



LEGAL COMMITTEE – 34TH SESSION

(Montréal, 9 to 17 September 2009)

Agenda Item 2: Consideration of the Reports of the Special Sub-Committee on the Preparation of One or More Instruments Addressing New and Emerging Threats

Views of the International Air Transport Association (IATA) on Recommending the Formation of a Special Study Group to Examine Emerging Legal Issues Presented by Unruly/Disruptive Passengers

(Presented by the International Air Transport Association (IATA))

1. BACKGROUND

1.1 Ever since the abhorrent events of 11 September 2001, there have been significant improvements in international civil aviation security to prevent and punish acts of unlawful interference with airline operations.¹ The work done by ICAO Member States and industry stakeholders has significantly contributed in reducing the number of acts of unlawful interference aimed at international civil aviation, especially those acts which resulted in very high casualty rates.²

1.2 Unfortunately, incidents involving disruptive and unruly passengers have continued to rise steadily since 2001.³ A number of factors can explain why the rate of such incidents continues to grow at a time when other types of acts of unlawful interference decrease. One important reason for this increase is the fact that quite often there is lack of jurisdiction to prosecute such incidents.⁴

1.3 In this context and being mindful of the gravity and implications that these incidents present for international civil aviation, ICAO has unequivocally noted this trend in Assembly Resolution A33-4, *Adoption of National Legislation on Certain Offences Committed on Board Civil Aircraft (unruly/disruptive passengers)*.⁵

1.4 Realizing the importance of the problem at stake, ICAO published Circular 288, *Guidance Material on Legal Aspects of Unruly/Disruptive Passengers*, in June 2002. The main purpose of this Circular was to set out a model law on certain offences committed on board civil aircraft, in order for ICAO Member States to transpose them into their national legislation.⁶

¹ See ICAO AVSECP/19-IP, IATA informational paper on *Unruly/Disruptive Passenger Legislation* [hereinafter “*IATA on Unruly/Disruptive Passenger Legislation*”].

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ See ICAO, Assembly Resolution A33-4, *Adoption of National Legislation on Certain Offences Committed on Board Civil Aircraft (unruly/disruptive passengers)*.

⁶ See ICAO, Cir. 288, LE/1, *Guidance Material on Legal Aspects of Unruly/Disruptive Passengers* (June 2002) [hereinafter “*ICAO Circular 288*”].

1.5 In line with these views, ICAO's AVSEC Panel has recently noted "...that despite an overall decrease in acts of unlawful interference, there continues to be an increase in unruly/disruptive passenger incidents. The Panel stressed the need for all Contracting States to ensure that they have enacted and are fully enforcing unruly/disruptive passenger legislation, as strong legislation in certain States has proven to be a good deterrent. Furthermore, because of jurisdictional issues, it is important that common definitions of unruly/disruptive passenger behaviour be determined and that cooperation exist between Contracting States to ensure that all incidents are dealt with in an appropriate matter."⁷

1.6 One ICAO Member State has already recommended that the need to revisit the existing international regime to ensure proper prosecution of unruly/disruptive passengers exists.⁸

2. DISCUSSION

2.1 The Jurisdictional GAP

2.1.1 Although in most cases the identity of an unruly passenger can be easily identified, this does not automatically mean that the passenger can be prosecuted.⁹ Quite often, following unruly/disruptive passenger incidents, the State of arrival refuses to assert jurisdiction when the aircraft is registered in another State. In this respect, IATA is of the firm view that there is an undisputed jurisdictional gap that requires a proper and effective legal remedy.

2.1.2 Under most domestic laws, States other than the State of registry of the aircraft do not have jurisdictions for offences committed on board an aircraft outside their respective territories, except those situations that are covered by international treaty.¹⁰

2.1.3 There have been a number of cases where offenders could not be prosecuted because the State where the passenger was offloaded had no jurisdiction to do so.¹¹ For example: if an offence is committed on board a foreign aircraft by a foreigner whilst the aircraft is not in the territorial airspace of the State where the aircraft lands, then the State of arrival has no jurisdiction to prosecute the offence. This is so because the offence has taken place outside the territory of the State of arrival on board an aircraft that is registered in another country. Moreover, the incident does not involve one of its nationals, either as a perpetrator or as a victim. Should this be the case, the unruly/disruptive passenger will walk away from the aircraft free from prosecution.

