



INTERNATIONAL CONFERENCE ON AIR LAW

(Montréal, 26 March to 4 April 2014)

REPORT OF THE WORKING GROUP ON JURISDICTION

(Presented by the Chairman of the Group)

The Working Group on Jurisdiction was chaired by the United Kingdom and consisted of delegates from Bolivia, China, France, Germany, Jamaica, Kuwait, Mexico, Namibia, Nigeria, Russian Federation, Singapore, Spain, United States and the International Air Transport Association.

The terms of reference of the group were as follows:

AIM

Address the concerns of those States who have reservations with mandatory State of landing jurisdiction, especially in the case of landings due to diversions, with a view to proposing potential solutions for the consideration of the Commission of the Whole.

CONCERNS TO ADDRESS

Legal certainty.

Proportionality.

Double jeopardy.

Due Process.

In addressing the concerns mentioned above, this Working Group must bear in mind that the Commission of the Whole has decided, by a very high majority, on the mandatory State of landing jurisdiction and any proposal to address these concerns should avoid opening up new areas of controversy in relation to the mandatory State of landing jurisdiction.

The group considers the following proposals worthy of consideration by the Commission as a Whole.

Legal certainty

The problem of legal certainty was identified as being that passengers may not be able to reasonably anticipate which set of criminal laws they will be subject to, particularly if there are unexpected landings due to diversions.

The group considered two ways to address this: to target the range of offences that would be considered as requiring mandatory jurisdiction¹ in the State of landing; and to deal with the specific issue of landings due to diversions.

¹ “Mandatory jurisdiction” is used throughout this explanatory paper as a shorter version of the strictly correct “mandatory establishment of jurisdiction”.

Targeting of scope and proportionality

Part of the approach to legal certainty was to target the scope of offences for which mandatory jurisdiction applies, so that it deals only with those offences that are relevant to the aims of the Convention. The group developed a proposal to recast proposed Article 3.2 *bis* as follows:

Each Contracting State shall also take such measures as may be necessary to establish its jurisdiction as the State of landing over offences [and acts]² committed on board aircraft, when

- i. the aircraft on board in which the offence [or act] is committed lands in its territory with the alleged offender on board;
- ii. the offence [or act] jeopardises the safety of the aircraft or of persons or property therein or jeopardises good order and discipline on board; [...]

The effect of this would be that a State of landing would only be obliged to establish jurisdiction when the incident is of the type that the Convention is primarily concerned with, that is to say, matters that affect the safety and good order of the aircraft and the people in it. The recast article excludes offences that have nothing to do with the flight (though the State of landing could use its discretion to establish jurisdiction in such cases if its law allowed). This also has the advantage of closely reflecting the language in Article 1(b) of the Convention.

Diversions

The reason for considering diversions is to avoid a situation where, as a result of a diversion, a passenger find himself or herself in a jurisdiction he or she did not expect to arrive in, and so cannot have had any expectation that he or she would be subject to the laws of that jurisdiction.

The group has developed a proposal that would have the effect that mandatory jurisdiction would not apply in a State of landing when the landing in that State was unplanned. This would involve inserting into proposed Article 3.2*bis* the text in bold:

Each Contracting State shall also take such measures as may be necessary to establish its jurisdiction as the State of landing over offences [and acts] committed on board aircraft, when

- i. the aircraft on board in which the offence [or act] is committed **has its next scheduled destination or last place of departure in its territory, if the aircraft next** lands in its territory with the alleged offender on board;
- ii. the offence [or act] jeopardises the safety of the aircraft or of persons or property therein or jeopardises good order and discipline on board; [...]

This formulation does not deal with the question of whether mandatory jurisdiction would still apply if the diversion was made by the commander of the aircraft *because of an incident to which mandatory jurisdiction would normally apply*. While this could create a situation where legal options to deal with an offender were limited because of the action taken by the pilot in diverting the aircraft to ensure its safety, the group considered that this was sufficiently unusual not to be worth providing for in its own right.

Put more simply, the effect is that a place is not regarded as a State of landing if the landing occurs as a result of a diversion.

² The square-bracketed text “and act(s)” is included as at the time of writing the Commission of the Whole has not decided on whether this text should be included.

Proportionality

The question of proportionality in the context of State of landing is multifaceted and includes such issues as:

- Does the act or offence warrant the potential inconvenience to alleged offender, passengers and crew of being involved in a criminal or administrative process which may be conducted far from their home?
- Is the expense and difficulty of affording the offender the rights to fair treatment as required by international law (translation etc.) commensurate with the scale of the wrong alleged to have been committed?
- What is the strength of justification for departing from the normally accepted principle that extra-territorial jurisdiction for criminal offences should only be exercised in exceptional cases?

