of the Code. This section specifies that the definition applies only in new sections 82.3 to 82.5 of the Code or, in other words, for three of the four *Criminal Code* offences that Bill S-9 introduces. The fourth new offence, which is outlined in section 82.6 of the Code, incorporates by reference the offences found in new sections 82.3 to 82.5. The decision to limit the applicability of the definition of "device" to the four new offences introduced by clause 5 appears to have been made to avoid confusion, as "device" has a different meaning in other sections of the Code.<sup>26</sup>

"Device," as defined in section 82.2, means:

- (a) a nuclear explosive device;
- (b) a device that disperses radioactive material;
- (c) a device that emits ionizing radiation and that is capable of causing death, serious bodily harm or substantial damage to property or the environment.<sup>27</sup>

Like the definitions of "radioactive material" and "nuclear facility" introduced into section 2 of the Code by clause 2 of the bill, the definition of "device" in section 82.2 seems to have been imported, with very slight wording changes, from Article 1 of the ICSANT.<sup>28</sup>

## 2.3 NEW OFFENCES AND ACTIVITIES EXEMPTED FROM THESE OFFENCES (CLAUSE 5)

As was stated in the first section of this legislative summary, the key change made by Bill S-9 is to introduce four new offences into the Code.

The first offence, described in new section 82.3 of the Code, makes it illegal to:

- possess, use, transfer, export, import, alter or dispose of nuclear or radioactive material, or a device;
- commit an act against a nuclear facility; or

- commit an act that causes serious interference with or disruption of a nuclear facility's operations.

Any of these acts is an offence where the intent is to cause death, serious bodily harm, or substantial damage to property or the environment. This is an indictable offence punishable upon conviction by up to life imprisonment.

The second offence, described in new section 82.4 of the Code, makes it illegal to:

- use or alter nuclear or radioactive material, or a device;
- commit an act against a nuclear facility; or
- commit an act that causes serious interference with or disruption of a nuclear facility's operations.

Any of these acts is an offence where the intent is to compel a person, government or international organization to do or refrain from doing something. This is also an indictable offence punishable upon conviction by up to life imprisonment.

The third offence, found in new section 82.5 of the Code, makes it illegal to commit any indictable offence under a federal statute where the intent is to obtain nuclear or radioactive material or a device, or to obtain access to a nuclear facility. As with new sections 82.3 and 82.4, this offence is an indictable offence punishable by up to life imprisonment.

The fourth offence, found in new section 82.6 of the Code, makes it illegal to threaten to commit any of the three new offences outlined above. While section 82.6 is also an indictable offence, it is punishable upon conviction by up to 14 years' imprisonment, a lesser maximum penalty than the other three new offences.

The penalties that may be imposed for any of these four offences are substantial, reflecting the requirement under articles 5 of the ICSANT and 7(2) of the CPPNM (unchanged by the CPPNM Amendment) that States Parties make the offences punishable by penalties appropriate to the grave nature of the offences.

New section 82.7, also introduced by clause 5 of the bill, exempts from the application of these four new offences both acts that are committed during an armed conflict "in accordance with customary international law or conventional international law applicable to the conflict," and "activities undertaken by military forces of a state in the exercise of their official duties," to the extent that those military activities are governed by other rules of international law. In other words, activities that might otherwise be covered by new sections 82.3 to 82.6 will not be offences if they are undertaken as an act of war under the laws of armed conflict as provided for by treaties (conventional international law) – e.g., the 1949 Geneva Conventions<sup>29</sup> and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*<sup>30</sup> – or through the general practice accepted as law by most states (customary international law). Section 82.7 essentially codifies similar exemptions contained in the ICSANT and the CPPNM, as modified by the CPPNM Amendment.<sup>31</sup>

### 2.3.1 BROAD SCOPE OF NEW SECTIONS 82.3 TO 82.6 OF THE CODE

It seems that the drafters of new sections 82.3 to 82.6 of the Code have combined the wording in the following provisions of the ICSANT, the CPPNM and the CPPNM Amendment in order to capture all of the relevant offence elements without having to introduce into the Code multiple offences with overlapping elements:

- articles 2(1) and 2(2)(b) of the ICSANT;
- articles 7(1)(a), 7(1)(b) and 7(1)(c) of the current CPPNM; and
- proposed new articles 7(1)(d) and 7(1)(e) of the CPPNM, which would be introduced by clause 9 of the CPPNM Amendment.

