



WORKING PAPER

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

**DRAFT PROTOCOL TO THE MONTREAL CONVENTION – CONSPIRACY OR
'ASSOCIATION DE MALFAITEURS' OFFENCE**

(Presented by Australia)

1. INTRODUCTION

1.1 Proposed amendments to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (the Montreal Convention) under consideration at the ICAO Legal Committee in 2009 will give States an opportunity to strengthen the international legal framework as it relates to new and emerging threats to civil aviation. The inclusion of new inchoate and ancillary offences will ensure that acts which do not constitute the primary offence but which include planning, facilitating or contributing to the primary offence are recognized as international crimes and are subject to the mutual assistance and international cooperation provisions of the Convention.¹ In particular, the proposed new conspiracy offence would criminalise certain activities undertaken prior to the commission of any of the principal offences in the Montreal Convention, including the proposed new transport offences.

1.2 The inclusion of a conspiracy offence in the Protocol to the Montreal Convention would be a significant step forward to ensuring that those who plan the primary offences are able to be detained and prosecuted. Applying international legal cooperation provisions to the proposed conspiracy offence in the draft amendments to the Montreal Convention would increase opportunities for the international community to act early to intervene in criminal plots.

1.3 The conspiracy offence does not require the primary offence to have been commenced or completed. The Special Sub-Committee of the Legal Committee on the Preparation of One or More Instruments Addressing New and Emerging Threats (the Sub-Committee) has noted that ancillary and inchoate offences constitute a key element of the proposed 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 criminalise and punish offenders for involvement in the plotting of such offences. Such offenders would be held equally accountable for their involvement in the principal offences.

¹ Inchoate offences are preliminary offences that are punishable even though the principal crime has not been carried out. Ancillary offences are offences that involve a contribution to the principal act carried out by others.

2. CURRENT DRAFT OF THE CONSPIRACY OFFENCE

2.1 Article 1 *ter* of the Draft Protocol to the Montreal Convention:

“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.”

2.2 The proposed text of Article 1 *ter* (3) is based on Article 5 of the UN Convention on Transnational Organised Crime. The proposed text incorporates two alternative provisions, one to address the crime of conspiracy in common law jurisdictions (sub-paragraph 3(a)), and one to encapsulate the concept of ‘*association de malfaiteurs*’ in civil law jurisdictions (sub-paragraph 3(b)). Common law systems tend to view conspiracy as a specific form of criminal participation, punishable in itself, though some legal systems require an act in furtherance of the agreement to occur. The model of ‘*association de malfaiteurs*’ requires the commission of a preparatory act (contribution) to carry out the group’s purposes in order to give rise to criminal liability.

2.3 The current draft text was agreed by the Sub-Committee at its first meeting in 2007 and attempted to take into account the requirements of different legal systems and how the offence could be implemented in domestic law.

2.4 *Sub-paragraph 3(a)*

2.4.1 This offence is based on that of conspiracy as found in countries in the common law tradition. The offence can be defined as two or more persons agreeing to bring about the commission of an unlawful act. A common intention to do an unlawful act will not be sufficient to give rise to criminal liability for conspiracy. Two or more persons must agree to carry the intention into effect.

2.4.2 The sub-paragraph sets out an additional element that an act take place in furtherance of the agreement where such a further act is required by domestic law to be part of the offence. This reflects the fact that in some common law countries, the crime of conspiracy requires both the agreement between the conspirators to commit a crime and an ‘overt act’ in furtherance of the agreement. The act in furtherance need not itself be criminal, but must be intended to further the criminal plan. In practice, even where an overt act is not required in order for the crime of conspiracy to occur, there may be some situations where an overt act or acts may have taken place following the agreement but before a charge of conspiracy is laid. This is because in practice it will often be difficult for the prosecution to prove what occurred in a private meeting between conspirators.

2.5 *Sub-paragraph 3(b)*

2.5.1 This sub-paragraph is not concerned with agreement, but rather, it is concerned with contribution by an individual to the commission of an offence by a group acting with common purpose. The person concerned must make a contribution. However, mere passive knowledge of the common purpose of the group will not amount to a contribution. For example, this offence extends to those who accept a task preparatory to the commission of the offence, without agreeing to participate directly in the intended crime.

2.5.2 The sub-paragraph sets out two alternative knowledge requirements: knowledge of the general criminal activity or purpose of the group, or knowledge of the intention of the group to commit a specific offence set out in paragraphs 1, 1 *bis*, 1 *ter* or 2(a) of Article 1. This reflects the different requirements of some legal systems.

2.6 *‘Accomplice’*

2.6.1 Currently the term ‘accomplice’ is used in a number of international Conventions. There is some doubt as to the conduct covered by the term ‘accomplice. In some situations depending on how the complicity offence is implemented in domestic law the term ‘accomplice’ may or may not cover all or some of the conduct which would be covered by the proposed conspiracy offence. The inclusion of the proposed conspiracy offence would mean that inchoate conduct is covered comprehensively by all States Parties.

