



LC/SC-NET

# International Civil Aviation Organization

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## **SPECIAL SUB-COMMITTEE ON THE PREPARATION OF ONE OR MORE INSTRUMENTS ADDRESSING NEW AND EMERGING THREATS**

Montréal, 3–6 July 2007

**REPORT**



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## PART I

### INTRODUCTION

#### 1. ACTION BY ICAO ASSEMBLY – 33RD SESSION

1.1 Assembly Resolution A33-1 directs the Council and the Secretary General to act urgently to address the new and emerging threats to civil aviation, in particular to review the adequacy of the existing ICAO aviation security conventions. Pursuant to this resolution, the subject is considered under Item 2 of the General Work Programme of the Legal Committee: “Acts or offences of concern to the international aviation community and not covered by existing air law instruments”.

#### 2. ACTION BY OTHER ICAO BODIES

2.1 Pursuant to this Resolution and recommendations of the High-level, Ministerial Conference on Aviation Security held in February 2002, the Council, in June 2002, approved an ICAO Aviation Security Plan of Action, which contains Project 12. Under this project, the ICAO Secretariat completed a study on legal measures to cover the new and emerging threats, which was made available to the 35th Session of the Assembly under cover of A35-WP/88. The study drew a preliminary conclusion that, while the existing five aviation security conventions have been widely accepted by States as useful legal instruments for combating unlawful interference against civil aviation, they should be updated in several instances to respond to new and emerging threats such as use of aircraft as weapons, and chemical, biological and radioactive attacks. Furthermore, the existing instruments focus on the persons actually committing the punishable acts, mainly on board an aircraft or at an airport, without specific provisions addressing the issue of persons organizing and directing the commission of the offences.

2.2 During the twelfth meeting of its 173rd Session on 15 December 2004, the Council was informed that a questionnaire would be circulated among ICAO Contracting States with a view to ascertaining the need to review and possibly amend the existing aviation security conventions. That questionnaire as well as the study were circulated to Contracting States on 24 March 2005. The majority of the responding States considered that there would be a need to amend existing international air law instruments or to adopt a new instrument to cover the new and emerging threats to civil aviation.

2.3 The Council agreed at its 176th Session in November 2005 that a Secretariat Study Group be established to assist the Secretariat in preparing an international legal instrument to cover the new and emerging threats to civil aviation. Three meetings of the Study Group were held in June 2006, October 2006 and February 2007. During the sixteenth meeting of its 179th Session on 5 December 2006, the Council considered a progress report relating to the Secretariat Study Group on Aviation Security Conventions and noted that the Secretary General would submit to the Council at its 180th Session the final report concerning the work of the Study Group. The final report of the Study Group was submitted to the 180th Session of the Council in March 2007.

### 3. ACTION BY THE COUNCIL CONCERNING THE SPECIAL SUB-COMMITTEE

3.1 Based on the recommendation of the Study Group, the Council decided at the tenth meeting of its 180th Session on 7 March 2007, to convene the special Sub-Committee of the Legal Committee at Montreal in July 2007.

### 4. ESTABLISHMENT OF THE SUB-COMMITTEE

4.1 Acting under Rule 12 b) of the Rules of Procedure of the Legal Committee, the Chairman of the Legal Committee, Mr. G. Lauzon, Q.C. (Canada), established a special Sub-Committee and decided to appoint legal experts of the following States to serve as members of the Sub-Committee: Argentina, Australia, Brazil, China, Finland, France, Germany, Japan, Lebanon, Mexico, Russian Federation, Senegal, Singapore, South Africa, Switzerland, United Arab Emirates, United Kingdom and United States. All these States (with the exception of Argentina and Mexico) were represented in the Sub-Committee.

4.2 Furthermore, the Representatives of the following States are *ex-officio* members of the Sub-Committee under Rule 13 b): Canada (Chairman of the Legal Committee), Italy (First Vice-Chairman), India (Second Vice-Chairman) and Nigeria (Third Vice-Chairman); the *ex-officio* members of Jordan (Fourth Vice-Chairman) and Egypt (past Chairman) were unable to attend.

4.3 In accordance with Rule 17, the Chairman of the Legal Committee appointed Ms. J. Atwell (Australia) as Rapporteur.

4.4 The list of participants of the Sub-Committee is shown in **Appendix 1** hereto.

### 5. TERMS OF REFERENCE OF THE SUB-COMMITTEE

5.1 The terms of reference of the Sub-Committee as agreed by the Council are as follows: “To prepare, in light of Assembly Resolution A33-1 (Declaration on misuse of civil aircraft as weapons of destruction and other terrorist acts involving civil aviation) and the guidance of the Council during its 180th Session, one or more draft instruments addressing the new and emerging threats to civil aviation, consistent with and taking into account only paragraph 1 of the conclusions of the Secretariat Study Group on Aviation Security Conventions at Appendix B to C-WP/12851.”

5.2 Regarding the issues of unruly passengers and the transport of prohibited material, there has been an emerging consensus in the Council that the issue of unruly passengers deserved consideration by ICAO in another forum, taking into account the request of IATA. On the other hand, this issue differed in nature from major attacks against civil aviation, such as the attacks on 11 September 2001. The special Sub-Committee should address such major attacks and the threats thereof.

5.3 As for the transport of prohibited material on board an aircraft, such as biological or nuclear weapons, there has also been an emerging consensus in the Council that its criminalization through a convention could be considered provided that its scope was limited to those acts which were likely to endanger the safety of aircraft in flight.

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## 6. MEETING OF THE SUB-COMMITTEE

6.1 The Sub-Committee met at Montreal between 3 and 6 July 2007.

6.2 In his capacity as Chairman of the Legal Committee, Mr. G. Lauzon, Q.C. (Canada), opened the meeting and invited the Director of the Legal Bureau, Mr. D. Wibaux, to address the meeting.

6.3 The Director of the Legal Bureau underlined the leading role of ICAO in the adoption of five international legal instruments relating to aviation security, in particular the *Convention for the Suppression of Unlawful Seizure of Aircraft*, signed at The Hague on 16 December 1970 (The Hague Convention), which, for the first time, incorporated in an international treaty the important *aut dedere, aut judicare* principle. In summarizing the background leading up to this meeting of the Sub-Committee, the Director stressed that Resolution A33-1 was adopted by the 33rd Session of the ICAO Assembly in response to the abhorrent terrorist acts which occurred in the United States on 11 September 2001. He emphasized the importance of the Sub-Committee's mandate in light of those acts and the more recent attacks or planned attacks against civil aviation, such as the alleged well-advanced plot in London in August 2006 to blow up a number of aircraft over the North Atlantic and the downing of two aircraft in August 2004 by alleged suicide bombers in the Russian Federation. The Director thanked the Rapporteur, Ms. J. Atwell (Australia), for producing her report at very short notice, in which she proposes, as a starting point, draft protocols to The Hague and Montreal Conventions.

6.4 On the first day of the meeting, the Sub-Committee unanimously elected as its Chairman Mr. T. Olson (France) and as Vice-Chairman Mr. V. Poonoosamy (United Arab Emirates).

6.5 The Secretary of the meeting was Mr. D. Wibaux, Director of the Legal Bureau. Mr. J. Huang, Legal Officer, acted as his Deputy. The Assistant Secretaries were Ms. M. Weinstein, Legal Adviser and Ms. A. Saran, Consultant; other officials of the Organization also provided services for the Sub-Committee.

## 7. DOCUMENTATION

7.1 A list of documents presented to the Sub-Committee is found in **Appendix 2** hereto.

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## PART II

### DISCUSSIONS OF THE SUB-COMMITTEE

#### 8. RAPPORTEUR'S REPORT

8.1 The Rapporteur of the Legal Committee, Ms. J. Atwell (Australia), presented her report, the text of which forms an integral part of this report of the Sub-Committee (**Appendix 3** hereto). The report discussed the existing aviation security instruments, including their purposes, the acts they criminalize and their shortcomings. In particular, the following acts were not covered by the existing instruments: use of civil aircraft as a weapon; use of civil aircraft to unlawfully spread biological, chemical and nuclear substances; and the attacks against civil aviation using such substances. Two draft protocols were proposed to amend respectively The Hague Convention and the *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, signed at Montreal on 23 September 1971 (the Montreal Convention), in order to cover these three principal offences. The focus of the proposed protocols is not directed primarily towards protection of the aircraft “in flight” or “in service” as in the case of The Hague and Montreal Conventions, but rather towards protection of persons, property and the environment both on board and outside an aircraft “in service”. One key element in the proposed protocols was the inclusion of directors and organizers of the offences and other contributors thereto, including those who agree with one or more persons to commit, or threaten to commit, or attempt to commit a principal offence contained in the instruments. Another key element in the proposed protocols was the inclusion of additional jurisdictional grounds, including jurisdiction of a State when the offence is committed by or against a national of that State. Furthermore, the proposed protocols also incorporated a number of provisions commonly found in recent United Nations (UN) counter-terrorism instruments, such as a “fair treatment” provision which obliges a State to guarantee that a person taken into custody will receive fair treatment including all the rights and guarantees a person would normally receive under the law of the State including relevant provisions of international law and international human rights law. A “military exclusion clause” was also included, which expressly specifies that the instruments do not govern the activities of armed forces during an armed conflict, and the activities undertaken by military forces of a State in the exercise of their official duties.

8.2 All members of the Sub-Committee congratulated the Rapporteur for her excellent report and for the draft texts which would provide an inspiring basis for further consideration. The Sub-Committee appreciated that the Rapporteur accomplished her task during a very short period of time after the establishment of the Sub-Committee.

#### 9. GENERAL STATEMENTS

9.1 There was general agreement among the Sub-Committee members that it was necessary to prepare one or more instruments addressing new and emerging threats to civil aviation in light of the events of 11 September 2001 and the developments in the UN counter-terrorism instruments since 1997.

9.2 A majority of the members agreed with the Rapporteur’s conclusions that the most appropriate form of instrument to address the new and emerging threats to civil aviation is a protocol to The Hague Convention and a protocol to the Montreal Convention. The development of two protocols builds on the achievements of each of the Conventions while supplementing those Conventions to address the gaps identified by the Secretariat Study Group. Both Conventions have widespread ratification and provide an appropriate framework for the inclusion of recent provisions developed in the context of other UN counter-terrorism instruments. The members also noted the precedent of the *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* (SUA Protocol) which amended the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, done at Rome on 10 March 1988 (SUA Convention), to cover new and emerging threats in the maritime context. Several members expressed the desire to have one comprehensive instrument consolidating The Hague and Montreal Conventions including any amendments thereto.

## 10. PROPOSED PROTOCOL TO AMEND THE MONTREAL CONVENTION

10.1 The Sub-Committee considered the Rapporteur’s draft protocol to the Montreal Convention (Attachment A to the Rapporteur’s report). Discussions focused on new principal offences, threats to commit the offences, other modes of committing the offences, military exclusion clause and other provisions.

### 10.2 New principal offences in Article 1, paragraph 1, subparagraphs (f), (g) and (h)

10.2.1 The Rapporteur proposed to add three new principal offences to Article 1, paragraph 1 of the Montreal Convention as follows:

- “(f) uses an aircraft in service to cause death, serious bodily injury, or serious damage to property or the environment; or
- (g) releases from an aircraft in service any toxic chemical, explosive, radioactive, biological, or nuclear material 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 toxic chemical, explosive, radioactive, biological, or nuclear material to cause death, serious bodily injury or serious damage to property or the environment.”

10.2.2 **In service** — In all three offences, the concept of aircraft “in service” was used. One member queried how an aircraft “in service” but not “in flight” may cause damage to the environment, and questioned whether it was appropriate to extend the period during which an offence could occur, i.e. to 24 hours after the landing, in line with the definition of “in service” at Article 2, paragraph (b) of the Montreal Convention. The Rapporteur explained that the concept of ‘in service’ was useful in this context given that damage both to and by an aircraft could occur outside of the flight, e.g. to cause damage to facilities on the ground. With respect to the time-frame of 24 hours, it was the result of the negotiations when the Montreal Convention was adopted. On this basis, the Sub-Committee agreed to retain the concept of “in service”.

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10.2.3 **Intent** — Some members proposed to add the term “with the intent” before the phrase “to cause death, serious bodily injury, or serious damage” in subparagraphs (f), (g) and (h) to underscore the intention of the offender to effect the consequences described therein. The Rapporteur explained that the term “intentionally” already exists in the *chapeau* of Article 1, paragraph 1 of the Montreal Convention. In her view, the term sufficiently covers the element of intent “to cause death, serious bodily injury, or serious damage” in subparagraphs (f), (g) and (h).

10.2.4 **“In a manner likely” to cause death, serious bodily injury, or serious damage** — Some members suggested that the acts under subparagraphs (f), (g) and (h) should be punishable if they are committed with the intent to cause death, injury or damage, regardless of whether there is an actual consequence of death, injury, or damage. For this reason, some members proposed the term “in a manner likely to cause death,...”, while others preferred the term “in a manner that causes death, ...”. There was wide support for the first formulation and the Sub-Committee decided to include this term in subparagraphs (f), (g) and (h). Two members stated their reservations with regard to this term, preferring the language as originally drafted by the Rapporteur.

10.2.5 **Electronic devices** — One member proposed to include a reference to ‘electronic devices’ in Article 1, paragraph 1, subparagraph (h) in order to address instances where damage could be caused to the operational systems of an aircraft or to property, persons or the environment outside the aircraft. Such devices could be used both on or off board to cause such damage. Some members averred that use of electronic devices to cause damage was already covered by the broad wording of Article 1, paragraph 1, subparagraphs (c) and (d) of the Montreal Convention. The member who proposed to include electronic devices clarified that this was distinct from damages to air navigation facilities covered under Article 1, paragraph 1, subparagraph (d) of the Montreal Convention. The Chairman then requested this member to present a written text for the new subparagraph (h) at a later stage. After consultation with other members, this member presented a new proposal to amend the existing subparagraph (d) instead of new subparagraph (h), which reads as follows:

“(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;”

The text received wide support and was accepted by the Sub-Committee.

10.2.6 One member stated for the record that it was its understanding that the object of the proposed amendment to Article 1, paragraph 1, subparagraph (d) was to target the use of an electronic device to cause interference with or to destroy on-board systems.

10.2.7 The member who proposed the amendment to subparagraph (d) also recommended the consequent deletion of the “air navigation facilities” definition at Article 2 of the draft protocol. The Sub-Committee decided to retain the definition.

10.2.8 **Releases/discharges** — Several members questioned the use of “releases” instead of “discharges” at Article 1, paragraph 1, subparagraph (g), the latter being the term utilized in the SUA Protocol and the 1997 *International Convention for the Suppression of Terrorist Bombings* (Terrorist Bombings Convention). The Rapporteur noted the use of “releases” seemed preferable in an aviation context, while various members felt that “discharges” was more suitable in the context of explosives. There was no consensus as to which term was preferable; therefore the Sub-Committee agreed to place “releases” and “discharges” in square brackets.

10.2.9 **Potentially deadly materials or similar substances** — When the Sub-Committee considered subparagraphs (g) and (h), there was a debate whether the reference to “toxic chemical, explosive, radioactive, biological, or nuclear material” should be expanded to include other potentially deadly material. It was noted that some non-toxic chemicals such as corrosives and flammable material may also cause damage to aircraft. In this instance, two alternative wordings were considered: one was “other potentially deadly materials” used in the UN Security Council Resolution 1373 (2001); another was “similar substances” used in Article 1, paragraph 3, subparagraph b of the Terrorist Bombings Convention. After some discussion, the Sub-Committee decided to insert “[or other potentially deadly materials] [or similar substances] following “nuclear material” at Article 1, paragraph 1, subparagraphs (g) and (h).

