



INTERNATIONAL CONFERENCE ON AIR LAW

(Beijing, 30 August – 10 September 2010)

COMMENTS ON THE DRAFT PROTOCOLS TO THE 1971 MONTREAL CONVENTION AND THE 1970 HAGUE CONVENTION

(Presented by China)

DRAFT PROTOCOL TO THE 1971 MONTREAL CONVENTION AS AMENDED BY THE 1988 PROTOCOL

1. FORMAT OF THE INSTRUMENT

1.1 We propose to have a new Convention, named “*Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (2010 Beijing Convention)*”. States, which have not acceded to the 1971 Montreal Convention and the 1988 Protocol, may directly sign and ratify the 2010 Beijing Convention; the new Convention will come into force as between the States Parties. For States Parties to the original Convention and its Protocol, this new Convention will replace the original ones as between them after they have signed and ratified the new Convention. One precedent for such format is *the Convention for the Unification of Certain Rules for International Carriage by Air (1999 Montreal Convention)*. The 1929 Warsaw Convention has been revised by several protocols which in effect turned the legal regime regarding civil liabilities of air carriers toward passengers into piecemeal. Thanks to the great efforts of the civil aviation industry, especially legislatures from different countries across the world, a new 1999 Montreal Convention has been produced which has replaced the 1929 Warsaw Convention and/or its later Protocols among the State Parties to the new convention. The new 1999 Montreal Convention has once again set up a uniform legal structure in that area. We suggest that modernization of the security conventions especially the 1971 Montreal Convention follow the successful experience from the previous civil aviation convention. Below is a brief analysis of difficulties of having a protocol and merits of a new convention.

2. DEFICIENCIES IN THE FORMAT OF A PROTOCOL

2.1 Redundant title

2.1.1 The 1971 Montreal Convention has been amended once in 1988, with the name “*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*”. If the second set of amendments is to take the form of another Protocol, it is a practical issue to come up with a title that is reasonable in length, without being too redundant and complex.

2.2 Scattered Content

2.2.1 The modernization of the 1971 Montreal Convention is rather comprehensive and

wide-ranging which does not deal only with a certain specific area, but has touched upon various provisions from new offences (both primary and ancillary) to definitions, jurisdiction and new principles from other UN conventions. If the format of a Protocol is taken, its content will seem rather scattered and will not be user-friendly.

2.3 **Advantages of a new stand-alone Convention**

2.3.1 A new Convention will not only reflect newly amended clauses but will also include content of the original texts. Instead of being scattered, the text of such a new convention will remain its integrity and will be user friendly.

2.3.2 Title of the new instrument will be neat and clear.

2.3.3 Participation to the new convention will not affect existence of the original Convention and Protocol, with the only effect that this new convention will, as between its States Parties, prevail over the original ones. States which have not signed and ratified the new convention, the original Convention and/or the 1988 Protocol will still remain in force as between them.

3. **ARTICLE 1 PARAGRAPH 1 (g)**

3.1 We propose the sentence between round brackets: “(as defined in Article 2 except paragraphs (a) (ii) and (b) (iii))” be deleted.

3.2 The use of text inside brackets in a legal provision is not advisable. Even if it is not explicitly excluded, the equipments stated in (a) (ii) and (b) (iii) will not be able to be released or discharged from an aircraft.

3.3 Similar provision in paragraph (h) (use BCN weapons against aircraft) faces the same issue but it does not particularly exclude subparagraphs (a) (ii) and (b) (iii) of paragraph (i) Article 2.

3.4 Similar provision in the *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation* (“SUA 2005”) does not have such exclusions.

3.5 **Definition for “explosive”**

3.5.1 The new offences in Article 1 have in several places mentioned “BCN weapon or explosive, radioactive or similar substances”. Despite the new definitions for BCN weapon and radioactive material, there is no definition for “explosive”. Therefore, we propose to adopt a definition for “explosive” similar to paragraph (a) of the definition of “Explosive or other lethal device” in Article 1.3 of the *International Convention for the Suppression of Terrorist Bombings 1997*, reading as: “An explosive or incendiary weapon or device that is designed, or has the capability, to cause death, serious bodily injury or substantial material damage”.

