



LEGAL COMMITTEE – 35TH SESSION

(Montréal, 6 – 15 May 2013)

Agenda Item 7: Report on work done at the Session

DRAFT REPORT ON THE WORK OF THE LEGAL COMMITTEE DURING ITS 35TH SESSION

1. The attached paragraphs 2:1 to 2:22 of the draft Report of the Legal Committee relate to Agenda Item 2.

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

2:1 The Rapporteur, Mr. A. Piera, presented an outline of his report which can be found at Appendix 4 to the Report of the first meeting of the Sub-Committee (LC/SC-MOT). The **Chairperson of the Sub-Committee**, Ms. Siew-Huay Tan, then introduced the Reports of the two meetings of the Sub-Committee held in May and December 2012, respectively (LC/SC-MOT and LC/SC-MOT/2) which she noted were summarized in LC/35-WP/2-1 presented by the Secretariat, to which the draft text for discussion was appended.

2:2 Following the above presentations, the Chairman announced that he intended to divide up the discussion in four blocks, namely: jurisdiction; offences; immunity of In-Flight Security Officers (IFSOs); and miscellaneous matters, after general remarks by the delegations.

2:3 All delegations expressed their appreciation for the work done so far and agreed that the draft text presented by the Sub-Committee provided an excellent basis for the discussions. A few delegations advised that their States had domestic legislation in place to fill gaps in the Tokyo Convention, but supported the modernization of the latter instrument as a coherent international regime was needed. Other delegations which did not have such domestic legislation suggested that an international regime would assist in the filling of some gaps in the absence of jurisdiction over foreign offenders on board of foreign aircraft.

2:4 An observer delegation representing the 240 leading scheduled airlines informed that its data indicated disruptive behaviours increasing steadily and constantly since 1963, more particularly during the last five years, currently at an average of one occurrence per 1200 flights. Considering also recent case law questioning the immunity of the commander, the observer was convinced that the Tokyo Convention had to be modernized in order to deter such anti-social acts, in addition to operational measures to be established by air carriers as presented in LC/35-WP/2-3. As regards the legal aspect of the matter, this delegation referred to its views developed in LC/35-WP/2-2 and mentioned that the work to be accomplished by the Committee was a once in a generation opportunity to modernize the Tokyo Convention and for creating a strong and robust regime.

2:5 A majority of States opined that the addition of new jurisdictions, in particular those of the State of the operator and of the State of landing, would strengthen the regime set up by the Tokyo Convention. A good number of those States would favour mandatory jurisdictions so as to avoid the possibility of unpunished acts, while others would prefer such jurisdictions to be optional, one of them mentioning that its own statistics in fact demonstrated a decrease of unruly behaviours in recent years. A handful of States expressed their doubts about incorporating such jurisdictions, as other possible non-penal avenues to deter disruptive acts had not been sufficiently explored. One State also raised the issue of addressing the matter of concurrent jurisdictions if additional jurisdictions were to be established.

2:6 The temporal issue was also mentioned by several delegations, raising the need to ascertain whether the power principle determining the applicability of the Tokyo Convention when the aircraft is in flight, had to be reconciled with the principle of closed doors when the commander is in authority.

2:7 As regards the incorporation of a list of offences, it was felt by several delegations that this would enhance the universality of the Tokyo regime. Some of them supported the idea of a generic list or a list limited to most serious offences, while others sought a more specific list. Other delegations were opposed to the idea of a list of offences.

2:8 The issue of IFSOs was commented upon by numerous delegations, some of them questioning the desirability of referring to IFSOs in the Tokyo Convention; it was stated that the status and authority of IFSOs should preferably be addressed at the bilateral level. Conversely, several delegations advocated that the Tokyo Convention should recognize IFSOs who are already referenced in Annex 17 to the Chicago Convention and in the ICAO Security Manual, as they are neither crew nor passengers, and that therefore their status vis-à-vis the commander and their immunity had to be addressed.

2:9 The right of recourse and monetary sanctions was further addressed, raising the issue of compensation for damages associated with the diversion of flights and disembarkation or delivery of offenders, in addition to the need for considering the termination of contracts of carriage with offenders. A number of delegations expressed the need to preserve accepted legal principles such as due process and to prevent arbitrary actions against the unruly passenger.

