



## **LEGAL COMMITTEE – 34TH SESSION**

(Montréal, 9 – 17 September 2009)

### **Agenda Item 5: Report on work done at the Session**

#### **DRAFT REPORT ON THE WORK OF THE LEGAL COMMITTEE DURING ITS 34TH SESSION**

The attached paragraphs 2:81 to 2:159 of the draft Report of the Legal Committee related to Agenda Item 2.

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**Agenda Item 2: Consideration of the Reports of the Special Sub-Committee on the Preparation of One or More Instruments Addressing New and Emerging Threats**

2:81 The Committee then considered **Article 5** in the proposed amendments to the Montreal Convention. The Rapporteur explained that the draft text has added three jurisdictional grounds, one is mandatory as set out in **sub-paragraph (e) of Article 5 (1)**, i.e. when the offence is committed by a national of a State (Active Personality Jurisdiction), the other two are optional as set out in **Article 5 (2)**, i.e. when the offence is committed against a national of that State (Passive Personality Jurisdiction), or by a stateless person who has his or her habitual residence in the territory of that State. She noted that the proposed amendment does not resolve the issue of competing jurisdictions. In practice, this issue would be resolved in accordance with the place where the alleged offender is found, or where the evidence could be collected.

2:82 One delegation, supported by other four, proposed that the Active Personality Jurisdiction become optional. It was mentioned that the territorial jurisdiction represents the basic principle in their countries, and nationality is almost irrelevant on criminal jurisdiction. To make this jurisdiction optional may also facilitate the wide acceptance of the future protocol.

2:83 Several other delegations were opposed to the proposal to downgrade the mandatory nature of this jurisdiction. A series of international conventions had successfully incorporated this mandatory jurisdictional ground and there was no reason that ICAO instruments should not do so. Moreover, the absence of the mandatory jurisdiction may also weaken the system of extradition, leaving a potential gap in the legal framework.

2:84 A further proposal to put **sub-paragraph (e) of Article 5 (1)** in square brackets being rejected, the Chairman concluded that sub-paragraph (e) should remain unchanged. The Delegation of Argentina indicated that it could not rally the consensus on sub-paragraph (e), and requested that reference be made on this issue in the records of this meeting, to be further considered by the future Diplomatic Conference.

2:85 With respect to **Article 5 (2)**, although there was one intervention to delete the reference to a stateless person, the Committee decided to keep the provision as it was. The Committee also adopted **Article 5 (3)** without any change.

2:86 Some delegations noticed the similarities between **paragraphs 4 and 5 of Article 5** and queried the possibility of merging them. The Rapporteur explained that paragraph (4) was taken from the 1971 Montreal Convention while paragraph (5) was taken from the 1988 Montreal Protocol. As the Montreal Protocol was only applicable to certain offences at airports, but not to the offences on board aircraft, some jurisdictional grounds relating to the acts on board aircraft, such as the one specified in the sub-paragraph (c) of Article 5 (1), did not apply in the context of the Protocol. This was the reason why Article 5 (5) only mentioned sub-paragraph (a) or (e) of Article 5 (1), while Article 5 (4) referred to the entire Article 5 (1). Based on this discussion, the Committee decided to request the Drafting Committee to examine if there was any unnecessary repetition in paragraphs 4 and 5 of Article 5.

2:87 One delegation pointed out that the Arabic text of **Article 5 (6)** referred to “court” jurisdiction, rather than “criminal” jurisdiction. It was decided to align the Arabic text with the English text.

2:88 In consideration of **Article 6**, one delegation noted that the French text used the word “legislation”, which should in fact be corrected by using the word “loi”. It was so agreed and the same should apply to Article 12. Another delegation proposed to insert “due process” in Article 6 (1). While this

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motion was supported, other delegations believed that the fair treatment clause as set forth in **Article 7 bis** would adequately cover the concern. Consequently, **paragraphs (1), (2) and (3) of Article 6** were adopted without any change, except the French linguistic point mentioned above.

