

# Unlawful Interference under the 2010 Beijing Conventions

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**Abstract:** Following the tragic incident at September 11, 2001, the International Civil Aviation Organization (ICAO) started to modernize existing international conventions concerning unlawful interference against civil aviation. From 30 August to 10 September 2010, a diplomatic conference held in Beijing that led to the adoption of two international measures, namely, "the Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation" (Beijing Convention) and "the Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft" (Beijing Supplementary Protocol). These two international conventions introduce many new acts as an offence, namely: the use of civil aviation for transport, loading and discharge of biological, chemical and nuclear weapons and similar substances; the use of civil aircraft as a lethal weapon to hit financial institutions, the use of biological, chemical or nuclear weapons for attacking civil aircraft; cyber-attacks against air navigation facilities with terrorist purposes.

**Keywords:** The Beijing Convention, aviation security, unlawful interference, civil aviation.

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## I. INTRODUCTION

To this day, many international conventions have been adopted by the international community with the aim of being able to seriously reduce the risks and consequences of the global spread of extremism, violence and terrorism in the national and international levels<sup>1</sup>. From 30 August to 10 September 2010, representatives from more than 80 countries gathered in Beijing under the auspices of the ICAO to sign and ratify two international air law instruments as a uniform and effective legal mechanisms to prevent and fight against unlawful acts<sup>2</sup>. With adoption of the Beijing Conventions, the international community decided to provide a new legal mechanism for preventing, combating and suppressing terrorism and other unlawful acts around the world<sup>3</sup>. The Beijing Conventions were adopted by the different approaches: First, the convention seeks to provide preventive measures in such way that adopted policies leads to precisely detect terrorists before the commission of acts. Second, the Beijing Conventions the same as former international conventions tried to design an efficient legal regime to combat and suppress terrorist acts against civil aircraft through the criminalization of a number of immediate threats to the safety and security of civil aviation.

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<sup>1</sup> Anand, V.K., Terrorism and Security, New Delhi, 1984, pp 19.

<sup>2</sup> Abeyratne, The Beijing Convention of 2010: An Important Milestone in in the Annals of Aviation Security 36 Air and Space Law, Issue 3, 2011, 243–255.

<sup>3</sup> Ramadhani Ally Maleta, Effectiveness of the 2010 Beijing Convention and Protocol in Addressing Aviation Security Threat, A Thesis Submitted in the Fulfillment of the Requirements for the Degree of Master of Laws of the Open University of Tanzania, 2014, 20-25.

## II. DEFINITION OF OFFENCE OF UNLAWFUL INTERFERENCE

One of the most important achievements of the 2010 Beijing Convention must be considered the criminalization of large numbers of illegal acts which are a danger and threat to the safety of civil aircraft. In other words, the Beijing Convention has introduced a wide range of illegal acts as an "offence" and intensified legal framework for bilateral and multilateral cooperation in order to combat and suppress terrorism and unlawful acts against civil aviation. The Beijing Convention broadly creates new principles and specific criminal acts, namely<sup>4</sup>: using civil aircraft as a weapon to cause death, injury or damage, using civil aircraft to discharge biological, chemical and nuclear (BCN) weapons or similar substances to cause death, injury or damage; using BCN weapons or similar substances to attack civil aircraft, unlawful transport of BCN weapons or certain related material, unlawful transport of explosive or radioactive material for terrorist purposes, cyber-attack on air navigation facilities. Article 1 of Beijing Convention enumerates variety numbers of criminal acts against the safety of civil aviation<sup>5</sup>. However, it should be noted that each acts requires at least two elements to be considered as an unlawful interference: firstly, the criminal acts should be committed unlawfully and intentionally; secondly, the criminal acts must be danger for the safety of an aircraft in flight<sup>6</sup>. Article 1(1) (a) of the convention criminalizes an act of violence against a person on board an aircraft in flight<sup>7</sup>. However, any acts of violence against a person on board an aircraft in flight cannot be punishable because the Article continues just those acts are danger for the safety of the aircraft. It should be noted that an act of violence should be performed on board an aircraft in flight. The Beijing Convention does not provide any definition of the crime of unlawful interference against passenger airlines or even the offence of terrorism. In fact, the convention only mentions criminal acts as the offence of unlawful interference, without providing a precise definition of the offence itself<sup>8</sup>.