2:10 Many delegations emphasized the virtually world-wide acceptance of the Tokyo Convention, making it necessary to finding a solution which would add value while not running contrary to the spirit and intent of this globally accepted regime. At the same time, it was generally acknowledged that the issue of unruly passengers had not been at the forefront of the considerations which had considered and adopted the Tokyo Convention 50 years ago. In relation to non-penal measures mentioned earlier, one delegation suggested to incorporate in the contract of carriage provisions addressing the consequences of a breach of discipline on the part of a passenger.

2:11 Referring to the two options presented in relation to **Article III as set out in the Appendix to LC/35-WP/2-1**, the Chairman invited delegations to express their sentiment whether (1) they favoured **State of landing jurisdiction** and (2) whether such jurisdiction should be mandatory or optional. In the given context, the Chairperson of the Sub-Committee explained that the two options differed inasmuch as Option No. 1 extended the State of landing and State of the operator jurisdictions in a mandatory way while providing for an option to add the jurisdictions of the State of nationality of the offender/victim and the State of habitual residence. In Option No. 2 all these grounds for jurisdiction were presented in a way which could render them either optional or mandatory.

2:12 In the ensuing discussion, a large number of delegations favoured the State of landing jurisdiction on a mandatory basis.

2:13 One observer delegation reiterated that the mandatory extension to the State of landing jurisdiction on the treaty level represented the best approach to ensuring that unacceptable behaviour would not go unpunished. This delegation explained that it would still remain at the discretion of the State concerned whether or not to subsequently prosecute. This general sentiment regarding a mandatory extension of the State of landing jurisdiction was echoed by a fair number of delegations who spoke on this point, several of them pointing out that there should be no impunity for grave behaviour affecting the safety of a flight. In the view of these delegations, Option No. 1 represented the best deterrent against unruly behaviour while Option No. 2 merely represented the status quo, in light of the fact that in a number of States the national legislators have already expanded the jurisdictional competencies to include the State of landing. One of the proponents of this approach provided examples of two recent cases involving more than 600 passengers and which had caused significant economic consequences for the air carrier involved, partially recouped from the unruly passengers concerned. This delegation stated that the State of landing had the ability to quickly ascertain the facts and gather relevant testimony. This delegation observed that in case Article 3 of the Tokyo Convention was amended consequential changes to Articles 13 (5) and 16 would have to be made. This assessment was shared by another delegation. One delegation, which supported

Option No.1, noted that the State of landing jurisdiction has been established in the 1971 Montreal Convention for the Suppression of Unlawful Acts and other instruments.

2:14 Several delegations did not support mandatory State of landing jurisdiction, one of them expressing serious doubts whether this measure would be proportionate to the perceived gain of deterrence. This delegation also raised the issue as to which law would apply in relation to the offence committed if the State of landing jurisdiction were to be made mandatory. This delegation was of the view that contractual liabilities could function as a meaningful deterrent. This sentiment was echoed by another delegation which opined that general legal principles such as equality before the law and no arbitrariness in law enforcement action could be compromised if the State of landing jurisdiction was made mandatory. In this context, the delegation stated that while certain behaviour could still be regarded as acceptable in one State, it might be completely unacceptable in the State of landing. One of the delegations which was not in favour of expanding the jurisdiction suggested to leave Article 3 of the Tokyo Convention unchanged or at most consider an optional provision only in cases of serious or criminal offences. In the experience of another delegation, the incidents of unruly behaviour involving that State's air carriers were decreasing and for that reason it preferred only an optional new jurisdiction; in case a mandatory State of landing jurisdiction was introduced in the new instrument, it would become necessary to address the problem of concurrent jurisdiction.

2:15 In the view of another delegation, Option No.1 constituted a structural deviation from the Tokyo Convention. In the view of this delegation, the proposed State of landing jurisdiction would be even wider than the original state of registration jurisdiction in the Tokyo Convention as the former also encompassed "acts" and was not confined to "offences". This sentiment was shared by another delegation which expressed the view that Option No. 2, being consistent with the structure of the Tokyo Convention, should be the starting point for discussion. This delegation stated that the State of landing played a key role in addressing the problem, given the transient nature of the offender and the ease of access to evidence. Three other delegations preferred Option No. 2, one of which expressed the view that the State of landing may only have a very tenuous connection to the incident concerned, making it undesirable to compel that State to exercise jurisdiction and deal with the aftermath of the procedures to be observed instead of merely enabling the State to do so.