2:89 With respect to **Article 6 (4)**, the Secretariat explained that the term “have established” was proposed during the second meeting of the Sub-Committee to replace the term “would otherwise have”. This proposal was based on the need to align Article 6 (4) with the newly proposed Article 5 (3) which required each State Party to notify the Depositary of the jurisdiction it “has established”. The notification would provide a transparent basis for determining which States would be covered by Article 6 (4). Based on this understanding, the Committee decided to retain the term “have established” and to delete the square brackets in the sub-paragraph as well as the term “would otherwise have”. Upon the recommendation of one delegation, it was further decided that reference should not only be made to paragraphs (1) and (2) of Article 5 but also to Article 5 (3). Moreover, as suggested by another delegation, the Committee agreed that in addition to the term “have established”, the word “notified” should also be added, and instructed the Drafting Committee to fine tune the wording.

2:90 **Article 7** was adopted without any change.

2:91 Concerning **Article 7 bis**, one delegation proposed to include a specific reference to the Vienna Convention on Consular Relations, in view of two cases referred to the International Court of Justice. It was believed that this reference was important in this context to ensure the procedural aspects of human rights, including the right to notify the consulate officials. Another delegation pointed out that the concern regarding diplomatic protection was already covered by Article 6 (3) and, therefore, there was no need to mention it again in Article 7 bis. It was then decided that Article 7 bis should be retained without any change.

2:92 In consideration of **Article 8**, one delegation mentioned that in the Arabic version the term “extradition” was expressed as “deportation”. It was agreed to change it to “extradition”. Another delegation proposed to delete the term “at its option” in **Article 8 (2)**, but it was not accepted. The third delegation referred to Article 1 (3) and queried whether the optional choice under that provision would have an impact upon the issue of extradition. Since extradition normally requires “double criminality”, a request of extradition based on the notion of conspiracy may be rejected by a State which had the system of “*association de malfaiteurs*”.

2:93 In view of this, the Committee requested the Drafting Committee to explore the possibility of establishing equivalent standards in the context of extradition. The Committee further decided to refer to Article 5 (2) in **Article 8 (4)**.

2:94 Regarding **Article 8 bis**, one delegation proposed to delete “an offence inspired by political motives”, and believed that such a deletion may facilitate more ratifications. This proposal was not supported and Article 8 bis was retained as it was.

2:95 Except Article 12, **Articles 8 ter to 14** inclusive were adopted by the Committee without any change. With respect to **Article 12**, it was decided to add the reference to Article 5 (3), as well as the change of the words in French as mentioned in paragraph 2:88 above.

2:96 The Chairman informed the Committee that Flimsy No.1 had been submitted by the Delegation of Argentina addressing the creation of new substantive offences in relation to the transport of persons. The Committee noted that the matter would be taken up by the small group dealing with the transport offences.

2:97 The Committee thereafter commenced its consideration of the proposed **Protocol to amend the 1970 Hague Convention**, on the basis of the text set out in LC/SC-NET-2, Appendix 5.

2:98 The Rapporteur provided the Committee with background information in relation to the point that the offence provision in **Article 1** would now apply to acts carried out when the aircraft is “in service” as opposed to when the aircraft is “in flight”. It was explained that the period of time, in which the offences would be captured, would be broadened to extend to situations such as pre-flight preparations up until 24 hours after landing of the aircraft. The Rapporteur further explained that the offence provision had been expanded as regards “threats” insofar as it was no longer required that the threat be committed on board the aircraft. Further expanding on the reasoning behind the proposal, the Chairman of the Legal Sub-Committee stated that the intention was to address all possible situations where perpetrators try to gain control of an aircraft, even in the absence of physical violence or the use of firearms on board the aircraft, for example by taking hostages in a school and threatening to kill them if the pilot did not follow their instructions. It was for this reason that the Sub-Committee had felt that it was appropriate to add the term “constraint” in **paragraph 1 of Article 1**. Lastly, the expression “by any technological means” had been added in order to address situations, in which the offenders seek to take control of an aircraft by jamming or otherwise interfering with flight instruments or data transmission systems.