4. **ARTICLE 1 PARAGRAPH 1 (I)(4)**

4.1.1 We would like to seek clarification of the meaning and criteria for “*significantly*” as in the sentence “*any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weaponin...*” in both two sets of square brackets.

5. **ARTICLE 1 PARAGRAPH 1 TER**

5.1 As different countries have different legal provisions regarding criminalization of “threats”, some countries do not even criminalize those pure threats that do not lead to the actual commission of the crimes threatened. Indeed, it should be further clarified what “credible threat” is. Therefore, we suggest that a definition or a clarification provision for “credible threat” be introduced into the draft Protocol.

6. **ARTICLE 1 PARAGRAPH 3**

6.1 In the chapeau of this paragraph, the reference to paragraph “2(a)” should be added in conformity with its subparagraphs (a) and (b).

6.2 We propose the wording of the chapeau as well as subparagraphs (a) and (b) be revised to be in line with its source conventions, namely “the *United Nations Convention Against Transnational Organized Crime 2000*” (Article 5(1)(a)(i)) and “the *International Convention for the Suppression of the Financing of Terrorism 1999*” (Article 2(5)(c)). Firstly, the element of intention should be clearly and expressly stated in the chapeau. Secondly, the conduct is not an agreement, but the act of agreeing; similarly, the conduct is not the contribution, but the act of contributing. Therefore we propose the following revision:

“3. Each State Party shall also establish as offences, when committed intentionally, whether or not any of the offences set forth in paragraphs 1, 1bis or 1ter of this article is actually committed or attempted, either or both of the following:

- (a) Agreeing with ...
- (b) Contributes in any other way to the commission of one or more offences set forth in paragraphs 1, 1bis, 1ter or 2(a) of this article by a group of persons acting with a common purpose and such contribution shall either:
 - 1) be made with the aim...
 - 2) be made in the knowledge...”

7. **ARTICLE 2 DEFINITION**

7.1 We propose to insert definitions for “source material” and “special fissionable material” as now in square brackets in paragraph (j) under Article 2 to make clear the range of such materials. Another way is to directly quote the definition of those materials as in the Statute of the International Atomic Energy Agency. SUA 2005 also has a similar provision under its Article 2.

8. **ARTICLE 4**

8.1 We propose to exclude application of the draft Protocol to purely domestic flights.

8.2 According to the current Article 4, the draft Protocol is applicable to both international and domestic flights as long as one of the four elements is outside the state of registration: the place of departure, landing, the place the offence is committed, and the place where the offender is found.

8.3 However, when a dry-leased aircraft registered in another State is performing a purely domestic flight between two points within the state of the operator, current draft Protocol will also apply. If it is the case, certain offence may raise the concern that international law is infringing domestic sovereignty. For instance, a leased aircraft registered in another state is operated by an airline of a state with flight crews and daily maintenance all provided by the airline of that state. When it transports in a purely domestic scenario, certain dangerous goods or materials which may fall into “the transport offence”, that particular State is most suitable to handle such offence in accordance with its domestic transport control regulations instead of international conventions.

8.4 Dry leasing is a modern commercial arrangement for making use of aircrafts. Modernization of 1971 Montreal Convention shall take into account developments of the industry and explicitly exclude application of the draft Protocol to such purely domestic operations.

8.5 We propose to adjust the application clause to newly added offences.

8.6 Firstly, paragraph 6 of Article 4 provides for the application of paragraphs 2, 3, 4, and 5 to the cases contemplated in Article 1 paragraph 2. It happens, however, that the proposed draft of Article 1 paragraph 2 now includes new offences that are inconsistent with the original criteria (that are based on the State of Registry of the aircraft or, in the case of paragraph 5, on the use of air navigation facilities in international air navigation). The new offences are not directly related to an aircraft, and as a consequence the reference to the State of Registry is not adequate.

8.7 Secondly, the original offences prescribed by the 1971 Montreal Convention and 1988 Protocol are only contained in Article 1 paragraph 1 and 2, and therefore the application clause only mentioned paragraph 1 and 2. However, the draft Protocol has included new offences in Article 1, paragraph 1ter. Therefore Article 4 should be revised to reflect the application rules regarding those new offences.

