



INTERNATIONAL CONFERENCE ON AIR LAW

(Beijing, 30 August – 10 September 2010)

THE VIEWS OF THE INTERNATIONAL AIR TRANSPORT ASSOCIATION (IATA) ON THE PROPOSED INSTRUMENTS TO ADDRESS NEW AND EMERGING THREATS TO CIVIL AVIATION

(Presented by the International Air Transport Association (IATA))

1. INTRODUCTION

1.1 IATA firmly believes that cooperation between government and industry is the key to building a safe and secure operational environment for the airline industry and the travelling public. It is in that spirit of cooperation that IATA wishes to set out its views on the proposed amendments to the Aviation Security Conventions that will be considered by the Diplomatic Conference.

1.2 The airline industry naturally supports the thrust of the initiative to further extend the scope of the criminal law to certain categories of acts that unlawfully interfere with international civil aviation. However, IATA is concerned with the practical implications and operational repercussions that may arise from the proposed amendments.

1.3 The proposed amendments are in large measure inspired by the previous work of the International Maritime Organization and in particular, the *Protocol of 2005 to the Convention for the suppression of Unlawful Acts Against the Safety of Maritime Navigation* (“2005 SUA Protocol”). IATA cautions drawing so heavily from an international instrument that regulates a sector of the transport industry with a significantly different operating environment and especially an instrument which, it must be acknowledged, has not been widely accepted by the international community.

1.4 IATA would urge the Diplomatic Conference to guard against the unintended consequences of the proposed amendments that would place unnecessary and undesirable financial and operational burdens on the airline industry.

1.5 We would like to focus on five specific areas of concern to the airline industry:

- a) Requirement of unlawful and intentional conduct;
- b) Carriage of dangerous goods;
- c) Carriage of biological, chemical and nuclear weapons (BCN weapons);
- d) Carriage of fugitives; and
- e) Exclusion of military activities.

2. DISCUSSION

2.1 Requirement of unlawful and intentional conduct

2.1.1 Both of the offences of transporting dangerous goods and BCN weapons require unlawful and intentional conduct on the part of the person committing the offence. However, nowhere in the existing Convention regimes nor in the proposed amendments are the terms “*unlawfully*” or “*intentionally*” defined. Those terms would fall to be interpreted under national law with different standards and tests being adopted by different jurisdictions throughout the world.

2.1.2 As a matter of practice, this uncertainty will leave State prosecutors with an extremely wide discretion over the categories of parties against whom they may decide to open criminal investigations. Innocent airlines and their employees will almost certainly find themselves embroiled in costly and time consuming defences to criminal investigations for matters that arise out of the normal course of their operations. Whilst the airline and its employees may ultimately be cleared of any criminal conduct, the mere fact of being subject to a criminal investigation would have a serious operational impact.

2.1.3 For this reason, the potential criminal liability of an airline and its employees should be excluded in certain limited circumstances as discussed below.

2.2 Carriage of dangerous goods – end use

2.2.1 It is proposed that it would constitute a criminal offence to transport, cause to be transported or facilitate the transport of certain categories of dangerous goods with the intention of causing death or injury for political means.¹

2.2.2 States will be aware that airlines already transport microbial and biological agents, toxic materials, explosives (including fissile material) and radioactive materials on an almost daily basis.

2.2.3 IATA submits that ordinary operational behavior should not give rise to criminal liability and this concept should be expressly captured in the wording of the Convention. Otherwise, the entirely legitimate and lawful transport of such items will be impaired.

2.2.4 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.² In addition, airlines, for the most part, follow the provisions of the *IATA Dangerous Goods Regulations*.³ These two sets of regulations require that a shipper must classify, pack, mark, label and document dangerous goods. Airlines then have an obligation to complete an acceptance checklist (with some small exceptions) for all dangerous goods consignments.

2.2.5 However, when accepting dangerous goods for transport, airlines do not know, and are never provided with, the intended end use for the materials. Indeed, end use is not a condition of transport. In this regard, it will be recalled that the requirement of including end use as a condition of transport was expressly discarded during the drafting of the Montreal Convention 1999. Provided that the goods are presented in a condition that complies with domestic and international regulations, they meet the safety conditions for transport.

