



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

SECOND MEETING

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**THE REPUBLIC OF KOREA'S LEGAL RESPONSES TO UNRULY PASSENGERS AND
THE ISSUE OF EXTENDED JURISDICTION**

(Presented by the Republic of Korea)¹

EXECUTIVE SUMMARY

The Republic of Korea (ROK) has continued to experience problems of unruly/disruptive behaviour in aircraft. In response, the Korean Government adopted relevant provisions (Article 23 of Aviation Safety and Security Act) in 2002 and gradually strengthened sanctions and enforcement.

Nonetheless, the ROK legislation is silent on the scope of jurisdiction. Despite the Supreme Court's judgment in 1984, it is commonly assumed that the law enforcement authorities are not entitled under the laws to exercise jurisdiction without any link of territoriality, nationality or registration. In order for the jurisdiction to be extended to the extra-territorial cases of unruly/disruptive offenses, either Aviation Safety and Security Act or the general Criminal Codes should be revised. The legislature, however, has been generally cautious in the past against legislating for granting extra-territorial jurisdiction in the absence of an international agreement.

An option alternative to the revision of the domestic laws (ASSA or Criminal Codes) would be to have an implementing legislation for an international treaty on the matter. This option presupposes an action by the international community, represented by the ICAO, to produce an international instrument offering a solid and harmonized basis for extended jurisdiction to the State of landing.

¹ Any views contained herein, in particular concerning the interpretations of the Korean domestic laws, are offered by the Korean delegation in order to introduce a comprehensive picture of its domestic status and facilitate the discussion of the Legal Sub-Committee. They merely represent the understanding of the current Korean delegation and thus should not be in any way prejudicial to the Korean Government's official positions to be taken in any future cases.

1. **BACKGROUND: STATUS OF UNRULY/DISRUPTIVE PASSENGERS IN KOREA**

1.1 The Republic of Korea (ROK) has continued to experience problems of unruly/disruptive passengers. According to statistics combining Korean Air and Asiana Air, the number of unruly/disruptive behavior has been persistent around 30 incidents annually (31 in 2006, 35 in 2007, 31 in 2008, 29 in 2009, and 29 in 2010).² The incidence of less serious unruly/disruptive behavior is presumed to be much more frequent, since the statistics above only counted those cases where the offenders were physically handed over to the law enforcement.

1.2 While perceiving the unruly/disruptive behavior as a potentially serious threat to air navigation safety, the Korean Government introduced relevant provisions in 2002 and gradually strengthened sanctions and enforcements. The court meted out a fine of approximately 5,000 USD in a case of 2006,³ and it sentenced even an imprisonment of 6 months in 2008⁴ (later appealed and relegated to the fine of 10,000 USD) in another case widely-covered by the media.⁵

2. **ROK'S UNRULY PASSENGER LEGISLATION IN LIGHT OF ICAO CIRCULAR 288**

2.1 **Aviation Safety and Security Act**

2.1.1 Aviation Safety and Security Act (hereinafter referred to as "ASSA"), an omnibus legislation on air safety and security, adopted a new clause in 2002, proscribing certain unruly/disruptive behaviors. This clause has been amended over the years partially reflecting the ICAO's model legislation (in its Circular 288)⁶ and also enhancing penalties for the offenses. Article 23 (Obligation of Passengers to Cooperate in Maintaining Safety)⁷ of ASSA stipulates (excerpted);

(1) The passengers in aircraft shall be prohibited from acts falling under any of the following subparagraphs to ensure the safe flight and travel of both the aircraft and themselves:

- 1. An act of disruption such as abusive language and loud singing;*
- 2. An act of smoking (excluding the act of smoking in any designated smoking area);*
- 3. An act of doing harm to other persons after drinking alcohol or abusing drug;*
- 4. An act of causing others to feel sexual humiliation;*
- 5. An act of using electronic devices in violation of Articles 61-2 of the Aviation Act; and*
- 6. An act of attempting to enter the cockpit without the captain's approval.*

² Yonhap News (in Korean), *Disruption in Aircraft Persists* (8 March 2010).

³ Travel Times (in Korean), "Heavier Sentence for Disruption in Aircraft" (19 April 2006).

⁴ Court of Busan District Judgment, "2008GoDan1656" (22 May 2008).

⁵ MBN News (in Korean), "CEO Park Fined 10 million won for Disruption in Aircraft" (4 December 2008).

⁶ ICAO, *Circular 288, Guidance Material on Legal Aspects of Unruly/Disruptive Passengers* (June 2002).