8.8 Taking into consideration of the above, we propose the following revisions to Article 4:

“1. (...)

2. In the cases contemplated in subparagraphs (a), (b), (c), (e), (f), (g), (h), and (i) of paragraph 1 **and in paragraph 1ter** of Article 1, this Convention shall apply, irrespective of whether the aircraft is engaged in an international or domestic flight, only if:

(a) (...);

(b) (...).

3. Notwithstanding paragraph 2 of this Article, in the cases contemplated in subparagraphs (a), (b), (c), (e), (f), (g) and (i) of paragraph 1 **and in paragraph 1ter** of Article 1, this Convention shall also apply if the offender or the alleged offender is found in the territory of a State other than the State of Registry of the aircraft.

4. With respect to the States Parties mentioned in Article 9 and in the cases set forth in subparagraphs (a), (b), (c), (e), (f), (g), (h) and (i) of paragraph 1 **and in paragraph 1ter** of Article 1, this Convention shall not apply if the places referred to in

subparagraph (a) of paragraph 2 of this Article are situated within the territory of the same State which is one of those referred to in Article 9, unless the offence is committed or the offender or alleged offender is found in the territory of a State other than that State.5. (...)

5. (...)

6. The provisions of paragraphs 2, 3, 4 and 5 of this Article shall also apply in the cases contemplated in paragraph 2 of Article 1, *in so far as that paragraph relates to the offences set forth in paragraphs 1 and 1ter of Article 1.*

9. **ARTICLE 4 AND ARTICLE 9**

9.1 As both in Article 4 and Article 9, “State of registration” should be replaced by the most common and modern ICAO terminology “State of Registry” the definition of which can be found, for instance, in Annexes 6, 7 and 13 to the Chicago Convention (“*State of Registry*. The State on whose register the aircraft is entered.”).

10. **ARTICLE 6 PARAGRAPH 4**

10.1 In Article 6 paragraph 4, regarding the part of the sentence that reads “... *and, if it considers it advisable, any other interested States Parties of the fact that such person is in custody and of the circumstances which warrant ...*”, we believe that the word “Parties” was added here by mistake and should be deleted as in the original text, there was not such restriction.

11. **ARTICLE 7 BIS**

11.1 The verb tenses on the sentence “other measures are taken or proceedings are being carried out” do not concur. We suggest the following draft text: “other measures are taken or proceedings are carried out”.

12. **CHINESE TEXT**

12.1 Considering Chinese is one of the working languages both in UN and ICAO, it is proposed that Chinese Text be taken as one of the official texts of the new convention.

DRAFT PROTOCOL TO 1970 HAGUE CONVENTION**1. FORMAT OF THE INSTRUMENT**

1.1 As it is the first time the 1970 Hague Convention is revised, a new Protocol could be an appropriate form for the amendments. An integrated text could be attached to the Protocol for adoption in the Diplomatic Conference for convenience of use.

2. ARTICLE 1 PARAGRAPH 2

2.1 Please see point 4 of the comments on the Draft Protocol to 1971 Montreal Convention as amended by the 1988 Protocol (“Draft Protocol to Montreal Convention”).

3. ARTICLE 1 PARAGRAPH 4

3.1 Please see point 5 of the comments on the Draft Protocol to Montreal Convention.

4. ARTICLE 3

4.1 Please see point 7 of the comments on the Draft Protocol to Montreal Convention.

5. ARTICLE 3 PARAGRAPH 5

5.1 Consideration should be given as to whether reference to “Articles 6, 7, 8 and 10” in this paragraph should be expanded to cover also Articles *7 bis*, *8 bis*, *8 ter* and *10 bis*.

6. ARTICLE 5

6.1 Please see point 8 of the comments on the Draft Protocol to Montreal Convention.

7. ARTICLE 6 PARAGRAPH 4

7.1 Please see point 9 of the comments on the Draft Protocol to Montreal Convention.

8. CHINESE TEXT

8.1 Considering Chinese is one of the working languages both in UN and ICAO, it is proposed that the final paragraph of 1970 Hague Convention on the four authentic language be revised to have Chinese Text be taken as one of the official texts both for the draft Protocol and the 1970 Hague Convention.