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International Civil Aviation Organization

LEGAL COMMITTEE 34th SESSION

Montréal, 9–17 September 2009

REPORT

Published by authority of the Secretary General

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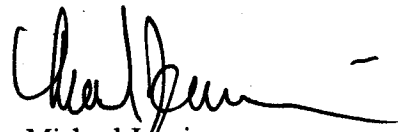
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REPORT OF THE 34TH SESSION OF THE LEGAL COMMITTEE

Letter of Transmittal

To: President of the Council
From: Chairman of the Legal Committee

I have the honour to submit, in accordance with Rule 46 of the *Rules of Procedure of the Legal Committee*, the Report of the 34th Session of the Legal Committee.



Michael Jennison

Montréal, 14 October 2009

LEGAL COMMITTEE – 34TH SESSION

(Montréal, 9 to 17 September 2009)

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1. Place and Duration

1.1 The 34th Session of the Legal Committee was held at Montréal from 9 to 17 September 2009. The Acting Chairman of the Legal Committee, Mr. Michael Jennison (United States), presided over the Session.

2. Opening addresses

2.1 The meeting was declared open by **the Acting Chairman of the Legal Committee. The President of the Council**, Mr. Roberto Kobeh González, welcomed all delegates and observers. He recalled the very proud history of the Legal Committee in the development and codification of international air law. He especially highlighted that, in the area of aviation security, the pioneering efforts of ICAO had resulted in five international instruments in this field, most of which almost universally accepted, and which have served as valuable precedents for other conventions in the UN family.

2.2 He further reminded that as an immediate response to the terrorist attacks of 11 September 2001, the ICAO Assembly adopted Resolution A33-1 and directed the Council and the Secretary General to address the new and emerging threats to civil aviation, and, among other things, to review the adequacy of the existing aviation security conventions. Pursuant to this Resolution, the Secretariat completed a study on legal measures to cover the new and emerging threats. The Secretariat Study Group concluded that the existing aviation security conventions could be updated or amended in several instances to cover these threats. Subsequently in March 2007, the Council invited the Legal Committee to establish a special Sub-Committee to prepare one or more draft instruments addressing the new and emerging threats to civil aviation. After two meetings, the Sub-Committee consequently developed two draft protocols to amend the Montreal Convention of 1971 and The Hague Convention of 1970, respectively.

2.3 The President took this opportunity to thank the Rapporteur, Ms. Julie Atwell (Australia). He also congratulated Mr. Terry Olson (France) for his chairmanship of the Sub-Committee. He was pleased to note that the Sub-Committee had reached broad consensus in many areas, although some issues require further deliberations by the Legal Committee, such as that relating to the criminalization of the transport of biological, chemical and nuclear substances. He expressed his high expectations on the work of the Legal Committee and placed great confidence in the Legal Committee in the fulfillment of its tasks. If the draft instruments prepared by the Committee are deemed sufficiently mature, the next step would be for the Council to convene a Diplomatic Conference to finalize and adopt the texts.

2.4 The Chairman expressed his thanks to the President for his kind remarks. He trusted that he would receive further cooperation from all participants at this Session, with a view to developing the two draft protocols which are ratifiable. He emphasized the urgent need to amend the existing conventions to cover the new and emerging threats to civil aviation.

3. Agenda and Working Arrangements

3.1 The Committee added “Any other business” to the provisional agenda shown in LC/34-WP/1. The agenda of the Session as adopted can be found at **Attachment A** to this Report.

3.2 The working papers considered by the Committee are listed by agenda items in **Attachment B** to this Report.

3.3 The action taken by the Committee in respect of each item is reported on separately in the Report. The material is arranged according to the numerical sequence of the agenda items considered by the Committee.

4. **Meetings**

4.1 The Committee held 14 meetings, all of which were held in open sessions.

4.2 The Secretary of the Committee was Mr. D. Wibaux, Director of the Legal Affairs and External Relations Bureau of ICAO. The Deputy Secretary was Mr. S.A.A. Espínola, Principal Legal Officer. Mr. J.V. Augustin, Senior Legal Officer, Messrs. B. Verhaegen, J. Huang, A. Jakob, Legal Officers, and Ms. M. Weinstein, Legal Adviser, were Assistant Secretaries. Other officials of the Organization also provided services to the Committee.

5. **Representation of States and International Organizations**

5.1 Sixty-four Contracting States and six international organizations were represented by 169 representatives and observers at this Session of the Legal Committee. The names of the representatives and observers appear in **Attachment C** to this Report.

6. **Records of Proceedings**

6.1 The Committee decided that in application of Rule 45 of its Rules of Procedure, the minutes of the 34th Session need not be prepared.

Agenda Item 2: Consideration of the Reports of the Special Sub-Committee on the Preparation of One or More Instruments Addressing New and Emerging Threats

2:1 The Chairman underlined the importance of this agenda item. The aim of the work was not to produce perfectly drafted texts for two protocols but to prepare the texts sufficiently mature to be referred by the ICAO Council to a Diplomatic Conference. The Chairman said that the Committee should aim to produce drafts that can be very broadly ratified, which is a high bar to clear. In reality, protocols will only be truly successful if they are as widely accepted as the treaties they amend. In this respect, he commended the work of the Special Sub-Committee and invited Mr. T. Olson (France), Chairman of the Sub-Committee, to present its reports.

2:2 The Chairman of the Sub-Committee stated that the objective of the work of the Sub-Committee was to prepare draft texts to update the Hague Convention of 1970 and the Montreal Convention of 1971. These two conventions represent milestones in the development of international air law and have been widely accepted by States. On the other hand, since they were concluded almost 40 years ago, there was a need to update them to address new and emerging threats against civil aviation. The Chairman of the Sub-Committee was pleased to inform the meeting that the Sub-Committee had reached consensus in a number of areas, including the criminalization of the act of using civil aircraft in flight as a weapon, and of the act of using certain dangerous materials to attack aircraft or other targets on the ground. It had also been agreed to explicitly institute new offences of directing and organizing certain offences set forth by the conventions. Moreover, it was proposed that credible threats which might cause economic damage to the aviation industry be criminalized. Finally, based on the most recent UN counter-terrorism instruments, provisions relating in particular to non-discrimination, exclusion of the political offence exception and additional jurisdictional grounds, had been introduced.

2:3 The Chairman of the Sub-Committee noted that a number of sensitive issues, including acts damaging the environment and acts of unlawfully transporting certain dangerous materials and fugitives, would require further consideration by the Legal Committee.

2:4 In addition to the reports of the Chairman of the Sub-Committee, the Rapporteur, Ms. J. Atwell (Australia), informed the meeting that the issue relating to the acts of transporting certain dangerous materials and fugitives had been referred by the Council to the Second Meeting of the Sub-Committee. She emphasized the need to work on this matter.

2:5 All delegations which took the floor welcomed and supported ICAO's initiative to amend the two conventions and pledged their cooperation in the work of the Committee. Some delegations referred to certain issues, such as the military exclusion clause, which would require the attention of the Committee.

2:6 The Chairman invited the Committee to review the amendments proposed by the Special Sub-Committee, marked up in Appendix 4 to its report on the second meeting (LC/SC-NET-2), to the Montreal Convention of 1971 as amended by the Airports Protocol of 1988. The Committee agreed to limit its review to the amendments proposed by the Sub-Committee. The Chairman stated that, as usual, the title of the instrument should be left for the Diplomatic Conference to decide.

2:7 In addressing the amendment to the *chapeau* of **Article 1 (1)** where the pronoun "he" is replaced by the term "that person", the Committee agreed upon this and any other changes related to gender throughout the text.

2:8 In discussing the amendment to **sub-paragraph (d) of Article 1 (1)**, the Committee decided not to retain such amendment on the grounds that it was not required in view of the definition of air navigation facilities provided in paragraph (c) of Article 2.

2:9 With respect to the amendment to **sub-paragraph (f) of Article 1 (1)**, one delegate proposed that the term "in a manner that causes or is likely to cause" be replaced by "to cause or likely to cause" in order to imply the existence of intent and avoid that a crew member not acting intentionally may fall under this provision. Another delegate proposed the deletion of the reference to damage to the environment which is not the subject of this Convention and should not be treated as an element separated from personal or material damages which are the determinants of the offence to be typified in this provision. One delegation proposed that the words "likely to cause" be deleted in order to align the text with the *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 2005* (2005 SUA Convention) as the use of an aircraft is not in itself, as is the case with dangerous substances, likely to cause the required damage.

2:10 During the ensuing discussion, the Committee, taking into account that this provision was designed to cover the use of a civil aircraft as a weapon and notwithstanding the use of the words "unlawfully and intentionally" in the *chapeau* of Article 1, **agreed** that there was a need to clarify that sub-paragraph (f) is not intended to capture ordinary operational behaviour. For this purpose, it was **decided** to refer sub-paragraph (f) to the Drafting Committee to be set up. As regards the reference to the environment, views were expressed in favour of and against its deletion. The views against its deletion prevailing, the Committee **agreed** to retain the reference to the environment, considering that it serves the purpose of covering indirect damage to persons or property.

2:11 In inviting comments on **sub-paragraphs (g) and (h) of Article 1 (1)**, the Chairman recommended to bear in mind the definition of "BCN weapon" provided in paragraph (i) of Article 2. From the explanations provided by the Chairman and the Rapporteur of the Sub-Committee, it was noted that these provisions were inspired by the 2005 SUA Convention and the wording used was aligned therewith. Balanced views were expressed in favour of and against retaining the reference to BCN weapon, and concerns were voiced with regard to the reference to nuclear material without having a definition thereof. At the end, it was **decided** to retain the reference to BCN weapon without square brackets and refer these provisions to the Drafting Committee.

2:12 Moving to **sub-paragraph (i) of Article 1 (1)**, one delegate proposed that the reference to "special fissionable material" appearing in point (3) be defined. Another delegate proposed to replace the term "not under safeguards" appearing in point (3) by "not under verification and control". These proposals were not supported and, therefore, were not adopted. One observer expressed concern about this paragraph, explaining that airlines accept shipments as labelled by the shippers and therefore do not know whether the contents of the parcels match the labels, or whether dangerous goods were shipped for terrorist acts. Thus, shippers, rather than carriers, should be the ones accountable. Furthermore, if carriers and airport facilities were to be equipped with means to detect shipments of nuclear material and BCN weapons, the costs thereof would be exorbitant and airlines should not be penalized. In conclusion, the observer proposed that air carriers be excluded from the application of this provision. This proposal, although seconded by two delegations, was not adopted.

2:13 Another delegate, with the support of other delegates, proposed the retention of the second of the alternatives appearing in square brackets in point (3) regarding a safeguards agreement. This proposal was **adopted**.

2:14 The Delegate of Australia introduced LC/34-WP/2-2 and the discussion on sub-paragraph (i) evolved in two directions. A number of delegates proposed its deletion, considering that it deals with non-proliferation of weapons and advocating that any amendment to the Convention should be restricted to the subject matter of civil aviation security. Several other delegates advocated its retention, considering that this provision aims at protecting the safety and security of civil aviation and wishing to follow the maritime approach as regards transport of dangerous goods. One delegate, although supporting the retention of this amendment, noted that there was a clear split of positions on this matter in the Committee and observed that the 2005 SUA Convention had so far not been widely ratified. He said that if such split were to remain it may be advisable to make this provision optional.

2:15 The Chairman recapped the discussion on the first transport offence in sub-paragraph (i) by stating that there had been no consensus in the Sub-Committee on the inclusion of this offence even if the text had not been placed in square brackets. He urged the Committee to focus on whether it would be possible to achieve consensus and, if not, how to bridge the gaps to make the task of the Diplomatic Conference easier.

2:16 As regards **sub-paragraph (i) (3)**, one delegation requested that the Committee revisit its decision to accept the text in the second set of square brackets, otherwise the parties to the *Treaty on the Non-Proliferation of Nuclear Weapons* could find that their obligations under that treaty could conflict with the new instrument under consideration. The transport-offence clauses had been taken from the 2005 SUA Convention but that treaty was not being ratified speedily as there were concerns about the language. UN Security Council Resolution 1540 applied exclusively to non-State actors. In conclusion, sub-paragraph (i) should be deleted. A number of other delegations agreed to delete sub-paragraph (i); it was stated, *inter alia*, that the link between these offences and the safety and security of civil aviation was not strong enough to warrant their retention, and that there was ambiguity in the relationship between the proposed protocols and Annexes 17 and 18 to the *Convention on International Civil Aviation* (Chicago Convention).

2:17 One delegation, while not in favour of BCN weapons, believed that there should be no requirement to detect biological, chemical or nuclear material in baggage.

2:18 One delegation believed that the matters under sub-paragraph (i) should not be criminalised.

2:19 Another delegation expressed its concerns about sub-paragraph (i) (3) and **sub-paragraph (i) (4)**. As regards sub-paragraph (i) (3), definitions were needed for “source material” and “special fissionable material”; the Committee was referred to definitions found in Article XX of the Statute of the International Atomic Energy Agency (IAEA). With respect to sub-paragraph (i) (4), the Committee’s attention was drawn to the relevant terminology in Security Council Resolution 1540. One delegation would prefer questions of definition to be considered when the Committee would deal with Article 2.

2:20 On the question of whether the transport offences should be included, one delegation believed that they were meant to deter and punish anyone intending to transport the identified materials, which was in line with the work on the other offences. The question was whether the transport offences would help to create a more robust regime. While guidance could be obtained from the

2005 SUA Convention and Resolution 1540, the specific interests of aviation should be taken into account. For the offence to bite, the element of unlawfulness and intent was a prerequisite, plus there were additional required elements in the sub-paragraphs. If persons intend to commit the acts but were caught before doing so, in the absence of these transport offences, problems might arise.

2:21 This viewpoint was supported by another delegation, which reminded the Committee that the ICAO Council had decided that the Sub-Committee should consider the transport offences. The 2005 SUA Convention should be used as an inspiration; problems of ratification of this Convention could be because of the ship-boarding regime included therein.

2:22 One delegation expressed its support for the criminalization and punishment of the unlawful transport of dangerous goods. As regards sub-paragraph (i) (3), this delegation favoured the language in the second set of square brackets.

2:23 Other delegations expressed the desire to retain the transport offences. It was stated that these activities posed a threat to civil aviation and the lives of persons.

2:24 A few delegations supported the idea of exploring the merits of an opt-in/opt-out approach in relation to the transport offences.

2:25 An observer opined that the airlines would still face difficulties even if intent and knowledge of use were included. In this regard, reference was made to the cases where space on an aircraft was wholly or partially reserved by a government for the carriage of explosives to be used for certain of the prohibited purposes known to the airline. Would a military exclusion clause apply and, if so, in which case? The observer believed that an exclusion clause should be inserted into sub-paragraph (i) to the effect that where a State Party is a shipper, the Protocol would not apply. A few delegations believed that this matter merited further consideration.

2:26 It was stated by one delegation that there could be some issues with the interpretation of sub-paragraph (i). The definition of the transport offences itself was a cause for concern. These offences did not apply to aircraft used in military, customs or police services, but States could define these categories differently. Furthermore, all the sub-paragraphs under (i) included a requirement for a specific purpose, such as intimidating or compelling a government and so on, and this could be determined very subjectively. Different States might have different burdens of proof for these offences. All these issues could cause problems with ratification. These transport offences should be linked to the safety of flight.

2:27 On this last point, one delegation stated the unlawful transportation of these materials is not subject to any type of control and there is an inherent risk to civil aviation.