10.2.10 Regarding the definitions of the material referred to in subparagraphs (g) and (h), some members noted that the definitions under Article 2 of the proposed protocol may require some alignments. For instance, paragraph (f) refers to “substantial damage”, whereas Article 1, paragraph 1, subparagraphs (f), (g) and (h) use the term “serious damage”. Other members noted that these definitions reflect the *status quo* of the existing instruments cited in the footnotes to Article 2 of the proposed protocol, and the Sub-Committee should take it or leave it; rewriting definitions may create inconsistencies among different international instruments. The Secretary of the Sub-Committee mentioned that the Terrorist Bombings Convention does not contain definitions of such material as “toxic chemicals”, “biological agents” or “radioactive material”, although these terms are used in that Convention. On this basis, some members proposed to delete all definitions except those which are strictly in the context of civil aviation, namely the existing definitions in Article 2, paragraphs (a) and (b) of the Montreal Convention, and the proposed definition in Article 2, paragraph (c) of the draft protocol. Upon further discussion, the Sub-Committee decided to put Article 2, paragraphs (d) to (h) in square brackets, with the understanding that these definitions could be deleted, unless the future instrument will criminalize the intentional and unlawful transport of the material mentioned in these definitions.

10.2.11 **Death of a person** — Pursuant to a point raised by one member, the Sub-Committee considered whether the word “death” in Article 1, paragraph 1, subparagraphs (f), (g) and (h) should be explicitly clarified in a definition as referring exclusively to death of a person. After some discussion, the Sub-Committee concluded that a definition was not necessary but it would state in its Report that the term “death” refers exclusively to death of a person.

10.2.12 **Environment** — Some members expressed the view that the term “environment” was vague. For instance, in the context of subparagraph (h), when an attack occurred on board an aircraft using biological, chemical and nuclear substances, the prospect of causing harm to the environment outside the aircraft was not that obvious. After some debate, the Sub-Committee decided to place “or the environment” at Article 1, paragraph 1, subparagraph (h) in square brackets for further review of its usefulness. One member also queried as to how an aircraft itself could cause damage to the environment in the context of subparagraph (f). On this issue, there was general agreement that “or the environment” should be retained in subparagraph (f) in order to encompass any possible environmental catastrophe which could result from unlawful control of an aircraft.

10.2.13 **Substantial/serious** — Some members queried whether use of the word “substantial” damage in relation to property and environmental damage should replace the word “serious” to reflect the accepted language of the 2005 *International Convention for the Suppression of Acts of Nuclear Terrorism* (Nuclear Terrorism Convention). The Sub-Committee decided to retain the term “serious”.

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10.2.14 **Sequence of the list of offences** — The Sub-Committee took note of one member’s suggestion that subparagraph (e) of Article 1, paragraph 1 of the Montreal Convention be re-positioned as the last subparagraph of paragraph 1, given that it would probably result in the least catastrophic scenario of the principal offences.

### 10.3 **Threats to commit an offence**

10.3.1 The Rapporteur’s text (Article 1, paragraph 2 adding new paragraph 1 *ter* to Article 1 of the Montreal Convention) proposed the following:

“A person also commits an offence if that person threatens to commit any of the offences in paragraph 1 or an offence in paragraph 1 *bis* provided that a State Party may allow a defence based upon the credibility of the threat.”

10.3.2 In addressing the Sub-Committee, the Rapporteur indicated that this provision is a preferable formulation to the comparable text in Article 2, paragraph 2, subparagraph (a) of the Nuclear Terrorism Convention. Instead of putting the burden of proof on the prosecutor to show “the credibility of the threat”, the provision as proposed provides a defence based upon the credibility of the threat. It was hoped that this could lessen the difficulty to be faced by the prosecutor in proving credibility of a threat. Although members appreciated this rationale, many of them indicated that this would raise difficulties in their domestic criminal law regarding the reversal of the burden of proof.

10.3.3 Three proposals emerged during the discussion. The first, as favoured by the majority, was to adopt precisely the formula of the Nuclear Terrorism Convention, i.e. “threatens, under circumstances which indicate the credibility of the threat”. The second proposal was to incorporate two formulations in paragraph 1 *ter*, which would allow States to choose one of them, either by putting the burden of proof on the prosecutor, or by allowing the defendant to show that his/her threat was not credible. The third proposal was to delete the reference to credibility of the threat leaving it for States to handle in their domestic law.

10.3.4 Numerous members disagreed with the third proposal, since they considered the credibility of the threat as one of the essential elements of the offence. In their view, international criminalization instruments should deal with more serious offences. To that end, only “credible” threats, i.e. those which could jeopardize the normal operation of civil aviation, should be criminalized. The Sub-Committee therefore agreed to replace the current wording of paragraph 1 *ter* with the text of Article 2, paragraph 2, subparagraph (a) of the Nuclear Terrorism Convention, and to put the “credibility” language in square brackets, as follows:

“1 *ter* Any person also commits an offence if that person threatens[, under circumstances which indicate the credibility of the threat,] to commit any of the offences in paragraph 1 or an offence in paragraph 1 *bis*.”

### 10.4 **Directors and organizers of the offences**

10.4.1 The Sub-Committee underlined the need to punish the person who organizes or directs others to commit an offence contained in the Montreal Convention and the proposed protocol. Therefore, the Sub-Committee agreed with the Rapporteur’s text in this respect (Article 1, paragraph 3 in Attachment A to the Rapporteur’s report, adding a new subparagraph (b) to Article 1, paragraph 2 of the

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Montreal Convention), and decided to add the term “intentionally” (in square brackets) to the *chapeau* of paragraph 2, to read as follows:

“Any person also commits an offence if that person [intentionally]:

(a) ...

(b) organizes or directs others to commit an offence contained in paragraphs 1, 1 *bis*, 1 *ter* or 2(a) of this Article;”

10.4.2 The term “intentionally” was put in brackets since some members believed that it would be necessary to specify explicitly the element of intent, whereas others believed that the element of intent mentioned in the principal offences under Article 1, paragraph 1, would be implicitly applicable to the offences at paragraph 2.

10.4.3 One member queried whether it would be necessary to include specific reference to the persons who provide funding for the offences. The Chairman clarified that the 1999 *International Convention for the Suppression of the Financing of Terrorism* (Terrorist Financing Convention) has already covered this matter. In the event that the coverage is not sufficient, it may be further covered by the provisions relating to ancillary and inchoate offences discussed below.

## 10.5 Ancillary and inchoate offences

10.5.1 The Sub-Committee noted that the 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 furnish States with the international legal tools to criminalize 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.

10.5.2 The Rapporteur’s text (Article 1, paragraph 3 amending paragraph 2 of Article 1 of the Montreal Convention) proposed the following:

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

(a) attempts to commit any of the offences contained in paragraph 1 or 1 *bis* of this Article; or

(b) organizes or directs others to commit an offence contained in paragraphs 1, 1 *bis*, 1 *ter* or 2(a) of this Article; or

(c) is an accomplice of a person who commits an offence contained in paragraphs 1, 1 *bis*, 1 *ter*, or 2(a) of this Article; or

(d) in any other way contributes to the commission of one or more offences 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 contained 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 contained in paragraphs 1, 1 *bis*, 1 *ter*, or 2(a) of this Article; or
- (e) agrees with one or more other persons to commit an offence in paragraphs 1, 1 *bis*, 1 *ter* or 2(a) of this Article whether or not the offence that is the subject of agreement is itself carried out.”

10.5.3 The Sub-Committee noted that subparagraphs (a) and (c), covering attempts and the actions of accomplices respectively, were already included in the Montreal Convention. Therefore, the text proposed by the Rapporteur was accepted. As for subparagraphs (b), (d) and (e), they constituted new provisions, which were based on similar texts found in various UN conventions. Since the content of subparagraph (b) was already agreed upon, the Sub-Committee focused on subparagraphs (d) and (e).

10.5.4 A majority of the Sub-Committee supported the aim of subparagraph (e) which was to criminalize preparatory behaviour to a principal offence without the requirement of an accomplished or attempted act. The concern with regard to this provision stemmed from the absence in civil law jurisdictions of the common law offence of ‘conspiracy’. There were some discussions as to whether subparagraph (d), which was based on Article 2, paragraph 3, subparagraph c of the Terrorist Bombings Convention, may serve the purpose since it could be viewed as not being predicated upon an accomplished act as its focus was on contributing “in any other way” to a principal offence. A number of members and the observer from the United Nations Office on Drugs and Crime (UNODC) indicated that, based on their experience, this would not be the case in most jurisdictions. While subparagraph (d) was not dependent upon causation, it did require that a principal offence was actually committed.

10.5.5 The Sub-Committee supported an alternative formulation compatible with all legal systems, which would create an optional regime based upon Article 5, paragraph 1, subparagraphs (a)(i) and (ii) of the 2000 *UN Convention Against Transnational Organized Crime* (Transnational Organized Crime Convention). The article incorporated two alternative provisions, one to address the crime of conspiracy in common law jurisdictions, and one to encapsulate the concept of ‘*association de malfaiteurs*’ in civil law jurisdictions. On this understanding, the Chairman developed, with the assistance of the Secretariat and several experts in this area, a revised text based upon the Transnational Organized Crime Convention and the Rapporteur’s text of subparagraphs (d) and (e). The new text, which resulted in moving subparagraphs (d) and (e) to a new paragraph 3, was further refined by an informal working group led by the Vice-Chairman, and subsequently accepted by the Sub-Committee as follows:

“3. Each State Party shall also establish as offences, whether or not any of the offences contained 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 contained 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 contained 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 contained 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 contained in paragraphs 1, 1 *bis*, 1 *ter* or 2(a) of this Article.”

## 10.6 Air navigation facilities

10.6.1 The Sub-Committee considered and agreed to the inclusion of the definition of “air navigation facilities” as proposed by the Rapporteur at Article 2 of the draft protocol, which would add a new subparagraph (c) to Article 2 of the Montreal Convention as follows:

“Air navigation facilities” include signals, data, information or systems necessary for the navigation of the aircraft;”

10.6.2 The Sub-Committee suggested that the view of the Air Navigation Commission (ANC) be solicited concerning this definition.

## 10.7 Military exclusion clause

10.7.1 The Sub-Committee discussed Article 3, paragraph 2 of the proposed protocol, which was to amend the Montreal Convention by adding the following Article 4 *bis*:

### “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 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.”

10.7.2 The Chairman explained to the Sub-Committee that draft Article 4 *bis* incorporated word for word the existing provisions, commonly known as a military exclusion clause, contained in the recent UN counter-terrorism conventions, such as the Nuclear Terrorism Convention. In ICAO, it has been widely understood that the aviation security instruments which criminalize certain acts are not applicable to military activities. The provisions would therefore be considered as declaratory in nature, i.e. to explicitly codify what had been implicit in the past.

10.7.3 The statement of the Chairman was supported by all members but one. This member could perhaps accept the exemption of armed forces activities **during armed conflict**, which would be in line with Article 89 of the Chicago Convention, but could not accept a total military exemption **even during peacetime**, since such an exemption would constitute a violation of the principles set out in the

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preambles of The Hague and Montreal Conventions, and also of the principles and provisions of the Chicago Convention, particularly Article 44. Moreover, it would also constitute a violation of a number of UN and ICAO resolutions, particularly ICAO Assembly Resolution A35-9, which condemns all acts of unlawful interference against civil aviation **wherever and by whomsoever and for whatever reason they are perpetrated**. The inclusion of such a military exclusion clause could not be justified by the sole reason that the same clause already exists in other conventions. As a result, armed officers guilty of unlawful seizure of civil aircraft or using an aircraft in the service of a third State as a weapon of mass destruction would be immune from criminal prosecution. The potential for the abuse of such an exemption could not be ignored. In conclusion, the member proposed that the text be amended to limit the military exemption to activities of armed forces during armed conflict. Otherwise it would have to place a reservation on the text.

10.7.4 It was decided to retain Article 4 *bis* as proposed by the Rapporteur and to reflect the differing views in the Report. Subsequent to this decision, the same member reiterated its previous position and elaborated two additional points. The first point related to the difficulty which may be encountered in the integration of the rules of “international humanitarian law” with civil aviation regulations. A further study would be necessary since the members of this Sub-Committee were not all familiar with international humanitarian law. The second point related to the draft Convention on Compensation for Damage Caused by Aircraft to Third Parties, in case of Unlawful Interference, currently considered by the Council Special Group. If the military exclusion clause is included in The Hague and Montreal Conventions, a question may be raised whether or not the same clause should be included in the aforementioned draft convention. This question should be studied and further explored in future work.

## 10.8 Jurisdiction

10.8.1 The Rapporteur’s text (Article 4, amending Article 5 of the Montreal Convention) was tabled at the meeting as follows:

### “Article 5

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences 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 principal place of business or, if the lessee has no such place of business, his 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.
  4. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences mentioned in Article 1, paragraphs 1 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 him pursuant to Article 8 to any of the States mentioned in paragraph 1 or 2 of this Article.
  5. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences 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 him pursuant to Article 8 to the State mentioned in paragraph 1(a) or (e) or paragraph 2 of this Article.
  6. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.”

10.8.2 The Rapporteur explained that her draft text includes one additional mandatory jurisdictional ground in paragraph 1, subparagraph (e) and two optional grounds in paragraph 2, subparagraphs (a) and (b). These additions were accepted by the Sub-Committee. One member referred to Article 6, paragraph 2, subparagraph (c) of the SUA Convention which provides that a State Party may also establish its jurisdiction over any offence set forth therein when “it is committed in an attempt to compel that State to do or abstain from doing any act”. It was noted that the draft text of the Rapporteur did not contain the similar provision. In response to this, the Rapporteur explained that the provision was absent because the mandate of the Council required the Sub-Committee to consider the criminalization of certain acts, independent of motive. The member intervened further by stating that the issue could be considered from a different perspective, since this was a jurisdictional issue related to the purpose and object of the crime, rather than to pure motive.

10.8.3 One member referred to the possibility of expanding the function of the depositary in the event that there is a conflict of jurisdiction among States Parties or when a State Party refuses to comply with its obligations. Another member suggested that the priority of jurisdiction be specified in the future instrument. Other members believed that the disputes among States Parties could be resolved under Article 14 of the existing Convention, and there would be no need to expand the function of the depositary or to set the priority of jurisdiction in criminal law.

10.8.4 Based on the discussions, the Chairman summarized that, while many points raised could be reserved for further study, the Sub-Committee should not embark on radical changes to the present structure of jurisdictional clauses and the mechanism for settlement of disputes. The Sub-Committee agreed with this summary and decided, for the time being, that the substance of the text of Article 5 as

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cited above be retained, only with the editorial changes that the term “him” in paragraphs 4 and 5 be replaced by the term “that person” to achieve gender neutrality, and that the term “the State” in paragraph 5 be replaced by “any of the States”. The Sub-Committee also recommended that the term “which have established jurisdiction” in paragraph 4 of Article 6 of the Montreal Convention (as amended by Article 5 of the proposed protocol) be replaced by the term “which would otherwise have jurisdiction”.

#### 10.9 **Fair treatment**

10.9.1 The Sub-Committee noted that Article 6 of the Rapporteur’s text (proposing to add Article 7 *bis* to the Montreal Convention) reflects the comparable clauses in the more recent UN conventions for the purpose of ensuring respect for human rights and for the rule of law. The Rapporteur further elaborated to the Sub-Committee that this provision was appropriate for inclusion given the nature of the proposed principal and other offences and the expanded jurisdictional grounds. The proposed text of Article 7 *bis* by the Rapporteur was accepted by the Sub-Committee.

#### 10.10 **Explicit exclusion of political offence exception**

10.10.1 In presenting her draft Article 7, paragraphs 2 and 3 (proposing to add Articles 8 *bis* and 8 *ter* respectively to the Montreal Convention), the Rapporteur stated that, in the context of extradition of an alleged offender, it may be argued that the current text does not allow States Parties to refuse the request for extradition by invoking the political offence exception. However, to be in line with the comparable provisions in the recent UN conventions, it would be desirable to make this rule explicit at Article 8 *bis*. The Rapporteur further stated that inclusion of the accompanying ‘safeguards provision’ at Article 8 *ter* would also be in line with comparable provisions in recent UN conventions. One member proposed that Article 8 *ter* be cross-linked with Article 5, paragraphs 4 and 5 of the Montreal Convention (as amended by Article 4 of the proposed protocol) to ensure that States Parties invoking Article 8 *ter* to refuse extradition of an alleged offender would not be obviated from the obligation to submit the case for prosecution. Other members averred that the wording of Article 7 of the Montreal Convention was sufficiently broad to cover the situation. The Sub-Committee accepted the texts of Articles 8 *bis* and 8 *ter*.

