



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

THE VIEWS OF THE INTERNATIONAL AIR TRANSPORT ASSOCIATION (IATA) ON THE PREPARATION OF ONE OR MORE INTERNATIONAL INSTRUMENTS ADDRESSING NEW AND EMERGING THREATS

(Presented by International Air Transport Association (IATA))

1. BACKGROUND

1.1 ICAO Assembly Resolution A33-1, *Declaration on misuse of civil aircraft as weapons of destruction and other terrorist acts involving civil aviation* instructed the Council to review the adequacy of existing aviation security conventions to deal with new and emerging threats to civil aviation.¹

1.2 Under its General Work Program, the Legal Committee was then required to consider “acts or offenses of concern to the international aviation community and not covered by existing air law instruments.” The report presented by the ICAO Secretariat makes it clear that existing public international air law governing acts of unlawful interference focuses mainly on the persons **actually** committing the punishable acts, either on board an aircraft or at an airport.

1.3 Conversely, there are presently no specific provisions tackling the issue of persons **organizing** and/or **directing** the commission of such offenses. There also seems to be general consensus on the fact that existing conventions do not contain sufficient measures relating to legal co-operation, extradition and prosecution of these offenses.

1.4 Furthermore, IATA observes that the current international legal regime does not cover the following acts:

- i) use of civil aircraft as a weapon;
 - ii) use of civil aircraft to unlawfully spread biological, chemical and nuclear substances;
- and

¹ See ICAO, A33-1, *Declaration on misuse of civil aircraft as weapons of destruction and other terrorist acts involving civil aviation*. See also ICAO Resolutions Adopted by the Assembly – 36th Session, A36-20, *Consolidated statement on the continuing ICAO policies related to the safeguarding of international civil aviation against acts of unlawful interference*, Montreal, 18-28 September 2007.

iii) attacks against civil aviation using such substances.

1.5 Taking 9/11 as a blunt example, the existing international air law regime would have criminalized the actual hijacking of the four aircraft involved, but not the preparation for and organization of the events that led to those acts.

1.6 On 24 March 2005, the ICAO Council circulated a questionnaire amongst Member States to assess whether there was a need to amend the existing conventions. The majority of States responded in the affirmative. Consequently, the ICAO Council formed a Study Group to lay down the foundations of proposed texts for consideration by the Legal Committee. This Study Group held three meetings.

1.7 The ICAO Council then decided to convene the first meeting of Special Sub-Committee of the Legal Committee (“SSCLC”) in Montreal in July 2007. At this meeting, the Australian delegate, serving as Rapporteur, proposed two draft protocols to amend respectively: i) *Convention for the Suppression of Unlawful Seizure of Aircraft*, signed at The Hague on 16 December 1970 (the “Hague Convention”)²; and ii) *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, signed at Montreal on 23 September 1971 (the “Montreal Convention”),³ as amended by the *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation*, signed at Montreal on 24 February 1988 (the “Montreal Protocol”).⁴

1.8 The Rapporteur noted that most of the recommendations proposed were in fact based on the previous work of the International Maritime Organization (“IMO”). In particular, the Rapporteur gave strong consideration to the *Protocol of 2005 to the Convention for the suppression of Unlawful Acts Against the Safety of Maritime Navigation* (“2005 SUA Protocol”) – an international instrument which has thus far achieved only six ratifications.⁵

1.9 In its 182nd Session the ICAO Council agreed that the SSCLC should also examine the issue of the unlawful carriage by air of particularly dangerous goods, related items, and fugitives. Thereafter, the ICAO Council decided to convene the second meeting of the

² See ICAO Doc. 8920, *Convention for the Suppression of Unlawful Seizure of Aircraft*, signed at The Hague on 16 December 1970. As of 24 August 2009, 184 States are parties to this convention. See ICAO, online: <http://www.icao.int/icao/en/leb/Hague.pdf> (Date accessed: 24 August 2009).

³ See ICAO Doc. 8966, *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, signed at Montreal on 23 September 1971. As of 24 August 2008, 187 States are parties to this convention. See ICAO, online: <http://www.icao.int/icao/en/leb/Mtl71.pdf> (Date accessed: 24 August 2009).

⁴ See ICAO Doc. 9518, *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Done at Montreal on 23 September 1971*, signed at Montreal on 24 February 1988. As of 24 August 2009, 168 States are parties to this convention. See ICAO, online: <http://www.icao.int/icao/en/leb/Via.pdf> (Date accessed: 24 August 2009).

⁵ See IMO, LEG/CONF.15/21, *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, done at London on 14 October 2005, available online: <http://www.unhcr.org/refworld/pdfid/49f58c8a2.pdf> (Date accessed: 28 August 2009). As of 31 July 2009, only Estonia, Fiji, Marshall Islands, Spain, Switzerland and Vanuatu are parties to this convention. See IMO, Status of Conventions by Country, online: http://www.imo.org/includes/blastDataOnly.asp/data_id%3D26103/status-x.xls (Date accessed: 24 August 2009). It is noteworthy that the number of State parties to this convention only represents 5.42% of the world’s maritime tonnage. See IMO, Summary of Status of Convention, online: http://www.imo.org/Conventions/mainframe.asp?topic_id=247 (Date accessed: 24 August 2009).