2:28 One delegation did not support the opt-in/opt-out proposal as it was not appropriate in an international criminal law context; there was no precedent amongst the UN counter-terrorism conventions for an optional criminal law offence. It should be ensured that the transport offences are criminalized across all jurisdictions that are States Parties to obtain the benefits of universal jurisdiction, mutual legal assistance and the extradition provisions so that there can be no safe haven for offenders. A number of statements had been made to the effect that the proposed offences did not concern the safety of aircraft or that ICAO was not the appropriate forum to consider these offences. However, a prohibition on the use of civil aircraft to intentionally and unlawfully transport BCN weapons, related material and delivery systems, and explosive or radioactive material was entirely consistent with ICAO objectives. In this context, the delegation referred to ICAO Assembly Resolution A33-1, and Articles 4 and 44 of the Chicago Convention. The delegation

further stated that the UN Security Council had also called on States and international organizations numerous times to take action in this area; specific reference was made to Security Council Resolutions 1373 (2001), 1456 (2003) and 1540 (2004). The International Maritime Organization (IMO) had addressed these issues by criminalizing the unlawful and intentional transport of BCN weapons and other dangerous materials using ships. ICAO should take the same action in relation to civil aviation.

2:29 These views were supported by another delegation.

2:30 At this point, the Chairman noted that there had been an earlier proposal for incorporation of certain definitions into the substantive provisions. This had some support but the preponderance of views was not to accept it. However, it could be further considered when examining the Definitions Article.

2:31 The Chairman invited consideration of **sub-paragraph (j) of Article 1 (1)**, dealing with the transport of certain persons. The observer from IATA referred the Committee to paragraph 2.4 of LC/34-WP/2-3, wherein it was proposed to delete any language that would attempt to criminalize the transport of fugitives, for the reasons given in the paper.

2:32 A delegation stated that the sub-paragraph gave rise to concerns, especially as regards the definition of “transport”. Sale of a ticket by an agent or purchase by a relative should not be an offence. The precise ambit of the offence should be established. There was a contradiction between sub-paragraph (j) and the objective of the proposed protocol, but if it was decided to include this offence, references should be made to the 2005 SUA Convention and to *the International Convention for the Suppression of Acts of Nuclear Terrorism* (2005).

2:33 In connection with the transport offence relating to fugitives, one delegation had concerns about human rights and due process. In its view, the offences were too broadly defined. A new wording may be necessary.

2:34 Another delegation would not recommend that the transport of fugitives be included as the term “fugitive” was ambiguous and inclusion of the offence could have unintended consequences. This delegation, however, believed that the draft proposed in paragraph 2.8.3 of LC/34-WP/2-2 merited consideration.

2:35 The Delegate of Australia then introduced paragraphs 2.8.1 to 2.9.2 of LC/34-WP/2-2. Several delegations supported this text. One delegation proposed new wording for sub-paragraph (f) as follows: “transports, causes to be transported, or facilitates the transport of another person on board an aircraft knowing that the person is subject to a warrant or facing charges or punishment relating to an offence set forth in the treaties listed in the Annex, and intending to assist that person to evade criminal judgement.” This proposal was supported by several other delegations; some of these stated that it was in line with the text in paragraph 2.8.3 of LC/34-WP/2-2.

2:36 One delegation, expressing its satisfaction with the draft in paragraph 2.8.3 of LC/34-WP/2-2, nevertheless felt that this was necessary to have objective criteria for the airlines to implement.

2:37 Another delegation wondered about the duty of care to be imposed on airlines. If the proposed protocol did not include a clarification of the duty of care, then sub-paragraph (j) should be deleted because of the potentially negative effects on the airline industry.

2:38 It was stated by a delegation that Article 21 (3) of the 2005 SUA Convention provides for the possibility for a State Party to declare that it will apply the provisions on fugitive transport in accordance with the principles of its criminal law concerning family exemptions of liability; a similar possibility should be provided here. This suggestion was supported by several other delegations.

2:39 One delegation believed that the text in paragraph 2.8.3 of LC/34-WP/2-2 did not create a duty of care for a carrier to make in-depth inquiries into the status of a person. If this was not clear, additional drafting might be required. This suggestion was supported by several other States.

2:40 One delegation had no difficulty with criminalizing the transport of fugitives, but pointed out that perhaps this offence was already included within the scope of some of the other offences, and duplication ought to be avoided. It stated that there was already a high level of control over the movement of persons in the air transport environment; the carriers already had the burden of complying with a no-fly list. Additionally, there was a long Annex linked to the clause, with a number of international legal instruments. What would be the position of States which are not Parties to one or more of these instruments? In this context, the Chairman referred to Article 21 (1) of the 2005 SUA Convention by virtue of which a State Party which is not a party to a treaty in the Annex may declare that the treaty shall be deemed not to be included in respect of the fugitive offence. One delegation shared the concerns expressed over the implementation issues for the airlines.

2:41 A delegation recalled that the carrier must act unlawfully, intentionally and with certain knowledge before its liability can be incurred under the proposed protocol.

2:42 The Chairman summarized the discussion by stating that there was no consensus on whether to include the fugitive offence. There was strong support for the language changes proposed in paragraph 2.35 above and in paragraph 2.8.3 of LC/34-WP/2-2. These two proposers should come to an agreement on the language and report back to the Committee. The language will then be placed in square brackets because there was no decision whether to include the offence.

2:43 The Chairman proposed to establish a **small group to deal with the transport offences**, with a mandate to see if there could be consensus on either of the two offences (sub-paragraphs (i) and (j) of Article 1 (1)). He noted that the Committee was much further away from consensus in the case of transport of persons. If consensus cannot be reached, how should the issue be presented to the Diplomatic Conference? The small group should also consider the suggestion of an opt-in/opt-out formula which had gathered some, though not overwhelming, support. The group should also consider whether including the notion of a duty of care in the transport of persons might make it more acceptable. The Chairman named the group as follows: Argentina, Australia, Canada, China, Egypt, Germany, India, Japan, Lebanon, the Russian Federation, South Africa and the United States; it would be chaired by the Chairman of the Sub-Committee.

2:44 One delegation, supported by another, objected to the group's composition, stating that it was not based on objective criteria as its balance overwhelmingly favoured the delegations who were supportive of the transport offences. This delegation declined to participate in the group and reserved its position on the outcome. The Chairman expressed regret at this decision and offered further consultation.

2:45 **Paragraph 1 bis of Article 1 was adopted** without discussion.

2:46 The Committee thereafter considered **paragraph 1 *ter*** of **Article 1**. One delegation proposed incorporating the element of criminal intent into paragraph 1 *ter* and paragraph 2 in order to align them with the wording in the *chapeau* of Article 1, i.e. “if that person unlawfully and intentionally...” Several delegations supported this proposal with one delegation suggesting to merge 1 *ter* into paragraphs 1 and 1 *bis* which would serve the purpose. Two delegations favoured only the term “intentionally” as some threats could be perceived as unintentional, for example a negligent statement made by an agent. Although there were no strong objections to the proposal, some delegations questioned the benefit of incorporating criminal intent into paragraph 1 *ter* given that a threat by itself is unlawful.

2:47 One delegation, supported by another, suggested that “unlawfully” be defined. Another delegation cautioned against this approach given that “unlawfully” was not defined under The Hague and Montreal Conventions.

2:48 One delegation stressed the importance of criminalizing only threats which could lead to serious disruption of international air transportation and therefore proposed deleting from paragraph 1 *ter* the reference to sub-paragraphs (e), (i), and (j) of Article 1, paragraph 1. This delegation also pointed out that there were no provisions to criminalize equivalent threats in the 2005 SUA Convention. A large number of delegations supported this proposal and it was **accepted**.

2:49 With regard to drafting, one delegation proposed limiting the offence in paragraph 1 *ter* to threats which are likely to endanger the safety of civil aviation or public security, while another delegation proposed wording to the effect that any person also commits an offence if that person threatens, “with or without a condition, as is provided for under national law...” as this could garner universal acceptance.

2:50 One delegation averred that the reference to “circumstances which indicate the credibility of the threat” may not be a useful qualification, proposing instead a formulation of threats being conveyed directly, and by a third party. This delegation suggested to rephrase it by using the term “conveys or causes any person to receive a credible threat”, which received substantive support.

2:51 In his summary of the discussion on paragraph 1 *ter*, the Chairman noted that there was strong support for the wording proposed above as it seemed to address most of the concerns expressed by the Committee. He referred the specific wording to the Drafting Committee for consideration. It was noted by one delegation that the Arabic text of paragraph 1 *ter* needed to be aligned with the English text, and the Chairman referred this matter to the Secretariat.

2:52 The Committee thereafter considered **Article 1 (2)**. The Committee **agreed** on the texts of **sub-paragraphs (b) and (c)** of paragraph 2 without discussion. With regard to sub-paragraph (a), one delegation, supported by another, proposed that the attempt to commit either of the transport offences at sub-paragraphs (i) and (j) of Article 1 (1) not be criminalized, given that this was not done under the 2005 SUA Convention. Other delegations who commented did not support this proposal stating that the attempt to commit any of the transport offences was by itself a grave offence and warranted criminalization. In light of the foregoing, the Committee **endorsed** the text of **sub-paragraph (a)** as it stands.

2:53 Consideration of **Article 1 (3)** began with one delegation presenting its working paper (LC/34-WP/2-1) summarizing the reasons of the Sub-Committee for including the conspiracy and *association de malfaiteurs* offences in the draft Protocol. This delegation stressed that ancillary and inchoate offences constitute a key element of the draft Protocol since they would expand the Montreal

Convention to cover not only those offenders actually committing the principal offences, but would provide States with the international legal tools to criminalize and punish offenders for involvement in the planning of such offences.

2:54 One delegation, supported by another, queried as to whether inchoate offences should apply to lesser offences such as the false communication offence at sub-paragraph (e) of Article 1 (1). This delegation noted that Article 5 of the *United Nations Convention against Transnational Organized Crime* (Organized Crime Convention), upon which Article 1 (3) had been partially based, limited the applicability of inchoate offences to “serious crime”. This delegation further stated that many jurisdictions either did not have a conspiracy offence or, if they did, its applicability was limited to serious crimes which are life-threatening and/or terrorist-related. This delegation suggested the addition of “to the extent that it is compatible with its domestic law” to the *chapeau* of Article 1 (3).

2:55 The Chairman of the Sub-Committee clarified that Article 1 (3) was adapted from the Organized Crime Convention because it was considered to be the most comprehensive text regarding criminal cooperation and overcomes the difficulties between the conspiracy and *association de malfaiteurs* offences. The Chairman stressed that although some jurisdictions may not recognize either offence, it is essential that the draft Protocol criminalizes any concerted action.

2:56 It was proposed by one delegation, supported by another, that Article 1 (3) should not apply to attempts under sub-paragraph (a) of Article 1 (2). The supporting delegation averred that the formulation of sub-paragraph (b) of Article 1 (3) was too far-reaching and therefore not in line with the UN resolutions on terrorism or the Organized Crime Convention. This delegation suggested that “a group of persons” at sub-paragraph (b) be defined in line with the Organized Crime Convention’s definitions of “organized criminal group” and “structured group”. Two delegations cautioned against such a definition in a terrorist convention given that terrorist groups tended to have little or no structure. One observer further noted that the aim of an “organized criminal group” was to commit an offence in order to obtain “a financial or other material benefit”, whereas terrorist groups are generally motivated by ideological reasons. This observer also clarified that the language adopted in sub-paragraphs (b) (i) and (ii) of Article 1 (3) regarding the composition of a group was taken from UN counter-terrorism conventions, i.e. the *International Convention for the Suppression of Terrorist Bombings* (“Terrorist Bombings Convention”), the *International Convention for the Suppression of the Financing of Terrorism* (“Terrorist Financing Convention”), the Nuclear Terrorism Convention and the 2005 SUA Convention.

2:57 When the meeting resumed on 11 September, the Chairman first asked for a moment of silence in memory of the victims of the attacks on 11 September 2001, and all other victims of attacks against civil aviation. He recalled that this set of events prompted the process under way before the Legal Committee, which commanded utmost seriousness in its work.

2:58 The Chairman then turned back to Article 1 (3) in the proposed amendments to the Montreal Convention and recalled earlier discussions which indicated that a few States had in their domestic law neither the concept of conspiracy, nor that of *association de malfaiteurs*. Nevertheless, he understood that every system of law should somehow be able to address this kind of criminal behaviour. While a proposal to add plain reference to domestic law had not received support so far, he wished to pursue the discussion to consider whether the language as it stood would be sufficiently broad for such States to implement this offence in their domestic system, or whether reference to domestic law was necessary.

2:59 The observer from the United Nations Office on Drugs and Crime (UNODC) then gave the background of this issue. Referring to Article 2 (3) of the Terrorist Financing Convention, he recalled that paragraph (3) was innovative in that offences would be constituted even if the intended act would not have taken place. The general wish to introduce this innovation had been obvious since preventive measures were necessary to enable interrupting a plot without being an obstacle to prosecution. The current draft aimed at achieving this aim through two models, i.e. conspiracy and *association de malfaiteurs*, but he urged the Committee members not to be too narrow, considering that the instrument had to apply globally. While some systems of law might not accommodate either model, he submitted that all systems must have a vehicle to prevent criminal action towards such life-endangering crimes and such avenues could be explored by the Drafting Committee.

2:60 The Chairman thanked the UNODC observer for his thoughtful summary, and concluded that the question remained whether to adjust the current text. One delegation supported the text as it stood, as it was the result of the Sub-Committee deliberations which were quite extensive on the subject. Adjustments might be made if absolutely necessary to accommodate some systems of law but the international community and ICAO would be off-mark without this innovative concept. Three delegations supported the observer's proposal for further consideration by the Drafting Committee aiming at a consensus, bearing in mind that the text had been carefully drafted. One delegation, supported by another, preferred to keep the text proposed by the Sub-Committee which sufficiently covered the systems in place in a large number of States, noting that it was up to domestic laws to adapt to international instruments where necessary.

2:61 The Chairman **concluded** from the discussion over Article 1 (3) that the Committee would transmit to the Diplomatic Conference the very carefully drafted text as it stood, without changes, which completed the consideration of Article 1.

2:62 The Committee then turned to the text of **Article 2** containing new definitions. One delegation questioned the use of the term "unlawfully" throughout the instrument and submitted that it should be defined. Another delegation acknowledged that, even if a definition might not be adequate given its potential impact for other conventions, a summary of the meaning of "unlawfully" in the records of the meeting could be useful. The Chairman of the Sub-Committee concurred that given the number of precedents in other conventions, a definition might complicate matters. The observer from UNODC agreed that the term "unlawfully" may appear as redundant but noted that this standard language originating from the common law system does not present any harm and is widely used. The Chairman concluded that, even if redundant or circular, this term should not be defined.

2:63 One delegation then recalled that the Drafting Committee still had to consider a proposal for referring to the IAEA charter regarding the terms "source material" and "special fissionable material" in Article 1 which should otherwise be defined if such reference would not be retained. With one delegation in favour and one against, the Chairman concluded that those terms would not be further defined. He also noted that sub-paragraph (g) of Article 1 (1) had been referred to the Drafting Committee whose outcome would then impact on sub-paragraphs (d) to (h) of Article 2. Regarding sub-paragraph (d), one delegation questioned the method of adopting dedicated definitions and their alignment with the definition of similar terms in other conventions, marking a preference for adopting plain reference to such conventions instead. The Chairman of the Sub-Committee was of the opinion that references to other conventions would entail difficulties in case of amendments thereto, not to mention the difficulties for ratification where States would not be Parties to the referenced instruments. The Chairman recalled that the Sub-Committee had not agreed on references to Annex 18 to the Chicago Convention.

2:64 One delegation questioned the wording of **sub-paragraph (c)** in view of technological developments and proposed to swap Articles 1 and 2. As regards the definition of “air navigation facilities”, the Secretary confirmed that, at the request of the Sub-Committee, it had been reviewed by the ICAO Air Navigation Commission (ANC) which found it in order. Following the interventions of one delegation in favour and two opposing any swap of Articles 1 and 2, it was concluded by the Chairman that any modification to the current order dating from 1971 might entail problematic adaptations in a number of domestic laws.

