



ASSEMBLY — 36TH SESSION

LEGAL COMMISSION

Agenda Item 46: Acts or offences of concern to the international aviation community and not covered by existing air law instruments

ACTS OR OFFENCES OF CONCERN TO THE INTERNATIONAL AVIATION COMMUNITY AND NOT COVERED BY EXISTING AIR LAW INSTRUMENTS

(Presented by the Council of ICAO)

EXECUTIVE SUMMARY

This paper presents, for the information of the Assembly, a progress report on the item “Acts or offences of concern to the international aviation community and not covered by existing air law instruments” in the General Work Programme of the Legal Committee.

<i>Strategic Objectives:</i>	This working paper relates to Strategic Objectives B1 and F1 as it provides information on the preparation of international air law instruments relating to aviation security.
<i>Financial implications:</i>	A sum of U.S.\$ 500 000 from the Aviation Security Plan of Action 2007 Budget was approved by the Council and it is expected that this funding resource will be used to meet the financial requirements. No additional resources will be sought from the budget of the Plan of Action.
<i>References:</i>	State letter LE 4/65-05/45 dated 24 March 2005 A35-WP/88

1. INTRODUCTION

1.1 Assembly Resolution A33-1 directs the Council and the Secretary General to act urgently to address the new and emerging threats to civil aviation, in particular to review the adequacy of the existing ICAO aviation security conventions (the Conventions). Pursuant to this resolution, the Secretariat completed a study on legal measures to cover new and emerging threats to civil aviation, which was reported to the 35th Session of the Assembly in A35-WP/88, "ICAO Aviation Security Plan of Action, Project 12: Legal" (Information Paper). Subsequently, a survey was made through a questionnaire to all Member States of ICAO in March 2005. Eighty-four out of 189 Member States replied, with an overwhelming majority affirming the need to review and amend the Conventions. On 29 November 2005, at the twelfth meeting of its 176th Session, the Council agreed that, as a first step, a Secretary Study Group be established to assist the Secretariat in preparing an international legal instrument to cover the new and emerging threats to civil aviation. The subject is currently considered under Item 2 of the General Work Programme of the Legal Committee: "Acts or offences of concern to the international aviation community and not covered by existing air law instruments".

2. THE RESULTS OF THE WORK OF THE STUDY GROUP

2.1 Issues to be addressed through treaty amendments

2.1.1 The Secretariat Study Group on Aviation Security Conventions held three meetings in 2006 and 2007. It undertook a comparative study of the Conventions (including the *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) and legal instruments of comparable nature adopted within the UN system, and reached the conclusion that certain issues could be addressed through amendments to some of the Conventions. These issues include criminalization of certain acts, incorporation of certain provisions commonly found in the more recent counter-terrorism conventions concluded in the UN system, and clarification of certain terms in the existing instruments.

2.1.2 Criminalization of certain acts

2.1.2.1 The Study Group identified certain acts as mentioned below which could be criminalized through treaty provisions. In addressing these matters, the Study Group was of the view that ICAO should continue to criminalize acts, independent of motive:

- a) **use of civil aircraft as a weapon** is a serious threat, as appeared in the case of 11 September 2001. While the existing instruments may cover certain aspects of the act, the gravity of using civil aircraft as a weapon calls for its explicit criminalization as an independent offence under an international convention, in order to protect the safety of civil aircraft and to maintain public confidence in air transport;
- b) **use of civil aircraft to unlawfully spread biological, chemical and nuclear substances** is also perceived as a serious threat. This act does not fall neatly within the category of unlawful acts against the safety of civil aviation but rather is an act which uses civil aviation as a means to cause a particular form of widespread damage. While the act does not necessarily jeopardize the safety of aircraft or of persons on board, such outcomes may still concurrently result from the act;

