



International Civil Aviation Organization

LEGAL COMMITTEE 35th SESSION

Montréal, 6–15 May 2013

REPORT

Published by authority of the Secretary General

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REPORT OF THE 35TH SESSION OF THE LEGAL COMMITTEE

Letter of Transmittal

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

I have the honour to submit, in accordance with Rule 46 of the *Rules of Procedure of the Legal Committee*, the Report of the 35th Session of the Legal Committee.



Michael Jennison

Montréal, 14 June 2013

LEGAL COMMITTEE – 35TH SESSION

(Montréal, 6 to 15 May 2013)

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1. Place and Duration

1.1 The 35th Session of the Legal Committee was held at Montréal from 6 to 15 May 2013. The Chairman of the Legal Committee, Mr. Michael Jennison (United States), presided over the Session.

2. Opening addresses

2.1 The meeting was declared open by **the Chairman of the Legal Committee. The First Vice-President of the Council**, Mr. Dionisio Méndez Mayora, welcomed all delegates and observers on behalf of the Council, its President and the Secretary General. He recalled the very proud history of the Legal Committee, established in 1947 during the first Assembly, in the development and codification of international air law. He highlighted that the Legal Committee had prepared the adoption of twenty two international air law instruments, noting in particular the *Convention on Offences and Certain Other Acts Committed on Board Aircraft* signed in Tokyo in September 1963 (Tokyo Convention). The Tokyo Convention, to be the subject of discussions in the current session, is one of the most widely ratified international instruments ever developed under the ICAO auspices, with 185 States parties.

2.2 Even though the Tokyo Convention enjoys nearly universal acceptance, he noted that this instrument is 50 years old which may call for review of its adequacy, especially in light of the significant increase of incidents involving unruly or disruptive passengers on board aircraft. He reminded that, to address this issue, the Council established in 1997 a Secretariat Study Group on Unruly Passengers. In view of the Group's reported work, the Assembly adopted in 2001 Resolution A33-4: *Adoption of National Legislation on Certain Offences Committed on Board Civil Aircraft (Unruly/Disruptive passengers)*, setting forth model legislation. Pursuant to this Resolution, guidance material was developed on the legal aspects of unruly/disruptive passengers, in the form of the Guidance Material on the Legal Aspects of Unruly/Disruptive Passengers (ICAO Circular 288) published in 2002.

2.3 However, as incidents of unruly and disruptive behaviors continued to rise, the Secretariat Study Group on Unruly Passengers was re-activated in 2001 as per the Council's decision. The Group identified a number of legal issues which needed to be addressed by the international community, and recommended that a Sub-Committee of the Legal Committee be established to prepare a draft text to modernize the Tokyo Convention. A report was produced by the Rapporteur and considered by the Special Sub-Committee which met in May and December 2012 and recommended that any amendment to the Tokyo Convention be made through a supplementary protocol, on the basis of a draft text.

2.4 The draft text prepared by the Sub-Committee for consideration by the Legal Committee contains options and brackets as issues remain to be resolved, principally: the State of the Operator and State of landing jurisdictions although it remains undetermined if such jurisdictions should be optional or mandatory; the text does not include a list of offences although proposals were made in this respect. He expressed his high expectations on the work of the Legal Committee and placed great confidence in the Legal Committee in the fulfillment of its tasks. If the draft supplementary protocol prepared by the Committee is deemed sufficiently mature, the next step would be for the Council to convene a Diplomatic Conference to finalize and adopt the text.

2.5 The **Chairman of the Legal Committee** expressed his thanks to the First Vice-President for his clear, complete and concise remarks. He announced that in view of the subject under Item 3 dealing with safety aspects of economic liberalization and Article 83 *bis*, he intended to take up on the second day of the session the related Secretariat paper LC/35-WP/3-2 and appoint a small group to deal with this question which would report to the Committee in the course of the second week.

2.6 He then referred to the principal purpose of the current session, i.e. the proposal to amend the Tokyo Convention of 1963 as unruly passengers were not a foremost consideration 50 years ago. He recognized, with reference to the development of the 2010 Beijing instruments, that acts of unruly behavior were not as consequential as acts of unlawful interference, but noted that they happen more often which required finding reasonable solutions to issues faced, with consensus and attention to ratifiability considering that the underlying treaty, the Tokyo Convention, was widely ratified.

3. Agenda and Working Arrangements

3.1 The Committee adopted the provisional agenda shown in LC/35-WP/1-1. The agenda of the Session as adopted can be found at **Appendix A** to this Report.

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

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

4. Meetings

4.1 The Committee held 16 meetings, all of which were held in open sessions.

4.2 The Secretary of the Committee was Mr. J. V. Augustin, Acting Director of the Legal Affairs and External Relations Bureau (LEB). Mr. B. Verhaegen, Senior External Relations and Legal Officer, and Dr. J. Huang, Senior Legal Officer were Deputy Secretaries. Dr. R. Abeyratne, Senior Legal Officer, Messrs A. Jakob, A. Opolot and C. Petras as well as Ms. M. Weinstein, Legal Officers, were AssistantSecretaries. Other officials of the Organization also provided services to the Committee.

5. Representation of States and International Organizations

5.1 Fifty-six Member States and five international organizations were represented by 152 representatives and observers at this Session of the Legal Committee. The names of the representatives and observers appear in **Appendix C** to this Report.

6. Records of Proceedings

6.1 The Committee **decided** that in application of Rule 45 of its Rules of Procedure, the minutes of the 35th Session need not be prepared.

Agenda Item 2: Acts or offences of concern to the international aviation community and not covered by existing air law instruments

2:1 The Rapporteur, Mr. A. Piera, presented an outline of his report which can be found at Appendix 4 to the Report of the first meeting of the Sub-Committee (LC/SC-MOT). The **Chairperson of the Sub-Committee**, Ms. Siew Huay Tan, then introduced the Reports of the two meetings of the Sub-Committee held in May and December 2012, respectively (LC/SC-MOT and LC/SC-MOT/2) which she noted were summarized in LC/35-WP/2-1 presented by the Secretariat, to which the draft text for discussion was appended.

2:2 Following the above presentations, the Chairman announced that he intended to divide up the discussion in four blocks, namely: jurisdiction; offences; immunity of In-Flight Security Officers (IFSOs); and miscellaneous matters, after general remarks by the delegations.

2:3 All delegations expressed their appreciation for the work done so far and agreed that the draft text presented by the Sub-Committee provided an excellent basis for the discussions. A few delegations advised that their States had domestic legislation in place to fill gaps in the Tokyo Convention, but supported the modernization of the latter instrument as a coherent international regime was needed. Other delegations which did not have such domestic legislation suggested that an international regime would assist in the filling of some gaps in the absence of jurisdiction over foreign offenders on board of foreign aircraft.

2:4 An observer delegation representing the 240 leading scheduled airlines informed that its data indicated disruptive behaviours increasing steadily and constantly since 1963, more particularly during the last five years, currently at an average of one occurrence per 1200 flights. Considering also recent case law questioning the immunity of the aircraft commander, the observer was convinced that the Tokyo Convention had to be modernized in order to deter such anti-social acts, in addition to operational measures to be established by air carriers as presented in LC/35-WP/2-3. As regards the legal aspect of the matter, this delegation referred to its views developed in LC/35-WP/2-2 and mentioned that the work to be accomplished by the Committee was a once in a generation opportunity to modernize the Tokyo Convention and for creating a strong and robust regime.

2:5 A majority of States opined that the addition of new jurisdictions, in particular those of the State of the operator and of the State of landing, would strengthen the regime set up by the Tokyo Convention. A good number of those States would favour mandatory jurisdictions so as to avoid the possibility of unpunished acts, while others would prefer such jurisdictions to be optional, one of them mentioning that its own statistics in fact demonstrated a decrease of unruly behaviours in recent years. A handful of States expressed their doubts about incorporating such jurisdictions, as other possible non-penal avenues to deter disruptive acts had not been sufficiently explored. One State also raised the issue of addressing the matter of concurrent jurisdictions if additional jurisdictions were to be established.

2:6 The temporal issue was also mentioned by several delegations, raising the need to ascertain whether the power principle determining the applicability of the Tokyo Convention when the aircraft is in flight, had to be reconciled with the principle of closed doors when the aircraft commander is in authority.

2:7 As regards the incorporation of a list of offences, it was felt by several delegations that this would enhance the universality of the Tokyo regime. Some of them supported the idea of a generic list or a list limited to most serious offences, while others sought a more specific list. Other delegations were opposed to the idea of a list of offences.

2:8 The issue of IFSOs was commented upon by numerous delegations, some of them questioning the desirability of referring to IFSOs in the Tokyo Convention; it was stated that the status and authority of IFSOs should preferably be addressed at the bilateral level. Conversely, several delegations advocated that the Tokyo Convention should recognize IFSOs who are already referenced in Annex 17 to the *Convention on International Civil Aviation* (Chicago, 1944) and in the *Security Manual for Safeguarding Civil Aviation Against Acts of Unlawful Interference* (Doc 8973) (hereafter ICAO Security Manual), as they are neither crew nor passengers, and that therefore their status vis-à-vis the aircraft commander and their immunity had to be addressed.

2:9 The right of recourse and monetary sanctions were further addressed, raising the issue of compensation for damages associated with the diversion of flights and disembarkation or delivery of offenders, in addition to the need for considering the termination of contracts of carriage with offenders. A number of delegations expressed the need to preserve accepted legal principles such as due process and to prevent arbitrary actions against the unruly passenger.

2:10 Many delegations emphasized the virtually world-wide acceptance of the Tokyo Convention, making it necessary to finding a solution which would add value while not running contrary to the spirit and intent of this globally accepted regime. At the same time, it was generally acknowledged that the issue of unruly passengers had not been at the forefront of the considerations underlying the adoption of the Tokyo Convention 50 years ago. In relation to non-penal measures mentioned earlier, one delegation suggested to incorporate in the contract of carriage provisions addressing the consequences of a breach of discipline on the part of a passenger.

2:11 Referring to the two options presented in relation to **Article III as set out in the Appendix to LC/35-WP/2-1**, the Chairman invited delegations to express their sentiment whether (1) they favoured **State of landing jurisdiction** and (2) whether such jurisdiction should be mandatory or optional. In the given context, the Chairperson of the Sub-Committee explained that the two options differed inasmuch as Option 1 extended the State of landing and the State of the operator jurisdictions in a mandatory way while providing for an option to add the jurisdictions of the State of nationality of the offender/victim and the State of habitual residence. In Option 2 all these grounds for jurisdiction were presented in a way which could render them either optional or mandatory.

2:12 In the ensuing discussion, a large number of delegations favoured the State of landing jurisdiction on a mandatory basis.

2:13 One observer delegation reiterated that the mandatory extension to the State of landing jurisdiction on the treaty level represented the best approach to ensuring that unacceptable behaviour would not go unpunished. This delegation explained that it would still remain at the discretion of the State concerned whether or not to subsequently prosecute. This general sentiment regarding a mandatory extension of the State of landing jurisdiction was echoed by a fair number of delegations who spoke on this point, several of them pointing out that there should be no impunity for grave behaviour affecting the safety of a flight. In the view of these delegations, Option 1 represented the best deterrent against unruly behaviour while Option 2 merely represented the status quo, in light of the fact that in a number of States the national legislators have already expanded the jurisdictional competencies to include the State of landing. One of the proponents of this approach provided examples of two recent cases involving more than 600 passengers and which had caused significant economic consequences for the air carrier involved, partially recouped from the unruly passengers concerned. This delegation stated that the State of landing had the ability to quickly ascertain the facts and gather relevant testimony. This delegation observed that in case Article 3 of the Tokyo Convention was amended, consequential changes to Articles 13, paragraph 5 and Article 16 would

have to be made. This assessment was shared by another delegation. One delegation, which supported Option 1, noted that the State of landing jurisdiction has been established in the 1971 Montreal Convention for the Suppression of Unlawful Acts and other instruments.

2:14 Several delegations did not support mandatory State of landing jurisdiction, one of them expressing serious doubts whether this measure would be proportionate to the perceived gain of deterrence. This delegation also raised the issue as to which law would apply in relation to the offence committed if the State of landing jurisdiction were to be made mandatory. This delegation was of the view that contractual liabilities could function as a meaningful deterrent. This sentiment was echoed by another delegation which opined that general legal principles such as equality before the law and no arbitrariness in law enforcement action could be compromised if the State of landing jurisdiction was made mandatory. In this context, the delegation stated that while certain behaviour could still be regarded as acceptable in one State, it might be completely unacceptable in the State of landing. One of the delegations which was not in favour of expanding the jurisdiction suggested to leave Article 3 of the Tokyo Convention unchanged or at most consider an optional provision only in cases of serious or criminal offences. In the experience of another delegation, the incidents of unruly behaviour involving that State's air carriers were decreasing and for that reason it preferred only an optional new jurisdiction; in case a mandatory State of landing jurisdiction was introduced in the new instrument, it would become necessary to address the problem of concurrent jurisdiction.

2:15 In the view of another delegation, Option No.1 constituted a structural deviation from the Tokyo Convention. In the view of this delegation, the proposed State of landing jurisdiction would be even wider than the original state of registration jurisdiction in the Tokyo Convention as the former also encompassed "acts" and was not confined to "offences". This sentiment was shared by another delegation which expressed the view that Option No. 2, being consistent with the structure of the Tokyo Convention, should be the starting point for discussion. This delegation stated that the State of landing played a key role in addressing the problem, given the transient nature of the offender and the ease of access to evidence. Three other delegations preferred Option No. 2, one of which expressed the view that the State of landing may only have a very tenuous connection to the incident concerned, making it undesirable to compel that State to exercise jurisdiction and deal with the aftermath of the procedures to be observed instead of merely enabling the State to do so.

2:16 In expressing support for Option 1 with respect to the mandatory expansion of the bases of jurisdiction to the State of landing, one delegation stressed that this would close the jurisdictional gap in the Tokyo Convention, that the prosecution of offenders would be facilitated due to immediate access to the offender, and that the effectiveness of the Convention would be universally enhanced. Another delegation, while supporting the foregoing statement, also recognized the reticence of some delegations to support a mandatory State of landing jurisdiction, especially in cases where a State of landing mandated penalties which were more severe than those of the State of nationality of the offender. This last delegation suggested an exception to the State of landing jurisdiction in cases where the State of nationality requests extradition of one of its nationals accused of unruly behaviour. In this delegation's view, there was no discrepancy with Article 16, paragraph 2 of the Tokyo Convention as currently drafted, although some delegations voiced an opposing view. Three delegations agreed that this proposal should be further explored as a way for some States to overcome their reservations with regard to a mandatory State of landing jurisdiction. One delegation noted that Article 13, paragraph 5 of the Tokyo Convention in fact obliges the State taking custody to notify the State of registration and the State of nationality and any other interested State; this delegation further suggested the option of shared jurisdiction with the affected States deciding amongst themselves who would exercise jurisdiction in a given situation.