¹ For the purpose of intimidating a population or compelling a government or an international organisation to do or to abstain from doing any act

² See ICAO Doc. 9284-AN905, *Technical Instructions for the Safe Transport of Dangerous Goods by Air*, (2009 –2010 Edition).

³ See also *IATA Cargo Services Conference Recommended Practice 1630 on cargo security*.

2.2.6 Thus, an airline may well transport goods that were intended to be used for unlawful purposes, but with no knowledge of the intended use. In such a case, whilst the person who prepared and shipped such goods should be held to be criminally liable there is no justification for imposing criminal liability on the airline or its employees.

2.2.7 IATA submits that if the requirements set out in the ICAO Technical Instructions and IATA Dangerous Goods Regulations are satisfied, airlines and their employees should not be held criminally liable for having accepted the transport of dangerous goods. The proposed changes to the existing international regime to be considered by the Diplomatic Conference should affirm this concept in accordance with the amendments set out Attachment A.

2.3 **Transport of BCN weapons**

2.3.1 The creation of the offence of transporting, causing to be transported or facilitating the transport of any BCN weapon is also to be considered by the Diplomatic Conference.

2.3.2 Member States will recognize that such mass casualty weapons are used as a military threat to State sovereignty. As such, we submit that the detection of BCN weapons should remain entirely the responsibility of the State and this should be reflected in the proposed amendments.

2.3.3 Member States should be aware that the detection of BCN materials is extremely complex, requires advanced technology and is extremely expensive to implement. Thus, the responsibility for the detection of BCN weapons is outside the core competency and capability of the airline industry.

2.3.4 By making the transport of BCN weapons a criminal offence, the new legal regime should not automatically create additional requirements for airports and aviation security authorities to deploy devices with technological capabilities to screen or detect them. Not only are such screening operations outside the competency of the airline industry but they would, in any event, give rise to exorbitant costs for the industry as a whole.

2.3.5 Finally, the drafting of the proposed offence to cover “*any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon*” is so wide that it could encompass any manner of goods that are lawfully and legitimately transported by air. For this reason, the suggested amendments set out in Attachment A should be adopted.

2.4 **Military exclusion clause**

2.4.1 The proposed amendments would exclude “*the activities of armed forces during an armed conflict*” from the scope of both Conventions. However, in many cases, governments lease, wholly or partly, commercial aircraft to transport weapons for military purposes. Typically, these arrangements involve a wet lease contract where the airline provides the aircraft and the crew. The airline may be an all-cargo carrier, a consolidator, or a passenger airliner with cargo operations. Since the carriage of such weapons is for military purposes, the airline in question “*knows*” that the materials being transported may be used to inflict “*serious injury or damage for the purpose of intimidating a population*” and thus would automatically be guilty of the offence by fulfilling the wet lease contract.

2.4.2 Two problems arise. First, would an aircraft wholly leased by a government agency be considered to be used for “*military service*”? Second, if a commercial airline transporting passengers and cargo only leases part of its cargo capacity to a government agency to transport explosive materials or weapons for military purposes, would that aircraft be considered as being in use for “*military service*”?

2.4.3 We would suggest that the most reasonable solution to these problems would to include drafting so that the transport of explosives, radioactive materials and BCN weapons is excluded from the application of both protocols where a government agency intervenes in its capacity as a shipper, consignee or both. Alternatively, the Conventions as amended should provide that States cannot intentionally transport any BCN weapon or its component parts on board a commercial aircraft. We propose drafting for both alternatives in Attachment A.

2.5 **Transport of fugitives**

2.5.1 Finally, it is proposed to introduce language criminalizing the act of knowingly transporting on board an aircraft in service a person attempting to evade criminal prosecution for offences set out in a number of other international treaties and not only those related to international civil aviation.

2.5.2 In practice, it is almost impossible for an airline to make a reasonable assessment in order to establish:

- a) that a person has committed an offence; and
- b) that that person intends to evade criminal prosecution.

2.5.3 The proposed language criminalizing the transport of fugitives is extremely unclear and 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, if a particular jurisdiction adopts an imputed or objective knowledge standard, an airline’s reservation, ticket or gate agent may easily be found to have “*facilitated*” the transport of the fugitive and therefore find him or herself criminally liable.

