



INTERNATIONAL CONFERENCE ON AIR LAW

(Montréal, 20 April to 2 May 2009)

ADDITIONAL COMMENTS RECEIVED ON THE TWO DRAFT CONVENTIONS

(Presented by the Secretariat)

1. The Council, in convening this Diplomatic Conference, also decided to invite States, organizations and regional civil aviation commissions to submit comments on the two draft conventions. State letter LM 1/15.1-08/61 dated 7 November 2008 accordingly invited such comments. In addition to working papers, a number of comments on the two draft conventions have been received. The relevant parts of these comments are reproduced in the Appendices to this paper in the order they have been received:

Appendix A – Kingdom of Bahrain

Appendix B – Republic of Guyana

Appendix C – Republic of Madagascar

Appendix D – Romania

Appendix E – Republic of South Africa

Appendix F – Federal Democratic Republic of Ethiopia

Appendix G – Republic of Peru

Appendix H – Republic of Senegal

APPENDIX A

KINGDOM OF BAHRAIN

...

1. The Arabic translation needs to be reviewed to insure consistency with the English text of the Draft Conventions.

2. The draft Unlawful Interference Compensation Convention provides that it applies in cases of accidents by an operator of a Contracting State in a non-Contracting State. It however does not specify the criteria for such application. Furthermore, this provision will entail that a non-Contracting State will benefit from the Convention and from the contributions paid by the passengers in a Contracting State without having to bear any burden itself. This would be a reason why States would not accelerate their accession to the Convention once they realize that they can benefit from this provision.

3. The Convention does not specify the limits or the value of the compensation in the case of death or injury, as in Article 22 of the Montreal Convention. In the latter Convention the compensation is established in two tiers. The first tier amounts to 100,000 Special Drawing Rights as a minimum compensation where the compensation has been set for each particular incident. The begs the question as to what would happen as to the number of victims and property lost were minimal. And what would be the maximum and minimum limits of compensation, and whether the entire amount will be paid if the incident results in the death or injury of one single person for instance.

4. Article 22 makes reference to reduced compensation if the claims exceed the limits indicated in Articles 4 and 18. The Article gives priority to the cases of death, bodily injury and mental injury; the remainder shall be awarded proportionately among the claims in respect of other damage. The question that arises here is how can this happen when there are no clear limits of compensation of specific rates for the cases of death, injury or other cases.

5. Article 30 of the draft Unlawful Interference Compensation Convention gives the Director the right to revise the limits specified in Article 4 at a time when the Director assumes the management of the Supplementary Compensation Mechanism and when the limits in Article 4 are governed by insurance considerations. So what would happen if the limits were increased and no insurance cover is provided for the new limits; would the Director have the right in such case to modify the text of the Convention that goes beyond his mandate?

6. The two draft Conventions have addressed neither aircraft used in aerial work nor helicopter operations.

...

APPENDIX B

REPUBLIC OF GUYANA

...

1. The proposed draft Conventions are considered to be favourable. ...
2. Be assured that Guyana remains in support of the initiatives to implement the proposed conventions

...

APPENDIX C

REPUBLIC OF MADAGASCAR

COMMENTS ON THE DRAFT CONVENTION ON COMPENSATION FOR DAMAGE TO THIRD PARTIES, RESULTING FROM ACTS OF UNLAWFUL INTERFERENCE INVOLVING AIRCRAFT

1. Article 12 – Contributions to the Supplementary Compensation Mechanism

1.1 In the implementation of Article 12 b), there must be equal treatment in the collection of amounts from both passengers on direct flights and in-transit passengers.

2. Article 23 – Additional Compensation

2.1 Can the phrase “prompt response” in paragraph 5 be specified in terms of days? When can a response be qualified as “prompt”?

3. Article 35 – Period of Limitation

3.1 In order to ensure uniformity with standard time limits for liability-related actions brought against air transport (see the 1999 Montreal Convention), we propose that the period of limitation for action be reduced to two years.

COMMENTS ON THE DRAFT CONVENTION ON COMPENSATION FOR DAMAGE CAUSED BY AIRCRAFT TO THIRD PARTIES

1. Article 1 – Definitions

1.1 In order to ensure a standard understanding of the text, a definition of the term “event” should be provided in this article.

2. Article 4 – Limit of the operator’s liability

2.1 As regards the degree of proof, we would re-word Article 4 (2) b) as follows:

“(2) b) was **solely or in part** due to the negligence or other wrongful act or omission of another person.”

3. Article 19 – Period of Limitation

3.1 In order to ensure uniformity with standard time limits for liability-related actions brought against air transport (see the 1999 Montreal Convention), we propose that the period of limitation for action be reduced to two years.