⁷ Unofficial translation aided by the Korea Legislation Research Institute's online database of the English translation of the Statutes of the Republic of Korea (<http://elaw.klri.re.kr/>).

- (2) *The passengers shall be prohibited from employing violence and making intimidation, perpetrating any deceptive act, or operating any door, emergency exit and devices, which hinder the safety of aircraft or the flight.*
- (3) *The passengers shall be prohibited from occupying an aircraft and staging a sit-in in such aircraft while refusing to get off the aircraft after the aircraft lands.*
- (4) *The passengers in aircraft shall follow lawful instructions given by the captain and crew who prohibit any acts hindering the safety of aircraft or the flight ...*

2.1.2 Article 50 prescribes for those passengers who violate Article 23 a fine of up to approximately 10,000 USD. Article 46 and 47 grants the penalty of imprisonment up to 3 or 5 years in serious cases.⁸ These punishments are much heavier compared with the same offenses committed on the ground.

2.1.3 With regard to the spatial element of the offense, it had to be committed ‘in flight’ (all doors closed) in the past. There were, however, several incidents, notably in February 2006, where disruptions commenced after embarkation but before the closing of all doors. As the aircraft was not ‘in flight’, the law enforcement was of the view that the general laws, as opposed to much more severe ASSA, should be applied.⁹ In order to fill such a gap, the National Assembly amended the Act by replacing the words “in flight” with “in aircraft” in 2008.

2.1.4 Paragraph 7 of Article 23 also allows air carriers to decline to board any person who is listed under the Ordinance of the Ministry of Land, Transport and Maritime Affairs (namely “blacklisted”), or is likely to cause a disruption due to intoxication.

2.2 **Act on Persons Assuming Duties of Judicial Police Officer and their Scope of Duties**

2.2.1 In addition to ASSA, Act on Persons Assuming Duties Judicial Police Officer and their Scope of Duties sets out in its Article 7, Paragraph 2, that an aircraft commander and crew will assume the duties of a judicial police officer with regard to any offenses taking place in aircraft.

2.2.2 Article 22 (Authority of Captain, etc) of ASSA, which incorporated Article 6 of the Convention on Offenses and Certain Other Acts Committed on Board Aircraft (hereinafter referred to as “the Tokyo Convention”) also empowers the aircraft commander and crew to take any measures necessary to stop the acts of a person who attempts to harm the safety of aircraft, to endanger lives, to damage property, and to disrupt the order. Unlike Article 5, Paragraph 2, of the Tokyo Convention, however, the powers of the aircraft commander and crew under ASSA commence upon the embarkation of passengers. Anyone ‘in aircraft’, therefore, is under obligation to cooperate once the aircraft commander and crew so request.¹⁰

⁸ Up to 5 years of imprisonment for those who breached Art. 23, Para. 2 (employing violence or intimidation), and up to 3 years for those who violated Art. 23, Para. 3 (staging a sit-in, etc).

⁹ Joongang Daily (in Korean), “Conflicting Opinions between Air Carrier and Police over Penalty for Unruly Passenger” (13 February 2006).

¹⁰ Article 22, Paragraph 2, of the Aviation Safety and Security Act: “Anyone in aircraft shall cooperate when the aircraft commander etc. so requests with regard to the measures in accordance with Paragraph 1”.

2.3 International Conventions

2.3.1 The Constitution (Article 6) of the Republic of Korea provides that any treaties duly ratified shall have the same effect with domestic laws.¹¹ As a corollary, any relevant treaties such as the Tokyo Convention have direct applicability in Korea. Article 3 of ASSA explicitly refers to the Tokyo Convention and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (hereinafter referred to as the “Hague Convention”) as applicable laws governing the safety and security of civil aviation unless the provisions of ASSA expressly provide for.

2.4 Observations

2.4.1 ASSA is in essence an implementing legislation of the Tokyo and Hague Conventions. As those Conventions lack any specific clause on unruly behavior, Article 23 of ASSA (Obligation of Passengers to Cooperate in Maintaining Safety) thus constitutes an additional development arising from practical necessities.

2.4.2 ASSA, although different in its drafting style and scope from ICAO’s Circular 288, deals squarely with the issue of unruly/disruptive behavior in aircraft. Whereas the ICAO’s model legislation focuses on assault, and distinguishes any acts toward crew members from those toward other persons and properties, ASSA enlisted the most common patterns of unruly/disruptive behaviors the local airlines had experienced. As can be seen in the wordings such as “doing harm to other persons after drinking alcohol or abusing drug”, ASSA’s language is generally broader than Sections 1-3 of the ICAO’s model legislation.

