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AMENDMENT TO THE CONVENTION ON PHYSICAL PROTECTION OF NUCLEAR MATERIAL

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Mr. BIDEN, from the Committee on Foreign Relations, submitted the following

REPORT

[To accompany Treaty Doc. 110–6]

The Committee on Foreign Relations, to which was referred the Amendment to the Convention on the Physical Protection of Nuclear Material, adopted on July 8, 2005 (the "Amendment") (Treaty Doc. 110–6), having considered the same, reports favorably thereon with one reservation, three understandings, and one declaration, as indicated in the resolution of advice and consent, and recommends that the Senate give its advice and consent to ratification thereof, as set forth in this report and the accompanying resolution of advice and consent.

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I. PURPOSE

This Amendment supplements the Convention on the Physical Protection of Nuclear Material (the "CPPNM" or the "Convention") (Treaty Doc. 96–43)[1] and requires each State Party to establish, implement, and maintain an appropriate physical protection regime applicable to nuclear facilities used for peaceful purposes and nuclear material used for peaceful purposes in domestic use, storage, and transport. Such a regime is to have the aim of protecting

[1] The Senate approved the CPPNM on July 30, 1981 and the United States deposited its instrument of ratification on December 13, 1982.

against theft of nuclear material, ensuring the implementation of measures to locate and recover missing or stolen nuclear material, protecting nuclear material and nuclear facilities from sabotage, and mitigating or minimizing the radiological consequences of sabotage. The Amendment also provides for expanded international cooperation mechanisms and additional criminal offenses that each State Party must make punishable by law. The Amendment is designed to expand and strengthen the existing physical protection regime established by the CPPNM.

II. BACKGROUND

The CPPNM, which was adopted in 1979 and entered into force in 1987, establishes an international framework for improving the physical protection of nuclear material used for peaceful purposes while in "international nuclear transport"[2] and for international cooperation in preventing the unlawful taking or theft of nuclear material and recovering nuclear material that has been stolen. The CPPNM requires States Parties, like other counterterrorism treaties to which the United States is a party, to criminalize certain offenses and either extradite or submit for prosecution alleged offenders. The extradite or prosecute regime is particularly useful in that it makes it difficult for perpetrators to find refuge in a country that cannot or will not prosecute. When signing the implementing legislation for the CPPNM in 1982, President Reagan declared: "This step symbolizes our firm commitment both to preventing the spread of nuclear explosives and to fighting the scourge of terrorism."[3] The Convention has been widely ratified; as of July 2008, it had 136 Parties.

The CPPNM, however, does not apply to nuclear facilities, and its physical protection requirements apply only to nuclear material used for peaceful purposes while in international nuclear transport. Thus, it was determined that a further amendment to the CPPNM would be useful to fill in the gaps in the current Convention's framework.[4] Specifically, the Amendment establishes (1) new international norms for the physical protection of nuclear material used for peaceful purposes (without regard to whether such material is in international nuclear transport) and nuclear facilities used for peaceful purposes, including protection from sabotage; (2) strengthened obligations for cooperation among States Parties to the Amendment on matters of physical protection (including recovery of unlawfully taken nuclear material), for protection of the confidentiality of physical protection information, and to prevent sabotage; and (3) new criminal offenses that must be made punishable by

[2] International nuclear transport, as defined by the Convention, "means the carriage of a consignment of nuclear material by any means of transportation intended to go beyond the territory of the State where the shipment originates beginning with the departure from a facility of the shipper in that State and ending with the arrival at a facility of the receiver within the State of ultimate destination." *See* Article 1(c).

[3] "Statement on Signing the Convention on the Physical Protection of Nuclear Material Implementation Act of 1982," Ronald Reagan Presidential Library, *available at*: http://www.reagan.utexas.edu/archives/speeches/1982/101982a.htm

[4] It should be noted that, unlike the Convention on Nuclear Terrorism, the CPPNM and this Amendment apply only to nuclear material-defined as plutonium, except when the concentration of the isotope plutonium-238 is greater than 80%; uranium-233; uranium enriched in the isotopes uranium-233 or uranium-235; or natural uranium already extracted from ore or ore-residue; and any material containing one or more of the foregoing—and not to other radioactive materials.