## III. APPLICABLE SCOPE OF BEIJING CONVENTIONS

The first article of the Beijing convention has tried to solve many of the weaknesses and shortcomings which was in the former international conventions in relation to preventing, combating and suppressing acts of terrorism or other unlawful acts against civil aircraft. From a pragmatic point of view, the adoption of the Beijing Convention shall be considered as a new achievement of the international society to fight against terrorism as a greatest security challenge of the twenty-first century. The convention has explicitly criminalized the use of civil aircraft as a deadly weapon like what happened in a tragic accident on September 11, 2001. It has been rightly observed that the Beijing Conventions implicitly criminalizes an act of terrorism which led to the terrorist attacks of September 11 because it is not far-fetched to see in the future use of the aircraft as a lethal weapon<sup>9</sup>. Article 2 (a) of the convention declares an aircraft should be considered in flight " 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"<sup>10</sup>. In case of a forced landing, this issue will be happen while the competent authorities take over the responsibility for the aircraft<sup>11</sup>. Article 2 (b) of the convention explains the meaning of "in service", as follows<sup>12</sup>:

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 paragraph (a) of this Article

<sup>4</sup> ICAO, Beijing Achievements 2010 diplomatic Conference, pp 1-32.

<sup>5</sup> Article 1, Beijing Convention.

<sup>6</sup> Abeyratne R.I.R., The effects of Unlawful Interference with Civil Aviation on World Peace and Social Order" (1995) 22 Trans. L.J.449

<sup>7</sup> *Ibid*, Article 1 (1) (a).

<sup>8</sup> Alejandro Piera & Michael Gill, will the new ICAO-Beijing Instruments Build a Chinese Wall for International Aviation Security? Vanderbilt journal of transnational law, vol. 47:145, 2014, 200.

<sup>9</sup> K.D. Magliveras, The New Regime in Aviation Security Law and the Al-Qaeda Clause, International Enforcement Report, 27, Issue 3, 2011, 597-598.

<sup>10</sup> Beijing Convention. Article 2 (a).

<sup>11</sup> *Ibid*.

<sup>12</sup> *Ibid*, Article 2 (b).

Articles 1 (2) (a) of the convention penalize an act of violence against person- unlawfully and intentionally-at an airport serving international civil aviation which led to serious injury or death of innocent person<sup>13</sup>. Also, Articles 1 (2) (b) of the convention penalizes and acts of sabotage, damage and destruction of air navigation facilities, airports and aircraft which is not in service<sup>14</sup>. The Article also introduces the disruption in the service of airports as unlawful act if such an act endangers safety and security of that airport.

#### IV. TRANSPORTATION OF NUCLEAR MATERIALS BY AIR

Among other matters under the Beijing Convention can be pointed on the prohibition of the use of civil aircraft for the transport and discharge of biological, chemical, nuclear weapons and nuclear substances such as uranium enrichment, nuclear explosives and radioactive material. The transportation and discharge of nuclear materials for the international community is very significant because nuclear materials have generally the dual-use so that it can also be used for military purposes<sup>15</sup>. As a result, these materials can be highly regarded by terrorists to create lethal weapons and explosives materials in order to achieve their political purposes. In this regard, Article 1 (g) of the convention criminalizes discharges of explosive and radioactive materials or similar substances from an aircraft in service so that this could cause death and injury to person or damage to property and environment<sup>16</sup>. Moreover, Articles 1 (h) of the convention also criminalize utilizing any explosive and radioactive materials or similar substances against or on board an aircraft in service<sup>17</sup>. Articles 1 (i) of the convention broadly penalize " transports, causes to be transported, or facilitates the transport of, on board an aircraft" any explosive or radioactive material, BCN weapon, special fissionable material and so forth<sup>18</sup>. However, the sub-paragraph (1), (2), (3) and (4) restricts this vide result and declares *mens rea* should be existed in criminal acts<sup>19</sup>. For instance, Articles 1 (i) (1) of the convention declares a person who should know explosive or radioactive materials are intended to be used to cause, or in a threat to cause death, injury and damage<sup>20</sup>.

