



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 2:90 to 2:125 of the draft Report of the Legal Committee relate to Agenda Item 2.

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2:90 The Chairman of the **Friends of the Chair Working Group on IFSOs** presented the Group's report containing the rationale for the inclusion of provisions on IFSOs in the Tokyo Convention and drafting recommendations in relation to the role and functions, legal protection and definition of IFSOs as set out in **Flimsy No. 1** (attached hereto as **Appendix F**).

2:91 The Committee was informed by the Chairman of the Group that there was broad agreement in the Group for the inclusion of IFSOs in the Tokyo Convention in order to identify them as a specific category of traveller, enjoying the same level of protection as crew members and passengers, whilst taking preventive measures for safety in terms of Articles 6 and 10 of the Tokyo Convention. Furthermore, it was understood that varying approaches and practices were applied by different States in the implementation of their IFSO programmes in accordance with bilateral or multilateral arrangements or agreements among the States concerned. However, with regard to the definition of IFSOs, the Group arrived at a multiplicity of options as it was evenly divided on the desirability of specifying the purpose of having IFSOs and including a definition of "unlawful interference". Some delegations favoured a reference to Annex 17 and others to bilateral and multilateral agreements or arrangements between States while others saw no need for a definition at all.

2:92 The Chairman of the Committee, while acknowledging the very helpful report provided by the Group, noted that, as the Group was divergently constituted, the same climate of opinion that prevailed within the Group was likely to apply in the plenary. In light of that assessment and as there was not enough time to solicit the position of all the delegations on each of the conclusions on the report, the Chairman proposed that delegations limit their interventions only to views as to whether the report accurately reflected the climate of opinion in Group.

2:93 With regard to the text proposed by the Group on the **role and functions of IFSOs**, one delegation, supported by another delegation, proposed that as there were two clear options and delegations could indicate their preference or support for either option by a show of hands. A strong majority of the Committee supported Option 2, namely, to add the words "in-flight security officer" between the words "crew member" and "or passenger" in Article 6 (2) of the Tokyo Convention. In response to queries raised by some delegations, the Chairman clarified that, in expressing preference for a particular option, delegations had merely indicated generally and not definitively what positions they could support. He noted further that as there was not a detailed discussion of the Group's report due to lack of time. States therefore remain at liberty to make issues and propose alternative formulations of text to the Diplomatic Conference.

2:94 In relation to the provision on **legal protection for IFSOs** the Committee **accepted** the Group's recommendation to add the words "any in-flight security officer" between the words "any passenger" and "the owner or operator of the aircraft" in Article 10 of the Tokyo Convention. One delegation reiterated its position not to support any amendment to Article 10 as all parties concerned, including IFSOs, are adequately protected if they take reasonable measures.

2:95 The Committee while noting the multiplicity of options and the clarification by the Chairman of the Group that some States could support more than one option **agreed** to adopt and refer to the Drafting Committee the comments and recommendations of the Group on the **definition of IFSOs** to be included in Article 1 of the Tokyo Convention. The Chairman clarified further that the Drafting Committee's consideration would not include Option B of paragraph 3 (b) which was not favoured by most delegations although this point was later altered, as described in paragraph 2:101 below.

2:96 One observer supported by one delegation invited the Committee to consider its drafting proposal to amend Article 10 in order to clarify the **scope of immunity** that would apply to the aircraft

commander in light of a court decision that indicated that it may not be adequate for the aircraft commander to rely solely on the reports of the cabin crew. The observer noted that this could cause operational uncertainty as the aircraft commander could not leave the cockpit to make a further assessment of the situation in the cabin. The observer saw the likelihood that courts in the future could interpret inaction by the States on this proposal as a tacit acceptance of the interpretation by that court.

2:97 One delegation, supported by another delegation, noted that it did not see any difficulty for its courts to interpret and apply the reasonableness standard as specified out in Articles 6 and 10.

2:98 The Chairman noted that the Sub-committee had unequivocally concluded that there was no need to change the wording in Articles 6 or 10 of the Tokyo Convention with regard to the immunity of the aircraft commander and that the observer's proposal had not been supported by at least two States. He accordingly **ruled that** the drafting proposal on this matter would not be carried forward.

2:99 The Chairman thereafter announced there were two major items for the Committee to consider: (i) consideration of the report of the Drafting Committee; and (ii) consideration of the question of whether the draft Protocol is mature enough to refer to the Council with a recommendation to convene a Diplomatic Conference.

