



LEGAL COMMITTEE – 34TH SESSION

(Montréal, 9 – 17 September 2009)

Agenda Item 4: Report on work done at the Session

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

The attached material comprises the draft Report of the Legal Committee on Agenda Item 2 from paragraphs 2:1 to 2:80.

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

2:1 The Chairman underlined the importance of this agenda item. The aim of the work was not to produce perfectly drafted texts for two protocols but to prepare the texts sufficiently mature to be referred by the ICAO Council to a Diplomatic Conference. In this respect, he commended the work of the Special Sub-Committee and invited Mr. T. Olson (France), Chairman of the Sub-Committee, to present its reports.

2:2 The Chairman of the Sub-Committee stated that the objective of the work of the Sub-Committee was to prepare draft texts to update the Hague Convention of 1970 and the Montreal Convention of 1971. These two conventions represent milestones in the development of international air law and have been widely accepted by States. On the other hand, since they were concluded almost 40 years ago, there was a need to update them to address new and emerging threats against civil aviation. The Chairman of the Sub-Committee was pleased to inform the meeting that the Sub-Committee had reached consensus in a number of areas, including the criminalization of the act of using civil aircraft in flight as a weapon, and of the act of using certain dangerous materials to attack aircraft or other targets on the ground. It had also been agreed to explicitly institute new offences of directing and organizing certain offences set forth by the conventions. Moreover, it was proposed that credible threats which might cause economic damage to the aviation industry be criminalized. Finally, based on the most recent UN counter-terrorism instruments, provisions relating in particular to non-discrimination, exclusion of the political offence exception and additional jurisdictional grounds, had been introduced.

2:3 The Chairman of the Sub-Committee noted that a number of sensitive issues, including acts damaging environment and acts of unlawfully transporting certain dangerous materials and fugitives, would require further consideration by the Legal Committee.

2:4 In addition to the reports of the Chairman of the Sub-Committee, the Rapporteur, Ms. J. Atwell (Australia), informed the meeting that the issue relating to the acts of transporting certain dangerous materials and fugitives had been referred by the Council to the Second Meeting of the Sub-Committee. She emphasized the need to work on this matter.

2:5 All delegations which took the floor welcomed and supported ICAO's initiative to amend the two conventions and pledged their cooperation in the work of the Committee. Some delegations referred to certain issues, such as the military exclusion clause, which would require the attention of the Committee.

2:6 The Chairman invited the Committee to review the amendments proposed by the Special Sub-Committee, marked up in Appendix 4 to its report on the second meeting (LC/SC-NET-2), to the Montreal Convention of 1971 as amended by Airports Protocol of 1988. The Committee agreed to limit its review to the amendments proposed by the Sub-Committee. The Chairman stated that, as usual, the title of the instrument should be left for the Diplomatic Conference to decide.

2:7 In addressing the amendment to the *chapeau* of **Article 1 (1)** where the pronoun "he" is replaced by the term "that person", the Committee agreed upon this and any other changes related to gender throughout the text.

2:8 In discussing the amendment to **sub-paragraph (d) of Article 1 (1)**, the Committee decided not to retain such amendment on the grounds that it was not required in view of the definition of air navigation facilities provided in paragraph (c) of Article 2.

2:9 With respect to the amendment to **sub-paragraph (f) of Article 1 (1)**, one delegate proposed that the term "in a manner that causes or is likely to cause" be replaced by "to cause or likely to cause" in order to imply the existence of intent and avoid that a crew member not acting intentionally may fall under this provision. Another delegate proposed the deletion of the reference to damage to the environment which is not the subject of this Convention and should not be treated as an element separated from personal or material damages which are the determinants of the offence to be typified in this provision.

2:10 During the ensuing discussion, the Committee, taking into account that this provision was designed to cover the use of a civil aircraft as a weapon and notwithstanding the use of the words "unlawfully and intentionally" in the *chapeau* of Article 1, agreed that there was a need to clarify that sub-paragraph (f) is not intended to capture ordinary operational behaviour. For this purpose, **it was decided to refer sub-paragraph (f) to the Drafting Committee** to be set up. As regards the reference to the environment, views were expressed in favour and against its deletion. The views against its deletion prevailing, **the Committee agreed to retain the reference to the environment**, considering that it serves the purpose of covering indirect damage to persons or property.