2:99 In response to a query raised by one delegation in relation the difference between “exercising control” and “seizing”, the Chairman of the Sub-Committee explained that “control” could be obtained by a person on the ground jamming the signals without seizing the plane physically. The Chairman noted that there probably existed some overlap between the two notions but that the provision was intended to cover a wide range of possibilities.

2:100 One delegation expressed the view that it was not necessary to add the term “constraint” as, taking the example of the aforementioned hostage situation, this situation would already be addressed by the notion of “threat”. In subsequent interventions, several delegations supported to retain the notion of “constraint” and to delete the square brackets around it, with a view to capturing as many situations as possible. It was nevertheless suggested by several delegations to consider to replace in the English text the word “constraint” by “coercion”. As to the use of the term “coercion”, one delegation wondered if it was indeed a correct formulation to speak of “coercion or threat thereof”. In this context, the Rapporteur indicated that in the drafting of The Hague Convention the word “coercion” had been considered, but it was elected to use “or by any other form of intimidation” instead. It was agreed to refer this point to the Drafting Committee in order to ensure consistency with previous usage.

2:101 In relation to **paragraph 2 of Article 1**, the Committee agreed to conform to the language as had been accepted in relation to the proposed Protocol to amend the Montreal Convention.

2:102 There were no comments in relation to **paragraph 3 (a) of Article 1** and it was adopted.

2:103 In relation to **paragraph 3 (b) of Article 1**, one delegation submitted to reconsider the retention of the reference to paragraph “3 (a)” contained therein as it would not make much sense to direct somebody to attempt an offence. In relation to this intervention, another delegation saw no need for an amendment to the text as it was appropriate to punish someone who organized an offence that ultimately failed.

2:104 In relation to **sub-paragraph 3 (c)**, one delegation recalled that it had submitted a flimsy in which it was proposed to make it an offence if a person assists or aids another person to evade prosecution, for example by providing forged identification documents. In his summary on these points, the Chairman

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stated that the language would remain as presented in Appendix 5, subject only to the outcome of the consideration of the points raised in Flimsy No.1, which would be addressed by the small group on transport offences.

2:105 Addressing **paragraph 4 of Article 1**, the Chairman recalled that the language was closely related to the one used in relation to the corresponding provision in the proposed Protocol to amend the Montreal Convention. As it had been extensively discussed there, the Chairman suggested, and the Committee agreed, to accept the same wording.

2:106 **Article 2** was accepted with no discussion.

2:107 In relation to **Article 3**, one delegation mentioned that the notion of “in flight” appeared to be used only once in the entire text, i.e. in the definition of “in service”. This delegation wondered if the definition was required at all. If the definition of “in flight” were to be retained, this delegation proposed to align the wording with the text found in the 2009 instruments amending the Rome Convention. In relation to this point, another delegation suggested to do away with all but the last sentence of **sub-paragraph (a)** and to merge that sentence with the definition of “in service” appearing in **sub-paragraph (b)**. Another delegation expressed the view that the current definition of “in flight” was only suitable for passenger planes but not for cargo aircraft. In his summary, the Chairman stated that the definition of “in flight” would be discarded and the definition of “in service” referred to the Drafting Committee for adjustments as necessary. The Drafting Committee was also tasked to ascertain if the definition of “in flight” appeared elsewhere in the text of the instrument.

2:108 In relation to **paragraphs 3 and 4 of Article 3**, the Committee acknowledged that as regards the issue of acts committed by persons who were not physically on board the aircraft a final decision could only be taken after the Committee concluded its deliberations of sub-paragraphs (a) and (b) of Article 4 (2), of the proposed Protocol to amend the Montreal Convention.

2:109 **Paragraph 5 of Article 3** was accepted without discussion.

2:110 In relation to **Article 3 bis**, the Chairman informed the Committee that the equivalent provision in the proposed Montreal Protocol was the subject of consideration a the small group. The Committee agreed to defer the discussion accordingly.

2:111 In relation to **Article 4**, the Chairman noted that extensive discussions regarding the corresponding provision in the proposed Montreal Protocol had taken place. On that occasion, the Committee had accepted the text, with one minor issue to be addressed by the Drafting Committee. In relation to a point raised by one delegation which suggested to provide for jurisdiction in case the offence is directed against a stateless person, the Chairman remarked that the jurisdiction provision was conceptually devised in relation to the perpetrator.