States Parties to the Amendment under their national law, such as sabotage and smuggling.

III. MAJOR PROVISIONS

A detailed paragraph-by-paragraph analysis of the Amendment may be found in the Letter of Submittal from the Secretary of State to the President, which is reprinted in full in Treaty Document 110–6. A summary of key provisions is set forth below.

Expanding the Scope of the CPPNM

Paragraphs 1, 2, 3, and 4 of the Amendment make changes to the underlying Convention that reflect the expanded purpose of the CPPNM, as amended. Paragraph 1 changes the title of the Convention so that it would read "Convention on Physical Protection of Nuclear Material and Nuclear Facilities." Paragraph 2 amends the preamble of the CPPNM to reflect the national and international reasons for conclusion of the Amendment. The changes to the preamble, for example, specifically express the desire of States Parties to avert the danger posed by illicit trafficking, the unlawful taking and use of nuclear material, and the sabotage of nuclear material and nuclear facilities. Paragraph 4 amends the Convention to include a provision that identifies the purpose of the Convention, as amended:

The purposes of this Convention are to achieve and maintain worldwide effective physical protection of nuclear material used for peaceful purposes and of nuclear facilities used for peaceful purposes; to prevent and combat offenses relating to such material and facilities worldwide; as well as to facilitate co-operation among States Parties to those ends.

Paragraph 3 amends the Convention to include definitions for the terms "nuclear facility" and "sabotage," which further reflect the expanded scope of the CPPNM that would be effected by the Amendment.

Expanded Physical Protection Regime

Paragraph 5 amends Article 2 of the CPPNM and, among other things, specifies that "the responsibility for the establishment, implementation and maintenance of a physical protection regime within a State Party rests entirely with that State."

Paragraph 6 adds a new Article 2A to the Convention, which requires States Parties to "establish, implement and maintain an appropriate physical protection regime applicable to nuclear material and nuclear facilities under its jurisdiction . . . ." The required "regime" is to have four objectives:

i. protecting against theft and other unlawful taking of nuclear material in use, storage and transport;

ii. ensuring the implementation of rapid and comprehensive measures to locate and, where appropriate, recover missing or stolen nuclear material;

iii. protecting nuclear materials and nuclear facilities from sabotage; and

iv. mitigating or minimizing the radiological consequences of sabotage.

In order to implement this regime, States Parties are required to:

i. establish and maintain a legislative and regulatory framework to govern physical protection;

ii. establish or designate a competent authority or authorities responsible for the implementation of the legislative and regulatory framework; and

iii. take other appropriate measures necessary for the physical protection of nuclear material and nuclear facilities.

In testimony before the committee, administration officials explained that it will not be necessary to promulgate new regulations to fulfill the obligations under this paragraph, as these requirements are consistent with the physical security practices that are already in use in the United States. Pursuant to paragraph (2)(b) of the new Article 2A of the amended Convention, the United States will designate the Department of Energy (DOE) as the U.S. competent authority with respect to relevant DOE facilities and the Nuclear Regulatory Commission (NRC) as the U.S. competent authority with respect to commercial licensees. Officials described the legislative and regulatory framework in place that would implement obligations regarding the physical protection regime as follows:

> For commercial licensed facilities, the Nuclear Regulatory Commission (NRC) has the legislative mandate, via a number of statutes (primarily, the Atomic Energy Act of 1954, as amended, and the Energy Reorganization Act of 1974), to protect nuclear material within its purview. NRC has several layers of agency-wide regulations relating to security and physical protection, beginning with Title 10 of the Code of Federal Regulations. 10 CFR Parts 26, 50, 73, 74 and 95 all contain provisions governing physical protection. 10 CFR Part 110 also requires, by establishing them as export licensing criteria, that certain physical security measures be maintained with respect to nuclear materials and production or utilization facilities exported. NRC promulgates other regulatory measures relating to physical protection as part of its security regulation framework, including orders and regulatory guides.
>
> For the Department of Energy (DOE), there are a series of DOE orders and manuals for achieving and maintaining physical protection in DOE facilities. They include the following:
>
> DOE O 470.3A (Order, 11/29/2005, HS) Design Basis Threat Policy (U). The order defines the Design Basis Threat for DOE facilities, including theft/diversion and radiological sabotage.
>
> DOE M 470.4–1 Chg 1 (Manual, 08/26/2005, HS) Safeguards and Security Program Planning and Management. The manual establishes program planning and management requirements for the Department's Safeguards and Security.
>
> DOE M 470.4–2 Chg 1 (Manual, 08/26/2005, HS) Physical Protection. This Manual establishes requirements for

the physical protection of safeguards and security interests.