2:11 In inviting comments on **sub-paragraphs (g) and (h) of Article 1 (1)**, the Chairman recommended to bear in mind the definition of "BCN weapon" provided in paragraph (i) of Article 2. From the explanations provided by the Chairman and the Rapporteur of the Sub-Committee, it was noted that these provisions were inspired by the Protocol of 2005 to the *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation* (2005 SUA Protocol) and the wording used was aligned therewith. Balanced views were expressed in favour of and against retaining the reference to BCN weapon, and concerns were voiced with regard to the reference to nuclear material without having a definition thereof. At the end, **it was decided to retain the reference to BCN weapon without square brackets and refer these provisions to the Drafting Committee.**

2:12 Moving to **sub-paragraph (i) of Article 1 (1)**, one delegate proposed that the reference to "special fissionable material" appearing in point (3) be defined. Another delegate proposed to replace the term "not under safeguards" appearing in point (3) by "not under verification and control". These proposals were not supported and, therefore, were not adopted. One observer expressed concern about this paragraph, explaining that airlines accept shipments as labelled by the shippers and therefore do not know whether the contents of the parcels match the labels, or whether dangerous goods were shipped for terrorist acts. Thus, shippers, rather than carriers, should be the ones accountable. Furthermore, if carriers and airport facilities were to be equipped with means to detect shipments of nuclear material and BCN weapons, the costs thereof would be exorbitant and airlines should not be penalized. In conclusion, the observer proposed that air carriers be excluded from the application of this provision. This proposal, although seconded by two delegations, was not adopted.

2:13 Another delegate, with the support of other delegates, proposed the retention of the second of the alternatives appearing in square brackets in point (3) regarding a safeguards agreement. This proposal **was adopted.**

2:14 The Delegate of Australia introduced LC/34-WP/2-1 and the discussion on sub-paragraph (i) evolved in two directions. A number of delegates proposed its deletion, considering that it deals with non-proliferation of weapons and advocating that any amendment to the Convention should be restricted to the subject matter of civil aviation security. Several other delegates advocated its retention, considering that this provision aims at protecting the safety and security of civil aviation and wishing to follow the maritime approach as regards transport of dangerous goods. One delegate, although supporting the retention of this amendment, noted that there was a clear split of positions on this matter in the

Committee and observed that the 2005 SUA Protocol had so far not been widely ratified. He said that if such split were to remain it may be advisable to make this provision optional.

2:15 The Chairman recapped the discussion on the first transport offence in sub-paragraph (i) by stating that there had been no consensus in the Sub-Committee on the inclusion of this offence even if the text had not been placed in square brackets. He urged the Committee to focus on whether it would be possible to achieve consensus and, if not, how to bridge the gaps to make the task of the Diplomatic Conference easier.

2:16 As regards **sub-paragraph (i) (3)**, one delegation requested that the Committee revisit its decision to accept the text in the second set of square brackets, otherwise the parties to the Nuclear Non-Proliferation Treaty could find that their obligations under that treaty could conflict with the new instrument under consideration. The transport-offence clauses had been taken from the 2005 SUA Protocol but that treaty was not being ratified speedily as there were concerns about the language. UN Security Council Resolution 1540 applied exclusively to non-State actors. In conclusion, sub-paragraph (i) should be deleted. A number of other delegations agreed to delete sub-paragraph (i); it was stated, *inter alia*, that the link between these offences and the safety and security of civil aviation was not strong enough to warrant their retention, and that there was ambiguity on the relationship between the proposed protocols and Annexes 17 and 18.

2:17 One delegation, while not in favour of BCN weapons, believed that there should be no requirement to detect biological, chemical or nuclear material in baggage.

2:18 One delegation believed that the matters under sub-paragraph (i) should not be criminalised.

2:19 Another delegation expressed its concerns about sub-paragraph (i) (3) and **sub-paragraph (i) (4)**. As regards sub-paragraph (i) (3), definitions were needed for “source material” and “special fissionable material”; the Committee was referred to definitions found in Article XX of the Statute of the International Atomic Energy Agency (IAEA). With respect to sub-paragraph (i) (4), the Committee’s attention was drawn to the relevant terminology in Security Council Resolution 1540. One delegation would prefer questions of definition to be considered when the Committee would deal with Article 2.