2:112 **Article 5** was accepted without discussion.

2:113 In relation to **paragraph 1 of Article 6**, the Committee was reminded that it was necessary to replace in the French text the word “legislation” by “loi”. **Paragraphs 2 and 3** were accepted without discussion. In relation to the text appearing in square brackets in **paragraph 4**, the Committee recalled its earlier decision to retain the expression “have established”.

2:114 **Article 7** was accepted without discussion, as was **Article 7 bis**.

2:115 In relation to **Article 8**, the Committee recalled its consideration of the corresponding provision in the proposed Protocol to the Montreal Convention where it was decided to refer one particular element to the Drafting Committee. Depending on the outcome of this issue, the provisions would be treated alike.

2:116 In relation to **Articles 8 bis** and **8 ter**, the Committee accepted the wording as in the previously agreed text relating to the proposed Protocol to the Montreal Convention.

2:117 **Articles 9 and 10** were accepted without discussion.

2:118 In relation to **Article 10 bis**, it was agreed to replace in the French text the words “national law” by “sa loi”.

2:119 **Articles 11 and 12** were accepted without discussion.

2:120 The Committee was invited to express its view on the question of the **format of the amendments** it would propose. The Chairman stated that one option could be to have two protocols; however, one would have to consider the issue that these protocols would be authentic in six languages, while the parent instruments were adopted in four languages only. The other option would be two texts consolidating the amendments with the parent instruments; these would be two replacement conventions. A variation could be to have two protocols plus consolidated texts.

2:121 Several delegations would prefer the adoption of two protocols, with consolidated texts for convenience. It was stated that both The Hague and Montreal instruments were listed in the respective annexes of certain other conventions or was otherwise referred to in those other conventions. The definition of The Hague and Montreal offences were part of what was seen as terrorist offences. It was important to remain clear as to what was penalized under those other instruments. The view was also expressed that consolidated texts having the force of new conventions could lead to a requirement to denounce The Hague and Montreal instruments. One of these delegations, supported by others, specified that the consolidated texts should be official; for example, a consolidated text of the Cape Town instruments appeared in a Resolution of the Conference, and the same could be done in this instance.

2:122 One delegation observed that complications could arise if protocols were adopted, in light of the difference in the number of authentic languages of The Hague and Montreal instruments and what would be the case with the protocols here.

2:123 One delegation expressed the opinion that the proposed amendments were not confined to a specific area but were wide-ranging. It would therefore be better to have new conventions. The matter of cross-references in other international legal instruments should not be an impediment as similar situations frequently arose in the context of the enactment of domestic legislation, and legal experts would find a solution.

2:124 The Chairman **concluded** that there was no need or requirement for the Committee to take a decision on this issue. There were preferences for each option, but the predominant view was to have two protocols, leaving the existing instruments in place, and consolidated texts in a resolution or resolutions of the Diplomatic Conference.

2:125 The Chairman of the Committee invited the Chairman of the **Small Group on the Military Exclusion Clause** to present the Group’s report. In so doing, the Committee Chairman stated that the word “exclusion” was not optimal as it was not used in the clause, which did not exempt anyone; rather, it

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specified which body of law applied to what activities. Perhaps it would have been better to speak of a “military activity clause” or a “military responsibility clause”.

2:126 The Chairman of the Small Group agreed that the words “military exclusion” did not properly describe the content of Article 4 *bis* of the proposed Montreal Protocol and Article 3 *bis* of the proposed Hague Protocol. He explained that the Group had tried to narrow the gap that existed in relation to the clause. The Group emphasized the importance of the integrity of other bodies of law, such as the UN Charter and international humanitarian law. In the **first paragraph** of the article, the Group proposed to add also a reference to the Chicago Convention. **Paragraph 2** of the existing draft was not intended to lead to the impunity of armed forces acting either outside or inside the context of armed conflict. It should be made clear that the activities of military forces of States in the exercise of their official duties would be governed by the Protocols unless it is established that the activities would be governed by other international conventions; however, the Group could not agree on the appropriate place to introduce this clarification. The Group welcomed the earlier proposal of Switzerland to introduce as **paragraph 3** text from the 2005 Nuclear Terrorism Convention to the effect that paragraph 2 shall not be interpreted as condoning or making lawful otherwise unlawful acts, or precluding prosecution under other law. This ensured that criminal acts could be prosecuted under national or international law. Two sets of texts were presented by the Group to the Committee. The first set reads:

1. Nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the Charter of the United Nations, the Convention on International Civil Aviation (Chicago, 1944) and international humanitarian law.
2. The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law are not governed by this Convention, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention
3. The provisions of paragraph 2 of the present article shall not be interpreted as condoning or making lawful otherwise unlawful acts, or precluding prosecution under other law.

2:127 It was recommended that an explanatory note relating to paragraph 2 be considered to clarify that the activities undertaken by military forces of a State in the exercise of their official duties are governed by this Convention, unless it is established that these activities are governed by other international conventions.

2:128 The Chairman of the Small Group advised that all its members agreed with this text in principle.

2:129 He stated further that some delegations in the Group preferred another wording of paragraph 2 and to have the explanatory note in the text, as follows:

1. Nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the Charter of the United Nations, the Convention on International Civil Aviation (Chicago, 1944) and international humanitarian law.

2. The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law are not governed by this Convention.
- 2 *bis* The activities undertaken by military forces of a State in the exercise of their official duties are governed by this Convention, unless it is established that these activities are governed by other international conventions.
3. The provisions of paragraph 2 of the present article shall not be interpreted as condoning or making lawful otherwise unlawful acts, or precluding prosecution under other law.

However, a number of other delegations in the Group were not in a position to accept the text immediately above.

2:130 The Chairman of the Small Group ended by thanking all the Members of the Group for their participation and cooperation.

2:131 The Chairman of the Committee observed that the issue had been discussed extensively in the plenary and that the Small Group had agreed in principle on a text. Accordingly, paragraph 1 should be amended to introduce the reference to the Chicago Convention, paragraph 3 should be added, and an explanatory note as mentioned by the Chairman of the Small Group should be kept for consideration by the Diplomatic Conference.

2:132 The second text did not reflect the consensus of the Small Group, but it was close to the language of the agreed text. The difference lay in the amended second paragraph and in the placement of the Swiss proposal. However, this second set of text would also be fully reproduced in the Committee Report which would form part of the documentation for the Diplomatic Conference.

2:133 One delegation was of the view that the language proposed did not reflect the full compromise. It queried the need to introduce such language. With respect to the explanatory note or paragraph 2 *bis*, the delegation noted that the language was new and did not reflect language used in the five anti-terrorism conventions; it was not clear that the delegation could join consensus on this wording.

2:134 When the meeting resumed, the Chairman mentioned that the translation of the alternative text of the military clause in paragraph 2 would only be available the next day; he therefore read this alternative text as follows:

- “2. The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law are not governed by this Convention.
- 2 *bis*. The activities undertaken by military forces of a State in the exercise of their official duties are governed by this Convention, unless it is established that these activities are governed by other international conventions.”

2:135 The Committee then proceeded to the review of the **Report of the Drafting Committee** (LC/34-WP/2-5) which was presented by its Chair, the Delegate from Singapore.

2:136 Starting with **Appendix A** (Montreal Convention), paragraph 1 of **Article 1**, the Committee approved the proposals of the Drafting Committee in sub-paragraphs (f), (g), (h) and (j). It was

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also noted that the Arabic and French texts of paragraph 1 *ter* had to be reviewed.

2:137 One delegation, supported by three others, submitted that, as in paragraphs 1 *bis* and 1 *ter*, the terms “unlawfully and intentionally” had to be added in paragraph 2 of Article 1, since this qualification for substantive offences had to be re-stated for their ancillary activities. The Rapporteur nevertheless noted that paragraph 2 of Article 1 was in this respect consistent with the original wording in the Montreal and The Hague Conventions, as well as other anti-terrorism conventions. One delegation acknowledged that the intent was part of the substantive offence, which made it unnecessary to insert the referenced terms in this provision. Another delegation, supported by two delegations, agreed that the intent was necessary to constitute the offence in paragraph 2 but was of the opinion that it was actually inherent to the concept and language of ‘attempt’, hence did not need to be explicit. The Chairman then concluded that the text would remain as is, considering also that this wording had passed the test of time.