DOE M 470.4–3 Chg 1 (Manual, 08/26/2005, HS) Protective Force. The manual establishes requirements for management and operation of the DOE Protective Force, establishes requirements for firearms operations and defines the firearms courses of fire.

DOE M 470.4–6 Chg 1 (Manual, 08/26/2005, HS) Nuclear Material Control and Accountability. The manual establishes a program for the control and accountability of nuclear materials within the Department of Energy.

DOE O 470.4A (Order, 05/25/2007, HS) Safeguards and Security Program. The Order establishes roles and responsibilities for the Department of Energy Safeguards and Security Program.

Paragraph 3 of the new Article 2A of the amended Convention states that when implementing a physical protection regime, each State Party shall "apply insofar as is reasonable and practicable" certain fundamental principles of physical protection of nuclear material and nuclear facilities that are listed in this paragraph (the "Principles"). The Principles listed provide specifics regarding the responsibilities of States Parties in providing for the physical protection of nuclear material and facilities. For instance, Principle G says that a State should base its physical protection on the State's current evaluation of the threat; the U.S. physical protection regime is built on this basis, and the United States has pressed for other countries to adopt it as well. Further, Principle F states that organizations implementing physical protection measures should give due priority to the development and maintenance throughout the entire organization of a "security culture" necessary to ensure the effective implementation of physical protection measures. Principle B states that it is the responsibility of States Parties to ensure that nuclear material is adequately protected during international transport, until that responsibility is transferred to another State. Principle I calls for defense in depth, i.e., that a State Party's "requirements for physical protection should reflect a concept of several layers and methods of protection (structural or other technical, personnel and organizational) that have to be overcome or circumvented by an adversary in order to achieve his objectives." In testimony before the committee, administration officials asserted that the "NRC applies the Fundamental Principles through its regulations and regulatory process."

As noted above, the Principles are to be applied by States Parties "insofar as is reasonable and practicable." In testimony before the committee, Principal Deputy Assistant Secretary of State Patricia McNerney explained why this language was included:

> The phrase "insofar as reasonable and practicable" was included in subparagraph 3 of [the] new Article 2A (added by paragraph 6 of the Amendment) to permit States Parties the flexibility to adapt the Fundamental Principles to their own nuclear programs. The Amendment is intended for many states with vastly different nuclear infrastructures—from those with no nuclear materials to those that have advanced nuclear programs—so that flexibility in im-

> plementation of the Fundamental Principles was essential and was a bottom-line requirement for the United States and many other States as well in the negotiation of the Amendment.

Paragraph 4 of the new Article 2A of the amended Convention provides that this Article "shall not apply to any nuclear material which the State Party reasonably decides does not need to be subject to the physical protection regime established . . . taking into account the nature of the material, its quantity and relative attractiveness and the potential radiological and other consequences associated with any unauthorized act directed against it and the current evaluation of the threat against it." In response to questions from the committee regarding this "opt-out" provision, the administration testified as follows:

> The "opt-out" was originally proposed by the United Kingdom, supported by Belgium, during the June 2002 Open-Ended Experts Group meeting. The UK stated that it considered that very small quantities of nuclear material should be outside the nuclear regulatory framework, as they are of very little proliferation concern and do not need to be subject to a full nuclear security regime. There was consideration of whether the exclusion of very small quantities of nuclear material could be achieved under the "graded approach" Fundamental Principle, but the UK opposed addressing small quantities in that way. Its position was that it was very important to ensure that the graded approach was applied to determining what physical protections measures were appropriate, not to the existence of a physical protection regime at all. We do not anticipate that the United States would make use of this "opt-out" provision.