SSCLC from 19 to 21 February 2008 to consider the two draft texts that would amend the *Hague Convention* and the *Montreal Convention*.⁶

1.10 Later, at the sixth meeting of its 184th Session, the ICAO Council approved the report produced by the second meeting of the SSCLC on the preparation of the instruments addressing new and emerging threats (the “Proposals”).⁷ The ICAO Council also decided to convene the 34th Session of the Legal Committee.⁸

2. DISCUSSION

2.1 General Overview

2.1.1 IATA commends wholeheartedly the significant work of the SSCLC in advancing the cause of international aviation law. In general the airline industry supports the thrust of this initiative to further extend as criminal offenses certain acts that may unlawfully and intentionally interfere with international civil aviation.

2.1.2 The use of an aircraft as a weapon of mass destruction (“WMD”) or to disperse WMDs poses a serious threat to international civil aviation. Aircraft may again be used to create a mass-casualty event. We acknowledge that there is an imminent need to address issues relating to new and emerging threats.

2.1.3 IATA is nonetheless concerned with the practical implications and operational repercussions that these proposals may present. It is our opinion that this should not lead to unintended consequences that may place unnecessary burdens on the already weakened airline industry.

2.1.4 IATA understands that the current proposals would criminalize the unlawful and intentional carriage of: explosive or radioactive material (knowing that it is intended to be used to cause death or serious injury or damage); substances composed of any biological, chemical, or nuclear (“BCN”) weapon; any source material (including fissionable material); any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon; and fugitives.⁹

2.1.5 Generally speaking, these acts would become criminal offenses if the carriage of such materials or persons is done with knowledge or intent to cause damage (including the transport of fugitives).

2.2 Carriage of Dangerous Goods – End Use

2.2.1 Airlines already transport infectious pathogens (microbial & biological agents) toxic materials, explosives and radioactive materials (including fissile material) almost every day. Most explosives, however, are restricted to cargo aircraft, although some may be shipped on passenger aircraft as well. In this context, the transport of these commodities is not at all uncommon.

⁶ See ICAO, LC/SC-NET-2, *Report of the Special Sub-Committee on the Preparation of One or More Instruments Addressing New and Emerging Threats* (Montreal, 19 –21 February 2008).

⁷ See ICAO, C-MIN 184/6, 23 June 2008.

⁸ See also ICAO, LM 2/19.1-09/27.

⁹ See ICAO, LC/SC-NET-2, *supra* note 6, Appendix 4, Art. 1.

2.2.2 We are sympathetic to the intent of the proposed changes to the existing conventions, but there is a need to ensure that in trying to stop criminal activities, the legitimate and lawful transport of these items is not negatively impaired.

2.2.3 This is particularly important in the context of radioactive materials in the medical industry where there are already problems with "denial of shipments." "Denial of shipment" occurs when shipments of these radioactive materials, that are in complete compliance with the applicable transport regulations, are (i) denied entry to a country or port; or (ii) are prevented from being transported timely due to additional layers of non-transport regulations that delay their movement. "Denial of shipment" is a particular problem that the International Atomic Energy Agency ("IAEA"), IATA, ICAO, manufacturers and transporters of radioactive materials have been working to address for a number of years. These regulated radioactive materials are a perishable commodity widely used in medicine for the diagnosis and treatment of diseases; any additional regulatory requirements imposed on the transport of these materials will only further aggravate the existing problems in achieving their timely and widely available air transport.

2.2.4 From an airline perspective, there is already a requirement for a mandatory acceptance check of almost all dangerous goods. The airline verifies that the document and the exterior appearance of the package comply with the regulatory requirements. What the airline has no way of determining is the so-called "end-use." This aspect is - thus far - not part of the safety regulations.

2.2.5 Airlines are required to follow the provisions set out in the *ICAO Technical Instructions for the Safe Transport of Dangerous Goods by Air* when transporting such materials,¹⁰ although, for the most part, airlines use the *IATA Dangerous Goods Regulations* (DGR), which are recognized as the "field guide" for the transport of dangerous goods by air. The provisions in these regulations require that the shipper of such goods must classify, pack, mark, label and document such goods as set out in the regulations. Airlines then have an obligation to complete an acceptance checklist, with some small exceptions, for all dangerous goods consignments.

2.2.6 When accepting dangerous goods for transport, airlines do not know, and are never provided with, the intended "end use" for the materials.

2.2.7 In this respect, "end use" is not a condition of transport. Provided that the goods are presented in a condition that complies with domestic and international dangerous goods regulations, they meet the "safety" conditions for transport.

2.2.8 For example, an airline could transport goods that were intended to be used for hostile purposes, but would have no knowledge such was the intended use. Should this be the case, it would make sense that the person who prepared and shipped such goods was held to be criminally liable, but certainly not the airline or its employees. Criminal offenses should be directed to and restricted to shippers, since airlines are innocent third parties.