The result is that some of the new offences in the Code appear broader in scope than the offences in the international agreements.

#### 2.3.1.1 NEW SECTIONS 82.3 AND 82.4

New sections 82.3 and 82.4 of the Code may be wider in scope than the offences found in the ICSANT, CPPNM and the CPPNM Amendment because the drafters have taken almost all of the activities prohibited by Article 2(1) of the ICSANT, Article 7(1)(a) of the current CPPNM and proposed new articles 7(1)(d) and 7(1)(e) found in the CPPNM Amendment, and used them to create two separate offences, each of which has its own separate, and broadly defined, intent. In other words, sections 82.3 and 82.4 of the Code, taken together, criminalize not only the activities of possession and use, but also the transport, import, export, alteration or disposal of nuclear or radioactive material or devices, as well as activities directed against nuclear facilities or those that interfere with their operation. The only activity prohibited in the specified articles that does not appear to be prohibited by either section 82.3 or 82.4 of the Code is the *making of* a nuclear or radioactive device, which is prohibited by Article 2(1) of the ICSANT.

The required intent in section 82.3 of the Code is the intent to cause death, serious bodily harm or substantial damage to property or the environment, and the required intent under section 82.4 of the Code is the intent to compel a person, government or international organization to do or refrain from doing something. It seems that an attempt was made to include the intent provisions found in both Article 2(1)(a) and Article 2(1)(b) of the ICSANT in these new *Criminal Code* provisions. The effect, when combined with the acts prohibited by sections 82.3 and 82.4, is to make the new *Criminal Code* offences arguably broader in scope than the offences found in the individual international agreements.

#### 2.3.1.2 NEW SECTION 82.5

As indicated previously, new section 82.5 makes it an offence to commit any indictable offence under Canadian federal law where the intent is to obtain nuclear or radioactive material, a device, or access to a nuclear facility.

The wording used in section 82.5 incorporates the acts prohibited in Article 2(2)(b) of the ICSANT, which makes it an offence to intentionally and unlawfully demand radioactive material, a device or a nuclear facility. It also incorporates several of the acts prohibited by Article 7 of the CPPNM (for example, theft, robbery, embezzlement and fraudulent obtaining of nuclear material, as described in articles 7(1)(b) and 7(1)(c)).

However, one could argue that the ambit of the offence found in section 82.5 of the Code is broader than the ambit of the offences outlined in the ICSANT, CPPNM and CPPNM Amendment, because section 82.5 makes it an offence to commit *any* indictable offence under Canadian federal law, as long as the intent behind it is to obtain nuclear or radioactive material or a device, or to obtain access to a nuclear facility. It does not restrict the prohibited activities to “unlawful demand” or theft, robbery, embezzlement or fraud, for example.

### 2.3.1.3 NEW SECTION 82.6

New section 82.6 makes it an offence to threaten to commit any of the offences outlined in sections 82.3 to 82.5 of the Code. The ICSANT also prohibits threats of this nature, but only in relation to the “use” offence described in Article 2(1)(b) of that Convention<sup>32</sup> or in respect of a demand for radioactive material, a device or a nuclear facility by credible threat or by use of force.<sup>33</sup>

Similarly, the CPPNM, as amended by the CPPNM Amendment, would criminalize threats in relation to the theft or robbery of nuclear material,<sup>34</sup> threats to use nuclear material to cause death, serious injury or substantial damage to property or the environment,<sup>35</sup> or threats to commit an act directed against a nuclear facility or to interfere with the operations of a nuclear facility,<sup>36</sup> but would not go beyond that.

