



**SPECIAL SUB-COMMITTEE OF THE LEGAL COMMITTEE
FOR THE MODERNIZATION OF THE TOKYO CONVENTION
INCLUDING THE ISSUE OF UNRULY PASSENGERS**

SECOND MEETING

Montréal, 3 – 7 December 2012

Municipal Legal Framework for Treatment of Unruly Passengers

(Presented by the United States)

1. INTRODUCTION

1.1 The Sub-Committee of the International Civil Aviation Organization (ICAO) Legal Committee on Unruly Passengers met May 21-25, 2012, at ICAO headquarters in Montreal. At the conclusion of that meeting, to facilitate further study, the Sub-Committee decided that members were encouraged to provide additional data, material and information, and several delegations indicated that they planned to provide to the Sub-Committee relevant information regarding their domestic legal authorities for addressing unruly behavior on aircraft.

1.2 This paper explains the legal framework for addressing unruly behavior on aircraft under United States federal law, setting out both the substantive provisions that establish the criminal and administrative offenses and the jurisdictional provisions that provide for the exercise of authority over certain conduct. In addition, this paper briefly summarizes the domestic authorities that establish the U.S. Federal Air Marshals program.

2. UNITED STATES LAW AND JURISDICTION

2.1 Special Aircraft Jurisdiction of the United States

2.1.1 The United States has enacted legislation and regulations that establish jurisdiction over conduct aboard transnational aircraft and that define and make punishable a variety of criminal and administrative offenses that may jeopardize the safety of the aircraft, persons, or property in the aircraft or good order and discipline on board.

2.1.2 U.S. criminal prosecutions for offenses aboard transnational aircraft must rest on a jurisdictional basis establishing a connection between the aircraft and the United States. The several bases of jurisdiction establishing this connection under U.S. law are collectively defined as the “special aircraft jurisdiction of the United States (“SAJUS”).”

2.1.3 The SAJUS is defined to include several of the bases of jurisdiction that were discussed by the Sub-Committee during its May 2012 meetings, including (i) State of registration jurisdiction; (ii) territorial jurisdiction; (iii) State of landing jurisdiction; and (iv) State of Operator jurisdiction (for leased aircraft). (The SAJUS also includes U.S. military aircraft and jurisdictional bases linked to the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft and the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation. Other jurisdictional provisions implementing those conventions are also set out elsewhere in U.S. law.)

2.1.4 The statute establishing the SAJUS, 49 U.S.C. § 46501(2), provides that “special aircraft jurisdiction of the United States” includes any of the following aircraft in flight:

- a) a civil aircraft of the United States.
- b) an aircraft of the armed forces of the United States.
- c) another aircraft in the United States.
- d) another aircraft outside the United States—
 - i. that has its next scheduled destination or last place of departure in the United States, if the aircraft next lands in the United States;
 - ii. on which an individual commits an offense (as defined in the Convention for the Suppression of Unlawful Seizure of Aircraft) if the aircraft lands in the United States with the individual still on the aircraft; or
 - iii. against which an individual commits an offense (as defined in subsection (d) or (e) of article I, section I of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation) if the aircraft lands in the United States with the individual still on the aircraft.
- e) any other aircraft leased without crew to a lessee whose principal place of business is in the United States or, if the lessee does not have a principal place of business, whose permanent residence is in the United States.

2.1.5 The United States enacted the legislation establishing the SAJUS in 1970, to implement the 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft. The categories of aircraft included in the SAJUS in the 1970 U.S. legislation implementing the Tokyo Convention actually included only territorial jurisdiction, State of registry jurisdiction, landing State jurisdiction, and U.S. military aircraft. The other categories of aircraft in the current SAJUS were added later. When ratifying the Tokyo Convention and enacting implementing legislation, the United States made clear its understanding that, although the Tokyo Convention requires each Contracting State to take steps to establish jurisdiction over offenses committed on board aircraft registered in that State, that State of registration jurisdiction is not exclusive. Rather, other States may exercise concurrent jurisdiction over the same offenses, depending on the State’s interest in the offense and the applicability of the traditional rules of international law regarding assertion of jurisdiction.

2.2 **Criminal Offenses**

2.2.1 U.S. law establishes criminal penalties for a variety of offenses committed on board aircraft in the SAJUS, in addition to those acts defined as offenses under the 1970 Hague Convention, the 1971 Montreal Convention, or other terrorism-related conventions.

2.2.2 Two provisions in U.S. law define these offenses. First, criminal penalties are established for assaulting or intimidating a flight crew member or flight attendant on an aircraft in the SAJUS so as to interfere with the performance of the crew member's or attendant's duties, or to lessen the ability of the crew member or attendant to perform those duties. 49 U.S.C. § 46504. The same section also criminalizes attempts or conspiracies to do such an act.