2:138 In **Article 2**, it was agreed that the Russian text of paragraph (c) had to be verified. Regarding paragraph (d) which was for deletion in view of the use of “BCN weapon”, one delegation wished to recall that States, in a spirit of cooperation, should prepare themselves for the Diplomatic Conference through exhaustive analysis of the notion of biological weapon as found in sub-paragraph (a) of paragraph (i). This definition, in its opinion, was not appropriate. The Chairman concurred that delegations to the Diplomatic Conference should include experts in this technical field. One delegation also requested review of the numbering of (i) in the French text.

2:139 One delegation went back to paragraph (e) to Article 2 and asked why damage to property and environment was not included therein whereas they were addressed in Article 1. The Chair of the Drafting Committee explained that the Drafting Committee did not consider appropriate to amend the definition, considering that the definition was taken from another convention and that damage to property and environment was part of the substantive offence in this protocol. The Chairman in his conclusion noted that this matter had already received attention in the Plenary. Given the lack of support for modifications to paragraph (e), the text would remain as is, keeping in mind that this would be revisited at the Diplomatic Conference. Without further comments, Article 2 was then accepted as proposed by the Drafting Committee.

2:140 The Committee then turned to **Article 4**. The Drafting Committee did not add the notion of “State of the Operator” in paragraph 2 because further study would be necessary. One delegation agreed that the State of Registry remained a very important reference in this context, but insisted on the need for further consideration of adding the reference to the State of the Operator in light of foreign leasing situations, including for domestic transportation. This was acknowledged by the Chairman who announced that the Rapporteur had volunteered to conduct a study on this issue, the results of which should be referred to the Diplomatic Conference.

2:141 One delegation further submitted that the reference to take-off and landing should be deleted from the first line of sub-paragraph (a) in paragraph 2 of Article 4. The Chair of the Drafting Committee submitted that it would be prudent not to make modifications to the text of paragraph 2 pending review of the proposed amendments to The Hague text. After consultations, the Chairman concluded that the intervention on sub-paragraph (a) was a language issue pertaining to the Arabic text which had to be reviewed. In the absence of further comments on Article 4, he declared it accepted as proposed by the Drafting Committee.

2:142 Regarding **Article 5**, the Delegation of Argentina wished to reiterate its view that establishment of jurisdiction when offences are committed by nationals of a State should not be mandatory but optional, and hence should be moved from sub-paragraph (e) of paragraph 1 to paragraph 2 as a new sub-paragraph (c). This would take into account the territoriality principle which is prevalent in a number

of States, thereby facilitating the ratification process of this instrument. This delegation contended that this question should be flagged for discussion at the Diplomatic Conference by placing square brackets around the text once it has been moved to paragraph 2. While this proposal was supported by three other delegations, one of them drawing attention to the difficulties raised in this context by dual nationality, the Chairman pointed out that the Committee should not re-open the debate and suggested that such views would be reflected in the report.

2:143 One delegation then questioned the use of the terms “applicable paragraphs” in paragraph 4 of Article 5, the scope of which might not be entirely clear. Two delegations concurred that clarification would be warranted. Another delegation noted the merging of paragraphs 4 and 5 and proposed that the first reference to applicable paragraphs in Article 1 could be deleted so as to avoid its repetition. The Chairman requested the Chair of the Drafting Committee to make consultations and report back to the Legal Committee with a solution to this problem. The Chair subsequently reported that a solution had been found by deleting the first reference to “applicable paragraphs”. The Committee agreed with this solution.

2:144 The changes proposed by the Drafting Committee to paragraph 4 of **Article 6** were accepted as is, as well as those to **Article 8** save in paragraph 5: “each of” was to be deleted while the Arabic text had to be reviewed in order to refer to “extradition”, not “deportation”.