International Cooperation in the Recovery and Protection of Stolen Nuclear Material

Paragraph 7 amends Article 5 of the CPPNM, which provides a framework for international cooperation in the recovery and protection of stolen nuclear material. The changes made to this article include broadening the framework of international cooperation to include the new offenses added by Paragraph 9 of the Amendment, such as sabotage, or a credible threat of sabotage. For example, if nuclear material or a nuclear facility is sabotaged in the territory of a State Party, and if in its view other States are likely to be radiologically affected, that State Party would be required by one of the new provisions to "take appropriate steps to inform as soon as possible the State or the States which are likely to be radiologically affected and to inform, where appropriate, the [IAEA] and other relevant international organizations, with a view to minimizing the radiological consequences thereof."

Confidential Information

Paragraph 8 amends Article 6 of the CPPNM, which continues to provide protection for confidential information, consistent with States Parties' national law, and makes clear that "States Parties shall not be required to provide any information which they are not

permitted to communicate pursuant to national law or which would jeopardize the security of the State concerned or the physical protection of nuclear material or nuclear facilities." Among other things, the changes to Article 6 provide that if a State Party has received information from another State Party in confidence, the receiving State Party "may provide this information to third parties only with the consent of that other State Party."

Additional Offenses for the Extradite or Prosecute Regime

Paragraph 9 amends Article 7 of the CPPNM, which sets forth certain offenses covered by the Convention that each State Party is required to make punishable under its national law and either extradite or submit for prosecution alleged offenders. Paragraph 9 amends existing offenses (to include, for example, criminal acts related to nuclear facilities, rather than just nuclear material) and adds new ones. The new offenses can be summarized as follows:

> i. Smuggling nuclear material into or out of a State without "lawful authority";
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> ii. Sabotaging a nuclear facility;
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> iii. Organizing or directing others to commit one of the offenses covered by the Convention, as amended; and
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> iv. Committing an act that contributes to the commission by a group of persons acting with a common purpose of an offense covered by the Convention, as amended.

Paragraph 12 amends Article 14(3) of the CPPNM, which currently provides that when an offense involves nuclear material used for peaceful purposes in domestic use, storage, or transport, and both the alleged offender and the nuclear material remain in the territory of the State Party in which the offense was committed, nothing in the Convention shall be interpreted as requiring that State Party to provide information concerning criminal proceedings arising out of such an offense. Paragraph 12 amends Article 14 so that the coverage of this provision is extended to offenses involving nuclear facilities, where the alleged offender remains in the territory of the State Party in which the offense was committed.

Exceptions from Scope

Paragraph 5 in part amends Article 2 of the CPPNM to explicitly exclude from the scope of the Convention the following three items, all of which were implicitly excluded from the scope of the original CPPNM: (1) "activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law," (2) "activities undertaken by the military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law" and (3) "nuclear material used or retained for military purposes or to a nuclear facility containing such material." In relation to this last exclusion, administration officials testified as follows:

> This exclusion merely makes explicit what was implicit in the original CPPNM in regard to nuclear materials used for "peaceful purposes." The term "peaceful purposes" was commonly understood for these purposes as excluding mili-

tary materials and defense programs. During the Amendment negotiation, several countries attempted to weaken further this language, some explicitly including military materials and facilities. Thus, in order to preclude any potential for compromise of national security, military materials and facilities were explicitly excluded.

As a result of this exclusion, States Parties would have no obligation under the amended CPPNM to provide, for example, cooperation and assistance to a requesting State to the extent feasible in the recovery and protection of nuclear material, if that nuclear material belongs to the military. Of course, States Parties could provide such assistance voluntarily and the committee expects that the United States would be among those countries that would do so, if doing so would not compromise U.S. national security.

IV. Entry Into Force

In accordance with Article 20 of the CPPNM, the Amendment will enter into force for each State Party that deposits its instrument of ratification, acceptance, or approval of the Amendment on the thirtieth day after the date on which two-thirds (87) of the States Parties to the CPPNM at the time the Amendment was adopted have deposited their instruments of ratification, acceptance, or approval of the Amendment with the depositary. Thereafter, the Amendment will enter into force for any other State Party on the day on which that State Party deposits its instrument of ratification, acceptance, or approval of the Amendment.

As of July 17, 2008, 17 States have deposited their instruments of ratification, acceptance, or approval of the Amendment with the depositary.