2.4.3 Article 23 of ASSA starts to apply once the passenger boards the aircraft. Penalties for the offenses are much heavier than similar offenses committed on the ground. Furthermore, air carriers are given wider discretion to decline to board any passenger who is likely to cause a disruption due to intoxication.

2.4.4 When compared with Section 4 (Jurisdiction) of the ICAO’s model legislation, however, the Korean legislation lacks any explicit provision on the matter of extended jurisdiction.

3. QUESTION OF EXTENDED JURISDICTION

3.1 ASSA does not address its jurisdictional scope, merely setting out the prohibited acts ‘in aircraft’. A reference can be found in the general Criminal Codes of the Republic of Korea, which base its jurisdiction on the links of territoriality/registration (Article 2, 4), nationality (Article 3) but remain restrictive in extending to “crimes by aliens outside Korea” (Article 5).¹² The Criminal Codes further stipulate that these general provisions shall also apply to such crimes as are provided by other Acts and subordinate statutes unless provided otherwise by such Acts and subordinate statutes (Article 8).

¹¹ Article 6, Paragraph 1, of the Korean Constitution provides, “Treaties duly concluded and promulgated under the Constitution and the generally recognized rule of international law have the same effect as the domestic laws of the Republic of Korea.”

¹² Article 5 stipulates that the Criminal Codes apply to aliens who commit such crimes as insurrection, foreign aggression, currency crimes, etc.

3.2 Pursuant to the combined reading of the above-mentioned provisions of the Criminal Codes, Article 23 of ASSA is applicable; (1) when the offender is a Korean national, or (2) when the offense takes place in the aircraft registered with Korea, or (3) when the victim of the offense is a Korean national.

3.3 **Jurisdictional Scope of Aviation Safety and Security Act (Offenses of Unruly Behavior)**

3.3.1 There cannot be any doubt that ASSA will apply to any offense taking place in the territory of the Republic of Korea including its airspace. Similarly, based on both Article 3 of the Tokyo Convention¹³ and Article 4 of the Korean Criminal Codes,¹⁴ Article 23 of ASSA is applicable to the unruly/disruptive behavior in an aircraft registered with Korea. In this particular case, the Tokyo Convention and the domestic ASSA are both applicable.¹⁵

3.3.2 Even in the cases whereby either the offender or the victim is a Korean national with all other elements being extra-territorial (such as in a foreign-registered aircraft on the high seas), the Korean authorities may apply Article 23 of ASSA (offenses of unruly behavior) by resorting to the link of nationality and Article 3 of the general Criminal Codes.¹⁶

3.3.3 There still remains the gap of extra-territorial offenses, namely, when the offenses are committed by foreigners in a foreign-registered aircraft outside Korea against non-Koreans.

3.4 **Supreme Court's Decision of Applying a Domestic Act to Extra-Territorial Offense**

3.4.1 The Supreme Court of the Republic of Korea ruled in 1984 that Aircraft Navigation Safety Act (the former version of ASSA) was applicable to an act of hijacking by aliens on the high seas. Given this precedent, it could be argued that ASSA may be applicable to cases lacking any territorial or nationality link.

3.4.2 This line of argument does not hold tenable any more since the language of the relevant article has changed. Article 3 of the former Aviation Navigation Safety Act used to stipulate that this Act applies to all offenses provided for under the Tokyo Convention, thus enabling the Supreme Court to reach a rather broad interpretation that even the extra-territorial hijacking by an alien was punishable under the domestic act. However, the current Article 3 of ASSA omits such enabling but ambiguous language and merely states that the Tokyo Convention will govern any matters which are not expressly dealt with in ASSA. Neither ASSA nor the Tokyo Convention explicitly grants jurisdiction to the State of landing with regard to an extra-territorial offense committed by an alien.

¹³ Article 3, Paragraph 1, of the Tokyo Convention provides: The State of registration of the aircraft is competent to exercise jurisdiction over offenses and acts committed on board.

¹⁴ Article 4 of the Korean Criminal Codes stipulates: This Act shall apply to aliens who commit crimes on board a Korean vessel or Korean aircraft outside the territory of the Republic of Korea.