#### 10.11 **Consequential and editorial changes**

10.11.1 The Sub-Committee also recommended some consequential and editorial changes to the Montreal Convention. **Appendix 4** to this Report represents the consolidated draft text of the amended Montreal Convention, incorporating all the changes recommended by the Sub-Committee, except the final clauses.

#### 10.12 **Mere transport of particularly dangerous goods and fugitives**

10.12.1 The Sub-Committee discussed the proposal to prohibit the intentional and unlawful transport by air of particularly dangerous goods and fugitives, on the basis of WP/3 presented by Australia. The working paper pointed out that there were gaps in the international legal framework in relation to the unlawful transport of biological, chemical and nuclear weapons and other dangerous material on board civil aircraft. There were also gaps in relation to civil aircraft being used to assist fugitives to evade prosecution for serious security-related offences. In view of the close relationship between terrorism and this type of illegal transport, ICAO has responsibility to ensure that civil aviation is not used for any purpose inconsistent with the aims of the 1944 *Convention on International Civil Aviation* (Chicago Convention). The paper identified two options to address the legal gaps: one option

was to follow the approach of the SUA Protocol; another was to link this matter to Annex 18 of the Chicago Convention.

10.12.2 The Chairman and several members expressed thanks to the author of the working paper but cautioned that the issue of mere transport was not, strictly speaking, within the terms of reference specified by the Council, i.e. that its criminalization through a convention could be considered provided that its scope was limited to those acts which were likely to endanger the safety of aircraft in flight. The issue of unlawful transport of fugitives was not even mentioned in the mandate given by the Council.

10.12.3 Several members supported the proposal in WP/3. In their view, the unauthorized transport of certain dangerous material would inherently present a danger to civil aircraft in flight, and therefore this issue was within the mandate of the Sub-Committee. It would be the historical responsibility of ICAO to criminalize these acts, otherwise the safety and integrity of civil aviation would be affected. In response to a statement that the illegal transport of nuclear and other deadly material was already covered by certain international conventions relating to arms control, these members expressed the view that the existing instruments relating to arms control did not contain international cooperation as well as extradition provisions. Addressing this issue through an ICAO instrument would strengthen the critical part of the law enforcement process.

10.12.4 A number of members expressed serious reservations and/or declined to take a premature position on the mere transport issue given its technical, legal and political complexity and need for further research and discussion. In addition to the argument that this issue exceeded the mandate of the Sub-Committee, they also cited the possible negative impact upon the progress of the work and eventual acceptability of the instrument. They further questioned whether there was any gap in coverage given that the transport before take-off and after landing was otherwise covered. Other issues were also identified, including how to qualify the mere transport offence in the aviation context as compared to that in the maritime context under the SUA Protocol which was based upon an import/export licensing scheme; how to implement the system of enforcement and punishment; and how to avoid overlap with similar offences covered in other conventions. On the issue of the intentional and unlawful transport by air of fugitives, these members showed stronger scepticism than they did on the issue of the unlawful transport of certain dangerous goods. Members of the Sub-Committee who were not opposed to the proposed offence at the outset cautioned that there were significant liability and policy issues which had to be resolved, such as the potential liability of airlines with regard to ascertaining who would qualify as a ‘fugitive’.

10.12.5 In concluding the discussion with regard to the prohibition of the intentional and unlawful transport by air of particularly dangerous goods, the Chairman noted that the Sub-Committee was divided on the subject and, although most members conceded the seriousness of the issue, many of them felt that it should not be pursued in a manner which would result in slowing down the work of the Sub-Committee. This issue would therefore be reported back to the Council for further consideration. If the Council determines that the issue should be pursued, it could then decide whether the matter will go to the Legal Committee directly or be sent back to the Sub-Committee for an in-depth study. It would then be incumbent upon members who supported inclusion of this issue within the Montreal Convention to present draft provisions. Similarly, the issue of intentional and unlawful transport of fugitives would also be reported to the Council for further consideration. The Sub-Committee agreed with this course of action.

## 10.13 **Other issues**

10.13.1 One member proposed that Article 3 of the Montreal Convention include as a severe penalty ‘forfeiture of assets’ to States Parties. Other members stressed the importance of States Parties

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determining what constitutes severe penalties within their domestic law. It was decided to note in the Report that forfeiture of assets constitutes a severe penalty in some legal systems.

10.13.2 One member suggested that a statute of limitations should not apply given the serious nature of the offences in The Hague and Montreal Conventions. The Chairman noted that comparable conventions do not refer to statutes of limitations, leaving it to States for determination in their national law.

## 11. PROPOSED PROTOCOL TO AMEND THE HAGUE CONVENTION

11.1 In presenting the draft protocol to the Hague Convention (Attachment B to the Rapporteur's report), the Rapporteur reported to the Sub-Committee that one of the proposed major changes to Article 1 was as follows:

“Any person commits an offence if that person unlawfully and intentionally seizes or exercises control of an aircraft in service by force or any other form of intimidation.”

11.2 She further explained that the term “on board an aircraft in flight” in the *chapeau* of Article 1 of The Hague Convention was deleted and the term of aircraft “in service” was introduced. She considered that this change would be necessary in order to align The Hague Convention with the Montreal Convention which uses the concept of “in service”, and to cover certain situations where the offender who unlawfully exercised control of an aircraft was not physically on board such an aircraft by himself or herself. This proposed change was accepted by the Sub-Committee. When one member questioned the necessity for retaining the definition of “in flight” in The Hague Convention, it was pointed out that the definition of “in service” was dependent upon the definition of “in flight”, and that consistency was needed with other aviation security conventions utilizing the latter term.

11.3 One member proposed to delete the term “by force or any other form of intimidation”. Others believed that such a deletion would expand the scope of the offence and lead to the consequence that theft of an aircraft or flying an aircraft without a license could also be covered, which had not been intended by the drafters of The Hague Convention. These members preferred to retain the original terms of Article 1, paragraph (a) of The Hague Convention, namely, “by force or threat thereof, or by any other form of intimidation”, and this view was accepted by the Sub-Committee.

11.4 Another member pointed out the future possibility of unlawfully controlling aircraft by technical means, such as by remote controlled electronic devices, instead of by the presence of an individual on board the aircraft. It was suggested to cover this type of offence through the addition of the term “by technical devices” after the term “by force”. A third member proposed to use the word “constraint” instead of “by technical devices”. A fourth member accepted the concept of “constraint” but suggested to verify whether it is linguistically appropriate or not. The Sub-Committee decided to retain “constraint” in square brackets and to formulate Article 1, paragraph (1) as follows:

“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 any other form of intimidation.”

11.5 With respect to other proposed amendments to The Hague Convention, it was understood that the comparable comments relating to the proposed amendments to the Montreal Convention were applicable to The Hague Convention, and there was no need to repeat them. One member, however, wished to reiterate all its comments regarding the military exclusion clause (paragraphs 10.7.3 and 10.7.4

refer).

11.6 The Sub-Committee also recommended consequential and editorial changes to The Hague Convention. The consolidated draft text of the amended Hague Convention, incorporating all the changes recommended by the Sub-Committee, except the final clauses, is set forth in **Appendix 5** to this Report.

## 12. **Other business**

12.1 The Delegation of the Russian Federation expressed regret that one of its delegates could not get a visa to come to Canada to attend this meeting. The Delegation of Canada stated that it would look into this matter.

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## PART III

### CONCLUSIONS OF THE SUB-COMMITTEE

#### 13. DRAFT TEXTS AGREED BY THE SUB-COMMITTEE

13.1 As a result of the discussions reflected in Part II of this Report, the draft texts as agreed by the Sub-Committee are set forth in **Appendices 4 and 5** hereto.

#### 14. SUBSEQUENT MEETINGS

14.1 With respect to the next meeting of the Sub-Committee, it would depend upon the decision of the Council on the mere transport issue. For planning purposes, a second meeting was tentatively scheduled for the week of 17 December 2007. If the Council determines the mere transport issue as described in this Report could be directly referred to the Legal Committee, the draft texts as set forth in **Appendices 4 and 5** could be suggested for consideration by the 33rd Session of the Legal Committee.

14.2 The Sub-Committee expressed its thanks to the Chairman.

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**APPENDIX 1****LIST OF PARTICIPANTS****MEMBERS**

Australia	Atwell, J.-A. M. Leonard, K. L. Clegg, S.
Brazil	Da Silva Pinto, R.
Canada	Lauzon, G., Q.C. Chambers, S. Hanson, C. Jones, K Morrill, K. Zigayer, M.
China	Qi, Y. Zhang, Q. Liu, H.
Finland	Tupamäki, M.
France	Olson, T. Crozat, A. Navarri, M.-L.
Germany	Lintl, E.
India	Zaidi, N.
Italy	Ceccarelli, S. Gueli, E. Sala, E.
Japan	Araki, T. Ito, M. Kawaguchi, Y. Ota, M. Watanabe, S.
Lebanon	Eid, S.
Nigeria	Gaiya, S. M.

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Russian Federation	Sinenko, A. Y. Chertok, V. B. Belyakov, A. V. Sveshnikov, A. N. Mnishko, V. V. Kuznetsova, N. V. Pasko, A. Shiyan, D.
Senegal	Sourand, M.
Singapore	Tan, S. H.
South Africa	Mashinini, J. Mabaso, L.
Switzerland	Cadrian, A. Noël, L.
United Arab Emirates	Poonoosamy, V.
United Kingdom	Keith, S.
United States	Keller, A. N. Levy, J. E. Giovanniello, A. Klang, J.

**OBSERVER**

United Nations Office on Drugs and Crime (UNODC) De Feo, M.

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**APPENDIX 2****LIST OF DOCUMENTS**

LC/SC-NET-O/B	Order of Business for the First Day of the Meeting
LC/SC-NET-WP/1	Introductory Note
LC/SC-NET-WP/2	Report of the Rapporteur on the Development of New Legal Instruments for the Suppression of Unlawful Acts Against the Safety of Civil Aviation
LC/SC-NET-WP/3	Proposal to Prohibit the Intentional and Unlawful Transport by Air of Particularly Dangerous Goods and Fugitives

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**APPENDIX 3**



International Civil Aviation Organization

LC/SC-NET-WP/2  
7/06/07

**WORKING PAPER**

**SPECIAL SUB-COMMITTEE ON THE PREPARATION  
OF ONE OR MORE INSTRUMENTS ADDRESSING  
NEW AND EMERGING THREATS**

(Montreal, 3 – 6 July 2007)

**REPORT OF THE RAPPORTEUR ON THE DEVELOPMENT OF NEW LEGAL  
INSTRUMENTS FOR THE SUPPRESSION OF UNLAWFUL ACTS  
AGAINST THE SAFETY OF CIVIL AVIATION**

(Ms. Julie Atwell)

**REPORT OF THE RAPPORTEUR ON THE DEVELOPMENT OF NEW LEGAL  
INSTRUMENTS FOR THE SUPPRESSION OF UNLAWFUL ACTS  
AGAINST THE SAFETY OF CIVIL AVIATION**

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**REPORT OF THE RAPPORTEUR ON THE DEVELOPMENT OF NEW LEGAL  
INSTRUMENTS FOR THE SUPPRESSION OF UNLAWFUL ACTS  
AGAINST THE SAFETY OF CIVIL AVIATION**

1. Following the presentation of results of a survey concerning the need to amend existing international air law instruments on aviation security, the ICAO Council agreed at its 176<sup>th</sup> session in November 2005 to establish a Secretariat Study Group to assist the Secretariat in preparing an international legal instrument to cover the new and emerging threats to civil aviation. The Secretariat Study Group met three times and a report was submitted to the Council at its 180<sup>th</sup> session in March 2007.

2. By letter dated 2 April 2007, Mr Gilles Lauzon QC, Chairman of the Legal Committee acting under Article 17 of the Rules of Procedure of the ICAO Legal Committee appointed the author of this report as rapporteur. In accordance with the Chairman's instructions, the purpose of the report is to prepare, within the parameters set by the Council, the draft text of one or more draft instruments addressing the new and emerging threats to civil aviation.

3. This report is prepared for consideration at the meeting of the special Sub-Committee of the Legal Committee in Montreal on 3-6 July 2007. When approving the convening of a new Legal Sub-Committee, the ICAO Council agreed that the purpose of the Sub-committee was to prepare, in light of Assembly Resolution A33-1<sup>1</sup> and the guidance of the Council during its 180<sup>th</sup> Session, one or more draft instruments addressing the new and emerging threats to civil aviation. Those instruments are to be consistent with, and only take into account paragraph 1 of the conclusions of the Secretariat Study Group on Aviation Security Conventions at Appendix B to C-WP/12851.

## **1. HISTORICAL BACKGROUND**

4. The 33<sup>rd</sup> Session of the Assembly, in Resolution A33-1, directed the Council and the Secretary General to act urgently to address the new and emerging threats to civil aviation, in particular to review the adequacy of the existing aviation security conventions. Pursuant to this Resolution and recommendations of the High-level, Ministerial Conference on Aviation Security held in February 2002, the Council, in June 2002, approved an ICAO Aviation Security Plan of Action, which contains Project 12-Legal Aspects. Project 12 mandates a review of existing legal instruments in aviation security so as to identify gaps and inadequacies as to their coverage in relation to new and emerging threats. This document analyses the coverage of new and emerging threats in existing aviation security conventions and identifies gaps and inadequacies in these conventions. The study focuses on the penal aspects of unlawful interference against civil aviation.<sup>2</sup>

5. The study drew a preliminary conclusion, that while the existing five aviation security conventions have been widely accepted by States as useful legal instruments for combating unlawful interference against civil aviation, they should be updated in several instances to respond to new and emerging threats. Certain threats, such as use of aircraft as weapons, suicide attacks, electronic and computer-based attacks, chemical, biological and radioactive attacks, are not adequately covered. Furthermore, the existing instruments focus on the persons actually committing the punishable acts, mainly on board an aircraft or at an airport, without specific provisions addressing the issue of persons organizing and directing the commission of the offences.<sup>3</sup>

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<sup>1</sup> Declaration on misuse of civil aircraft as weapons of destruction and other terrorist acts involving civil aviation.

<sup>2</sup> A35-WP/88, "ICAO Aviation Security Plan of Action, Project 12: Legal".

<sup>3</sup> Report on the Survey Concerning the Need to Amend Existing International Air Law Instruments on Aviation Security, 4 November 2005, C-WP/12531, paragraph 1.1.

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LC/SC-NET-WP/2

6. During the twelfth meeting of its 173<sup>rd</sup> Session on 15 December 2004, the Council was informed that a questionnaire would be circulated among ICAO Contracting States with a view to ascertaining the need to review and possibly amend the existing aviation security conventions. That questionnaire as well as the study was circulated to Contracting States on 24 March 2005 with a view to ascertaining the need to review and possibly amend the existing aviation security conventions. Fifty-seven replies were received.<sup>4</sup> The majority of those States that responded to the questionnaire agreed that threats by electronic and computer-based attacks, chemical and biological attacks and misuse of nuclear or other radioactive materials were not adequately covered by the existing international air law instruments, they should be dealt with by international air law instruments and that there was a need to amend existing international air law instruments.<sup>5</sup>

7. The Council agreed at its 176<sup>th</sup> session in November 2005 that a Secretariat Study Group be established to assist the Secretariat in preparing an international legal instrument to cover the new and emerging threats to civil aviation. Three meetings of the study group were held in June 2006, October 2006 and February 2007. During the 16<sup>th</sup> meeting of its 179<sup>th</sup> Session on 5 December 2006, the Council considered a progress report relating to the Secretariat Study Group on Aviation Security Conventions and noted that the Secretary General would submit to the Council at its 180<sup>th</sup> Session the final report concerning the work of the Study Group. The final report of the study group was submitted to the 180<sup>th</sup> Session of the Council in March 2007.<sup>6</sup>

8. The Council agreed to the following terms of reference for a special Sub-Committee to be established by the Chairman of the Legal Committee: “To prepare, in light of Assembly Resolution A33-1 (Declaration on misuse of civil aircraft as weapons of destruction and other terrorist acts involving civil aviation) and the guidance of the Council during its 180<sup>th</sup> Session, one or more draft instruments addressing the new and emerging threats to civil aviation, consistent with and taking into account only paragraph 1 of the conclusions of the Secretariat Study Group on Aviation Security Conventions at Appendix B to C-WP/12851.”