Given the breadth of the offences found in sections 82.3 to 82.5 of the Code and, in particular, the offence outlined in section 82.5, and given the fact that the threat offence in section 82.6 applies for all three offences, this latter offence is broader in scope than the threat offences found in Article 2 of the ICSANT or in Article 7 of the CPPNM, as modified by the CPPNM Amendment.

## 2.4 EXTRATERRITORIALITY (CLAUSE 3)

Article 8 of the CPPNM requires States Parties to criminalize the acts described in Article 7 of the CPPNM not only when they take place within the territory of the state and are perpetrated by nationals of that state, but also when they occur outside the state and/or are perpetrated by non-nationals, in certain circumstances.<sup>37</sup>

As required by Article 8 of the CPPNM, Canada established extraterritorial jurisdiction over those who commit nuclear material offences by enacting sections 7(3.2) to 7(3.6) of the Code. While the CPPNM Amendment would not amend Article 8 of the CPPNM, its proposed amendment of Article 7 to add new offences to the convention means that Canada would be required, upon ratifying the amendment, to ensure that extraterritorial jurisdiction may be exercised over these new offences. Likewise, where there is a substantial connection to the state, Article 9

of the ICSANT obligates States Parties to exercise extraterritorial jurisdiction over the prohibited activities described in Article 2 in some circumstances and allows them to do so in others.

As a result, to comply with the obligations imposed by these conventions, section 7 of the Code must be amended to ensure that extraterritorial jurisdiction is extended to the offences regarding nuclear or radioactive material, a device, or a nuclear facility now found in sections 82.3 to 82.6 of the Code. Clause 3(1) of Bill S-9 therefore introduces section 7(2.21) into the Code. This section provides that if a person commits, outside Canada, an offence that, if committed in Canada, would constitute an offence under sections 82.3 to 82.6 of the Code, that person can be prosecuted in Canada if the offences are committed:

- on a ship registered or licensed under a federal statute, or for which an identification number has been issued under such a statute (section 7(2.21)(a));
- on an aircraft registered in Canada (section 7(2.21)(b)(i)) or leased and operated by a person qualified to be registered as the owner of an aircraft in Canada, pursuant to regulations made under the *Aeronautics Act* (section 7(2.21)(b)(ii));
- by a Canadian citizen (section 7(2.21)(c)); or
- by someone who is present in Canada following their commission (section 7(2.21)(d)).

Since the offences described in sections 82.3 to 82.6 of the Code, incorporated by reference into section 7(2.21) of the Code, are much broader in scope than the nuclear material offences currently described in sections 7(3.2) to 7(3.6), clause 3(2) of Bill S-9 repeals sections 7(3.2) to 7(3.6).

## 2.5 AMENDMENT TO THE DEFINITION OF “TERRORIST ACTIVITY” (CLAUSE 6)

Article 6 of the ICSANT specifies that, in relation to the offences outlined in Article 2, States Parties shall:

adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention, in particular where they are intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature and are punished by penalties consistent with their grave nature.<sup>38</sup>

In addition, clause 9 of the CPPNM Amendment would amend Article 7 of the CCPNM to specify that States Parties must make the following acts offences under national law:

- participation in any of the offences described in that article;<sup>39</sup>
- directing or organizing persons to commit such offences;<sup>40</sup> or
- acts contributing to the commission of the offences by a group of persons acting with a common purpose.<sup>41</sup>

To implement these obligations, clause 6 of Bill S-9 amends the definition of “terrorist activity” in section 83.01(1)(a)(v) of the Code, the interpretation section of Part II.1, dealing with terrorism. The amendment designates as “terrorist activity” the four new offences that were added to the Code by clause 5 (sections 82.3 to 82.6 of the Code) and were incorporated by reference into section 7(2.21) of the Code. It makes threats, counselling, or attempts to commit them “terrorist activity” as well.