2:17 Another delegation, informing that it has the State of landing jurisdiction in its domestic law, stressed the importance of a mandatory State of landing jurisdiction while at the same time maintaining the State of registration as the primary jurisdiction in the Tokyo Convention given that it is a fundamental tenet of international aviation law. The State of landing jurisdiction is essential to combatting unruly conduct and rather than being viewed as filling a “jurisdictional” gap, should be viewed as filling an “enforcement” gap. This delegation further opined that those States who have failed to exercise State of landing jurisdiction will probably continue to do so if such jurisdiction is optional, while other States require a mandatory provision in order to implement such jurisdiction in their legislation. This delegation cautioned against confusing mandatory jurisdiction with a State’s discretion to prosecute an alleged offender.

2:18 Two delegations sought clarification from the Secretariat as to what would constitute mandatory and optional jurisdictions and the extent of a prosecutor’s discretion. The Secretary clarified that mandatory jurisdiction would require a State to have legislation empowering it to take jurisdiction, whereas optional jurisdiction would give a State discretion whether or not to enact legislation to take jurisdiction. Whether mandatory or not, those States with a State of landing jurisdiction can always elect not to prosecute any particular case.

2:19 One delegation stated that it could support either option so long as the State of landing jurisdiction is mandatory, without which the efficacy of the modernization of the Tokyo Convention would be undermined. This delegation emphasized the difference between mandatory jurisdiction and prosecutorial discretion further to the Secretary’s clarification above. Another delegation suggested that the “mandatory” versus “optional” terminology be dispensed with so as to overcome differences with regard to jurisdiction and that the emphasis should be placed on empowering a State’s judiciary to consider cases involving unruly passengers.

2:20 One observer delegation, in referring to its LC/35-WP/2-4, supported mandatory State of landing jurisdiction.

2:21 A number of delegations, including those who currently have State of landing jurisdiction in their domestic legislation, supported Option 2 with an optional State of landing jurisdiction citing, among other reasons, that this could be acceptable to more States which would increase the likelihood of ratification. One delegation, in supporting Option 2, pointed out that it may not be economically feasible for many States to implement the State of landing jurisdiction, and that this should be further studied. This same delegation considered that there would be no jurisdictional gap, and that an optional jurisdiction would not result in States of landing disregarding unruly acts with impunity. Another delegation was of the view that there is no jurisdictional gap in the Tokyo Convention in its current form.

2:22 One delegation, supported by two others, noted that it is important to retain the structure of the Tokyo Convention, and that the number of consequential changes to the Convention could potentially increase with the expansion of the bases of jurisdiction.

2:23 The Chairman **summarized** the discussion, noting the overwhelming consensus for the State of landing jurisdiction, and that most of those delegations who supported a State of landing jurisdiction would prefer it to be on a mandatory basis. A few delegations who opposed changes to Article 3 of the Tokyo Convention stated that they could live with an optional State of landing jurisdiction under Option 2. The Chairman noted that there was some support for, and no opposition against, the proposal expressed at paragraph 2:16 with regard to an exception to the State of landing jurisdiction in cases where the State of nationality requests extradition of one of its nationals accused of unruly behaviour, and that this proposal warrants further study. The State of landing jurisdiction would therefore be included in the draft Protocol as a mandatory jurisdiction without square brackets. The Chairman noted that there was little comment on the

Option 1 and Option 2 drafting approaches under Article III of the draft Protocol. However, the view had been expressed that either approach should respect the current structure of, and remain in harmony with Article 3, and he would therefore direct the drafting group to take that into consideration when further examining this issue.

2:24 The Committee thereafter considered the **State of the operator jurisdiction**. A large number of delegations supported the State of the operator as a mandatory jurisdiction given the increasing number of leased aircraft in today's world, a situation which did not exist in 1963, and which is underscored by the data provided in LC/35-WP/2-2. One delegation noted the example of aircraft being registered in EU countries for legal and economic reasons, with the State of the operator being virtually unknown to especially, passengers, which would vitiate in favour of a State of operator jurisdiction for legal certainty and to reflect modern reality. One delegation stressed that should the State of the operator jurisdiction be accepted, that either Article 16 of the Tokyo Convention would need to be consequentially adjusted, or a provision could be added whereby the State of registration would transfer some powers to the State of the operator consistent with Article 83 *bis* of the Chicago Convention. An observer delegation, in supporting a mandatory State of the operator jurisdiction, reiterated the points cited in its paragraphs 2.7 to 2.11 of LC/35-WP/2-2.

2:25 Several delegations could opt for either a mandatory or optional State of the operator jurisdiction. Of those delegations cautioning against the State of the operator jurisdiction, one deferred to its comments with regard to the State of landing jurisdiction, citing the problems associated with the State of the operator being included in an international legal instrument, its effect upon a relationship determined by civil law, and the consequent problems which could arise in civil law States with large leasing companies. Another delegation averred that imposing a mandatory obligation upon States to take on the State of operator jurisdiction is an intrusive measure and should only be resorted to when other avenues have been exhausted. That being said, this delegation could live with either the optional State of operator jurisdiction under Option 2, or alternatively could entertain the possibility of the Tokyo Convention reflecting operation of aircraft by ownership or by lease which would not necessarily entail an expansion of jurisdiction.

2:26 Upon further discussion of the jurisdiction of the State of the operator, many delegations held the view that the legal framework should reflect the development of industry practice. Accordingly, the Tokyo Convention should be amended to establish such a jurisdiction mandatorily. Other delegations believed that the establishment of such a jurisdiction should be on an optional basis. Some delegations were of the view that the issue of the jurisdiction of the State of the operator was not as obvious as that of the State of landing. Nothing was said to demonstrate that the establishment of such a jurisdiction was necessary to address the issue of unruly passengers. It was not considered proportional to introduce changes in the legal system to deal with matters which have not been proven to be caused by a lack of jurisdiction. Moreover, the expansion of jurisdiction does not necessarily result in an increase of the prosecution of unruly passengers. One delegation cautioned that Article 3, paragraph 3 of the Convention does not prohibit the establishment of other jurisdictions in accordance with national law. Any new provision establishing jurisdiction on an optional basis may be mistakenly interpreted as narrowing down the effect of that paragraph.

2:27 The Chairman **summarized** the discussion by stating that there had been general support for the inclusion in the draft Protocol of a provision concerning the jurisdiction of the State of the operator. The majority considered that such a jurisdiction should be established on a mandatory basis. Accordingly, the provisions relating to such a jurisdiction should be presented without square brackets. At the same time, it would be mentioned in the report of the Committee that some delegations had expressed reservation on this issue.

2:28 The Committee then considered **other grounds on jurisdiction**, including territorial jurisdiction, the jurisdiction of the State of the nationality of the victims or alleged offenders, as well as the State of habitual residence of the alleged offenders.

2:29 With respect to territorial jurisdiction, one delegation stated that it should be explicitly mentioned in the draft Protocol. Others believed that in the context of unruly passengers, emphasis should be placed on the State of registration, State of landing and State of the operator. As for territorial jurisdiction in general, there was no indication of any problem in actual practice.

2:30 A number of delegations supported the optional jurisdiction of the State of the nationality of the victims or alleged offenders. One delegation reiterated that Article 3, paragraph 3 had encompassed all optional jurisdictions. As a result, no further reference to optional jurisdiction was warranted.

2:31 In view of the small number of delegations which intervened on these issues, the Chairman proposed and the Committee **agreed** that the provision concerning the jurisdiction of the State of nationality be put in square brackets and referred to the Drafting Committee for further formulation. With respect to territorial jurisdiction and the jurisdiction of the State of habitual residence, it was agreed that no reference was necessary as support was not indicated.

2:32 In this connection, the Chairman announced that the **Drafting Committee** was composed of the following States: Australia, Brazil, Canada, Congo, France, Jamaica, Japan, Lebanon, Nigeria, Republic of Korea, Singapore, the United Arab Emirates, and the United States. The International Air Transport Association (IATA) and the International Union of Aerospace Insurers (IUAI) were invited as observers. The delegate of Australia would chair the Committee.

2:33 One delegation mentioned that Article 4 of the Tokyo Convention only refers to criminal jurisdiction, whereas the draft Protocol refers to administrative penalties.

2:34 In the case of multiple possible jurisdictions, and in order to ensure appropriate coordination among different legal systems, it was suggested to add the following Article 3 *bis* to the draft Protocol:

“If a Contracting State exercising its jurisdiction under Article 3 has been notified, or has otherwise learned, that one or more other Contracting States are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, those Contracting States shall, as appropriate, consult one another with a view to coordinating their actions.”

2:35 Several delegations supported this addition, stating that this could alleviate certain concerns relating to overlapping jurisdictions. One delegation proposed to replace “as appropriate” with “be encouraged to” in order to provide certain flexibility to States. It was pointed out that most of the offences covered were less serious in nature and would not involve the cumbersome procedure of extradition.

2:36 As there was no opposition to this draft provision, the Committee decided to refer it to the Drafting Committee with a view to producing more refined text, if necessary.

2:37 The Committee then discussed the **possible offences** to be covered by the draft Protocol. The Chairperson of the Sub-Committee explained that a list of offences was initially considered by the Sub-Committee for the purpose of providing common denominators for the extension of the jurisdiction of the State of landing and the State of the operator. Upon further consideration, the Sub-Committee found it very difficult to agree on the contents of such a list. Eventually, the Sub-Committee decided not to include the list of offences but proposed by majority to add Article 15 *bis* to the Tokyo Convention as follows:

- “1. Each Contracting State shall ensure that the following acts are made punishable by appropriate criminal or administrative penalties when committed by a passenger on board an aircraft in flight:
- (a) physical assault or a threat to commit such assault against a crew member;
 - (b) refusal to follow a lawful instruction given by or on behalf of the aircraft commander for the purposes set out in Article 6, paragraph 1(a) or (b).

2. Nothing in this Convention shall affect the right of each Contracting State to introduce, according to its national legislation, appropriate penalties in order to punish other unruly or disruptive acts committed on board by passengers.”

The majority in the Sub-Committee believed that subparagraphs (a) and (b) above were a description of conduct rather than a list of offences.

2:38 Supporting the above statement of the Chairperson of the Sub-Committee, one delegation stated that Article 15 *bis* was designed as a compromise between those who preferred and those who did not prefer to have a list of offences. It was noted that due to different cultural overtones, standards of behaviour varied from one State to another. Article 15 *bis* could serve to demonstrate that certain disrespectful acts against crew members are not internationally tolerable. The text of Article 15 *bis* was drafted in such a way as to avoid duplication with the provisions of other conventions. This view was endorsed by a number of delegations, which mentioned that acts having negative impacts upon the safety of aircraft or of persons on board ought to be punishable.

2:39 Another delegation was opposed to any effort to turn the Tokyo Convention into another criminalization instrument; it was stated that Article 15 *bis*, in substance, is a list of offences. The Tokyo Convention had stood the test for 50 years and had been integrated into various national laws. It should not be changed without caution because of the concern over unruly behaviour. The description of unacceptable acts on board aircraft could be provided through guidance material, such as an updated ICAO Circular 288. This delegation further noted that the contents of Article 15 *bis* would at least partially overlap with the provisions of the existing conventions adopted under the auspices of ICAO. For instance, physical assault in paragraph a) may overlap with Article 1, paragraph 1 a) of the *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation* (Montreal, 1971), and that of the *Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation* (Beijing, 2010). If the list of offences was to be included in the Protocol to amend the Tokyo Convention, then a number of safeguard provisions would also need to be incorporated, such as a clause excluding the application of the Convention to military activities. This delegation was supported by a number of other delegations.

2:40 One delegation expressed its reservations about the need for the proposed Article 15 *bis* to the draft Protocol to the Tokyo Convention. The delegation indicated that it shared the same concern raised earlier: that is, that the offences described in Article 15 *bis* overlap with those already covered by the Montreal Convention, Beijing Convention, and the *Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft* (Beijing, 2010). Noting that many of the delegations that took the floor earlier had indicated that the conduct described in Article 15 *bis* was already criminalized under the provisions of their national legislation, the delegation further opined that the issue of unruly passengers, which the Article 15 *bis* was ostensibly intended to address, is one of a failure by States to exercise jurisdiction when an offence occurs, not one of a failure by States to criminalize particular offences.

2:41 Another delegation singled out three shortcomings with the proposed Article 15 *bis*. First, the delegation stated that the Tokyo Convention was a part of a system of instruments, including the 1971 Montreal Convention, the 2010 Beijing Convention, and the 2010 Beijing Protocol, which already addresses the conducts described in Article 15 *bis*. Second, it was noted that because the elements of criminal offences vary according to national law, Article 15 *bis* would not achieve international uniformity. Third, the delegation averred that since no list will be exhaustive, there will inevitably be offences left off; it would therefore be better not to include such a list.

2:42 One delegation observed that insofar as the proposed revised Tokyo Convention would extend jurisdiction over offences and certain other acts committed on board aircraft to the State of landing and the State of the operator, the issue of whether this expanded jurisdiction would apply to the offences described in Article 1 or the offences described in Article 15 *bis* or both, needed to be addressed. Second, the delegation emphasized that although Article 15 *bis* mandates certain acts be made punishable by either appropriate criminal or administrative penalties, not all States employ so-called “administrative penalties” in this manner; therefore, clarification was needed on the types of administrative penalties that were to be expected. Third, the delegation observed that “physical assault or a threat to commit such assault against a crew member” was already encompassed within the offences covered by the 2010 Beijing Convention and, thus, the adoption of Article 15 *bis* would create overlap between a revised Tokyo Convention and the Beijing Convention with respect to these offences. Finally, the delegation referred to the formulation of paragraph 1(b) of the proposed Article 15 *bis* and suggested that in order to justify inclusion of this text the requirement of risk to the safety of the aircraft should be made clear. The delegation proposed the following revised text:

- a) refusal to follow a lawful instruction given by or on behalf of the aircraft commander for the purposes set out in Article 6, paragraph 1 a) or b), *and likely to endanger the safety of the aircraft.* (emphasis added)

2:43 The Chairman highlighted the regime of civil (administrative) penalties in place in the United States. He further noted what he believed was an “underutilization” of administrative penalties in ICAO guidance materials, but at the same time questioned whether a revised Tokyo Convention was the appropriate vehicle for promoting the use of civil penalties.

