



WORKING PAPER

LEGAL COMMITTEE – 39TH SESSION

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Agenda Item 6: Any Other Business

FAIR TREATMENT OF AIR CREW IN CASES OF ARREST

(Presented by the International Federation of Air Line Pilots' Associations, IFALPA)

1. OBJECTIVE

1.1 The objective of this Information Paper is to introduce the idea of developing Guidelines for the fair treatment of air crews in cases of arrest after. The objective is not to limit the criminal jurisdiction of States but to provide an international framework for treating air crews fairly if they are under suspicion to be involved in a criminal case, similarly to the Guidelines for fair treatment of seafarers in cases of arrest, developed by the International Maritime Organization, IMO.

1.2 Air crews are especially vulnerable if suspected of crimes committed while on duty. While criminal immunity granted to diplomats as per Arts. 29, 31 and 32 of the 1961 Vienna Convention on Diplomatic Relations is not requested for air crews, at the very least an arrested crew member should be treated fairly while detained. Having clear Guidelines for fair treatment of air crews in cases of arrest will contribute to this.

2. INTRODUCTION

2.1 After the arrest of two Dutch Martinair Cargo pilots in Buenos Aires, Argentina related to 80 kilograms of cocaine found in the cargo hold in January 2020, it was reported that the crew was maltreated during the first ten days following their arrest.

2.2 Furthermore, the arrest of a Turkish business jet Captain in Fortaleza, Brazil, in August 2021 with 1.3 tons of cocaine onboard. After almost four months under custody in Brazil, the captain was released due to lack of evidence — only to be detained when arrived in Turkey in December 2021, and charged four days later. The pilot is still under custody.

2.3 Then, the arrest of a Canadian crew (pilots and cabin crew) in April 2022 in the Dominican Republic after 210 kg of cocaine was found in the avionics bay. The crew discovered eight bags hidden in the avionics bay and immediately notified Dominican authorities and the RCMP in Canada. The crew were imprisoned for nine days before being released on bail and had their passports confiscated and detained in what they describe as deplorable conditions in a Dominican jail. The crew was then released but remain in the island for seven months going from one safe house to another every few weeks to protect them from local gangs. 24/7-armed security protection was needed. The case was then dropped after the Dominican District Attorney stated that there was not enough evidence to proceed.

2.4 The IFALPA Legal Committee decided the creation of a Task Force to further investigate about fair treatment of air crews in cases of arrest and explore the possibility of creating guidelines to improve the way air crews are treated when facing arrests in a foreign country.

3. WHAT IS FAIR TREATMENT?

3.1 The Guidelines on fair treatment of Seafarers in the event of a Maritime Accident (Resolution LEG.3(91) of 27 April 2006 IMO/ILO) were used as reference. The objective of this Guidelines is to ensure that seafarers are treated fairly following a maritime accident and during any investigation and detention by public authorities, and that detention is for no longer than necessary.

While there's no definition of "fair treatment", it can be-inferred from these guidelines that:

- a) Treatment means that seafarers are entitled to protection against coercion and intimidation from any source during or after any investigation into a maritime accident, and
- b) The investigation of a maritime accident should not prejudice the seafarer in terms of repatriation, lodgings, subsistence, payment of wages and other benefits and medical care. These should be provided at no cost to the seafarer by the shipowner, the detaining State, or an appropriate State.

The detailed explanation of what is "fair treatment" in relation to seafarers is the whole content of these guidelines.

Article 5 of the Universal Declaration of Human Rights states that, in the situation of arrest and detention, no one shall be subjected to inhuman or degrading treatment:

Article 5:

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

One of the elements of fair treatment is the right to get contact with a consular officer of the State where the individual is a national of, from the moment when the national is in prison, custody, or detention, as is laid down in Article 36c of the Vienna Convention on Consular Relations, 1963.

4. SCOPE

4.1 The scope should ideally go beyond of that of the current IMO Guidelines, meaning not only in cases of arrests after incidents and/or accidents, but also in cases of arrests on suspicion of crimes committed on board the airplane.

5. WHY DO AIR CREWS NEED THIS?

5.1 Air crews have an important role in society. From safely gathering families together, to transporting goods for medical and humanitarian purposes (as experienced recently during the COVID-19 pandemic). During the pandemic, hundreds of thousands of vaccines, ventilators and different medical goods were delivered to all five continents-thanks to the air crews, and in some cases, taking on the lives of several crew members.