## **2. DEVELOPMENT OF NEW INSTRUMENTS AND THEIR CONTEXTS**

### **A. Development of new instruments**

9. The Study Group identified both acts which were not covered by existing international aviation security instruments which should be criminalised under international law as well as criminalisation of contributory offences. These acts include:

- (a) use of civil aircraft as a weapon;
- (b) use of civil aircraft to unlawfully spread biological, chemical and nuclear substances; and
- (c) attacks against civil aviation using biological, chemical and nuclear substances.

Clarification of the term ‘air navigation facilities’ was also identified as an issue that required redressing in light of advances in technology to ensure that the existing offence in the Montreal Convention adequately captures interference with signals, data and other non-tangible systems used for air navigation. The Study Group identified also that the threat to commit any of these offences as well as existing offences should also be criminalised.

10. Whilst considering the current aviation security instruments it became apparent to the Study Group that additional provisions found in recent United Nations counter-terrorism instruments

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<sup>4</sup> Summary of Decisions, 176<sup>th</sup> Session, ICAO Council, C-DEC 176/12, 30 November 2005, paragraph 7.

<sup>5</sup> See Appendix B, C-WP/12531, 4 November 2005.

<sup>6</sup> C-WP/12851, 20 February 2007, Final Report Relating to the Secretariat Study Group on Aviation Security Conventions.

could also usefully be incorporated including the political offence exception, fair treatment and non-discrimination provisions and explicit confirmation that the Conventions do not govern armed forces activities during an armed conflict. The nature of the acts identified as not being covered by existing international aviation security instruments also resulted in the need for additional jurisdictional grounds to be considered for inclusion in any new aviation security instrument.

11. The following examines the context of each of the existing relevant aviation security instruments including causative factors for their development, scope of the instrument, offences, general shortcomings of the instruments and reasons why they do not adequately cover the threats to aviation security identified by the Study Group. The context of relevant United Nations counter-terrorism instruments is also examined to identify scope of the instrument, and relevant provisions that in the context of the offences identified by the Study Group should also be included in new aviation security instruments.

## **B. Context of the Tokyo Convention 1963**

12. The Tokyo Convention took the first steps towards suppression of unlawful acts on board aircraft,<sup>7</sup> and prescribes the means to determine the penal law applicable when an offence has been committed above territories not belonging to any particular State, or in cases in which the place where an offence has been committed cannot be precisely located. The Tokyo Convention required that the State of registration of the aircraft must establish jurisdiction in respect of offences committed on board the aircraft and recognised the competence of the State of registration to exercise jurisdiction in the case of offences affecting the safety, good order and discipline on board the aircraft.<sup>8</sup> Further, a State Party which is not the State of registration may not interfere with an aircraft in flight in order to exercise its criminal jurisdiction except in certain circumstances.<sup>9</sup>

13. Prior to the Tokyo Convention, States encountered difficulties dealing with increased occurrences of hijacking and the inadequacies of existing offences to cover this act, differences between legal systems concerning the ability to exercise jurisdiction with limited capacity to extradite offenders in the absence of a relevant treaty. The Convention does not prescribe specific offences but rather relies upon offences as codified under national law. The Convention also applies to acts which may or do jeopardise the safety of the aircraft or of persons or property on board or which jeopardise the good order and discipline on board the aircraft. Although the Convention does attempt to cover unlawful seizure of aircraft specifically in Article 11, not all forms of unlawful seizure of aircraft are covered, nor does it provide for a specific response other than an obligation on States to “take all appropriate measures to restore control of the aircraft to its lawful commander or to preserve his control of the aircraft.”<sup>10</sup>

14. Although there is a requirement for States Parties to take delivery of a person whom the aircraft commander delivers because he has reason to believe the person has committed a serious offence according to the penal law of the State of registration of the aircraft, there is no requirement for that State to prosecute or extradite that person. In the event that prosecution or extradition proceedings are not instituted the Convention provides an obligation to assist in communicating with the State of which that person is a national, releasing that person from custody and ensuring that person is at liberty to continue his journey to his choice of destination.<sup>11</sup> The absence of any obligation for States to actually deal with the offence committed was regarded as a serious deficiency of the Tokyo Convention, particularly in relation to the offence of hijacking.<sup>12</sup>

<sup>7</sup> Matte, N.M. *Treatise on Air-Aeronautical Law* (1981) ICASL, p. 353.

<sup>8</sup> Article 2, Convention on Offences and Certain Other Acts Committed on Board Aircraft 1963 (Tokyo Convention).

<sup>9</sup> Article 4, Tokyo Convention 1963.

<sup>10</sup> Article 11, Tokyo Convention 1963.

<sup>11</sup> Article 13 (2), (3) and Article 15 of the Tokyo Convention.

<sup>12</sup> Horlick, GN “The Developing Law of Air Hijacking” 12 *Harvard International Law Journal* (1971) states at p.37 “Most important for hijacking, however, is the clear lack of any *obligation* to exercise jurisdiction. Quite clearly, the Convention

15. The Tokyo Convention does not provide an adequate framework to deal with the acts identified by the Study Group. The lack of specific offence provisions and the reliance upon national law to criminalise acts results in an absence of uniform multilateral offences for the acts identified. Further there is no specific provision criminalising the threat to commit such an offence, resulting in reliance on national penal law for the criminalisation of such threats. The inadequacy of the Tokyo Convention to provide obligations for States to actually deal with the offences, that is to prosecute or extradite offenders also means that the Tokyo Convention is not an appropriate mechanism to address the acts identified by the Study Group.

### C. Context of the Hague Convention 1970

16. The Hague Convention was largely developed in response to an increase in the number of hijackings in the late 1960s resulting in the need to define the act of hijacking recognising it as an international offence<sup>13</sup> and provide an appropriate legal framework to deal with the offence. The Hague Convention made several important contributions to international law concerning aviation security. The Convention covers both domestic and international flights.<sup>14</sup> There is a specific definition of hijacking an aircraft as well as the inclusion of the threat to undertake such an act as an offence although this is limited to a threat made on board the aircraft in flight.<sup>15</sup> States Parties are also required to make the offence punishable by severe penalties.<sup>16</sup>

17. Another important development in the Hague Convention is the system under which States establish jurisdiction. A system of multiple and concurrent jurisdiction is set out in Article 4(1) of the Convention. States Parties are required to establish jurisdiction when the offence is committed on board an aircraft registered in that State, when the offender is on board an aircraft which lands in its territory and when the offence is committed in the State of the principal place of business or permanent residence of the lessee of the aircraft. This issue was the subject of extensive debate with various proposals concerning mandatory and optional jurisdiction.<sup>17</sup> Although it appears that the jurisdictional grounds are concurrent, as a matter of practice in relation to the offence of unlawful seizure of aircraft the State of landing is likely to have priority as the offender will be present in the territory of that State and can be readily arrested.

18. One of the most important features of the Hague Convention is the provision effectively establishing universal jurisdiction, that is, if the State Party does not extradite, it must take measures to establish its jurisdiction over an offender present in its territory.<sup>18</sup> This provision together with certain other requirements<sup>19</sup> was designed to ensure that States either prosecute or extradite offenders in their territory. There was extensive debate over these provisions, particularly over the issue of hijacking for political motive and the discretion of States to prosecute in those circumstances. Although the intention is to preclude political motive as a reason for not extraditing where prosecution of an offender does not

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would be ineffective if states did not prosecute cases in which they were not interested.”

<sup>13</sup> Diedericks-Verschuur, I.H. *An Introduction to Air Law* (1991) Kluwer p.199. See also Bantekas, I. and Nash, C. *International Criminal Law* (2003) Cavendish Publishing Ltd., p.23.

<sup>14</sup> Article 3(3) of the Hague Convention 1970. For example where an aircraft is registered in State A and leased to State B for domestic flights within State B, the Hague Convention will apply.

<sup>15</sup> Article 1, Hague Convention 1970.

<sup>16</sup> Article 2, Hague Convention 1970.

<sup>17</sup> For a summary of the debates see Rutgers, H.J. *Conventions on Penal Law Regarding Aircraft* (1978) Utrecht, p.142. See also proposals by the United Kingdom (S.A. Doc No 62 ICAO Doc 8979-LC/165-2, Switzerland (S.A. Doc No 58 ICAO Doc 8979-LC/165-2), Spain (S.A. Doc No 61 ICAO Doc 8979-LC/165-2) and Austria (S.A. Doc No 42 ICAO Doc 8979-LC/165-2).

<sup>18</sup> Article 4(2), Hague Convention 1970.

<sup>19</sup> See Articles 7 and 8 of the Hague Convention 1970.

occur<sup>20</sup>, there is no specific provision in the Convention stating that the offence is not a ‘political offence’.<sup>21</sup>

19. Although the Hague Convention included several key concepts addressing some of the deficiencies of the Tokyo Convention, its scope is limited to the specific offence of unlawful seizure of aircraft and acts of violence connected with the offence. The addition of a specific political offence provision with accompanying safeguard provisions will address one of the shortcomings of the Hague Convention, particularly given the long history of seizure of aircraft and its association with political motive.<sup>22</sup> The addition of expanded jurisdiction grounds including the mandatory ground of a national of that State as well as the inclusion of two optional jurisdiction grounds will also improve the effectiveness of the Convention. Whilst the Hague Convention includes an accomplice offence, an accomplice only falls within the ambit of the Convention if the assistance is provided whilst on board the aircraft in flight.<sup>23</sup> The inclusion of additional offences concerning organizers or directors of an offence or contributors to the commission of an offence will broaden the scope of the Hague Convention and its application ensuring accomplices on the ground as well as on board the aircraft fall within the ambit of the Convention.

#### **D. Context of the Montreal Convention 1971 and Airports Protocol 1988**

20. Even prior to the conclusion of the Hague Convention the necessity for the Montreal Convention became apparent, that is, the increasing number of acts of violence committed on board aircraft as well as on airport ground facilities<sup>24</sup> required the development of a Convention which criminalised offences not only in flight but on the ground. The development of the Convention was characterised by extensive debate concerning Article 1 of the Convention and the development of specific offences. In particular whether Article 1 should only cover acts committed intentionally which might be expressed by including the word “intentionally” at the beginning of Article 1 and whether acts to be covered by the Convention should be confined to acts endangering the safety of air navigation. Some members thought that the Convention should only cover acts in which it was the intention of an offender to endanger the safety of air navigation, while others thought that the Convention should cover acts where there was an actual risk to the safety of air navigation, whether the offender intended it or not.

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<sup>20</sup> Article 7, Hague Convention 1970. One delegate stated: “States often made a distinction between political and criminal offences, and that distinction could serve to bar the extradition of an offender. But the same distinction could also influence the manner of prosecution and – in some cases – lead to non-prosecution.” His understanding of Article 7 was that it should ensure the maximum possibility of prosecution in the State where the offender was found, and that the decision to prosecute would be governed by exactly the same considerations as those invoked in connection with any other ordinary criminal offence. ICAO Doc 8979 – LC 165-1 at p.135. Another delegate also stated that “the convention should serve notice that hijacking for whatever motive was universally considered as a serious crime, and not as a mere political offence.” ICAO Doc 8979-165-1 at p.9.

<sup>21</sup> The Ottawa Summit Statement on Terrorism, 20 July 1981 referred to a specific case where heads of government were convinced that, in the case of the hijacking of a Pakistan International Airlines aircraft in March 1981, the conduct of the Babrak Karmal regime of Afghanistan, both during the incident and subsequently in giving refuge to the hijackers, was and is in flagrant breach of its international obligations under the Hague Convention to which Afghanistan is a party, and constitutes a serious threat to air safety. The statement proposed to suspend all flights to and from Afghanistan in implementation of the Bonn Declaration. The 1978 Bonn Declaration was an early attempt to ensure that States did not refuse to extradite or prosecute those who hijacked an aircraft. This was to be achieved by all members agreeing to cease all flights to the relevant country and all incoming flights from that country.

<sup>22</sup> For more extensive discussion of the reasons for hijacking and different phases of hijacking aircraft both prior to and subsequent to the Hague Convention see: Harrison J, “The Changing Face of Aviation Terrorism” in Gunaratna, R. ed. *The Changing Face of Terrorism* (2004) Eastern Universities Press, pp. 83-101 and Dempsey, PS “Aviation Security: The Role of Law in the War against Terrorism” 41 *Columbia Journal of Transnational Law* (2003) p.649.

<sup>23</sup> Bantekas, I. & Nash S. *International Criminal Law* (2003) Cavendish Publishing Ltd, p.24. See also Shubber, S. “Aircraft Hijacking under the Hague Convention 1970 – A new regime?” 22 *International and Comparative Law Quarterly* (1973) pp.704-705.

<sup>24</sup> See Matte, NM. *Treatise on Air- Aeronautical Law* (1981) ICASL, p.367. See also Dempsey, PS. “Aviation Security: The Role of Law in the War against Terrorism”, 41 *Columbia Journal of Transnational Law* 2003 at p.669.

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21. During extensive debate on this issue one delegate observed that there were certain principles which had emerged from the debate on which the Committee might decide, in particular whether “the word ‘intentionally’ should apply only to the act of destruction or damage and not to an intent to endanger an aircraft in flight.”<sup>25</sup> This issue of whether the act itself should be intentional was put to the vote and this principle was accepted. The second part as to whether acts should be intended to endanger the safety of aircraft in flight was also put to the vote and the principle was rejected.<sup>26</sup>

22. Another issue which caused significant debate was the interpretation of “safety of air navigation” some members believing this only involved the safety of an aircraft in flight, while others thought that it should also include an aircraft on the ground, with passengers embarking or disembarking, or perhaps any aircraft in operational service.<sup>27</sup> This debate resulted in the definition of an aircraft ‘in service’ a term used in the offence concerning placement of a device or substance on an aircraft in service which is likely to destroy that aircraft.<sup>28</sup> This offence and the definition of ‘in service’<sup>29</sup> ensures that a device or substance placed on the aircraft prior to an aircraft being considered in flight is captured by the Convention.

23. As a result the Montreal Convention is limited to offences which affect the safety of the aircraft ‘in service’ or ‘in flight’. This limitation was addressed to some extent by the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation 1988 which specifically provided for offences against a person at an airport as well as the destruction or damage of facilities of an airport or an aircraft not in service where such acts endanger or are likely to endanger safety at that airport.<sup>30</sup>

24. A further limitation of the Montreal Convention is that it does not make it an offence to threaten to commit the offences in the Convention, unlike the Hague Convention which specifically criminalises a threat to unlawfully seize an aircraft, although this is limited to persons on board the aircraft in flight. Because of the time constraints in developing the Montreal Convention as well as the desire to closely align the Hague and Montreal Conventions, a proposal to adopt Articles 4 to 14 of the Hague Convention for the Montreal Convention was agreed.<sup>31</sup> As a result the comments made concerning the inclusion of specific provisions relating to offences not being a political offence, relevant safeguards provisions and jurisdictional grounds made in the context of the Hague Convention also apply to the Montreal Convention.

25. Although the Montreal Convention expanded the scope of offences to include offences against a person on board an aircraft, that offence is limited by the requirement of an act likely to endanger the safety of that aircraft.<sup>32</sup> The Montreal Convention reflects the focus of States at that time, on offences

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<sup>25</sup> Ninth Meeting, Monday 5 October 1970 in Doc 8936-LC/164-1, Legal Committee Eighteenth Session, London, 29 September – 22 October 1970 Volume 1 Minutes, p.64.