2:20 On the question of whether the transport offences should be included, one delegation believed that they were meant to deter and punish anyone intending to transport the identified materials, which was in line with the work on the other offences. The question was whether the transport offences would help to create a more robust regime. While guidance could be obtained from the 2005 SUA Protocol and Resolution 1540, the specific interests of aviation should be taken into account. For the offence to bite, the element of unlawfulness and intent was a prerequisite, plus there were additional required elements in the sub-paragraphs. If persons intend to commit the acts but were caught before doing so, in the absence of these transport offences, problems might arise.

2:21 This viewpoint was supported by another delegation, which reminded the Committee that the ICAO Council had decided that the Sub-Committee should consider the transport offences. The 2005 SUA Protocol should be used as an inspiration; problems of ratification of this Protocol could be because of the ship-boarding regime included therein.

2:22 One delegation expressed its support for the criminalization and punishment of the unlawful transport of dangerous goods. As regards sub-paragraph (i) (3), this delegation favoured the language in the second set of square brackets.

2:23 Other delegations expressed the desire to retain the transport offences. It was stated that these activities posed a threat to civil aviation and the lives of persons.

2:24 A few delegations supported the idea of exploring the merits of an opt-in/opt-out approach in relation to the transport offences.

2:25 An observer opined that the airlines would still face difficulties even if intent and knowledge of use were included. In this regard, reference was made to the cases where space on an aircraft was wholly or partially reserved by a government for the carriage of explosives to be used for certain of the prohibited purposes known to the airline. Would a military exclusion clause apply and, if so, in which case? The observer believed that an exclusion clause should be inserted into sub-paragraph (i) to the effect that where a State Party is a shipper, the Protocol would not apply. A few delegations believed that this matter merited further consideration.

2:26 It was stated by one delegation that there could be some issues with the interpretation of sub-paragraph (i). The definition of the transport offences itself was a cause for concern. These offences did not apply to aircraft used in military, customs or police services, but States could define these categories differently. Furthermore, all the sub-paragraphs under (i) included a requirement for a specific purpose, such as intimidating or compelling a government and so on, and this could be determined very subjectively. Different States might have different burdens of proof for these offences. All these issues could cause problems with ratification. These transport offences should be linked to the safety of flight.

2:27 On this last point, one delegation stated the unlawful transportation of these materials is not subject to any type of control and there is an intent risk to civil aviation.

2:28 One delegation did not support the opt-in/opt-out proposal as it was not appropriate in an international criminal law context; there was no precedent amongst the UN counter-terrorism conventions for an optional criminal law offence. It should be ensured that the transport offences are criminalized across all jurisdictions that are States Parties to obtain the benefits of universal jurisdiction, mutual legal assistance and the extradition provisions so that there can be no safe haven for offenders. A number of statements had been made to the effect that the proposed offences did not concern the safety of aircraft or that ICAO was not the appropriate forum to consider these offences. However, a prohibition on the use of civil aircraft to intentionally and unlawfully transport BCN weapons, related material and delivery systems, and explosive or radioactive material was entirely consistent with ICAO objectives. In this context, the delegation referred to ICAO Assembly Resolution A33-1, and Articles 4 and 44 of the Chicago Convention. The delegation further stated that the UN Security Council had also called on States and international organizations numerous times to take action in this area; specific reference was made to Security Council Resolutions 1373 (2001), 1456 (2003) and 1540 (2004). The IMO had addressed these issues by criminalizing the unlawful and intentional transport of BCN and other dangerous materials using ships. ICAO should take the same action in relation to civil aviation.

2:29 These views were supported by another delegation.

2:30 In connection with the transport offences relating to fugitives, one delegation had concerns about human rights and due process. In its view, the offences were too broadly defined. A new wording may be necessary.

2:31 At this point, the Chairman noted that there had been an earlier proposal for incorporation of certain definitions into the substantive provisions. This had some support but the preponderance of views was not to accept it. However, it could be further considered when examining the Definitions Article.

2:32 At this point, the Chairman invited consideration of **sub-paragraph (j) of Article 1 (1)**, dealing with the **transport of certain persons**. The observer from IATA referred the Committee to paragraph 2.4 of LC/34-WP/2-3, wherein it was proposed to delete any language that would attempt to criminalize the transport of fugitives, for the reasons given in the paper.

2:33 A delegation stated that the sub-paragraph gave rise to concerns, especially as regards the definition of “transport”. Sale of a ticket by an agent or purchase by a relative should not be an offence. The precise ambit of the offence should be established. There was a contradiction between sub-paragraph (j) and the objective of the proposed protocol, but if it was decided to include this offence, references should be made to the 2005 SUA Protocol and to the Nuclear Terrorism Convention (2005).

