

January 26, 2010

[PDF Print Version](#)

Volume 15, Issue 3

RELATED ASIL INSIGHTS

[The European Court of Justice Kadi Decision and the Future of UN Counterterrorism Sanctions](#)

[International Convention for the Suppression of Acts of Nuclear Terrorism Enters into Force](#)

[A Conundrum Posed by U.S. Anti-Terrorism Policy](#)

[United States Reconnaissance Aircraft Collision with Chinese Jet](#)

DOCUMENTS OF NOTE

[Convention on the Suppression of Unlawful Acts Related to International Civil Aviation \(Beijing Convention\)](#)

[Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation \(Montreal Convention\)](#)

[Protocol to the Convention for the Suppression of Unlawful Seizure of Aircraft \(Beijing Protocol\)](#)

[Convention for the Suppression of Unlawful Seizure of Aircraft \(Hague Convention\)](#)

[Treaty on the Non-Proliferation of Nuclear Weapons](#)

[Protocol of 2005 to the Convention for the Suppression of Unlawful Acts \(SUA\) Against the Safety of Maritime Navigation](#)

ORGANIZATIONS OF NOTE

[International Civil Aviation Organization](#)

[International Atomic Energy Agency](#)

September 11 Inspired Aviation Counter-terrorism Convention and Protocol Adopted

By [Damien van der Toorn](#)



Introduction

On September 10, 2010, the Diplomatic Conference on Aviation Security, organized under the auspices of the International Civil Aviation Organization ("ICAO"), adopted two new aviation counter-terrorism instruments—the Beijing Convention, replacing the Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation 1971 (known as the

"Montreal Convention"), and the Beijing Protocol, amending the Convention for the Suppression of Unlawful Seizure of Aircraft 1970 (known as the "Hague Convention").^[1]

The new instruments update the existing conventions in light of the September 11, 2001 terrorist attacks and developments in counter-terrorism law over recent decades. The Beijing Convention provides for key new offenses of using an aircraft as a weapon (such as occurred on September 11), using weapons of mass destruction or dangerous substances against, on, or from an aircraft, and transporting dangerous materials. The instruments also provide for new ancillary offenses, expanded jurisdiction, and strengthened extradition and mutual assistance regimes. These developments aim to ensure that a wider range of perpetrators can be brought to justice in aviation-related terrorist or proliferation activities than is currently possible. The instruments are part of a series of UN conventions aimed at combating international terrorism. This *Insight* provides background on the development of these new instruments and describes their key provisions.

Impetus and Process for Review of the Montreal and Hague Conventions

The proposals before the Diplomatic Conference were developed through a review of the Montreal and Hague Conventions in a series of ICAO meetings commencing in 2007 and involving key states. The review was sparked by the September 11 attacks. It concluded that the existing international regime did not cover notable aspects of these attacks—for instance, the use of an aircraft to cause death and destruction; other types of foreseeable terrorist acts, such as the use of weapons of mass destruction onboard, from, or against aircraft; and ancillary offenses, such as organizing or conspiring to commit such offenses.

Copyright 2011 by The American Society of International Law ASIL

The purpose of ASIL Insights is to provide concise and informed background for developments of interest to the international community. The American Society of International Law does not take positions on substantive issues, including the ones discussed in this Insight. Educational and news media copying is permitted with due acknowledgement.

The Insights Editorial Board includes: [Cymie Payne](#), UC Berkeley School of Law; [Amelia Porges](#); and [David Kaye](#),

Delegations also proposed to update the Conventions to take into account developments in international criminal and counter-terrorism law since the 1970s—for instance, to exclude the activities of armed forces from the Conventions' scope, to add jurisdictional grounds, and to insert extradition safeguards.

During these preparatory meetings, Australia, supported by several other states, proposed that the transport of weapons of mass destruction and other dangerous materials by civil aircraft be criminalized. Several states also suggested that providing assistance to fugitives following the commission of an offense be criminalized.

These proposals were referred to the Diplomatic Conference.

Negotiation of the Amendments to the Montreal and Hague Conventions

Seventy-one states attended the Diplomatic Conference.^[2] The negotiations focused on issues that had been most controversial in the preparatory ICAO sessions: inclusion of a transport of dangerous materials offense and addition of a provision excluding the activities of armed forces in armed conflicts from the scope of the Conventions. Other key issues were the inclusion of an offense criminalizing assistance to fugitives and the form of the new instruments. Several of these issues were referred to working groups.

In the transport-of-dangerous-materials working group, the African group and India raised concerns relating to the need to preserve rights under the Nuclear Non-proliferation Treaty^[3] ("NPT"). After extensive discussions, the working group developed a compromise text attempting to balance the concerns of its major members. India still objected, arguing that it considered the text discriminatory against non-parties to the NPT.