2:44 One delegation noted that while the States which supported a list of offences in the draft Protocol generally sought harmonization and reciprocity of treatment with respect to those offences, the information provided by all delegations who had spoken in response to the Chairman’s request suggested that criminalization of the acts listed in the proposed Article 15 *bis* was to a great extent already harmonized due to the establishment of these offences in States’ national laws. This delegation expressed understanding with the position of those States that did not want to turn a revised Tokyo Convention into a “criminalization Convention.” In light of this, the delegation tabled a new compromise proposal with the following elements:

- a) Redraft Art 15 *bis* to read along the following lines:

“Each Contracting State is encouraged to ensure that any person who commits an offence or act referred to in Article 1 paragraph [1]/ [1(b)], in particular, that which jeopardizes the safety of the aircraft or persons or property therein, is appropriately punished by criminal or administrative sanctions.”

- b) that the Legal Committee recommends that the Diplomatic Conference, if/when convened, adopts a resolution calling upon ICAO to update Circular 288 with, if necessary, the support of, for example, an *ad hoc* group created from among the States

participating in the Diplomatic Conference, to include a list of unruly acts commonly occurring on board aircraft and which States Parties should consider criminalizing under their national laws.

2:45 In response, one delegation expressed misgivings about the discussion of specific draft text in the Plenary session and proposed the formation of a small “Friends of the Chairman” Group to work on the matter. The delegation further suggested that reference to administrative penalties in the proposed Article 15 *bis* address the diversity of legal systems among States. The delegation further opined that the purpose of the proposed Protocol is to deal with unruly passengers and not all conduct of unruly passengers rises to the level of threatening the safety of the aircraft, so the purpose of the Protocol will not be achieved with the revised text previously put forth.

2:46 The Chairman suggested that going forward further discussion should center on the overarching question of whether or not the character of the draft instrument should be changed to address the criminalization of certain acts or behaviours.

2:47 Other delegations offered varying opinions, with some generally favouring the inclusion of Article 15 *bis* (or something like it), a few opposing inclusion, and still others favouring revising the text along the lines that had proposed in paragraph 2.44 above, or even removing it from the draft Protocol and instead including it in a revision to ICAO Circular 288. Notably, more than one delegation took the floor to suggest that the text of Article 15 *bis* be changed so that it applied to “persons” on board the aircraft, as opposed to just “passengers”.

2:48 In **summarizing**, the Chairman submitted that on the fundamental question of whether or not the character of the draft instrument should be changed to address the criminalization of certain acts or behaviours (i.e., through the inclusion of Article 15 *bis* or something like it), there was no consensus among the delegates either way. He averred that this was perhaps an appropriate outcome since the question of the fundamental character of the instrument was not *per se* a legal question but a policy one; he further advised that, as such, the text of Article 15 *bis* would be submitted to any eventual diplomatic conference for a decision.

2:49 The Committee **agreed** to create a small group to consider improvements to draft Article 15 *bis* but not the fundamental question of whether or not Article 15 *bis* should be included in the text of the draft Protocol, composed of the following delegations: Argentina, China, Columbia, Ecuador, France, Jamaica, Japan, Singapore and IATA, to be chaired by Jamaica.

2:50 Having concluded discussions on Article 15 *bis*, the Chairman then called for a round of general statements on the topic of **IFSOs**. The statements offered by delegations in this regard were varied. One delegation suggested that including the issue of IFSOs demanded a new, separate instrument. Three other delegations advanced the notion that IFSOs were a modern reality and that if the Committee were to produce a revised Tokyo Convention that failed to mention IFSOs, it could not reasonably be considered a “modernization” of the instrument.

2:51 Some delegations took this opportunity to present views on specific topics related to IFSOs; for example, two delegations urged that IFSOs should only act pursuant to the request and authority of the pilot-in-command (PIC). Another delegation took the opposite view, suggesting that the IFSO’s authority was complementary to, not subservient to or in conflict with PIC authority. With this in mind, this delegation averred that an IFSO, charged by his government with overseeing the law enforcement response to incidents on board the aircraft and needing a degree of autonomy to respond as necessary to mere disturbances to good

order and discipline with the potential to escalate into unlawful interference, needed the authority to take unilateral action (i.e., without a request or authorization from the PIC).

2:52 Several delegations were opposed to the inclusion of provisions on IFSOs in the Tokyo Convention on the basis that their activities, including their respective authorities and immunities, are already provided for under bilateral or multilateral arrangements between States. One delegation proposed that it would be more appropriate for matters regarding IFSOs to be regulated in a separate international instrument other than in the Tokyo Convention. Another delegation, supported by another, proposed that the issue of IFSOs be included on the work programme of the Legal Committee so that it could be considered distinctly and independently of the Tokyo Convention.

2:53 Several delegations stated that they had established bilateral arrangements with other States or enacted domestic legislation in relation to IFSOs. Some delegations stated that they had not encountered any difficulties in the implementation of their IFSO programme that could require the formulation of further provisions in an international instrument such as the Tokyo Convention.

2:54 Several delegations could support the inclusion of provisions on IFSOs in the draft Protocol provided that they are consistent with Annex 17 and restricted to cover only acts of unlawful interference and did not include a duty to maintain good order and discipline aboard aircraft. A number of delegations saw the need to consider further the role of IFSOs with some noting that this role was limited in their States only to intervening in the most serious cases such as hijacking and terrorism. Concern was expressed that an expanded role for IFSOs to deal with minor cases could expose their presence on board thereby compromising the secret or covert nature of their deployment. Several delegations that could accept the inclusion of provisions on IFSOs, if the majority of delegations so desired or if they had to make a choice, favoured the text contained in Option 2 of Article IV as set out in the Appendix to LC/35-WP/2-1. While some delegations saw the need to define acts of unlawful interference, other delegations felt that they are adequately defined in Annex 17.

2:55 Delegations that supported the inclusion in the Tokyo Convention of provisions relating to IFSOs expressed the view that IFSOs could not be properly classified as passengers or crew. Those delegations argued that IFSOs have a special status different from that of a passenger or crew member by virtue of their training and rules of engagement and being government employees who are not subject to the chain of command applicable to crew members. Another delegation clarified that the inclusion of IFSOs in the Tokyo Convention would not mean that they had absolute immunity as they would be required to act reasonably.

2:56 The Chairman proposed that, following the conclusion of general statements, the consideration of the item would continue with delegations addressing the **status and scope of functions of the IFSOs, their immunities, and definitions**, in that order. The Chairman while noting that there was no consensus yet on whether IFSOs should be recognized in the Tokyo Convention indicated that several delegations were opposed to it while others could accept it depending on how the provision is formulated. At the same time, a substantial majority could support the inclusion of a provision on IFSOs on the basis that this would be a recognition of the status quo that is relevant as part of updating the Tokyo Convention. Furthermore, a clear majority expressed a preference to consider the text in Option 2. The Chairman noted further that from the information that had been provided to the Committee by several delegations, many States specify the duties of IFSOs and their operations subject to bilateral and sometimes multilateral arrangements. He proposed that therefore the way to address the question of the scope of functions could be to determine whether IFSOs should be prevented by the amended convention from assisting in maintaining good order and discipline on board aircraft.

2:57 One delegation, citing the difficulty it had with agreeing with what the Chairman had expressed as the preponderance of opinion on the recognition of IFSOs in the Tokyo Convention, proposed to call for a vote in order to conclusively determine the majority view on whether to include IFSOs or not.

2:58 The Chairman concluded that a substantial number of delegations had expressed support for further consideration of the matter, and that the appropriate way to determine the status of opinion was to continue with the discussion of the issues.

2:59 One delegation reiterated its request for clarification on what duties and responsibilities would be assigned to the IFSOs and the framework in which they would perform them. In responding, one delegation explained that each State had the discretion to decide the scope of duties and responsibilities it wanted, whether it would be a broad scope mandating a response to any crimes committed on board aircraft or a narrow scope restricted only to certain acts or offences. This delegation explained further that the framework for the execution of these responsibilities could be set up in three different layers, namely, in domestic legislation, bilateral or multilateral arrangements, and an international instrument such as the Tokyo Convention. This delegation expressed its preference for the broadest scope of responsibilities to be provided in an international instrument thereby allowing different States the flexibility to opt for the most ideal scope that would apply to IFSOs entering into that State.

2:60 At the request of one delegation, the Chairperson of the Sub-Committee informed the Committee that the Sub-Committee, at its last meeting, while noting that the use of IFSOs had increased over the years, concluded that consideration should be given to including them in the Tokyo Convention. However, the Sub-Committee had not taken a decision, but there was a consensus that this issue be referred to the Legal Committee in the form of two optional texts in square brackets as reported in paragraph 8.5.6 of the Report of the meeting.

2:61 One delegation noted that IFSOs were not foreseen when the Tokyo Convention was adopted. IFSOs were therefore being treated as passengers and thus not adequately protected for action taken without the authorization of the PIC. Accordingly, the delegation stated that it favoured giving IFSOs much needed recognition and protection. The Chairman noted that it is for each State to decide for itself whether to have an IFSO program and the scope of the IFSO's duties; the first question for the Committee was whether and/or to what extent a revised Tokyo Convention should address IFSO duties and responsibilities.

2:62 In the discussion that followed, most of the delegations that took the floor supported the notion that IFSO duties and responsibilities should be addressed in the draft Protocol; however, there was disagreement as to what the IFSO's role should be. For example, one delegation proposed that an IFSO's duties and responsibilities should include maintaining good order and discipline on the aircraft in flight; a second delegation suggested that the IFSO's duties and responsibilities should be viewed more narrowly so as to allow IFSO intervention only to stop conduct that would jeopardize the safety of the flight; while a third delegation would narrow the role of the IFSO even further, such that the IFSO's purpose was to prevent "unlawful interference" as defined in Annex 17 to the Chicago Convention. Upon seeing no further requests, the Chairman offered a **preliminary summary** of the discussion, wherein he suggested that the prevailing view was that Tokyo modernization required acknowledgement of the existence of the IFSO as a particular category of actor on board the aircraft and that most States favoured a restrictive use of IFSOs in accordance with Annex 17.

2:63 As regards "immunities" of the IFSO, one delegation urged the Committee to focus not on "immunities" *per se*, but on "protections"; the delegation argued that IFSOs should have the same protections afforded to the pilot, crew, and passengers when they act within the scope of their duties; i.e., to deal with serious threats to aircraft safety. The delegation further emphasized that a revised

Tokyo Convention must recognize the existence of the IFSO as a separate category of actor on board the aircraft. This position was generally echoed by the handful of remaining delegations that took the floor on this issue.

2:64 The Committee noted a suggestion that the word “protection” may be preferable to “immunities” as the latter may convey a wrong impression.

2:65 Various views were presented on whether the primary role of IFSOs was to take reasonable measures against an act contemplated in Article 1, paragraph 1, of the Tokyo Convention (Option 1) or to protect aircraft against acts of unlawful interference with civil aviation (Option 2) as reflected in draft Article IV of LC/35-WP/2-1 which suggests a possible revision of Article 6 of the Tokyo Convention, by adding a new paragraph 3 to the provision. Several delegations reiterated their support for Option 2, which admitted of an IFSO taking reasonable measures in the case of an act of unlawful interference. They were also of the view that this option should also apply to Article 10 of the Convention and that Articles 6 and 10 should be read in parallel and both provisions should be considered together for amendment. One delegation suggested that the scope of the IFSO’s duties should be extended to cover, in a generic sense, the safety of aircraft endangered by willful unlawful conduct. Other delegations were of the view that an IFSO’s responsibility should be restricted to responding to acts of unlawful interference.

2:66 It was noted that definitions of an IFSO and an act of unlawful interference already existed in Annex 17 to the Chicago Convention, linking the responsibilities of the IFSO to acts of unlawful interference. The Committee also noted that mention of unlawful interference is made in other ICAO documents as well the *International Civil Aviation Vocabulary*, Volumes I & II (Doc 9713) and ICAO *Security Manual*. However, some delegations were of the view that the term “unlawful interference” would have to be defined, as the definition contained in Annex 17 does not mesh with the concept of an IFSO on board an aircraft in flight.

2:67 With regard to protection to be offered to the IFSO, opinion was divided, where some delegations supported protection while others were of the view that IFSOs were to be treated like any other person who would be required to take responsibility for their acts and that the rule of law should prevail. It was noted that, if the former view were to prevail, it might be necessary to address the issue whether, in the absence of responsibility of the IFSO, the carrier concerned could be held responsible. One delegation was of the view that since aviation crosses many cultures and boundaries, the conduct of IFSOs may have to be viewed accordingly.

2:68 In the context of the discussions, one delegation raised the issue of the “go around” phase of the flight and invited the Committee to address the issue, along with possible definitions related to the legal status of IFSOs, their duties and responsibilities. In this regard, the Chairman was requested to establish a special working group to work toward bringing clarity to these undefined areas. Another delegation suggested that the Committee consider the manner in which Articles 6 and 10 of the Convention work together and that since the term “in flight” was redefined in the Beijing Convention taking the original definition appearing in The Hague Convention, it may now be necessary to introduce the notion of “in flight” in the work of the Committee. This delegation also pointed to Article 6, paragraph 2 of the Tokyo Convention which provided that any crew member or passenger may also take reasonable preventive measures without authorization of the aircraft commander when he has reasonable grounds to believe that such action is immediately necessary to protect the safety of the aircraft, or of persons or property therein, and suggested that the word “reasonable” may have to be clarified in the context of its applicability under the Convention with regard to civil and criminal law.

2:69 The Chairman stated that the inter-relation between the IFSO and the term “in flight” could be considered when the Committee addressed all definitions. With regard to the request for a special working group to be established to provide clarity on definitions and “in flight”, the Chairman was concerned that there would not be adequate time for such a group to complete its work and submit its report for consideration by the Committee.

2:70 Upon the request of several delegations, that a special working group be established to work toward bringing clarity to undefined areas, it was decided by an overwhelming majority of votes that such a group would be established.

2:71 In his **summary** the Chairman stated that as there was no consensus on the issues discussed and he had to rely on a preponderance of opinion on the following issues:

- a) IFSOs are to be included in a separate and special group which reflected the status quo;
- b) the definition of IFSO should be as close as possible to the definition in Annex 17 to the Chicago Convention;
- c) the scope of functions of IFSOs with respect to unlawful interference should be narrowed;
- d) IFSOs should be involved in the safety of aircraft and passengers on board;
- e) States should be able to authorize their IFSOs to respond to threats to good order and discipline on board; and
- f) IFSOs should have at least the protection given to passengers on board.