5.2 Existing special considerations:

There are provisions in ICAO Annex 9 regarding the entry of crew members performing duties in a specific country:

3.65, Contracting States shall accept Crew Member Certificates, issued according to the requirements of Standard 3.62, for visa-free entrance of crew members when arriving in a duty status on an international flight and seeking temporary entry for the period allowed by the receiving State.

3.65.1 Contracting States should waive the visa requirement for crew members when arriving on duty on an international flight and seeking temporary entry for the period allowed by the receiving State as well as 3.65.2 which specifies that Contracting States should waive the visa requirement for arriving crew members presenting CMCs, when arriving on another aircraft operator or another mode of transport and seeking temporary entry for the period allowed by the receiving State in order to join their assigned flight on duty.

5.3 Air crews are subject to the laws and regulations of the country of its registration and some countries have special consideration in cases of arrest-or detention. An example for that is the Brazilian Code of Criminal Procedure, which has a list of specific professions that enjoy special imprisonment rules during the process before conviction, and a subsequent law that includes pilots on the list.

LAW No. 3988 - 24 November 1961:

Extends the privileges of special imprisonment (in a different prison or in a private cell from regular prisoners and transportation granted by article 295 of the Code of Criminal Procedure, to pilots of commercial national registered aircraft who have already performed command duties:-

5.4 Conventions

5.4.1 The Convention on Offences and Certain other Acts Committed on Board Aircraft (known as the Tokyo Convention) provides for the transfer of arrested or detained crew members to their home countries for legal proceedings or imprisonment for offences committed on board. The Tokyo Convention was adopted in 1963 and has been ratified by over 180 countries.

5.4.2 The Tokyo Convention (1963), and the Montreal Protocol (2014), deal with punishable offences on board aircraft and the jurisdiction of States to prosecute them, but its effect is limited to the time in which the airplane doors are closed to when the doors are opened. Once the door is opened, local law (but in some cases also the law of the State of registration) applies.

5.4.3 Under the Tokyo Convention, a country that has arrested or detained a crew member for an offence committed on board an aircraft must, at the request of the crew member's home country, either prosecute the offence in accordance with its own laws or, if it considers it appropriate, hand over the crew member to the home country for prosecution. In 2014, the Montreal Protocol amended the Tokyo Convention.

5.4.4 Over 90 countries have ratified the Convention on the Transfer of Sentenced Persons, of 1983. This Convention provides the transfer of convicted persons between countries, including crew members who have been convicted and sentenced in a foreign country.

5.4.5 There are several treaties that emphasize the need for a fair treatment (not specified to air crews but to persons who are in custody). See for example article 5 of the Declaration of Human Rights, in the situation of arrest and detention, during such a period no one shall be subjected to inhuman or degrading treatment:

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

5.4.6 Also, the UN international covenant on civil and political rights, Arts. 7 and 10, and the 1987 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Arts. 11 and 16.

5.4.7 Moreover, the Declaration Against Arbitrary Detention in State-to-State Relations is part of an international effort to deter and put an end to the practice of arbitrary arrest, detention and sentencing of individuals for leverage over another state launched by Canada in 2021. 69 countries and the European Union have endorsed the declaration and stand together against this practice. In this Declaration there is also a stipulation about the treatment during detention:

“We call upon States to take concrete steps to prevent and put an end to harsh conditions in detention, denial of access to counsel, and torture or other cruel, inhuman, or degrading treatment or punishment of individuals arbitrarily arrested, detained, or sentenced to exercise leverage over foreign governments. We reaffirm the urgent need to provide these individuals with an effective remedy consistent with international human rights law, and call for their immediate release.”

5.5 Impact of arrest on licensing

5.5.1 One of the key concerns when a crew member is arrested is the potential impact on their ability to perform their duties. Depending on the circumstances, an arrest could lead to the suspension or revocation of their aviation licenses or certificates, which could imply significant financial and professional consequences not just for the crew member, but also for the people depending on them, as well as their employers.

6. THE ROLE OF ICAO

6.1 ICAO can have a decisive role in developing guidelines or best practices for the fair treatment of air crews who are arrested or detained abroad. Such guidelines could help to ensure crew members are granted fair treatment, due process protections, and that their rights and well-being are respected, including a provision that airlines should provide legal assistance and representation to their crews when situations like this arise.

6.2 The development and further adoption of these Guidelines will require the cooperation and support of ICAO Member States, as well as relevant stakeholders in the aviation industry. It is also important to ensure that any Guidelines developed are in line with international human rights conventions and treaties and respectful of the sovereignty of each country.