<sup>26</sup> Tenth Meeting, Tuesday 6 October 1970 in Doc 8936-LC/164-1, Legal Committee Eighteenth Session, London, 29 September – 22 October 1970 Volume 1 Minutes, p.68.

<sup>27</sup> See debates in the Seventh Meeting, Friday 2 October 1970 and Ninth Meeting, Monday 5 October 1970 in Doc 8936-LC/164-1, Legal Committee Eighteenth Session, London, 29 September – 22 October 1970 Volume 1 Minutes.

<sup>28</sup> Article 1 (1)(c), Montreal Convention 1971.

<sup>29</sup> Article 2, Montreal Convention 1971.

<sup>30</sup> Article II of the Protocol (Article 1 (*Ibis*) of the Montreal Convention).

<sup>31</sup> See First Meeting of the Commission of the Whole, Thursday 9 September 1971, ICAO Doc 9081-LC/170-1, International Conference on Air Law, Montreal, September 1971, Volume 1, Minutes.

<sup>32</sup> It is interesting to note that in the initial draft of the Legal Committee this offence was not so qualified (CUI Doc No 4, DOC 9081-LC/170-2, International Conference on Air Law, Montreal, September 1971, Vol II, Documents). This point was recognised by some delegations. One delegate stated “the paragraph represented a departure from the rest of the offences, in that it aimed at extending protection by international agreement to a part of international civil aviation not otherwise protected, that is, the passenger.” Another delegate stated, “..it seemed that in all conventions there was a gap in failing to create the

specifically directed against the safety of the aircraft either ‘in flight’ or ‘in service’. Acts which utilise an aircraft as a means to cause damage potentially both in the air and on the ground without necessarily endangering the safety of aircraft were an unlikely threat at the time of the development of the Convention. Although certain elements of the offences described in the Montreal Convention may well be applicable to some of these acts, the offences described do not reflect the gravity of the act or specifically criminalise the use of an aircraft for such purposes.

26. As a result, there is a necessity to amend the Montreal Convention in order to internationally criminalise such acts. Although these acts may have a secondary effect on the safety of aviation, their primary purpose is to cause widespread death and destruction through use of an aircraft. As such, the offences described differ significantly from existing offences in the Montreal Convention in that they are not conditional upon the acts being likely to endanger the safety of the aircraft in flight. This is a fundamental shift in the basis of the Montreal Convention but one that is necessary in order to internationally criminalise and punish such acts.

### **E. Context of United Nations counter-terrorism instruments**

27. The following is an analysis of the existing United Nations counter-terrorism instruments, in particular identification of some of the provisions and reasons for their inclusion in some of the more recent instruments. Several United Nations instruments deal with various unlawful acts including acts of violence in specific contexts which have been criminalised under international law. These conventions seek to suppress international terrorism by establishing a framework for international cooperation among States in a way that principles such as ‘prosecute or extradite’, exchange of information and mutual legal assistance are reiterated in every instrument.<sup>33</sup> A key principle is the requirement to prosecute or extradite an offender apprehended in a State’s territory as found in the Hague and Montreal Conventions.

28. In order to ensure that the ‘prosecute or extradite’ model works efficiently, it is important to ensure that acts which could otherwise be characterised by national law as ‘political offences’ and thereby exempt from extradition are specifically exempt from such an exception in the instruments themselves. Although the Hague and Montreal Conventions attempt indirectly to prevent such exceptions from occurring<sup>34</sup> there is no specific provision stating that the offences in the Conventions are not ‘political offences’.<sup>35</sup> In conjunction with such a provision, there is also a requirement in many instruments that a requested State is not bound to extradite if it has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing on account of a person’s race, religion, nationality, ethnic origin, political opinion or gender.<sup>36</sup> Many instruments also include a provision guaranteeing fair treatment by the custodial State in conformity with international law including international human rights law.<sup>37</sup>

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offence of endangering the life of a person on board when the safety of the aircraft was not also endangered.” Second Meeting Commission of the Whole, Thursday 9 September 1971, ICAO Doc 9081-LC/170-1.

<sup>33</sup> Bantekas, I. and Nash S. *International Criminal Law* (2003) Cavendish Publishing Ltd., p. 35. See also Murphy JF “The Future of Multilateralism and Efforts to Combat International Terrorism” 25 *Colombia Journal of Transnational Law* (1996) p.35.

<sup>34</sup> Article 7 in both the Hague Convention 1970 and the Montreal Convention 1971.

<sup>35</sup> A specific provision that the offences in the Convention are not ‘political offences’ is found in the following Conventions: Article 11, Terrorist Bombings Convention 1997, Article 14, Terrorist Financing Convention 1999, Article 15, Nuclear Terrorism Convention and Article 11*bis*, 2005 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (2005 SUA Convention).

<sup>36</sup> This requirement is found in the following Conventions: Article 12, Terrorist Bombings Convention 1997, Article 9(1), of the Hostages Convention 1979, Article 15, Terrorist Financing Convention, Article 16, Nuclear Terrorism Convention 2005 and Article 11*ter*, 2005 SUA Convention.

<sup>37</sup> This provision is found in the following Conventions: Article 8(2), Hostages Convention 1979, Article 14, Terrorist Bombings Convention, Article 17, Terrorist Financing Convention 1999, Article 12, Nuclear Terrorism Convention, Article 10 (2), 2005 SUA Convention.

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29. A common provision also found in United Nations counter-terrorism instruments is that exempting the activities of armed forces during an armed conflict and official State military activities.<sup>38</sup>

30. Finally, a key aspect of ensuring there is no ‘safe haven’ for an offender is the range of jurisdictional grounds available to States Parties under United Nations terrorism instruments. In these instruments, jurisdictional grounds are commonly divided between mandatory and optional grounds. Under the former, States are required to take measures to establish their jurisdiction in certain cases (as found in both the Hague and Montreal Conventions). Many instruments also provide for optional jurisdictional grounds whereby States may also establish their jurisdiction.

31. In relation to mandatory grounds, jurisdiction can be founded in various United Nations instruments when an offence is committed by a national of that State.<sup>39</sup> The addition of this jurisdictional ground to both the Hague and Montreal Conventions will assist in widening the net to provide greater opportunities for offenders to be brought to justice. The optional jurisdictional grounds of ‘when the offence is committed against a national’<sup>40</sup> and ‘when the offence is committed by a stateless person’<sup>41</sup> will provide greater opportunities for States to exercise jurisdiction should they choose to do so depending on the circumstances of the case.

32. The flexibility offered by the inclusion of these jurisdictional grounds is particularly important given the context of the new offences. In particular, the addition of new jurisdictional grounds will make a key contribution to both Conventions particularly in relation to the new offences of ‘organises and directs’ and ‘contributes to’ an offence offering increased opportunity for those offenders who may not ordinarily be on board the aircraft to be brought to justice.

### **3. THE TEXT OF THE PROTOCOLS**

#### **A. Form of the instruments**

33. In the author’s opinion in order to effectively address the issues identified by the Study Group, the most appropriate form of instrument is a protocol to the Hague Convention and a protocol to the Montreal Convention. The development of two protocols builds on the achievements of each of the Conventions, whilst supplementing those Conventions to address the gaps identified by the Study Group. Both Conventions have widespread ratification and provide an appropriate framework for the inclusion of recent provisions developed in the context of other United Nations counter-terrorism instruments. An attempt to use a single instrument to amend both Conventions could be more complex particularly in relation to matters of inter-relationship between each of the instruments.

#### *Items for consideration by the Sub-Committee*

34. The Montreal Convention already has a supplementary protocol, the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation 1988 (‘the Airports

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<sup>38</sup> This provision is found in the following Conventions: Article 19, Terrorist Bombings Convention 1997, Article 4, Nuclear Terrorism Convention 2005, Article 2*bis*, 2005 SUA Convention.

<sup>39</sup> This jurisdictional ground is found in the following Conventions: Article 6(1), Terrorist Bombings Convention 1997, Article 7(1), Terrorist Financing Convention 1999, Article 9(1), Nuclear Terrorism Convention 2005, Article 6(1), 1988 SUA Convention, Article 8(1), Physical Protection of Nuclear Material Convention 1980, Article 5(1), Hostages Convention 1979.

<sup>40</sup> This jurisdictional ground is found in the following Conventions: Article 5(1)(d), Hostages Convention 1979, Article 6(2)(b), 1988 SUA Convention, Article 6(2)(a), Terrorist Bombings Convention 1997, Article 7(2)(a), Terrorist Financing Convention 1999, Article 9(2)(a), Nuclear Terrorism Convention 2005.

<sup>41</sup> This jurisdictional ground is found in the following Conventions: Article 5(1)(b), Hostages Convention 1979, Article 6(2)(a), 1988 SUA Convention, Article 6(2)(c), Terrorist Bombings Convention 1997, Article 7(2)(d), Terrorist Financing Convention 1999, Article 9(2)(c), Nuclear Terrorism Convention 2005.

Protocol'). Not all States that are parties to the Montreal Convention are parties to the Airports Protocol. However, the draft Protocol to the Montreal Convention proposes to apply to the Montreal Convention as updated by the Airports Protocol. The Sub-Committee may wish to consider and recommend an appropriate mechanism for the draft Protocol to be able to apply to States which are a party to the Montreal Convention but not a party to the Airports Protocol and who wish to become a party to the proposed Protocol.

## **B. Sphere of application**

### *The Montreal Protocol*

35. The scope and application of the proposed Protocol are necessarily different from the existing Convention as a result of the nature of the offences proposed. The application of the Montreal Convention to an aircraft 'in service' is limited to 'destroying an aircraft in service' or 'placing a device or substance on board an aircraft in service'. The Protocol expands the application of the Convention to three new principal offences each of which refers to an aircraft 'in service'. The focus of the offences in the Protocol is not directed primarily towards protection of the aircraft 'in service' or 'in flight' as is the case in the Convention but rather towards protection of persons, property and the environment both on board and outside of an aircraft in service. This is a fundamental shift in the focus of the Convention to address acts affecting aviation security emanating directly from the use of an aircraft to cause death, serious injury, damage to property or to the environment rather than acts which affect the safety of an aircraft either 'in service' or 'in flight'.

36. The Protocol also changes the application of the Convention ensuring that States Parties are not able to refuse extradition on the basis of an alleged 'political offence'. If States Parties do not submit a case for prosecution they are not able to refuse to extradite on the grounds that it is a 'political offence'. The Protocol also restricts the application of the Convention in relation to activities of armed forces during an armed conflict which are governed by international humanitarian law as well as military forces where their activities are governed by other rules of international law.

### *The Hague Protocol*

37. Although there are no new principal offences in the proposed Hague Protocol, the sphere of its application is altered to some degree by the redrafting of the offence provision in Article 1. The Hague Convention was drafted on the basis of a single offence provision which contained a number of elements including the 'unlawful seizure of an aircraft' and the 'unlawful exercise of control over an aircraft'. Those acts however were only offences when committed by a person on board an aircraft in flight. The redrafting of the offence provision in Article 1 of the Protocol results in a wider application of the Convention by criminalising those acts whether or not committed by a person on board an aircraft 'in flight' provided that the person committing those acts did so in relation to an aircraft which was 'in service'. Similarly the offence of threatening to seize or exercise control of an aircraft is no longer limited to those acts committed by persons on board an aircraft in flight.

38. The inclusion of a 'political offence' provision and a provision excluding the activities of armed and military forces similarly alters the application of the Hague Convention as discussed in the context of the Montreal Convention.

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*Items for consideration by the Sub-Committee*

*The Montreal Protocol*

39. The application of the new principal offences in the Convention and how this inter-relates with the existing offences.

*The Hague Protocol*

40. The application of the Convention as altered by the redrafting of the offence provision in Article 1 to apply to those acts carried out when the aircraft is 'in service' as opposed to when the aircraft is 'in flight'.

**C. Definitions**

*The Montreal Protocol*

41. The Montreal Protocol includes several additional definitions in Article 2 to the Convention. With the exception of the definition of 'air navigation facilities' each of these definitions is a result of the new offence provisions in Article 1. Those offences refer to the use of certain material, the meaning of which has been defined in existing multilateral Conventions.<sup>42</sup> It should be noted that the definition of 'biological material' is altered from that in the Biological Weapons Convention as it does not exclude those quantities of biological material which may be used for other legitimate purposes. The reason for not limiting the definition in relation to the quantity of the material is to ensure that the situation where small quantities of such material are used for the purpose of causing death, serious bodily injury and serious damage to property or the environment on board an aircraft 'in service' are criminalised. Although the definition is broad, the offence itself is limited by the unlawful and intentional use or release of such material to cause death, serious injury or serious property or environmental damage. The definition of 'air navigation facilities' was included to ensure that developments in new technology would be captured by the definition of 'air navigation facilities' and that this term would not be limited to those facilities necessary for the navigation of an aircraft in existence at the time the Convention was developed.

*The Hague Protocol*

42. The only definition added to Article 2 of the Hague Protocol is that of 'in service' which is consistent with the definition of that term in the Montreal Convention. The use of the term 'in service' in the amended offence provision in Article 1, paragraph 1 of the Convention makes the inclusion of that term necessary. Although the term 'in flight' is no longer separately used in the Hague Convention, the definition of 'in service' encompasses aircraft 'in flight'.

**D. Principal offences**

*The Montreal Protocol*

43. There are three new offences which have been added to Article 1, paragraph 1 of the Montreal Convention describing certain unlawful acts. Subparagraph (f) makes use of an aircraft in service to cause death, serious bodily injury, or serious damage to property or the environment an

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<sup>42</sup> The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction 1972, Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction 1993, Convention on the Physical Protection of Nuclear Material 1980.

offence.<sup>43</sup> While this offence encompasses a wide range of acts it is appropriately limited by the term ‘in service’, as well as the requirement that it be unlawful and intentional. The offence covers acts using aircraft from the beginning of the pre-flight preparation of the aircraft by ground crew until 24 hours after landing. It would cover the situation where an aircraft being prepared for flight was used as a means of causing death, serious injury, property or environment damage, for example against an airport terminal.

44. The language ‘to cause death, serious bodily injury, or serious damage to property or the environment’<sup>44</sup> is a departure from the formulation previously used in Article 1 of the Montreal Convention. Under the existing offences the required intention is to ‘endanger the safety of an aircraft in flight’ or ‘render it incapable of flight’. The broad terms of the proposed offence are limited by the intent element. In many cases the consequences of such acts could extend outside of the aircraft ‘in service’ as it affects persons, property and the environment both in the air and on the ground. This does not mean that death, serious bodily injury or serious damage must necessarily result from an act which may not be successfully carried out, but merely that the offender had the intention of unlawfully and intentionally using an aircraft to cause such a result.

45. Proposed subparagraph (g) of paragraph 1 of Article 1 of the Convention would make it an offence to ‘release from an aircraft in service’ certain material to cause death, serious bodily injury or serious damage to property or the environment.<sup>45</sup> This offence includes ‘release’ from an aircraft of certain material<sup>46</sup> from the beginning of the preflight preparation of the aircraft by ground crew until 24 hours after the aircraft has landed, that is, when the aircraft is ‘in service’. This is intended to cover for example the situation where material is released from an aircraft in order to cause death, serious injury, serious property or environment damage to those aircraft which surround it on the ground, the aircraft terminal or surrounding property and persons therein. Such material could be released prior to embarkation or following disembarkation as well as during the period the aircraft was ‘in flight’.

46. Proposed subparagraph (h) of paragraph 1 of Article 1 of the Convention would make it an offence to ‘use(s) against or on board an aircraft in service’ such material to cause death, serious injury or serious property or environment damage.<sup>47</sup> The offence is intended to include acts where persons use such material from outside of the aircraft in service against the aircraft itself. It would also cover the situation where persons are deliberately infected or carry such material on board the aircraft with the intent of causing death or serious injury to passengers on board the aircraft without necessarily endangering the safety of the aircraft itself or being likely to destroy the aircraft. It would also include those acts where persons outside the aircraft in service intentionally used such material against the aircraft but did not succeed in damaging or affecting the safety of the aircraft in flight or those on board the aircraft but did cause death, serious injury or serious property or environment damage to those on the ground.