The activities-of-armed-forces working group was unable to reach a compromise. The majority of states in this group focused on exempting the activities of armed forces from the scope of the Conventions in favor of international humanitarian law ("IHL"), which would instead govern the conduct of armed forces during armed conflict. However, the Middle East group argued that both the Conventions *and* IHL should apply to this type of conduct. These differing views could not be reconciled. The Middle East group continually blocked consensus on this issue when it was returned to the Conference.

The assistance-to-fugitives working group quickly reached a compromise provision, later unanimously accepted by the majority. Meanwhile, the plenary debated the form of the instruments, with no consensus. After wrapping up the working groups, the Chairman then proposed an overall compromise to the Conference, including new principal offenses (e.g., the transport offense), an exemption for the activities of armed forces, and a new Beijing Convention to replace the amended Montreal Convention. The Middle East group, India, and Pakistan opposed this proposal. The matter proceeded to a vote, where the requisite majority adopted the instruments.

Overview of the Amendments to the Montreal and Hague Conventions

New Principal Offenses

The Beijing Convention includes several new principal offenses. The first criminalizes the use of a civil aircraft to cause death, serious bodily injury, or serious damage to property or the environment.^[4] In other words, using aircraft as a weapon is now a specific offense. This would cover such conduct as flying an aircraft into a building as occurred in the September 11 attacks.

The second new offense criminalizes the releasing or discharging from a civil aircraft any

biological, chemical, or nuclear ("BCN") weapon or explosive, radioactive or similar substances in a manner that is likely to cause death, serious bodily injury, or serious damage to property or the environment. [5]

The third new offense is similar to the second, but specifically criminalizes the use of the same dangerous items *against or on board* a civil aircraft. In this scenario, the target is the actual aircraft and the persons on board, rather than anything outside the aircraft. This is a situation that has occurred with some frequency over the recent years.[6]

A major development is the inclusion of a provision criminalizing the transport of dangerous materials—such as explosive or radioactive material, a BCN weapon, or source or special fissionable material—if proof is shown of specific mental elements in relation to the transport of each type of dangerous material. For instance, the provision makes an individual liable under this offense if the person transported the explosive or radioactive materials *knowing* they will be used for a terrorist purpose, or if the person transported source or special fissionable material *knowing* that they will be used in a nuclear explosive activity. These requirements restrict the scope of the offenses to cover only transport connected with illicit proliferation or terrorism. The changes also preserve the rights of states parties to the NPT, ensuring that state officials are not prosecuted for transporting nuclear materials as permitted by the NPT.[7]

For those not party to the NPT, the offense will apply, except that transport of source or special fissionable material is permitted if done pursuant to a "safeguards agreement" concluded with the International Atomic Energy Agency. This includes comprehensive, as well as voluntary or facility-specific, safeguards agreements.

The rationale for the transport offense is to deter and punish movement of materials of proliferation around the world by air into the hands of state or non-state actors in circumstances that would pose a threat to international peace and security. The offense parallels a similar transport offense contained in the 2005 Protocol to the Convention for the Suppression of Unlawful Acts.[8]

Accordingly, transportation of these materials by sea or air is now an international criminal offense subject to the extradition or prosecution requirements of the Convention.

New Ancillary and Inchoate Offenses

The Beijing Convention and Protocol include several new ancillary and inchoate offenses. They provide that it is an offense to directly or indirectly threaten to commit one or more of the principal offenses,[9] or to organize or direct the commission of an offense.[10]

These provisions are meant to harmonize recent UN counter-terrorism conventions.

In addition, the instruments include a "fugitives offense" which criminalizes any assistance to persons evading investigation, prosecution, or punishment, knowing that he or she has committed one of the offenses or is wanted for prosecution or to serve a sentence.[11] This crime is akin to an "accessory after the fact" offense known to many common law jurisdictions and will help restrict the movement of those seeking to flee states where they may face prosecution. The instruments also incorporate a "conspiracy" or "association de malfaiteurs" offense which criminalizes the planning of an offense in conjunction with others[12]—reflecting both the common law and civil law traditions. This is the first time a UN counter-terrorism convention has included such a provision. It is designed to allow enforcement officers to apprehend and prosecute offenders before terrorist attacks can be carried out.