3. APPLICATION OF THE CONSPIRACY OFFENCE TO THE PROPOSED TRANSPORT OFFENCES

3.1 It is proposed that the conspiracy offence will apply to the proposed primary offences concerning the unlawful transportation of weapons of mass destruction and the unlawful transportation of fugitives by civil aircraft.

3.2 The proposed transport offences (Article 1(1)(i) and (j) of the Draft Protocol to the Montreal Convention) would help to address the Security Council’s call for coordination by requiring States Parties to criminalize the intentional and unlawful:

- a) transportation of biological, chemical and nuclear (BCN) weapons and related material on board a civil aircraft; and

- b) transportation of a fugitive on board a civil aircraft where the person intends that this will assist the fugitive to evade prosecution for a serious offence under one of the listed Conventions.

3.3 The conspiracy offence would ensure that those who plan the unlawful transportation of biological, chemical and nuclear material by civil aircraft would be guilty of an offence irrespective of whether the primary offence actually took place. Similarly the conspiracy offence would also ensure that where there is a plan to assist a person suspected of committing an offence under a listed Convention to evade justice the offence would apply even if the plan does not come to fruition.

3.4 UN Security Council Resolution 1373 noted the close connection between international terrorism and the illegal movement of BCN and other potentially deadly materials. The proposed conspiracy offence supports the Security Council's decision that all States must take the necessary steps to ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice. Security Council Resolutions 1456 and 1540 reaffirmed that the growing danger of terrorist access to BCN and other potentially deadly materials requires strengthened controls on these materials. The inclusion of ancillary and inchoate offences together with the international cooperation and mutual assistance provisions provide an international legal framework that allows Security Council Resolutions to be more effectively applied in the international civil aviation context.

4. CONSPIRACY OFFENCE AND THE DEFINITION OF TRANSPORT

4.1 The term 'transport' is not defined in the Draft Protocol. Rather, the conduct is described as transporting, causing to transport or facilitating transport on board an aircraft. This approach was seen as preferable to a strict definition as it ensures the offences cover the full range of actions that may be involved.

4.2 Some States may view the offences of causing or facilitating transport as inchoate forms of the transport offence. However, they are not inchoate offences. The actions of causing or facilitating transport were regarded as of sufficient gravity to warrant their inclusion in the definition of 'transport' and therefore as a primary offence in the Draft Protocol. Just as the financing of terrorism was given the status of a primary offence in the International Convention for the Suppression of Terrorist Financing, these are serious actions that the Security Council has recognised are a threat to international peace and security. The offence of conspiracy therefore applies equally to the offences of causing or facilitating transport as it does to all the other primary offences in the Montreal Convention.

4.3 The proposed conspiracy offence would criminalise the conduct of individuals who agree to transport BCN material or fugitives wanted for offences in listed Conventions. It will also criminalise the conduct of individuals who agree to commit the offences of causing or facilitating the transport of BCN material or fugitives wanted for offence in listed Conventions. For example, the conspiracy offence would apply to an agreement or plan to commit the following types of conduct:

- a) providing funding for the transport of BCN material or fugitives, for example, by purchasing an airline ticket, delivering material to the airport, chartering a plane;
- b) assisting an individual in evading immigration authorities, for example, by falsifying travel or identity documents, or bribing immigration officials;

- c) ensuring that BCN material cannot be detected by airport detection mechanisms; or
- d) facilitating the transport of BCN material or fugitives, for example, by installing cooperative baggage handlers or other airport personnel.

4.4 The application of legal cooperation mechanisms under the new Protocols would facilitate assistance to intervene at these early points, before the item of concern or fugitive has been moved. This is critical in the area the transport offences are attempting to regulate. When dealing with the illicit movement of biological, chemical and nuclear material, law enforcement officials need the option to intervene as early as possible.

4.5 The conduct that will be criminalised by the proposed conspiracy offence may be covered by existing criminal offences in some States. The inclusion of the conspiracy offence in the Protocol will ensure that this conduct is also subject to the mutual assistance and international cooperation provisions in the Convention. The proposed conspiracy offence in conjunction with the transport offences will allow States to give full effect to their intention to prevent and punish the illegal transportation of BCN material and fugitives wanted for offences in listed Conventions.

5. CONCLUSION

5.1 A conspiracy offence has long been recognized by States as desirable when drafting international conventions criminalizing certain acts. However, it has been difficult to achieve because of different legal systems and the ability to effectively implement such an offence in domestic law. The current proposed text seeks to accommodate to the extent possible those differences by including an internal option for States whose domestic legal systems require either an act in furtherance of the agreement or the contribution by an individual to the commission of an offence by a group acting with a common purpose. The application of the conspiracy offence to the primary offences of the Convention will ensure that those who plan or contribute to the commission of an offence are able to be detained and prosecuted and will be subject to the international cooperation and mutual assistance provisions of the Convention. Australia commends the text of the conspiracy offence and its application to the primary offences to the Committee for its consideration.