#### V. PRINCIPLE OFFENCE IN THE BEIJING CONVENTION

The Beijing Convention -like other previous international conventions- has criminalized some illegal acts, namely, carried out violent acts against a person on board an aircraft in flight if such act is hazardous for the safety of aircraft<sup>21</sup>; the damaging, destroying or removing civil aircraft in service so that aircraft are not able to fly or be dangerous to the safety of aircraft<sup>22</sup>; places or causes to be placed any special devices or materials in aircraft in service which led to injury, damage, or destruction of civil aircraft so that aircraft is not able to fly or to be hazardous to aviation security<sup>23</sup>; damage or destroy air navigation facilities or interfere in the operational activities of units so that such acts is dangerous to safety and security of civil aircraft<sup>24</sup>; the communicate and send false information about the aircraft's air navigation facilities in a manner that is dangerous to the safety and security of the civil aviation. However, according to provision of the Beijing Conventions of any criminal act shall be composed of two inseparable elements: First, all criminal acts must be committed unlawfully and intentionally. Second, criminal acts should be hazardous per se for the safety and security of civil aircraft. In fact, the convention stipulates that criminal acts cannot actually be considered as an offence, if a criminal act is devoid from any constituent elements of the offence such as illegal and deliberate acts against aviation security<sup>25</sup>.

<sup>13</sup> *Ibid.* Article 1(2) (a).

<sup>14</sup> Beijing Convention, Article 1(2) (b).

<sup>15</sup> Maurice Andem, The Treaty on the Non-Proliferation of Nuclear Weapons NPT: Some reflections in the light of North Korea's refusal to all international inspection of its nuclear facilities, Nordic Journal of International Law, 1995, p 3.

<sup>16</sup> *Ibid.* Article 1(1) (g).

<sup>17</sup> *Ibid.* Article 1(1) (h).

<sup>18</sup> *Ibid.* Article 1(1) (i).

<sup>19</sup> *Ibid.* sub-paragraph (1), (2), (3) and (4).

<sup>20</sup> *Ibid.* Article 1(i) (1).

<sup>21</sup> Beijing Convention, Article 1 (b).

<sup>22</sup> Article 1 (c).

<sup>23</sup> Article 1 (d).

<sup>24</sup> Article 1 (e).

<sup>25</sup> Huang, Jiefang, Aviation Safety through the Rule of Law, First Edition, Wolters Kluwer, p 51.

From the viewpoint of the Beijing Conventions, criminal acts against civil aircraft could just be committed in the situation that all constituent elements of the offence be fully established at the time of commission of the offence. For example, Article 1 of the convention states that performing acts of violence against persons on board an aircraft is considered as a terrorist offence so that offender should be fully punished. On the other hand, the convention also stipulates such criminal acts must be considered as offense if acts of violence committed "unlawfully", "intentionally" and "likely to endanger the safety of that aircraft". In fact, in this section, the convention has sought to decriminalize many criminal acts so that every acts cannot be easily identified as acts of terrorism. On the other hand, the convention seeks to prevent from identification of any criminal acts committed on board an aircraft in flight as acts of terrorism. No need to say that all offences listed in the convention should contain at least two constituent elements of the offence. Actually, the constituent elements of the crime must exist entirely in all criminal acts mentioned the Beijing Convention as an offence. It is important to note that the constituent elements of crime must be divided into two categories: material element of the crime, mental element of the crime. In this regard, material element of the crime can be divided into the criminal conduct and consequences or circumstances. Criminal conduct can be defined as any act or omission that is known as an offense under the Criminal Act and thus can be prosecuted and punished by the justice. Mental element of the crime also can be divided into two categories: intend and knowledge<sup>26</sup>.

The constituent elements of the crime can also be divided in terms of common or specific crime into two categories: common elements and specific elements of crime. With regard to provision of the Beijing Convention, the common elements of the crime can be defined as criminal elements that must exist fully in all the offences listed in the convention. Indeed, this criminal elements must be existed simultaneously in all the offences listed in the convention. It is important to note that specific elements of the crime can be defined as criminal elements that are different in every crime listed in the convention. Based on this classification, common elements of crime in the Beijing Convention included: "unlawfully", "intentionally" and "likely to endanger the safety of that aircraft". The convention also has paid attention to specific elements of a criminal offense listed in the convention. In the Article 1 (a) of the Beijing Convention have been introduced specific elements of the offence such as "performs an act of violence against a person", "on board an aircraft", "in flight".