2:100 When the Committee resumed, one delegation raised a point of procedure about the prior discussion when the Committee had considered text proposed in the "Friends of the Chair" (FOC) Working Group's report (Recommendation A) relating to the roles and functions of IFSOs. Specifically, the delegation questioned the procedure whereby the Chairman had called for a show of hands to gauge support for alternative provisions on IFSOs that were contained in the report without affording delegates the opportunity for further discussion of the matter in the Plenary. The delegation made it clear that it did not wish to reopen discussions on the matter, but rather wanted to ensure that its concerns were reflected in the record of the proceedings.

2:101 The Chairman indicated he would consider the delegation's point of procedure and consult with the Secretariat and, after a short recess, announced his ruling. To wit, the Chairman acknowledged an inconsistency in the way the Committee handled FOC Recommendation A versus other substantive issues considered under Agenda item 2, insofar as the matter was decided on a show of hands without substantive discussion of what was indeed two newly formulated alternative texts. As a solution, he proposed that Recommendation A be treated in the same way as Recommendations B and C. That is, the Committee would accept the FOC's recommendation that the newly formulated competing proposals continue in the text of the draft Protocol in brackets, and reflect in its report the weight of opinion on the two competing formulations as expressed in both the report of the FOC, which would appear as an appendix to the report of the meeting, and in the show of hands taken during the Plenary.

2:102 There were no objections to the Chairman's proposed resolution to this point of procedure, though one delegation expressed its concurrence with the point of procedure and acceptance of the Chairman's proposed amended summary.

2:103 The Chairman announced that the Committee would next consider the **report of the Drafting Committee** (LC/35-WP/2-6).

2:104 The Chairman of the Drafting Committee presented the Drafting Committee's report, with certain editorial changes.

2:105 The Chairman of the Drafting Committee further noted that a number of States represented in the Drafting Committee expressed the desire to voice concerns about the draft Protocol as proposed.

2:106 The Chairman of the Committee commended the capable work of the Drafting Committee and proposed an article-by-article, paragraph-by-paragraph review of the text of the draft Protocol on issues of drafting. The Chairman urged delegates to focus their attention on whether the instructions of the Plenary to the Drafting Committee had been given effect in the proposed draft Protocol.

2:107 The Chairman then called for comments concerning Article I of the draft Protocol and, noting no requests for the floor, declared Article I **adopted**.

2:108 The Chairman next called for comments concerning Article II of the draft Protocol. One delegation urged that more information on the concerns of States represented in the Drafting Committee should be provided, while a second delegation noted the fact that whereas Article II of the draft Protocol uses the term “State of registration”, the Chicago Convention uses the term “State of registry” and questioned whether the Chicago Convention’s wording might be preferable.

2:109 The Chairman then called for comments specifically concerning Article II, paragraph 3 (a), of the draft Protocol. On this point, a number of delegations questioned the appropriateness of provisions of the draft Protocol that had been adapted from other existing agreements, such as the 2010 Beijing Convention definition of “in-flight” and Tokyo Convention verbiage on “forced landing”. The Chairman noted that the concerns of these delegation’s were substantive issues that should be appropriately addressed at the subsequent diplomatic conference. Three other delegations noted that there were drafting and/or translation issues with the French, Chinese, and Arabic translations of the Drafting Committee’s report and offered to submit proposed edits to the Secretariat in each of their respective languages.

2:110 One delegation argued that the phrase “deployed on an aircraft, pursuant to a bilateral or multilateral agreement or arrangement” in Article II, paragraph 3 (b), of the draft Protocol, was problematic insofar as it could be interpreted to mean that a bilateral or multilateral agreement or arrangement between States could override provisions of a revised Tokyo Convention. The Chairman suggested that the delegation’s concern was a quasi-drafting, quasi-substantive one, and so proposed that the matter be referred to any subsequent diplomatic conference for resolution.

2:111 Lastly, one delegation proposed that phrase “the government of the State of the operator or the government of the State of registration” in the second line of Article II, paragraph 3 (b), should be amended to read “the government of the State of the operator and/or the government of the States of registration” shown in square brackets, since consistent with Annex 17 the agreement of both parties to the presence of an IFSO onboard the aircraft is needed. Here again, the Chairman suggested the delegation’s concerns were substantive in nature and should therefore be taken up at any subsequent diplomatic conference.

2:112 The Committee **accepted**, without comment, the proposals of the Drafting Committee in sub-paragraphs **3 c) and d) of Article II** with respect to the definitions of “State of the operator” and “State of registration” respectively.