2:72 The Chairman announced the composition of the **Friends of the Chair Working Group on IFSOs** as follows: Argentina, Canada, Chile, China, Colombia, France, Jamaica, Japan, Lebanon, Mexico, the Russian Federation, Singapore, South Africa, United Arab Emirates and the United States, to be chaired by France. The mandate of the group was to specify in greater detail the roles and functions of IFSOs.

2:73 The Chair of the **Friends of the Chair Working Group on the reformulation of Article 15 bis** presented the group’s report which is attached as **Appendix D** to this Report. The group made two recommendations in an effort to achieve harmonization: first, a re-draft of Article 15 *bis* for the reasons stated in its report, and second, that a Diplomatic Conference, if/when convened, adopt a resolution calling upon ICAO to update Circular 288 to include a list of unruly acts commonly occurring on board aircraft and in respect of which States would be encouraged to take criminal or administrative action under their national laws. With regard to the first recommendation, the Chair of the working group highlighted the salient points behind the group’s re-draft of Article 15 *bis*, namely, to prevent overlap between the offences in the draft Article with those in other aviation security instruments; to achieve a compromise between those States which prefer a list of offences and those which do not; and to replace the obligatory language in the Article’s chapeau with permissive language in order to encourage States to initiate criminal or administrative proceedings especially for those offences and acts mentioned in paragraphs 1 a) and b). The Chair clarified that the group opted to maintain “crew member” over “any person” at paragraph 1 a) so as to preserve a link with the safety impact to civil aviation. With regard to the second recommendation, the group decided not to categorize the six proposed offences for Circular 288, deferring instead to the internal legislation of States to do so.

2:74 The Chairman of the Legal Committee requested comments on the impact and formulation of the group’s revisions to Article 15 *bis*. One delegation opposed the inclusion of paragraph 1 of Article 15 *bis* in the Tokyo Convention, and supported the removal of the square brackets from paragraph 2

in order to maintain the discretion of States to introduce, according to their national legislation, appropriate penalties/measures to punish unruly or disruptive acts committed on board an aircraft. One delegation stated that it supported in substance the re-formulation but queried whether the expression “is encouraged to” in the chapeau to paragraph 1 is usual terminology in treaties, and suggested that the word “may” would be more appropriate. Another delegation suggested that the words “or the crew” be inserted after “the aircraft commander” at paragraph 1 b) to clarify who gave the instruction. It was understood that the text of Article 15 *bis* as re-formulated by the Group would be referred to the Drafting Group for consideration, which would also take into account the abovementioned drafting proposals.

2:75 There was no opposition to the second recommendation, with one delegation suggesting a tightening of the language in relation to disruption of peace and quiet / disturbance of any person on board, so as to avoid capturing, for example, waking someone up in order to exit one’s seat. In response to one delegation seeking clarification on the procedure contained in the second recommendation, the Chairman, in consultation with the Secretary, confirmed that the Committee would recommend to the ICAO Council that the Diplomatic Conference should adopt a resolution calling upon ICAO to update Circular 288.

2:76 One delegation, supported by another, wishing to re-visit the issue of jurisdiction, expressed deep concern with regard to the Committee’s approach thus far of maintaining certain provisions in square brackets where there had been no consensus, for example the provisions on IFSOs and Article 15 *bis*, while the square brackets had been removed from other provisions which also had no clear consensus, that is with respect to the mandatory State of landing and State of the operator jurisdictions. This delegation requested that the square brackets be put back for the mandatory jurisdiction and that the optional jurisdiction be re-introduced, also in square brackets. The supporting delegation further emphasized the importance of optional jurisdictions in order for States to have flexibility in the introduction and implementation of these jurisdictions and to better enable a new instrument to be successful and widely ratified. This delegation stressed that putting both options in square brackets is a point of order and a question of consistency in the work of the Legal Committee.

2:77 The Chairman responded to the above-mentioned concern and stated that where there was a preponderance of support in one direction, as was the case with the key mandatory State of landing and State of the operator jurisdictions, he had ruled that the square brackets be removed in order to progress the issues and to demonstrate to the Council that the Committee had made progress. The Chairman further stated that it was late in the proceedings to re-open substantive issues and his preference was not to re-open the discussion or to put back the square brackets. The proposing delegation, while not wishing to re-open the discussion, wanted it on record that it could not agree with submitting mandatory State of landing and the State of the operator jurisdictions to a Diplomatic Conference, and that both the mandatory and optional draft provisions should be submitted in square brackets with a view to improving the likelihood of successful negotiations at the Conference.

2:78 The Chairman then asked the Chairperson of the Sub-Committee to present the subject of **restitution and recourse as embodied in Article 18 *bis*** at Article VII of the draft Protocol. In referring the Committee to paragraph 8.6 of the Report on LC/SC-MOT/2, the Chairperson pointed out that a number of Sub-Committee members were of the view that draft Article 18 *bis* could serve as a deterrent to unruly behaviour, while others felt that the Tokyo Convention was not the appropriate place to address this issue and that such a provision could in fact violate the rights of passengers, such as the right to continue their journey under Article 15 of the Convention. The Chairperson noted that paragraph 1 of draft Article 18 *bis* is a discretionary provision in that an operator “shall not be precluded” from recovering damages, which is contingent on the law of the jurisdiction of a State which must allow for such action. Paragraph 2 is somewhat obligatory in that when a contract of carriage is terminated in accordance with national law, the

operator shall not be liable for any damages sustained by that person as a result of the termination of the contract of carriage following disembarkation/delivery.

2:79 The delegations were divided in their views on draft Article 18 *bis*, paragraph 1. Of those who supported its inclusion, one delegation, in referencing Article 37 of the Montreal Convention of 1999, proposed adding the wording “pursuant to provisions contained in national legislation as contained in paragraph 2”. Another delegation, in supporting the previous delegation, stated it could in fact live with mandatory language in paragraph 1 given that an action which is not specifically prohibited would be permitted in Latin American civil law jurisdictions. Another delegation supported paragraph 1 with great conviction to ensure the best possibility of success in operators’ actions against unruly passengers and to avoid that recourse provisions in contracts of carriage be struck down as abusive by courts. This delegation, along with several others, stressed the importance of having the possibility of such recourse in an international legal instrument which would carry more weight. Several delegations expressed their support for paragraph 1 as being just and fair.

2:80 One observer, supported by another observer, in citing the reasons expressed in LC/35-WP/2-2, paragraphs 5.1 to 5.4, opined that although the right of recourse against unruly passengers may be covered in an operator’s contract of carriage, that this right was not always effective due to the differences in domestic law and in contractual interpretation.

2:81 Of the delegations that opposed the inclusion of Article 18 *bis*, paragraph 1, one delegation viewed the paragraph as a “solution in search of a problem” in that it did not see clear evidence of a concrete problem which could not be successfully addressed elsewhere, i.e. preferably in the contract of carriage. Several delegations shared this view, some further stressing that the matter would be more appropriately handled by a State’s domestic law. In contemplating this reasoning, a delegation which had supported inclusion of the provision during the LC/SC-MOT/2, stated that it could accept its deletion. One delegation stated that Article 18 *bis* was unnecessary for the purposes of its jurisdiction given that its courts would, in any case, sanction compensation for damages, subject to the accused’s exoneration.

2:82 In his **summation**, the Chairman, in pointing out that the views on Article 18 *bis*, paragraph 1 were evenly divided, directed that they be maintained in square brackets.

2:83 The Committee thereafter considered draft Article 18 *bis*, paragraph 2, pertaining to the termination of the contract of carriage.

2:84 A number of delegations stated that they favoured the inclusion of a clause giving the carrier the right to terminate the contract of carriage, two of them expressing the view that the clause should remain optional by using the word “may”. One of the delegations which supported the inclusion stated that the contract of carriage should be terminated in the event of an unplanned landing due to a serious offence. One observer delegation stated that the air carrier should be automatically released from the obligation to transport the unruly passenger to his onward destination unless the national law provided for the contrary; it called for this treaty-based stipulation in order to prevent denied boarding claims. Another observer stated that airlines should not be civilly responsible for complying with their public law obligations.

2:85 A fair number of delegations expressed their reluctance to incorporate the clause into the Tokyo Convention. They regarded this to be an issue of contract law and freedom to contract, best left to be addressed in the contract or conditions of carriage. One of these delegations expressed the sentiment that there existed already now no bar under the Tokyo Convention to end the contract of carriage in accordance with its terms. One delegation, positing that in most cases an unruly passenger would be restrained and transported to the intended destination, expressed the view that the State where a diverted aircraft landed should not be burdened with the costs of arranging the onward journey of the person concerned. It relation to

this latter point, it was explained that the decision whether or not to divert an aircraft ultimately vested with the aircraft commander.

2:86 In his **summary** on this subject, the Chairman noted that the opponents to the inclusion of the clause outnumbered the supporters by a fair margin. It was thus **decided** to suppress draft Article 18 bis, paragraph 2.

2:87 The Committee thereafter turned its attention to the **definition of the term “in flight”** found in Article II of the Appendix to LC/35-WP/2-1. In this context, the Chairperson of the Legal Sub-Committee recalled that the current Tokyo Convention contained two different definitions of the term (one in Article 1, paragraph 3 and one in Article 5, paragraph 2) and that the proposed definition utilized the wider expression taken from Article 5, paragraph 2, of the Tokyo Convention.

2:88 In the ensuing discussion, one delegation observed that in line three of the proposed text the expression “of this Chapter” would need to be substituted in order to ensure that the definition applied for the whole Convention. This point was echoed in other interventions, and it was decided to refer this matter to the Drafting Committee on the understanding that there was otherwise no opposition regarding the inclusion of the definition.

2:89 As regards the proposals for the definition of **“State of the operator” and “State of registration”**, several States expressed the view that the definitions were not needed, two of them stating that the Tokyo Convention had left these expressions undefined with no problems encountered. Other delegations were of the opinion that that an inclusion of these definitions would be useful, in particular as it relates to the “State of the operator”. In light of the opinions expressed, the Committee **agreed** to retain the proposed definitions regarding the two terms in square brackets.

2:90 The Chairman of the **Friends of the Chair Working Group on IFSOs** presented the Group’s report containing the rationale for the inclusion of provisions on IFSOs in the Tokyo Convention and drafting recommendations in relation to the role and functions, legal protection and definition of IFSOs as set out in **Flimsy No. 1** (attached hereto as **Appendix F**).

2:91 The Committee was informed by the Chairman of the Group that there was broad agreement in the Group for the inclusion of IFSOs in the Tokyo Convention in order to identify them as a specific category of traveller, enjoying the same level of protection as crew members and passengers, whilst taking preventive measures for safety in terms of Articles 6 and 10 of the Tokyo Convention. Furthermore, it was understood that varying approaches and practices were applied by different States in the implementation of their IFSO programmes in accordance with bilateral or multilateral arrangements or agreements among the States concerned. However, with regard to the definition of IFSOs, the Group arrived at a multiplicity of options as it was evenly divided on the desirability of specifying the purpose of having IFSOs and including a definition of “unlawful interference”. Some delegations favoured a reference to Annex 17 and others to bilateral and multilateral agreements or arrangements between States while others saw no need for a definition at all.

2:92 The Chairman of the Committee, while acknowledging the very helpful report provided by the Group, noted that, as the Group was divergently constituted, the same climate of opinion that prevailed within the Group was likely to apply in the Plenary. In light of that assessment and as there was not enough time to solicit the position of all the delegations on each of the conclusions on the report, the Chairman proposed that delegations limit their interventions only to views as to whether the report accurately reflected the climate of opinion in the Group.

2:93 With regard to the text proposed by the Group on the **role and functions of IFSOs**, one delegation, supported by another delegation, proposed that as there were two clear options and delegations could indicate their preference or support for either option by a show of hands. An overwhelming majority of the Committee supported Option 2, namely, to add the words “in-flight security officer” between the words “crew member” and “or passenger” in Article 6, paragraph 2 of the Tokyo Convention. In response to queries raised by some delegations, the Chairman clarified that, in expressing preference for a particular option, delegations had merely indicated generally and not definitively what positions they could support. He noted further that there was not a detailed discussion of the Group’s report due to lack of time. States therefore remain at liberty to raise issues and propose alternative formulations of text to the Diplomatic Conference.

2:94 In relation to the provision on **legal protection for IFSOs**, the Committee **accepted** the Group’s recommendation to add the words “any in-flight security officer” between the words “any passenger” and “the owner or operator of the aircraft” in Article 10 of the Tokyo Convention. One delegation reiterated its position not to support any amendment to Article 10 as all parties concerned, including IFSOs, are adequately protected if they take reasonable measures.

2:95 The Committee, while noting the multiplicity of options and the clarification by the Chairman of the Group that some States could support more than one option, **agreed** to adopt and refer to the Drafting Committee the comments and recommendations of the Group on the **definition of IFSOs** to be included in Article 1 of the Tokyo Convention. The Chairman clarified further that the Drafting Committee’s consideration would not include Option B of paragraph 3 b) which was not favoured by most delegations although this point was later altered, as described in paragraph 2:101 below.

2:96 One observer supported by one delegation invited the Committee to consider its drafting proposal to amend Article 10 in order to clarify the **scope of immunity** that would apply to the aircraft commander in light of a court decision that indicated that it may not be adequate for the aircraft commander to rely solely on the reports of the cabin crew. The observer noted that this could cause operational uncertainty as the aircraft commander could not leave the cockpit to make a further assessment of the situation in the cabin. The observer saw the likelihood that courts in the future could interpret inaction by the States on this proposal as a tacit acceptance of the interpretation by that court.

2:97 One delegation, supported by another delegation, noted that it did not see any difficulty for its courts to interpret and apply the reasonableness standard as specified in Articles 6 and 10.

2:98 The Chairman noted that the Sub-Committee had unequivocally concluded that there was no need to change the wording in Articles 6 or 10 of the Tokyo Convention with regard to the immunity of the aircraft commander and that the observer’s proposal had not been supported by at least two States. He accordingly **ruled that** the drafting proposal on this matter would not be carried forward.

2:99 The Chairman thereafter announced there were two major items for the Committee to consider: (i) consideration of the report of the Drafting Committee; and (ii) consideration of the question of whether the draft Protocol is mature enough to refer to the Council with a recommendation to convene a Diplomatic Conference.

2:100 When the Committee resumed, one delegation raised a point of procedure about the prior discussion when the Committee had considered text proposed in the “Friends of the Chair” (FC) Working Group’s report (Recommendation A) relating to the roles and functions of IFSOs. Specifically, the delegation questioned the procedure whereby the Chairman had called for a show of hands to gauge support for alternative provisions on IFSOs that were contained in the report without affording delegates the

opportunity for further discussion of the matter in the Plenary. The delegation made it clear that it did not wish to reopen discussions on the matter, but rather wanted to ensure that its concerns were reflected in the record of the proceedings.