4. Other Comments

4.1 Does this draft Convention cover war risks and damage due to civil disobedience?

4.2 Is it possible to provide for a framework aimed at compensating for an unavailability of insurance in the market?

APPENDIX D

ROMANIA

QUESTIONS AND COMMENTS TO THE DRAFT CONVENTION ON COMPENSATION FOR DAMAGE TO THIRD PARTIES, RESULTING FROM ACTS OF UNLAWFUL INTERFERENCE INVOLVING AIRCRAFT

1. MENTAL INJURY

1.1 Article 3, paragraph 3, provides that “damages due to (...) mental injury shall be compensable” upon the condition that such injuries were caused by a “recognizable psychiatric illness resulting either from bodily injury or from direct exposure to the likelihood of imminent death or bodily injury”. Furthermore, Article 22 establishes that such injuries will be awarded preferentially and with priority.

1.2 The simple condition that the mental injury was caused by a recognizable psychiatric illness appears to be rather risky, as any person who has suffered a damage can claim compensation for mental injury, as a medical certificate could be obtained rather easily in some countries.

1.3 Prioritizing compensation for mental injury could create a risk that there will be no available funds left to compensate damages to property or bodily injury.

1.4 We would like to know how the drafters consider this matter and its implications.

2. SENIOR MANAGEMENT

2.1 The next important element would be a proper definition of “senior management”. The current definition in Article 1 h) does not refer to a purely formal criterion, but is linked to the actual decision-making authority of the person involved. In this sense we would suggest replacing the wording “members of an operator’s supervisory board, members of its board of directors, or other senior officers” with “person that has been duly appointed by the operator and to whom the regulatory body of the country concerned has entrusted the function it is performing” in order to have a more distinct definition.

3. CONTRIBUTIONS TO THE SCM

3.1 Regarding the SCM and the operator’s duty to collect and remit contributions to the SCM, considering that operators function in different agreements, like code share, the mechanism of collecting contributions must be known at the moment the text of the Convention will be discussed at the Diplomatic Conference. How did the drafters of the Convention envision the functionality of such a mechanism?

3.2 Another question regarding contributions is related to Article 14, paragraph 1, that provides: “(...) If a state Party makes a declaration under Article 2, paragraph 2, initial contributions shall be paid in respect of passengers and cargo departing on flights covered by such a declaration from the time it takes effect. (...)”. The problem is whether we are talking about one contribution or two contributions because from the current text it results that there are two contributions:

- a) one initial contribution; and
- b) permanent contributions to the SCM.

It is not clear which is what and what they mean. Are there indeed two types of contributions? And if so, what are these contributions?

4. **DUTIES OF THE STATES**

4.1 Article 16 establishes a series of State obligations. One of them is to take appropriate measures, including imposing sanctions to ensure that an operator fulfils its obligations to collect and remit contributions. Considering the fact that the contributions are collected for each departure of an operator, the State must verify the fulfilment of the obligation not only of its own operators, but of the operators of other States, too. In this situation, what are the envisaged measures a State should take to effectively check if the operators fulfilled their obligations?

APPENDIX E

REPUBLIC OF SOUTH AFRICA

COMMENTS ON THE DRAFT CONVENTIONS

1. Draft Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft

ISSUES	COMMENTS	PROPOSED SOLUTION
Articles 1; 3; 7; 16 and 37	The definition of the word “ <i>Operator</i> ” in paragraph (f) of Article 1 refers to the word “ <i>person</i> ” whose definition in paragraph (g) of Article 1 includes the word “ <i>State</i> ”. This means that a State can be an operator and therefore liable in terms of the Convention. This is in contradiction with the provisions of Article 37.	The definition of “ <i>Operator</i> ” should be amended by adding the words “ <i>other than a State</i> ” after the word “ <i>person</i> ” in the first line.
Article 24	Articles 24 and 25 seem to suggest that a claim against the perpetrator may only be instituted after all claims have been finally settled. Some complicated claims may take longer than three years to finalize. In many jurisdictions, claims prescribe within three years. The right of recourse may, therefore, not be exercised as the claim will have prescribed.	The words “ <i>judgment in respect of</i> ” should be inserted between the words “ <i>No</i> ” and “ <i>such claim</i> ” in Articles 24(1) and 25(1). The word “ <i>suffering</i> ” should also be substituted with the words “ <i>who suffered</i> ”. The second sentences of both Articles 24(1) and 25(1) should, therefore, read as follows: “ <i>No judgment in respect of such claim may be enforced until all claims from persons who suffered damages due to an event have been finally settled and satisfied</i> ”.

2. Comments raised in the above draft Convention are also, where relevant, applicable to the draft Convention on Compensation for Damage Caused by Aircraft to Third Parties.