- c) **attacks against civil aviation using biological, chemical and nuclear substances** are partially covered by the existing instruments. However, since some of the threats to commit such attacks have not been fully covered, the Study Group was of the view that it is desirable, for completeness and ease of reference, to declare in an aviation security convention that such attacks are internationally punishable;
- d) **acts of organizing or directing offences specified in the Conventions** are not explicitly covered by these Conventions. In particular, the Group noted that in the cases of suicide attacks in the air or on the ground, while the attackers perish during the attacks and can no longer be punished under criminal law, those masterminds remaining on the ground should not be allowed to have safe haven;
- e) **wilful contributions to an offence specified in the Conventions** should be criminalized even if such contributions did not lead to the actual commission of an unlawful act. Such contributions, which are not fully covered by the Conventions, may also present serious threats and therefore require deterrence by criminal sanctions; and
- f) noting that the Conventions do not criminalize a threat to commit an offence specified therein, the Group was of the view that the time has arrived for criminalizing **a credible threat to commit an offence specified in the Conventions**. The Group observed that, under certain circumstances, a threat to commit an act, without the actual commission of the act contemplated, may cause grave adverse consequences to civil aviation. It was further noted that the more recent treaties concluded within the UN system, such as the UN *International Convention for the Suppression of Acts of Nuclear Terrorism*, criminalize certain threats to commit offences.

2.1.3 **Incorporation of certain provisions commonly found in the more recent counter-terrorism conventions concluded in the UN system**

2.1.3.1 The Group recognized the value of the Conventions in the international cooperation for the prevention and suppression of unlawful acts against the safety of civil aviation. At the same time, it acknowledged that the Conventions were adopted decades ago and they do not reflect the provisions commonly found in the relevant conventions concluded recently in the UN system. Several such provisions are mentioned below.

2.1.3.2 Comparable UN counter-terrorism conventions concluded after 1997 contain a military exclusion clause, which expressly specifies that the conventions do not govern the activities of armed forces during an armed conflict, and the activities undertaken by military forces of a State in the exercise of their official duties. In ICAO, it has been widely understood that the aviation security instruments which criminalize certain acts are not applicable to the military activities mentioned above. The same clause of military exclusion can be included in any instrument amending the Conventions, in order to achieve uniformity and clarity and to prevent any interpretative confusion. Such a clause would be considered as declaratory in nature.

2.1.3.3 The relevant UN conventions also contain provisions that the offences covered therein shall not be regarded as a political offence. Accordingly, States parties are unable to refuse the request for extradition by invoking a political offence exception. Since no such an explicit provision exists in the Conventions, it is also considered necessary to include it.

2.1.3.4 The relevant UN conventions include clauses with respect to fair treatment and non-discrimination. These provisions are aimed at the protection of basic human rights and should therefore be incorporated into the ICAO instruments.

2.1.3.5 The Study Group further noted the trend of providing wider jurisdictional grounds in the more recent conventions. When an offence covered by these conventions is committed by a national of a State, such a State shall establish jurisdiction over such an offence wherever the national might be. If the offence is committed against a national of that State, the latter may also claim jurisdiction. In the view of the Study Group, these jurisdictional grounds should also be added to the Conventions, adapted to the context of civil aviation, as appropriate.

2.1.4 **Clarification of certain terms**

2.1.4.1 During the discussions in the Study Group, it was noted that the term “air navigation facilities” in one of the Conventions may need clarification, in order to ensure explicit coverage of satellite signals, computer-generated data and other non-tangible systems used for air navigation. Such clarification could also be made during the treaty amendment process.

2.1.5 **Recommendation of the Study Group**

2.1.5.1 Based on the foregoing, the Study Group recommended that the Council invite the Chairman of the Legal Committee to establish a special Sub-Committee for the preparation of a draft text amending the Conventions.