2:65 One delegation then wondered whether reference to environmental damage should be made in **sub-paragraph (e)**, since the same reference was made in **sub-paragraph (f)**. The Rapporteur drew attention to the point of difference that in sub-paragraph (g) and (h) of Article 1 (1) environmental damage was referred to as a result of the offences, whereas in sub-paragraph (f) of Article 2 environmental damage was considered as one of the built-in elements of the definition of “radioactive material”. She, therefore, cautioned against changing definitions without knowing the context at issue. This was supported by two delegations and the Chairman concluded that the issue of definitions had been referred to the Drafting Committee.

2:66 Concerning **sub-paragraph (i)**, the Chairman reminded the Committee that keeping the definition of “BCN weapon” in Article 2 would depend on the deliberations of the Drafting Committee on the so-called transport offence, noting that there was otherwise consensus on the text of the definition itself. Two delegations nevertheless stated that consistency with other conventions should be sought by the Drafting Committee.

2:67 Turning to **Article 3**, the Chairman acknowledged that the indicated changes were of editorial nature only and that no delegation had asked for any further modification.

2:68 Regarding **Article 4**, one delegation noted that **sub-paragraphs 2, 3 and 4** were not referring to sub-paragraphs (i) and (j) of Article 1 (1) and asked for the reason of such differentiation of treatment. The Rapporteur concurred that reference to sub-paragraphs (i) and (j), which had been added by the Sub-Committee, was necessary as a consequential amendment to Article 4. She further suggested that sub-paragraph 6 of Article 4 should, for the same reason, refer not only to paragraph 2 of Article 1, but also to paragraph 1 *ter*.

2:69 One delegation, supported by another, was of the opinion that reference should be made in **Article 4 (2)** to the State of the operator rather than to the State of registration, given the development of air transport. While the Chairman observed that the State of Registry actually remained the State of the nationality of the aircraft and was more stable, one delegation insisted that full consistency had to be ensured in this respect with the recently adopted Convention on *Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft*. One delegation, noting that the reference could be modernized to read “State of ‘Registry’”, offered that the latter had to subsist in paragraph 2, even if the State of the operator would be added. As this was supported by another delegation, the Chairman decided to transmit this question to the Drafting Committee.

2:70 The Chairman of the Legal Committee then announced the composition of the Drafting Committee: Argentina, Australia, Brazil, Cameroon, Canada, China, Egypt, France, Germany, Japan, Mexico, Nigeria, the Russian Federation, Saudi Arabia, Singapore, South Africa, Sweden, Tunisia, the United Kingdom and the United States of America, as well as IATA and UNODC. The Chairman also announced that the Drafting Committee would be chaired by Ms. S. H. Tan (Singapore).

2:71 The Committee thereafter considered **Article 4 bis** (the military exclusion clause).

2:72 With regard to **Article 4 bis (1)**, one delegation, citing the importance of the Chicago Convention to international civil aviation, suggested to insert the following wording at the end of the clause: "... and the objectives and principles of the Chicago Convention as they pertain to international civil aviation". This proposal received the support of several delegations.

2:73 Two delegations suggested the deletion of paragraph 1, with one cautioning that if the paragraph was retained, it should not be viewed as implying that general international law prevails over the Montreal and Hague Conventions, but that all relevant treaties are equally binding upon States and that paragraph 1 is merely declaratory in nature. Two delegations recommended that if paragraph 1 is deleted, then paragraph 2 should be re-numbered as, respectively, Article 4 *bis* (1) or Article 4 (7) given that paragraph 2 also deals with the scope of application.

2:74 The Rapporteur provided the background for **Article 4 bis (2)** which was based on the text negotiated in the Terrorist Bombings Convention and subsequently adopted in the Nuclear Terrorism Convention and the 2005 SUA Convention. The Rapporteur pointed out that the clause's inclusion in both draft Protocols would ensure that the Montreal and Hague Conventions did not purport to regulate the conduct of armed forces in State control as this was already addressed in other fields of law, in particular international humanitarian law, the law relating to the responsibility for internationally wrongful acts and the Charter of the United Nations. The Rapporteur further stressed that the focus of the Montreal and Hague Conventions was on the activities of the individual and not States, and that this was demonstrated not only through the offences themselves but through Articles 4 (1) and 3 (2) respectively. The assumption is that the activities of the States are covered by other rules of international law. The military exclusion clause therefore does not constitute a total exclusion of criminal responsibility but rather a qualification as to the applicable law; it is declaratory in nature.

2:75 A majority of the delegations which took the floor echoed the Rapporteur's views on Article 4 *bis* (2), with some averring that Article 4 *bis* be viewed as a package with both paragraphs necessarily linked. These delegations emphasized the Article's declaratory nature, its having developed a strong standing in counter-terrorism conventions, its resolution of potential conflict of law situations, and the importance of articulating and codifying long-accepted law when the failure to do so could create ambiguity.

2:76 One delegation proposed to replace Article 4 *bis* (2) with the following text: "This Convention does not apply to activities of armed forces during an armed conflict in the case of a declaration of war between belligerent parties."

2:77 In objecting to this proposal, one delegation cited the many undeclared armed conflicts over the last 70 years, including those based upon the right of self-defense recognized by the UN Charter and legal military interventions sanctioned by Security Council resolutions. A number of delegations supported the text proposed in 2:76, with one making a lengthy statement with respect to the second part of

paragraph (2), i.e. “activities undertaken by military forces of a State in the exercise of their official duties”, reiterating the concern expressed by this and other delegations at the Sub-Committee meetings, at the Legal Commission of the 36th Session of the ICAO Assembly and by Council members, namely that this may be viewed as an exemption of criminal acts committed by a member of a State’s armed forces during peacetime, and he queried as to whether the rules of international law exist which effectively govern such activities, especially with respect to extradition and prosecution. This delegation reminded the Committee of its proposal at the Sub-Committee that a legal study be done which would clarify international law regulating such activities. This delegation averred that although the scope of the aviation security conventions was being expanded to cover further acts of unlawful interference, a new loophole may be created that could have the effect of legalizing acts of unlawful interference carried out by certain States, thus violating the principles of the aviation security conventions, the Chicago Convention, and resolutions of the UN General Assembly, Security Council and the ICAO Assembly. He questioned the acceptance of the military exclusion clause solely because it appears in other counter-terrorism conventions, which differ from the aviation security context. Based upon the reasoning of this delegation, other delegations suggested that the last part of Article 4 *bis* (2) be deleted.

2:78 Given the disparate views on Article 4 *bis* (2), and in an effort to achieve a compromise, one delegation proposed an additional paragraph based upon Article 4 (3) of the Nuclear Terrorism Convention. A large number of delegations agreed that this proposal was worth exploring.

2:79 In summarizing the discussion, the Chairman noted the division of opinions toward the text of Article 4 *bis* as agreed by the Sub-Committee. The burden of persuasion to amend the text had not been met. However, as there was no consensus, the Chairman proposed to form a small group, chaired by the Delegation of Switzerland, whose mandate would be to work towards consensus, failing which, to arrive at a way to present the issue to the Diplomatic Conference.

2:80 The Committee decided to defer consideration of **Article 4 *ter*** pending the outcome of the discussions of the small group on transport offences.

2:81 The Committee then considered **Article 5** in the proposed amendments to the Montreal Convention. The Rapporteur explained that the draft text has added three jurisdictional grounds; one is mandatory as set out in **sub-paragraph (e) of Article 5 (1)**, i.e. when the offence is committed by a national of a State (Active Personality Jurisdiction), the other two are optional as set out in **Article 5 (2)**, i.e. when the offence is committed against a national of that State (Passive Personality Jurisdiction), or by a stateless person who has his or her habitual residence in the territory of that State. She noted that the proposed amendment does not resolve the issue of competing jurisdictions. In practice, this issue would be resolved in accordance with the place where the alleged offender is found, or where the evidence could be collected.

2:82 One delegation, supported by four others, proposed that the Active Personality Jurisdiction become optional. It was mentioned that the territorial jurisdiction represents the basic principle in their countries, and nationality is almost irrelevant on criminal jurisdiction. To make this jurisdiction optional may also facilitate the wide acceptance of the future protocol.

2:83 Several other delegations were opposed to the proposal to downgrade the mandatory nature of this jurisdiction. A series of international conventions had successfully incorporated this mandatory jurisdictional ground and there was no reason that ICAO instruments should not do so. Moreover, the absence of the mandatory jurisdiction may also weaken the system of extradition, leaving a potential gap in

the legal framework.

2:84 A further proposal to put **sub-paragraph (e) of Article 5 (1)** in square brackets being rejected, the Chairman **concluded** that sub-paragraph (e) should remain unchanged. The Delegation of Argentina indicated that it could not rally the consensus on sub-paragraph (e), and requested that reference be made on this issue in the records of this meeting, to be further considered by the future Diplomatic Conference.

2:85 With respect to **Article 5 (2)**, although there was one intervention to delete the reference to a stateless person, the Committee **decided** to keep the provision as it was. The Committee also **adopted Article 5 (3)** without any change.

2:86 Some delegations noticed the similarities between **paragraphs 4 and 5 of Article 5** and queried the possibility of merging them. The Rapporteur explained that paragraph 4 was taken from the 1971 Montreal Convention while paragraph 5 was taken from the 1988 Montreal Protocol. As the Montreal Protocol was only applicable to certain offences at airports, but not to the offences on board aircraft, some jurisdictional grounds relating to the acts on board aircraft, such as the one specified in sub-paragraph (c) of Article 5 (1), did not apply in the context of the Protocol. This was the reason why Article 5 (5) only mentioned sub-paragraph (a) or (e) of Article 5 (1), while Article 5 (4) referred to the entire Article 5 (1). Based on this discussion, the Committee decided to request the Drafting Committee to examine if there was any unnecessary repetition in paragraphs 4 and 5 of Article 5.

2:87 One delegation pointed out that the Arabic text of **Article 5 (6)** referred to “court” jurisdiction, rather than “criminal” jurisdiction. It was decided to align the Arabic text with the English text.

2:88 In consideration of **Article 6**, one delegation noted that the French text used the word “legislation”, which should in fact be corrected by using the word “loi”. It was so agreed and the same should apply to Article 12. Another delegation proposed to insert “due process” in Article 6 (1). While this motion was supported, other delegations believed that the fair treatment clause as set forth in **Article 7 bis** would adequately cover the concern. Consequently, **paragraphs 1, 2 and 3 of Article 6** were **adopted** without any change, except the French linguistic point mentioned above.

2:89 With respect to **Article 6 (4)**, the Secretariat explained that the term “have established” was proposed during the second meeting of the Sub-Committee to replace the term “would otherwise have”. This proposal was based on the need to align Article 6 (4) with the newly proposed Article 5 (3) which required each State Party to notify the Depositary of the jurisdiction it “has established”. The notification would provide a transparent basis for determining which States would be covered by Article 6 (4). Based on this understanding, the Committee decided to retain the term “have established” and to delete the square brackets in the sub-paragraph as well as the term “would otherwise have”. Upon the recommendation of one delegation, it was further **decided** that reference should not only be made to paragraphs 1 and 2 of Article 5 but also to paragraph 3 of Article 5. Moreover, as suggested by another delegation, the Committee agreed that in addition to the term “have established”, the word “notified” should also be added, and instructed the Drafting Committee to fine tune the wording.

2:90 **Article 7** was **adopted** without any change.

2:91 Concerning **Article 7 bis**, one delegation proposed to include a specific reference to the *Vienna Convention on Consular Relations*, in view of two cases referred to the International Court of Justice. It was believed that this reference was important in this context to ensure the procedural aspects of human rights, including the right to notify the consular officials. Another delegation pointed out that the concern regarding diplomatic protection was already covered by Article 6 (3) and, therefore, there was no need to mention it again in Article 7 bis. It was then **decided** that Article 7 bis should be retained without any change.

2:92 In consideration of **Article 8**, one delegation mentioned that in the Arabic version the term “extradition” was expressed as “deportation”. It was **agreed** to change it to “extradition”. Another delegation proposed to delete the term “at its option” in **Article 8 (2)**, but it was not accepted. The third delegation referred to Article 1 (3) and queried whether the optional choice under that provision would have an impact upon the issue of extradition. Since extradition normally requires “double criminality”, a request of extradition based on the notion of conspiracy may be rejected by a State which had the system of “*association de malfaiteurs*”.

2:93 In view of this, the Committee **requested** the Drafting Committee to explore the possibility of establishing equivalent standards in the context of extradition. The Committee further **decided** to refer to Article 5 (2) in **Article 8 (4)**.

2:94 Regarding **Article 8 bis**, one delegation proposed to delete “an offence inspired by political motives”, and believed that such a deletion may facilitate more ratifications. This proposal was not supported and Article 8 bis was retained as it was. One delegation acknowledged the value of a provision excluding the possibility to refuse extradition or mutual legal assistance with reference to the crime being a political offence but emphasized that the issue of extradition for political offences in international instruments is an issue that has to be dealt with on a case-by-case/instrument-by-instrument basis.

2:95 Except Article 12, **Articles 8 ter to 14** inclusive were **adopted** by the Committee without any change. With respect to **Article 12**, the Drafting Committee was **requested** to consider the need to add the reference to Article 5 (3). Moreover, the change in French as mentioned in paragraph 2:88 above was **accepted**.

2:96 The Chairman informed the Committee that Flimsy No.1 had been submitted by the Delegation of Argentina addressing the creation of new substantive offences in relation to the transport of persons. The Committee noted that the matter would be taken up by the small group dealing with the transport offences.

2:97 The Committee thereafter commenced its consideration of the proposed **Protocol to amend the 1970 Hague Convention**, on the basis of the text set out in LC/SC-NET-2, Appendix 5.

2:98 The Rapporteur provided the Committee with background information in relation to the point that the offence provision in **Article 1** would now apply to acts carried out when the aircraft is “in service” as opposed to when the aircraft is “in flight”. It was explained that the period of time, in which the offences would be captured, would be broadened to extend to situations such as pre-flight preparations up until 24 hours after landing of the aircraft. The Rapporteur further explained that the offence provision had been expanded as regards “threats” insofar as it was no longer required that the threat be committed on board the aircraft. Further expanding on the reasoning behind the proposal, the Chairman of the Sub-Committee stated that the intention was to address all possible situations where perpetrators try to

gain control of an aircraft, even in the absence of physical violence or the use of firearms on board the aircraft, for example by taking hostages in a school and threatening to kill them if the pilot did not follow their instructions. It was for this reason that the Sub-Committee had felt that it was appropriate to add the term “constraint” in **Article 1 (1)**. Lastly, the expression “by any technological means” had been added in order to address situations, in which the offenders seek to take control of an aircraft by jamming or otherwise interfering with flight instruments or data transmission systems.

2:99 In response to a query raised by one delegation in relation to the difference between “exercising control” and “seizing”, the Chairman of the Sub-Committee explained that “control” could be obtained by a person on the ground jamming the signals without seizing the plane physically. The Chairman noted that there probably existed some overlap between the two notions but that the provision was intended to cover a wide range of possibilities.

2:100 One delegation expressed the view that it was not necessary to add the term “constraint” as, taking the example of the aforementioned hostage situation, this situation would already be addressed by the notion of “threat”. In subsequent interventions, several delegations supported to retain the notion of “constraint” and to delete the square brackets around it, with a view to capturing as many situations as possible. It was nevertheless suggested by several delegations to consider to replace in the English text the word “constraint” by “coercion”. As to the use of the term “coercion”, one delegation wondered if it was indeed a correct formulation to speak of “coercion or threat thereof”. In this context, the Rapporteur indicated that in the drafting of The Hague Convention the word “coercion” had been considered, but it was elected to use “or by any other form of intimidation” instead. It was **agreed** to refer this point to the Drafting Committee in order to ensure consistency with previous usage. Another delegation proposed to add in Article 1 (1) the term “by interference with its technical operation or” after the term “aircraft in service”.