47. This offence also includes an aircraft ‘in service’ in order to cover for example, the situation where persons use such material against an aircraft during its preflight preparations in order to cause death, serious injury, or serious property or environment damage to persons and property surrounding the aircraft on the ground. It would also cover the situation where a person enters and uses such material on

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<sup>43</sup> The term ‘use of an aircraft’ is based on the formulation applied in the 2005 SUA Convention, although ‘use of an aircraft’ is limited by the term ‘in service’ to ensure that only certain aircraft are captured as described in the definitions section.

<sup>44</sup> The formulation of ‘cause death, serious bodily injury, or serious damage to property or the environment’ is drawn from Article 2 of the Nuclear Terrorism Convention 2005, Article 2 of the Terrorist Bombings Convention 1997 and Article 3*bis* of the 2005 SUA Convention.

<sup>45</sup> The use of the word ‘release’ is based on the formulation used in Article 2(1)(b) of the Nuclear Terrorism Convention 2005, Article 1(3)(b) of the Terrorist Bombings Convention 1997 and is the equivalent of ‘discharge’ used in the maritime context in Article 3*bis*(1)(a)(ii) of the 2005 SUA Convention.

<sup>46</sup> The description of the material itself is drawn from Articles 1 and 2 of the Terrorist Bombings Convention 1997 and Articles 1 and 3*bis* of the 2005 SUA Convention. The material is defined in Article 2 of the Convention as described above.

<sup>47</sup> This text is based on the formulation used in Article 3*bis* of the 2005 SUA Convention and Article 2 of the Terrorist Bombings Convention 1997.

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an aircraft in order to kill or seriously injure passengers who will later board the aircraft. The material itself may not necessarily endanger the safety of the aircraft or cause damage to the aircraft itself. This offence would address a gap in the current offence provision in Article 1(1)(c) of the Montreal Convention.

48. Paragraph *1ter* to Article 1 makes it an offence for a person to threaten to commit any of the offences in paragraph 1 or *1bis* of the Convention.<sup>48</sup> A threat to commit such acts in an aviation context was recognised in the Hague Convention which included a threat to seize or exercise control over an aircraft as an offence.<sup>49</sup> The provision is qualified by a defence based on the lack of credibility of the threat. In the author's view this formulation is preferred as it does not make the 'credibility of the threat' an element that needs to be proved by the prosecution. Rather the absence of a credible threat must be proved by the defence.

#### *The Hague Protocol*

49. The Hague Protocol does not include any new principal offences. However the existing offence in Article 1, paragraph 1 has been redrafted. Previously the offence had been limited to aircraft 'in flight'. The expanded application of the offence to seizure or exercise of control of an aircraft 'in service' is intended to cover those situations where an aircraft is seized or control is exercised over the aircraft during preflight preparation or following landing of an aircraft as well as when the aircraft is 'in flight'.

50. Paragraph 2 to Article 1 makes it an offence for a person to threaten to commit any of the offences in paragraph 1 of the Convention.<sup>50</sup> Although the Hague Convention already included a threat to seize or exercise control of an aircraft as an offence, it was limited to a person on board an aircraft in flight threatening to seize or exercise control of an aircraft. The provision making it an offence to seize or exercise control of an aircraft has been separated from the provisions relating to the principal acts and has been expanded to cover a threat to seize or exercise control of an aircraft 'in service' irrespective of whether the person making the threat is on board the aircraft.

#### *Items for consideration by the Sub-Committee*

##### *The Montreal Protocol*

51. Whether the proposed text for each of the offences appropriately captures acts which are not covered in existing Conventions.

##### *The Hague Protocol*

52. Whether the offence provision as redrafted in paragraph 1 of Article 1 appropriately reflects and updates the Hague Convention. In particular whether the use of 'in service' to apply to the principal offence provision is appropriate given the proposed offences in the Montreal Convention which also apply to aircraft 'in service' and which in many cases require an aircraft to be unlawfully controlled or seized through use of force for those acts to be perpetrated. It would seem incongruous if under the Montreal Convention it was an offence to use an aircraft in service to cause death and serious injury but not an offence under the Hague Convention to seize that aircraft in order to commit such an offence

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<sup>48</sup> The inclusion of a provision which makes it an offence to threaten to commit any of the acts described in paragraphs 1 and *1bis* is consistent with the Nuclear Terrorism Convention 2005 and the 2005 SUA Convention.

<sup>49</sup> The provision is drafted in a different manner than the provisions in the Nuclear Terrorism Convention 2005 and the 2005 SUA Convention.

<sup>50</sup> The same formulation proposed for the Montreal Protocol is proposed for the Hague Protocol. As discussed in relation to the Montreal Protocol, the provision is drafted in a different manner than the provisions in the Nuclear Terrorism Convention 2005 and the 2005 SUA Convention for the same reasons discussed in the context of the Montreal Protocol.

because the aircraft was ‘in service’ and not ‘in flight’. Whether the separation of the provision concerning threats to commit an offence appropriately reflects the possibility that such an offence may be committed by a person not on board the aircraft or not on board an aircraft in flight and whether a defence based on the credibility of the threat is appropriate.

### **E. Ancillary and inchoate offences**

#### *The Montreal Protocol*

53. Additional ancillary offences are also included in paragraph 2 of Article 1 of the Montreal Convention including subparagraph (b) which makes it an offence to organize or direct others to commit an offence in paragraphs 1, *1bis*, *1ter*, or 2(a) of Article 1. This covers those organizing or directing others to commit an offence in the existing Montreal Convention, an offence as supplemented by the Airports Protocol, any of the new primary offences in the Montreal Protocol as well as attempting to commit any of these offences. The inclusion of this offence ensures that those persons who contribute to the principal act carried out by others are also able to be prosecuted and are held equally responsible. This is particularly relevant to the new offences as the principal offenders may perish in conduct of the principal act. The offence of organizing or directing others to commit an offence is also found in a number of other international conventions.<sup>51</sup>

54. The other ancillary offence included in the Montreal Protocol is where a person contributes to: (a) the commission of a principal offence, (b) a threat to commit a principal offence, or (c) an attempt to commit a principal offence by a group of persons acting with a common purpose, intentionally with the aim of furthering the purpose or in the knowledge of the intention of the group to commit such an offence. This provision is aimed at ensuring those who contribute to the commission of an offence are criminally responsible for their acts as principals, and not just as aiders and abettors.<sup>52</sup> The offence in this provision goes beyond mere ‘aiding and abetting’ requiring the existence of acts pursuant to a common plan or purpose,<sup>53</sup> that is, the offence should be regarded with the same gravity as a principal offence.

55. Subparagraph (e) of paragraph 2 of Article 1 also makes it an offence for a person to agree to commit an offence whether or not the principal offence itself is actually carried out. The essence of this offence is the making of an agreement to commit an offence irrespective of whether the offence which is the subject of the agreement is carried out. This offence is a form of the common law offence of ‘conspiracy’ and is part of the inchoate offences, that is, offences that are punishable even though the principal crime has not been carried out. The presence of a ‘conspiracy’ offence is more limited in other international conventions.<sup>54</sup>

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<sup>51</sup> Article 2(3)(b), Terrorist Bombings Convention 1997, Article 3*quater*(d), 2005 SUA Convention, Article 2(5)(b), Terrorist Financing Convention 1999 and Article 2(4)(b), Nuclear Terrorism Convention 2005.

<sup>52</sup> The Appeals Chamber in the *Prosecutor v Dusko Tadic* judgment (ICTY Case No. IT-94-1) (2 October 1995), paragraph 192 stated, “.to hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrator physically to carry out that criminal act. At the same time, depending upon the circumstances, to hold the latter liable only as aiders and abettors might understate the degree of their criminal responsibility.” The text of the provision is found in several international conventions including Article 25 (3)(d), Rome Statute of the International Criminal Court 1998, Article 3*quater*, 2005 SUA Convention, Article 2(3)(c), Terrorist Bombings Convention 1997, and Article 2(4)(c), 2005 Nuclear Terrorism Convention.

<sup>53</sup> For detailed discussion of the distinction between ‘aiding and abetting’ and acting pursuant to a common purpose or design to commit a crime see the judgment of the Appeals Chamber of the ICTY in *Tadic*, paragraph 229.

<sup>54</sup> Article III (b), Genocide Convention 1948, Article 5(1)(a)(i), Transnational Organized Crime Convention 2000, Article 8, Council of Europe Convention on the Prevention of Terrorism 2005.

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*The Hague Protocol*

56. Although the Hague Convention includes the offences of both attempt and accomplice in Article 1 of the Convention, the proposed Hague Protocol separates the principal offences from the ancillary and inchoate offences which are contained in paragraph 3 of Article 1 of the Convention. Additional offences have also been included in paragraph 3 and the reasons for the inclusion of those offences apply equally in the context of the Hague Convention as they do in the Montreal Convention.

*Items for consideration by the Sub-Committee*

57. The reasons for inclusion and the proposed text of the offences in paragraph 3 of Article 1 of both Conventions and whether these offences are appropriate in the context of the principal offences.

**F. Jurisdiction**

*The Montreal Protocol*

58. Article 5 of the Montreal Convention is amended to include additional jurisdictional grounds. Paragraph 1 of the Article includes the additional mandatory jurisdictional ground of ‘when the offence is committed by a national of that State.’ Paragraph 2 of Article 5 provides for two optional jurisdictional grounds, ‘when the offence is committed against a national of that State’ and ‘when the offence is committed by a stateless person who has his or her habitual residence in the territory of that State.’

59. The requirement to establish jurisdiction when an offence is committed by a national will ensure that those States which would otherwise not exercise extra-territorial jurisdiction over their nationals, will be required to do so in relation to the offences in this Convention. The inclusion of this jurisdictional ground will mean that under paragraph 4 of Article 8 of the Convention States Parties will be required to treat such offences committed by their nationals in other States as if they had occurred in its territory for the purposes of extradition.

60. The inclusion of the two proposed optional jurisdictional grounds would be particularly advantageous in their application to the proposed new offence provisions. As discussed previously the proposed offences expand the scope of the Convention focussing on death, serious injury and serious damage to property and the environment outside of the aircraft as well as inside the aircraft. The optional jurisdictional grounds allow States Parties greater opportunities to exercise jurisdiction particularly where an offence has been committed against a national.

61. The inclusion of paragraph 3 of Article 5 of the Convention as amended by the Montreal Protocol is a result of the inclusion of optional jurisdictional grounds. It requires States Parties to notify the depositary of any jurisdiction established as a result of the optional jurisdictional grounds in paragraph 2 as well as any changes a State Party may make concerning optional jurisdictional grounds. This provision is included in a number of other international conventions containing optional jurisdictional grounds.<sup>55</sup>

62. The Montreal Protocol also amends the Convention to require States Parties to take measures to establish jurisdiction over the offence in Article 1, paragraph 1 (d). The clarification in the definition of ‘air navigation facilities’ is a result of developments in technology that make it possible for aircraft to rely on facilities including data and information systems which are not necessarily confined to the territory of any one State. Currently the Convention does not require States Parties to establish jurisdiction over this

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<sup>55</sup> Nuclear Terrorism Convention 2005, Terrorist Bombings Convention 1997, Terrorist Financing Convention 1999 and the 2005 SUA Convention.

offence where the alleged offender is present in its territory and it does not extradite the offender. The changing nature of technology has meant that the gravity of such an offence is potentially much greater and therefore should be regarded as an extraditable offence in Article 5 of the Convention.

63. It should also be noted that in relation to offences concerning Article 1, paragraph 1*bis* and Article 1, paragraph 2 where the offender is present in the territory of a State and it does not extradite the offender, the requirement to establish jurisdiction arises not only in the case of a decision not to extradite the offender to the State where the offence was committed but also extends to the State whose national committed the offence. Article III of the Airports Protocol currently provides that States Parties would only be required to establish jurisdiction over those offences where the offender was present in its territory and it did not extradite to the State where the offence was committed.

#### *The Hague Protocol*

64. As with the Montreal Protocol, the Hague Protocol amends Article 4 of the Hague Convention to create two additional mandatory grounds of jurisdiction. The first requires a State Party to exercise jurisdiction over an alleged perpetrator who is a national of that State. The second is ‘when the offence is committed in the territory of [a] State’. The offence committed ‘by a national’ although not precluded by the Hague Convention, is currently not mandatory<sup>56</sup>. The inclusion of the first additional jurisdictional ground will mean that under paragraph 4 of Article 8 of the Convention States Parties will be required to treat such offences committed by their nationals in other States as if they had occurred in the territory of the State Party for the purposes of extradition.

65. The inclusion of the jurisdictional ground of ‘when the offence is committed in the territory of that State’ assumes greater relevance in light of the expanded scope of the offence in Article 1 of the Convention. The seizure or exercise of control over an aircraft ‘in service’ as opposed to ‘in flight’ ensures that such acts occurring prior to the external doors of the plane being closed are criminalised under the Convention. It is therefore desirable to include the additional mandatory jurisdictional ground of ‘when an offence is committed in the territory of that State.’<sup>57</sup> As discussed in the context of the proposed Montreal Protocol the inclusion of two optional jurisdictional grounds provide States Parties additional opportunities to exercise jurisdiction. This would be advantageous given the expanded scope of the offence in paragraph 1 of Article 1.

#### *Items for consideration by the Sub-Committee*

##### *The Montreal Protocol*

66. The proposal to include an additional mandatory jurisdictional ground and the inclusion of optional jurisdictional grounds and how they apply in relation to existing offences in the Montreal Convention and the Airports Protocol as well as to the proposed new offences.

##### *The Hague Protocol*

67. The proposal to include two additional mandatory jurisdictional grounds and the inclusion of optional jurisdictional grounds and their proposed operation taking into account the expanded scope of the principal offence.

<sup>56</sup> Article 4(3), the Hague Convention 1970.

<sup>57</sup> This mandatory jurisdictional ground is already found in Article 5, Montreal Convention.

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## **G. Fair treatment**

68. Both the Hague and Montreal Protocols include a provision where States Parties guarantee that a person taken into custody shall receive fair treatment including all the 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. This provision was included in the Terrorist Bombings Convention 1997 and was designed to ensure fair treatment at all stages, to all persons against whom proceedings were being carried out.<sup>58</sup> As a result of a proposal by some delegations to include an international law element which had not been present in previous versions of the provision, the text ‘...and applicable provisions of international law, including international human rights’ was included. Fair treatment provisions are part of a broader effort to ensure that human rights, fundamental freedoms and the rule of law are recognised as essential tools in the effort to combat terrorism.<sup>59</sup> The provision is found in several other international conventions<sup>60</sup> and is appropriate for incorporation in both the proposed Protocols in light of the new offence provisions and the broader scope of application of both Conventions as amended by the Protocols.

### *Items for consideration by the Sub-Committee*

69. Consider the inclusion of the fair treatment provision in the context of the Hague and Montreal Conventions taking into account the expanded scope and nature of the offences proposed.

## **H. Exclusions and safeguards**

### *Political offence exception and safeguards provision*

70. Both the Hague and Montreal Protocols include a provision that none of the offences 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. This explicitly obliges States not to invoke an exception to extradite or afford mutual legal assistance on the grounds that the offence was a political offence. The nature and gravity of the offences in both Conventions are such that political motivation should not be available as a reason for States Parties’ refusal to extradite or provide mutual legal assistance. The Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism<sup>61</sup> encouraged States not to regard political offences as excluded from the scope of extradition agreements in relation to terrorist offences which endanger or represent a physical threat to the safety and security of persons. Similar provisions can also be found in other conventions.<sup>62</sup>

71. Accompanying the political offence provision is a ‘safeguards provision’ which allows for an exception to the obligation to extradite or to afford mutual legal assistance. Where a State Party believes that an extradition request or a mutual legal assistance request has been made for the purpose of prosecuting a person on the basis of that person’s race, religion, nationality, ethnic origin, political opinion or gender it is not obliged to extradite that person or provide such assistance. The provision was added to the Terrorist Bombings Convention because some delegations believed the provision was

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<sup>58</sup> Paragraphs 78 and 83, Annex IV, Report of the Ad Hoc Committee established by the General Assembly Resolution 51/210 of 17 December 1996, (A/52/37).

