



INTERNATIONAL CONFERENCE ON AIR LAW

(Montréal, 26 March to 4 April 2014)

COMMENTS ON THE DRAFT PROTOCOL AMENDING THE TOKYO CONVENTION OF 1963 ON OFFENCES AND CERTAIN OTHER ACTS COMMITTED ON BOARD AIRCRAFT

(Presented by the Bolivarian Republic of Venezuela)

EXECUTIVE SUMMARY

The purpose of this working paper is to refer to the Venezuelan State's comments on the draft Protocol Amending the Convention on Offences and Certain Other Acts Committed on Board Aircraft, done at Tokyo on 14 September 1963, as proposed by ICAO's Legal Committee.

Conference Decision: The Conference is invited to:

- a) Review the information set forth in the appendix to this document;
- b) consider the comments submitted for relevant inclusion in the final text of the protocol amending the Tokyo Convention of 1963

<i>Strategic Objectives:</i>	Civil Aviation Security and Facilitation.
<i>Financial implications:</i>	None.
<i>References:</i>	Draft text of the Protocol to the Tokyo Convention of 1963 proposed by the Legal Committee (DCTC Doc. No. 3)

1. INTRODUCTION

1.1 The legal provisions of the draft Amending Protocol proposed by ICAO's Legal Committee supplement the Convention on Offences and Certain Other Acts Committed on Board Aircraft, done at Tokyo on 14 September 1963. The contents of this legislative draft were analyzed, which in turn led to a series of comments being produced that will contribute to an improved understanding and implementation of the principles enshrined therein, which is why we are putting forward the considerations annexed to this working paper in the accompanying Appendix.

1.2 A series of considerations have emerged from the aforementioned analysis, which justify the relevance of this working paper, enabling effective implementation of the legislation to be produced by the International Conference:

1.2.1 It is thus recommended that certain definitions should be adjusted and others should be conceptualized correctly in close harmony with the contents of the Annexes to the Chicago Convention of 1944 and the international laws governing civil aviation, with the firm commitment to comply with the principle of uniformity of air law instruments.

1.2.2 Furthermore, we would purport that jurisdiction-related aspects should be kept as broad as possible in order to ensure proper implementation of the Law, and respect should be given to the procedural guarantees which apply to those affected by the alleged acts regulated in this body of law.

1.2.3 With regard to the powers and responsibilities of the aircraft commander, we believe that these might become fractured if delegated to the security officer who is not part of the crew, according to technical legislation; thus it is appropriate to maintain the demarcation lines between these two sets of responsibilities, as envisaged in Option 2 of Article VI of the draft protocol.

1.2.4 Likewise, and pursuant to the provisions of Article X, as regards the damages incurred by the operator of the aircraft as a result of the disembarkation or delivery of the person about whom he has reasonable grounds to believe that such person has committed, or is about to commit, on board the aircraft, an act that endangers or is likely to endanger the safety of the aircraft, the crew and the passengers, we believe that third parties affected by such offences or acts should be included, since we consider that they might also find themselves in a situation that is disadvantageous and detrimental to their interests due to the diversion of the traffic operation from its original destination.

1.2.5 The corresponding Appendix has been attached to reflect the above-mentioned remarks. It contains the draft text of the Amending Protocol to the Tokyo Convention of 1963, with the Venezuelan State's comments, and the inclusions and variations that we are proposing for approval within the Diplomatic Conference to be held for this purpose.

1.3 The cited instrument attached in the Appendix has been shown with grey shaded text used to identify the contents of the draft text of the Protocol that have been approved by the Venezuelan State. Similarly, the proposals submitted by the Bolivarian Republic of Venezuela for inclusion in the final version of the draft text of the Protocol are shown in grey shaded text with bold italics.

2. CONFERENCE DECISION

2.1 The Conference is invited to review the information contained in the appendix to this document and consider the comments presented for relevant inclusion in the final text of the protocol amending the Tokyo Convention of 1963.

APPENDIX

COMMENTS ON THE DRAFT PROTOCOL AMENDING THE TOKYO CONVENTION OF 1963 ON OFFENCES AND CERTAIN OTHER ACTS COMMITTED ON BOARD AIRCRAFT

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 of the aircraft (TR’s note: “of the aircraft” is included in the Spanish version of DCTC Doc No.3 but does not appear in the English version of DCTC Doc No.3) is competent to exercise jurisdiction over offences and acts committed on board, **even when flying outside its airspace.**

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

- a) as the State of landing, when the aircraft on board which the offence or act is committed lands **that is located** 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~~ **in an** aircraft leased **with or** without crew **when the to-a** lessee whose has his principal place of business or, ~~if the lessee has no such place of business, whose permanent residence in that State~~[-]/[; and]
- c) [when the offence or act is committed by or against a national of that State **and all of the conditions for extradition of the alleged offenders are met .]**

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 (TR's note: proposal to change the Spanish adjective ending ~~as to~~ [os], purely grammatical) 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 [or acts] committed (TR's note: proposal to change the Spanish adjective ending ~~as to~~ [os], purely grammatical) 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~~ **and is located in its territory** with the alleged offender still on board; ~~and~~
- b) as the State of the operator, when the offence [or act] ~~is~~[are] committed (TR's note: proposal to change the Spanish adjective ending ~~a- to~~ [os], purely grammatical) 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- if he does not have one,~~ whose (TR's note: proposal to replace the verb ~~tiene~~ by **tenga** in the Spanish version – purely grammatical) permanent residence is in that State.
- c) **as the State of registration, if the offence or act occur on board aircraft registered in this State, when flying outside its airspace; and**
- d) **When the offence or act committed on board aircraft, regardless of its nationality, occur in foreign airspace and produce or are designed to produce effects in this State's territory.**

[2 ter. Each Contracting State may also take such measures as may be necessary to establish its jurisdiction over offences [or acts] committed (TR's note: proposal to change the Spanish adjective ending ~~a- to~~ [os], purely grammatical) on board aircraft when an offence [or act] ~~is~~ [are] committed (TR's note: proposal to change the Spanish adjective ending ~~da- to~~ [dos], purely grammatical) on board an aircraft by or against a national of that State-, have (TR's note: auxiliary verb missing in the Spanish version) **met the conditions for extradition of the alleged offenders.**]

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 *and affected third parties* 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.”]