2:145 Without further comments on **Article 12** in Appendix A, the Legal Committee finished its consideration of Appendix A of the Drafting Committee’s report. The changes in Appendix B were also accepted, with the note that the term “coercion” in Article 1 (1) should be “constraint” in French.

2:146 The Chairman stated, and the Committee agreed, that the Secretariat would be entrusted to adequately transpose the changes made to the Montreal Convention into the text of the Hague Convention, whenever applicable.

2:147 The Chairman then stated that the group on the transport offences had completed its work, he invited the Chairman of the Group, the Delegate of France to present his report. The report underlined two major concerns: (1) the concern voiced regarding a too wide criminalization in an area where the industry had already to deal with strict regulatory obligations and the potential for unjustified prosecutions; and (2) the notion that the transport offences found in the 2005 SUA Protocol did not focus on safety of transport in the strict sense but rather aimed at serving many objectives, such as the non-proliferation of nuclear weapons. As some States felt that this should be dealt with outside of ICAO, the text devised by the Group aimed at reinforcing the objective of enhancing the safety of civil aviation. The Chairman noted that the confidence of the public in civil aviation would nevertheless be threatened in case a terror group would use the aircraft for the purpose of transporting dangerous materials for an illicit act in the future. The Group felt that it was logical and opportune to include the transport offences when they are closely linked to aviation security. He explained that the approach contemplated was to add in the *chapeau* defined offences that the illegal transport should have a link with. Bearing in mind the specificity of air transport, the Group departed from the language of the 2005 SUA Protocol as it was not considered necessary to import all concepts found in the maritime context.

2:148 The alternative text proposed by the Group for sub-paragraph (i) of Article 1 (1) was as follows:

- 1) Article 1, paragraph 1 (i) (1) (2) and (3) would read as follows:

“transports, causes to be transported or facilitates the transport on board an aircraft of the following items, knowing that it is to be used to facilitate an act intended to cause

[with or without a condition] death or serious bodily injury to a civilian [or to any person not taking an active part in the hostilities in a situation of armed conflict], when the purpose of such act, by its nature or context, is to intimidate a population or to compel a government or an international organization to do or to abstain from doing any act:

1. any explosive or radioactive material; or
2. any BCN weapon, knowing it to be a BCN weapon as defined in Article 2; or
3. any source material, special fissionable material or material or equipment or material especially designed or prepared for the processing, use or production of special fissionable material [knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity not under safeguards pursuant to a safeguards agreement with the International Atomic Energy Agency]; or
4. any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon [knowing that it is intended to be used for such purpose].

2) In the definitions under Article 2 would be added a (j) that would read as follows:

- (j) the terms “source material” and “special fissionable material” have the same meaning as given to those terms in the Statute of the International Atomic Energy Agency, done at New York on 26 October 1956.

3) Article 4 *ter* of the present draft would be deleted.

2:149 The Chairman of the Group explained that one delegation, while supporting to find a possible solution to the problem, reiterated its earlier intervention regarding the need to define “BCN weapon” in a more adequate way. A revised definition proposed by the delegation reads as follows:

“Any WMD-related material as defined in the UNSCR 1540 (2004): materials, equipment and technology covered by relevant multilateral treaties and arrangements, or included on national control lists [or included on control lists of the relevant multilateral export controls agreements, i.e. the Nuclear Suppliers Group, the Zangger Committee and the Missile Technology Control Regime], which could be used for the design, development, production or use of nuclear, chemical and biological weapons and their means of delivery.”

2:150 The Chairman of the Legal Committee invited the delegations to comment or react. Explaining its initial sentiment, one delegation stated that the proposal contained a novel approach which that delegation still needed to consider in more detail. On the point of importing language from the 2005 SUA Protocol, the delegation noted that the Protocol had thus far only attracted 9 ratifications. In the same vein, borrowing language from the 1999 Terrorism Financing Convention should be treated with some caution as definitions contained therein had been adopted within a very specific context. This delegation remarked further that the proposal could alter the approach regarding the IAEA safeguards insofar as it no longer referred to “comprehensive safeguards”. This delegation viewed this as potentially being in contravention to the obligations of States Parties to the Non-Proliferation Treaty.