2:34 Another delegation would not recommend that the transport of fugitives be included as the term “fugitive” was ambiguous and inclusion of the offence could have unintended consequences. This delegation, however, believed that the draft proposed in paragraph 2.8.3 of LC/34-WP/2-2 merited consideration.

2:35 The Delegate of Australia then introduced paragraphs 2.8.1 to 2.9.2 of LC/34-WP/2-2. Several delegations supported this text. It was stated that it was one delegation proposed new wording for sub-paragraph (f) as follows: “transports, causes to be transported, or facilitates the transport of another person on board an aircraft knowing that the person is subject to a warrant or facing charges or punishment relating to an offence set forth in the treaties listed in the Annex, and intending to assist that person to evade criminal judgement.” This proposal was supported by several other delegations; some of these stated that it was in line with the text in paragraph 2.8.3 of LC/34-WP/2.2.

2:36 One delegation, expressing its satisfaction with the draft in paragraph 2.8.3 of LC/34-WP/2-2, nevertheless felt that this was necessary to have objective criteria for the airlines to implement.

2:37 Another delegation wondered about the duty of care to be imposed on airlines. If the proposed protocol did not include a clarification of the duty of care, then sub-paragraph (j) should be deleted because of the potentially negative effects on the airline industry.

2:38 It was stated by a delegation that Article 21 (3) of the SUA Protocol provides for the possibility for a State Party to declare that it will apply the provisions on fugitive transport in accordance with the principles of its criminal law concerning family exemptions of liability; a similar possibility should be provided here. This suggestion was supported by several other delegations.

2:39 One delegation believed that the text in paragraph 2.8.3 of LC/34-WP/2-2 did not create a duty of care for a carrier to make in-depth inquiries into the status of a person. If this was not clear, additional drafting might be required. This suggestion was supported by several other States.

2:40 One delegation had no difficulty with criminalizing the transport of fugitives, but pointed out that perhaps this offence was already included within the scope of some of the other offences, and duplication ought to be avoided. It stated that there was already a high level of control over the movement of persons in the air transport environment; the carriers already had the burden of complying with a no-fly list. Additionally, there was a long Annex linked to the clause, with a number of international legal instruments. What would be the position of States which are not Parties to one or more of these instruments? In this context, the Chairman referred to Article 21 (1) of the 2005 SUA Protocol by virtue of which a State Party which is not a party to a treaty in the Annex may declare that the treaty shall be deemed not to be included in respect of the fugitive offence. One delegation shared the concerns expressed over the implementation issues for the airlines.

2:41 A delegation recalled that the carrier must act unlawfully, intentionally and with certain knowledge before its liability can be incurred under the proposed protocol.

2:42 The Chairman **summarized** the discussion by stating that there was no consensus on whether to include the fugitive offence. There was strong support for the language changes proposed in paragraph 2.35 above and in paragraph 2.8.3 of LC/34-WP/2-2. These two proposers should come to an agreement on the language and report back to the Committee. The language will then be placed in square brackets because there was no decision whether to include the offence.

2:43 The Chairman proposed to establish a **small group to deal with the transport offences**, with a mandate to see if there could be consensus on either of the two offences (sub-paragraphs (i) and (j) of Article 1 (1)). He noted that the Committee was much further away from consensus in the case of transport of persons. If consensus cannot be reached, how should the issue be presented to the Diplomatic Conference? The small group should also consider the suggestion of an opt-in/opt-out formula which had gathered some, though not overwhelming, support. The group should also consider whether including the notion of a duty of care in the transport of persons might make it more acceptable. The Chairman named the group as follows: Argentina, Australia, Canada, China, Egypt, Germany, India, Japan, Lebanon, the Russian Federation, South Africa and the United States; it would be chaired by the Chairman of the Sub-Committee.

2:44 One delegation, supported by another, objected to the group's composition, stating that it was not based on objective criteria as its balance overwhelmingly favoured the delegations who were supportive of the transport offences. This delegation declined to participate in the group and reserved its position on the outcome. The Chairman expressed regret at this decision and offered further consultation.

2:45 **Paragraph 1 bis of Article 1** was **adopted** without discussion.

