



WORKING PAPER

ASSEMBLY — 38TH SESSION

LEGAL COMMISSION

Agenda Item 46: Acts or offences of concern to the international aviation community and not covered by existing air law instruments

**PROGRESS REPORT ON LEGAL WORK RELATING TO UNRULY PASSENGERS
AND ON THE IMPLEMENTATION OF THE BEIJING CONVENTION
AND THE BEIJING PROTOCOL**

(Presented by the Council of ICAO)

EXECUTIVE SUMMARY

This working paper is a progress report on legal work relating to unruly passengers and on the implementation of the Beijing Convention and the Beijing Protocol.

Action: The Assembly is invited to:

- a) call upon Member States to participate in the Diplomatic Conference to amend the Tokyo Convention; and
- b) urge Member States to sign and ratify the Beijing Convention and the Beijing Protocol.

<i>Strategic Objectives:</i>	This working paper relates to Strategic Objective B as it provides information on the preparation of an air law treaty relating to aviation security and invites actions connected thereto; and to Supporting Implementation Strategies – Programme Support – Legal Services and External Relations.
<i>Financial implications:</i>	None
<i>References:</i>	Doc 8364, <i>The Convention on Offences and Certain Other Acts Committed on Board Aircraft</i> (Tokyo, 1963) Doc 9960, <i>The Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation</i> (Beijing, 2010) Doc 9959, <i>The Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft</i> (Beijing, 2010) Doc 10014, <i>Report of the 35th Session of the Legal Committee</i>

1. BACKGROUND OF THE LEGAL WORK RELATING TO UNRULY PASSENGERS PRIOR TO THE 35TH SESSION OF THE LEGAL COMMITTEE

1.1 On 3 June 1996, the Council decided during the sixth meeting of its 148th Session to include in the General Work Programme of the Legal Committee the subject “Acts or offences of concern to the international aviation community and not covered by existing air law instruments”. On 6 June 1997, the Council further decided during the sixth meeting of its 151st Session that a Secretariat Study Group should be established for this item. The Group, designated as the Secretariat Study Group on Unruly Passengers, held several meetings. As a result of its work, the 33rd Session of the ICAO Assembly (25 September to 5 October 2001) adopted Resolution A33-4 “Adoption of National Legislation on Certain Offences Committed on Board Civil Aircraft (Unruly/disruptive Passengers)”, setting forth model legislation developed by the Group. Further, guidance material was developed by the Study Group on the legal aspects of unruly/disruptive passengers in the form of *ICAO Circular 288*.

1.2 In September 2009, the International Air Transport Association noted during the 34th Session of the ICAO Legal Committee that incidents involving disruptive and unruly passengers had continued to rise steadily. Its proposal to form a working group to address this issue was supported by the Committee. Accordingly, the Secretariat Study Group on Unruly Passengers was reactivated in early 2011 based on a decision of the Council at the sixth meeting of its 188th Session in October 2009. The reactivated Secretariat Study Group held its first meeting in Montreal from 2 to 3 May 2011 and its second meeting in Paris from 3 to 4 October 2011. It identified a number of legal issues related to unruly passengers which needed to be addressed, including a review of the jurisdictional clauses under the *Convention on Offences and Certain Other Acts Committed on Board Aircraft* (Tokyo Convention, 1963) in order to align them with modern practice; the establishment of common standards and practices with regard to offences; the strengthening of international cooperation in harmonizing enforcement procedures; the powers of the aircraft commander and related immunity, and the status of In-Flight Security Officers (IFSOs). The Study Group reached the conclusion that the issue of unruly passengers needed to be addressed by the international community, that ICAO was the proper forum for this purpose, and that the Tokyo Convention should be reviewed and the feasibility of its amendment examined, with particular reference to the issue of unruly passengers. To that end, the Group recommended that a Sub-Committee of the Legal Committee be established and be tasked to prepare a draft text to modernize the Tokyo Convention.

1.3 Based on the recommendation of the Study Group, the Council decided on 15 November 2011 during the 5th meeting of its 194th Session to request the Chairman of the Legal Committee to establish a Special Sub-Committee of the Legal Committee to review the Tokyo Convention, with particular reference to the issue of unruly passengers. On 20 December 2011, the Chairman of the Legal Committee, Mr. M. Jennison (the United States) established a Special Sub-Committee and appointed Mr. A. Piera (the United Arab Emirates) as the Rapporteur. The Sub-Committee, chaired by Ms S. H. Tan (Singapore), held two meetings in 2012.

1.4 Based on the report of the Rapporteur, the Sub-Committee focused its discussions on jurisdiction, a list of offences, extradition, immunity of the aircraft commander, IFSOs and the extent of the modernization of the Tokyo Convention.

1.5 With respect to jurisdiction, the Sub-Committee expressed the sentiment that the inclusion and exercise of the State of the Operator and State of Landing jurisdictions will assist to curb the increasing trend of unruly behaviour on board aircraft. There was general agreement in the Sub-Committee that the establishment of such jurisdictions is desirable. Other bases of jurisdiction were also considered. What remained to be determined was whether such jurisdictions would be mandatory or optional.

1.6 With respect to a list of offences, the Sub-Committee agreed not to include such a list in the draft instrument, but its majority proposed a new Article 15 *bis* in the Tokyo Convention to include two types of acts. These would be the act of assault against a crew member and the act of refusal to follow a lawful instruction given by or on behalf of the aircraft commander.