2:151 Another delegation, a member of the Group, expressed the sentiment that there had been broad agreement within the Group to include transport offences. The delegation stated that some States preferred to retain the old text of the Legal Sub-Committee, taking also into account the proposals made during the discussion, whereas others had favoured to link the transport offences to a terrorist purpose. In

the view of this delegation, the text emanating from the Legal Sub-Committee represented the best approach and the best way for ICAO to address this issue. The delegation cautioned that it would send a wrong signal if the new regime would criminalize the use of BCN weapons but not the transport thereof. The new proposal would be unique as it would require the knowledge regarding the terror motive behind the transport. In the view of this delegation, the offence should capture also situations in which the transport was for purposes of financial profit.

2:152 Adding to the initial sentiment expressed earlier, one delegation stated that it continued to believe that the issue of transport of dangerous material was a non-proliferation issue with no link to aviation. Another delegation stated that the proposal in the report addressed the main misgivings that had been expressed regarding the transport issue and that it adequately drew a distinction between non-proliferation and terrorism issues. This delegation fully supported the proposal.

2:153 One delegation remarked that it had not been the intention of the Group to come up with a result which would be supported unanimously.

2:154 The Chairman of the Informal Group thereafter provided the Committee with explanations regarding the textual changes which had been made. When compared to the Legal Sub-Committee text in sub-paragraph (i) of Article 1 (1), the new text expanded the *chapeau* in order to introduce a common denominator which preceded sub-paragraphs (1) to (4) and called for a link between the offender and the terrorist group.

2:155 Regarding sub-paragraphs (1) to (4), the Chairman of the Informal Group explained that sub-paragraphs (3) and (4) had been extracted from the old text. He recalled that the text in Appendix 4 of LC/SC-NET-2, on the issue of the “knowledge requirement, implied that the offence would be only criminalized if the offender knew that the source material would be intended for use in a nuclear explosion or when the offender knew that the listed equipment would be used in the manufacturing of a weapon. The Group felt that this would place an inordinate high burden of proof on the prosecuting authority. This element was placed in square brackets as the Diplomatic Conference should consider whether the knowledge was still required.

2:156 Regarding the definition of “source material”, the Chairman of the Informal Group remarked that it had been taken over from the 2005 SUA Protocol. He explained that this provision could be inserted as new sub-paragraph (j) of Article 2, which would, in the view of the Group, make it unnecessary to retain Article 4 *ter* of the current draft. The delegate also explained that an alternative text for sub-paragraph (4) had been proposed by the Russian Federation, which was reflected in the report.

2:157 In the view of one delegation, the Group’s proposal reflected some level of support for the inclusion of transport offences as it had an impact on the safety of civil aviation. The proposal should therefore be brought to the attention of the Diplomatic Conference. The delegation felt that it remained a policy decision for the Diplomatic Conference whether to have a broad or narrow approach and suggested to submit both texts for consideration. Another delegation supported the inclusion of the transport offences in relation to dangerous material and weapons. Both options had their pros and cons and the delegation stated that the two options should be presented to the Council and the Diplomatic Conference. In the view of another delegation the two proposals appeared not to be radically opposed to each other. The two proposals could be presented together, and fresh thinking by the Council and the Diplomatic Conference may allow for an incorporation of the two views, this delegation opined. Another delegation supported the inclusion of the transport offences and supported to present the new wording in square brackets to the Diplomatic Conference. Another delegation, while being aware of the broader context in which the discussion took place, stated that the criminalization of weapons of mass destruction as such should be taken care of in ICAO.

2:158           Some delegations reiterated their opposition to the inclusion of the transport offence as a matter of policy , one of these delegations explicitly objected to the inclusion of language set forth in the proposal to be incorporated into the draft protocol by means of square brackets.

2:159           The Chairman of the Legal Committee remarked that the placement of a text in square brackets denoted that there was no consensus on the text. He stated that there had been widespread support to submit the text to the Diplomatic Conference, with one delegation opposing to transmit it to the Diplomatic Conference.