Furthermore, since all of the various terrorism offences found in Part II.1 of the Code incorporate either the definition of “terrorist activity” or “terrorist group” found in section 83.01(1) of the Code by reference, adding to section 83.01(1)(a)(v) a reference to section 7(2.21) also extends the nature of the acts or omissions that constitute terrorism offences under the Code. In particular, because they are captured by section 7(2.21), the offences that were formerly outlined in sections 7(3.2) and 7(3.3) of the Code and were not classified as “terrorist activities” are now classified as terrorist activities under the Code. New section 83.01(1)(a)(v) makes specific reference to the CPPNM Amendment and the ICSANT. Clause 6 of Bill S-9 also removes all reference to sections 7(3.2) to 7(3.6) from section 83.01(1)(a)(v) of the Code.

## 2.6 EXTENSION OF SPECIALIZED ELECTRONIC SURVEILLANCE AND WARRANT PROVISIONS (CLAUSES 7 AND 8)

The *Anti-terrorism Act* introduced amendments into the Code which made it easier to use electronic surveillance to intercept the communications of those for whom there are reasonable grounds to believe that they have committed or will commit terrorism offences. The amendments also made it easier to collect DNA from them.

With respect to electronic surveillance, the *Anti-terrorism Act* amended the Code’s wiretap provisions so that the investigative powers introduced in 1997 to make it easier to use electronic surveillance against criminal organizations could also be used to investigate the terrorism offences described above. The changes had the effect of:

- eliminating the need to demonstrate that electronic surveillance is a last resort in the investigation of terrorism offences, which is an exception to the general rule applicable in other circumstances;
- extending the period of validity of a wiretap authorization from 60 days to up to one year when police are investigating a terrorism offence; and
- permitting a delay of up to three years in notifying a target after surveillance has taken place, as opposed to the 90-day period that is applicable for other criminal offences.

The *Anti-terrorism Act* also amended the DNA warrant and collection scheme found in the Code to make the terrorism offences described in earlier sections of this legislative summary “primary designated offences” for the purpose of the collection scheme. In other words, the Code provisions allowing peace officers to apply for, and for judges to issue, DNA warrants for the seizure of bodily substances during criminal investigations of certain offences, and those making collection of bodily DNA



substances from individuals convicted of certain offences mandatory, were extended to apply to people being investigated for the terrorism offences described above, as well as those convicted of them.

Clause 7 of Bill S-9 adds the four new offences found in new sections 82.3 to 82.6 of the Code to section 183 of the Code. Section 183 defines the terms used in Part VI of the Code which, among other things, gives peace officers the ability to apply to judges for warrants to intercept private communications of individuals when there are reasonable grounds to believe those individuals have committed or will commit certain offences. By adding references to sections 82.3 to 82.6 of the Code to section 183, clause 7 ensures that wiretap provisions in the Code applicable to criminal organization and other terrorism offences found in the Code also apply for these four new nuclear terrorism offences.

Clause 8 of Bill S-9 amends section 487.04(a.1) of the Code, making the four new terrorism offences added by clause 5 of the bill “primary designated offences” for DNA collection. This allows peace officers to apply for, and judges to issue, DNA warrants for the seizure of bodily substances when they are investigating individuals for these offences. Clause 8 also makes it mandatory to collect DNA substances from those convicted of these new offences, as is the case for those convicted of the other terrorism offences contained in the Code.

## 2.7 DOUBLE JEOPARDY (CLAUSE 9)

As stated in an earlier section of this legislative summary, Section 607 of the *Criminal Code* codifies how the common law rule against double jeopardy works in Canadian criminal proceedings. It provides that an accused person cannot be tried again on the same or similar charges if he or she has already been legitimately acquitted or convicted, or has received a pardon in respect of those charges.

Despite this general rule, section 607(6) of the Code states that for many of the offences described in section 7 of the Code, if individuals were previously convicted *in absentia* for these acts by a foreign court without being represented by counsel, and did not serve the imposed sentence, they will not be able to avail themselves of the rule against double jeopardy. Clause 9 amends section 607(6) to ensure that this section applies to the new offences added to the Code by clause 5 of the bill and incorporated by reference into new section 7(2.21), where the acts in question have been committed outside of Canada but where the Canadian courts retain jurisdiction over the person and/or subject matter.