1.7 The Sub-Committee concluded that there was no need to change the wording in Article 6 or 10 of the Tokyo Convention with regard to the immunity of the aircraft commander. With respect to the issue of extradition, the Sub-Committee believed that there was no need to include additional provisions in the Tokyo Convention.

1.8 On the status of the IFSOs, the Sub-Committee noted that IFSOs did not exist when the Tokyo Convention was adopted, but today they are being increasingly deployed on international flights. Further work was considered necessary in order to build consensus with respect to the role of the IFSOs and their corresponding immunities within the framework of the Tokyo Convention.

1.9 In addition, the Sub-Committee also discussed other issues, such as possible financial claims by airlines against unruly passengers, particularly in cases of diversion of aircraft; and definitions of certain terms, such as aircraft “in flight”.

1.10 The Sub-Committee considered the possible forms for amending the Tokyo Convention. If a decision was eventually made to amend the Tokyo Convention, the Sub-Committee recommended that such amendments be effected through a supplementary protocol instead of a new and stand-alone convention. The Sub-Committee prepared for the consideration of the Legal Committee “Main Operative Clauses for the Draft Protocol to Amend the Tokyo Convention”.

1.11 At the second meeting of its 198th Session on 20 February 2013, the Council considered a report on the Second Meeting of the Sub-Committee and decided to convene the 35th Session of the Legal Committee in May 2013.

2. WORK RELATING TO UNRULY PASSENGERS DURING THE 35TH SESSION OF THE LEGAL COMMITTEE

2.1 The 35th Session of the Legal Committee, chaired by Mr. M.B. Jennison (United States), was held in Montréal from 6 to 15 May 2013. Its main agenda item was to consider the text prepared by the Special Sub-Committee. The Committee focussed its discussion on jurisdiction, offences and in-flight security officers (IFSOs). The Draft Text for the Protocol to the Tokyo Convention of 1963 proposed by the Legal Committee is set forth in the **Appendix**.

2.1.1 With respect to jurisdiction, there was the overwhelming consensus for the State of landing jurisdiction and most delegations supporting this jurisdiction would prefer it to be on a mandatory basis. There was also general support for the inclusion of the jurisdiction of the State of the operator. Accordingly, the final draft of the text reflects these two jurisdictional grounds without any square brackets in Article III, although certain reservations were expressed. The jurisdiction of the State of nationality of the victim or the alleged offender is reflected in Article III in square brackets.

2.1.2 With respect to offences, the Committee accepted the recommendation of the Sub-Committee that no list of offences would be developed. Instead, Article VIII was introduced to propose an amendment in the form of Article 15 *bis* to encourage States to take measures to initiate appropriate criminal or administrative proceedings against any person who commits on board an aircraft any offence or punishable act covered by the Convention, in particular the act of assault against a crew member and the act of refusal to follow a lawful instruction given by or on behalf of the aircraft commander. The provisions still remain in square brackets for further consideration.

2.1.3 With respect to IFSOs, while there was no consensus, the Committee was able to put into the final drafts two options relating to the functions of IFSOs and some provisions relating to their immunity. All these provisions are in square brackets in Articles VI and VII.

2.1.4 With respect to other miscellaneous items, the Committee dealt with the general provision about amendment in Article I, definitions in Article II and a consequential amendment in Article V, concurrent jurisdictions in Article IV, consequential amendments from jurisdiction in Article IX, and recourse actions from airlines in Article X. Some of these provisions require further study and deliberation

2.1.5 Article I and the underlined parts throughout the text are the changes proposed by the Committee to the Sub-Committee text. By consensus, the Committee agreed that the text was sufficiently mature and concluded that the text was ready for transmittal to the Council as a final draft for presentation to States and, ultimately, to a Diplomatic Conference. While the basic framework of the draft protocol has been prepared by the Committee, it was evident that not all the issues could be resolved at its level. Certain policy matters could only be decided at a Diplomatic Conference.

3. DIPLOMATIC CONFERENCE

3.1 The Council considered the report on the 35th Session of the Legal Committee on 14 June 2013 at the eleventh meeting of its 199th Session and decided to convene a Diplomatic Conference to amend the Tokyo Convention from 26 March to 4 April 2014. At the twelfth meeting of the same Session, the Council suggested that the future Diplomatic Conference should consider a uniform reference to the term “his” or “her” throughout the text of the proposed protocol.

4. IMPLEMENTATION OF THE BEIJING CONVENTION AND BEIJING PROTOCOL

4.1 A Diplomatic Conference in Beijing, convened under the auspices of ICAO, adopted on 10 September 2010 the *Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation* (Beijing, 2010) (Beijing Convention); and the *Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft* (Beijing, 2010) (Beijing Protocol). The 37th Session of the Assembly adopted Resolution A37-23: *Promotion of the Beijing Convention and the Beijing Protocol*, urging all States to sign and ratify these two instruments. As of 5 July 2013, the Beijing Convention had been signed by 27 States, ratified by 5 and acceded to by 3; and the Beijing Protocol had been signed by 29 States, ratified by 5, and acceded to by 2. To assist States in becoming parties to these treaties, administrative packages have been developed and transmitted by a State letter and placed in the Treaty collection on the ICAO website.

APPENDIX

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.”]