2.5.4 IATA notes that the proposed offence is adapted from the drafting of the 2005 SUA Protocol referred to above. However, it is clear 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.

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

3. **CONCLUSION**

3.1 We urge the Diplomatic Conference to adopt Protocols that reflect revisions to the proposals in line with Attachment A.

3.2 IATA looks forward to being in a position to support new Protocols that would attract the widespread support of the airline industry. This would only serve to increase significantly the prospects of States ratifying the Protocols.

ATTACHMENT

We set out below our specific revisions to the proposed amendments to the Conventions.

SUGGESTED REVISIONS TO THE DRAFT CONSOLIDATED TEXT OF THE MONTREAL CONVENTION 1971 AS AMENDED BY THE AIRPORTS PROTOCOL 1988 WITH AMENDMENTS PROPOSED BY THE LEGAL COMMITTEE

ARTICLE 1

- (i) transports, causes to be transported, or facilitates the transport of, on board an aircraft:
...
(4) any equipment, materials or software or related technology whose sole purpose is to be used in the design, manufacture or delivery of a BCN weapon [knowing that it is intended to be used for such purpose.]
- (j) An operator shall be conclusively deemed not to have committed the offences set out in Article 1, paragraph (i)(1) and (3) where it has complied with the requirements of both the ICAO Technical Instructions for the Safe Transport of Dangerous Goods by Air and the IATA Dangerous Goods Regulations in force at the time of the alleged offence.
- (k) An operator shall be conclusively deemed not to have committed the offence set out in Article 1, paragraph (i)(2) where it has established a system to facilitate and audit compliance with the IATA Operational Safety Audit (IOSA) and Annex 17 of the Chicago Convention with respect to the carriage of goods by air.
- ...
4. An operator shall be conclusively deemed not to have committed the offence set out in Article 1, paragraph 2(d) where it has established a system to facilitate and audit compliance with the IATA Operational Safety Audit (IOSA) and Annex 17 of the Chicago Convention with respect to the carriage of passengers by air.

ARTICLE 2

- ...
- (k) “operator” means the person who as a principal enters into a contract of carriage for the carriage by air of passengers, baggage or cargo or the person who performs the whole or part of the carriage by virtue of authority from that principal, or the servants or agents thereof in the course of their employment, whether or not in the scope of their authority.
- (l) “commercial aircraft” means any aircraft other than State aircraft. Aircraft used in military, customs and police services shall be deemed to be State aircraft.

ARTICLE 4

Alternative 1

1. This Convention shall not apply to aircraft used in military, customs or police services, nor to commercial aircraft being used for military activities where the lessee of the aircraft or the consignor or consignee of cargo is a State entity.

Alternative 2

...

- ~~7. No State entity shall be permitted to transport, cause to be transported, or facilitate the transport of any BCN weapon, knowing it to be a BCN weapon as defined in Article 2 nor any equipment, material or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon on board a commercial aircraft.~~

**SUGGESTED REVISIONS TO THE DRAFT CONSOLIDATED TEXT OF THE HAGUE
CONVENTION 1970 WITH AMENDMENTS PROPOSED BY THE LEGAL COMMITTEE**

ARTICLE 1

...

- ~~5. An operator shall be conclusively deemed not to have committed the offence set out in Article 1, paragraph 3(d) where it has established a system to facilitate and audit compliance with the IATA Operational Safety Audit (IOSA) and Annex 17 of the Chicago Convention with respect to the carriage of passengers by air.~~

ARTICLE 3

1. For the purposes of this Convention,

...

- (b) “operator” means the person who as a principal enters into a contract of carriage for the carriage by air of passengers, baggage or cargo or the person who performs the whole or part of the carriage by virtue of authority from that principal, or the servants or agents thereof in the course of their employment, whether or not in the scope of their authority.
- (c) “commercial aircraft” means any aircraft other than State aircraft. Aircraft used in military, customs and police services shall be deemed to be State aircraft.
2. This Convention shall not apply to aircraft used in military, customs or police services, nor to commercial aircraft being used for military activities where the lessee of the aircraft or the consignor or consignee of cargo is a State entity.