



INTERNATIONAL CONFERENCE ON AIR LAW

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TRANSPORT OF CERTAIN MATERIALS OFFENCE AND THE USE OF CIVIL AIRCRAFT FOR PROLIFERATION PURPOSES

(Presented by the Australia)

1. INTRODUCTION

1.1 During discussion by the ICAO Legal Committee in September 2009 in relation to the proposed transport offence there were some questions concerning the necessity for including a transport offence and particularly one that covered proliferation of certain material by civil aircraft. Some questioned whether ICAO was the appropriate body to deal with these issues particularly where the offence does not concern safety of the aircraft. This paper sets out exactly why a prohibition on the use of the civil aircraft to intentionally and unlawfully transport biological, chemical and nuclear (BCN) weapons, related material and delivery systems, and explosive or radioactive material is not only necessary but entirely consistent with ICAO's objectives.

2. USE OF CIVIL AVIATION FOR PROLIFERATION PURPOSES IS INCONSISTENT WITH ICAO OBJECTIVES

2.1 To ensure that international civil aviation is not used for any purpose inconsistent with the *Convention on International Civil Aviation* (Chicago Convention), we must address the use of civil aircraft for proliferation purposes. There are gaps in the international legal framework in relation to the unlawful transport of BCN weapons and other dangerous material on board civil aircraft.

2.2 ICAO Assembly resolution A33-1 on the "misuse of civil aircraft as weapons of destruction and other terrorist acts involving civil aviation" directed 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 aviation security conventions.¹ This resolution recognised that "terrorist acts are not only contrary to elementary considerations of humanity but constitute also use of civil aircraft for an armed attack on civilized society and are incompatible with international law" and that the "new type of threat posed by terrorist organizations requires new concerted efforts and policies of cooperation on the part of States". Operative paragraph 3 of the resolution, "[u]rges all Contracting States to ensure, in accordance with Article 4 of the Convention, that civil aviation is not used for any purpose inconsistent with the aims of the *Convention on International Civil Aviation*".

¹ Operative paragraph 7.

2.3 The Chicago Convention prohibits States from using civil aviation for any purpose inconsistent with the aims of the Convention (Article 4). ICAO was created to help ensure the safe and orderly growth of civil aviation and to encourage the operation of civil aircraft for peaceful purposes (Article 44(a) and (b)). The unlawful transport of BCN and other dangerous materials threatens these specific objectives. The transport of such materials may directly threaten the safety of an aircraft and its passengers. However, even if this is not the case, the failure to prevent civil aviation from becoming an avenue for the unlawful transport of these materials runs counter to the aims of the Convention and undermines ICAO's objectives. A failure to work toward prohibiting the unlawful transport of BCN weapons, related material and delivery systems, and explosive or radioactive material in the civil aviation context can only be considered as a failure to encourage the operation of civil aircraft for peaceful purposes.

3. THE LINK BETWEEN TERRORISM AND PROLIFERATION

3.1 The United Nations Security Council has also called on states and international organisations numerous times to take action in this area. Following the terrorist attacks which took place on 11 September 2001 in the United States of America, the Security Council called upon “the international community to redouble their efforts to prevent and suppress terrorist acts including increased cooperation”.² The Council decided in Resolution 1373 (2001) that States shall “[t]ake the necessary steps to prevent the commission of terrorist acts” and “[e]nsure that **any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice**”.³ The Security Council also noted “with concern the close connection between international terrorism and transnational organized crime, illicit drugs, money-laundering, illegal arms-trafficking, and **illegal movement of nuclear, chemical, biological and other potentially deadly materials**, and in this regard *emphasizes* the need to enhance coordination of efforts on national, subregional, regional and international levels in order to strengthen a global response to this serious challenge and threat to international security”.⁴