In other words, section 607(6) has been amended to stipulate that notwithstanding the fact that the person may have previously been tried and convicted for these new offences outside Canada, the rule against double jeopardy will not apply when the foreign trial did not meet certain basic Canadian legal standards, and the person did not serve a sentence for these offences, notwithstanding his or her conviction. In such circumstances, a Canadian court may try this person, once again, for the same offence of which he or she was convicted by a foreign court. By removing all reference to sections 7(3.2) to 7(3.6) from section 607(6) of the Code, Clause 9 of Bill S-9 takes into account the fact that the nuclear materials offences mentioned in

sections 7(3.2) to 7(3.6) of the Code are being repealed and replaced by new section 7(2.21).

## 2.8 COMING INTO FORCE (CLAUSE 10)

Clause 10 of Bill S-9 specifies that the Act comes into force on a day to be fixed by order of the Governor in Council. Accordingly, it appears that there are no plans to have some parts of the Act come into force before others, although the CPPNM Amendment is currently not in force.

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## NOTES

1. [Criminal Code](#), R.S.C. 1985, c. C-46.
2. UN Security Council, [Resolution 1373 \(2001\)](#), S/RES/1373 (2001), 28 September 2001.
3. Government of Canada, [Report of the Government of Canada to the Counter-Terrorism Committee of the United Nations Security Council on Measures Taken to Implement Resolution 1373 \(2001\)](#), 12 December 2001.
4. [Anti-terrorism Act](#), S.C. 2001, c. 41.
5. See the Code, ss. 83.01(1)(a)(v), 7(3.4)(a) and 7(3.4)(b).
6. *Ibid.*, ss. 83.01(1)(a)(v) and 7(3.4)(c).
7. *Ibid.*, ss. 83.01(1)(a)(v) and 7(3.4)(d).
8. [Convention on the physical protection of nuclear material](#), 1456 U.N.T.S. 124 (1979), No. 24631 [CPPNM]. Article 7 of this convention requires States Parties to criminalize:
  - the receipt, possession, use, transfer, alteration, disposal or dispersal of nuclear material which causes or is likely to cause death or serious injury to any person or substantial damage to property;
  - theft or robbery of nuclear material;
  - embezzlement or fraudulent obtaining of nuclear material; acts constituting a demand for nuclear material by threat or use of force or by any other form of intimidation;
  - threats to use nuclear material to cause death or serious injury to any person or substantial property damage, or to compel a natural or legal person, international organization or state to do or to refrain from doing any act; and
  - attempts to commit such an act or acting as an accessory to such acts.

Canada signed the CPPNM on 23 September 1980 and subsequently ratified it on 21 March 1986. The Convention entered into force on 8 February 1987, 30 days after a sufficient number of States Parties had ratified it. See CPPNM, art. 19(1).
9. UN Security Council, [Resolution 1540 \(2004\)](#), S/RES/1540 (2004), 28 April 2004.
10. *Ibid.* See also the [1540 Committee website](#). While the 1540 Committee was originally given only a two-year mandate by the United Nations Security Council, its mandate has been extended by successive Security Council Resolutions, which have also imposed more particularized obligations on both UN Member States and the 1540 Committee to further the objectives of the original resolution. See United Nations Security Council, [Resolution 1673 \(2006\)](#), S/RES/1673 (2006), 27 April 2006; United Nations Security Council, [Resolution 1810 \(2008\)](#), S/RES/1810 (2008), 25 April 2008; and United Nations Security Council, [Resolution 1977 \(2011\)](#), S/RES/1977 (2011), 20 April 2011. Currently, the 1540 Committee has a mandate to continue its duties until 2021.