Therefore, three criminal elements must be existed for the recognition of the offence mentioned in Article 1 (a), otherwise, the acts of terrorism was not happened and actor cannot be prosecuted or punished by rule of law. On the other hand, the offences listed in Article 1 (a) of the convention are fully realized when there is fully the six criminal elements "unlawfully", "intentionally", "a dangerous operation for the safety and security of aircraft in flight", on the one hand, "performs an act of violence against a person", "on board an aircraft" and "in flight" on the other hand. For instance, performing acts of violence against individuals unlawfully and intentionally cannot be punishable, if the aircraft is ready to fly based on the provisions of Article 1 (a) of the Beijing Convention. Moreover, carrying out violent acts against individuals could be criminalized if the criminal act is carried on board an aircraft in flight. It is also clear that mere performing criminal acts of violence against persons cannot be prosecuted and punished by the justice.

The main purpose of Article 1 (b) is to penalize acts of sabotage perpetrated against security of aircraft itself. The destruction should be occurred when an aircraft is in service<sup>27</sup>. Some author observes the notion of destruction in this paragraph referred to "substantial destruction of an aircraft beyond the possibility of rendering it airworthy through repairs"<sup>28</sup>. The notion of "causing damage" in the Article 1 (b) referred to any damage may led to an aircraft incapable of flight or endanger its safety in flight<sup>29</sup>. The specific elements of the offense in Article 1 (b) of the convention included: "destroying an aircraft", "in service", "causing damage to an aircraft", and "the inability of the flight". As matter of fact, the offence mentioned in the above article can be fulfilled undoubtedly if there are the all six common and specific elements of crime such as "unlawfully", "intentionally", "a dangerous operation for the safety and security of aircraft in flight" on the one hand, "destroying an aircraft", "in service", "causing damage to an aircraft", and "the inability of the flight" on the other hand. Indeed, the offenses listed in Article 1 (b) is conceivable, if there is simultaneously general and specific elements of the crime. Therefore, the offenses listed in Article 1 (b) is not happen, if a person destroys an aircraft in service on the ground, or causing damage to the aircraft in service, but there is no danger to the safety and security of

<sup>26</sup> Stefan Barriga and Claus Kress, *Crime of Aggression* Library, Cambridge University Press, 2012, p 694.

<sup>27</sup> The Beijing Convention. Article 1 (b).

<sup>28</sup> *Ibid.* Article 1(1) (b).

<sup>29</sup> *Ibid.*

aircraft. In this regard, the offence mentioned in Article 1 (b) is unprovable if a person cause damage to an aircraft unintentionally.

The main purpose of Article 1(1) (c) is to prevent situations which offender of acts placed explosive substance or other devices in board an aircraft<sup>30</sup>. The terms of "Places or causes to be placed" referred to any dangerous devices or substances which are carried on board by the perpetrator or accomplice of acts directly or indirectly should be considered as unlawful interference<sup>31</sup>. Similarly, the specific elements of the offense in Article 1 (c) included: "placing or causing to be placed any means" and "an aircraft in service". In this section, the convention seeks to prevent from placing any lethal means on the aircraft in service. According to published statistics in connection with terrorist incidents, placing explosives and other lethal materials in passenger aircraft is the most common form of terrorist attacks. By secretly placing explosives on the plane, terrorists could attempt to blow up a jet without any problems. One of the biggest problems the international community in dealing with terrorism is a lack of effective mechanisms to prevent secretly placing explosives in passenger plane. The Beijing Convention tries to solve this problem through the criminalization of placing explosives in passenger plane.