2.2.3 Second, criminal penalties are established, 49 U.S.C. § 46506, for the following offenses occurring in the SAJUS: murder, attempted murder, manslaughter, attempted manslaughter, assault, maiming, robbery, theft, receiving stolen property, various degrees of sexual abuse, and lewd or indecent conduct. These offenses are not defined specifically for the SAJUS. Rather, these offenses are established for the SAJUS by reference to the definitions of the same offenses as set out in the general U.S. federal criminal code. The SAJUS offenses therefore include the various elements of each offense as defined elsewhere in U.S. law. For example, manslaughter in the SAJUS is defined by reference to the following definition in the U.S. federal criminal code, 18 U.S.C. § 1112:

Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:

- a) Voluntary—Upon a sudden quarrel or heat of passion.
- b) Involuntary—In the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death.

2.2.4 As another example, assault in the SAJUS is defined by reference to a provision of the U.S. federal criminal code, 18 U.S.C. § 113, which includes a number of forms of assault, such as “assault with intent to commit murder,” “assault with intent to commit any felony, except murder or a felony [of sexual abuse],” “assault with a dangerous weapon, with intent to do bodily harm, and without just cause or excuse,” “assault by striking, beating, or wounding,” “simple assault,” and “assault resulting in substantial bodily injury to an individual who has not attained the age of 16 years.” Each of these assault offenses is further defined by definitions of terms set out elsewhere in the U.S. code, as well as through interpretation by U.S. courts.

2.2.5 The above provisions of U.S. law defining criminal offenses in the SAJUS are regularly enforced. Each year, U.S. federal prosecutors bring charges under the two provisions defining these SAJUS criminal offenses, 49 U.S.C. §§ 46504 and 46506, in numerous cases. In many more cases, as discussed below, administrative enforcement actions are also brought by the U.S. Federal Aviation Administration for illegal conduct aboard transnational aircraft that may jeopardize the safety of the aircraft, persons, or property in the aircraft or good order and discipline on board.

2.3 **Administrative Penalties**

2.3.1 The central mission of the Federal Aviation Administration (FAA) is to promote safety in civil aeronautics. To further protect aviation safety, the FAA has a compliance and enforcement program designed to promote conformity with its statutory and regulatory requirements. Unruly passengers can present a serious risk to aviation safety. The FAA Administrator has broad authority to take action considered necessary to carry out his or her statutory responsibilities and powers relating to safety in air commerce, including conducting investigations, prescribing regulations, standards, and procedures, and issuing orders. 49 U.S.C. § 40113.

2.3.2 The FAA exercises broad authority to take administrative action against a range of activities aboard aircraft that may be considered “unruly.” For example, by statute the FAA is authorized to impose civil penalties on “an individual who physically assaults or threatens to physically assault a member of the flight crew or cabin crew of a civil aircraft or any other individual on the aircraft, or takes any action that poses an imminent threat to the safety of the aircraft or other individuals on the aircraft.” 49 U.S.C. §§ 46301(d) and 46318.)

2.3.3 In addition, consistently with the FAA’s mission to promote air safety in transportation, the FAA has by regulation and policy long proscribed what constitutes interference with operations and unruly passenger conduct. For example, 14 C.F.R. §§ 91.11 provides that “[n]o person may assault, threaten, intimidate, or interfere with a crewmember in the performance of the crewmember’s duties aboard an aircraft being operated.”¹ The activity covered by this regulation runs the gamut of unruly behavior aimed at crewmembers, from challenging the authority of a crewmember to physically assaulting a crew member.²

2.3.4 The agency has a wide range of options available for addressing apparent violations of the law such as oral or written counseling, administrative action, legal enforcement action, and referral for criminal prosecution. Under 14 C.F.R. § 13.11, FAA investigative personnel issue an administrative action in the form of either a warning notice or a letter of correction for an apparent violation. FAA legal counsel may seek civil penalties primarily under 49 U.S.C. § 46301 and issue judicially enforceable orders under 49 U.S.C. § 40113. Civil penalties for violations of the applicable statute and regulations can be assessed in amounts of not more than \$25,000.

2.3.5 Over the last five years, the FAA’s administrative process has been employed in more than 500 cases pursuant to its statute and regulations regulating unruly conduct, 49 U.S.C. § 46318 and 14 C.F.R. §§ 91.11, 121.580, 125.328 and 135.120. The decision whether to prosecute a particular case is based on a review of the evidence, relevant policy, and litigation considerations. The agency exercises broad discretion in both the initial decision to bring a legal enforcement action, and in any later determination to compromise or settle a case based on various considerations. The FAA’s discretion in these areas is presumed to be immune from judicial review.

2.4 **In-Flight Security Officers/Federal Air Marshals**

2.4.1 Pursuant to 49 U.S.C. § 114, the U.S. Transportation Security Administration (TSA) is responsible for security in all modes of transportation, including civil aviation security and related research and development activities. These responsibilities encompass, among others, powers to issue and enforce security-related regulations and requirements and to designate TSA employees to serve as law enforcement officers with the authority to carry a firearm, make arrests, and seek and execute warrants.

