



INTERNATIONAL CONFERENCE ON AIR LAW

(Beijing, 30 August – 10 September 2010)

DRAFTING PROPOSAL FOR THE ESTABLISHMENT OF JURISDICTION BASED ON NATIONALITY OF THE OFFENDER

(Presented by the Republic of Argentina)

1. Article 5 of the draft amendment to the Montreal Convention and Article 4 of the draft amendment to The Hague Convention introduce three additional criteria for determining the establishment of jurisdiction, one of which is mandatory (Articles 5.1. (e) and 4.1 (e) - of the draft amendments to the Montreal and The Hague Conventions respectively) and two of which are optional (Articles 5.2 (a) and 5.2. (b) and Articles 4.2 (a) and 4.2 (b) of the draft amendments to the Montreal and The Hague Conventions respectively). The mandatory provision indicates that each State Party shall establish its criminal jurisdiction when the offence is committed by one of its nationals (jurisdiction based on the nationality of the offender), whereas the optional provisions take effect when the offence is committed against a national of the State of jurisdiction (jurisdiction based on the nationality of the victim), or when the offence is committed by a stateless person having his/her habitual residence in that State.
2. When these provisions were discussed in the plenary of the Legal Committee, the delegation of Argentina submitted a motion for the provision conferring jurisdiction based on the nationality of the offender to be optional as well, and not mandatory on the State establishing said jurisdiction. This request was made in view of the fact that many States establish their jurisdiction on a territorial basis, i.e., the place where the offence was committed, and cannot therefore be obliged to establish their jurisdiction solely because an offence was committed by a national of that State. As we see it, therefore, making the criterion of offender nationality optional would facilitate broader and more rapid acceptance of the new text of the Convention.
3. Although the proposal won the support of several countries, there was not the necessary consensus for its adoption. Delegations expressing doubts pointed out that a number of international conventions currently in force already enshrine the concept of establishment of jurisdiction on the basis of nationality, and so in their view there was no compelling reason why ICAO instruments could not do the same. Those delegations also expressed concern that the lack of mandatory jurisdiction might weaken the extradition system in instances where States do not extradite their nationals.

4. In actual fact, other international conventions do provide for the establishment of jurisdiction as an option when the offence is committed by a national¹, and so the proposal to make jurisdiction based on the offender's nationality optional does have a precedent in international law.

5. Furthermore, conferring an option on the jurisdiction in question certainly does not mean that the offence would necessarily go unpunished if the country of which the offender is a national refuses to extradite him/her. Indeed, Article 5.4 of the draft amendment to the Montreal Convention and Article 4.4 of the draft amendment to The Hague Convention impose the obligation to take any measures necessary to establish jurisdiction when the offender is present in the territory of one of the States Parties and is not extradited².

6. Finally, it is very important to point out that this proposal is consistent with the domestic legislation of many States, which would undoubtedly facilitate a broader and more rapid acceptance of the Convention text were it to be included.

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¹ Article 42.2 of the United Nations Convention Against Corruption and Article 15.2 of the United Nations Convention Against Transnational Organized Crime.

² Article 5.4 of the Montreal Convention: "Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in Article 1, in the case where the alleged offender is present in its territory and it does not extradite that person pursuant to Article 8 to any of the States Parties that have established their jurisdiction in accordance with the applicable paragraph of this Article with regard to those offences."