The group first looked at the question of setting a standard of severity for offences (and acts) to which mandatory jurisdiction should apply. This was rather problematic as, when States create standards of severity for offences they tend to do so based on their own scale of penalties, and these scales vary widely from State to State.

The group also considered, but rejected, a test based on whether the offence in question was extraditable or not. The group considered that a requirement that an offence be extraditable for it to fall within mandatory jurisdiction would be complicated and inconsistent, given that extradition arrangements between States may be based on domestic law, or on bilateral treaties, or indeed be completely absent; and that a test of extraditability might set too high a bar for offences of general disorder that the Convention and the Protocol aim to deal with.

The group did, however, consider that a softer dual-criminality test could be appropriate, to ensure that there is some acknowledgement of the fact that passengers would not necessarily be familiar with all aspects of the criminal law of State of landing. This would involve adding the following text as a new Article 15.3:

In exercising its jurisdiction as State of landing, a State shall consider whether the offence [or act] in question is generally an offence in other States [and the severity of the penalties that generally apply].³

Delivering the alleged offender

In addition, the group developed a more specific test based on the working of the Convention itself. The effect of this would be that a State of landing would only be required to establish jurisdiction in the case where the commander of the aircraft had delivered the passenger according to the procedure already established in Article 9.1 of the Convention.⁴ This acts as a proxy for a severity test as it draws on the question of whether the commander considered the matter serious enough to act upon.⁵

This results in a further proposal for proposed Article 2bis, as follows (additional text in bold):

³ We have square-bracketed the final part of this text as this section arose from a very late proposal that was subject to limited discussion. The group's view is that the text stands with or without this square-bracketed section.

⁴ Article 9.1 reads: "The aircraft commander may deliver to the competent authorities of any Contracting State in the territory of which the aircraft lands any person who he has reasonable grounds to believe has committed on board the aircraft an act which, in his opinion, is a serious offence according to the penal law of the State of registration of the aircraft."

⁵ It is important to note that this does not mean that the pilot is expected to establish whether an offence has been committed or not. The test for this purpose is simply whether the pilot delivered the passenger to the authorities.

Each Contracting State shall also take such measures as may be necessary to establish its jurisdiction as the State of landing over offences [and acts] committed on board aircraft, when

- i. the aircraft on board in which the offence [or act] is committed *has its next scheduled destination or last place of departure in its territory, if the aircraft next⁶ lands in its territory with the alleged offender on board;*
- ii. the offence [or act] jeopardises the safety of the aircraft or of persons or property therein or jeopardises good order and discipline on board; **and**
- iii. **the aircraft commander has delivered the alleged offender in accordance with Article 9(1) of the Convention.**

The “three part test”

This proposal, when taken with the proposal on targeting of scope, can be considered as part of a three-part test to establish whether a matter falls within mandatory jurisdiction. In plainer language, the overall test to establish what jurisdiction would be is that

- an incident has occurred on the aircraft that lands in its territory (not as a result of a diversion),
- that incident affects the safety and good order of the aircraft and the people on it; and
- the commander has taken the step of delivering the passenger concerned to the authorities, (which he or she is only empowered by the Convention to do if of the opinion that a serious offence has been committed).

The fact that an aircraft has landed and a passenger been delivered, pursuant to an allegation that meets this threefold test, obliges the State of landing to then make its own enquiries.

This test appears to meet the remit of the group’s work in that it creates greater certainty and protection without undermining the overarching intention to ensure that those whose behaviour has endangered airline operations or harmed passengers can be dealt with effectively by the State of landing. This is for two reasons.

- First, it captures the types of incidents the Convention is designed to deal with, while leaving other matters (offences that may be more particular to individual States; those that may have nothing to do with the flight, or matters too minor to concern the pilot) to the discretion of the authorities of the State of landing without requiring them to establish jurisdiction. Put another way, it means that the State of landing deals with the things we are really worried about, but does not have to take jurisdictional responsibility for everything that happens on the flight simply because it arrives in that State’s territory.
- Second, from the point of view of the passenger, it provides clarity that the enforcement intended by the Protocol will certainly apply if he or she does anything to compromise safety or harm other passengers, but not necessarily in the case of other matters that have nothing to do with the flight.

Some members of the group, however, suggested that the final part of this three part test might raise its own issues. They noted that the motivation for the aircraft commander to deliver the person to the competent authorities in Article 9(1) of the Tokyo Convention is usually to offload the person who is causing disturbance or compromising the safety of the aircraft. They also noted that, while the test might be based on the fact of whether the plane was diverted or not, it still arguably introduced a subjective element as that fact was based on the judgement of the pilot in assessing whether there were reasonable grounds to believe that a serious offence had been committed. It was also noted that “delivered” in (iii) in the above is not a defined term.

⁶ Italic text is taken from the “diversion” proposal.