2:101 In relation to **Article 1 (2)**, the Committee **agreed** to conform to the language as had been accepted in relation to the proposed text to amend the Montreal Convention.

2:102 There were no comments in relation to **sub-paragraph (a) of Article 1 (3)** and it was **adopted**.

2:103 In relation to **sub-paragraph (b) of Article 1 (3)**, one delegation submitted to reconsider the retention of the reference to sub-paragraph “3 (a)” contained therein as it would not make much sense to direct somebody to attempt an offence. In relation to this intervention, another delegation saw no need for an amendment to the text as it was appropriate to punish someone who organized an offence that ultimately failed.

2:104 In relation to **sub-paragraph 3 (c)**, one delegation recalled that it had submitted a flimsy in which it was proposed to make it an offence if a person assists or aids another person to evade prosecution, for example by providing forged identification documents. In his summary on these points, the Chairman stated that the language would remain as presented in Appendix 5 to the Report of the Sub-Committee (LC/SC-NET-2), subject only to the outcome of the consideration of the points raised in Flimsy No.1, which would be addressed by the Group on Transport Offences.

2:105 Addressing **Article 1 (4)**, the Chairman recalled that the language was closely related to the corresponding provision in the proposed text to amend the Montreal Convention. As it had been extensively discussed there, the Chairman suggested, and the Committee **agreed**, to accept the same wording.

2:106 **Article 2** was **accepted** with no discussion.

2:107 In relation to **Article 3**, one delegation mentioned that the notion of “in flight” appeared to be used only once in the entire text, i.e. in the definition of “in service”. This delegation wondered if the definition was required at all. If the definition of “in flight” were to be retained, this delegation proposed to align the wording with the text found in the 2009 instruments amending the Rome Convention. In relation to this point, another delegation suggested to do away with all but the last sentence of **sub-paragraph (a)** and to merge that sentence with the definition of “in service” appearing in **sub-paragraph (b)**. Another delegation expressed the view that the current definition of “in flight” was only suitable for passenger planes but not for cargo aircraft. In his summary, the Chairman stated that the definition of “in flight” would be discarded and the definition of “in service” referred to the Drafting Committee for adjustments as necessary. The Drafting Committee was also tasked to ascertain if the definition of “in flight” appeared elsewhere in the text of the instrument.

2:108 In relation to **paragraphs 3 and 4 of Article 3**, the Committee acknowledged that as regards the issue of acts committed by persons who were not physically on board the aircraft a final decision could only be taken after the Committee concluded its deliberations of the issue of the State of the operator in the context of sub-paragraphs (a) and (b) of Article 4 (2), of the proposed text to amend the Montreal Convention.

2:109 **Article 3 (5)** was **accepted** without discussion.

2:110 In relation to **Article 3 bis**, the Chairman informed the Committee that the equivalent provision in the proposed Montreal Protocol was the subject of consideration by a small group. The Committee agreed to defer the discussion accordingly.

2:111 In relation to **Article 4**, the Chairman noted that extensive discussions regarding the corresponding provision in the proposed text to amend the Montreal Convention had taken place. On that occasion, the Committee had **accepted** the text, with one minor issue to be addressed by the Drafting Committee. In relation to a point raised by one delegation which suggested to provide for jurisdiction in case the offence is directed against a stateless person, the Chairman remarked that the jurisdiction provision was conceptually devised in relation to the perpetrator.

2:112 **Article 5** was **accepted** without discussion.

2:113 In relation to **Article 6 (1)**, the Committee was reminded that it was necessary to replace in the French text the word “legislation” by “loi”. **Paragraphs 2 and 3** were accepted without discussion. In relation to the text appearing in square brackets in **paragraph 4**, the Committee recalled its earlier decision to **retain** the expression “have established”.

2:114 **Article 7** was **accepted** without discussion, as was **Article 7 bis**.

2:115 In relation to **Article 8**, the Committee recalled its consideration in paragraph 2:93 of this report of the corresponding provision in the proposed text to amend the Montreal Convention where it was decided to refer one particular element to the Drafting Committee. Depending on the outcome of this issue, the provisions would be treated alike.

2:116 In relation to **Articles 8 bis** and **8 ter**, the Committee accepted the wording as in the

previously agreed text relating to the proposed text to amend the Montreal Convention.

2:117 **Articles 9 and 10** were accepted without discussion.

2:118 In relation to **Article 10 bis**, it was **agreed** to replace in the French text the words “national law” by “sa loi”.

2:119 **Articles 11 and 12** were **accepted** without discussion.

2:120 The Committee was invited to express its view on the question of the **format of the amendments** it would propose. The Chairman stated that one option could be to have two protocols; however, one would have to consider the issue that these protocols would be authentic in six languages, while the parent instruments were adopted in four languages only. The other option would be two texts consolidating the amendments with the parent instruments; these would be two replacement conventions. A variation could be to have two protocols plus consolidated texts.

2:121 Several delegations would prefer the adoption of two protocols, with consolidated texts for convenience. It was stated that both The Hague and Montreal instruments were listed in the respective annexes of certain other conventions or were otherwise referred to in those other conventions. The definition of The Hague and Montreal offences were part of what was seen as terrorist offences. It was important to remain clear as to what was penalized under those other instruments. The view was also expressed that consolidated texts having the force of new conventions could lead to a requirement to denounce The Hague and Montreal instruments. One of these delegations, supported by others, specified that the consolidated texts should be official; for example, a consolidated text of the Cape Town instruments appeared in a Resolution of the Conference, and the same could be done in this instance.

2:122 One delegation observed that complications could arise if protocols were adopted, in light of the difference in the number of authentic languages of The Hague and Montreal instruments and what would be the case with the protocols here.

2:123 One delegation expressed the opinion that the proposed amendments were not confined to a specific area but were wide-ranging. It would therefore be better to have new conventions. The matter of cross-references in other international legal instruments should not be an impediment as similar situations frequently arose in the context of the enactment of domestic legislation, and legal experts would find a solution.

2:124 The Chairman **concluded** that there was no need or requirement for the Committee to take a decision on this issue. There were preferences for each option, but the predominant view was to have two protocols, leaving the existing instruments in place, and consolidated texts in a resolution or resolutions of the Diplomatic Conference.

2:125 The Chairman of the Committee invited the Chairman of the **Small Group on the Military Exclusion Clause** to present the Group’s report. In so doing, the Committee Chairman stated that the word “exclusion” was not optimal as it was not used in the clause, which did not exempt anyone; rather, it specified which body of law applied to what activities. Perhaps it would have been better to speak of a “military activity clause” or a “military responsibility clause”.

2:126 The Chairman of the Small Group agreed that the words “military exclusion” did not

properly describe the content of Article 4 *bis* of the proposed Montreal Protocol and Article 3 *bis* of the proposed Hague Protocol. He explained that the Group had tried to narrow the gap that existed in relation to the clause. The Group emphasized the importance of the integrity of other bodies of law, such as the UN Charter and international humanitarian law. In the **first paragraph** of the article, the Group proposed to add also a reference to the Chicago Convention. **Paragraph 2** of the existing draft was not intended to lead to the impunity of armed forces acting either outside or inside the context of armed conflict. It should be made clear that the activities of military forces of States in the exercise of their official duties would be governed by the Protocols unless it is established that the activities would be governed by other international conventions; however, the Group could not agree on the appropriate place to introduce this clarification. The Group welcomed the earlier proposal in paragraph 2:78 to introduce as **paragraph 3** text from the 2005 Nuclear Terrorism Convention to the effect that paragraph 2 shall not be interpreted as condoning or making lawful otherwise unlawful acts, or precluding prosecution under other law. This ensured that criminal acts could be prosecuted under national or international law. Two sets of texts were presented by the Group to the Committee. The first set reads:

1. Nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the Charter of the United Nations, the Convention on International Civil Aviation (Chicago, 1944) and international humanitarian law.
2. The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law are not governed by this Convention, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention
3. The provisions of paragraph 2 of the present article shall not be interpreted as condoning or making lawful otherwise unlawful acts, or precluding prosecution under other law.

2:127 It was recommended that an explanatory note relating to paragraph 2 be considered to clarify that the activities undertaken by military forces of a State in the exercise of their official duties are governed by this Convention, unless it is established that these activities are governed by other international conventions.

2:128 The Chairman of the Small Group advised that all its members agreed with this text in principle.

2:129 He stated further that some delegations in the Group preferred another wording of paragraph 2, including the addition of paragraph 2 *bis*, the content of which would be the same as that of the explanatory note in paragraph 2:127, as follows:

1. Nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the Charter of the United Nations, the Convention on International Civil Aviation (Chicago, 1944) and international humanitarian law.
2. The activities of armed forces during an armed conflict, as those terms are

understood under international humanitarian law, which are governed by that law are not governed by this Convention.

- 2 *bis* The activities undertaken by military forces of a State in the exercise of their official duties are governed by this Convention, unless it is established that these activities are governed by other international conventions.
3. The provisions of paragraph 2 of the present article shall not be interpreted as condoning or making lawful otherwise unlawful acts, or precluding prosecution under other law.

However, a number of other delegations in the Group were not in a position to accept the text immediately above.

2:130 The Chairman of the Small Group ended by thanking all the Members of the Group for their participation and cooperation.

2:131 The Chairman of the Committee observed that the issue had been discussed extensively in the plenary and that the Small Group had agreed in principle on a text. Accordingly, paragraph 1 should be amended to introduce the reference to the Chicago Convention, paragraph 3 should be added, and an explanatory note as mentioned by the Chairman of the Small Group should be kept for consideration by the Diplomatic Conference.

2:132 The second text did not reflect the consensus of the Small Group, but it was close to the language of the agreed text. The difference lay in the amended second paragraph and in the placement of the proposal referred to in paragraph 2:78 of this report. However, this second set of text would also be fully reproduced in the Committee Report which would form part of the documentation for the Diplomatic Conference.

2:133 One delegation was of the view that the language proposed did not reflect the full compromise. It queried the need to introduce such language. With respect to the explanatory note on paragraph 2 *bis*, the delegation noted that the language was new and did not reflect language used in the five anti-terrorism conventions; it was not clear that the delegation could join consensus on this wording.

2:134 When the meeting resumed, the Chairman of the Committee mentioned that the translation of the alternative text of the military clause in paragraph 2 would only be available the next day; he therefore read this alternative text as follows:

- “2. The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law are not governed by this Convention.
- 2 *bis*. The activities undertaken by military forces of a State in the exercise of their official duties are governed by this Convention, unless it is established that these activities are governed by other international conventions.”

2:135 The Committee then proceeded to the review of the **Report of the Drafting Committee** (LC/34-WP/2-5) which was presented by its Chair, the Delegate from Singapore.

2:136 Starting with **Appendix A** (Montreal Convention), **Article 1 (1)**, the Committee approved the proposals of the Drafting Committee in sub-paragraphs (f), (g), (h) and (j). It was also noted that the Arabic and French texts of paragraph 1 *ter* had to be reviewed.

2:137 One delegation, supported by three others, submitted that, as in paragraphs 1 *bis* and 1 *ter*, the terms “unlawfully and intentionally” had to be added in Article 1 (2), since this qualification for substantive offences had to be re-stated for their ancillary activities. The Rapporteur nevertheless noted that Article 1 (2) was in this respect consistent with the original wording in the Montreal and The Hague Conventions, as well as other anti-terrorism conventions. One delegation acknowledged that the intent was part of the substantive offence, which made it unnecessary to insert the referenced terms in this provision. Another delegation, supported by two delegations, agreed that the intent was necessary to constitute the offence in paragraph 2 but was of the opinion that it was actually inherent to the concept and language of ‘attempt’, hence did not need to be explicit. The Chairman then concluded that the text would remain as is, considering also that this wording had passed the test of time.

2:138 In **Article 2**, it was agreed that the Russian text of paragraph (c) had to be verified. Regarding paragraph (d) which was for deletion in view of the use of “BCN weapon”, one delegation wished to recall that States, in a spirit of cooperation, should prepare themselves for the Diplomatic Conference through exhaustive analysis of the notion of biological weapon as found in sub-paragraph (a) of paragraph (i). This definition, in its opinion, was not appropriate. The Chairman concurred that delegations to the Diplomatic Conference should include experts in this technical field. One delegation also requested review of the numbering of (i) in the French text.

2:139 One delegation went back to paragraph (e) of Article 2 and asked why damage to property and environment was not included therein whereas they were addressed in Article 1. The Chair of the Drafting Committee explained that the Drafting Committee did not consider appropriate to amend the definition, considering that the definition was taken from another convention and that damage to property and environment was part of the substantive offence in this protocol. The Chairman in his conclusion noted that this matter had already received attention in the Plenary. Given the lack of support for modifications to paragraph (e), the text would remain as is, keeping in mind that this would be revisited at the Diplomatic Conference. Without further comments, Article 2 was then **accepted** as proposed by the Drafting Committee.

2:140 The Committee then turned to **Article 4**. The Drafting Committee did not add the notion of “State of the operator” in paragraph 2 because further study would be necessary. One delegation agreed that the State of registration remained a very important reference in this context, but insisted on the need for further consideration of adding the reference to the State of the operator in light of foreign leasing situations, including for domestic transportation. This was acknowledged by the Chairman who announced that the Rapporteur had volunteered to conduct a study on this issue, the results of which should be referred to the Diplomatic Conference.

2:141 One delegation further submitted that the reference to take-off and landing should be deleted from the first line of sub-paragraph (a) in Article 4 (2). The Chair of the Drafting Committee submitted that it would be prudent not to make modifications to the text of paragraph 2 pending review of the proposed amendments to The Hague text. After consultations, the Chairman concluded that the intervention on sub-paragraph (a) was a language issue pertaining to the Arabic text which had to be reviewed. In the absence of further comments on Article 4, he declared it **accepted** as proposed by the Drafting Committee.

2:142 Regarding **Article 5**, the Delegation of Argentina wished to reiterate its view that establishment of jurisdiction when offences are committed by nationals of a State should not be mandatory but optional, and hence should be moved from sub-paragraph (e) of paragraph 1 to paragraph 2 as a new sub-paragraph (c). This would take into account the territoriality principle which is prevalent in a number of States, thereby facilitating the ratification process of this instrument. This delegation contended that this question should be flagged for discussion at the Diplomatic Conference by placing square brackets around the text once it has been moved to paragraph 2. While this proposal was supported by three other delegations, one of them drawing attention to the difficulties raised in this context by dual nationality, the Chairman pointed out that the Committee should not re-open the debate and suggested that such views would be reflected in the report.

2:143 One delegation then questioned the use of the terms “applicable paragraphs” in paragraph 4 of Article 5, the scope of which might not be entirely clear. Two delegations concurred that clarification would be warranted. Another delegation noted the merging of paragraphs 4 and 5 and proposed that the first reference to applicable paragraphs in Article 1 could be deleted so as to avoid its repetition. The Chairman requested the Chair of the Drafting Committee to make consultations and report back to the Committee with a solution to this problem. The Chair subsequently reported that a solution had been found by deleting the first reference to “applicable paragraphs”. The Committee **agreed** with this solution.

2:144 The changes proposed by the Drafting Committee to **Article 6 (4)** were **accepted** as is, as well as those to **Article 8** save in paragraph 5: “each of” was to be deleted while the Arabic text had to be reviewed in order to refer to “extradition”, not “deportation”.

