



INTERNATIONAL CONFERENCE ON AIR LAW

(Beijing, 30 August – 10 September 2010)

INTRODUCTION OF THE OFFENSE OF “CONCEALMENT” [*ENCUBRIMIENTO*] TO REPLACE THE OFFENSE OF “TRANSPORTING FUGITIVES”

(Presented by the Republic of Argentina)

1. The draft protocol amending the **Montreal Convention of 1971 as amended by the Airports Protocol of 1988**, submitted for the consideration of the Legal Committee of ICAO at its 34th Session included the description of a specific offense, the *illegal transport of fugitives*¹. This innovative concept of criminal law quickly became one of the most problematic and controversial elements of the draft amendment to the Convention when the delegations of a number of countries openly voiced their objections to its inclusion in the final text.
2. There were three main objections to the concept: (a) the unspecified nature of the main verb (“...*transports, causes to be transported, or facilitates the transport*”) and the ambiguous term *fugitive*, with the resulting difficulty for countries to agree on a mutually acceptable definition that would fit into the different legal systems; (b) reference to offences mentioned in other international legal instruments, which it was argued gave rise to digressions, confusion and inaccuracies, and; (c) concerns of some observers such as IATA about the practical difficulties that the concept posed for airlines, which would be incapable of determining when such an offence were taking place.
3. Citing a lack of consensus as to whether or not the offence of *transport of fugitives* should be written into the text, the Chair of the Legal Committee proposed to establish a small working group to address the matter of transport offences and seek consensus on one or the other offence contained Article 1.1. paragraphs (i) and (j) respectively. The Chair pointed out that the Committee was much less likely to reach a consensus on the transport of persons and that if no agreement were reached, a decision would have to be taken as to how to present the issue to the Diplomatic Conference. The working group was also to consider the suggestion of an opt-in/opt-out clause that received moderate, though not overwhelming support. Further, the group was to determine whether the offence of transporting persons would be rendered more acceptable if a reference to due diligence were inserted.
4. The Chair joined the working group together with the delegates of Germany, Argentina, Australia, Canada, China, Egypt, the United States, the Russian Federation, India, Japan, Lebanon and South Africa under the chairmanship of the Chair of the Sub-committee.

¹ Article 1.1. (j) of the draft reviewed by the Legal Committee criminalizes any person who, “transports, causes to be transported or facilitates the transport of another person on board an aircraft in service, knowing that that person committed an act which constitutes an offence under the treaties listed in Attachment 2, and with the intention of helping that person to evade criminal prosecution.” (Attachment 8)

5. With a view to facilitating discussion of the matter, Argentina presented an alternative proposal to replace the offence of *transport of fugitives* with a broader criminal offence covering all forms of assistance provided to a person seeking to evade criminal prosecution for one of the crimes under the Convention. By that standard, such an act constitutes an offence in itself, and it is therefore that offence which must be prosecuted and punished.

6. The Legal Committee consequently accepted the deletion of Article 1.1 (j) *transport of fugitives*, and replaced it with a new paragraph 2 of Article 1 as follows:

“2. Any person also commits an offence if that person:

(d) knowing that a person has committed an act that constitutes an offence set forth in paragraphs 1, 1 bis, 1 ter or 2(a) of this Article, or that a person is wanted for criminal prosecution by law enforcement authorities for such an offence or has been sentenced for such an offence, assists that person to evade investigation, prosecution or punishment.”

7. This new draft presents the following advantages:

- a) First, it does not exclude the prosecution of the offence of transporting fugitives, but on the contrary includes it;
- b) Further, it covers all forms of assistance provided to any person responsible for any of the offences punishable under the Convention, thus conferring greater legal certainty and protection for the interests that the Convention is intended to defend;
- c) Reference is removed to other international conventions not relating to the field of ICAO, thus avoiding the aforementioned disputes and, again, providing greater legal certainty; and
- d) Finally, both the wording and the core concept are much easier to incorporate into the various legal systems of the different countries. To cite only two examples, the offence can be identified as *concealment* in the civil law tradition and as *accessory after the fact* in the common law tradition.

8. We therefore believe that it would be highly desirable to adopt the concept described, in replacement of the offence of *transport of fugitives*. This would enhance legal certainty and would no doubt promote broader and quicker acceptance of the new text of the Montreal Convention of 1971.