2:46 The Committee thereafter considered **paragraph 1 ter of Article 1**. One delegation proposed incorporating the element of criminal intent into paragraph 1 *ter* and para. 2 in order to align it with the wording in the *chapeau* of Article 1, i.e. "if that person unlawfully and intentionally..." Several delegations supported this proposal with one delegation suggesting to merge 1 *ter* into paragraphs 1 and 1 *bis* which would serve the purpose. Two delegations favoured only the term "intentionally" as some threats could be perceived as unintentional, for example a negligent statement made by an agent. Although there were no strong objections to the proposal, some delegations questioned the benefit of incorporating criminal intent into paragraph 1 *ter* given that a threat by itself is unlawful.

2:47 One delegation, supported by another, suggested that "unlawfully" be defined. Another delegation cautioned against this approach given that "unlawfully" was not defined under The Hague and Montreal Conventions.

2:48 One delegation stressed the importance of criminalizing only threats which could lead to serious disruption of international air transportation and therefore proposed deleting from paragraph 1 *ter* the reference to sub-paragraphs (e), (i), and (j) of Article 1, paragraph 1. This delegation also pointed out that there were no provisions to criminalize equivalent threats in the 2005 SUA Protocol. A large number of delegations supported this proposal and it was accepted.

2:49 With regard to drafting, one delegation proposed limiting the offence in paragraph 1 *ter* to threats which are likely to endanger the safety of civil aviation or public security, while another delegation proposed wording to the effect that any person also commits an offence if that person threatens, "with or without a condition, as is provided for under national law..." as this could garner universal acceptance.

2:50 One delegation averred that the reference to “circumstances which indicate the credibility of the threat” may not be a useful qualification, proposing instead a formulation of threats being conveyed directly, and by a third party. This delegation suggested to rephrase it by using the term “conveys or causes any person to receive a credible threat”, which received substantive support.

2:51 In his summary of the discussion on paragraph 1 *ter*, the Chairman noted that there was strong support for the wording proposed above as it seemed to address most of the concerns expressed by the Committee. He referred the specific wording to the Drafting Committee for consideration. It was noted by one delegation that the Arabic text of paragraph 1 *ter* needed to be aligned with the English text, and the Chairman referred this matter to the Secretariat

2:52 The Committee thereafter considered **Article 1 (2)**. The Committee **agreed** on the text of **sub-paragraphs (b) and (c)** of paragraph 2 without discussion. With regard to sub-paragraph (a), one delegation, supported by another, proposed that the attempt to commit either of the transport offences at sub-paragraphs (i) and (j) of Article 1 (1) not be criminalized, given that this was not done under the 2005 SUA Protocol. Other delegations who commented did not support this proposal stating that the attempt to commit any of the transport offences was by itself a grave offence and warranted criminalization. In light of the foregoing, the Committee **endorsed** the text of **sub-paragraph (a)** as it stands.

2:53 Consideration of **Article 1 (3)** began with one delegation presenting its working paper (LC/34-WP/2-1) summarizing the reasons of the Sub-Committee for including the conspiracy and *association de malfaiteurs* offences in the draft Protocol. This delegation stressed that ancillary and inchoate offences constitute a key element of the draft Protocol since they would expand the Montreal Convention to cover not only those offenders actually committing the principal offences, but would provide States with the international legal tools to criminalize and punish offenders for involvement in the planning of such offences.

2:54 One delegation, supported by another, queried as to whether inchoate offences should apply to lesser offences such as the false communication offence at sub-paragraph (e) of Article 1 (1). This delegation noted that Article 5 of the *United Nations Convention against Transnational Organized Crime* (Organized Crime Convention), upon which Article 1 (3) had been partially based, limited the applicability of inchoate offences to “serious crime”. This delegation further stated that many jurisdictions either did not have a conspiracy offence or, if they did, its applicability was limited to serious crimes which are life-threatening and/or terrorist-related. This delegation suggested the addition of “to the extent that it is compatible with its domestic law” to the chapeau of Article 1 (3).

2:55 The Chairman of the Sub-Committee clarified that Article 1 (3) was adapted from the Organized Crime Convention because it was considered to be the most comprehensive text regarding criminal cooperation and overcomes the difficulties between the conspiracy and *association de malfaiteurs* offences. The Chairman stressed that although some jurisdictions may not recognize either offence, it is essential that the draft Protocol criminalizes any concerted action.