3.2 In 2003, the Security Council reaffirmed in Resolution 1456 (2003) that “there is a serious and growing danger of terrorist access to and use of nuclear, chemical, biological and other potentially deadly materials, and therefore a need to strengthen controls on these materials”.⁵ The Security Council called for international organisations to “evaluate ways in which they can enhance the effectiveness of their action against terrorism ... and directs this appeal in particular to those technical agencies and organizations whose activities relate to the control of the use of or access to nuclear, chemical, biological and other deadly materials; in this context the importance of fully complying with existing legal obligations in the field of disarmament, arms limitation and non-proliferation and, where necessary, strengthening international instruments in this field should be underlined”.⁶

3.3 In 2004, the Council again called on states to “cooperate fully in the fight against terrorism ... in order to find, deny safe haven and bring to justice, on the basis of the principle to extradite or prosecute, any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or commission of terrorist acts or provides safe havens”.⁷ The Security Council further called upon “relevant international, regional and subregional organizations to strengthen international cooperation in the fight against terrorism”.⁸

² Operative paragraph 4, UNSCR 1368 (2001).

³ Operative paragraph 2(b) and (e), UNSCR 1373 (2001).

⁴ Operative paragraph 4, UNSCR 1373 (2001).

⁵ Annex, preliminary paragraph 1, sub-point 3, UNSCR 1456 (2003).

⁶ Annex, operative paragraph 7, UNSCR 1456 (2003).

⁷ Operative paragraph 2, UNSCR 1566 (2004).

⁸ Operative paragraph 6, UNSCR 1566 (2004).

3.4 In Resolution 1540, the Security Council affirmed that “proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, constitutes a threat to international peace and security” and recognised “the need to enhance coordination of efforts on national, subregional, regional and international levels in order to strengthen a global response to this serious challenge and threat to international security” and the “urgent need for all States to take additional effective measures **to prevent the proliferation of nuclear, chemical and biological weapons and their means of delivery**”.⁹ The Security Council went on to call upon “all States to promote dialogue and cooperation on non-proliferation so as to address the threat posed by proliferation of nuclear, chemical, or biological weapons, and their means of delivery”.¹⁰

4. GAPS IN EXISTING INTERNATIONAL LAW

4.1 Existing international conventions do not provide a comprehensive prohibition of the unlawful transport of BCN weapons and other dangerous materials, or fugitives, by civil aircraft. While some instruments address elements of a transport of material offence, relevant actions are often linked to a specific intention to assist in a broader offence, or to damage or a safety risk occurring. The scope of the existing international instruments is discussed at **Attachment A**.

4.2 In summary, the existing conventions cover:

- a) situations where the placing of BCN material on board an aircraft in service is unlawful and intentional, and the material is likely to destroy the aircraft or cause damage to it which renders it incapable of flight or endangers its safety in flight (Montreal Convention);
- b) an act which constitutes the intentional transfer of nuclear material in international nuclear transport without lawful authority which causes or is likely to cause death or serious injury to any person or substantial damage to property (Nuclear Material Convention);
- c) the unlawful and intentional possession of radioactive material or device with the intent to cause death or serious bodily injury, or with the intent to cause substantial damage to property or to the environment, or assisting with this offence (Nuclear Terrorism Convention);
- d) the transfer by a State of nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly, to any recipient; and the provision of source or special fissionable material between States (Non-Proliferation Treaty);
- e) the transfer of chemical weapons by natural and legal persons (Chemical Weapons Convention);
- f) the acquisition, in any area within its jurisdiction or control, of the agents, toxins, weapons, equipment or means of delivery of microbial or other biological agents or toxins of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes, and weapons, equipment or means of delivery designed to use such agents or

⁹ Preliminary paragraphs 1, 10 and 12, UNSCR 1540 (2004).

¹⁰ Operative paragraph 9, UNSCR 1540 (2004).

toxins for hostile purposes or in armed conflict (Biological Weapons Convention); and

- g) unlawfully and intentionally placing an explosive or other lethal device in a place of public use or a public transportation system with the intent to cause death or serious bodily injury or with the intent to cause extensive destruction of such a place, where such destruction results in or is likely to result in major economic loss, or assisting with this offence (Terrorist Bombings Convention).