Expanded Jurisdiction

Both the Beijing Convention and Protocol include nationality of the offender as a mandatory

ground for jurisdiction for states parties.^[13] This will help to expand the extra-territorial scope of the instruments and ensure that a greater number of states parties will have jurisdiction to prosecute or extradite known offenders. The instruments also include optional jurisdiction on the basis of nationality of the victims of offenses.^[14]

Activities of Armed Forces

The Beijing Convention and Protocol exclude from their scope the activities of armed forces during an armed conflict.^[15]

This provision was the most controversial aspect of the negotiations. Essentially, it means that members of armed forces cannot be prosecuted if they undertake an act that would amount to an offense under the instruments. For example, the use of a bomb against a civil airliner by military forces during an armed conflict could not be prosecuted under the Beijing Convention. However, if this conduct amounted to a violation of IHL (because it was not a legitimate military objective), then it could be prosecuted under that body of law.

Extradition Safeguards

The instruments include new provisions aimed at supporting extradition and mutual legal assistance obligations. In particular, none of the offenses can be considered a “political offense” in order to avoid these obligations.^[16] However, no state may be compelled to extradite a person or provide mutual legal assistance if there are substantial grounds to believe that it would lead to prosecution on discriminatory grounds.^[17]

Entry into Force

The Beijing Convention and Protocol will enter into force two months after the twenty-second ratification.^[18]

Implications

The adoption of the Beijing Convention and Protocol is a significant development in international counter-terrorism and aviation law. The new principal offenses combined with the ancillary offenses, expanded jurisdiction, and strengthened extradition and mutual assistance regimes will help to ensure that a range of individuals can be brought to justice for their role in terrorist or proliferation activities—including those who participate before, during, and after such acts. If the instruments are widely accepted, they can help prevent a repetition of the September 11 attacks.

About the Author:

Damien van der Toorn (B.A., LL.B. (Hons.) (UQ), LL.M. (Lond)) is an international lawyer working for the Australian Government. He was a member of the Australia delegation at the Conference. The opinion in this *Insight* is the personal view of the author and does not necessarily reflect the views of the Australian Government.

Endnotes:

^[1] These instruments are available at www.icao.int/DCAS2010.

^[2] See Diplomatic Conference on Aviation Security, Aug. 30-Sept. 10, 2010, *Final Act of the International Conference on Air Law* (Sept. 10, 2010), available at http://www.icao.int/DCAS2010/restr/docs/beijing_final_act_multi.pdf.

^[3] Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161.

^[4] Convention on the Suppression of Unlawful Acts Related to International Civil Aviation art. 1(1)(f), Sept. 10, 2010, available at http://www.icao.int/DCAS2010/restr/docs/beijing_convention_multi.pdf [hereinafter Beijing Convention].

[5] *Id.* art. 1(1)(g).

[6] See, e.g., Anahad O'Connor & Eric Schmitt, *Terror Attempt Seen as Man Tries to Ignite Device on Jet*, N.Y. TIMES, Dec. 25, 2009, available at <http://www.nytimes.com/2009/12/26/us/26plane.html> (discussing the attempted bombing of Northwest Airlines Flight 253 on December 25, 2009).

[7] Beijing Convention, *supra* note 4, arts. 1(1)(i), and 7.

[8] Protocol of 2005 to the Convention for the Suppression of Unlawful Acts (SUA) Against the Safety of Maritime Navigation art. 3, *opened for signature* Oct. 14, 2005, IMO Doc. LEG/CONF.15/21 (entered into force July 28, 2010).

[9] Beijing Convention, *supra* note 4, art. 1(3); Protocol to the Convention for the Suppression of Unlawful Seizure of Aircraft art. 1(2), Sept. 10, 2010, available at http://www.icao.int/DCAS2010/restr/docs/beijing_protocol_multi.pdf [hereinafter Beijing Protocol].

[10] Beijing Convention, *supra* note 4, art. 1(4)(b); Beijing Protocol, *supra* note 9, art. 1(3)(b).

[11] Beijing Convention, *supra* note 4, art. 1(4)(d); Beijing Protocol, *supra* note 9, art. 1(3)(d).

[12] Beijing Convention, *supra* note 4, art. 1(5); Beijing Protocol, *supra* note 9, art. 1(4).

[13] Beijing Convention, *supra* note 4, art. 8(1)(e); Beijing Protocol, *supra* note 9, art. 4(1)(e).

[14] Beijing Convention, *supra* note 4, art. 8(2)(a); Beijing Protocol, *supra* note 9, art. 4(2)(a).

[15] Beijing Convention, *supra* note 4, art. 6; Beijing Protocol, *supra* note 9, art. 3bis.

[16] Beijing Convention, *supra* note 4, art. 13; Beijing Protocol, *supra* note 9, art. 8bis.

[17] Beijing Convention, *supra* note 4, art. 14; Beijing Protocol, *supra* note 9, art. 8ter.

[18] Beijing Convention, *supra* note 4, art. 22; Beijing Protocol, *supra* note 9, art. XXIII.