<sup>59</sup> See comments of the Secretary-General extracted in: *Guide for the Legislative Incorporation and Implementation of the Universal Anti-Terrorism Instruments*, United Nations Office on Drugs and Crime, 2006, paragraph 407.

<sup>60</sup> Nuclear Terrorism Convention 2005, the 2005 SUA Convention and the Terrorist Bombings Convention 1997.

<sup>61</sup> The Declaration was added in an annex to General Assembly Resolution 51/210 (1996) establishing the Ad Hoc Committee which developed the Terrorist Bombings Convention 1997.

<sup>62</sup> Such as the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, the Genocide Convention 1948 and the European Convention on the Suppression of Terrorism 1977. See Paragraph 88, Annex IV, Report of the Ad Hoc Committee established by the General Assembly Resolution 51/210 of 17 December 1996, (A/52/37).

necessary to ensure the Convention did not impose an obligation to extradite if the requested State had substantial grounds for believing that the request for extradition was for the purpose of prosecuting or punishing a person for the reasons described.<sup>63</sup>

*Military and armed forces exception*

72. Both the Hague and the Montreal Protocols include an exception that the activities of armed forces during an armed conflict and the activities undertaken by military forces in the exercise of their official duties are not governed by the respective Conventions where they are governed by other rules of international law. This exception was developed during negotiations on the Terrorist Bombings Convention 1997 and was designed to ensure that the Convention did not purport to regulate the conduct of armed forces under State control. Delegations asserted that the conduct of armed forces was already addressed, *inter alia*, in other bodies of law such as international humanitarian law and the law of State responsibility. This exception has since been adopted in other international conventions<sup>64</sup> and in light of the nature and scope of the offences proposed in the Protocols it seems appropriate to similarly include this exception.

*Items for consideration by the Sub-Committee*

73. Whether the political offence exclusion and accompanying safeguards provision and the military and armed forces exception are appropriate for inclusion in the proposed Protocols taking into account the reasons for inclusion in other international conventions as well as the scope and nature of the offences in the proposed Protocols.

#### 4. CONCLUSIONS

74. The development of the two Protocols, one to the Hague Convention and one to the Montreal Convention, will update those Conventions by criminalising acts which affect not only the safety of the aircraft but also of persons and property on board and outside of the aircraft. The inclusion of fair treatment provisions and relevant exclusions with accompanying safeguard provisions will update Conventions which were developed some time ago bringing them in line with recent United Nations Conventions dealing with unlawful acts in specific contexts. The addition of the two Protocols will provide an important role in continuing to safeguard and assure public confidence in civil aviation.

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<sup>63</sup> The text was adapted from Article 5, European Convention for the Suppression of Terrorism 1977, see discussion in paragraph 89, Annex IV, Report of the Ad Hoc Committee established by the General Assembly Resolution 51/210 of 17 December 1996, (A/52/37). The provision can also be found in the Nuclear Terrorism Convention 2005, the 2005 SUA Convention and the Terrorist Bombings Convention 1997.

<sup>64</sup> Nuclear Terrorism Convention 2005 and the 2005 SUA Convention.

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**ITEMS TO BE CONSIDERED BY THE LEGAL SUB-COMMITTEE****Substantive***The Montreal Protocol*

1. Form and the objectives of the instrument.
2. Content of the preamble and the objectives of the instrument.
3. How the Protocol could apply between States who are parties to the Convention but not parties to the Airports Protocol but wish to become parties to the proposed Protocol.
4. Application of the principal offences in Article 1, paragraph 1 and how they inter-relate with existing offences.
5. Reason for inclusion and application of the credibility of the threat allowed as a defence in Article 1, paragraph 1<sup>ter</sup> and relationship with principal offences.
6. Reason for inclusion and application of the ancillary offences in Article 1, paragraph 2 and their relationship with the principal offences.
7. Reason for inclusion and application of the offence in Article 1, paragraph 2 (e) and its relationship with the principal offences.
8. Application of the definition of 'biological material' in Article 1, paragraph 1.
9. Inclusion of the exception concerning armed forces in Article 4<sup>bis</sup>.
10. Effect of the inclusion of the new mandatory jurisdiction ground and its effect on the Convention, particularly in relation to new offences and the extradition requirement in Article 8.
11. Effect of the inclusion of optional jurisdictional grounds particularly in relation to new offences and the extradition requirement in Article 8.
12. The requirement to establish jurisdiction in relation to the offence relating to air navigation facilities which now applies in Article 5 as a result of the clarification of the definition of 'air navigation facilities'.
13. Inclusion of the fair treatment obligation in Article 7<sup>bis</sup>.
14. Inclusion of the political offence exception in Article 8<sup>bis</sup> and the accompanying safeguards provision in Article 8<sup>ter</sup> and their effect particularly in relation to the new offences.

*The Hague Protocol*

1. Form and objectives of the instrument.
2. Preamble and the objectives of the instrument.
3. Application of the expanded scope of Article 1, paragraph 1.
4. Separation of the threat offence provision from the principal offence in Article 1, paragraph 2 and consideration of the defence based on 'credibility of the threat'.
5. Reasons for inclusion and application of the ancillary offences in Article 1, paragraph 3 and their relationship to the principal offence.
6. Reason for inclusion and application of the offence in Article 1, paragraph 3 (e) and its relationship to the principal offence.
7. Inclusion of the definition of 'in service' in relation to its use in Article 1.
8. Inclusion of the exception relating to armed forces in Article 3<sup>bis</sup>.
9. Effect of the inclusion of two new mandatory jurisdiction grounds and their effect on the Convention, particularly in relation to the expanded scope of the offence in Article 1 and the extradition requirement in Article 8.
10. Effect of the inclusion of optional jurisdictional grounds particularly in relation to new offences and the extradition requirement in Article 8.
11. Inclusion of the fair treatment obligation in Article 7<sup>bis</sup>.
12. Inclusion of the political offence exception in Article 8<sup>bis</sup> and the accompanying safeguards provision in Article 8<sup>ter</sup> and their effect particularly in relation to the new offences.

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13. Inclusion of the obligation to furnish relevant information in Article 10*bis*.

### **Drafting**

#### *The Montreal Protocol*

1. Text of the offences in Article 1, paragraph 1.
2. Inclusion of paragraph 1*ter*.
3. Text of the offences in Article 1(2)(d) and (e).
4. Definition of 'air navigation facilities' in Article 2.
5. The consequential amendments to Article 4, paragraphs (2), (3) and (4) as a result of proposed new offence provisions in Article 1, paragraph 1.
6. Whether paragraphs 4 and 5 in Article 5 should be combined.
7. The consequential amendments to Article 6, paragraph 4 of the Convention as a result of the expanded jurisdiction grounds in Article 5, paragraphs 1 and 2 of the Convention.
8. Consequential amendments in paragraph 4 of Article 8 as a result of the additional jurisdictional ground in Article 5, paragraph 1(e).
9. Consequential amendment to Article 12 of the Convention as a result of jurisdictional grounds in Article 5.

#### *The Hague Protocol*

1. The revised drafting of Article 1, paragraph 1 of the Convention.
2. Text of the offences in Article 1, paragraphs 3(d) and (e).
3. Consequential amendment to Article 2.
4. Addition of the definition of 'in service' to Article 3, paragraph 1.
5. Consequential amendments to Articles 8, 9, 10 and 11 as a result of redrafting of Article 1.

**ACKNOWLEDGEMENTS**

The Rapporteur wishes to express her gratitude to the Secretariat for its assistance and international criminal and aviation law experts who provided advice in the preparation of this report. She also wishes to thank the Australian Attorney-General's Department for enabling her to discharge her functions.

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**ATTACHMENT A****REPORT OF THE RAPPORTEUR ON THE DEVELOPMENT  
OF NEW LEGAL INSTRUMENTS FOR THE SUPPRESSION OF UNLAWFUL  
ACTS AGAINST THE SAFETY OF CIVIL AVIATION****DRAFT****PROTOCOL OF 2007 TO THE CONVENTION FOR SUPPRESSION  
OF UNLAWFUL ACTS AGAINST THE SAFETY OF CIVIL AVIATION**

## THE STATES PARTIES TO THIS PROTOCOL

CONSIDERING that unlawful acts using civil aircraft and unlawful acts against civil aircraft jeopardise the safety of persons and property in the air and on the ground, and undermine the confidence of the peoples of the world in the safety of civil aviation and threatens international and domestic security;

BELIEVING that it is necessary to adopt provisions supplementary to those of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation signed at Montreal on 23 September 1971, and the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Done at Montreal on 23 September 1971 signed at Montreal on 24 February 1988, to deal with unlawful acts using civil aircraft and additional unlawful acts that endanger the safety of international civil aviation;

Have agreed as follows:

**ARTICLE 1****1. The following sub-paragraphs are added to Paragraph 1 of Article 1 of the Convention:**

- (f) uses an aircraft<sup>1</sup> in service to cause death, serious bodily injury, or serious damage to property or the environment;<sup>2</sup> or

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<sup>1</sup> Article 3*bis* of the 2005 SUA Convention uses the formulation 'uses a ship in a manner'.

<sup>2</sup> Article 2 of the Nuclear Terrorism Convention 2005 uses the formulation 'death or serious bodily injury or substantial damage to property or to the environment', Article 2 of the Terrorist Bombings Convention 1997 uses the formulation 'death or serious bodily injury or extensive destruction of such a place, facility or system, where such destruction results in major economic loss.' Article 3*bis* of the 2005 SUA Convention uses the formulation 'death or serious injury or damage' and further defines 'serious injury or damage' as meaning 'serious bodily injury or extensive destruction of a place...(same as TBC formulation) or substantial damage to the environment, including air, soil, water, fauna, or flora'

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- (g) releases from an aircraft<sup>3</sup> in service any toxic chemical, explosive, radioactive, biological, or nuclear material to cause death, serious bodily injury or serious damage to property or the environment; or
- (h) uses against or on board an aircraft<sup>4</sup> in service any toxic chemical, explosive, radioactive, biological, or nuclear material to cause death, serious bodily injury or serious damage to property or the environment.

**2. The following text is added as new paragraph 1ter to Article 1:**

1 *ter*. A person also commits an offence if that person threatens to commit any of the offences in paragraph 1 or an offence in paragraph 1*bis*<sup>5</sup> provided that a State Party may allow a defence based upon the credibility of the threat.

**3. Paragraph 2 of Article 1 of the Convention is amended to read**

- 2. Any person also commits an offence if that person:
  - (a) attempts to commit any of the offences contained in paragraph 1 or 1*bis* of this Article; or
  - (b) organizes or directs others to commit an offence contained in paragraphs 1, 1*bis*, 1*ter* or 2(a) of this Article; or
  - (c) is an accomplice of a person who commits an offence contained in paragraphs 1, 1*bis*, 1*ter*, or 2(a) of this Article; or
  - (d) in any other way contributes to the commission of one or more offences 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 contained 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 contained in paragraphs 1, 1*bis*, 1*ter*, or 2(a) of this Article<sup>6</sup>; or
  - (e) agrees with one or more other persons to commit an offence in paragraphs 1, 1*bis*, 1*ter* or 2(a) of this Article whether or not the offence that is the subject of agreement is itself carried out.<sup>7</sup>

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<sup>3</sup> Article 3*bis* of the 2005 SUA Convention uses the formulation ‘discharges from a ship’.

<sup>4</sup> Article 3*bis* of the 2005 SUA Convention uses the formulation ‘uses against or on a ship’. This would include the situation of a person deliberately infected with biological material coming on board the aircraft to cause death or serious injury to other passengers whilst not necessarily endangering the safety of the aircraft in flight or likely to destroy the aircraft which would be covered by Article 2(c) of the Montreal Convention. The offence would also cover the situation of persons on the ground seeking to use such means to cause death, serious injury etc to persons on board the aircraft.

<sup>5</sup> This formulation is an adaptation from Article 2(2) of the Nuclear Terrorism Convention 2005 and Article 3*bis* of the 2005 SUA Convention. This formulation rather than making “under circumstances which indicate the credibility of the threat” an element of the offence, in the author’s view it is preferable to provide an offence provision that provides a defence concerning the credibility of the circumstances under which the threat was made.

<sup>6</sup> This text is based on Article 3*quater* of the 2005 SUA Convention. Similar provisions are also found in Article 2(3)(c) of the Terrorist Bombings Convention 1997 and Article 2(4)(c) of the Nuclear Terrorism Convention 2005.

<sup>7</sup> This text is a simplified version of that found in Article 5 (1)(a)(i) of the Transnational Organized Crime Convention 2000.

**ARTICLE 2****The following definitions will be added to Article 2.**

(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;<sup>8</sup>

(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;<sup>9</sup>

(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.<sup>10</sup>

(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.<sup>11</sup>

**ARTICLE 3**

**1. Paragraphs (2), (3) and (4) of Article 4 are amended to refer to “subparagraphs (a), (b), (c), (e), (f), (g) and (h)”.**

**2. The following text is added as article 4bis of the Convention:**

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 and international humanitarian law.

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<sup>8</sup> Taken from Article I(1) of the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction 1972. It should be noted that the last part of Article I(1) has been omitted because the intention is to cover biological material that could cause death, serious bodily injury or damage as a result of its use by, on or against civil aircraft. In that situation the quantities required of such material may also be similar to the quantities required for other legitimate purposes. It should be noted that the offence is qualified by the intention to cause death, serious injury or damage.

<sup>9</sup> Definition used in Article II(2) of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction 1993.

<sup>10</sup> Article 1(1) of the International Convention for the Suppression of Acts of Nuclear Terrorism 2005.

<sup>11</sup> Article 1(2) of the International Convention for the Suppression of Acts of Nuclear Terrorism 2005.

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**Attachment A**

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.<sup>12</sup>

#### ARTICLE 4

**Article 5 of the Convention is replaced by the following text:**

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences 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 principal place of business or, if the lessee has no such place of business, his permanent residence, in that State;
- (e) when the offence is committed by a national of that State.<sup>13</sup>

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;<sup>14</sup>
- (b) when the offence is committed by a stateless person who has his or her habitual residence in the territory of that State.<sup>15</sup>

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.<sup>16</sup>

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<sup>12</sup> This text is consistent with the Nuclear Terrorism Convention 2005, the 2005 SUA Convention and the Terrorist Bombings Convention 1997. It has been placed following Article 4 as this provision relates to the application of the Convention. This is consistent with the Nuclear Terrorism Convention 2005 and the 2005 SUA Convention.

<sup>13</sup> This jurisdictional ground is mandatory in the following instruments: Terrorist Bombings Convention 1997, Nuclear Terrorism Convention 2005, Convention on the Physical Protection of Nuclear Material 1980, Terrorist Financing Convention 1999, Hostages Convention 1979 and the 1988 SUA Convention and Fixed Platforms Protocol.

<sup>14</sup> This jurisdictional ground is optional in the following instruments: Terrorist Bombings Convention 1997, Nuclear Terrorism Convention 2005, Hostages Convention 1979 and the 1988 SUA Convention and Fixed Platforms Protocol.

<sup>15</sup> This jurisdictional ground is optional in the following instruments: Terrorist Bombings Convention 1997, Nuclear Terrorism Convention 2005, Terrorist Financing Convention 1999, Hostages Convention 1979 and the 1988 SUA Convention and Fixed Platforms Protocol.

<sup>16</sup> This provision is included where there are optional jurisdictional grounds. Slight variations of this text are in the following instruments: Nuclear Terrorism Convention 2005, Terrorist Bombings Convention 1997 and Terrorist Financing Convention 1999.

4. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences mentioned in Article 1, paragraphs 1 and *1ter*, 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 him pursuant to Article 8 to any of the States mentioned in paragraph 1 or 2 of this Article.

5. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences mentioned in Article 1, paragraphs *1bis* and *1ter*, 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 him pursuant to Article 8 to the State mentioned in paragraph 1(a) or (e), or paragraph 2 of this Article.