2.1.4 In addition, it is noteworthy that bilateral and multilateral agreements have not been commonly used to address these types of incidents. The suggestion made by ICAO Circular 288 that bilateral clauses be inserted in air services agreements to deal with this issue is still very far from being adopted on a widespread basis.

2.1.5 IATA member airlines report a number of incidents where the cross-border prosecution of both criminal and civil offences suffers from severe lack of uniformity. In some cases, communication and cooperation amongst the various national authorities involved is at best deficient. In other cases, there is a complete lack of uniformity between the different applicable regulatory regimes.

⁷ See ICAO, AVSECP/20 Report, at 5-3.

⁸ See ICAO, SSG-ASC/2-WP/2, at 2.

⁹ See IATA on Unruly/Disruptive Passenger Legislation, *supra* note 1, at 3.

¹⁰ *Ibid.*

¹¹ *Ibid.*

2.2 The Existing International Regime

2.2.1 Member States will recall that international aviation security conventions have been extremely effective in combating acts of terrorism, including but not limited to aerial hijacking, sabotage, acts of unlawful interference against civil aviation, and unlawful acts of violence at airports.¹²

2.2.2 These are the applicable international instruments, to which more than 160 ICAO Member States are parties:

- i) the *Convention on Offences and Certain Other Acts Committed on Board Aircraft*, signed at Tokyo on 14 September 1963 (the “Tokyo Convention”);¹³
- ii) the *Convention for the Suppression of Unlawful Seizure of Aircraft*, signed at The Hague on 16 December 1970 (the “Hague Convention”);¹⁴
- iii) the *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, signed at Montreal on 23 September 1971 (the “Montreal Convention”);¹⁵ and
- iv) the *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation*, signed at Montreal on 24 February 1988 (the “Montreal Protocol”).¹⁶

2.2.3 None of these international instruments was designed to deal expressly with unruly/disruptive passengers, let alone less serious offences.¹⁷ The long-standing provisions of the *Tokyo Convention* have a somewhat limited application to the issue at hand.¹⁸ In fact, very broadly the *Tokyo Convention* applies to offences against penal law and acts that may not be considered offences but may still jeopardize the safety of the aircraft.¹⁹

¹² See ICAO Circular 288, *supra* note 6, at 1.

¹³ See ICAO Doc. 8364, *Convention on Offences and Certain Other Acts Committed on Board Aircraft*, signed at Tokyo on 14 September 1963. As of 08 September 2009, 185 States are parties to this convention. See ICAO, online: <http://www.icao.int/icao/en/leb/Tokyo.pdf> (Date accessed: 08 September 2009).

¹⁴ See ICAO Doc. 8920, *Convention for the Suppression of Unlawful Seizure of Aircraft*, signed at The Hague on 16 December 1970. As of 08 September 2009, 184 States are parties to this convention. See ICAO, online: <http://www.icao.int/icao/en/leb/Hague.pdf> (Date accessed: 08 September 2009).

¹⁵ See ICAO Doc. 8966, *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, signed at Montreal on 23 September 1971. As of 08 September 2009, 187 States are parties to this convention. See ICAO, online: <http://www.icao.int/icao/en/leb/Mtl71.pdf> (Date accessed: 08 September 2009).

¹⁶ See ICAO Doc. 9518, *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Done at Montreal on 23 September 1971*, signed at Montreal on 24 February 1988. As of 08 September 2009, 168 States are parties to this convention. See ICAO, online: <http://www.icao.int/icao/en/leb/Via.pdf> (Date accessed: 08 September 2009).

¹⁷ See ICAO Circular 288, *supra* note 6, at 1.

¹⁸ See Christian Giesecke, *Unruly Passengers and Passenger Rights: A Legal Perspective on Handling Unruly Behaviour Taking into Account the Rights of Passengers* (Montreal: McGill University, 2001) at 107.

¹⁹ See *Tokyo Convention*, *supra* note 13, Art. 1.