4.3 The proposed new offences amending the Montreal Convention will include an offence of releasing from an aircraft in service certain material to cause death, serious bodily injury or serious damage to property or the environment, and the use against or on board an aircraft in service such material to cause death, serious injury or serious property or environment damage. Additional ancillary offences have also been proposed.

4.4 This still leaves gaps in relation to the unlawful transport of nuclear weapons and material where that material does not cause damage to the aircraft, the transport does not cause or is not likely to cause death or serious injury to any person or substantial damage to property, and where the person transporting the material has no personal intent to cause death or serious bodily injury or extensive destruction of a specified place which results in or is likely to result in major economic loss or the transport does not make the person an accessory to a broader offence. Significantly, there are also gaps in the international legal cooperation arrangements which have become a critical part of law enforcement related treaties today.

4.5 It is important to note that IMO has moved to address these issues at sea by criminalising the unlawful and intentional transport of BCN and other material using ships in the *Convention on Suppression of Unlawful Acts against the Safety of Maritime Navigation 2005*. If ICAO does not take such action in relation to civil aircraft who will? Furthermore failure to criminalise the transport of certain materials by civil aircraft when such action is criminalised using ships is likely to result in greater reliance upon civil aircraft by proliferators to transport such material thereby even further compromising the objectives of ICAO and the operation of civil aircraft for peaceful purposes. The threat to civil aviation posed by such action demands the same response as other threats identified and addressed in proposed amendments to Article 1 of the Montreal Convention.

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ATTACHMENT

EXISTING INTERNATIONAL LAW RELEVANT TO TRANSPORT OFFENCES IN THE AVIATION CONTEXT

1. THE MONTREAL CONVENTION

1.1 Offences created under the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* (Montreal Convention) prohibit acts endangering the safety of civil aviation. This connection to the safety of civil aviation is made explicit in the provisions and limits the scope of the offences. Offences created by the Montreal Convention would only criminalise the transport of BCN materials where danger or damage an aircraft in flight is, or is likely to be, a result.

1.2 For example, it is prohibited to unlawfully and intentionally place or cause to be placed on an aircraft in service a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight (Article 1(c)). The act of “transporting” BCN material would only be caught by this provision where the placement of the material is likely to destroy that aircraft or accompanying damage occurs. Such a provision does not reflect the gravity of unlawfully and intentionally transporting BCN weapons and other dangerous material as an act which should be criminalised in its own right.

1.3 It is also an offence under the Montreal Convention to unlawfully and intentionally communicate false information, thereby endangering the safety of an aircraft in flight (Article 1(e)). A person may communicate false information in the act of transporting BCN material, but it must be shown that the false information thereby endangers the safety of an aircraft in flight.

2. THE HAGUE CONVENTION

2.1 The *Convention for the Suppression of Unlawful Seizure of Aircraft* (Hague Convention) covers unlawful seizure of aircraft and has no application to the transport of BCN materials.

3. TOKYO CONVENTION

3.1 The *Convention on Offences and Certain Other Acts Committed on Board Aircraft* (Tokyo Convention) does not prescribe specific offences but relies upon offences as specified under national law. The Convention also applies to acts which may or do jeopardise the safety of the aircraft or of persons or property on board which jeopardise the good order and discipline on board the aircraft.

4. THE PHYSICAL PROTECTION CONVENTION

4.1 *The Convention on the Physical Protection of Nuclear Material* (the Physical Protection Convention) applies to nuclear material used for peaceful purposes while in international nuclear transport.¹ The Convention does not contain a transport offence. However, it does require States parties to

¹ *Nuclear material* means plutonium except that with isotopic concentration exceeding 80% in plutonium-238; uranium-233; uranium enriched in the isotopes 235 or 233; uranium containing the mixture of isotopes as occurring in nature other than in the form of ore or ore-residue; any material containing one or more of the foregoing.

create an offence in their *national law* for the act, without lawful authority, which constitutes the receipt, possession, use, *transfer*, alteration, disposal or dispersal of nuclear material and which causes or is likely to cause death or serious injury to any person or substantial damage to property (Article 7). It is possible that the use of “transfer” in this Convention may include “transport”.