V. Implementing Legislation

With the exception of the provisions in the Amendment that obligate the United States to criminalize certain offenses, to make those offenses punishable by appropriate penalties, and to authorize the assertion of jurisdiction over such offenses, this Amendment is self-executing. The provisions that are not self-executing would be implemented through legislation.

Some of the offenses States Parties are obligated to criminalize are already covered by existing provisions in the U.S. Code. For example, the Amendment's prohibition against causing damage to a nuclear facility would be implemented in part by 42 U.S.C. § 2284, which prohibits sabotage of nuclear facilities. For those offenses not covered in existing provisions of the U.S. Code, it will be necessary to enact further implementing legislation prior to U.S. ratification of the Amendment. In light of this, the Department of Justice has submitted a draft bill to Congress entitled the "Nuclear Terrorism Conventions Implementation Act of 2008," which would supplement existing provisions of the U.S. Code in order to fully implement not just this Amendment, but also the International Convention for Suppression of Acts of Nuclear Terrorism (Treaty Doc. 110–4). This draft legislation is currently under consideration by the Committees on the Judiciary of the House and Senate. The committee understands that the executive branch will not deposit an instrument of ratification for this Amendment until legislation has been en-

acted that will allow the United States to fully implement the Amendment.

VI. Committee Action

The committee held a public hearing on the Amendment on May 7, 2008. Testimony was received from Ms. Patricia McNerney, Principal Deputy Assistant Secretary of State for International Security and Nonproliferation at the Department of State; Mr. John Demers, Deputy Assistant Attorney General for the National Security Division at the Department of Justice; and Mr. Richard Douglas, Deputy Assistant Secretary of Defense for Counternarcotics, Counter-proliferation and Global Threats at the Department of Defense. A transcript of this hearing can be found in the Annex to Executive Report 110–23.

On July 29, 2008, the committee considered the Amendment and ordered it favorably reported by voice vote, with a quorum present and without objection.

VII. Committee Recommendation and Comments

The Committee on Foreign Relations believes that the Amendment will enhance U.S. national security by modernizing and strengthening the international counter-proliferation and counterterrorism legal framework. The committee agrees with the view expressed by President Bush in his Letter of Transmittal to the Senate, that the Amendment is "important in the campaign against international nuclear terrorism and nuclear proliferation." The United States, which pushed for the creation and widespread ratification of the original Convention, led the initiative that resulted in this Amendment. The CPPNM left an important gap by focusing only on physical protection requirements for nuclear material used for peaceful purposes while in international nuclear transport. No matter how well the United States protects its own peaceful nuclear material and facilities, nuclear material located in any other country that is not appropriately protected from theft or sabotage poses a potentially grave threat to the United States. This Amendment will support efforts by the United States, as well as those of the International Atomic Energy Agency and other states, to work with countries that possess nuclear material to ensure that they have appropriate laws, regulations, and practices in place to protect that material. In the committee's view, the Amendment also complements United Nations Security Council Resolution 1540, in which the Security Council decided, by its authority under Chapter VII of the Charter of the United Nations, that all States shall take and enforce effective measures to establish domestic controls, including the development and maintenance of "appropriate effective physical protection measures," to prevent the proliferation of nuclear weapons and related materials. Accordingly, the committee urges the Senate to act promptly to give advice and consent to ratification of the Amendment, as set forth in this report and the accompanying resolution of advice and consent.

Resolution

The committee has included in the resolution of advice and consent a reservation, three understandings, and one declaration.

Reservation

With this reservation the United States would opt out of the binding dispute resolution mechanism provided for in the CPPNM with respect to disputes concerning the interpretation or application of the Amendment. This reservation is similar to those made by the United States with respect to the dispute settlement mechanisms in the Terrorist Bombings and Terrorism Financing Conventions.

First Understanding

Subparagraph 4(b) of Article 2 of the amended Convention carves from the scope of the CPPNM the activities of armed forces during an armed conflict, which are instead governed by "international humanitarian law" (also known as the "law of war"). This carve-out is identical to the one found in Article 19(2) of the Terrorist Bombings Convention, as well as Article 4 of the Nuclear Terrorism Convention. This proposed understanding would make it clear that this carve-out does not include certain situations such as "internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature," in an effort to prevent attempts by suspected offenders to claim the benefit of this "armed conflict" exception in order to improperly avoid extradition or prosecution under the Convention. This understanding is the same as the understanding included in the Senate's resolution regarding the Terrorist Bombings Convention with respect to Article 19(2).