2.2.4 The purpose of the *Tokyo Convention* was “...to encourage nations to exercise jurisdiction in instances where a crime was committed aboard an aircraft registered in that nation.”²⁰ States have the obligation to exercise jurisdictions but only over offences committed on board an aircraft registered in such State.²¹ There is no similar language, however, with respect to the State of disembarkation.

2.2.5 The State where the aircraft is registered will be able to exercise jurisdiction over an unruly/disruptive passenger.²² However, the State where the aircraft is registered may not necessarily be the State of the aircraft operator. Such a situation arises frequently in the context of certain common industry practices such as aircraft leasing which the *Tokyo Convention* was not designed to take into account in 1963.

2.2.6 Moreover, the State of registry is not always the State of disembarkation. Frequently, air carriers run the risk of having passengers not being prosecuted in that particular State due to lack of jurisdiction. In addition, Member States must bear in mind that the *Tokyo Convention* does not impose mandatory requirements on extradition.

2.2.7 Under the *Tokyo Convention*, unruly/disruptive passengers cannot be held in restraint beyond the first stopover. In many cases, passengers have benefited from this lacuna to avoid criminal and civil prosecutions.²³

2.2.8 Arguably, the *Tokyo Convention* has a number of shortcomings. For example, it does not provide for a definition of what constitutes an international criminal offence leaving it to the subjective interpretation of State parties. Conduct that may be considered to be a criminal offence in the country of embarkation may not be a criminal offence in the country where the aircraft lands.²⁴

2.2.9 At the second meeting of the Secretariat Study Group on Aviation Security Conventions, one Member State noted that the issue is aggravated by the fact that there is a “...lack of common understanding among States as to what constitutes a serious offence within the meaning of the provisions of the *Tokyo Convention*.”²⁵

2.2.10 The *Tokyo Convention* does not impose any obligation on the State of disembarkation to prosecute an offender. Neither is there any obligation to assert jurisdiction in relation to offences and crimes committed on board a foreign aircraft.²⁶ The only duties imposed on the State of disembarkation are to: i) allow the aircraft commander to disembark any passenger who he has reasonable grounds to believe has committed, or is about to commit an offence;²⁷ and ii) take delivery of any person whom the aircraft commander has reasonable grounds to believe has committed a serious offence according to the penal law of the State of registration of the aircraft.²⁸ These obligations are significantly different from having to prosecute incidents committed by unruly/disruptive passengers on board a foreign aircraft.

²⁰ See Oliver Beiersdorf & Jennifer A. Guidea, “Recent Developments in Aviation Law” (2007) 72 J. Air L. & Com. 207, at 222.

²¹ See R. F. Kane, “Disruptive Passengers – Some Legal Aspects”, online: <http://www.raes-hfg.com/reports/12oct99-DisPax/121099-kane.pdf> (Date accessed: 08 September 2009).

²² See William P. Schwab, “Air Rage: Screaming For International Uniformity” (2001) 14 Transnat’l Law. 401, at 409.

²³ See ICAO Circular 288, *supra* note 6, at 1.

²⁴ See William P. Schwab, *supra* note 22, at 410.

²⁵ See ICAO SSG-ASC/2-WP/2, at 1.

²⁶ See Margaret P. Fogg, “Air Rage: Is It a Global Problem? What Proactive Measures Can Be Taken To Reduce Air Rage, and Whether They Tokyo Convention Should Be Amended to Ensure Prosecution of Air Rage Offenders?” 7 ILSA K. In’l & Comp L 511, at 532.

²⁷ See *Tokyo Convention*, *supra* note 13, Arts. 8 & 12.

²⁸ *Ibid.*, Arts. 9 & 13.

2.2.11 Similarly, the *Tokyo Convention* does not deal with unruly/disruptive passenger incidents that are not in violation of the criminal law of a given territory. A number of ICAO Member States have yet to enact appropriate legislation to codify such conduct. The fact that offences are subject to domestic law does not encourage prosecution. In most cases the prosecution gap occurs when the conduct of the unruly/disruptive passenger does not constitute an offence under the criminal laws of the country of arrival.²⁹

2.2.12 The *Tokyo Convention* only applies when the aircraft is “in flight”, which is considered “from the moment when power is applied for the purpose of take-off until the moment when the landing run ends.”³⁰

2.2.13 This means that the *Tokyo Convention* does not cover incidents taking place while the aircraft is being taxied out of the gate before take-off or to the gate after landing. IATA believes that there is a need to revisit the timeframe of offences, and in particular whether it should encompass both the processes of embarkation and disembarkation.