The proposed language above is presented to the Commission of the Whole for its consideration.

Offences and acts

The Conference as a whole is to consider the inclusions of “acts” within the scope of the mandatory State of landing and State of operator jurisdiction. Although the terms of reference of this group do not specifically include the issue of State of operator jurisdiction, this group has been asked to consider the question of “acts”.

The group notes that States can address minor incidents on board an aircraft by way of non-criminal administrative penalties. The new express competence to deal with acts and offences as State of landing (article *2bis*) makes it even clearer that there is nothing preventing a State from doing this.

This working group recognises that the new safeguards proposed above could be undermined by the inclusion of “acts” in the mandatory State of landing jurisdiction. Therefore, the group comments that the omission of the word “acts” from article *2bis* might contribute towards the aim of achieving a consensus. We understand this omission could alleviate a legal certainty/proportionality concern raised by States that support the new mandatory jurisdiction, as well as those that have opposed it.

Double jeopardy and due process

Since the Protocol has the effect of increasing the number of jurisdictions that have an interest in a particular incident, it might create a greater risk of breaching the principle that a person should not be tried more than once for the same offence.

At the time of writing, the Commission of the Whole appeared to have concluded that the following should be added as Article *3bis* 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 shall, as appropriate, consult those other Contracting States with a view to coordinating their actions.

The group considers that this is helpful in dealing with one practical aspect of the issue of double jeopardy. In addition, in order to deal with the generality of the issue of due process and fair treatment, the Commission of the Whole is asked to consider adding a new paragraph (15.4) to the Convention as follows:

Each contracting State, when fulfilling its obligations, or exercising a permitted discretion, under this Convention, shall act in accordance with the obligations and responsibilities of States under international law. In this respect, each contracting State shall have special regard for the principles of due process and fair treatment.

Finally, as a general safeguard, the group invites the Commission of the Whole to consider updating Article 2 of the Convention so that it reads as follows:

Without prejudice to the provisions of Article 4 and except when the safety of the aircraft or of persons or property on board so requires, no provision of this Convention shall be interpreted as authorising or requiring any action in respect of offences against penal laws of a political nature or those based on *discrimination on any ground such as race, religion, nationality, ethnic origin, political opinion or gender, or other status.*⁷

⁷ New text in italics.

This change leaves the essential meaning of the existing Article 2 intact but provides some comfort by recasting the non-discrimination provision into something that has more in common with equivalent provisions in more recent Conventions. This list is taken from the Beijing Convention.

Other matters

Guidance

While most of the proposals above have general legal effect rather than creating any practical matters that would need to be dealt with at a day-to-day level, the group notes that, in the event of the three-part test proposed for Article 3.2*bis* being adopted, consideration should be given to the need for guidance for those who would need to apply its provisions on the ground (principally law enforcement in States of landing, but also aircraft commanders as it touches on their powers to deliver passengers).

Double jeopardy and Article 13

The group noted that some delegates had suggested in the Commission of the Whole that a reference should be made linking the obligations in proposed Article 3*bis* of the Protocol to the obligations in Article 13; and that the intention of this suggestion was not to introduce new policy but simply to make it easier for those who had to apply the respective obligations to navigate around the Convention and the Protocol. While this matter is connected to the question of double jeopardy above, the group did not feel that it fell strictly within its remit. However, it noted that in dealing with this question, the Drafting Committee might wish to consider adding a further paragraph to Article 3*bis* as follows:

The obligations in the preceding paragraph are without prejudice to the obligations of a contracting State under Article 13.

Extradition and assistance

The group also considered proposals from delegates of the Czech Republic aimed at easing extradition proceedings in cases where no extradition treaty existed, and in creating obligations relating to legal assistance. The group considered that while there was a relationship between these questions and the issues being considered by the group in that they both relate to the fair and effective course of justice, the proposals did not fall within the remit of the group. It is, of course, open to delegates of the Czech Republic to raise these matters on their own account if they wish.

The group also considered that the issue of extradition was considered by the Legal Committee and that there had been no support to include language on extradite or prosecute as the offences contemplated by the Tokyo Conventions were not of sufficient gravity to attract such an obligation.

Absence of prosecutorial discretion

The group noted that during earlier discussions on mandatory jurisdiction, many delegates had commented that difficulties associated with the obligations thus created could be mitigated by the use of prosecutorial discretion: that is to say, in the event that an unsuitable case came before a State, it could discharge its obligations by deciding, not to take the case before the courts. In the group's discussions, it emerged that a number of States do not have such discretion (or have only very limited discretion), and that this could create issues that would not be resolved by the proposals in this paper. Without wishing to reopen the question of mandatory jurisdiction, the group simply draws attention to this matter, as it might be prudent to establish whether and to what extent this could create practical issues for the implementation of the Protocol.