¹⁵ This concurrent application of the Tokyo Convention and the domestic ASSA might give rise to confusions; 1) whether the offenses under Article 23 of the Act constitute "offenses against penal law" under Article 1 of the Tokyo Convention, 2) which rules should be resorted to when the same act counts both as an offense under Article 23 of the Act and a jeopardizing act of Article 1 of the Tokyo Convention, etc. Article 3 of ASSA, however, states that the international agreements will govern except as otherwise provided for in this ASSA.

¹⁶ Article 3 of the Criminal Codes provide "This Act shall apply to all Korean nationals who commit crimes outside the territory of the Republic of Korea."

3.5 **Interpretation with regard to Extra-territorial Offenses of Unruly Passengers**

3.5.1 Given the lack of express provision either in the general Criminal Codes or in the specific ASSA, the law enforcement authorities would perceive themselves not entitled to exercise jurisdiction in extra-territorial cases. As it did in the past, the judiciary might take an active posture when the offense in question is of serious gravity. However, most of the unruly offenses within the ambit of Article 23 of ASSA do not entail such gravity.

3.5.2 Aside from those offenses of unruly behavior, it is most likely that even the current Criminal Codes will not be construed as to authorize the local authorities to exercise jurisdiction to any extra-territorial cases without any link of territoriality, nationality or registration.

3.5.3 In this regard, it also needs to be considered that there might arise a discrepancy when a future international instrument extends jurisdiction to the landing State only with regard to the issue of unruly/disruptive passengers while leaving any other grave crimes under the traditional lacuna of the Tokyo Convention. Thus, any amendment of the Tokyo Convention with a view to extending jurisdiction to the State of landing requires a holistic approach, taking into consideration any offenses of a grave nature other than those unruly/disruptive offenses.

3.6 **Possible Ways Forward to Fill the Jurisdictional Gap**

3.6.1 A few options can be considered in order for the jurisdiction to be extended to the extra-territorial cases of unruly/disruptive offenses. On the domestic plane, either the general Criminal Codes or ASSA can be revised. An inclusion into ASSA of a clause for the extended jurisdiction would resolve the issue in a targeted manner. This approach, however, might entail debate as to whether such fundamental issue of criminal jurisdiction can be addressed in the specific domestic Act rather than the general Criminal Codes. Such debate would not ensue when the general Criminal Codes is to be amended. In terms of time-frame, however, the revision of the Criminal Codes usually requires complicated preparations and stages. Questions would also arise as to what extent the jurisdiction is to be extended; whether it would only cover the unruly behaviour or any other general offenses.

3.6.2 For these domestic options, it should be also recalled that the legislature has been generally cautious in the past against legislating for granting extra-territorial jurisdiction in the absence of an international agreement to that effect; that is to say, to legislate in a way that unilaterally – without international agreement – extends jurisdiction to ‘offenses by aliens outside Korea’. Such caution stems from the concern that unilateral extension of jurisdiction would potentially infringe upon other States’ sovereign rights. There have been the ICAO Circular and several precedents of a few Contracting States’ domestic legislations, but they would not be sufficient to convince the legislature in favour of the revision of ASSA or the Criminal Codes. In light of all these, as of now, it does not appear likely for the legislature to move to fill the jurisdictional gap.

3.6.3 An option alternative to the revision of the domestic laws (ASSA or Criminal Codes) would be to have an implementing legislation for an international treaty on the matter. This option presupposes an action by the international community, represented by the ICAO, to produce an international instrument offering a solid and harmonized basis for extended jurisdiction to the State of landing. Such an instrument will dispel the notion that the said extension of jurisdiction would be potentially considered an infringement of other States' sovereignty.¹⁷

4. CONCLUSION

4.1 The Republic of Korea has continued to experience the problem of unruly/disruptive behavior in aircraft. In response, the Korean Government amended ASSA in 2002 and partially took the ICAO's model legislation into consideration.

4.2 Nonetheless, the ROK legislation is silent on the scope of jurisdiction. Despite the Supreme Court's judgment in 1984, it is commonly assumed that the law enforcement authorities are not entitled under the laws to exercise jurisdiction without any link of territoriality, nationality or registration. In order for the jurisdiction to be extended to the extra-territorial cases of unruly/disruptive offenses, either ASSA or the general Criminal Codes should be revised. The legislature, however, has been generally cautious in the past against legislating for granting extra-territorial jurisdiction in the absence of an international agreement.

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— END —

¹⁷ A latest example is the ROK's ratification of the Rome Statute of the International Criminal Court. In its implementing legislation in the form of a special act, the court of the Republic of Korea is now empowered to have jurisdiction on those crimes under the Rome Statute even if they are committed by aliens outside Korea.