2:56 It was proposed by one delegation, supported by another, that Article 1 (3) should not apply to attempts under sub-paragraph (a) of Article 1 (2). The supporting delegation averred that the formulation of sub-paragraph (b) of Article 1 (3) was too far-reaching and therefore not in line with the UN resolutions on terrorism or the Organized Crime Convention. This delegation suggested that “a group of persons” at sub-paragraph (b) be defined in line with the Organized Crime Convention’s definitions of “organized criminal group” and “structured group”. Two delegations cautioned against such a definition in a terrorist convention given that terrorist groups tended to have little or no structure. One observer further noted that the aim of an “organized criminal group” was to commit an offence in order to obtain “a financial or other

material benefit”, whereas terrorist groups are generally motivated by ideological reasons. This observer also clarified that the language adopted in sub-paragraphs (b) (i) and (ii) of Article 1 (3) regarding the composition of a group was taken from UN terrorism conventions, i.e. the Terrorist Bombings Convention, the Terrorist Financing Convention, the Nuclear Terrorism Convention and the 2005 SUA Protocol.

2:57 When the meeting resumed on 11 September, the Chairman first asked for a moment of silence in memory of the victims of the attacks on 11 September 2001, and all other victims of attacks against civil aviation. He recalled that this set of events prompted the process under way before the Legal Committee, which commanded utmost seriousness in its work.

2:58 The Chairman then turned back to paragraph 3 of Article 1 in the proposed amendments to the Montreal Convention and recalled earlier discussions which indicated that a few States had in their domestic law neither the concept of conspiracy, nor that of *association de malfaiteurs*. Nevertheless, he understood that every system of law should somehow be able to address this kind of criminal behaviour. While a proposal to add plain reference to domestic law had not received support so far, he wished to pursue the discussion to consider whether the language as it stood would be sufficiently broad for such States to implement this offence in their domestic system, or whether reference to domestic law was necessary.

2:59 The observer from UNODC (United Nations Office on Drugs and Crime) then gave the background of this issue. Referring to Article 2.3 of the *International Convention for the Suppression of the Financing of Terrorism*, he recalled that paragraph 3 of Article 1 was innovative in that offences would be constituted even if the intended act would not have taken place. The general wish to introduce this innovation had been obvious since preventive measures were necessary to enable interrupting a plot without being an obstacle to prosecution. The current draft aimed at achieving this aim through two models, i.e. conspiracy and *association de malfaiteurs*, but he urged the Committee members not to be too narrow, considering that the instrument had to apply globally. While some systems of law might not accommodate either model, he submitted that all systems must have a vehicle to prevent criminal action towards such life-endangering crimes and such avenues could be explored by the Drafting Committee.

2:60 The Chairman thanked the UNODC observer for his thoughtful summary, and concluded that the question remained whether to adjust the current text. One delegation supported the text as it stood, as it was the result of the Sub-Committee deliberations which were quite extensive on the subject. Adjustments might be made if absolutely necessary to accommodate some systems of law but the international community and ICAO would be off-mark without this innovative concept. Three delegations supported the observer’s proposal for further consideration by the Drafting Committee aiming at a consensus, bearing in mind that the text had been carefully drafted. One delegation, supported by another, preferred to keep the text proposed by the Sub-Committee which sufficiently covered the systems in place in a large number of States, noting that it was up to domestic laws to adapt to international instruments where necessary.

2:61 The Chairman concluded from the discussion over paragraph 3 of Article 1 that the Committee would transmit to the Diplomatic Conference the very carefully drafted text as it stood, without changes, which completed the consideration of Article 1.

2:62 The Committee then turned to the text of **Article 2** containing new definitions. One delegation questioned the use of the term “unlawfully” throughout the instrument and submitted that it should be defined. Another delegation acknowledged that, even if a definition might not be adequate given its potential impact for other conventions, a summary of the meaning of “unlawfully” in the records of the meeting could be useful. The Chairman of the Sub-Committee concurred that given the number of precedents in other conventions, a definition might complicate matters. The observer from UNODC agreed that the term “unlawfully” may appear as redundant but noted that this standard language originating from

the common law system does not present any harm and is widely used. The Chairman concluded that, even if redundant or circular, this term should not be defined.

