



WORKING PAPER

LEGAL COMMITTEE – 35TH SESSION

(Montreal, 6 – 15 May 2013)

Agenda Item 2: Acts or offences of concern to the international aviation community and not covered by existing air law instruments

INTRODUCTORY NOTE

(Presented by the Secretariat)

1. INTRODUCTION

1.1 On 3 June 1996, the Council decided during the sixth meeting of its 148th Session to include in the General Work Programme of the Legal Committee the subject “Acts or offences of concern to the international aviation community and not covered by existing air law instruments”. On 6 June 1997, the Council further decided during the sixth meeting of its 151 Session that a Secretariat Study Group should be established for this item. The group, designated as the Secretariat Study Group on Unruly Passengers, held several meetings. As a result of its work, the 33rd Session of the ICAO Assembly (25 September to 5 October 2001) adopted Resolution A33-4 “Adoption of National Legislation on Certain Offences Committed on Board Civil Aircraft (Unruly/disruptive Passengers)”, setting forth a model legislation was developed by the Group. Further, guidance material was developed by the Study Group on the legal aspects of unruly/disruptive passengers in the form of *ICAO Circular 288*.

1.2 In September 2009, the 34th Session of the Legal Committee expressed its support for the establishment of a study group to address the issue of unruly passengers. Accordingly, the Secretariat Study Group on Unruly Passengers was reactivated in early 2011 based on a decision of the Council at the sixth meeting of its 188th Session in October 2009.

2. WORK OF THE SECRETARIAT STUDY GROUP

2.1 The reactivated Secretariat Study Group held its first meeting in Montreal from 2 to 3 May 2011 and its second meeting in Paris from 3 to 4 October 2011. It identified a number of legal issues related to unruly passengers which needed to be addressed, including a review of the jurisdictional clauses under the *Convention on Offences and Certain Other Acts Committed on Board Aircraft* (Tokyo Convention, 1963) in order to align them with modern practice; the establishment of common standards and practices with regard to offences; the strengthening of international cooperation in harmonizing enforcement procedures; the powers of the aircraft commander and related immunity, and the status of In-Flight Security Officers (IFSOs). The Study Group reached the conclusion that the issue of unruly passengers needed to be addressed by the international community, that ICAO was the proper

forum for this purpose, and that the Tokyo Convention should be reviewed and the feasibility of its amendment examined, with particular reference to the issue of unruly passengers. To that end, the Group recommended that a sub-committee of the Legal Committee be established and be tasked to prepare a draft text to modernize the Tokyo Convention.

3. WORK OF THE SPECIAL SUB-COMMITTEE OF THE LEGAL COMMITTEE

3.1 Based on the recommendation of the Study Group, the Council decided on 15 November 2011 during the 5th meeting of its 194th Session to request the Chairman of the Legal Committee to establish a Special Sub-Committee of the Legal Committee to review the Tokyo Convention, with particular reference to the issue of unruly passengers. On 20 December 2011, the Acting Chairman of the Legal Committee, Mr. M. Jennison (the United States) established a Special Sub-Committee and appointed Mr. A. Piera (the United Arab Emirates) as the Rapporteur. The Sub-Committee, chaired by Ms S. H. Tan (Singapore), held two meetings in 2012.

3.2 At its first meeting from 22 to 25 May, 2012, based on the report of the Rapporteur, the Sub-Committee focused its discussions on jurisdiction, a list of offences, extradition, immunity of the aircraft commander, IFSOs and the extent of the modernization of the Tokyo Convention. In general, many delegations indicated that more time was needed to collect information and data, to undertake consultation within their own States and with outside parties, and to further study the issues.

3.3 At its second meeting from 3 to 7 December, 2012, the Sub-Committee continued its consideration on the issues identified as its first meeting. With respect to the issue relating to jurisdiction, the Sub-Committee had previously expressed the sentiment that the inclusion and exercise of the State of the Operator and State of Landing jurisdictions will assist to curb the increasing trend of unruly behaviour on board aircraft. There was general agreement in the Sub-Committee that the establishment of such jurisdictions is desirable. Other bases of jurisdiction were also considered. What remains to be determined is whether such jurisdictions would be mandatory or optional. These two possibilities have been retained by the Sub-Committee for further consideration by the Legal Committee.