2:101 The Chairman indicated he would consider the delegation's point of procedure and consult with the Secretariat and, after a short recess, announced his ruling. To wit, the Chairman acknowledged an inconsistency in the way the Committee handled FC Recommendation A versus other substantive issues considered under Agenda Item 2, insofar as the matter was decided on a show of hands without substantive discussion of what was indeed two newly formulated alternative texts. As a solution, he proposed that Recommendation A be treated in the same way as Recommendations B and C. That is, the Committee would accept the FC's recommendation that the newly formulated competing proposals continue in the text of the draft Protocol in brackets, and reflect in its report the weight of opinion on the two competing formulations as expressed in both the report of the FC, which would appear as an appendix to the report of the meeting, and in the show of hands taken during the Plenary.

2:102 There were no objections to the Chairman's proposed resolution to this point of procedure, though one delegation expressed its concurrence with the point of procedure and acceptance of the Chairman's proposed amended summary.

2:103 The Chairman announced that the Committee would next consider the **report of the Drafting Committee** (LC/35-WP/2-6).

2:104 The Chairman of the Drafting Committee presented the Drafting Committee's report, with certain editorial changes.

2:105 The Chairman of the Drafting Committee further noted that a number of States represented in the Drafting Committee expressed the desire to voice concerns about the draft Protocol as proposed.

2:106 The Chairman of the Committee commended the capable work of the Drafting Committee and proposed an article-by-article, paragraph-by-paragraph review of the text of the draft Protocol on issues of drafting. The Chairman urged delegates to focus their attention on whether the instructions of the Plenary to the Drafting Committee had been given effect in the proposed draft Protocol.

2:107 The Chairman then called for comments concerning Article I of the draft Protocol and, noting no requests for the floor, declared Article I **adopted**.

2:108 The Chairman next called for comments concerning Article II of the draft Protocol. One delegation urged that more information on the concerns of States represented in the Drafting Committee should be provided, while a second delegation noted the fact that whereas Article II of the draft Protocol uses the term "State of registration", the Chicago Convention uses the term "State of registry" and questioned whether the Chicago Convention's wording might be preferable.

2:109 The Chairman then called for comments specifically concerning Article II, paragraph 3 a), of the draft Protocol. On this point, a number of delegations questioned the appropriateness of provisions of the draft Protocol that had been adapted from other existing agreements, such as the 2010 Beijing Convention definition of "in-flight" and Tokyo Convention verbiage on "forced landing". The Chairman noted that the concerns of these delegations were substantive issues that should be appropriately addressed at the subsequent Diplomatic Conference. Three other delegations noted that there were drafting and/or translation issues with the French, Chinese, and Arabic translations of the Drafting Committee's Report and offered to submit proposed edits to the Secretariat in each of their respective languages.

2:110 One delegation argued that the phrase “deployed on an aircraft, pursuant to a bilateral or multilateral agreement or arrangement” in Article II, paragraph 3 b), of the draft Protocol, was problematic insofar as it could be interpreted to mean that a bilateral or multilateral agreement or arrangement between States could override provisions of a revised Tokyo Convention. The Chairman suggested that the delegation’s concern was a quasi-drafting, quasi-substantive one, and so proposed that the matter be referred to any subsequent Diplomatic Conference for resolution.

2:111 Lastly, one delegation proposed that the phase “the government of the State of the operator or the government of the State of registration” in the second line of Article II, paragraph 3 b), should be amended to read “the government of the State of the operator and/or the government of the State of registration” shown in square brackets, since consistent with Annex 17 the agreement of both parties to the presence of an IFSO on board the aircraft is needed. Here again, the Chairman suggested the delegation’s concerns were substantive in nature and should therefore be taken up at any subsequent Diplomatic Conference.

2:112 The Committee **accepted**, without comment, the proposals of the Drafting Committee in **Article II**, paragraphs **3 c) and d)** with respect to the definitions of “State of the operator” and “State of registration” respectively.

2:113 The Committee then proceeded to consider **Article III** of the draft Protocol relating to jurisdiction. One delegation citing the need for consistency with paragraph 1 and the chapeau to paragraph 1 *bis* of Article III, proposed drafting amendments to paragraph 1 *bis* of Article III, namely, to delete the words “offence or act” wherever they appear in sub-paraphars a), b) and c) of paragraph 1 *bis* and replace them with “offences and acts”. The proposal was not supported by any other delegation and was therefore not taken further.

2:114 Three delegations intervened to place on record their reservations on the issue of mandatory jurisdiction for the State of landing and the State of the operator provided in Article III. The Chairman called for the forbearance of delegates to desist from reiterating positions that had previously been made and would be duly recorded in the report of the Committee. Such matters could be raised at a Diplomatic Conference when convened. He reminded the delegates that jurisdiction is a crucial part of the draft Protocol and therefore that a high degree of importance would be attached to ensuring that the text relating to such a provision is not taken forward in square brackets. He assured all delegations that the Report dealing with this issue would highlight what transpired in the deliberations of the Committee and the weight of opinion attached to each position.

2:115 One delegation cited difficulties it had with the provision in paragraph 2 *ter* relating to jurisdiction based on nationality due to the specific circumstance of multiple nationalities prevalent in its State. The Chairman noted that this should not be a matter of major concern as there had been a consistent treatment of States with quasi sovereign entities within them, in various treaties. The Committee **accepted** Article III of the draft Protocol without any changes.

2:116 With respect to **Article IV** of the draft Protocol, one delegation, while noting that the proposal in Article 3 *bis* relating to coordination among States with concurrent jurisdiction was a new one that had not been reflected in the report of the Sub-Committee nor sufficiently considered by the Committee, proposed that it be placed in square brackets as there had not been enough time for delegations to consult on this. This delegation, supported by other delegations, indicated that it could support the retention of the provision if it was reflected in a non-prescriptive manner by the use of the word “may” rather than “shall”. Delegations that preferred the more permissive text felt that the prescriptive wording would make consultations obligatory and could thereby infringe on the sovereignty of States or constrain States that had

to act expeditiously to apply penalties in order to enable the offender to proceed with the journey. One delegation indicated that similar wording to that in Article IV of the draft Protocol was found in other treaties such as the *2000 UN Convention against Transnational Organized Crime*.

2:117 The Chairman of the Drafting Committee, supported by other delegations, explained that the inclusion of the words “as appropriate” was intended to allay concerns that some delegations had about the prescriptive formulation of the provision. The Chairman pointed out that simply deleting the words “as appropriate” and leaving “shall” in square brackets could have the unintended effect of limiting the discretion of States. The Committee **accepted** Article IV with the words “may” and “shall” respectively reflected in square brackets before the words “as appropriate”.

2:118 One delegation, citing the need for consistency, called for the words “offences or acts” in Article 3 bis to be reflected in square brackets as was the case with other related provisions in the draft Protocol. The proposal was not supported by any other delegation and was therefore not taken further.

2:119 In consideration of **Article V** of the draft Protocol, one delegation queried whether the complete deletion of paragraph 2 in Article 5 to the Convention could affect other provisions in the Convention. The Chairman of the Drafting Committee acknowledged the merit of this observation and suggested further study of the consequences of such deletion. The Committee **accepted** retention of Article V without changes and asked to highlight in the Report the need for further consideration to be given to the unintended consequences of the deletion of this paragraph particularly those words related to Chapter III of the Convention.

2:120 With respect to **Article VI** of the draft Protocol which contains only one of the two options presented by the Friends of the Chair Working Group on IFSOs on provisions relating to the role and functions of IFSOs, the Chairman reminded the Committee of the earlier decision to include both options and accordingly instructed the Secretariat to reinsert the omitted option in the draft Protocol.

2:121 The Committee turned to the consideration of the text in paragraph 2 of Article 6 in Article VI proposed by the Drafting Committee. The Chairman of the Drafting Committee drew the attention of the Committee to the words “in-flight security officer” that had been inserted in the second line of the first sentence while noting that while this was proposed to the Drafting Committee it was not decided by the Plenary and did not have universal support.

2:122 One delegation which supported the addition of those words stated that the aircraft commander should have the ability not only to request but also to authorize the IFSO to restrain an unruly passenger.

2:123 One delegation, supported by several other delegations, called for the deletion of the words in the first sentence as they would raise substantive policy issues regarding the enhancement of the role of the IFSOs that had not been examined by the Committee. The Committee **accepted** Article VI of the draft Protocol with the addition only of the words “in-flight security officer” in the second sentence of paragraph 2 to Article 6.

2:124 The Committee **accepted** Articles **VII, VIII, IX and X** of the draft Protocol without changes. One delegation reiterated the need, in respect of Article IX on restitution, to confirm the policy position that this provision was not intended to fetter national courts.

2:125 Following the discussion above, the Committee **agreed** on the text of the draft Protocol which is set out in **Appendix G** to this Report.

2:126 The Chairman thereafter invited the Committee to give its assessment whether the draft Protocol can be regarded “as ready for presentation to the States as a final draft” in the context of the Procedure for Approval of Draft Conventions set out in Assembly Resolution A7-6.

2:127 By consensus, the Committee agreed that the draft instrument was sufficiently mature and concluded that the text was ready for transmittal to the Council as a final draft for presentation to States and, C-WP/14034, paragraph 2.1.6 ultimately, to a Diplomatic Conference. The delegations which spoke on the subject noted that the Committee had taken decisions on uncontroversial matters while successfully narrowing down and providing clear options regarding those limited elements were consensus was not yet attainable. These delegations considered the remaining open issues as policy matters which should be taken up by the Diplomatic Conference.

2:128 It was further recognized that the Committee’s work had succeeded in making the issues better understood and the Committee invited to promote an enhanced knowledge of the instrument and the issues involved through regional legal seminars, with a view to facilitating the involvement of States which did not participate in this Session of the Committee.

Agenda Item 3: Consideration of other items on the General Work Programme of the Legal Committee

3:1 The Secretariat introduced LC/35-WP/3-2-Revised which reported on the status, and assistance with the implementation, of Article 83 *bis* of the Chicago Convention, in particular, the development by ICAO of guidance material to assist States with implementation, the revelation under the ICAO Universal Safety Oversight Audit Programme (USOAP) that 68% of the States Parties to Article 83 *bis* have not modified their primary aviation legislation, regulations and procedures to account for transfers of duties and responsibilities as envisaged by the Article, the low number of registered Article 83 *bis* agreements with ICAO, and the raising of this item's priority by the ICAO Council to No. 3 on the General Work Programme of the Legal Committee. The Committee was invited to consider the working paper and endorse three conclusions: first, States whose constitutional systems in principle require high-level authority for signing agreements under Article 83 *bis* should consider the possibility of signing umbrella agreements to provide for delegation of authority at lower level for concluding such agreements; second, while Article 83 *bis* implementing agreements must be registered with ICAO, third states may be officially advised of any agreement by any State Party to such agreement by way of direct notification as per paragraph b) of Article 83 *bis*; and third, given ICAO's progressive establishment of its Aircraft Registration System (ARS) and Air Operator Certificate (AOC) system which should prove useful to accurately identifying the respective State of registry and State of the operator for specific aircraft, consideration should be given to the possible utility of an electronic interface between those systems and the database of aeronautical agreements and arrangements (DAGMAR).

3:2 The Chairman proposed to establish a **small group to deal with the safety aspects of economic liberalization and Article 83 *bis*** with a mandate to consider the working paper and its conclusions. The group, which would meet when the plenary and drafting groups are not in session, would report to the Committee during the second week of the Session. The Chairman named the group as follows: Canada, France, Jamaica, the Netherlands, Nigeria, Singapore, South Africa, the United States and IATA; it would be chaired by Mr. J. Thachet (Canada). The Chairman stressed that this was not a closed group and invited other delegations and observers to participate.

3:3 The Chairman of the Working Group later presented the Group's report, which is reproduced in **Appendix E**. The Report concluded that there are no legal issues per se with Article 83 *bis* or the draft agreement proposed by ICAO Circular 295, but that resulting legal issues may arise in the implementation of Article 83 *bis* due to a lack of understanding of some Member States as to the applicability of Article 83 *bis* and the nature of leasing. The Report offered the following recommendations:

- i) that the Secretariat could review ICAO Circular 295 to determine whether changes are necessary to address some key questions, such as the voluntary nature of these agreements; when these various aircraft lease and/or interchange agreements implicate Article 83 *bis*; whether agreements for transfer of aircraft from one State to another State on a short term basis involve (or necessitate) a transfer of State of registry responsibilities under Article 83 *bis*; the legal implications for each State of entering into an Article 83 *bis* agreement, etc.;
- ii) that a Task Force be formed with appropriate ICAO Secretariat personnel and representatives from the Legal Committee with expertise in dealing with Article 83 *bis* agreements to assist in revising ICAO Circular 295 and also to better educate Member States on the applicability of 83 *bis* agreements;

- iii) on this issue of registration:
 - a) that the registration of agreements that do not involve a transfer of State of Registry responsibilities might be addressed by educating Member States as to the application of Article 83 *bis* and the purpose and effect of registering these agreements with ICAO; and
 - b) with respect to delays in registration, that, subject to availability of resources, ICAO consider the option of developing a web-based registry where Member States can input information and upload agreements themselves electronically rather than sending the agreement to ICAO to complete the registration process; and
- iv) that when regional conferences are held, ICAO consider including Article 83 *bis* as an agenda item and promote the relevance of these agreements to Member States.

3:4 Following this presentation, the Chairman opened the floor to questions, of which there were none; whereupon the Chairman called for the Committee to voice any opposition to the recommendations made by the Working Group in its Report. As to recommendation i), there was no objection and it was deemed adopted by the Committee. In the ensuing discussion of recommendation ii), one delegation proposed that the Legal Committee draft a model Article 83 *bis* agreement to assist States with implementation. The Chairman noted that ICAO Circular 295 contained a model agreement and that the need to update that model agreement would be part of the Secretariat's review of the Circular pursuant to recommendation i). A second delegation questioned whether Article 83 *bis* agreements were required to be "treaty-level" agreements. The Chairman pointed out that Article 83 *bis* referred to the word "agreement", and that such an arrangement is an exchange of rights and obligations between States and how this was accomplished was a matter of national law. Recommendation ii) was adopted by the Committee.