2:145 With regard to **Article 12**, the Drafting Committee recommended that a reference to Article 5 (3) not be added given that Article 12 is a preventive provision which should not be contingent on a State’s notification of the establishment of jurisdiction, but rather should be invoked to inform as many States as possible of a future act of unlawful interference. The Committee **agreed** with this proposal and then completed its consideration of Appendix A of the Drafting Committee’s report. The changes in Appendix B were also **accepted**, with the note that the term “coercion” in Article 1 (1) should be “constraint” in French.

2:146 The Chairman stated, and the Committee agreed, that the Secretariat would be entrusted to adequately transpose the changes made to the Montreal Convention into the text of The Hague Convention, whenever applicable.

2:147 The Chairman, stating that the **Group on the Transport Offences** had completed its work, invited the Chairman of the Group, the Delegate of France to present his report. The report underlined two major concerns: (1) the concern voiced regarding a too wide criminalization in an area where the industry had already to deal with strict regulatory obligations and the potential for unjustified prosecutions; and (2) the notion that the transport offences found in the 2005 SUA Convention did not focus on safety of transport in the strict sense but rather aimed at serving many objectives, such as the non-proliferation of nuclear weapons. As some States felt that this should be dealt with outside of ICAO, the text devised by the Group aimed at reinforcing the objective of enhancing the safety of civil aviation. The Chairman noted that the confidence of the public in civil aviation would nevertheless be threatened in case a terrorist group would use the aircraft for the purpose of transporting dangerous materials for an illicit act in the future. The Group felt that it was logical and opportune to include the transport offences when they are closely linked to aviation security. He explained that the approach contemplated was to add in the *chapeau* defined

offences that the illegal transport should have a link with. Bearing in mind the specificity of air transport, the Group departed from the language of the 2005 SUA Convention as it was not considered necessary to import all concepts found in the maritime context.

2:148 The alternative text proposed by the Group for sub-paragraph (i) of Article 1 (1) was as follows:

1) Article 1, paragraph 1 (i) (1) (2) (3) and (4) would read as follows:

“transports, causes to be transported or facilitates the transport on board an aircraft of the following items, knowing that it is to be used to facilitate an act intended to cause [with or without a condition] death or serious bodily injury to a civilian [or to any person not taking an active part in the hostilities in a situation of armed conflict], when the purpose of such act, by its nature or context, is to intimidate a population or to compel a government or an international organization to do or to abstain from doing any act:

1. any explosive or radioactive material; or
2. any BCN weapon, knowing it to be a BCN weapon as defined in Article 2; or
3. any source material, special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material [knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity not under safeguards pursuant to a safeguards agreement with the International Atomic Energy Agency]; or
4. any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon [knowing that it is intended to be used for such purpose].

2) In the definitions under Article 2 would be added a (j) that would read as follows:

(j) the terms “source material” and “special fissionable material” have the same meaning as given to those terms in the Statute of the International Atomic Energy Agency, done at New York on 26 October 1956.

3) Article 4 *ter* of the present draft would be deleted.

2:149 The Chairman of the Group explained that one delegation, while supporting to find a possible solution to the problem, reiterated its earlier intervention regarding the need for a more adequate definition of WMD-related material contained in sub-paragraph (i) (4). A revised definition proposed by the delegation reads as follows:

“Any WMD-related material as defined in the UNSCR 1540 (2004): materials, equipment and technology covered by relevant multilateral treaties and arrangements, or included on national control lists [or included on control lists of the relevant multilateral export controls agreements, i.e. the Nuclear Suppliers Group, the Zangger Committee and the Missile Technology Control Regime], which could be used for the design, development, production or use of nuclear, chemical and biological weapons and their means of delivery.”

2:150 The Chairman of the Legal Committee invited the delegations to comment or react. Explaining its initial sentiment, one delegation stated that the proposal contained a novel approach which that delegation still needed to consider in more detail. On the point of importing language from the 2005 SUA Convention, the delegation noted that the Convention had thus far only attracted 9 ratifications. In the same vein, borrowing language from the 1999 Terrorism Financing Convention should be treated with some caution as definitions contained therein had been adopted within a very specific context. This delegation remarked further that the proposal could alter the approach regarding the IAEA safeguards insofar as it no longer referred to “comprehensive safeguards”. This delegation viewed this as potentially being in contravention to the obligations of States Parties to the Non-Proliferation Treaty.

2:151 Another delegation, a member of the Group, expressed the sentiment that there had been broad agreement within the Group to include transport offences. The delegation stated that some States preferred to retain the old text of the Sub-Committee, taking also into account the proposals made during the discussion, whereas others had favoured to link the transport offences to a terrorist purpose. In the view of this delegation, the text emanating from the Sub-Committee represented the best approach and the best way for ICAO to address this issue. The delegation cautioned that it would send a wrong signal if the new regime would criminalize the use of BCN weapons but not the transport thereof. The new proposal would be unique as it would require the knowledge regarding the terror motive behind the transport. In the view of this delegation, the offence should capture also situations in which the transport was for purposes of financial profit.

2:152 Adding to the initial sentiment expressed earlier, one delegation stated that it continued to believe that the issue of transport of dangerous material was a non-proliferation issue with no link to aviation. Another delegation stated that the proposal in the report addressed the main misgivings that had been expressed regarding the transport issue and that it adequately drew a distinction between non-proliferation and terrorism issues. This delegation fully supported the proposal.

2:153 One delegation remarked that it had not been the intention of the Group to come up with a result which would be supported unanimously.

2:154 The Chairman of the Group thereafter provided the Committee with explanations regarding the textual changes which had been made. When compared to the Sub-Committee text in sub-paragraph (i) of Article 1 (1), the new text expanded the *chapeau* in order to introduce a common denominator which preceded sub-paragraphs (1) to (4) and called for a link between the offender and the terrorist group.

2:155 Regarding sub-paragraphs (1) to (4), the Chairman of the Group explained that sub-paragraphs (3) and (4) had been extracted from the old text. He recalled that the text in Appendix 4 of LC/SC-NET-2, on the issue of the “knowledge requirement”, implied that the offence would be only criminalized if the offender knew that the source material would be intended for use in a nuclear explosion or when the offender knew that the listed equipment would be used in the manufacturing of a weapon. The Group felt that this would place an inordinately high burden of proof on the prosecuting authority. This element was placed in square brackets as the Diplomatic Conference should consider whether the knowledge was still required.

2:156 Regarding the definition of “source material”, the Chairman of the Group remarked that it had been taken over from the 2005 SUA Convention. He explained that this provision could be inserted as new sub-paragraph (j) of Article 2, which would, in the view of the Group, make it unnecessary to retain

Article 4 *ter* of the current draft. The Chairman of the Group also explained that an alternative text for sub-paragraph (4) had been proposed by the Russian Federation, which was reflected in the report.

2:157 In the view of one delegation, the Group's proposal reflected some level of support for the inclusion of transport offences as it had an impact on the safety of civil aviation. The proposal should therefore be brought to the attention of the Diplomatic Conference. The delegation felt that it remained a policy decision for the Diplomatic Conference whether to have a broad or narrow approach and suggested to submit both texts for consideration. Another delegation supported the inclusion of the transport offences in relation to dangerous materials and weapons. Both options had their pros and cons and the delegation stated that the two options should be presented to the Council and the Diplomatic Conference. In the view of another delegation the two proposals appeared not to be radically opposed to each other. The two proposals could be presented together, and fresh thinking by the Council and the Diplomatic Conference may allow for an incorporation of the two views, this delegation opined. Another delegation supported the inclusion of the transport offences and supported to present the new wording in square brackets to the Diplomatic Conference. Another delegation, while being aware of the broader context in which the discussion took place, stated that the criminalization of weapons of mass destruction as such should be taken care of in ICAO.

2:158 Some delegations reiterated their opposition to the inclusion of the transport offence as a matter of policy; one of these delegations explicitly objected to the inclusion of language set forth in the proposal to be incorporated into the draft protocol by means of square brackets.

2:159 The Chairman of the Legal Committee remarked that the placement of a text in square brackets denoted that there was no consensus on the text. He stated that there had been widespread support to submit the text to the Diplomatic Conference, with one delegation opposing to transmit it to the Diplomatic Conference.

2:160 After the adjournment of the meeting, the Chairman reported that he had undertaken lengthy consultations with delegations concerning the alternative draft proposed by the Group on Transport Offences as set forth in paragraph 2:148 of this report. While the draft had received broad support for its inclusion in the draft Protocol, a forceful objection was raised by one delegation and supported by several others. In the absence of an acceptable compromise, and given the time constraints faced by the Committee, he had no choice but to accede to the request for a vote although the Committee rarely did so in practice. The question put to vote was whether the alternative draft proposed by the Group would be placed in square brackets alongside the current draft text of sub-paragraph (i) of Article 1 (1). A vote then took place by show of hands: 35 in favour, 5 against, with 5 abstentions. It was therefore **decided** to include the proposal of the Group, within square brackets, in the draft text to amend the Montreal Convention.

2:161 The Chairman of the Group then introduced the proposed changes to the transport of fugitives offence, which was currently in **sub-paragraph (j) of Article 1(1)** of the draft text. He noted that a number of the Group members expressed doubts as to the relevance and acceptability of the transport of fugitives offence as a principal offence. A compromise had been reached within the Group to adopt an innovative approach which was both narrower and broader than that taken in the 2005 SUA Convention; narrower because the offence would target only people who have committed an offence in relation to the 1971 Montreal Convention as amended, and broader in the sense that the offence would extend beyond "facilitating" to any kind of assistance to a person to evade investigation, prosecution or punishment. As newly formulated, the provision could be in line with the criminal law concepts of various legal systems, e.g.

“accessory after the fact” in common law jurisdictions. Accordingly, it was proposed to delete sub-paragraph (j) from Article 1 (1), and to add the following sub-paragraph (d) to Article 1 (2):

- 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 Convention, 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.

2:162 It was further suggested that a similar provision should be introduced into The Hague Convention. The Committee accepted in its entirety the proposal of the Group relating to the transport of fugitives. The Committee also decided to attach to the Report of the Committee the report of the Group on the Transport Offences, which is set forth as **Attachment D**. The same also applied to Flimsy No. 2 presented by Australia and Saudi Arabia, which is set forth as **Attachment E**.

2:163 One delegation requested that its view be recorded with regard to Article 4 *ter*. It cautioned against the temptation to cast The Hague and Montreal Conventions in the Non-Proliferation Treaty framework. Article 4 *ter* would curtail the rights of non-States Parties to the NPT to pursue peaceful uses of nuclear energy and this delegation was opposed to any curtailment of its right to transport, including on its own civil aircraft, nuclear or nuclear-related dual use material, equipment and technology for use in its civilian nuclear power programme. The delegation averred that Article 4 *ter*, paragraph (2) seeks to further extend NPT-derived principles to non-States Parties with the exclusive purpose of protecting the interest of a few. It further noted that the exception provided in paragraph (2) may facilitate proliferation, which was not the intention of the proposed amendments. In its view, Article 4 *ter* was the language taken directly from the 2005 SUA Convention, which obviously raised difficulties of ratifications for States. It suggested that the non-proliferation issues be separated from terrorism-related offences and that Article 4 *ter* be deleted. In this context, the Chairman referred to the above decision of the Committee on the proposal of the Group on Transport Offences for deletion of Article 4 *ter*.

2:164 The Chairman then advised that the Committee would need to indicate its view as to whether the draft texts to amend The Hague and Montreal Conventions were sufficiently mature to be referred to the ICAO Council and, ultimately, to a Diplomatic Conference. Each of the many delegations that took the floor expressed the affirmative view, with some delegations noting the urgency to adopt the Protocols given the amount of time that has passed since 11 September 2001. One or two remaining issues were of a politically sensitive nature and could only be resolved at a Diplomatic Conference. Several delegations stressed the importance of States bringing technical experts to the Conference in order to resolve outstanding issues, with one delegation suggesting that meetings take place in the interim to deal with remaining obstacles. By consensus, the Committee agreed that the draft texts to amend the two Conventions were sufficiently mature and concluded that they were ready for transmittal to the Council as final drafts for presentation to States and, ultimately, to a Diplomatic Conference. The Committee also emphasized the importance for States to ensure that experts who are familiar with the definitions of BCN weapons and related materials form part of their delegations to the Conference.

2:165 The draft consolidated text for the Montreal Convention of 1971 as amended by the Airports Protocol of 1988 with amendments proposed by the Legal Committee is found at **Attachment F**. The draft consolidated text of The Hague Convention of 1970 with amendments proposed by the Legal Committee is found at **Attachment G**. The texts in lighter shading indicate the proposals by the Sub-Committee, whereas the texts in darker shading reflect the changes made by the Legal Committee.

Agenda Item 3: Consideration of Rule 31 of the Rules of Procedure of the Legal Committee

3:1 The Secretary introduced LC/34-WP/3-1 (*Legal Committee: Participation of Observers*). He noted that the ICAO Council had referred the issue of participation of observers in the Legal Committee to its Working Group on Governance (WGOG). After considering the report of the WGOG, the Council invited the Committee to consider whether to amend Rule 31 of its Rules of Procedure, which enables observers to make a motion or amendment provided that such a motion or amendment is seconded by the Representatives of two States on the Committee. LC/34-WP/3-1 stated that Rule 31 is rather unique in the ICAO framework: save for Diplomatic Conferences held under ICAO auspices, the Committee is the only ICAO body where observers benefit from such a right. The views of the WGOG and the Council were reflected in paragraphs 3.1 and 3.2 of the paper. In conclusion, the Committee was invited to consider whether to amend Rule 31 so as to prevent observers from making motions or proposing amendments, subject to the approval of the Council.

3:2 Many delegations supported the current text of Rule 31 and did not see the need to amend it. The value of the contribution of observers to the legal work of ICAO was emphasized in light of the specialized industry expertise they possessed. It was stated that observers could be governmental or non-governmental in nature and that Rule 31 simply allowed observers to make motions or propose amendments, provided that they were supported by two member States; in addition, the Legal Committee had the choice to accept or reject such motions or proposed amendments. On the matter of the uniqueness of Rule 31, it was pointed out that the focus should not be on uniformity but on effectiveness; Rule 31 was unique for good reasons. Motions or proposed amendments from observers are recorded and this enhances transparency in the work of the Committee. It was further stated that the observers performed research, undertook studies and provided fact-based inputs for the benefit of the Committee.

3:3 One delegation, supporting the retention of Rule 31, stated that there were good reasons for its existence. It stated that the Committee was one of the oldest, most prestigious and effective bodies in ICAO. Both its written and unwritten procedures had evolved to meet the challenges facing it. It was a challenge to develop mature international instruments in shorter and shorter working sessions. One of the distinguishing feature of this Committee was its openness to work with observers and to attract intellectual leaders. Rule 31 was not that generous to observers. The Legal Committee ought not to be directed to adopt a formalistic approach to its debates; it was not the way the Committee worked.

3:4 A number of delegations which favoured the text of Rule 31 nevertheless saw a need for its proper implementation as drafted.

3:5 One delegation supported the aims of the WGOG which was to deal with the behaviour of some observers during the last meetings of the Legal Committee and the Diplomatic Conference. While the contributions of observers were uncontested, at those meetings some industry observers *de facto* adopted a role reserved for States. Observers should be able to contribute during the discussions in their capacity as observers.

3:6 This delegation was supported by another which noted that Rule 31 afforded observers a privileged status compared to what obtained in other ICAO fora and other international organizations, in that it allowed them to make proposals on their own behalf. A distinction should be made between observers from inter-governmental organizations and those from non-governmental organizations (NGOs): the former defended the interest of States while the latter pursued other social and economic objectives. The Committee should distinguish between the role of observers as it ought to be and how it actually was. The role of NGOs was to bring to States making up an organization a certain number of competencies, a form of intellectual support. For a number of years, Rule 31 has been misunderstood; in this regard, the delegate referred in particular to the preparatory work leading to the adoption of two conventions in May 2009,

where NGOs sometimes behaved as if they were representatives of States. Their proper role was to advise. Rule 31 which required motions or proposals for amendments from observers to be seconded by two States should be applied with rigour. The delegation could accept to retain Rule 31 on the understanding that it would be adhered to forcefully and scrupulously.