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

## ARTICLE 5

### **Paragraph 4 of Article 6 of the Convention is amended to:**

4. When a State, pursuant to this Article, has taken a person into custody, it shall immediately notify the States which have established jurisdiction in accordance with Article 5, paragraphs 1 and 2, and if it considers it advisable, any other interested State of the fact that such person is in custody and of the circumstances which warrant that person's detention. The State which makes the preliminary enquiry contemplated in paragraph 2 of this Article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

## ARTICLE 6

### **The following text is added as article 7bis:**

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.<sup>17</sup>

## ARTICLE 7

1. **Paragraph 4 of Article 8 is amended to read “in accordance with Article 5, paragraph 1 (b), (c), (d) and (e).”**

2. **The following text is added as article 8bis:**

None of the offences mentioned in Article 1, shall be regarded for the purposes of extradition or mutual

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<sup>17</sup> This text is consistent with that in the Nuclear Terrorism Convention 2005, the 2005 SUA Convention and the Terrorist Bombings Convention 1997. This provision was placed following the extradite or prosecute provision consistent with both the Nuclear Terrorism Convention 2005 and the 2005 SUA Convention.

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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.

**3. The following text is added as article 8<sup>ter</sup> to the Convention:**

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 mentioned 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.<sup>18</sup>

**ARTICLE 8**

**Article 12 of the Convention is amended to:**

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

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<sup>18</sup> This text is consistent with the text in the Nuclear Terrorism Convention 2005, the 2005 SUA Convention and the Terrorist Bombings Convention 1997. Both *8bis* and *8ter* were placed consecutively following the extradition provisions. This is consistent with the 2005 SUA Convention. The Nuclear Terrorism Convention 2005 and the Terrorist Bombings Convention 1997 both place this provision following the mutual legal assistance provision however in the Montreal Convention this provision appears somewhat later in the text. In the author's opinion the text therefore should come after the extradition provisions.

**ATTACHMENT B****REPORT OF THE RAPPORTEUR ON THE DEVELOPMENT  
OF NEW LEGAL INSTRUMENTS FOR THE SUPPRESSION OF UNLAWFUL  
ACTS AGAINST THE SAFETY OF CIVIL AVIATION****DRAFT****PROTOCOL OF 2007 TO THE CONVENTION FOR THE SUPPRESSION  
OF UNLAWFUL SEIZURE OF AIRCRAFT**

## THE STATES PARTIES TO THIS PROTOCOL

CONSIDERING that unlawful acts of seizure or exercise of control of aircraft 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 and threaten international and domestic security;

BELIEVING that it is necessary to adopt provisions supplementary to those of the Convention for the Suppression of Unlawful Seizure of Aircraft signed at The Hague on 16 December 1970 to deal with unlawful acts of seizure or exercise of control of aircraft;

Have agreed as follows:

**ARTICLE 1****1. Article 1 of the Convention is replaced by the following text:**

1. Any person commits an offence if that person unlawfully and intentionally seizes or exercises control of an aircraft in service by force or any other form of intimidation.<sup>1</sup>

**2. The following text is added as new paragraph 2 to Article 1:**

2. A person also commits an offence if that person threatens to commit an offence in paragraph 1 provided that a State Party may allow a defence based on the credibility of the threat.<sup>2</sup>

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<sup>1</sup> Paragraph 1 has been amended to focus on the offence of seizing or exercising control of an aircraft. The threat to commit such an offence has been placed in a separate paragraph. The scope of the offence has also been broadened to apply to those aircraft 'in service' to allow for those situations where an aircraft is seized or unlawful control is exercised over it prior to it being 'in flight'. The offence is limited by the chapeau which requires it to be an unlawful and intentional seizure consistent with the formulation used in the Montreal Convention. Formulation of the offence in this way also ensures that the offence of 'threatening to seize an aircraft' is not limited to when an aircraft is 'in flight' nor is it limited to a person on board an aircraft making a threat once the aircraft is 'in flight'.

<sup>2</sup> Separation of the offence of 'threatens to commit...' from paragraph 1 broadens the scope of the Convention and avoids the deficiency in the Hague Convention which only made it an offence if the person who made the threat was on board the aircraft in flight at the time the threat was made. This text is an adaptation from Article 2(2) of the Nuclear Terrorism Convention 2005

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**Attachment B****3. The following text is added as Paragraph 3 of Article 1:**

3. Any person also commits an offence if that person:
- (a) attempts to commit an offence contained in paragraph 1 of this Article; or
  - (b) organizes or directs others to commit an offence contained in paragraphs 1, 2, or 3(a) of this Article;<sup>3</sup> or
  - (c) is an accomplice of a person who commits an offence contained in paragraphs 1, 2, or 3(a) of this Article; or
  - (d) in any other way contributes to the commission of one or more offences 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 contained 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 contained in paragraphs 1, 2, or 3(a) of this Article<sup>4</sup>; or
  - (e) agrees with one or more other persons to commit an offence in paragraphs 1, 2, or 3(a) of this Article whether or not the offence that is the subject of agreement is itself carried out.<sup>5</sup>

**ARTICLE 2**

**In Article 2 of the Convention the word ‘offence’ is replaced by ‘offences’.**

**ARTICLE 3****Article 3 paragraph 1 of the Convention is amended to read:**

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;

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and Article 3*bis* of the 2005 SUA Convention. This formulation rather than making “under circumstances which indicate the credibility of the threat” an element of the offence, in the author’s view it is preferable to provide an offence provision that provides a defence concerning the credibility of the circumstances under which the threat was made.

<sup>3</sup> This offence can be found in Article 2, Terrorist Bombings Convention 1997, Article 2, Terrorist Financing Convention 1999, Article 3*quater*, 2005 SUA Convention, and Article 2, Nuclear Terrorism Convention 2005.

<sup>4</sup> This text is based on Article 3*quater* of the 2005 SUA Convention. Similar provisions are also found in Article 2(3)(c) of the Terrorist Bombings Convention 1997 and Article 2(4)(c) of the Nuclear Terrorism Convention 2005.

<sup>5</sup> This text is a simplified version of that found in Article 5 (1)(a)(i) of the Transnational Organized Crime Convention 2000.

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.

#### ARTICLE 4

**The following text is added as article 3bis of the Convention:**

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 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.<sup>6</sup>

#### ARTICLE 5

**Article 4 of the Convention is replaced by the following text:**

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences 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;<sup>7</sup>
- (b) when the offence is committed 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 on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that State;
- (e) when the offence is committed by a national of that State.<sup>8</sup>

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

- 1. when the offence is committed against a national of that State;<sup>9</sup>

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<sup>6</sup> This text is consistent with the Nuclear Terrorism Convention 2005, the 2005 SUA Convention and the Terrorist Bombings Convention 1997. It has been placed following Article 3 as this provision relates to the application of the Convention. This is consistent with the Nuclear Terrorism Convention 2005 and the 2005 SUA Convention.

<sup>7</sup> This jurisdictional ground is in found in Article 5 of the Montreal Convention and should also be included here to broaden the mandatory jurisdictional grounds in line with the broadening of the scope of the offences in Article 1.

<sup>8</sup> This jurisdictional ground is mandatory in the following instruments: Terrorist Bombings Convention 1997, Nuclear Terrorism Convention 2005, Convention on the Physical Protection of Nuclear Material 1980, Terrorist Financing Convention 1999, Hostages Convention 1979 and the 1988 SUA Convention and Fixed Platforms Protocol.

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2. when the offence is committed by a stateless person who has his or her habitual residence in the territory of that State.<sup>10</sup>

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.<sup>11</sup>

4. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences mentioned in Article 1 where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 or 2 of this Article.

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

## ARTICLE 6

### **Paragraph 4 of Article 6 of the Convention is amended to:**

4. When a State, pursuant to this Article, has taken a person into custody, it shall immediately notify the States which have established jurisdiction in accordance with Article 4, paragraphs 1 and 2, and if it considers it advisable, any other interested State of the fact that such person is in custody and of the circumstances which warrant that person's detention. The State which makes the preliminary enquiry contemplated in paragraph 2 of this Article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

## ARTICLE 7

### **The following text is added as article 7bis:**

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.<sup>12</sup>

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<sup>9</sup> This jurisdictional ground is optional in the following instruments: Terrorist Bombings Convention 1997, Nuclear Terrorism Convention 2005, Hostages Convention 1979 and the 1988 SUA Convention and Fixed Platforms Protocol.

<sup>10</sup> This jurisdictional ground is optional in the following instruments: Terrorist Bombings Convention 1997, Nuclear Terrorism Convention 2005, Terrorist Financing Convention 1999, Hostages Convention 1979 and the 1988 SUA Convention and Fixed Platforms Protocol.

<sup>11</sup> This provision is included where there are optional jurisdictional grounds. Slight variations of this text are in the following instruments: Nuclear Terrorism Convention 2005, Terrorist Bombings Convention 1997 and Terrorist Financing Convention 1999.

<sup>12</sup> This text is consistent with that in the Nuclear Terrorism Convention 2005, the 2005 SUA Convention and the Terrorist Bombings Convention 1997. This provision was placed following the extradite or prosecute provision consistent with both the Nuclear Terrorism Convention 2005 and the 2005 SUA Convention.

**ARTICLE 8**

1. In paragraphs (1) and (3) of Article 8 delete ‘an’.
2. In paragraphs (1), (2), (3) and (4) of Article 8 replace ‘offence’ with ‘offences’.
3. In paragraph (4) of Article 8 insert “Each of” at the beginning of the paragraph.
4. In paragraph 4 of Article 8 the following should be added at the end of the paragraph “(b), (c), (d) and (e).”
5. The following text is added as article *8bis*:

None of the offences mentioned 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.

6. The following text is added as article *8ter* to the Convention:

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 mentioned 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.<sup>13</sup>

**ARTICLE 9**

**Paragraph 1 of Article 9 is amended to read:**

1. When any of the acts mentioned in paragraph 1 of Article 1 has occurred or is about to occur, States Parties shall take all appropriate measures to restore control of the aircraft to its lawful commander or to preserve his control of the aircraft.

**ARTICLE 10**

**In paragraph 1 of Article 10 the word ‘offence’ is replaced by ‘offences’.**

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<sup>13</sup> This text is consistent with the text in the Nuclear Terrorism Convention 2005, the 2005 SUA Convention and the Terrorist Bombings Convention 1997. Both *8bis* and *8ter* were placed consecutively following the extradition provisions. This is consistent with the 2005 SUA Convention. The Nuclear Terrorism Convention 2005 and the Terrorist Bombings Convention 1997 both place this provision following the mutual legal assistance provision however in the Hague Convention this provision appears later in the text. In the author’s opinion the text therefore should come after the extradition provisions.

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**ARTICLE 11**

**The following text is added as Article 10*bis* to the Convention:**

Any State Party having reason to believe that an offence contained in Article 1 will be committed shall, in accordance with its national law, furnish any relevant information in its possession to those States which it believes would be the States mentioned in Article 4, paragraphs 1 and 2.<sup>14</sup>

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<sup>14</sup> This provision is found in Article 12 of the Montreal Convention and updates the Hague Convention to require States to provide information where it believes that an offence will be committed.

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**APPENDIX 4****MONTREAL CONVENTION OF 1971 AS AMENDED  
BY THE AIRPORTS PROTOCOL OF 1988 WITH AMENDMENTS PROPOSED  
BY THE SPECIAL SUB-COMMITTEE OF 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,**<sup>1</sup> 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 likely to cause death, serious bodily injury,**

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<sup>1</sup> Note by the Secretariat: This change may impact Article 4, paragraphs 4 and 5, e.g. paragraph 4 may now have to include a reference to subparagraph (d) since “other systems necessary for aircraft operations” differ from air navigation facilities.

or serious damage to property or the environment; or

- (g) [releases] [discharges] from an aircraft in service any toxic chemical, explosive, radioactive, biological, or nuclear material [or other potentially deadly materials] [or similar substances] in a manner 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 toxic chemical, explosive, radioactive, biological, or nuclear material [or other potentially deadly materials] [or similar substances] in a manner likely to cause death, serious bodily injury or serious damage to property [or the environment].

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 threat,] to commit any of the offences in paragraph 1 or an offence in paragraph 1 *bis*.

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

- (a) attempts to commit any of the offences ~~mentioned~~ set forth<sup>2</sup> in paragraphs 1 or ~~paragraph~~ 1 *bis* of this Article; or
- (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
- (~~b~~c) 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.

<sup>2</sup> Note by the Secretariat: It was pointed out in the Sub-Committee that consistency should be maintained in the draft protocols and the Conventions with regard to use of the term “contained” as proposed by the Rapporteur and “mentioned” used in the original text of both Conventions. Certain UN counter-terrorism conventions employ the term “as set forth”, while the SUA Convention and Protocol use the term “set forth”. The draft consolidated texts at Appendices 4 and 5 currently use the term “set forth”, pending further discussion.

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.]

### 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 subparagraphs (a), (b), (c), ~~and~~ (e), (f), (g) and (h) 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) and (h) 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 ~~set forth mentioned~~ in Article 9 and in the cases ~~set forth mentioned~~ in subparagraphs (a), (b), (c), ~~and~~ (e), (f), (g) and (h) 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.

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5. In the cases contemplated in subparagraph (d) of paragraph 1 of Article 1, this Convention shall apply only if the air navigation facilities 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 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.

#### **ARTICLE 5**

1. Each ~~Contracting~~ State Party shall take such measures as may be necessary to establish its jurisdiction over the offences 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,<sup>3</sup> 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 mentioned in Article 1, paragraphs 1 (a), (b) and (e) 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 or 2 of this Article.

~~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 (e) 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, pursuant to this Article, has taken a person into custody, it shall immediately notify the States mentioned in which would otherwise have jurisdiction in accordance with Article 5, paragraphs 1 and 2, the State of nationality of the detained person—and, if it considers it advisable, any other interested States of the fact that such person is in custody and of the circumstances which warrant his that person's detention. The State which makes the preliminary enquiry contemplated in paragraph 2 of this Article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

<sup>3</sup> Note by the Secretariat: The term "Protocol" needs to be changed if it is eventually decided to adopt the consolidated texts of the Conventions in Appendices 4 and 5. Alternatively, the wording of the SUA Protocol may be used, i.e.: "Any State Party which has established jurisdiction mentioned in paragraph 2 shall notify the [Depositary]. If such State Party subsequently rescinds that jurisdiction, it shall notify the [Depositary]."

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## 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 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. 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 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 required to establish their jurisdiction in accordance with Article 5, paragraphs 1 (b), (c), ~~and~~ (d) and (e).

### 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.

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**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.

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## 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 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.

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**APPENDIX 5****THE HAGUE CONVENTION OF 1970 WITH AMENDMENTS PROPOSED BY  
THE SPECIAL SUB-COMMITTEE OF 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 any other form of intimidation.

2. Any person also commits an offence if that person threatens[, under circumstances which indicate the credibility of the threat,] to commit an offence in paragraph 1.

3. Any person also commits an offence if that person [intentionally]:

(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) is an accomplice of a person who commits an offence set forth in paragraphs 1, 2 or 3(a) of this Article.

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 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.

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 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.

### Article 4

1. Each Contracting State Party shall take such measures as may be necessary to establish its jurisdiction over the offences 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;

~~(e)~~(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<sup>1</sup>, 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.

~~2.4.~~ 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 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

<sup>1</sup> See Note 3 in Appendix 4

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mentioned in paragraph 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, pursuant to this Article, has taken a person into custody, it shall immediately notify the States of registration of the aircraft, the State mentioned in which would otherwise have jurisdiction in accordance with Article 4, paragraphs 1(e) and 2, the State of nationality of the detained person and, if it considers it advisable, any other interested States of the fact that such person is in custody and of the circumstances which warrant his that person's detention. The State which makes the preliminary enquiry contemplated in paragraph 2 of this Article shall promptly report its findings to the said States 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

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rights law.

### Article 8

1. The offences 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. 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 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 required to establish their jurisdiction in accordance with Article 4, paragraphs 1 (b), (c), (d) and (e).

### 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

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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 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 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.