2.2.14 For these reasons, IATA firmly believes that the *Tokyo Convention* is ripe for re-examination. Any such consideration of the existing legal regime should consider the following key elements:

- i) a common definition of unruly/disruptive behaviour;
- ii) an extension of jurisdiction over such offences;
- iii) a harmonized enforcement procedures;
- iv) a uniform imposition of fines and penalties;
- v) a revision of the timeframe of offences; and
- vi) a system that encourages international cooperation and assistance.

2.3 Domestic Responses

2.3.1 IATA recognizes that some ICAO Member States have already extended their domestic jurisdiction to certain offences committed on board foreign aircraft landing in their respective territories,³¹ by instituting criminal and civil prosecution procedures against unruly/disruptive passengers, as well as by imposing monetary penalties.³²

2.3.2 Although it is clear that such initiatives have contributed to mitigating the effect of the jurisdictional dilemma presented by unruly/disruptive passengers, Nevertheless, domestic responses to an increasing phenomenon that it is by its very nature international are far from being the sought-after cure for all evils. In fact, in most cases they will only serve to create a patchwork solution.

2.3.3 This is so because only very few ICAO Member States have decided to expand their traditional territorial, personal or protective jurisdictions towards a more comprehensive concept of jurisdiction to deal with these incidents. Yet, even if they did choose to do so, such measures will not

²⁹ See William P. Schwab, *supra* note 22, at 416

³⁰ See *Tokyo Convention*, *supra* note 13, Art. 1, paragraph 2.

³¹ See ICAO Circular 288, *supra* note 6, at 2.

³² See Mark C. Fava, “A Proliferation of Litigation, Allegations of Racial Discrimination and Prosecutions of Unruly Passengers” (2004) 15 S. Carolina Lawyer 34, at 40.

solve the tremendous obstacles that their airlines are faced with when they operate their outbound flights into countries that have decided not to follow the same route.

2.3.4 Furthermore, it appears that the level of adherence to the *ICAO Circular 288* is not, regrettably, particularly high; this prevents the necessary uniformity that international air law so desperately strives to achieve.

3. ICAO LEGAL COMMITTEE'S DUTIES

3.1 In accordance with its Constitution, the ICAO Legal Committee is empowered, subject to the prior approval of the Council, to study and make recommendations on problems affecting international civil aviation at its own initiative.³³

3.2 IATA is of the firm belief that the problems described above fall within the jurisdiction and mandate of the ICAO Legal Committee.

4. CONCLUSION

4.1 As one Member State has aptly noted,³⁴ *ICAO Circular 288* concluded that “in the longer term, the advisability of an appropriate international legal instrument (e.g. a protocol to the *Tokyo Convention of 1963*) specifically for the purposes as an effective mechanism to deal with the problem relating to unruly passengers should be considered.”³⁵ IATA wholeheartedly supports this suggestion.

4.2 Therefore, IATA respectfully suggests that the 34th Session of the ICAO Legal Committee recommends to the Council that a Special Working Group be formed to engage in a thorough study of the issue of unruly/disruptive passengers, and consider whether or not the existing international legal regime must be revisited to address apparent flaws relating to the lack of jurisdiction and enforcement mechanisms.

4.3 Should the ICAO Council so decide, it may be advisable to invite the Aviation Security Section of the ICAO Secretariat to the deliberations of this Special Working Group.

4.4 Finally, IATA begs to suggest that the Special Working Group should conduct its work independently of the works of the Legal Committee or any subsequent Diplomatic Conference that the ICAO Council may decide to convene in relation to the issue of “New and Emerging Threats.” The respective subject matters involved in these two issues are completely different and merit separate treatment.

— END —

³³ See ICAO Doc. 7669-LC/139/5, Constitution, at 1.

³⁴ See ICAO SSG-ASC/2-WP/2, at 1.

³⁵ See ICAO Circular 288, *supra* note 6, at 11.