



**WORKING PAPER**

**LEGAL COMMITTEE – 34TH SESSION**

(Montréal, 9 to 17 September 2009)

**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**

**DRAFT PROTOCOL TO THE MONTREAL CONVENTION -  
TRANSPORT OFFENCES**

(Presented by Australia)

**1. INTRODUCTION**

1.1 Proposed amendments to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (the Montreal Convention) under consideration at the ICAO Legal Committee in 2009 will give States an opportunity to strengthen the international legal framework as it relates to the unlawful transport of weapons of mass destruction and the unlawful transport of terrorist fugitives by civil aircraft.

1.2 We have a shared responsibility to take action in this area. The Security Council affirmed in Resolution 1540 that the ‘proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, constitutes a threat to international peace and security’ and recognised the ‘urgent need for all States to take additional effective measures to prevent the proliferation of nuclear, chemical and biological weapons and their means of delivery’. The Security Council has also recognised that there is a close connection between international terrorism and the illegal movement of nuclear, chemical, and biological weapons and their delivery systems. The Council has emphasised the need to enhance the coordination of efforts in response to this threat to international security (Resolutions 1456, 1373).

**2. DRAFT OFFENCES**

2.1 The proposed transport offences (Article 1(1)(i) and (j) of the draft Protocol to the Montreal Convention), would help to address the Security Council’s call for coordination by requiring States Parties to criminalise the *intentional* and *unlawful*:

- a) transport of biological, chemical and nuclear weapons and related material on board a civil aircraft; and

- b) transport of a fugitive on board a civil aircraft where the person intends that this will assist the fugitive to evade prosecution for a serious offence under one of the UN Counter-Terrorism Conventions.

2.2 The new offences would impose individual criminal responsibility and would be based on conduct (that is, the act of transporting) and on knowledge and intent requirements. These elements would have to be proven by the prosecution. This means that the offence would *not* cover recklessness as to the contents of air cargo or the status of a passenger, and would *not* apply to a carrier who unintentionally transports an item or person in a prohibited manner.

2.3 While some existing international instruments address elements of these transport activities, relevant offences are often linked to a specific intention to assist in a terrorist act, or to damage or a safety risk occurring. There is no complete coverage in the existing legal framework. Furthermore, air safety procedures that regulate the carriage of dangerous goods, is not comprehensive (as not all items covered by the offence would be classified as dangerous to carry by air), and do not give recognition to the seriousness of the acts which warrant criminalisation.

#### 2.4 *Definition of transport*

2.4.1 The Special Sub-Committee of the Legal Committee on the Preparation of One or More Instruments Addressing New and Emerging Threats discussed possible definitions of what it means to ‘transport’ in the air environment. Rather than adopting a specific definition, the Sub-Committee considered that the better approach was to describe the conduct as ‘transports, causes to be transported, or facilitates the transport of on board an aircraft’ to ensure the offences cover the full range of action involved.

#### 2.5 *Definitions of weapons*

2.5.1 The definitions of the various weapons described in the proposed transport of materials offence reflect the definitions used in the relevant weapons conventions. This ensures consistency across the different legal regimes.

#### 2.6 *Savings clauses*

2.6.1 The accompanying provisions set out at Article 4*ter* of the draft Protocol are designed to make clear how the instrument would interact with the existing weapons conventions. The first element is designed to ensure that the transport of materials offence preserves the rights and obligations of parties to the Biological Weapons Convention, the Chemical Weapons Convention and the Non-Proliferation Treaty. The second element is designed to ensure that nuclear-related offences parallel the rights and obligations of Parties to the Non-Proliferation Treaty.

#### 2.7 *Safeguards Agreements*

2.7.1 The current draft of the transport offence is based on the transport of materials offence in the 2005 Protocol to the Suppression of Unlawful Acts against the Safety of Navigation Convention (2005 SUA Protocol). The 2005 SUA Protocol makes it an offence to transport nuclear material knowing that it is intended to be used in a nuclear activity not under safeguards pursuant to ‘an IAEA comprehensive safeguards agreement’.