3:5 The Chairman next called for the Committee to voice any opposition to recommendations iii) and iv) and, noting no objections, declared them adopted. One delegation then took the floor and proposed that the Secretariat offer a programme on Article 83 *bis* during the upcoming 38th Session of the Assembly, subject to the availability of resources and its feasibility, in light of the limited time available to plan such an event. A second delegation requested that Recommendation iv) assumed that a regional conference had already been scheduled and called upon the Secretariat to schedule a legal seminar at the regional level. The Secretary invited delegates to urge their States to host regional conferences, noting that LEB did not have the budget to finance these events. The Chairman also intervened and lauded LEB support for a recent conference in Warsaw that was funded by the Civil Aviation Authority (CAA) of Poland. Finally, one delegation requested that the recommendations of the Working Group be amended to include the development of a draft model clause for the delegation of Article 83 *bis* authority for use in bilateral air transport/air service agreements. Here again, the Chairman noted this proposal would be considered as part of the Secretariat's review of ICAO Circular 295 pursuant to recommendation i).

3:6 Next, the Secretary presented LC/35-WP/3-1 describing recent progress made on the items on the General Work Programme of the Legal Committee. The Committee had no comments.

Agenda Item 4: Review of the General Work Programme of the Legal Committee

4.1 Following the presentation of LC/35-WP/4-1, one delegation questioned whether all of the items on the Committee's Work Programme should remain. The delegation pointed out that other items related to the work of ICAO, such as States' implementation of Standards and Recommended Practices (SARPs), States' implementation of treaties, and States' compliance with SARPs, especially in the areas of safety and security, were not included on the Work Programme, while, for example, no work was currently being done on Item 4 of the Work Programme, dealing with international interests in mobile equipment. The delegation further indicated that a reprioritization of remaining items on the Work Programme was in order.

4.2 The Chairman provided the delegates with an overview of the current status of the Work Programme, as set forth in paragraph 5 of LC/35-WP/4-1.

4.3 Following the Chairman's overview, discussion focused primarily on Item 4 – *Consideration, with regard to CNS/ATM systems including global navigation satellite systems (GNSS), and the regional multinational organisations, of the establishment of a legal framework* – after one delegation proposed that it be removed from the Work Programme (or at least moved down in priority), based on the fact that it has been on the Work Programme for 20 years and has seen no activity since 2004. Several delegations thereafter took the floor to oppose removing Item 4 from the Work Programme, with one delegation pointing out that the lack of progress on this item was mainly attributable to the fact that it had originally been put in place and supported by many African States upon the condition that an international GNSS regime would include “technical assistance” and that this assistance has not been forthcoming. One delegation also opposed to removing Item 4 from the Work Programme added that removing it based on a lack of progress would only make progress that much more difficult. Other delegations supported removing Item 4 from the Work Programme, with one such delegation pointing out that the item could be restored in the future when there is a possibility for further progress.

4.4 Aside from the discussion on the proposed removal/reprioritization of Item 4, delegations also made various proposals for reprioritizing various other items on the Work Programme, but there was no clear consensus with respect to these proposals, except for the proposal that Item 7 – *Consideration of Guidance on Conflicts of Interest* – be given higher priority, which received broad support.

4.5 The **Chairman** then offered his **summary** of the discussion on Agenda Item 4, wherein he noted that due to the lack of a clear consensus on the removal of Item 4 from the Work Programme, it would remain in the Work Programme at its current priority. He further proposed that, based upon the discussions, Work Programme Item 7 would be moved up in priority to Item 5 and Items 5 and 6 reduced in priority accordingly.

Agenda Item 5: Election of the Chairman and Vice-Chairmen of the Committee

5.1 Before the election of the Chairman and Vice-Chairmen of the Committee at the end of this Session, the Committee noted that in its 34th Session and the current Session, the previously elected Chairman was absent and did not chair any meetings of the Committee. An informal proposal had therefore been made that the Rules of Procedure of the Legal Committee (Doc 7669-LC/139/5) be amended to the effect that when the Chairman resigns or otherwise becomes unable to serve for the remainder of his or her term, the First Vice-Chairman shall become the Chairman, and other Vice-Chairmen shall be advanced to the precedence higher than his or her current level, with the office of fourth Vice-Chairman remaining vacant.

5.2 The discussion of this matter was presided over by Ms. S. Tan (Singapore), the Third Vice-Chair of the Committee, as Mr. M. Jennison recused himself due to a perceived conflict of interest. Ms. Tan declared to the meeting that if the proposed amendment were adopted, she would have been advanced from the Third Vice-Chair to the Second Vice-Chair, which could also be perceived as a conflict of interest. Despite this declaration, the Committee decided that Ms. Tan may chair the meeting.

5.3 Before the discussion of the contents of the proposed amendment, some procedural issues had been raised concerning how to include this item in the agenda. According to one view, the introduction of a new agenda item at this stage by the Committee itself after the final agenda had been fixed may not be in conformity with the Rules of Procedure, as Rule 11, sub-paragraph c) requires the approval of the Council for adding an additional item to the agenda. Another possible interpretation was that the Committee is generally the master of its own procedure, and consequently, subject to constraints of its Constitution, and the specific provisions in Rule 47, it may amend its rules as may be deemed necessary or appropriate.

5.4 As an alternative to the amendment of the Rules of Procedure, two delegations jointly presented a motion that in view of the *de facto* Chairmanship of Mr. M. Jennison at the 34th and 35th Sessions of the Legal Committee, the Committee should adopt a decision to recognize him as *de jure* the Chairman of the two Sessions. This proposal was supported by many delegations and unanimously carried by the Committee. It was decided that the record of the Legal Committee should indicate that he was the Chairman of the Legal Committee for a full term consisting of its 34th and 35th Sessions.

5.5 Several delegations mentioned the need to amend the Rules of Procedure of the Committee in due course, taking into account the foregoing discussion. On the basis of LC/35-WP/5-1 and in conformity with Rule 6 of its Rules of Procedure, the Committee proceeded to the election of its Chairman and of its First, Second, Third and fourth Vice-Chairmen.

5.6 Mr. Terri Olson (France) was elected as Chairman. He was nominated by the Delegation of Lebanon; this nomination was seconded by the delegation of Canada. The afore-mentioned delegations also nominated and seconded the four Vice-Chairmen. All officers were elected by acclamation.

5.7 Accordingly, the following candidates were elected: Ms. S.H. Tan (Singapore) as First Vice-Chairman, Mr. A. Piera (the United Arab Emirates) as Second Vice-Chairman, Mr. N. Luongo (Argentina) as Third Vice-Chairman, Mrs. H. Hitula (Namibia) as Fourth Vice-Chairman.

5.8 The Committee expressed its deep appreciation for the work of Mr. Jennison and the guidance he had provided to the Committee.

Agenda Item 6: Date, place and agenda of the 36th Session of the Legal Committee

6.1 The Committee considered this item on the basis of LC/35-WP/6-1, presented by the Secretariat. Upon recommendation by the Chairman, the Committee decided that it should be left to the Council to determine the date, place and agenda of the 36th Session.

Agenda Item 7: Report on work done at the Session

7:1 The Committee reviewed and approved, with a number of modifications, the report on work done in the first seven days of the Session. With respect to the items discussed on the last day of the Session, Wednesday, 15 May 2013, the Committee **agreed** to delegate to the Chairman the authority to approve that portion of the Report on behalf of the Committee.

7:2 Several delegations expressed their thanks to the Chairman for his leadership, wisdom and dedication in guiding the work of the Committee, which has produced helpful conclusions and a solid text for further work. These sentiments were echoed by other delegations, which also referred to the excellent work done by the Chairman at the 34th Session of the Committee. A number of delegations expressed the hope that the Chairman could continue to assist the future work of the Legal Committee in his *ex-officio* capacity.

7:3 The Chairman thanked the delegations for their kind words and hoped to see all delegations again in the ICAO Assembly and the future Diplomatic Conference.

APPENDIX A**AGENDA****Item 1: Adoption of the Agenda**

Note: Rule 11 a) of the *Rules of Procedure of the Legal Committee* (Doc 7669-LC/139/5) provides: “The Committee shall fix the final agenda of the session at its first meeting.”

Item 2: Acts or offences of concern to the international aviation community and not covered by existing air law instruments

Note: This is the **main item** to be considered by the Legal Committee; the Committee will study this item on the basis of the text prepared by the Special Sub-Committee for the Modernization of the Tokyo Convention Including the Issue of Unruly Passengers.

Item 3: Consideration of other items on the General Work Programme of the Legal Committee

Note: The Committee will consider reports on the other items in its General Work Programme:

- Compensation for damage caused by aircraft to third parties arising from acts of unlawful interference or from general risks;
- Safety aspects of economic liberalization and Article 83 bis;
- Consideration, with regard to CNS/ATM systems including global navigation satellite systems (GNSS), and the regional multinational organisms, of the establishment of a legal framework;
- International interests in mobile equipment (aircraft equipment);
- Review of the question of the ratification of international air law instruments; and
- Consideration of Guidance on Conflicts of Interest.

Item 4: Review of the General Work Programme of the Legal Committee

Note: The Committee will determine its General Work Programme, with an indication of priority of items, for submission to the Council for approval.

Item 5: Election of the Chairman and Vice-Chairmen of the Committee

Note: Rule 6 of the *Rules of Procedure of the Legal Committee* provides: “The Committee shall elect at the end of every second session, from among the

representatives of States, a Chairman and the First, Second, Third and Fourth Vice-Chairmen. Such officers shall hold office from the time of adjournment of the session when they were elected until the end of the session during which their successors are duly elected. They shall not be eligible for re-election for the next succeeding term for the same position."

Item 6: Date, place and agenda of the 36th Session of the Legal Committee

Note: The Committee will consider the date, place and provisional agenda of its next session, in the light of the decisions it will have taken during the 35th Session.

Item 7: Report on work done at the Session

APPENDIX B**LIST OF WORKING PAPERS AND OTHER DOCUMENTS****WORKING PAPER TITLE****Agenda Item 1**

- | | |
|--------------|--|
| LC/35-WP/1-1 | Provisional Agenda |
| LC/35-WP/1-2 | Note on Documentation and Working Arrangements |

Agenda Item 2

- | | |
|--------------|--|
| LC/35-WP/2-1 | Introductory Note |
| LC/35-WP/2-2 | Comments of the International Air Transport Association (IATA) on LC/35-WP/2-1 and the Legal Aspects of the Issue of Unruly Passengers |
| LC/35-WP/2-3 | Views of the International Air Transport Association (IATA) on Some Practical Aspects of the Issue of Unruly Passengers |
| LC/35-WP/2-4 | Comments of the International Union of Aerospace Insurers (IUAI) on LC/35-WP/2-1 and the Legal Aspects of the Issue of Unruly Passengers |
| LC/35-WP/2-5 | Views of the United Arab Emirates on the Draft Protocol to Amend the Tokyo Convention |
| LC/35-WP/2-6 | Report of the Drafting Committee |

Agenda Item 3

- | | |
|--------------|---|
| LC/35-WP/3-1 | Consideration of Other Items on the General Work Programme of the Legal Committee |
| LC/35-WP/3-2 | Safety Aspects of Economic Liberalization and Article 83 <i>bis</i> |

Agenda Item 4

LC/35-WP/4-1 Review of the General Work Programme of the Legal Committee

Agenda Item 5

LC/35-WP/5-1 Note on the Election

Agenda Item 6

LC/35-WP/6-1 Date, Place and Agenda of the 36th Session of the Legal Committee

Agenda Item 7

LC/35-WP/7 Draft Report on the Work of the Legal Committee during its 35th Session – Organization of the Meeting

LC/35-WP/7-1 Draft Report on the Work of the Legal Committee during its 35h Session – Agenda Item 2 – Paragraphs 2:1 to 2:22

LC/35-WP/7-2 Draft Report on the Work of the Legal Committee during its 35h Session – Agenda Item 2 – Paragraphs 2:23 to 2:71

LC/35-WP/7-3 Draft Report on the Work of the Legal Committee during its 35h Session – Agenda Item 2 – Paragraphs 2:72 to 2:89

LC/35-WP/7-4 Draft Report on the Work of the Legal Committee during its 35h Session – Agenda Item 2 – Paragraphs 2:90 to 2:125

LC/35-WP/7-5 Draft Report on the Work of the Legal Committee during its 35h Session – Agenda Item 3 – Paragraphs 3:1 to 3:6

LC/35-WP/7-6 Draft Report on the Work of the Legal Committee during its 35h Session – Agenda Item 4 – Paragraphs 4:1 to 4:5

LC/35-WP/7-7 Draft Report on the Work of the Legal Committee during its 35h Session – Agenda Item 5 – Paragraphs 5:1 to 5:5

LC/35-WP/7-8 Draft Report on the Work of the Legal Committee during its 35h Session – Appendix A

LC/35-WP/7-9 Draft Report on the Work of the Legal Committee during its 35h Session – Appendix B

LC/35-WP/7-10	Draft Report on the Work of the Legal Committee during its 35h Session – Appendix C
LC/35-WP/7-11	Draft Report on the Work of the Legal Committee during its 35h Session – Appendix D
LC/35-WP/7-12	Draft Report on the Work of the Legal Committee during its 35h Session – Appendix E
LC/35-WP/7-13	Draft Report on the Work of the Legal Committee during its 35h Session – Appendix F
LC/35-WP/7-14	Draft Report on the Work of the Legal Committee during its 35h Session – Appendix G

OTHER DOCUMENTS

LC/SC-MOT	Special Sub-Committee of the Legal Committee for the Modernization of the Tokyo Convention including the Issue of Unruly Passengers – First Meeting
LC/SC-MOT-2	Special Sub-Committee of the Legal Committee for the Modernization of the Tokyo Convention including the Issue of Unruly Passengers – Second Meeting

APPENDIX C
LIST OF PARTICIPANTS

STATES

Argentina	Luongo, N. Vallarino, C. M.
Australia	Reid, J.
Belgium	Deckers, F.
Brazil	Arbigaus, D. F. Botelho de Queiroz, J.R.P. Da Fonseca Filho Cleso, J. Torres Nogueira, F.
Cameroon	Afouba Ngayihi, M. S. Zambo Zambo, D. Zoa Etoundi, E.
Canada	Thachet, J. Lalonde, S. Zigayer, M. Forsythe, C.
Chile	Espinosa, C. Mena, A. E.
China	Chim Ho, B. Ding, C. Guo, R. Liu, H. Sa Da Bandeira, M. Wang, R. Zhao, J.
Colombia	Bejarano Ramon, C. A. Rivera Florez, E. B.
Congo	Makaya Batchi, R. M. F.
Côte D'Ivoire	Coulibaly, S.
Cuba	Castillo de la Paz, J. F. Pérez, A. M.