2.2 **Other issues**

2.2.1 A question was raised during the meetings of the Study Group whether a treaty provision should be developed to prohibit the transport on board a civil aircraft of any unauthorized biological, chemical or nuclear weapons or related material, as in the case of the *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, as amended in 2005, with respect to maritime transport. The Group felt that, while the precedent in maritime law warranted consideration, the policy guidance of the Council was needed on this matter. The traditional ICAO approach has been focused on the protection of the safety of international civil aviation *per se*. The mere transport of certain prohibited material may not necessarily threaten the safety of aircraft or persons on board. Whether ICAO should shift from the traditional approach and embark on a new direction was a matter of policy choice. On this matter, the Council observed on 7 March 2007, at the tenth meeting of its 180th Session, that there was an emerging consensus that the criminalization of these acts through a convention could be considered provided that its scope was limited to those acts which were likely to endanger the safety of aircraft in flight.

2.2.2 Another issue which the Group raised for the policy guidance of the Council was whether the *Convention on Offences and Certain Other Acts Committed on Board Aircraft*, signed at Tokyo on 14 September 1963, should be amended to cover the issue of unruly passengers. At the same meeting on 7 March 2007, the Council provided guidance by stating that there was an emerging consensus that the issue of unruly passengers deserved consideration by ICAO in another forum, taking into account a request of the International Air Transport Association. On the other hand, this issue differed in nature from major attacks against civil aviation, such as the attacks on 11 September 2001. The special Sub-Committee should address such major attacks and the threats thereof.

3. ESTABLISHMENT OF THE SPECIAL SUB-COMMITTEE OF THE LEGAL COMMITTEE

3.1 Based on a decision of the Council taken at the aforementioned meeting (C-DEC 180/10), the Chairman of the Legal Committee, Mr. G. Lauzon Q.C. (Canada), established on 3 April 2007 a Special Sub-Committee of the Legal Committee to prepare one or more draft instruments addressing the new and emerging threats to civil aviation and appointed Ms. J. Atwell (Australia) as Rapporteur. The Special Sub-Committee is composed of the following States: Argentina, Australia, Brazil, Canada, China, Egypt, Finland, France, Germany, India, Italy, Japan, Jordan, Lebanon, Mexico, Nigeria, Russian Federation, Senegal, Singapore, South Africa, Switzerland, United Arab Emirates, United Kingdom and United States. The terms of reference of the Sub-Committee as agreed by the Council are as follows: “To prepare, in light of Assembly Resolution A33-1 (Declaration on misuse of civil aircraft as weapons of destruction and other terrorist acts involving civil aviation) and the guidance of the Council during its 180th Session, one or more draft instruments addressing the new and emerging threats to civil aviation, consistent with and taking into account only paragraph 1 of the Conclusions of the Secretariat Study Group on Aviation Security Conventions at Appendix B to C-WP/12851.”

3.2 A meeting of the Special Sub-Committee on the Preparation of One or More Instruments Addressing New and Emerging Threats was held from 3 to 6 July 2007, under the Chairmanship of Mr. T. Olson (France). The Sub-Committee considered the report of the Rapporteur and tentatively proposed two draft protocols to respectively amend the *Convention for the Suppression of Unlawful Seizure of Aircraft*, signed at The Hague on 16 December 1970, and the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, signed at Montreal on 23 September 1971. The draft protocols contain provisions addressing the issues mentioned in subparagraph 2.1 of this working paper. During the meeting, some delegations proposed to include in one of the draft protocols provisions prohibiting the intentional and unlawful transport by air of particularly dangerous goods and fugitives. Other delegations were opposed to this proposal. One of the reasons for their opposition was that the Sub-Committee was not mandated to do so. It would be necessary to report this proposal to the Council and to seek its guidance. The Council will consider the results of the meeting of the Sub-Committee at its 182nd Session.

4. SUMMARY

4.1 Since the 33rd Session of the Assembly, the need to amend the existing aviation security conventions to address new and emerging threats has been actively considered by the Secretariat, the Study Group and the Special Sub-Committee of the Legal Committee. One or more draft legal instruments will be prepared for this purpose.