Article 1 (d) of the convention also introduces the specific elements of the offense such as "destroying or damaging to air navigation facilities", interferes with their operation so that they cannot do their responsibility very well. In fact, this article penalise sabotage of air navigation facilities such as airports, towers, radio services and meteorological services<sup>32</sup>. The acts of sabotage also can be occurred with intervention in operation of air navigation facilities so that endanger the safety of aircraft in flight. In this respect, specific elements of the offence in Article 1 (e) is fully described by the convention, included: "communicating and transmitting false information about aircraft", "a person should know this information is incorrect" and "misinformation to be dangerous for an aircraft in flight". Indeed, communication false information with different motivations such as pecuniary gain, political blackmail, social upheaval or practical jokes should be punished if such acts endangers for the safety of an aircraft in flight<sup>33</sup>.

In addition, the convention also considered to be some criminal acts as "offence" such as the use of aircraft in service for criminal purposes, such as harm to individuals or damage to property or the environment<sup>34</sup>; transport or facilitate the transportation of explosives and radioactive materials<sup>35</sup>; perform criminal acts against another person in international Airport<sup>36</sup>; destroy or damage to airport facilities or disruption of airport services in a manner that is dangerous to the security of airports<sup>37</sup>. Article 1 (f) of the convention penalize using an aircraft in service for illegal purposes such as causing death and serious injury to innocent person or causing damage to property and environment<sup>38</sup>. The specific elements of the offense in Article 1 (f) included: "unauthorized and illegitimate use of civil aircraft", "in service" and "to harm people and damage property and the environment"<sup>39</sup>. It should be noted that the Beijing Convention not only criminalizes the use of aircraft in flight as a deadly weapon, but the use of civil aircraft in service for terrorist purposes also considers as an offence. As mentioned earlier, in all cases listed in the convention, general and specific elements of a crime should exist alongside each other so that all of them should be existed in the commission of a criminal act simultaneously.

## VI. ANCILLARY OFFENCE IN THE BEIJING CONVENTION

One of the most important initiatives in the Beijing Convention can be seen in Article 1 (3) (a) (b) where threatening others to commit any of the crimes listed in the convention shall be considered as a crime in terms of the convention.

<sup>30</sup> *Ibid.* Article 1(1) (c).

<sup>31</sup> Abeyratne R.I.R., Aviation Security: Legal and Regulatory Aspects, First Edition, Ashgate Publishing Co. Ltd., 1999, p 321.

<sup>32</sup> Beijing Convention. Article 1(1) (d).

<sup>33</sup> *Ibid.*, Article 1 (1) (e).

<sup>34</sup> Article 1 (f).

<sup>35</sup> Article 1 (i).

<sup>36</sup> Article 1(2) (a).

<sup>37</sup> Article 1(2) (b).

<sup>38</sup> *Ibid.* Article 1(1) (f).

<sup>39</sup> Article 1 (f).



From the point of view of the convention, threatening to commit any of the offenses listed in the convention is considered as a terrorist crime, as well as, providing a situation for any person to receive such a threat so that under special circumstances indicate such threat is credible<sup>40</sup>. The other initiatives of the Beijing Conventions can be seen in article 1 (4) (a) which attempt to commit any criminal offence listed in the convention is considered as an offence *inter alia*, attempts to commit acts of violence against persons on board an aircraft in flight, attempt to destroy or damage an aircraft in service so that an aircraft are not able to fly; attempt to commit subversive activities and sabotage operations in association with an aircraft in service or air navigation facilities, attempt to send false information, attempts to use the aircraft in service to harm persons or damage property and environment, attempts to release or discharge of explosives and nuclear weapons, attempts to transport nuclear weapons or explosives materials.

For the first time in an international conventions any attempt to discharge explosives, biological, radiological materials have been considered as a terrorist crime. Usually, international conventions criminalized the mere transportation of explosives, weapons and ammunition by passenger planes because this type of aircraft is made solely for the transportation of passengers and their goods. Nevertheless, the Beijing Convention with an emphasis on the concept of "attempt to commit a crime" criminalize any attempt -directly or indirectly- for the transportation of explosives by civilian aircraft. In fact, the Beijing Convention expands the scope of prohibition on the transportation of explosives on passenger airlines. The convention also introduce a new number of criminal acts as criminal offence, *inter alia*, organizing or directing others to commit terrorist crimes against civil aviation, or participating in illegal acts against civil aircraft as an accomplice, or cooperation and assistance other individuals to evade criminal investigation, prosecution and punishment so that he/she knows alleged offender has committed acts of unlawful interference.