D.R. Congo	Kanyanga Tshimanga, A.
Denmark	Nissem, M.
Ecuador	Montes de Oca, B. P. Simball Mosquera, X.
Finland	Metsalampi, S. Tupamaki, M.
France	Olson, T. De La Guéronnière, A. Gonnet, K. Mezi, É. Orus, S. Risse, E.
Germany	Schwierczinski, U.
Greece	Andritsou, I.
Guatemala	Rosales Slaverria Hector, A.
Haiti	Théramène, B.
I.R. Iran	Shahbazilar, H.
Indonesia	Afrianto, D. Kresna Budhi, K. Maulani, N. Mayrianti, C. Ramon Adrianus Adityo, V. Ricardo, R. Rosita, Y.
Italy	Bardaro, A.
Jamaica	Gordon, M.
Japan	Sugiyama, H. Nishio, S. Sakamoto, K. Furuhata, M. Takata, S. Uchita, T. Fukushiro, T. Hagio, M. Koda, T.

Jordan

Abual Arja, I.

Kuwait

Al-Awady Ibraheem, O.
Al-Mansouri Youssef, A.
Almutairi, M.
Rashid Khamees, K.
Eid, S.

Lebanon

Yong Heng, L.

Mali

Traore Coulibaly, A.

Malta

Spagnol Clive, A.

Mexico

Méndez Mayora, D.
Valle Álvarez, D. M.

Mozambique

Pinto, A.

Namibia

Hitula, H.
Fikunawa, C.

Netherlands

Cambridge, M. C.
Muller, T. L.

Nigeria

Muhammad, L. A.
Ejembı, A. A.
Gbem, A.
Okoronkwo, P. I.
Owolabi, A.

Paraguay

Báez Argana, D.
Meza Abdo, A.
Recalde, R.

Peru

Camacho Bueno, L.
Lazo Jorge, E.

Republic of Korea

Choi Dong, H.
Kang Myong, I.
Kang, S.
Moon, D.
Lee, J.
Lee Jae, W.

Russian Federation	Efimov, D. G. Gavrilov, I. K. Gruzdev, Y. N. Malikova, N. V. Novgorodov, A. A. Shiyan, D. V. Subbotin, D. V.
Saudi Arabia	Alblawi, B. A. Almoghraby, A.
Singapore	Dawn, V. Kaur, R. Tan, S. H.
South Africa	Mabaso, L. Chiumya, J. Mamabolo, M. Mdlalose, B. Peege, T. Steenkamp, T. Thabethe, F.
Swaziland	Litchfield, D. Nkonyane, S.
Sweden	Anderson, J.
Switzerland	Candrian, A. Noel, L.
Tanzania	Camulungu, V.
Thailand	Sanguthai, C. Sathiracharocnsap, S.
Turkey	Turna Zeynep, B.
Uganda	Baliddawa Zephaniah, M. Kanyunyuzi Jane Frances, K. Okwalinga Joseph, J. Ruhesi, R.
United Arab Emirates	Al Maazmi Nadia, I. Piera, A.

United States

Burrows, T.
Giovanniello, A.
Cors, D.
Jennison, M.
McDonald, S. W.
Tisi, A.
Tourtellot, C.
Weir, E.

Uruguay

González Silva, M. A.

Venezuela B.R.

Blanco, D.

Zambia

Kabaso, S.
Mulenga, C.
Kombe, M. C.

OBSERVERS

African Civil Aviation Commission (AFCAC) Gaiya, S.

**Agency for Air Navigation Safety in Africa and
Madagascar (The) (ASECNA)** Fofana, M.
Moussa, H.
Sankara, M. B.

**European Organisation for the Safety of Air
Navigation (EUROCONTROL)** Tanhouse, P.

International Air Transport Association (IATA) Gill, M.
Hocking, A.

International Union of Aviation Insurers (IUAI) Gates, S.

APPENDIX D**REPORT
FRIENDS OF CHAIR (FC)**

on

Review of LC/35 Agenda Item 2 on ‘the establishment of common standards and practices with regard to offences’ Art 15 *bis* draft Protocol and ICAO Circular 288

(9 May 2013)

Argentina, China, Colombia, Ecuador, France, Indonesia, Jamaica (Chair), Japan, Singapore, Uganda and IATA.

FC Terms of Reference:

to revise Article 15 *bis* in view of the various revision proposals made in the plenary and to present by lunchtime on Friday 10th May 2013. Not to question whether to keep Article 15 *bis* or not.

DISCUSSION & RATIONALE

The FC reiterated its understanding that the intent was not to create new offences nor to change the character of the Convention. However, it was to encourage States to codify the types of offences which were being emphasised. After some discussion, it was found useful to use the Singapore proposal made in Plenary as the basis for the discussions going forward since it was closest to what the Delegates in this FC determined was required.

It is to be noted that the references to the particularised acts in Article 15 *bis* paragraph 1 (a) and (b) were a means of drawing States’ attention to them, given that airlines had determined that they were particularly troublesome.

The FC’s recommendations and draft Art 15 *bis* presented are intended to achieve the following:

1. Prevent overlap in the offences outlined with offences created in other aviation security conventions.
2. Meet the concerns of States which prefer not to include a list of offences in the Convention as well as those who prefer to include such a list.
3. The words “are encouraged to” are used (instead of obligatory language) as States would, in their national legislation, have already provided for punishment of all offences under their penal law and thus, an appropriate action is to encourage States to initiate criminal or administrative proceedings particularly where the offences or acts committed on aircraft endanger the aircraft or persons or property on board.

4. Reference to assault on crewmembers was maintained in order to highlight the safety impact to civil aviation.

5. Square brackets are used in paragraph 1(b) – to allow the LC to confirm which of the commander's lawful instructions would be covered (i.e. whether to cover only lawful instructions given to ensure safety or cover instructions given to secure good order and discipline as well).

6. Square brackets are used around paragraph 2, - since this provision guarantees sovereignty of States but we are uncertain if that is strictly necessary; yet we wanted to ensure that States recognise that the acts mentioned are not the only ones to be addressed.

7. Square brackets are used within paragraph 2, - penalties are generally used in Conventions to relate to punishment but measures would allow for other sanctions (*used in Beijing Convention*).

8. We removed the word 'other' in the original paragraph 2 – in order to bring clarity.

9. We were strongly tempted to categorise the six (6) offences/acts listed into those which are suitable for criminal proceedings and penalties (the first 3 listed) and for administrative proceedings and penalties (the second 3 listed) for inclusion into Circular 288 but refrained since we did not desire to tell States how to order their internal legislation. Also, we understand that not all States use/apply administrative proceedings and penalties.

The FC would also like to add that it notes that the redrafted Article 15 *bis* and the proposed update to Circular 288 **form a package** to achieve harmonisation among Contracting States of actions to address the unruly passenger problem.

RECOMMENDATIONS TO THE CHAIRMAN OF THE LEGAL COMMITTEE:

(i) Redraft Art 15 *bis* thus:

"1. Each Contracting State is encouraged to take such measures as may be necessary to initiate appropriate criminal or administrative proceedings against any person who commits on board an aircraft an offence or act referred to in Article 1 paragraph 1, in particular:

- (a) physical assault or a threat to commit such assault against a crew member;
- (b) refusal to follow a lawful instruction given by or on behalf of the aircraft commander for the [purposes set out in Article 6, paragraph 1(a) or (b)] / [purpose of protecting the safety of the aircraft or the persons or property therein].

[2. Nothing in this Convention shall affect the right of each Contracting State to introduce, according to its national legislation, appropriate [penalties] / [measures] in order to punish unruly or disruptive acts committed on board.]

(ii) Update Circular 288

That the Legal Committee recommends that the Diplomatic Conference, if/when convened, adopts a resolution calling upon ICAO to update Circular 288 with, if necessary, the support of, say, an *ad hoc* group created from among the States and Observers participating in the Diplomatic Conference, to include a list of unruly acts commonly occurring on board aircraft and in respect of which States Parties would be strongly encouraged to take criminal or administrative action under their national laws and to punish with appropriate criminal or administrative penalties. This list may include the offences/acts already set out in Circular 288 and the following:

Intentional commission on board an aircraft of any act that:

- jeopardises the safety of the aircraft;
 - harms or endangers the life or the physical or moral integrity of passengers or crewmembers;
 - affects the property of said persons or of the aircraft operator;
 - affects the good order or discipline on board;
 - disrupts the peace or quiet or disturbs any person on board;
 - causes delays or disrupts any operations.
-

APPENDIX E

REPORT OF THE WORKING GROUP TO REVIEW LC/35 - WP/3-2 Revised "SAFETY ASPECTS OF ECONOMIC LIBERALIZATION AND ARTICLE 83 BIS"

The Chairman of the 35th Session of the Legal Committee requested this working group to review LC/35 - WP/3-2 Revised "Safety Aspects of Economic Liberalization and Article 83 *bis*", presented by the ICAO Secretariat, and prepare a report whether there are any legal issues related to the negotiation of Article 83 *bis* agreements and their registration with the ICAO. In the alternative, this working group was requested to provide some recommendations to improve the quality of these Agreements.

An article 83 *bis* Agreement is a tool to transfer certain functions and duties normally incumbent on the State of Registry to the State of the Operator, in the case of lease, charter or interchange of an aircraft. Without these agreements, safety oversight would be costly and complicated as the State of Registry may have to follow the aircraft to foreign jurisdiction to ensure that they are in compliance with their safety regulations. Article 83 *bis* makes clear that in order to have an 83 *bis* Agreement to be in place, the State of Registration and the State of the Operator must agree to transfer all or part of the State of Registry's legal responsibilities under Articles 12, 30, 31 and 32 *a*) of the Convention, which generally relate to Licences of Personnel, Certificate of Airworthiness, Aircraft Radio Equipment, and Rules of the Air. These agreements are therefore useful when aircrafts are transferred on a long term basis.

At the outset, this working group is of the view that there are no legal issues per se with language of Article 83 *bis* or the draft agreement proposed by ICAO in its Circular 295; however, consequential legal issues may arise in the implementation of Article 83 *bis* due to a lack of understanding of some member States as to the applicability of Article 83 *bis* and the nature of leasing. ICAO Secretariat has also indicated in its Working Paper LC/35 - WP/3-2 that most of the Article 83 *bis* Agreements registered with ICAO are not valid Article 83 *bis* Agreements. They are mostly lease agreements whereby both States agree to carry out certain aspects of their respective function without transferring the safety oversight- which is not the real intent of an Article 83 *bis* Agreement. In fact, most of these agreements, according to the Secretariat, are standard lease agreements.

A related issue is States' registration of these agreements with ICAO as "Article 83 *bis* Agreements" when they do not actually involve a transfer of the State of Registry's legal responsibilities, as contemplated by Article 83 *bis*. This may have some unintended consequences, as third States who have ratified Article 83 *bis* may be lead to believe that such agreements involve a transfer of the State of Registry responsibilities, which they are obliged to recognize under Article 83 *bis*, paragraph *b*), when actually they do not. As for the States that have concluded these so-called 83 *bis* Agreements, the registration of an agreement pursuant to Article 83 *bis* that does not involve a transfer of State of Registry responsibilities under Articles 12, 30, 31 or 32 *a*) of the Convention may be evidence of a lack of understanding about the applicability of Article 83 *bis*, which is perpetuated when the agreement is entered into the ICAO registry. To exacerbate this issue, ICAO has clearly indicated that they do not have the legal

mandate authority, or resources to conduct substantive reviews of these agreements, nor any of hundreds of the various types agreements that States submit to the ICAO registry on a yearly basis. In fact, ICAO has indicated that because of the large volumes of agreements they receive, there is a backlog of agreements awaiting registration.

This Working Group has discussed these issues in detail and would like to make the following recommendations to the Chairman of the Legal Committee:

1. Various aircraft lease and/or interchange arrangements are useful tools for air carriers to use to meet fluctuating operational needs, allowing them to take advantage of market opportunities and increased demands despite a lack of internal fleet capacity during periods of peak demand. However, there seems to be a lack of understanding amongst States as to the applicability of Article 83 *bis* and its applicability to these types of transactions. Without doubt, this group is of the view that updated guidance on the applicability of Article 83 *bis* and the nature of 83 *bis* agreements should be available to Member States. As a first step, the Secretariat could review ICAO Circular 295 to determine whether changes are necessary to address some key questions, such as the voluntary nature of these agreements; when these various aircraft lease and/or interchange agreements implicate Article 83 *bis*; whether agreements for transfer of aircraft from one State to another State on a short term basis involve (or necessitate) a transfer of State of Registry responsibilities under Article 83 *bis*; the legal implications for each State of entering into an Article 83 *bis* Agreement, etc.
2. This group also recommends that a task force be formed with appropriate ICAO Secretariat personnel and representatives from Legal Committee with expertise in dealing with Article 83 *bis* Agreements to assist in revising ICAO Circular 295 and also to better educate Member States on the applicability of 83 *bis* Agreements.
3. There are two issues with registration: (1) Agreements that do not involve a transfer of State of Registry responsibilities being registered pursuant to Article 83 *bis*, and (2) the delay in registration. The first issue might be addressed by educating Member States as to the application of Article 83 *bis* and the purpose and effect of registering these agreements with ICAO. In this regard, the task force recommended in #2 could be of help. With respect to the delay, this group recommends that subject to availability of resources ICAO consider the option of developing a web based registry where Member States can input information and upload agreements themselves electronically rather than sending the agreement to ICAO to complete the registration process. Legal issues relating to the implementation of a web-based registry could be considered by the Task Force. Another possible option would be for States to notify other States directly and on a parallel basis as outlined in Article 83 *bis* (b).
4. Another recommendation of this Group is that when regional conferences are held, ICAO consider including Article 83 *bis* as an agenda item and promote the relevance of these agreements to Member States. This would result in a better understanding of these agreements amongst all Member States.

5. The working group was doubtful as to the benefit of having these agreements for short term leases due to the complexities involved in negotiating these agreements, since many States consider them as formal treaties, as well as the financial costs associated with their implementation. Therefore, this group recommends that ICAO should continue to encourage States to be flexible in negotiating these agreements so that they do not end up negotiating treaties each time an Article 83 *bis* Agreement has to be concluded. Although this would depend on the nature of each State's national laws and their Constitution, ICAO should promote awareness of arrangements that give States flexibility with respect to the approval level of Article 83 *bis* Agreements such as umbrella agreements and delegate further signing authority to State officials to negotiate future agreements with the same State given the nature of short term leases that are more common these days.