2.7.2 At the meeting of the Legal Sub-Committee in February 2008 it was pointed that an IAEA comprehensive safeguards agreement does not apply to every State. Some States which are not parties to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) had entered into other safeguards agreements with the IAEA. It was therefore suggested to replace “an IAEA comprehensive safeguards agreement” with “a safeguards agreement with the IAEA”. The proposed alternative drafting would allow those States who became parties to the Protocol and who are not parties to the NPT to transport nuclear material where they had completed an IAEA safeguards agreement.

## 2.8 *Transport of fugitives*

2.8.1 Although many States criminalise the acts described in the transport of fugitives offence already (for example, as an ‘accessory after the fact’), it is not clear that these acts are regarded by States Parties as ‘accomplice’ offences within the scope of the various UN Counter-Terrorism Conventions - offences to which extradition and mutual legal assistance provisions apply. For example, in some legal systems, someone may intentionally assist a fugitive to escape six months after the initial crime was committed and may not be regarded as having the necessary nexus to the crime to be an ‘accomplice’ as traditionally understood. The new provision would ensure coverage across different legal systems and make clear that cooperation mechanisms apply. This is consistent with the approach taken in the Terrorist Financing Convention and would also be consistent with our obligations under Security Council Resolution 1373 to ‘[t]ake the necessary steps to prevent the commission of terrorist acts’ and ‘[e]nsure that any person who participates in ... supporting terrorist acts is brought to justice’.

2.8.2 Under the proposed offence, it is not intended that the person being transported has to have been convicted on the principal offence. To be caught under the transport of fugitives offence, a person would need to knowingly help a person wanted in relation to one of the offences under the UN Counter-Terrorism Conventions to escape from authorities. This act of assistance is a criminal act of itself. It does not rely on the eventual prosecution of the fugitive. What may need to be shown, for example, is that (a) the accused transported the fugitive, (b) that a warrant (or its equivalent) had been issued for the fugitive, that is, that the person is fugitive, and (c) that the accused had knowledge of this status, and (d) that the accused intended to assist the fugitive to evade the criminal justice system.

2.8.3 A possible redrafting of Article 1 to make this clearer would be to say that:

1. Any person commits an offence if that person unlawfully and intentionally:

...

(j) transports, causes to be transported, or facilitates the transport of, another person on board an aircraft ~~knowing that the person has committed an act that constitutes an offence set forth in the treaties listed in the Annex, and, intending to assist that person to evade criminal prosecution or punishment for an act that constitutes an offence set forth in one of the treaties listed in the Annex~~ [the UN Counter-Terrorism treaties].

## 2.9 *Enforcement*

2.9.1 The transport offences are not designed to create a new basis at international law for law enforcement action in the air environment. What it would do is ensure that all states parties criminalise these actions, that there are agreed bases for legislative jurisdiction, and that international legal cooperation mechanisms, such as extradition and mutual legal assistance, apply.

2.9.2 The exercise of law enforcement jurisdiction would be based on existing international air law as established in the Chicago Convention. In this way, these proposals reflect existing practice in UN law enforcement treaties such as the UN Convention Against Corruption or the Convention Against Transnational Organized Crime. While creating common obligations to criminalise certain conduct, these conventions do not change the normal rules about law enforcement jurisdiction and neither do the proposed changes to the Montreal Convention.

### 3. CONCLUSION

3.1 Air carriage is a significant mode of transport for people and goods, and the proposed transport offences aim to address two highly foreseeable ways in which civil aviation can be used to threaten international peace and security. As improvements have been made to the legal framework in the maritime environment in recent years, it is important that changes are also made in the context of civil aviation to ensure that air transport is not left vulnerable to abuse. Australia would like to commend the proposed text of the transport offences to you for consideration at the 2009 Legal Committee.

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