3.4 With respect to the list of offences, the Sub-Committee agreed not to include such a list in the draft instrument, but its majority proposed a new Article 15 *bis* in the Tokyo Convention to include two types of acts. These are the act of assault against a crew member and the act of refusal to follow a lawful instruction given by or on behalf of the aircraft commander. The provisions still remain in square brackets for further consideration.

3.5 The Sub-Committee concluded that there was no need to change the wording in Article 6 or 10 of the Tokyo Convention with regard to the immunity of the aircraft commander. With respect to the issue of extradition, the Sub-Committee believed that there was no need to include additional provisions in the Tokyo Convention.

3.6 With respect to the status of the IFSOs, the Sub-Committee noted that IFSOs did not exist when the Tokyo Convention was adopted, but today they are being increasingly deployed on international flights. Further work was considered necessary in order to build consensus with respect to the role of the IFSOs and their corresponding immunities within the framework of the Tokyo Convention.

3.7 In addition, the Sub-Committee also discussed other issues, such as the possible financial claims by airlines against unruly passengers, particularly in cases of diversion of aircraft; and definitions of certain terms, such as aircraft “in flight”.

3.8 The Sub-Committee considered the possible forms for amending the Tokyo Convention. If a decision is eventually made to amend the Tokyo Convention, it is the recommendation of the Sub-Committee that such amendments be effected through a supplementary protocol instead of a new and stand-alone convention. To facilitate the future work, the Sub-Committee has prepared “Main Operative Clauses for the Draft Protocol to Amend the Tokyo Convention”, which is reproduced as the **Appendix** to this working paper.

3.9 The Sub-Committee concluded that the current work should be referred to the Legal Committee for further consideration. Although the basic framework of the text of the draft protocol has been prepared by the Sub-Committee, it was evident that not all of the issues could be resolved at that level, which is why the draft protocol contains options and square brackets. Certain policy matters could only be decided at the level of the Legal Committee or even that of a diplomatic conference. Accordingly, the Sub-Committee unanimously recommends to the Council to convene the 35th Session of the Legal Committee to further review the Tokyo Convention, with particular reference to the issue of unruly passengers.

3.10 The reports of the two meetings of the Sub-Committee may be found at the ICAO website: <http://www.icao.int/secretariat/legal/LC-SC-MOT2/Pages/default.aspx>.

4. DECISIONS OF THE COUNCIL

4.1 On 20 February 2013, the Council decided at the second meeting of its 198th Session to convene the 35th Session of the Legal Committee from 6 to 15 May 2013 and directed that the meeting be held as a special session.

5. ACTION BY THE LEGAL COMMITTEE

5.1 The Legal Committee is invited to

- 1) note this working paper, and
- 2) review the draft text set out in the **Appendix**.

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APPENDIX

MAIN OPERATIVE CLAUSES FOR THE DRAFT PROTOCOL TO AMEND THE TOKYO CONVENTION

(Presented by the Legal Sub-Committee)

Article I

This Protocol supplements the Convention on Offences and Certain Other Acts Committed on Board Aircraft, Signed at Tokyo on 14 September 1963 (hereinafter referred to as “the Convention”), and, as between the Parties to this Protocol, the Convention and this Protocol shall be read and interpreted together as one single instrument.

[Article II

1. **Article 1, paragraph 3**, of the Convention shall be replaced by the following:

“3. For the purposes of this Convention:

- (a) an aircraft is considered to be in flight from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation. In the case of a forced landing, the provisions of this Chapter shall continue to apply with respect to offences and acts committed on board until the competent authorities of a State take over the responsibility for the aircraft and for the persons and property on board; [and]
- (b) “in-flight security officer” means a [government employee]/[person] who is specially selected, trained and authorized by the government of the State of the operator [and]/[or] the government of the State of registration to be deployed on an aircraft with the purpose of protecting that aircraft and its occupants against acts of unlawful interference; [and]
- (c) “State of the Operator” means the State in which the operator’s principal place of business is located or, if there is no such place of business, the operator’s permanent residence[.]/[; and]
- (d) “State of registration” means the State on whose register the aircraft is entered.”]