Report prepared by:

Macheld Cambridge (Delegate – Netherlands)
Augustine Hocking (IATA)
Michael Gill (IATA)
Elizabeth Weir (Delegate - United States of America)
Siew Huay Tan (Delegate – Singapore)
Marva Gordon (Delegate – Jamaica)
Pollie Okoronkwo (Delegate – Nigeria)
Emilie Mezi (Delegate – France)
Levers Mabaso (Delegate – South Africa)
Anastasia A Gbem (Delegate – Nigeria)
John Thachet – Chair (Delegate – Canada)

With support from:

Mitch Fox (Air Navigation Bureau – ICAO)
Henry Gourdji (Universal Safety Oversight Audit Programme – ICAO)
Christopher Petras (Legal Affairs and External Relations Bureau – ICAO)

APPENDIX F

REPORT OF THE FRIENDS OF THE CHAIR WORKING GROUP ON IFSOS

The FC Working Group in charge of dealing with issues on the role and functions of IFSOs met on 8 and 11 May 2013. Delegates from 17 Member States took part to its work (Argentina, Canada, Chile, China, Colombia, France, Jamaica, Japan, Mexico, Lebanon, Mexico, Russian Federation, South Africa, Russian Federation, Singapore, United Arab Emirates, United States of America). The Group was chaired by France.

Rationale

The Group took note of the following points :

1. The wish of the delegations advocating the inclusion of provisions on IFSOs in the Tokyo convention is mainly 1/ to make explicit reference to them since they form a specific category apart from the aircraft commander, crew members or passengers and 2/ to grant them the same legal protection as crew members or passengers.
2. Amongst countries having an IFSO program, the work undertaken on airplanes by these agents may differ according to the law of each of these States.
3. The deployment of IFSOs is decided according to bilateral or multilateral agreements or arrangements.

The Group also noted that some countries had concerns with respect to both of the options considered by the Legal Sub-Committee, which would result in adding a new paragraph 3 to Article 6 of the Tokyo convention. Discussions within the Group showed that simpler solutions could be :

1. to align the power of the IFSO on that of the aircraft commander [(a) and (b)], except that it seems difficult to give to the IFSO the authority to deliver a person to competent authorities or to disembark him / her, such authority being provided to the aircraft commander under (c), (see option 1 below) ; **or**
2. to add the IFSO to the people listed in paragraph 2 (see option 2 below).

If either of these options were kept, the definition of IFSOs would have to be adjusted by :

1. making reference to the bilateral or multilateral agreements on the basis of which they operate **and**
2. **if necessary**, defining the purpose of their intervention on board the aircraft. If defining such purpose is necessary, the Group envisaged three options:
 - the IFSOs protect the aircraft and its occupants against acts of unlawful interference (see option A below);
 - the IFSOs protect the aircraft and its occupants against any act which is defined as an offence under Article 1 paragraph 1 (a) of the Tokyo convention, provided that all unlawful interferences are criminal acts (see option B below);

- the IFSOs protect the safety of that aircraft, or of persons or property on board (see option C below).

If these adjustments were made to Article 6 and if an appropriate definition of IFSOs was introduced, it would not be necessary anymore to add a new paragraph 3 to Article 6 of the Tokyo Convention.

Drafting recommendations

New provisions applying to IFSOs appear in **black** letters.

A - Definition of the role and functions of IFSOs : ARTICLE 6

1) Add a reference to IFSOs according to one of the two following options :

Option 1

1. The aircraft commander **or in-flight security officer** may, when he **or she** has reasonable grounds to believe that a person has committed, or is about to commit, on board the aircraft, an offence or act contemplated in Article 1 paragraph 1, impose upon such person reasonable measures including restraint which are necessary :

- (a) to protect the safety of the aircraft, or of persons or property therein; or
- (b) to maintain good order and discipline on board; or
- (c) to enable **the aircraft commander** to deliver such person to competent authorities or to disembark him in accordance with the provisions of this chapter.

3. The aircraft commander may require or authorize the assistance of other crew members and may request or authorize, but not require, the assistance of passengers to restrain any person whom he is entitled to restrain. Any crew member or passenger may also take reasonable preventive measures without such authorization when he has reasonable grounds to believe that such action is immediately necessary to protect the safety of the aircraft, or of persons or property therein.

Option 2

1. The aircraft commander may, when he has reasonable grounds to believe that a person has committed, or is about to commit, on board the aircraft, an offence or act contemplated in Article 1 paragraph 1, impose upon such person reasonable measures including restraint which are necessary;

- (a) to protect the safety of the aircraft, or of persons or property therein; or

- (b) to maintain good order and discipline on board; or
- (c) to enable him to deliver such person to competent authorities or to disembark him in accordance with the provisions of this chapter.

2. The aircraft commander may require or authorize the assistance of other crew members and may request or authorize, but not require, the assistance of passengers to restrain any person whom he is entitled to restrain. Any crew member, **in-flight security officer** or passenger may also take reasonable preventive measures without such authorization when he has reasonable grounds to believe that such action is immediately necessary to protect the safety of the aircraft, or of persons or property therein.

2) Delete draft paragraph 3 (both options).

Comments

All the members of the Working Group agreed that the draft protocol can acknowledge the existence of IFSOs.

The Working Group was divided on what is the most appropriate way to reach this goal.

A majority of the delegations expressed their preference for Option 2, because they regard such Option as consistent with existing ICAO rules and regulations under which the IFSOs are under the authority of the aircraft commander, and should always act according to the instructions given by him / her. They share the view that such Option is more consistent with Annex 17.

However other delegations consider that the draft protocol should go a step forward and provide the IFSOs with most of the powers provided to the aircraft commander. They therefore expressed their preference for Option 1.

B- LEGAL PROTECTION FOR IFSOs : ARTICLE 10

For actions taken in accordance with this Convention, neither the aircraft commander, any other member of the crew, any passenger, **any in-flight security officer**, the owner or operator of the aircraft, nor the person on whose behalf the flight was performed shall be held responsible in any proceeding on account of the treatment undergone by the person against whom the actions were taken.

Comments

There was general agreement within the Working Group that this wording matches well with either options (1 or 2) to be chosen under Article 6. The Group therefore recommends adopting it in any case.

C – DEFINITION OF IFSOs : ARTICLE 1

Add a definition of IFSOs following one of these three options :

1. This Convention shall apply in respect of:
 - (a) offences against penal law ;
 - (b) acts which, whether or not they are offences, may or do jeopardize the safety of the aircraft or of persons or property therein or which jeopardize good order and discipline on board.
2. Except as provided in Chapter III, this Convention shall apply in respect of offences committed or acts done by a person on board any aircraft registered in a Contracting State, while that aircraft is in flight or on the surface of the high seas or of any other area outside the territory of any State.
3. For the purposes of this Convention, ~~an aircraft is considered to be in flight from the moment when power is applied for the purpose of take off until the moment when the landing run ends.~~
 - (a) an aircraft is considered to be in flight 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 provisions of this Chapter shall continue to apply with respect to offences and acts committed on board until the competent authorities of a State take over the responsibility for the aircraft and for the persons and property on board; [and]
 - (b) “in-flight security officer” means a [government employee]/[person] who is specially selected, trained and authorized by the government of the State of the operator [and]/[or] the government of the State of registration to be deployed on an aircraft, pursuant to a bilateral or multilateral [agreement (and/or) arrangement], with the purpose of

(Option A) protecting that aircraft and its occupants against acts of unlawful interference*.

(Option B) protecting that aircraft and its occupants against any offence or act contemplated in Article 1 paragraph 1.

(Option C) protecting the safety of that aircraft, or of persons or property on board.
4. This Convention shall not apply to aircraft used in military, customs or police services.

Comments

There was a pretty even expression of interest amongst the members of the Working Group in favour of either Option A or Option C. Few delegations favoured Option B.

Most delegations in favour of option A expressed the view that, if it was adopted, the expression “unlawful interference” should be defined. This would take the form of a reference to Annex 17 of the Chicago Convention. A delegation recommended to specify that, if the IFSO’s role is to protect the

aircraft and people on board against unlawful interference, a definition could be avoided provided that it is specified that he / she acts “according to the powers provided under such agreement or arrangement”. Another delegation regarded such definition as being unnecessary whatsoever, if such option is adopted.

A delegation noted that, if option 1 was adopted under Article 6, there would be some lack of consistency whatever option is chosen under Article 1 since neither of these three options include a reference to what the IFSO does to protect good order and discipline.

Some delegations expressed the view that there might be no need to define the purpose of the intervention of the IFSOs, since the scope of such intervention is specified by relevant agreements or arrangements. They therefore recommended to explore the possibility of dropping all the three options and to simply keep the “chapeau” as a definition of the role of the IFSOs, deleting the words “with the purpose of”.

Two delegations shared the view that the reference to agreements or arrangements would fit better into Article 6.

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APPENDIX G

DRAFT TEXT OF THE PROTOCOL TO THE TOKYO CONVENTION OF 1963 PROPOSED BY THE LEGAL COMMITTEE

Article I

This Protocol supplements the Convention on Offences and Certain Other Acts Committed on Board Aircraft, done at Tokyo on 14 September 1963 (hereinafter referred to as “the Convention”), and, as between the Parties to this Protocol, the Convention and this Protocol shall be read and interpreted together as one single instrument.

Article II

1. Article 1, paragraph 3, of the Convention shall be replaced by the following:

“3. 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) “in-flight security officer” means a [government employee] / [person] who is specially selected, trained and authorized by the government of the State of the operator or the government of the State of registration to be deployed on an aircraft, pursuant to a bilateral or multilateral agreement or arrangement [.] / [, with the purpose of protecting that aircraft and its occupants against acts of unlawful interference.] / [, with the purpose of protecting the safety of that aircraft, or of persons or property on board.]

[(c) “State of the operator” means the State in which the operator’s principal place of business is located or, if the operator has no such place of business, the operator’s permanent residence[.] / [; and]

[(d) “State of registration” means the State on whose register the aircraft is entered.]”

Article III

Article 3 of the Convention shall be replaced by the following:

“1. The State of registration is competent to exercise jurisdiction over offences and acts committed on board.

1 bis. A State is also competent to exercise jurisdiction over offences and acts committed on board:

- a) as the State of landing, when the aircraft on board which the offence or act is committed lands in its territory with the alleged offender still on board; [and]

- b) as the State of the operator, when the offence or act is committed on board an aircraft leased without crew to a lessee whose principal place of business or, if the lessee has no such place of business, whose permanent residence is in that State[.] / [; and]
 - c) [when the offence or act is committed by or against a national of that State.]
2. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction as the State of registration over offences [and acts] committed on board aircraft registered in such State.
- 2 bis. Each Contracting State shall also take such measures as may be necessary to establish its jurisdiction over offences [and acts] committed on board aircraft in the following cases:
- a) as the State of landing, when the aircraft on board which the offence [or act] is committed lands in its territory with the alleged offender still on board; and
 - b) as the State of the operator, when the offence [or act] is committed on board an aircraft leased without crew to a lessee whose principal place of business or, if the lessee has no such place of business, whose permanent residence is in that State.
- [2 ter. Each Contracting State may also take such measures as may be necessary to establish its jurisdiction over offences [and acts] committed on board aircraft when an offence [or act] is committed on board an aircraft by or against a national of that State.]
3. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.”

Article IV

The following shall be added as Article 3 *bis* of the Convention:

“If a Contracting State, exercising its jurisdiction under Article 3, has been notified or has otherwise learned that one or more other Contracting States are conducting an investigation, prosecution or judicial proceeding in respect of the same offences or acts, that Contracting State [may] / [shall], as appropriate, consult those other Contracting States with a view to coordinating their actions.”

Article V

Article 5, paragraph 2 of the Convention shall be deleted.

[Article VI]

Article 6, paragraph 2 of the Convention shall be replaced by the following:

Option 1

[“1. The aircraft commander or in-flight security officer may, when he or she has reasonable grounds to believe that a person has committed, or is about to commit, on board the aircraft, an offence or act

contemplated in Article 1, paragraph 1, impose upon such person reasonable measures including restraint which are necessary:

- a) to protect the safety of the aircraft, or of persons or property therein; or
 - b) to maintain good order and discipline on board; or
 - c) to enable the aircraft commander to deliver such person to competent authorities or to disembark him in accordance with the provisions of this Chapter.
2. The aircraft commander may require or authorize the assistance of other crew members and may request or authorize, but not require, the assistance of passengers to restrain any person whom he is entitled to restrain. Any crew member or passenger may also take reasonable preventive measures without such authorization when he has reasonable grounds to believe that such action is immediately necessary to protect the safety of the aircraft, or of persons or property therein.”]

Option 2

[“1. The aircraft commander may, when he has reasonable grounds to believe that a person has committed, or is about to commit, on board the aircraft, an offence or act contemplated in Article 1, paragraph 1, impose upon such person reasonable measures including restraint which are necessary:

- a) to protect the safety of the aircraft, or of persons or property therein; or
- b) to maintain good order and discipline on board; or
- c) to enable him to deliver such person to competent authorities or to disembark him in accordance with the provisions of this Chapter.

2. The aircraft commander may require or authorize the assistance of other crew members and may request or authorize, but not require, the assistance of passengers to restrain any person whom he is entitled to restrain. Any crew member, in-flight security officer or passenger may also take reasonable preventive measures without such authorization when he has reasonable grounds to believe that such action is immediately necessary to protect the safety of the aircraft, or of persons or property therein.”]

[Article VII]

Article 10 of the Convention shall be replaced by the following:

“For actions taken in accordance with this Convention, neither the aircraft commander, any other member of the crew, any passenger, any in-flight security officer, the owner or operator of the aircraft, nor the person on whose behalf the flight was performed shall be held responsible in any proceeding on account of the treatment undergone by the person against whom the actions were taken.”]

[Article VIII]

The following shall be added as Article 15 *bis* of the Convention:

"1. Each Contracting State is encouraged to take such measures as may be necessary to initiate appropriate criminal or administrative proceedings against any person who commits on board an aircraft an offence or act referred to in Article 1, paragraph 1, in particular:

- a) physical assault or a threat to commit such assault against a crew member;
- b) refusal to follow a lawful instruction given by or on behalf of the aircraft commander for the purpose of protecting the safety of the aircraft or the persons or property therein.

[2. Nothing in this Convention shall affect the right of each Contracting State to introduce [or maintain] in its national legislation appropriate measures in order to punish unruly and disruptive acts committed on board.]"

Article IX

Article 16, paragraph 1 of the Convention shall be replaced by the following:

"1. Offences committed on board aircraft shall be treated, for the purpose of extradition between the Contracting States, as if they had been committed not only in the place in which they occurred but also in the territories of the Contracting States required to establish their jurisdiction in accordance with paragraphs 2 and 2 bis of Article 3[, and who have established their jurisdiction in accordance with paragraph 2 ter of Article 3]."

[Article X]

The following shall be added as Article 18 bis of the Convention:

"When the aircraft commander disembarks or delivers a person pursuant to the provisions of Articles 8 or 9 respectively, the operator of the aircraft shall not be precluded from recovering from such a person any damages incurred by the operator of the aircraft as a result of such disembarkation or delivery."

— END —

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