5. THE NUCLEAR TERRORISM CONVENTION

5.1 The *International Convention for the Suppression of Acts of Nuclear Terrorism* (Nuclear Terrorism Convention) contains a number of offences relating to the use of radioactive materials and devices.² The accessory offences provide some coverage of the transport of these materials.

5.2 For example, it is an offence to possess radioactive material or possess or make a nuclear explosive or radiation-emitting device with the intent to cause death or serious bodily injury or with the intent to cause substantial damage to property or the environment (Article 2(a)(i) and (ii)). It is an offence, under the accessory provisions, to contribute to the commission of the offence where the contribution is intentional and either made with the aim of furthering the general criminal activity or purpose of the group, or made with the knowledge of the intention of the group to commit the offence or offences concerned (Article 2(4)(c)). If the requisit intent or knowledge can be established, a person transporting or organising the transport of nuclear materials or technology via civil aviation would be considered an accessory.

6. THE NON-PROLIFERATION TREATY

6.1 The *Treaty on the Non-Proliferation of Nuclear Weapons* (NPT) prohibits States from *transferring*, to any recipient, nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly. It also prohibits States from assisting, encouraging or inducing any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices (Article I).

6.2 States parties are also prohibited from providing source or special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material, to any non-nuclear-weapon State for peaceful purposes, unless the source or special fissionable material shall be subject to the safeguards required by the Treaty (Article III(2)).

7. THE CHEMICAL WEAPONS CONVENTION

7.1 The *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction* (Chemical Weapons Convention) prohibits States parties from *transferring*, directly or indirectly, chemical weapons to anyone (Article I(1)(a)).³ States are under

² *Radioactive material* means nuclear material and other radioactive substances which contain nuclides which undergo spontaneous disintegration (a process accompanied by emission of one or more types of ionizing radiation, such as alpha-, beta-, neutron particles and gamma rays) and which may, owing to their radiological or fissile properties, cause death, serious bodily injury or substantial damage to property or to the environment.

A *device* means any nuclear explosive device, or any radioactive material dispersal or radiation-emitting device which may, owing to its radiological properties, cause death, serious bodily injury or substantial damage to property or to the environment.

³ *Chemical weapons* means the following, together or separately:

- a) toxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention, as long as the types and quantities are consistent with such purposes;
- b) munitions and devices, specifically designed to cause death or other harm through the toxic properties of those toxic chemicals specified in subparagraph (a), which would be released as a result of the employment of such munitions and devices; and

an obligation to prohibit persons within their jurisdiction and nationals overseas from undertaking any activity prohibited under the Convention. This obligation includes the enactment of penal legislation with respect to such an activity (Article VII(1)(a) and (c)). This obliges States to prohibit natural and legal persons within their jurisdiction from transferring chemical weapons. The Convention does not, however, provide for international legal cooperation mechanisms in this area such as extradition or mutual assistance.

8. THE BIOLOGICAL WEAPONS CONVENTION

8.1 The *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on their Destruction* (Biological Weapons Convention) prohibits States from *transferring*, directly or indirectly, any of the agents, toxins, weapons, equipment or means of delivery listed in Article I of the Convention to any recipient (Article III).⁴ The obligation on States to prevent offences from occurring within their own jurisdiction, unlike the Chemical Weapons Convention, does not extend to prohibit *transfers*. However, it does include taking measures to prohibit and prevent the *acquisition* of any of the agents, toxins, weapons, equipment or means of delivery listed in Article I. Again, this Convention does not provide for international legal cooperation mechanisms such as extradition or mutual assistance.