3:7 The views of this last delegation were endorsed by another, which stressed that the Rule should also be applied in any ICAO groups set up to deal with legal issues, such as Legal Sub-Committees and Council Special Groups.

3:8 The Chairman **concluded** that, while there were expressions of concern from a few delegations, an overwhelming number saw no need to change the Rule. The important benefits and contributions provided by observers were highlighted. Those with concerns focussed on the role of observers at legal meetings and the fact that they differed from States. It would be conveyed to the Council that observers were very valuable and essential to the work of the Committee. However, their role was different from that of States. In the final analysis, motions and proposed amendments from observers could not be carried without the support of States. The Committee decided not to change the Rule, but to take account of the sentiments of the Committee and to leave it for the Chairman of such meetings to give appropriate weight to the participation of State delegations and observers and to ensure that the difference in status was respected.

Agenda Item 4: Any other business

4:1 The observer from IATA presented LC/34-WP/2-4 which recommended the formation of an ICAO Special Study Group to Examine Emerging Legal Issues Presented by Unruly/Disruptive Passengers. The observer noted that unfortunately incidents involving disruptive and unruly passengers have continued to rise steadily since 2001. LC/34-WP/2-4 stated that although in most cases the unruly passenger can be easily identified, this did not automatically mean that the passenger can be prosecuted. Quite often, the State of arrival refuses to assert jurisdiction when the aircraft is registered in another State. Therefore, there was a jurisdictional gap that required a proper and effective legal remedy. None of the existing aviation security instruments were designed to deal expressly with unruly/disruptive passengers, let alone serious offences. The Tokyo Convention (1963) applied to offences against penal law that may not be considered offences but may still jeopardize the safety of the aircraft. This Convention had a number of shortcomings among which was the fact that it did not impose any obligation on the State of disembarkation to prosecute an offender and there was no obligation to assert jurisdiction in relation to offences and crimes committed on board a foreign aircraft. The Tokyo Convention was ripe for re-examination, and IATA suggested that the Committee recommend to the Council that a Special Working Group be formed to engage in a thorough study of the issue of unruly/disruptive passengers, and to consider whether or not the existing international legal regime must be revised to address the apparent flaws relating to the lack of jurisdiction and enforcement mechanisms. The Group should conduct its work independently of the ongoing efforts related to new and emerging threats.

4:2 Many delegations supported the proposal of IATA.

4:3 One such delegation opined that ICAO Circular 288 (*Guidance on Legal Aspects of Unruly/Disruptive passengers*) was perhaps not as effective as it could be. The manner in which the work on this should be pursued should be left to ICAO. This item should be placed on the Work Programme of the Legal Committee; this suggestion was supported by some other delegations.

4:4 The Chairman observed that any study on this subject should look into the degree of effectiveness of the Circular.

4:5 A few delegations, while supporting the proposal, also felt that it was necessary to study how the effects of deterioration of service on passenger aircraft contributed to the rise in the number of unruly passengers.

4:6 One delegation wondered whether jurisdiction could be given to the State of the Operator, in light of the growing trend to use leased aircraft.

4:7 Observing that the Tokyo, The Hague and Montreal Conventions were regarded as one group, one delegation believed that the Tokyo Convention should be examined and updated as necessary, considering that the other two conventions were now being modernized.

4:8 The Chairman stated that it was clear that the Committee supported the idea that ICAO should address the issue of unruly/disruptive passengers. There was general support for the idea of the establishment of a Special Study Group to do so. There was also a suggestion to include this in the Work Programme of the Committee. The Council would be informed accordingly.

Agenda Item 5: Report on work done at the Session

5:1 The Committee reviewed and approved, with a number of modifications, the report on work done in the first six days of the Session. With respect to the items discussed on the last day of the Session, Thursday, 17 September 2009, the Committee **agreed** to delegate to the Chairman the authority to approve that portion and any consequential changes to the Report on behalf of the Committee.

Closing of the Session

5:2 The Chairman recalled that he became the accidental Chairman of the Committee several days ago at a very short notice due to the absence of the Chairman elected by the 33rd Session of the Committee. While he felt honoured particularly because he was the first American to chair the meeting of the Legal Committee since 1951, he also realized the heavy responsibility on his shoulders. He was pleased to note that through the intensive work in less than two weeks, the Committee had successfully completed its agenda. He thanked all delegations, the President of the Council, the Secretary General and the two Vice-Chairs of the Committee who were present at the meeting for their support and cooperation. He praised the Chairman of the Special Sub-Committee, the Rapporteur, the Chair of the Drafting Committee, the Chairs of the groups established during the meeting and the Secretariat, including the Director of the Legal Affairs and External Relations Bureau, his staff and interpreters, for their excellent work and assistance. He sincerely hoped that the Diplomatic Conference in the near future would adopt the two Protocols, thereby accomplishing a historically important task in combating terrorism.

5:3 One delegation, duly seconded by another, thanked the Chairman on behalf of the meeting for his excellent leadership in ensuring the success of the meeting. Appreciating the kind words from the delegations, the Chairman closed the meeting.

ATTACHMENT A**AGENDA FOR THE 34TH SESSION
OF THE LEGAL COMMITTEE****Item 1: Adoption of the Agenda**

Note: Rule 11 a) of the *Legal Committee* (Constitution — Procedure for Approval of Draft Conventions — Rules of Procedure) (Doc 7669) provides: “The Committee shall fix the final agenda of the session at its first meeting”.

Item 2: Consideration of the Reports of the Special Sub-Committee on the Preparation of One or More Instruments Addressing New and Emerging Threats

Note: The Special Sub-Committee has held two meetings and submitted two reports. The two draft texts proposed by the Special Sub-Committee are set out as Appendices 4 and 5 to the report of the second meeting (LC/SC-NET-2).

Item 3: Consideration of Rule 31 of the Rules of Procedure of the Legal Committee**Item 4: Any other business****Item 5: Report on work done at the Session**

ATTACHMENT B**LIST OF WORKING PAPERS AND OTHER DOCUMENTS****OTHER DOCUMENTS**

LC/SC-NET	Report of the Special Sub-Committee on the Preparation of One or More Instruments Addressing New and Emerging Threats – First Meeting
LC/SC-NET-2	Report of the Special Sub-Committee on the Preparation of One or More Instruments Addressing New and Emerging Threats – Second Meeting

WORKING PAPER TITLE**Agenda Item 1**

LC/34-WP/1	Provisional Agenda
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Agenda Item 2

LC/34-WP/2-1	Draft Protocol to the Montreal Convention – Conspiracy or ‘ <i>Association de Malfaiteurs</i> ’ Offence
LC/34-WP/2-2	Draft Protocol to the Montreal Convention – Transport Offences
LC/34-WP/2-3	The views of the International Air Transport Association (IATA) on the preparation of one or more international instruments addressing new and emerging threats
LC/34-WP/2-4	Views of the International Air Transport Association (IATA) on recommending the formation of a special study group to examine emerging legal issues presented by unruly/disruptive passengers
LC/34-WP/2-5	Report of the Drafting Committee
LC/34-WP/2-6	General Comments on the Montreal and The Hague Conventions

Agenda Item 3

LC/34-WP/3-1	Legal Committee: Participation of Observers
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Agenda Item 5

LC/34-WP/5	Draft Report on the Work of the Legal Committee during its 34th Session – Organization of the Meeting
LC/34-WP/5-1	Draft Report on the work of the Legal Committee during its 34th Session – Agenda Item 2 – Paragraphs 2:1 to 2:80
LC/34-WP/5-2	Draft Report on the work of the Legal Committee during its 34th Session – Agenda Item 2 – Paragraphs 2:81 to 2:159
LC/34-WP/5-3	Draft Report on the work of the Legal Committee during its 34th Session – Attachments D and E of the Report
LC/34-WP/5-4	Draft Report on the work of the Legal Committee during its 34th Session – Agenda Item 3 – Paragraphs 3:1 to 3:8
LC/34-WP/5-5	Draft Report on the work of the Legal Committee during its 34th Session – Agenda Item 4 – Paragraphs 4:1 to 4:8
Flimsy No. 1	Presented by Argentina
Flimsy No. 2	Presented by Australia and Saudi Arabia

ATTACHMENT C
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ATTACHMENT D**ALTERNATIVE SOLUTIONS CONTEMPLATED BY THE INFORMAL GROUP ON THE
TRANSPORT OFFENCES****(ICAO Legal Committee – September 14/16 2009)***Report by the Chairman of the informal group***« Transport of dangerous materials » provision**Rationale*Policy dimension*

The group had a lengthy policy discussion on the principle of including an offence dealing with illegal transport of material. The conclusion to which the group was brought on this point was that this issue required careful thinking. No delegation within the group expressed a firm opposition to the principle of addressing this issue in our draft. Following such an approach to the problem would seem consistent with the fact that the Legal Committee has already accepted that should be criminalized the use of a civil aircraft as a weapon of mass destruction, or even as a vector from which would be released deadly substances killing the people or damaging property on the surface.

This point is particularly relevant to justify the inclusion of a transport offence for weapons or materials when it is in relation with planning a terrorist act. Releasing deadly substances from the aircraft may well be done in a manner that it would not endanger the people on board or the security of the aircraft. In this case the aircraft may be used as a WMD without any risk for the security of the aircraft or the crew. What is being criminalized is the mere fact to cause death or damage using the aircraft. Basically it is very close to the fact of using an aircraft to transport weapons or substances that will later be used to perform a terrorist attempt.

At the same time, the group noted that it was within its mandate to try and develop an approach that would help solve the principle and practical problems that have been previously raised by a number of States and by the industry. Such an alternative solution may increase the chances for having a revised convention come into force within a period of time that could be shorter than what would require an instrument retaining the approach of the draft as it presently stands.

Alternative solution

The group, at least a substantial majority of the delegates within the group, considered that a possible alternative solution to the important issue of the illegal transport by air of weapons and materials could be to enlarge the chapeau of Article 1§ 1 (i) of the 1971 convention as to make clear that such a transport offence would be criminalized only when in relation with a terrorist activity (including of course the planning of actions aimed at causing death or damages later on).

The approach contemplated would be to add to the chapeau an explicit definition of the type of act that the

illegal transport should have a link with. Since it is not possible to refer simply to a “terrorist act” the idea is to include the same definition of a terrorist act as the one that can be found in Article 2 § 1 (b) of the 1999 Convention on the Suppression of the Financing of Terrorism. There was some debate within the group as to how accurate was this definition. The main question was to determine whether it was relevant to include the expression “*or to any person not taking an active part in the hostilities in a situation of armed conflict*”. Some delegates thought that should be criminalized for instance the transport of weapons or materials planned by a terrorist group in order to attack later on military personnel belonging to the armed forces of a State. Other delegations expressed the view that the less controversial path to follow was to stick to the definition of terrorism given by the above mentioned 1999 convention, which has met wide acceptance within the international community. At the end the group decided to retain this expression within the text but to add square brackets so that the attention of the Diplomatic Conference should be drawn on this point, in order to develop some extra thinking on this important issue.

After the chapeau we would have a list of weapons, items and materials. The group chose that mentioning the “items” (i.e. the items listed below under 1, 2 and 3) would be sufficient. The group has reviewed this list in the light of the debates we had within the plenary. It is fairly close to the list adopted by the Sub-Committee, noting that the reference to the agreements concluded with the IAEA would be made only to safeguards agreements, and not to comprehensive safeguards agreements.

The group debated on how the “knowledge conditions” would work as for prosecuting offenders. In the concept developed under the draft submitted to the Legal Committee, the wording used under (3) and (4) implies that the offence will be criminalized only if it can be proven that the alleged offender knew that :

- (3) the source material was intended to be used in a nuclear explosive activity (...) not performed under safeguards pursuant to a safeguards agreement with the IAEA;
- (4) the equipments listed under (4) would significantly contribute to manufacturing a BCN weapon.

The group did some thinking to try and determine whether it would really make sense to retain this specific “knowledge” requirements in (3) and (4) if the chapeau actually required to prove that the offender had knowledge that, by performing or helping the illegal transport, he or she was actually facilitating the preparation of criminal acts by a terrorist movement. In other words, the group thought that if a person was proven to be in relation with a terrorist group and willing to concur to the activities of this group, the offence could reasonably be criminalized, no matter if the offender knew or did not know that the material or equipment did actually fulfil the conditions listed respectively in (3) or (4). Facilitating the illegal transport of such items by a person in connection with a terrorist group would be enough to criminalize such an act of transport.

On this very point the group thought that it wasn't in a position to come to a final position, some extra thinking being necessary. It was thus decided that the extra knowledge requirements drawn under (3) and (4) in their present wording would be put within square brackets. This important matter could be addressed later on, again in the event that the novel approach for which a majority of delegates within the group showed interest was to be developed.

The delegation from the Russian Federation produced an alternative version for (4) and close attention was given to it by the group. This text is inserted below, so that the Legal Committee can take note of it.

With respect to definitions, the group is of the view that “source material” and “special fissionable material” should be defined in a more precise way. It came to the conclusion that the definitions that can be found in the 2005 SUA convention were relevant. These definitions could be inserted in Article 2. It could become a (j), without prejudice of possible changes made within the drafting committee.

Finally, if this approach was to be adopted, the group came to the conclusion that there may be no need to retain Article 4 ter of the present draft and therefore the deletion of this article could be contemplated.

Wording**1) Article 1 paragraph 1 (i) (1) (2) (3) and (4) would read as follows:**

- (i) *transports, causes to be transported or facilitates the transport on board an aircraft of the following items, knowing that it is to be used to facilitate an act intended to cause [with or without a condition] death or serious bodily injury to a civilian [or to any person not taking an active part in the hostilities in a situation of armed conflict], when the purpose of such act, by its nature or context, is to intimidate a population or to compel a government or an international organization to do or to abstain from doing any act:*
1. *any explosive or radioactive material; or*
 2. *any BCN weapon, knowing it to be a BCN weapon as defined in Article 2; or*
 3. *any source material, special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material [knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity not under safeguards pursuant to a safeguards agreement with the International Atomic Energy Agency]; or*
 4. *any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon [knowing that it is intended to be used for such purpose].**

2) In the definitions under Article 2 would be added a (j) that would read as follows:

(j) *the terms « source material » and « special fissionable material » have the same meaning as given to those terms in the Statute of the International Atomic Energy Agency, done at New York on 26 October 1956.*

3) Article 4 ter of the present draft would be deleted.

* The delegation from the Russian Federation submitted an alternative version for (4) that would read as follows : *4. Any WMD-related material as defined in the UNSCR 1540 (2004) : materials, equipment and technology covered by relevant multilateral treaties and arrangements, or included on national control lists [or included on control lists of the relevant multilateral export controls agreements, i.e, the Nuclear Suppliers Group, the Zangger Committee and the Missile Technology Control Regime], which could be used for the design, development, production or use of nuclear, chemical and biological weapons and their means of delivery.*

« Transport of fugitives » provisionRationale

The group noted that within the plenary some States had supported the inclusion of the “transport of fugitive” offence as it currently stands. It was also noted that some States and also the industry were uncomfortable with including this offence as presently drafted, especially with reference to a very long list of conventions which do not deal with air law. It also noted that there are already a lot of measures to be taken to prevent from using air transport people who are suspected of illegal activities (“no-fly lists”).