¹ Similar regulations at 14 C.F.R. §§ 121.580, 125.328, and 135.120 create the same prohibition, though the application of these regulations is limited to aircraft operated under particular Parts of the Code of Federal Regulations.

² There is some overlap between the activity proscribed by 49 U.S.C. § 46318 and the regulations discussed here. The statutory language is broader than the regulations and the proscribed conduct need only occur on the aircraft regardless of its operating status and includes conduct directed at any individual on the aircraft, not just the crewmembers. When an unruly passenger’s conduct violates both the interference regulations and statute, the FAA can charge both separately. When an unruly passenger’s conduct violates only the regulation (for example, where the passenger’s interference or intimidation of a crewmember does not rise to the level of a physical assault or threatened physical assault), the FAA can charge only the regulatory violation. In those situations in which an unruly passenger’s conduct violates only the statute, 49 U.S.C. § 46318 (e.g., where the passenger physically assaults or threatens to physically assault another passenger), then the FAA can charge only the statutory violation.

2.4.2 Congress specifically authorized Federal Air Marshals (FAMs) to be deployed on every passenger flight of a U.S. carrier in interstate or intrastate transportation within the United States and between a place in the United States and a place outside the United States. The FAM program also relies on the general authority granted to TSA in 49 U.S.C. § 44903 to provide for air transportation security.

2.4.3 Pursuant to 49 U.S.C. §§ 114(q) and 44903(d)(2), FAMs are law enforcement officers with authority to carry firearms and to make arrests without warrants for offenses against the United States committed in their presence and when they reasonably believe that someone has committed or is committing a felony offense. These statutory powers carry with them the right to use a reasonable amount of force when making an arrest. FAMs deployed on passenger flights of U.S. air carriers within the U.S. airspace are authorized to exercise this arrest authority. FAMs are required to adhere to the policies regarding the use of force adopted by the Departments of Justice and Homeland Security.

2.4.4 Under U.S. law, when a FAM is deployed on a flight, he or she controls the on-scene law enforcement response for incidents that occur onboard that flight. This does not diminish the parallel authority of the pilot-in-command to conduct overall flight operations. Under Annex 6, section 4.5.1 of the Chicago Convention, the pilot-in-command is “responsible for the safety of all crew members, passengers and cargo on board when the doors are closed,” as well as for “the operation and safety of the aeroplane from the moment the aeroplane is ready to move for the purpose of taking off until the moment it finally comes to rest at the end of the flight and the engine(s) used as primary propulsion units are shut down.”

2.4.5 Under the SAJUS, FAMs have extraterritorial arrest authority for specified offenses occurring on passenger flights of U.S. air carriers flying between the United States and a foreign country. FAMs are outside the SAJUS once the aircraft on which they are deployed lands in a foreign country. At that point, the ability of the FAMs to retain custody over an offender will depend on the acquiescence and approval of the appropriate foreign authorities. In the event FAMs make an arrest on board an aircraft in international flight that subsequently lands at a foreign airport, current TSA policy is to surrender the person in custody, as well as any evidence collected or recovered, to the police authority that responds to the aircraft.

3. TOPICS REQUIRING FURTHER STUDY

3.1 As demonstrated above, the United States has sufficient laws, regulations, and processes to punish and deter unruly or disruptive behavior on board transnational aircraft. Other States have similarly established the transnational jurisdiction, criminal offenses, and administrative sanctions sufficient to achieve this objective. The United States recognizes that, although these various domestic legal regimes may each provide a sufficient basis to address this issue, those legal regimes may differ substantially in terms of the precise scope of transnational jurisdiction asserted and the definitions of various criminal offenses and administrative violations.

3.2 The Sub-Committee of the ICAO Legal Committee is reviewing the Tokyo Convention with respect to this issue of unruly passengers. Suggested modifications to the Tokyo Convention include specifying additional mandatory or permissive bases of jurisdiction, and listing specific offenses to be incorporated into domestic law. Discussions at the first meeting of the Sub-Committee, however, failed to clarify what obstacles states have encountered in establishing jurisdiction over conduct aboard transnational aircraft, in defining and punishing within that jurisdiction criminal or administrative offenses constituting unruly or disruptive behavior, or other practical issues they face in prosecuting such activity. To gather the information necessary for the Sub-Committee to determine whether and what modifications to the Tokyo Convention would be necessary in order for States to be able to address this problem, and to assess the benefits of harmonization of offenses in the domestic legal regimes of the various States Parties, the United States recommends that States Parties provide the following information:

- a) What measures has each State already taken to address the issue of unruly passengers on transnational aircraft, including by establishing the types of jurisdiction that are contemplated in the Rapporteur's report, and by defining criminal and administrative laws that may be enforced?
- b) If a State has not taken measures to establish in its domestic law sufficient provisions to address the issue of unruly passengers on transnational aircraft, are there particular legal or policy obstacles that have been identified?

— END —