9. THE TERRORIST BOMBINGS CONVENTION

9.1 The *International Convention for the Suppression of Terrorist Bombings* (Terrorist Bombings Convention) contains a broad offence provision regarding the use of an explosive or lethal device (Article 2(1)). An explosive or lethal device is defined as including a weapon or device that is designed, or has the capability, to cause death, serious bodily injury or substantial material damage through the release, dissemination or impact of toxic chemicals, biological agents or toxins or similar substances or radiation or radioactive material (Article 1(3)(b)).

9.2 Although the Convention does not contain a provision prohibiting the transport of an explosive or lethal device, accessory provisions (identical to those that occur in the Nuclear Terrorism Convention), provide some coverage of the transport of these materials. It is an offence to contribute to the commission of the listed offences in Article 2 where the contribution is intentional and either made with the aim of furthering the general criminal activity or purpose of the group or made with the knowledge of the intention of the group to commit the offence or offences concerned (Article 2(3)(c)). If the requisite intent or knowledge can be established, a person transporting or organising the transport of nuclear materials or technology via civil aviation in a way that contributes to the commission of one of the convention offences would be considered an accessory. However, such a provision is dependent on the separate primary offence being established.

c) any equipment specifically designed for use directly in connection with the employment of munitions and devices specified in subparagraph (b).

⁴ The materials referred to in Article 1 are:

- a) microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes; and
- b) weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.

**TABLE: EXISTING TRANSPORT-RELATED OFFENCES APPLICABLE
IN THE AVIATION CONTEXT**

Treaty	Article	Offence
Montreal Convention	1	<p>It is prohibited to unlawfully and intentionally:</p> <p>...</p> <p>(c) place or cause to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight</p> <p>...</p> <p>(e) communicate information which is known to be false, thereby endangering the safety of an aircraft in flight.</p>
Physical Protection Convention	7	<p>(1) The intentional commission of:</p> <p>(a) an act without lawful authority which constitutes the receipt, possession, use, <i>transfer</i>, alteration, disposal or dispersal of nuclear material and which causes or is likely to cause death or serious injury to any person or substantial damage to property.</p> <p>Limited to nuclear material in international nuclear transport.</p>
Nuclear Terrorism Convention	2	<p>(1)(a) Prohibits the unlawful and intentional possession of radioactive material or the possession or making of a device with the intent to cause death or serious bodily injury, or with the intent to cause substantial damage to property or to the environment.</p> <p>(4)(a) prohibits participation as an accomplice.</p> <p>(4)(c) prohibits contributing in any other way to the commission of one or more of the offences by a group of persons acting with a common purpose.</p> <p>Limited to radioactive materials.</p>

<p>Biological Weapons Convention</p>	<p>III</p> <p>IV</p>	<p>Each State Party undertakes not to <i>transfer</i> to any recipient whatsoever, directly or indirectly, and not in any way to assist, encourage, or induce any State, group of States or international organizations to manufacture or otherwise acquire any of the agents, toxins, weapons, equipment or means of delivery specified in Article I.</p> <p>States Parties shall, in accordance with their constitutional processes, take any necessary measures to prohibit and prevent the development, production, stockpiling, acquisition, or retention of the agents, toxins, weapons, equipment and means of delivery specified in Article I, within the territory of such state, under its jurisdiction or under its control anywhere.</p>
<p>Terrorist Bombings Convention</p>	<p>1</p> <p>2</p>	<p>(3)(b) An explosive or other lethal device means an explosive or incendiary weapon or device that is designed, or has the capability, to cause death, serious bodily injury or substantial material damage, or a weapon or device that is designed, or has the capability, to cause death, serious bodily injury or substantial material damage through the release, dissemination or impact of toxic chemicals, biological agents or toxins or similar substances or radiation or radioactive material.</p> <p>(1) Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility with the intent to cause death or serious bodily injury, or with the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.</p> <p>(3) Any person also commits an offence if that person participates as an accomplice, or in any other way contributes to the commission of one or more offences by a group of persons acting with a common purpose.</p>