The conclusion to which the group came by consensus is that an alternative solution to this issue could be contemplated. This alternative would be based upon a novel concept which could be both narrowed and widened:

- it could be **narrowed** as to apply simply to offences committed with relation to air security. In that respect the offence would target only people who have committed an offence according to the 1971

convention and not any more an offence to the long list of anti-terrorist conventions that can be found in the transport offence as drafted in the 2005 SUA convention;

- it could be **enlarged** as to criminalize not only the transport but more widely every kind of assistance provided to a person having committed an offence under this convention and trying to escape investigation or prosecution. On this very point delegations from common law countries noted that it would be in line with their own criminal law concepts (*accessory after the fact*). As far as civil law countries should not have problems with it either (for example, Article 434-6 of the French *Code pénal*).

The drafting that has been contemplated combines inputs from the proposals earlier made by Argentina on the one hand, by Saudi Arabia and Australia on the other hand. It would appear not as a principal offence any more but as an accessory offence. With this view the idea would be to add a (d) under Article 1 § 2 of the present draft. The consequence would then be to delete Article 1 § 1 (j) of the present draft. The group shared the view that if this proposal was to be retained, it would have a positive impact on preventing terrorist acts targeting civil aviation, being offences under the 1971 Montreal Convention. At the same time it would raise amongst States and the industry far little controversy than the original fugitive transport clause as it is presently worded, and therefore help to speed up the ratification process. On this particular offence, the group thought that there could be enough policy and rationale reasons for ICAO Member States to contemplate a different approach than IMO Member States have followed in the 2005 SUA Convention.

The group finally wished to draw the attention of the Legal Committee on the fact that, if this novel approach was to be adopted so that the transport of fugitive offence would become an accessory offence in the 1971 Montreal Convention, it would not be applicable to persons helping people having committed offences under the 1970 Hague Convention to escape prosecution. Such a consequence would be most unwelcome, and therefore the possibility to duplicate such a provision in the Hague revised draft should be seriously explored, in order to have the overall international criminal procedure covering the offences against civil aviation (dealing both with illegal interferences and hijackings) be as wide and consistent as possible,

Wording

- 1) **Insert under Article 1 paragraph 2 of the present draft** (Any person also commits an offence if that person ...^o) after c) :
 - d) *knowing that a person has committed an act that constitutes an offence set forth in paragraphs 1, 1bis, 1ter or 2 (a) of this convention, 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.*
- 2) **Delete Article 1 paragraph 1 (j) of the present draft**

ATTACHMENT E

LC/34
Flimsy No.2
16/9/09

LEGAL COMMITTEE – 34TH SESSION

(Montréal, 9 to 17 September 2009)

Agenda Item 2: Consideration of the Reports of the Special Sub-Committee on the Preparation of One or More Instruments Addressing New and Emerging Threats

TRANSPORT OFFENCES

(Presented by Australia and Saudi Arabia)

Transports, causes to be transported, or facilitates the transport of, another person on board an aircraft intending to assist that person to evade criminal prosecution or punishment knowing that the person is:

a) wanted for criminal prosecution by law enforcement authorities for an offence;

or

b) has committed an offence;

set forth in one of the treaties listed in the Annex.

ATTACHMENT F**DRAFT CONSOLIDATED TEXT OF THE MONTREAL CONVENTION OF 1971
AS AMENDED BY THE AIRPORTS PROTOCOL OF 1988 WITH
AMENDMENTS PROPOSED BY THE LEGAL COMMITTEE**

THE STATES PARTIES TO THIS CONVENTION

CONSIDERING that unlawful acts against the safety of civil aviation jeopardize the safety of persons and property, seriously affect the operation of air services, and undermine the confidence of the peoples of the world in the safety of civil aviation;

CONSIDERING that the occurrence of such acts is a matter of grave concern;

CONSIDERING that, for the purpose of deterring such acts, there is an urgent need to provide appropriate measures for punishment of offenders;

HAVE AGREED AS FOLLOWS:

ARTICLE 1

1. Any person commits an offence if **that person** ~~he~~ unlawfully and intentionally:
 - (a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or
 - (b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or
 - (c) places or causes 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; or
 - (d) destroys or damages air navigation facilities ~~or other systems necessary for aircraft operation,~~ or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight; or
 - (e) communicates information which he ~~or she~~ knows to be false, thereby endangering the safety of an aircraft in flight; or
 - (f) ~~uses an aircraft in service in a manner that causes or is likely to cause for the purpose of causing death, serious bodily injury, or serious damage to property or the environment; or~~

(g) releases or discharges from an aircraft in service any ~~BCN weapon (as defined in Article 2 except paragraphs (a)(ii) and (b)(iii)) or~~ ~~toxic chemical,~~ explosive, radioactive, ~~biological, or nuclear material/~~ ~~or other potentially deadly materials]~~ ~~or similar substances]~~ in a manner that causes or is likely to cause death, serious bodily injury or serious damage to property or the environment; or

(h) uses against or on board an aircraft in service any ~~BCN weapon or~~ ~~toxic chemical,~~ explosive, radioactive, ~~biological, or nuclear material/~~ ~~or other potentially deadly materials]~~ ~~or similar substances]~~ in a manner that causes or is likely to cause death, serious bodily injury or serious damage to property or the environment; or

[(i) transports, causes to be transported, or facilitates the transport of, on board an aircraft:

(1) any explosive or radioactive material, knowing that it is intended to be used to cause, or in a threat to cause, with or without a condition, as is provided for under national law, death or serious injury or damage for the purpose of intimidating a population, or compelling a government or an international organization to do or to abstain from doing any act; or

(2) any BCN weapon, knowing it to be a BCN weapon as defined in Article 2; or

(3) any source material, special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material, knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity not under safeguards pursuant to ~~an International Atomic Energy Agency comprehensive safeguards agreement]~~ ~~a safeguards agreement with the International Atomic Energy Agency];~~ or

(4) any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon, with the intention that it will be used for such purpose.]

[(i) transports, causes to be transported or facilitates the transport on board an aircraft of the following items, knowing that it is to be used to facilitate an act intended to cause [with or without a condition] death or serious bodily injury to a civilian [or to any person not taking an active part in the hostilities in a situation of armed conflict], when the purpose of such act, by its nature or context, is to intimidate a population or to compel a government or an international organization to do or to abstain from doing any act:

(1) any explosive or radioactive material; or

(2) any BCN weapon, knowing it to be a BCN weapon as defined in Article 2; or

(3) any source material, special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material [knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity not

under safeguards pursuant to a safeguards agreement with the International Atomic Energy Agency]; or

(4) any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon [knowing that it is intended to be used for such purpose].

[(j) transports, causes to be transported, or facilitates the transport of, another person on board an aircraft knowing that the person has committed an act that constitutes an offence set forth in the treaties listed in the Annex[†], and intending to assist that person to evade criminal prosecution.]

1 bis. Any person commits an offence if that person ~~he~~ unlawfully and intentionally, using any device, substance or weapon:

- (a) performs an act of violence against a person at an airport serving international civil aviation which causes or is likely to cause serious injury or death; or
- (b) destroys or seriously damages the facilities of an airport serving international civil aviation or aircraft not in service located thereon or disrupts the services of the airport,

if such an act endangers or is likely to endanger safety at that airport.

1 ter. Any person also commits an offence if that person ~~threatens, under circumstances which indicate the credibility of the~~ makes a credible threat or unlawfully and intentionally causes any person to receive a credible threat to commit any of the offences in subparagraphs (a), (b), (c), (d), (f), (g) and (h) of paragraph 1 or an offence in paragraph 1 bis.

2. Any person also commits an offence if ~~he~~ that person :

- (a) attempts to commit any of the offences ~~mentioned~~ set forth in paragraphs 1 or paragraph 1 bis of this Article; or

[†]The Annex includes the following treaties:

- *Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on 16 December 1970*
- *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971*
- *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973*
- *International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979*
- *Convention on the Physical Protection of Nuclear Material, done at Vienna on 26 October 1979*
- *Protocol for the Suppression of 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 24 February 1988*
- *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988*
- *International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997*
- *International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on 9 December 1999*

- (b) organizes or directs others to commit an offence set forth in paragraphs 1, 1 *bis*, 1 *ter* or 2(a) of this Article; or
- (bc) participates as an accomplice in ~~is an accomplice of a person who commits or attempts to commit any such~~ an offence set forth in paragraphs 1, 1 *bis*, 1 *ter* or 2(a) of this Article; or
- (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.

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

- (a) agreement with one or more other persons to commit an offence set forth in paragraphs 1, 1 *bis*, 1 *ter* or 2(a) of this Article and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement; or
- (b) contribution in any other way to the commission of one or more offences set forth in paragraphs 1, 1 *bis*, 1 *ter* or 2(a) of this Article by a group of persons acting with a common purpose, intentionally and either:
 - (i) with the aim of furthering the general criminal activity or purpose of the group, where such activity or purpose involves the commission of an offence set forth in paragraphs 1, 1 *bis*, 1 *ter* or 2(a) of this Article; or
 - (ii) in the knowledge of the intention of the group to commit an offence set forth in paragraphs 1, 1 *bis*, 1 *ter* or 2(a) of this Article.

ARTICLE 2

For the purposes of this Convention:

- (a) an aircraft is considered to be in flight at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation; in the case of a forced landing, the flight shall be deemed to continue until the competent authorities take over the responsibility for the aircraft and for persons and property on board;
- (b) an aircraft is considered to be in service from the beginning of the preflight preparation of the aircraft by ground personnel or by the crew for a specific flight until twenty-four hours after any landing; the period of service shall, in any event, extend for the entire period during which the aircraft is in flight as defined in paragraph (a) of this Article;

-
-
- (c) “Air navigation facilities” include signals, data, information or systems necessary for the navigation of the aircraft;
- (d) “Biological material” means microbial or other biological agents, or toxins whatever their origin or method of production;
- (e) “Toxic chemical” means any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. This includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere;
- (f) “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;
- (g) “Nuclear material” means plutonium, except that with isotopic concentration exceeding 80 per cent in plutonium-238; uranium-233; uranium enriched in the isotope 235 or 233; uranium containing the mixture of isotopes as occurring in nature other than in the form of ore or ore residue; or any material containing one or more of the foregoing;
- (h) “Uranium enriched in the isotope 235 or 233” means uranium containing the isotope 235 or 233 or both in an amount such that the abundance ratio of the sum of these isotopes to the isotope 238 is greater than the ratio of the isotope 235 to the isotope 238 occurring in nature.]
- (i) “BCN weapon” means:
- (a) “biological weapons”, which are:
- (i) 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; or
- (ii) weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.
- (b) “chemical weapons”, which are, together or separately:
- (i) toxic chemicals and their precursors, except where intended for:
- (A) industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes; or
- (B) protective purposes, namely those purposes directly related to protection against toxic chemicals and to protection against chemical weapons; or

(C) military purposes not connected with the use of chemical weapons and not dependent on the use of the toxic properties of chemicals as a method of warfare; or

(D) law enforcement including domestic riot control purposes,

as long as the types and quantities are consistent with such purposes;

(ii) munitions and devices specifically designed to cause death or other harm through the toxic properties of those toxic chemicals specified in subparagraph (b)(i), which would be released as a result of the employment of such munitions and devices;

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

(c) nuclear weapons and other nuclear explosive devices.

(j) “Precursor” means any chemical reactant which takes part at any stage in the production by whatever method of a toxic chemical. This includes any key component of a binary or multicomponent chemical system.

(j) the terms “source material” and “special fissionable material” have the same meaning as given to those terms in the Statute of the International Atomic Energy Agency, done at New York on 26 October 1956.

ARTICLE 3

Each ~~Contracting State~~ Party undertakes to make the offences ~~set forth mentioned~~ in Article 1 punishable by severe penalties.

ARTICLE 4

1. This Convention shall not apply to aircraft used in military, customs or police services.

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

- (a) the place of take-off or landing, actual or intended, of the aircraft is situated outside the territory of the State of registration of that aircraft; or
- (b) the offence is committed in the territory of a State other than the State of registration of the aircraft.

3. Notwithstanding paragraph 2 of this Article, in the cases contemplated in subparagraphs (a), (b), (c), ~~and (e), (f), (g), (h) and (i)~~ of paragraph 1 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 registration of the aircraft.

4. With respect to the States ~~Parties set forth mentioned~~ mentioned in Article 9 and in the cases ~~set forth mentioned~~ in subparagraphs (a), (b), (c), ~~and (e), (f), (g), (h) and (i)~~ of paragraph 1 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 where that State 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. In the cases contemplated in subparagraph (d) of paragraph 1 of Article 1, this Convention shall apply only if the air navigation facilities ~~or other systems necessary for aircraft operation~~ are used in international air navigation.

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.

ARTICLE 4 bis

1. Nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the Charter of the United Nations, ~~the Convention on International Civil Aviation~~ and international humanitarian law.

2. The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law are not governed by this Convention, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention.

3. The provisions of paragraph 2 of the present Article shall not be interpreted as condoning or making lawful otherwise unlawful acts, or precluding prosecution under other laws.

~~ARTICLE 4 ter~~

~~1. Nothing in this Convention shall affect the rights, obligations and responsibilities under the Treaty on the Non-Proliferation of Nuclear Weapons, done at Washington, London and Moscow on 1 July 1968, the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, done at Washington, London and Moscow on 10 April 1972, or the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, done at Paris on 13 January 1993, of States Parties to such treaties.~~

~~2. It shall not be an offence within the meaning of this Convention to transport an item or material covered by Article 1, paragraph 1, subparagraph (i)(3) or, insofar as it relates to a nuclear weapon or other nuclear explosive device, Article 1, paragraph 1, subparagraph (i)(4), if such item or~~

~~material is transported to or from the territory of, or is otherwise transported under the control of, a State Party to the Treaty on the Non-Proliferation of Nuclear Weapons where:~~

~~(a) the resulting transfer or receipt, including internal to a State, of the item or material is not contrary to such State Party's obligations under the Treaty on the Non-Proliferation of Nuclear Weapons and,~~

~~(b) if the item or material is intended for the delivery system of a nuclear weapon or other nuclear explosive device of a State Party to the Treaty on the Non-Proliferation of Nuclear Weapons, the holding of such weapon or device is not contrary to that State Party's obligations under that Treaty.]~~

ARTICLE 5

1. Each Contracting State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in Article 1 in the following cases:

- (a) when the offence is committed in the territory of that State;
- (b) when the offence is committed against or on board an aircraft registered in that State;
- (c) when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board;
- (d) when the offence is committed against or on board an aircraft leased without crew to a lessee who has his or her principal place of business or, if the lessee has no such place of business, his or her permanent residence, in that State;
- (e) when the offence is committed by a national of that State.

2. A State Party may also establish its jurisdiction over any such offence in the following cases:

- (a) when the offence is committed against a national of that State;
- (b) when the offence is committed by a stateless person who has his or her habitual residence in the territory of that State.

3. Upon ratifying, accepting, approving or acceding to this Protocol, each State Party shall notify the Depository of the jurisdiction it has established under its national law in accordance with paragraph 2 of this Article. Should any change take place, the State Party concerned shall immediately notify the Depository.

24. Each Contracting State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth mentioned in Article 1, paragraphs 1 (a), (b) and (c) ~~1-ter, and in Article 1, paragraph 2, in so far as that paragraph relates to those offences,~~ in the case where the alleged offender is present in its territory and it does not extradite that person ~~him~~ pursuant to Article 8 to any of the States Parties that have established their jurisdiction in accordance with the applicable set forth mentioned in paragraphs 1 or 2 of this Article with regard to those offences.

~~2 bis 5. Each Contracting State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth mentioned in Article 1, paragraphs 1 bis and 1 ter, and in Article 1, paragraph 2, in so far as that paragraph relates to those offences, in the case where the alleged offender is present in its territory and it does not extradite that person him pursuant to Article 8 to any of the States set forth mentioned in paragraph 1(a) or (c) or paragraph 2 of this Article.~~

36. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

ARTICLE 6

1. Upon being satisfied that the circumstances so warrant, any Contracting State Party in the territory of which the offender or the alleged offender is present, shall take him or her into custody or take other measures to ensure his or her presence. The custody and other measures shall be as provided in the law of that State but may only be continued for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

2. Such State shall immediately make a preliminary enquiry into the facts.

3. Any person in custody pursuant to paragraph 1 of this Article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he or she is a national.