2:63 One delegation then recalled that the Drafting Committee still had to consider a proposal for referring to the IAEA charter regarding the terms “source material” and “special fissionable material” in Article 1 which should otherwise be defined if such reference would not be retained. With one delegation in favour and one against, the Chairman concluded that those terms would not be further defined. He also noted that sub-paragraph (g) of Article 1 (1) had been referred to the Drafting Committee whose outcome would then impact on **sub-paragraphs (d) to (h) of Article 2**. Regarding sub-paragraph (d), one delegation questioned the method of adopting dedicated definitions and their alignment with the definition of similar terms in other conventions, marking a preference for adopting plain reference to such conventions instead. The Chairman of the Sub-Committee was of the opinion that references to other conventions would entail difficulties in case of amendments thereto, not to mention the difficulties for ratification where States would not be Parties to the referenced instruments. The Chairman recalled that the Sub-Committee had not agreed on references to Annex 18 to the Chicago Convention.

2:64 One delegation questioned the wording of **sub-paragraph (c)** in view of technological developments and proposed to swap Articles 1 and 2. As regards the definition of “air navigation facilities”, the Secretary confirmed that, at the request of the Sub-Committee, it had been reviewed by the ICAO Air Navigation Commission (ANC) which found it in order. Following the interventions of one delegation in favour and two opposing any swap of Articles 1 and 2, it was concluded by the Chairman that any modification to the current order dating from 1971 might entail problematic adaptations in a number of domestic laws.

2:65 One delegation then wondered whether reference to environmental damage should be made in **sub-paragraph (e)**, since the same reference was made in **sub-paragraph (f)**. The Rapporteur drew attention to the point of difference that in sub-paragraph (g) and (h) of Article 1 (1) environmental damage was referred to as a result of the offences, whereas in sub-paragraph (f) of Article 2 environmental damage was considered as one of the built-in elements of the definition of “radioactive material”. She, therefore, cautioned against changing definitions without knowing the context at issue. This was supported by two delegations and the Chairman concluded that the issue of definitions had been referred to the Drafting Committee.

2:66 Concerning **sub-paragraph (i)**, the Chairman reminded the Committee that keeping the definition of “BCN weapon” in Article 2 would depend on the deliberations of the Drafting Committee on the so-called transport offence, noting that there was otherwise consensus on the text of the definition itself. Two delegations nevertheless stated that consistency with other conventions should be sought by the Drafting Committee.

2:67 Turning to **Article 3**, the Chairman acknowledged that the indicated changes were of editorial nature only and that no delegation had asked for any further modification.

2:68 Regarding **Article 4**, one delegation noted that **sub-paragraphs 2, 3 and 4** were not referring to **sub-paragraphs (i) and (j)** of Article 1 and asked for the reason of such differentiation of treatment. The Rapporteur concurred that reference to sub-paragraphs (i) and (j), which had been added by the Sub-Committee, was necessary as a consequential amendment to Article 4. She further suggested that sub-paragraph 6 of Article 4 should, for the same reason, refer not only to paragraph 2 of Article 1 but also to **Articles 1 ter, 2 and 3**.

2:69 One delegation, supported by another, was of the opinion that reference should be made in **paragraph 2 of Article 4** to the State of the operator rather than to the State of registration, given the

development of air transport. While the Chairman observed that the State of Registry actually remained the State of the nationality of the aircraft and was more stable, one delegation insisted that full consistency had to be ensured in this respect with the recently adopted Convention on *Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft*. One delegation, noting that the reference could be modernized to read “State of ‘Registry’”, offered that the latter had to subsist in paragraph 2, even if the State of the operator would be added. As this was supported by another delegation, the Chairman decided to transmit this question to the Drafting Committee.

2:70 The Chairman of the Legal Committee then announced the composition of the Drafting Committee: Argentina, Australia, Brazil, Cameroon, Canada, China, Egypt, France, Germany, Japan, Mexico, Nigeria, the Russian Federation, Saudi Arabia, Singapore, South Africa, Sweden, Tunisia, the United Kingdom and the United States of America, as well as IATA and UNODC. The Chairman also announced that the Drafting Committee would be chaired by Ms. S. H. Tan (Singapore).

2:71 The Committee thereafter considered **Article 4 bis** (the military exclusion clause).

2:72 With regard to **paragraph (1) of Article 4 bis**, one delegation, citing the importance of the Chicago Convention to international civil aviation, suggested to insert the following wording at the end of the clause: “... and the objectives and principles of the Chicago Convention as they pertain to international civil aviation”. This proposal received the support of several delegations.