2:16 In expressing support for Option 1 with respect to the mandatory expansion of the bases of jurisdiction to the State of landing, one delegation stressed that this would close the jurisdictional gap in the Tokyo Convention, that the prosecution of offenders would be facilitated due to immediate access to the offender, and that the effectiveness of the Convention would be universally enhanced. Another delegation, while supporting the foregoing statement, also recognized the reticence of some delegations to support a mandatory State of landing jurisdiction, especially in cases where a State of landing mandated penalties which were more severe than those of the State of nationality of the offender. This last delegation suggested an exception to the State of landing jurisdiction in cases where the State of nationality requests extradition of one of its nationals accused of unruly behaviour, although it was recognized that Article 16 (2) of the Tokyo Convention as currently drafted militates against this exception. Three delegations agreed that this proposal should be further explored as a way for some States to overcome their reservations with regard to a mandatory State of landing jurisdiction. One delegation noted that Article 13 (5) of the Tokyo Convention in fact obliges the State taking custody to notify the State of registration and the State of nationality and any other interested State; this delegation further suggested the option of shared jurisdiction with the affected States deciding amongst themselves who would exercise jurisdiction in a given situation.

2:17 Another delegation, informing that it has the State of landing jurisdiction in its domestic law, stressed the importance of a mandatory State of landing jurisdiction while at the same time maintaining the State of registration as the primary jurisdiction in the Tokyo Convention given that it is a fundamental tenet

of international aviation law. The State of landing jurisdiction is essential to combatting unruly conduct and rather than being viewed as filling a “jurisdictional” gap, should be viewed as filling an “enforcement” gap. This delegation further opined that those States who have failed to exercise State of landing jurisdiction will probably continue to do so if such jurisdiction is optional, while other States require a mandatory provision in order to implement such jurisdiction in their legislation. This delegation cautioned against confusing mandatory jurisdiction with a State’s discretion to prosecute an alleged offender.

2:18 Two delegations sought clarification from the Secretariat as to what would constitute mandatory and optional jurisdictions and the extent of a prosecutor’s discretion. The Secretary clarified that mandatory jurisdiction would require a State to have legislation empowering it to take jurisdiction, whereas optional jurisdiction would give a State discretion whether or not to enact legislation to take jurisdiction. Whether mandatory or not, those States with a State of landing jurisdiction can always elect not to prosecute any particular case.

2:19 One delegation stated that it could support either option so long as the State of landing jurisdiction is mandatory, without which the efficacy of the modernization of the Tokyo Convention would be undermined. This delegation emphasized the difference between mandatory jurisdiction and prosecutorial discretion further to the Secretary’s clarification above. Another delegation suggested that the “mandatory” versus “optional” terminology be dispensed with so as to overcome differences with regard to jurisdiction and that the emphasis should be placed on empowering a State’s judiciary to consider cases involving unruly passengers.

2:20 One observer delegation, in referring to its LC/35-WP/2-4, supported mandatory State of landing jurisdiction.

2:21 A number of delegations, including those who currently have State of landing jurisdiction in their domestic legislation, supported Option 2 with an optional State of landing jurisdiction citing, among other reasons, that this could be acceptable to more States which would increase the likelihood of ratification. One delegation, in supporting Option 2, pointed out that it may not be economically feasible for many States to implement the State of landing jurisdiction, and that this should be further studied. This same delegation considered that there would be no jurisdictional gap, and that an optional jurisdiction would not result in States of landing disregarding unruly acts with impunity. Another delegation was of the view that there is no jurisdictional gap in the Tokyo Convention in its current form.

2:22 One delegation, supported by two others, noted that it is important to retain the structure of the Tokyo Convention, and that the number of consequential changes to the Convention could potentially increase with the expansion of the bases of jurisdiction.