4. When a State Party, pursuant to this Article, has taken a person into custody, it shall immediately notify the States Parties mentioned in which ~~it would otherwise have~~ [have established] jurisdiction in accordance with ~~under~~ Article 5, paragraphs 1 and established jurisdiction and notified the Depositary under Article 5, paragraphs 2 and 3, ~~the State of nationality of the detained person 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 his that person's detention. The State Party which makes the preliminary enquiry contemplated in paragraph 2 of this Article shall promptly report its findings to the said States Parties and shall indicate whether it intends to exercise jurisdiction.

ARTICLE 7

The Contracting State Party in the territory of which the alleged offender is found shall, if it does not extradite him or her, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.

ARTICLE 7 bis

Any person who is taken into custody, or regarding whom any other measures are taken or proceedings are being carried out pursuant to this Convention, shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international human rights law.

ARTICLE 8

1. The offences set forth in Article 1 shall be deemed to be included as extraditable offences in any extradition treaty existing between Contracting States Parties. Contracting States Parties undertake to include the offences as extraditable offences in every extradition treaty to be concluded between them.
2. If a Contracting State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another Contracting State Party with which it has no extradition treaty, it may at its option consider this Convention as the legal basis for extradition in respect of the offences set forth in Article 1. Extradition shall be subject to the other conditions provided by the law of the requested State.
3. Contracting States Parties which do not make extradition conditional on the existence of a treaty shall recognize the offences set forth in Article 1 as extraditable offences between themselves subject to the conditions provided by the law of the requested State.
4. Each of the offences shall be treated, for the purpose of extradition between Contracting States Parties, as if it had been committed not only in the place in which it occurred but also in the territories of the States Parties required to establish their jurisdiction in accordance with Article 5, paragraphs 1 (b), (c), and (d) and (e) and who have established jurisdiction in accordance with Article 5, paragraph 2.
5. The offences set forth in subparagraphs (a) and (b) of paragraph 3 of Article 1 shall, for the purpose of extradition between States Parties, be treated as equivalent.

ARTICLE 8 bis

None of the offences set forth in Article 1 shall be regarded, for the purposes of extradition or mutual legal assistance, as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.

ARTICLE 8 ter

Nothing in this Convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance if the requested State Party has substantial grounds for believing that the request for extradition for offences set forth in Article 1 or for mutual legal assistance with respect to such offences has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin, political opinion or gender, or that compliance with the request would cause prejudice to that person's position for any of these reasons.

ARTICLE 9

The ~~Contracting~~ States ~~Parties~~ which establish joint air transport operating organizations or international operating agencies, which operate aircraft which are subject to joint or international registration shall, by appropriate means, designate for each aircraft the State among them which shall exercise the jurisdiction and have the attributes of the State of registration for the purpose of this Convention and shall give notice thereof to the International Civil Aviation Organization which shall communicate the notice to all States Parties to this Convention.

ARTICLE 10

1. ~~Contracting~~ States ~~Parties~~ shall, in accordance with international and national law, endeavour to take all practicable measures for the purpose of preventing the offences ~~set forth mentioned~~ in Article 1.

2. When, due to the commission of one of the offences ~~set forth mentioned~~ in Article 1, a flight has been delayed or interrupted, any ~~Contracting~~ State Party in whose territory the aircraft or passengers or crew are present shall facilitate the continuation of the journey of the passengers and crew as soon as practicable, and shall without delay return the aircraft and its cargo to the persons lawfully entitled to possession.

ARTICLE 11

1. ~~Contracting~~ States ~~Parties~~ shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offences. The law of the State requested shall apply in all cases.

2. The provisions of paragraph 1 of this Article shall not affect obligations under any other treaty, bilateral or multilateral, which governs or will govern, in whole or in part, mutual assistance in criminal matters.

ARTICLE 12

Any ~~Contracting~~ State Party having reason to believe that one of the offences ~~mentioned set forth~~ in Article 1 will be committed shall, in accordance with its national law, furnish any relevant information in its possession to those States ~~Parties~~ which it believes would be the States ~~set forth mentioned~~ in Article 5, paragraphs 1 and 2.

ARTICLE 13

Each ~~Contracting~~ State Party shall in accordance with its national law report to the Council of the International Civil Aviation Organization as promptly as possible any relevant information in its possession concerning:

- (a) the circumstances of the offence;

- (b) the action taken pursuant to Article 10, paragraph 2;
- (c) the measures taken in relation to the offender or the alleged offender and, in particular, the results of any extradition proceedings or other legal proceedings.

ARTICLE 14

1. Any dispute between two or more ~~Contracting~~ States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each State may at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by the preceding paragraph. The other ~~Contracting~~ States Parties shall not be bound by the preceding paragraph with respect to any ~~Contracting~~ State Party having made such a reservation.

3. Any ~~Contracting~~ State Party having made a reservation in accordance with the preceding paragraph may at any time withdraw this reservation by notification to the Depositary Governments.

ATTACHMENT G
**DRAFT CONSOLIDATED TEXT OF THE HAGUE CONVENTION OF 1970
WITH AMENDMENTS PROPOSED BY THE LEGAL COMMITTEE**
PREAMBLE

THE STATES PARTIES TO THIS CONVENTION

CONSIDERING that unlawful acts of seizure or exercise of control of aircraft in ~~service flight~~ jeopardize the safety of persons and property, seriously affect the operation of air services, and undermine the confidence of the peoples of the world in the safety of civil aviation;

CONSIDERING that the occurrence of such acts is a matter of grave concern;

CONSIDERING that, for the purpose of deterring such acts, there is an urgent need to provide appropriate measures for punishment of offenders;

HAVE AGREED AS FOLLOWS:

Article 1

~~Any person who on board an aircraft in flight:~~

~~(a) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act, or~~

~~(b) is an accomplice of a person who performs or attempts to perform any such act~~

~~commits an offence (hereinafter referred to as "the offence").~~

1. Any person commits an offence if that person unlawfully and intentionally seizes or exercises control of an aircraft in service by force, ~~constraint~~ or threat thereof, or by coercion, or by any other form of intimidation, or by any technological means.

2. Any person also commits an offence if that person ~~threatens, under circumstances which indicate the credibility of the~~ makes a credible threat or unlawfully and intentionally causes any person to receive a credible threat to commit an offence in paragraph 1.

3. Any person also commits an offence if that person:

(a) attempts to commit an offence set forth in paragraph 1 of this Article; or

(b) organizes or directs others to commit an offence set forth in paragraphs 1, 2, or 3(a) of this Article; or

(c) participates as an accomplice in an offence set forth in paragraphs 1, 2 or 3(a) of this Article; or

(d) knowing that a person has committed an act that constitutes an offence set forth in paragraphs 1, 2 or 3(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.

4. Each State Party shall also establish as offences, whether or not any of the offences set forth in paragraphs 1, 2 or 3(a) of this Article is actually committed or attempted, either or both of the following:

(a) agreement with one or more other persons to commit an offence set forth in paragraphs 1, 2 or 3(a) of this Article and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement; or

(b) contribution in any other way to the commission of one or more offences set forth in paragraphs 1, 2 or 3(a) of this Article by a group of persons acting with a common purpose, intentionally and either:

(i) with the aim of furthering the general criminal activity or purpose of the group, where such activity or purpose involves the commission of an offence set forth in paragraphs 1, 2 or 3(a) of this Article; or

(ii) in the knowledge of the intention of the group to commit an offence set forth in paragraphs 1, 2 or 3(a) of this Article.

Article 2

Each Contracting State Party undertakes to make the offences set forth in Article 1 punishable by severe penalties.

Article 3

1. For the purposes of this Convention,

~~[(a) an aircraft is considered to be in flight at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation. In the case of a forced landing, the flight shall be deemed to continue until the competent authorities take over the responsibility for the aircraft and for persons and property on board.];]~~

~~[[~~

~~(b)]] an aircraft is considered to be in service from the beginning of the pre-flight preparation of the aircraft by ground personnel or by the crew for a specific flight until twenty-four hours after any landing; the period of service shall, in any event, extend for the entire period during which the aircraft is in flight as defined in sub-paragraph (a) of this Article. In the case of a~~

forced landing, the flight shall be deemed to continue until the competent authorities take over the responsibility for the aircraft and for persons and property on board.

2. This Convention shall not apply to aircraft used in military, customs or police services.
3. This Convention shall apply only if the place of take-off or the place of actual landing of the aircraft on board which the offence is committed is situated outside the territory of the State of registration of that aircraft; it shall be immaterial whether the aircraft is engaged in an international or domestic flight.
4. In the cases set forth mentioned in Article 5, this Convention shall not apply if the place of take-off and the place of actual landing of the aircraft on board which the offence is committed are situated within the territory of the same State where that State is one of those referred to in that Article.
5. Notwithstanding paragraphs 3 and 4 of this Article, Articles 6, 7, 8, and 10 shall apply whatever the place of take-off or the place of actual landing of the aircraft, if the offender or the alleged offender is found in the territory of a State other than the State of registration of that aircraft.

Article 3 bis

1. Nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the Charter of the United Nations, the Convention on International Civil Aviation and international humanitarian law.
2. The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law are not governed by this Convention, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention.
3. The provisions of paragraph 2 of the present Article shall not be interpreted as condoning or making lawful otherwise unlawful acts, or precluding prosecution under other laws.

Article 4

1. Each Contracting State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in Article 1 and any other act of violence against passengers or crew committed by the alleged offender in connection with the offences, in the following cases:
 - (a) when the offence is committed in the territory of that State;
 - ~~(a)~~(b) when the offence is committed against or on board an aircraft registered in that State;
 - ~~(b)~~(c) when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board;
 - ~~(c)~~(d) when the offence is committed against or on board an aircraft leased without crew to a lessee who has his or her principal place of business or, if the lessee has no such place of business, his or her permanent residence, in that State;

(e) when the offence is committed by a national of that State.

2. A State Party may also establish its jurisdiction over any such offence in the following cases:

(a) when the offence is committed against a national of that State;

(b) when the offence is committed by a stateless person who has his or her habitual residence in the territory of that State.

3. Upon ratifying, accepting, approving or acceding to this Protocol, each State Party shall notify the Depositary of the jurisdiction it has established under its national law in accordance with paragraph 2 of this Article. Should any change take place, the State Party concerned shall immediately notify the Depositary.

24. Each Contracting State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in Article 1 in the case in the case where the alleged offender is present in its territory and it does not extradite that person him pursuant to Article 8 to any of the States Parties that have established their jurisdiction in accordance with set forth mentioned in paragraphs 1 or 2 of this Article.

3-5. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

Article 5

The Contracting States Parties which establish joint air transport operating organizations or international operating agencies, which operate aircraft which are subject to joint or international registration shall, by appropriate means, designate for each aircraft the State among them which shall exercise the jurisdiction and have the attributes of the State of registration for the purpose of this Convention and shall give notice thereof to the International Civil Aviation Organization which shall communicate the notice to all States Parties to this Convention.

Article 6

1. Upon being satisfied that the circumstances so warrant, any Contracting State Party in the territory of which the offender or the alleged offender is present, shall take him or her into custody or take other measures to ensure his or her presence. The custody and other measures shall be as provided in the law of that State but may only be continued for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

2. Such State shall immediately make a preliminary enquiry into the facts.

3. Any person in custody pursuant to paragraph 1 of this Article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he or she is a national.

4. When a State Party, pursuant to this Article, has taken a person into custody, it shall immediately notify the States Parties of registration of the aircraft, the State mentioned in which /would otherwise have//have established/ jurisdiction in accordance with under Article 4, paragraphs 1 (e) and 2, and established jurisdiction and notified the Depositary under Article 4, paragraphs 2 and 3 the State of

nationality of the detained person 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 his that person's detention. The State Party which makes the preliminary enquiry contemplated in paragraph 2 of this Article shall promptly report its findings to the said States Parties and shall indicate whether it intends to exercise jurisdiction.

Article 7

The Contracting State Party in the territory of which the alleged offender is found shall, if it does not extradite him or her, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.

Article 7 bis

Any person who is taken into custody, or regarding whom any other measures are taken or proceedings are being carried out pursuant to this Convention, shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international human rights law.

Article 8

1. The offences set forth in Article 1 shall be deemed to be included as an extraditable offences in any extradition treaty existing between Contracting States Parties. Contracting States Parties undertake to include the offences as an extraditable offences in every extradition treaty to be concluded between them.
2. If a Contracting State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another Contracting State Party with which it has no extradition treaty, it may at its option consider this Convention as the legal basis for extradition in respect of the offences set forth in Article 1. Extradition shall be subject to the other conditions provided by the law of the requested State.
3. Contracting States Parties which do not make extradition conditional on the existence of a treaty shall recognize the offences set forth in Article 1 as an extraditable offences between themselves subject to the conditions provided by the law of the requested State.
4. Each of the The offences shall be treated, for the purpose of extradition between Contracting States Parties, as if it had been committed not only in the place in which it occurred but also in the territories of the States Parties required to establish their jurisdiction in accordance with Article 4, paragraphs 1 (b), (c), (d) and (e) and who have established jurisdiction in accordance with Article 4, paragraph 2.
5. The offences set forth in subparagraphs (a) and (b) of paragraph 4 of Article 1 shall, for the purpose of extradition between States Parties, be treated as equivalent.

Article 8 bis

None of the offences set forth in Article 1 shall be regarded, for the purposes of extradition or mutual legal assistance, as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.

Article 8 ter

Nothing in this Convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance, if the requested State Party has substantial grounds for believing that the request for extradition for offences set forth in Article 1 or for mutual legal assistance with respect to such offences has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin, political opinion or gender, or that compliance with the request would cause prejudice to that person's position for any of these reasons.

Article 9

1. When any of the acts set forth mentioned in paragraph 1 of Article 1 (a) has occurred or is about to occur, Contracting States Parties shall take all appropriate measures to restore control of the aircraft to its lawful commander or to preserve his or her control of the aircraft.
2. In the cases contemplated by the preceding paragraph, any Contracting State Party in which the aircraft or its passengers or crew are present shall facilitate the continuation of the journey of the passengers and crew as soon as practicable, and shall without delay return the aircraft and its cargo to the persons lawfully entitled to possession.

Article 10

1. Contracting States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offences set forth in Article 1 and other acts set forth mentioned in Article 4. The law of the State requested shall apply in all cases.
2. The provisions of paragraph 1 of this Article shall not affect obligations under any other treaty, bilateral or multilateral, which governs or will govern, in whole or in part, mutual assistance in criminal matters.

Article 10 bis

Any State Party having reason to believe that an offence set forth in Article 1 will be committed shall, in accordance with its national law, furnish any relevant information in its possession to those States Parties which it believes would be the States set forth in Article 4, paragraphs 1 and 2.

Article 11

Each Contracting State Party shall in accordance with its national law report to the Council of the International Civil Aviation Organization as promptly as possible any relevant information in its possession concerning:

- (a) the circumstances of the offence;
- (b) the action taken pursuant to Article 9;
- (c) the measures taken in relation to the offender or the alleged offender, and, in particular, the results of any extradition proceedings or other legal proceedings.

Article 12

1. Any dispute between two or more Contracting States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each State may at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by the preceding paragraph. The other Contracting States Parties shall not be bound by the preceding paragraph with respect to any Contracting State Party having made such a reservation.

3. Any Contracting State Party having made a reservation in accordance with the preceding paragraph may at any time withdraw this reservation by notification to the Depositary Governments.

— END —

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