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11. For Canada's three reports to the 1540 Committee, see "[National Reports](#)," *1540 Committee*; for its action plan for implementation of Resolution 1540 (2004), see "[National Action Plans](#)," *1540 Committee*; and for a chart outlining the obligations imposed on UN Member States by this resolution, and the specific steps Canada has taken towards implementation, see "[Committee-Approved Matrices](#)," *1540 Committee*.
12. [International Convention for the Suppression of Acts of Nuclear Terrorism](#) [ICSANT], UN Doc. A/RES/59/290 (2005).
13. International humanitarian law refers to a set of rules found in customary international law as well as in treaties, such as the Geneva Conventions, to name but one example, that seeks, for humanitarian reasons, to limit the effects of armed conflict.
14. IAEA Board of Governors General Conference, [Nuclear Security – Measures to Protect Against Nuclear Terrorism: Amendment to the Convention on the Physical Protection of Nuclear Material](#) [CPPNM Amendment], GOV/INF/2005/10-GC(49)/INF/6, 6 September 2005.
15. Information regarding which countries have ratified the CPPNM Amendment is available at IAEA, "[Amendment to the Convention on the Physical Protection of Nuclear Material](#)," 5 April 2012.
16. See CPPNM Amendment, cc. 4 to 6.
17. *Ibid.*, c. 5.
18. *Ibid.*, c. 9.
19. See CPPNM, art. 7(2), which would remain unchanged by the CPPNM Amendment.
20. See Department of Justice, "[Government Introduces Legislation to Combat Nuclear Terrorism](#)," News release, 27 March 2012; and Department of Justice, "[Background: Nuclear Terrorism Legislation](#)," 27 March 2012.
21. See Prime Minister of Canada, "[Communiqué of the Washington Nuclear Security Summit](#)," 13 April 2010.
22. See Council on Foreign Relations, "[Seoul Communiqué at 2012 Nuclear Security Summit](#)," 27 March 2012.
23. [Canadian Environmental Protection Act, 1999](#), S.C. 1999, c. 33.
24. A fuller explanation for the repeal of section 7(3.6) of the Code by clause 3(2) of Bill S-9 is provided in section 2.4, "Extraterritoriality," of this legislative summary.
25. See ICSANT, arts. 1(3) and 1(1).
26. See, for example, section 431.2(1) of the Code, which defines "explosive or other lethal device" for the purpose of section 431.2(2), which describes the offence of delivering, placing, discharging or detonating an explosive or other lethal device into a place of public use, government or public facility, public or transportation system or infrastructure facility. "Device" as defined by section 431.2(1) has a much broader meaning than "device" as defined by section 82.2.
27. New section 82.2 of the Code; clause 5 of Bill S-9.
28. See ICSANT, art. 1(1).
29. These include the [Convention \(I\) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field](#), 75 U.N.T.S. 31 (1949); the [Convention \(II\) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea](#), 75 U.N.T.S. 85 (1949); the [Geneva Convention Relative to the Treatment of Prisoners of War \(Third Geneva Convention\)](#), 75 U.N.T.S. 135 (1949); and the [Convention \(IV\) relative to the Protection of Civilian Persons in Time of War](#), 75, U.N.T.S. 287 (1949).

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30. [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#), 1465 U.N.T.S. 85 (1984).
31. See ICSANT, art. 4; and CPPNM Amendment, c. 5, which would add Article 2(4) to the CPPNM.
32. See ICSANT, art. 2(2)(a).
33. Ibid., art. 2(2)(b).
34. See CPPNM, art. 7(1)(b); and CPPNM Amendment, c. 9, which contains proposed new art. 7(1)(g)(ii) of the CPPNM.
35. See CPPNM Amendment, c. 9, which contains proposed new Article 7(1)(g)(i) of the CPPNM.
36. See CPPNM Amendment, c. 9, which contains proposed new articles 7(1)(e) and 7(1)(g) of the CPPNM.
37. See CPPNM, art. 8.
38. See ICSANT. art. 6.
39. See CPPNM Amendment, c. 9, which contains proposed new Article 7(1)(j) of the CPPNM.
40. Ibid.
41. See *ibid.*, for proposed Article 7(1)(k) of the CPPNM.