Second Understanding

Paragraph 5 of the Amendment, which amends Article 2 of the CPPNM, uses the term "international humanitarian law," which is not generally used by the United States armed forces and therefore the committee has included, on the basis of the State Department's recommendation, this proposed understanding to make clear that the term "international humanitarian law" has the same substantive meaning as "law of war."

Third Understanding

Subparagraph 4(b) of Article 2 of the amended Convention carves from the scope of the CPPNM "activities undertaken by the military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law." The committee, on the basis of the State Department's recommendation, has included this proposed understanding in order to clarify that the conduct of certain civilians who direct or organize or act with the military are also exempted from the Convention's scope of application.

Declaration

The committee has included a proposed declaration, which states that the Amendment is self-executing, with the exception of those provisions that obligate the United States to criminalize certain offenses, make those offenses punishable by appropriate penalties, and authorize the assertion of jurisdiction over such offenses. In addition, the proposed declaration clarifies that none of the provisions in the Amendment confer private rights enforceable in U.S. courts. This declaration is consistent with testimony provided by

the Department of State. The Senate has rarely included statements regarding the self-executing nature of treaties in resolutions of advice and consent, but in light of the recent Supreme Court decision, *Medellín* v. *Texas,* 128 S.Ct. 1346 (2008), the committee has determined that a clear statement in the resolution is warranted. A further discussion of the committee's views on this matter can be found in Section VIII of Executive Report 110–12.

VIII. Resolution of Advice and Consent to Ratification

Resolved (two-thirds of the Senators present concurring therein),

SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO A RESERVATION, UNDERSTANDINGS, AND A DECLARATION.

The Senate advises and consents to the ratification of the Amendment to the Convention on the Physical Protection of Nuclear Material, adopted on July 8, 2005 (the "Amendment") (Treaty Doc. 110–6), subject to the reservation of section 2, the understandings of section 3, and the declaration of section 4.

SECTION 2. RESERVATION

The advice and consent of the Senate under section 1 is subject to the following reservation, which shall be included in the instrument of ratification:

> Consistent with Article 17(3) of the Convention on the Physical Protection of Nuclear Material, the United States of America declares that it does not consider itself bound by Article 17(2) of the Convention on the Physical Protection of Nuclear Material with respect to disputes concerning the interpretation or application of the Amendment.

SECTION 3. UNDERSTANDINGS

The advice and consent of the Senate under section 1 is subject to the following understandings, which shall be included in the instrument of ratification:

> (1) The United States of America understands that the term "armed conflict" in Paragraph 5 of the Amendment (Article 2 of the Convention on the Physical Protection of Nuclear Material, as amended) does not include internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature.
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> (2) The United States of America understands that the term "international humanitarian law" in Paragraph 5 of the Amendment (Article 2 of the Convention on the Physical Protection of Nuclear Material, as amended) has the same substantive meaning as the law of war.
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> (3) The United States of America understands that, pursuant to Paragraph 5 of the Amendment (Article 2 of the Convention on the Physical Protection of Nuclear Material, as amended), the Convention on the Physical Protection of Nuclear Material, as amended, will not apply to: (a) the military forces of a State, which are the armed forces of a State organized, trained, and equipped under its internal law for the primary purpose of national defense or security, in the exercise of their official duties; (b) civilians who direct or organize the official activities of military forces of a State; or (c) civilians acting in support of

the official activities of the military forces of a State, if the civilians are under the formal command, control, and responsibility of those forces.

SECTION 4. DECLARATION

The advice and consent of the Senate under section 1 is subject to the following declaration:

With the exception of the provisions that obligate the United States to criminalize certain offenses, make those offenses punishable by appropriate penalties, and authorize the assertion of jurisdiction over such offenses, this Amendment is self-executing. Included among the self-executing provisions are those provisions obligating the United States to treat certain offenses as extraditable offenses for purposes of bilateral extradition treaties. This Amendment does not confer private rights enforceable in United States courts.

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