In Article 1 (4) (b) of the convention also "organizing" or "directing" another person to commit criminal offence considers as an offence<sup>41</sup>. In the past, former international convention were criminalized collaboration, accomplice and assistance in the commission of unlawful acts against civil aircraft, while the Beijing Convention also criminalize assisting another individuals to escape from the criminal justice. Although, it should be noted that the Beijing Convention expressly stipulates collaborator of alleged offender should know that he/she has committed a terrorist offense. The Beijing Convention also require member states to introduce dangerous and deadly acts as an terrorist crime if a person agrees with others to commit illegal acts against passenger aircraft regardless of whether the offence actually committed the crime or merely attempted<sup>42</sup>. This is the first time that an international conventions criminalize "agreeing" with others to commit terrorist acts, regardless of whether the terrorist crime is actually committed or not. Generally speaking, in all conventions before the Beijing Convention, agreeing with others to commit a terrorist crime against passenger planes is not considered as a terrorist crime. However, this innovation of Beijing Convention cannot be considered positive because actually did not provide any criteria to specify agreement or disagreement with others to commit a terrorist act. The Beijing Convention also criminalize the contribution and assistance in any way to commit an unlawful act. As mentioned before, cooperation with others to commit a terrorist act can encompass a wide scope of actions and behaviors such as: giving specific information to terrorists to facilitate the commission of a criminal act, providing financial resources to commit terrorist offences, providing a safe place for hiding terrorists before and after committing the criminal act, encourage terrorists to commit a criminal act, planning terrorist operations, transfers of arms and ammunition from one country to another to commit a terrorist act.

## VII. CONCLUSION

The Beijing Convention has attempted to adopt many preventive policies to prevent terrorist incidents throughout the world. Perhaps for such reasons the convention has criminalized a new number of acts such as "making a threat to commit criminal offences", "causing another person to receive this threat", "attempting to commit any of criminal offences", "organizing or directing another person to commit criminal offence", "attempting to commit any of criminal offences" and "to being accomplice". The Beijing Convention has attempted to eliminate gradually all the weaknesses and shortcomings of former international conventions such as Tokyo Convention, Hague Convention, Montreal Convention and Max Convention. Indeed, the convention provides a situation that reduces terrorist operations against civil aviation throughout

<sup>40</sup> Beijing Convention, Article 1(3) (a) and 1(3) (b).

<sup>41</sup> Beijing Convention, Article. 1(4) (b), (c) and (d).

<sup>42</sup> Article. 1(5) (a).

the world so that there is no safe place in the world for terrorists. This matter can be considered as one of the most important achievements of the convention which provide legal and technical mechanism to prosecute and punish terrorism in whole world.

In fact, an approach of Beijing Convention is greatly valuable because it has limited the scope of terrorist activities through the creation of an international legal and regulatory regime. As a result, the Beijing Convention and Protocol opened a new space in the world to improve the legal and regulatory mechanisms to prevent, combat and suppression of unlawful acts against aircraft and other terrorist activities around the world. In fact, the Beijing Convention would greatly reduce the weaknesses and shortcomings of the former international conventions in the past in relation to preventing, combating and suppression of unlawful acts against civil aircraft and provide a suitable ground for the development of multilateral international cooperation between state parties and the creation of an effective and uniform legal mechanism.

As a result, the main achievements of the 2010 Beijing Convention and Beijing Supplementary Protocol can be summarized<sup>43</sup>: firstly, in both treaties a threat to commit criminal acts is considered as offence itself, if the threat is credible; secondly, in both treaties the conspiracy to commit unlawful acts or its equivalent can be punished; thirdly, assistance of offender of acts to evade investigation, prosecution or punishment is punishable; fourthly, both treaties introduce a criminal liability of legal entity, if the applicable municipal law so provides; fifthly, with regard to jurisdiction a member state should establish jurisdiction if the offender or victim is in its national; sixthly, in both treaties it has been guaranteed a fair treatment in the legal process for the alleged offender; seventhly, in legal process both treaties ban expressly discrimination regarding alleged offender on the ground of race, religion, nationality, ethnic origin, political opinion or gender.

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<sup>43</sup> ICAO, *Beijing Achievements 2010 diplomatic Conference*, pp 1-32.