2.2.9 IATA is of the view that if the requirements set out in the DGR are satisfied, airlines or their employees should not be held criminally liable for having accepted the transport of such goods. **The proposed changes to the existing international regime should affirm this concept.**

¹⁰ See ICAO Doc. 9284-AN905, *Technical Instructions for the Safe Transport of Dangerous Goods by Air*, (2009 – 2010 Edition).

2.3 **Transport of BCN weapons**

2.3.1 Member States should be aware of the fact that there is no reasonable, cost-effective method to ensure that air carriers do not transport “BCNs.” Most of the screening technologies available at airports throughout the world – be they X-ray machines or Explosive Detection Systems (“EDS”) – are able to detect explosive devices that might be associated with BCNs weapons, but not necessarily stand-alone BCNs.

2.3.2 By making the transport of BCN weapons a criminal offense, the new legal regime should not create additional requirements for airports and aviation security authorities to deploy devices with technological capabilities to screen and/or detect them. This would incur exorbitant costs for the aviation industry.

2.3.3 In addition, under the current wording a situation may arise where a country that was not involved in the approved transport of BCN weapons, or components thereof, considers such transport as an offense under its national legislation, since these BCN weapons or components thereof were later used to cause death or serious damage. This may arise, for instance, in the context of countries involved in a conflict where a party used BCN weapons to inflict damage. For these specific situations, language should be included to avoid the air carrier being held responsible for an approved, declared transportation of BCN weapons or components thereof.

2.3.4 Airlines should be blameless for WMD acts using their assets, provided they have observed State security programs.

2.4 **Transport of Fugitives**

2.4.1 The proposal also seeks to introduce language criminalizing the act of knowingly transporting on board an aircraft in service a person attempting to evade criminal prosecution for offenses set out in a number of other international treaties (not only related to international civil aviation). We are not convinced, however, that this provision is necessary since there is already sufficient coverage in other international instruments.

2.4.2 In practice it is almost impossible for an airline to make a reasonable assessment to establish: that a person has committed an offense; and that such person intends to evade criminal prosecution.

2.4.3 Member States will recall that at previous meetings of the SSCLC, a number of States expressed strong reservations in relation to the criminalization of this offense.¹¹ Likewise, it has been said that “...the application of any such provision would be open to abuse and political pressure.”¹²

2.4.4 The proposed language criminalizing the transport of fugitives is extremely unclear. The element of “knowledge” does not necessarily remove the vagueness that currently exists. We are of the firm belief that the current language may lead to unintended consequences. For instance, a reservation, ticket or gate agent may easily be found to have “facilitated” the transport of the fugitive, and therefore criminally liable.

¹¹ See ICAO, LS/SC-NET, *Special Sub-Committee on the Preparation of One or More Instruments Addressing New and Emerging Threats Report*, (Montreal, 3 – 6 July 2007), at 2-12.

¹² See *supra* note 7, at B-2.

2.4.5 Proponents of the criminalization of the transport of fugitives often cite the precedent of the *2005 SUA Protocol*. However, IATA again underlines the fact that this international instrument has thus far received only 6 ratifications.¹³ This indicates the reluctance of the international community to accept the transport of fugitives as a criminal offense in the codification of international law.

2.4.6 IATA agrees with the views of some States expressed at the last meeting of the SSCLC that international air transport significantly differs from the maritime environment, particularly with respect to the security controls that are in place to gain access to aircraft and vessels. Security controls in the air transport context are notably more rigorous than in other modes of transport.

2.4.7 Member States who adhere to this proposal have also said that the criminalization of the transport of fugitives is in line with United Nations Resolution 1373 (“UN Resolution”).¹⁴ Whilst IATA fully supports the spirit of the UN Resolution - to prevent and suppress the financing of terrorist acts - we have, however, failed to find in this resolution any express reference to the transport of fugitives. It is our understanding that its aims can be best achieved by multilateral cooperation arrangements to prevent and suppress terrorist attacks and the enhancement of effective border controls. In this context, the criminalization of this proposed offense does not bring any added value to the laudable initiative now under the consideration of the Legal Committee.

2.4.8 In light of the foregoing arguments, IATA would respectfully suggest the complete deletion of any language that would attempt to criminalize the transport of fugitives.

3. CONCLUSION

3.1 For the above reasons, IATA urges Member States to:

- i) include language that would expressly exempt airlines and their employees from criminal liability, on condition that they observe dangerous goods and security requirements when accepting and transporting infectious pathogens (microbial & Biological agents), toxic materials, explosives (including fissile materials), and radioactive materials;
- ii) recognize that the criminalization of the transport of BCN weapons should not impose an obligation on airports and aviation security providers to deploy technological devices able to screen for and / or detect stand-alone BCNs;
- iii) and exclude completely and expressly any language that would attempt to criminalize the transport of fugitives.

— END —

¹³ See *supra* note 5.

¹⁴ See United Nations Security Council, *Resolution 1373* (2001), adopted by the Security Council at its 4385th meeting on 28 September 2001, available online: <http://daccessdds.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement> (Date accessed: 24 August 2009).