[Article III

Option 1

In **Article 3** of the Convention, the following shall be added as **paragraphs 2 bis** and **2 ter**:

“2 *bis* Each Contracting State is competent to and shall also take such measures as are needed to establish its jurisdiction over offences or acts committed on board aircraft in the following cases:

- (a) as the State of landing, when the aircraft on board which an offence or act is committed lands in its territory with the alleged offender still on board;
- (b) as the State of the operator, when the aircraft on board which an offence or act is committed is an aircraft leased without crew to the operator whose principal place of business or permanent residence is in that State.

2 *ter* Each Contracting State is competent to and may also take such measures as are needed to establish its jurisdiction over offences or acts committed on board aircraft in the following cases:

- (a) as the State of nationality, when an offence or act is committed on board an aircraft [by] / [against] / [by or against] a national of that State;
- (b) as the State of habitual residence, when an offence or act is committed on board an aircraft by a stateless person whose habitual residence is in the territory of that State.”]

Option 2

1. **Article 3, paragraph 1**, of the Convention shall be replaced by the following:

“1. The State of registration[, the State of landing, the State of the operator, the State of nationality and the State of habitual residence] are competent to exercise jurisdiction over offences and acts committed on board.”

2. In **Article 3** of the Convention, the following shall be added as **paragraph 2 bis**:

“2 *bis* Each Contracting State [may]/[shall] also take such measures as may be necessary to establish its jurisdiction over offences [or acts] committed on board aircraft in the following cases:

- (a) as the State of landing, when the aircraft on board which an offence [or act] is committed lands in its territory with the alleged offender still on board; [and]
- (b) as the State of the operator, when the offence [or act] is committed on board an aircraft leased without crew to the [lessee]/[operator] whose principal place of business or, if the [lessee]/[operator] has no such place of business, whose permanent residence is in that State; [and]

- (c) as the State of nationality, when an offence [or act] is committed on board an aircraft [by] / [against] / [by or against] a national of that State; [and]
- (d) as the State of habitual residence, when an offence [or act] is committed on board an aircraft by a stateless person whose habitual residence is in the territory of that State.”]

[Article IV]

In **Article 6** of the Convention, the following shall be added as paragraph 3:

Option 1

“3. An in-flight security officer acting pursuant to a bilateral or multilateral arrangement may, when he or she has reasonable grounds to believe that a person has committed, or is about to commit, on board the aircraft, an offence or act contemplated in Article 1 paragraph 1, impose upon such person reasonable measures including restraint which are necessary to protect the safety of the aircraft, or of persons or property on board or to maintain good order and discipline on board.”

Option 2

“3. An in-flight security officer on the aircraft pursuant to a bilateral or multilateral arrangement may, when he or she has reasonable grounds to believe that a person has committed, or is about to commit, on board the aircraft, an act of unlawful interference, impose upon such person reasonable measures including restraint which are necessary for the purpose of protecting that aircraft and its occupants against acts of unlawful interference.”]

[Article V]

Option 1

In **Article 10** of the Convention, the existing paragraph shall be numbered as “1” and the following shall be added as paragraph 2:

“2. For the purpose of the application of paragraph 1, an inflight security officer shall be deemed to be a passenger.”]

Option 2

In **Article 10** of the Convention, the words “any in-flight security officer,” shall be inserted after the words “any passenger,” and before the words “the owner or operator of the aircraft”,]

[Article VI]

The following shall be added as Article 15 *bis* of the Convention:

“1. Each Contracting State shall ensure that the following acts are made punishable by appropriate criminal or administrative penalties when committed by a passenger on board an aircraft in flight:

- (a) physical assault or a threat to commit such assault against a crew member;
- (b) refusal to follow a lawful instruction given by or on behalf of the aircraft commander for the purposes set out in Article 6, paragraph 1(a) or (b).

2. Nothing in this Convention shall affect the right of each Contracting State to introduce, according to its national legislation, appropriate penalties in order to punish other unruly or disruptive acts committed on board by passengers.”]

[Article VII]

The following shall be added as Article 18 *bis* of the Convention:

1. When the aircraft commander disembarks or delivers a person pursuant to the provisions of Article 8 or 9 respectively, the Operator shall not be precluded from recovering from such person any damages incurred by the Operator as a result of such disembarkation or delivery.

2. The disembarkation or delivery of a person pursuant to the provisions of Article 8 or 9 respectively [shall]/[may], in accordance with national law, terminate the contract of carriage between the Operator and that person. The Operator shall not be liable for any damages sustained by that person as a result of the termination of the contract of carriage following such disembarkation or delivery.]

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