APPENDIX F

FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA

COMMENTS

1. THE UNLAWFUL INTERFERENCE CONVENTION

1.1 In the interest of providing adequate protection for the air transport system and upholding the principles of victim protection, our Government would like to propose the following comments on the above indicated draft Conventions.

1.1.1 Article 3 of the Unlawful Interference Convention includes a liability for mental injury recognizable as psychiatric illness. Liability for mental injury could be highly controversial as the concept could vary from State to State. Therefore, its consideration as an international standard is questionable.

1.1.2 The concept of per event and per aircraft limit of liability under Article 4 expands the limit of liability into a higher maximum. It stipulates a compensation amount extending from 750,000 SDRs for aircraft weighing 500 kgs to 700,000,000 SDRs for aircraft weighing more than 500,000 kgs. We have a concern that this could pose a threat on carriers from developing countries, a threat which could drive them out from the market even with a single occurrence.

1.1.3 The “senior management” concept under Article 1(h), Article 5 and Article 23(5) of the draft Convention seems ambiguous as to who in the management is the provision intending to bestow responsibility. It is suggested that the concept need to be narrowly defined.

1.1.4 Pursuant to Article 6 of the draft Convention, advance payment would be subject to national laws where the damage occurred. This could expose the operator to a financial risk in view of the fact that payment is to be effected before its liability is established. No mechanism of recovering the payment is envisaged where the operator is subsequently absolved from liability to the damage.

1.1.5 The requirement of furnishing maximum insurance guarantee on a per event basis seems to be onerous and could impact on the competitive advantage of smaller airlines from the developing world, including Ethiopia.

1.1.6 The draft Convention under Article 8 envisages the creation of an independent organization called the Supplementary Compensation Mechanism (SCM). Although the SCM will be managed by a Secretariat headed by a Director, the rationale for creating an organization separate and distinct from ICAO needs to be revisited as ICAO should maintain its leadership role in international civil aviation. The name of SCM, as a mechanism also needs to be revisited.

1.1.7 According to Article 13(2) the SCM contributions are to be fixed uniformly, regardless of the capacity of the States Parties, and in a non-discriminatory manner. As the damage caused by an aircraft used as a terrorist weapon could be beyond any conceivable insurance coverage and above a government intervention the contributions made need to consider the economic situation of developing countries.

1.1.8 The sanctions that are intended to be taken under Article 16(1) of the Convention against the operator who fails to fulfil its obligation need to be clarified.

1.1.9 The draft Convention provides that where the quantum of damage is beyond the limits provided for in the SCM, Contracting States may intervene to ensure that victims are adequately compensated (Articles 16-18). The circumstances where the capacity of SCM is exceeded seem remote. The extent of government intervention is also not clearly stipulated. How is this layer of liability, as a third layer, to be alluded from the Convention and how are carriers to demand claim for damages beyond the first and second layers of liability? The provisions also remain unclear as to what would be done in the event a Contracting State fails to meet the funds needed to redress the damage.

1.1.10 How would the Convention address the issue of full government responsibility considering the fact that substantial compensation is less likely if such incidence occurs in a developing country?

2. THE GENERAL RISKS CONVENTION

2.1 By virtue of Article 3, the liability of the operator is strict, up to a certain threshold, tentatively set at 250,000 to 500,000 SDRs. Beyond that, the operator is liable for all damages unless he proves “fault of the victim”. There is no cap on the liability of the operator. If the Convention intends to cover full damage/victim’s satisfaction, why not make the SCM operate here? Otherwise how is the operator to cope with the compensation beyond his insurance or its means?

2.2 The rationale for excluding damage caused by aircraft from States not Parties to the Convention as is the case in the unlawful interference compensation is not clear to us.

APPENDIX G

REPUBLIC OF PERU

COMMENTS

Following comments are with regard to the adoption of the instruments of the Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft; and the Convention on Compensation for Damage Caused by Aircraft to Third Parties:

1. It is clear from the tenor of the aforementioned draft conventions that the main objective of both is to ensure payment of compensation to third parties.
2. The draft conventions make a distinction between damage caused to third parties by aircraft as a consequence of acts of unlawful interference, which would be governed by one convention, and damage to third parties caused by aircraft, to which the other convention would apply.
3. It is important to note that the draft Convention on Compensation for Damage Caused by Aircraft to Third Parties seeks to establish a greater scope than that founded by the Rome Convention; it also expands the concept of “third parties”, which is now no longer limited to persons on the surface.
4. In contrast to the Rome Convention, which refers to damage in a general manner, the draft Convention on Compensation for Damage Caused by Aircraft to Third Parties makes a distinction between compensable damages of a personal nature (death, bodily injury and mental injury) and those of a material nature (damage to property).
5. Another point worthy of note is the matter of the extent of operator liability. According to the draft texts, the operator shall be liable for the damage caused by its aircraft upon condition only of the operation of said aircraft. Negligence or intent on the part of the operator with regard to the damage is not necessary. Also contemplated is advance payment, if required by the law of the State, in order to meet the immediate needs of the victims.
6. The provisions of our national regulations are similar to those contained in the draft Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft. It bears mentioning that in both of the draft conventions under review, the limits of the operator’s liability are classified based on the maximum mass of aircraft, which could obviously have economic consequences for operators, as operating costs could be affected as the result of an increase in the insurance premiums to be paid.
7. However, it should be pointed out that the draft Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft refers to the creation of an organization responsible for implementing the compensation mechanism for damage, when said damage exceeds the limits cited above, to third parties in States Party which results from acts of unlawful interference involving aircraft. This organization shall have the participation of all States Party and it shall comprise a Secretariat headed by a Director.
8. The draft under study establishes that the aforementioned mechanism shall pay damages to third parties in cases where the operator has not been able to obtain insurance and where this is

established by the organization. Financial assistance shall also be available to the operator of the State Party which is responsible for damage to third parties caused in non-States Party.

9. With regard to the matters regulated by the draft conventions, in the case of national air transport, Peruvian air law regulates the liability of the carrier in respect of damage caused by aircraft to third parties on the surface. It states that the liability of the carrier in international air transport is governed by the international instruments in force.

10. In terms of the question of liability, Peru has ratified the Convention for the Unification of Certain Rules for International Carriage by Air. This Convention exclusively governs the liability of the carrier in respect of passengers, baggage, and the cargo transported; it does not cover damage to third parties.

11. Our office wishes to specify that the opinions expressed with regard to the draft conventions do not imply any position regarding Peru's accession thereto. The accession of Peru is to be studied at a later date, once the draft conventions are formalized and the advisability of ratification by our State is assessed.

APPENDIX H

REPUBLIC OF SENEGAL

OPINION AND COMMENTS OF THE NATIONAL CIVIL AVIATION AGENCY

1. THE NUMBER OF TEXTS

1.1 The International Civil Aviation Organization (ICAO) has proposed to Member States two (2) draft instruments which actually legislate in respect of only one matter, namely, damage caused to third parties on the surface.

1.2 If there is a difference between the two instruments, it would be the question of the cause of damage.

1.3 In view of this, the two texts could be merged to create a single instrument comprised of two (2) parts:

- a) Part 1, entitled Damage Resulting from General Causes; and
- b) Part 2, entitled Damage Resulting from Acts of Unlawful Interference.

1.4 There would be certain advantages to the above proposal made by Senegal, namely, the following:

- a) there would be only one instrument for Member States to submit for ratification;
- b) any kind of positive or negative conflict due to the ratification, by some States, of only one instrument out of the two would be avoided; and
- c) there would not be the possibility of Member States giving ratification priority to one instrument over the other.

2. THIS IS THE FIRST TIME THAT AN INTERNATIONAL LEGAL SYSTEM OR LEGAL ORDER PROPOSES A MECHANISM BASED ON JOINT AND SEVERAL LIABILITY

2.1 No legal system today can use these provisions to justify this exception to the principles of the privity of contract in respect of third parties or the principle based on which a contracting party would pay for damage caused to a third party even if the contracting party was not involved in the production of the damage.

2.2 The participation of the passenger or the charterer in the payment of compensation for damage caused not by the carrier itself or by its servants, but by another third party, even if an ill-intentioned individual, thus constitutes a change in air transport law.

2.3 Such as they are, the explanatory statements of the instruments proposed (in the international conventions, see the preamble) contain nothing in the way of a plausible justification.

2.4 The International Civil Aviation Organization should thus provide all the well-founded justifications necessary for Member States to persuade their respective legislative bodies in the event that that the conventions in question are submitted for their ratification.

3. **THE INTERNATIONAL CIVIL AVIATION ORGANIZATION (ICAO) SHOULD BE CONSISTENT IN TERMS OF THE PROTECTION AFFORDED IN THE DRAFT INSTRUMENTS PROPOSED**

3.1 Thus, in cases of environmental damage, the responsibility should not be passed on to Member States while protection is afforded to property and persons on the surface (Article 3, sub-paragraph 5 of the Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft).

4. **IN THE SECOND CONVENTION, ARTICLE 11 REFERS TO ARTICLE 13**

4.1 The phrase used in Article 11 is “Subject to Article 13”.

4.2 In fact, the content of Article 13 does not constitute an exception to the principle established in Article 11. It even serves to confirm it: Article 13 lists the persons who may not be held liable for the damage caused.

4.3 Article 11 should instead refer to Article 20, which provides for cases in which a person other than the aircraft operator can be held responsible.