2:73 Two delegations suggested the deletion of paragraph (1), with one cautioning that if the paragraph was retained, it should not be viewed as implying that general international law prevails over the Montreal and Hague Conventions, but that all relevant treaties are equally binding upon States and that paragraph (1) is merely declaratory in nature. Two delegations recommended that if paragraph (1) is deleted, then paragraph (2) should be re-numbered as, respectively, Article 4 bis (1) or Article 4 (7) given that paragraph (2) also deals with the scope of application.

2:74 The Rapporteur of the Sub-Committee provided the background for **paragraph (2) of Article 4 bis** which was based on the text negotiated in the Terrorist Bombings Convention and subsequently adopted in the Nuclear Terrorism Convention and the 2005 SUA Protocol. The Rapporteur pointed out that the clause’s inclusion in both draft Protocols would ensure that the Montreal and Hague Conventions did not purport to regulate the conduct of armed forces in State control as this was already addressed in other fields of law, in particular international humanitarian law, the law relating to the responsibility for internationally wrongful acts and the Charter of the United Nations. The Rapporteur further stressed that the focus of the Montreal and Hague Conventions was on the activities of the individual and not States, and that this was demonstrated not only through the offences themselves but through Articles 4 (1) and 3 (2) respectively. The assumption is that the activities of the States are covered by other rules of international law. The military exclusion clause therefore does not constitute a total exclusion of criminal responsibility but rather a qualification as to the applicable law; it is declaratory in nature.

2:75 A majority of the delegations which took the floor echoed the Rapporteur’s views on paragraph (2) of Article 4 bis, with some averring that Article 4 bis be viewed as a package with both paragraphs necessarily linked. These delegations emphasized the Article’s declaratory nature, its having developed a strong standing in counter-terrorism conventions, its resolution of potential conflict of law situations, and the importance of articulating and codifying long-accepted law when the failure to do so could create ambiguity.

2:76 One delegation proposed to replace paragraph (2) Article 4 bis with the following text: “This Convention does not apply to activities of armed forces during an armed conflict in the case of a declaration of war between belligerent parties.”

2:77 In objecting to this proposal, one delegation cited the many undeclared armed conflicts over the last 70 years, including those based upon the right of self-defense recognized by the UN Charter and legal military interventions sanctioned by Security Council resolutions. A number of delegations supported the proposed text, with one making a lengthy statement with respect to the second part of paragraph (2), i.e. “activities undertaken by military forces of a State in the exercise of their official duties”, reiterating the concern expressed by this and other delegations at the Sub-Committee meetings, at the Legal Commission of the 36th Session of the ICAO Assembly and by Council members, namely that this may be viewed as an exemption of criminal acts committed by a member of a State’s armed forces during peacetime, and he queried as to whether the rules of international law exist which effectively govern such activities, especially with respect to extradition and prosecution. This delegation reminded the Committee of its proposal at the Sub-Committee that a legal study be done which would clarify international law regulating such activities. This delegation averred that although the scope of the aviation security conventions was being expanded to cover further acts of unlawful interference, a new loophole may be created that could have the effect of legalizing acts of unlawful interference carried out by certain States, thus violating the principles of the aviation security conventions, the Chicago Convention, and resolutions of the UN General Assembly, Security Council and the ICAO Assembly. He questioned the acceptance of the military exclusion clause solely because it appears in other counter-terrorism conventions, which differ from the aviation security context. Based upon the reasoning of this delegation, other delegations suggested that the last part of paragraph (2) of Article 4 *bis* be deleted.

2:78 Given the disparate views on paragraph (2) of Article 4 *bis*, and in an effort to achieve a compromise, one delegation proposed an additional paragraph based upon Article 4 (3) of the Nuclear Terrorism Convention. A large number of delegations agreed that this proposal was worth exploring.

2:79 In summarizing the discussion, the Chairman noted the division of opinion toward the text of Article 4 *bis* as agreed by the Sub-Committee. The burden of persuasion to amend the text had not been met. However, as there was no consensus, the Chairman proposed to form a small group, chaired by the Delegation of Switzerland, whose mandate would be to work towards consensus, failing which, to arrive at a way to present the issue to the Diplomatic Conference.

2:80 The Committee decided to defer consideration of **Article 4 *ter*** pending the outcome of the discussions of the small group on transport offences.