2:113 The Committee then proceeded to consider **Article III** of the draft Protocol relating to jurisdiction. One delegation citing the need for consistency with paragraphs 1 and the chapeau to paragraph 1 *bis* of Article III, proposed drafting amendments to paragraph 1 *bis* of Article III, namely, to delete the words “offence or act” wherever they appear in sub-paragraphs a), b) and c) of paragraph 1 *bis* and replace them with “offences and acts”. The proposal was not supported by any other delegation and was therefore not taken further.

2:114 Three delegations intervened to place on record their reservations on the issue of mandatory jurisdiction for the State of landing and the State of the operator provided in Article III. The Chairman called

for the forbearance of delegates to desist from reiterating positions that had previously been made and would be duly recorded in the report of the Committee. Such matters could be raised at a diplomatic conference when convened. He reminded the delegates that jurisdiction is a crucial part of the draft Protocol and therefore that a high degree of importance would be attached to ensuring that the text relating to such a provision is not taken forward in square brackets. He assured all delegations that the report dealing with this issue would highlight what transpired in the deliberations of the Committee and the weight of opinion attached to each position.

2:115 One delegation cited difficulties it had with the provision in paragraph 2 *ter* relating to jurisdiction based on nationality due to the specific circumstance of multiple nationalities prevalent in its State. The Chairman noted that this should not be a matter of major concern as there had been a consistent treatment of States with quasi sovereign entities within them, in various treaties. The Committee **accepted** Article III of the draft Protocol without any changes.

2:116 With respect to **Article IV** of the draft Protocol, one delegation, while noting that the proposal in Article 3 *bis* relating to coordination among States with concurrent jurisdiction was a new one that had not been reflected in the report of the Sub-Committee nor sufficiently considered by the Committee, proposed that it be placed in square brackets as there had not been enough time for delegations to consult on it. This delegation, supported by other delegations, indicated that it could support the retention of the provision if it was reflected in a non-prescriptive manner by the use of words “may” rather than “shall”. Delegations that preferred the more permissive text felt that the prescriptive wording would make consultations obligatory and could thereby infringe on the sovereignty of States or constrain States that had to act expeditiously to apply penalties in order to enable the offender to proceed with the journey. One delegation indicated that similar wording to that in Article IV of the draft Protocol was found in other treaties such as the *2000 UN Convention against Transnational Organized Crime*.

2:117 The Chairman of the Drafting Committee, supported by other delegations, explained that the inclusion of the words “as appropriate” was intended to allay concerns that some delegations had about the prescriptive formulation of the provision. The Chairman pointed out that simply deleting the words “as appropriate” and leaving “shall” in square brackets could have the unintended effect of limiting the discretion of States. The Committee **accepted** Article IV with the words “may” and “shall” respectively reflected in square brackets before the words “as appropriate”.

2:118 One delegation, citing the need for consistency, called for the words “acts or offences” in Article 3*bis* to be reflected in square brackets as was the case with other related provisions in the draft Protocol. The proposal was not supported by any other delegation and was therefore not taken further.

2:119 In consideration of **Article V** of the draft Protocol, one delegation queried whether the complete deletion of paragraph 2 in Article 5 to the Convention could affect other provisions in the Convention. The Chairman of the Drafting Committee acknowledged the merit of this observation and suggested further study of the consequences of such deletion. The Committee **accepted** retention of Article V without changes and asked to highlight in the report the need for further consideration to be given to the unintended consequences of the deletion of this paragraph particularly those words related to Chapter III of the Convention.

2:120 With respect to **Article VI** of the draft Protocol which contains only one of the two options presented by the Friends of the Chair Working Group on IFSOs on provisions relating to the role and functions of IFSOs, the Chairman reminded the Committee of the earlier decision to include both options and accordingly instructed the Secretariat to reinsert the omitted option in the draft Protocol.

2:121 The Committee turned to the consideration of the text in paragraph 2 of Article 6 in Article VI proposed by the Drafting Committee. The Chairman of the Drafting Committee drew the attention of the Committee to the words “in-flight security officer” that had been inserted in the second line of the first sentence while noting that while this was proposed to the Drafting Committee it was not decided by the plenary and did not have universal support.

2:122 One delegation which supported the additions of those words stated that the aircraft commander should have the ability not only to request but also to authorize the IFSO to restrain an unruly passenger.

2:123 One delegation, supported by several other delegations, called for the deletion of the words in the first sentence as they would raise substantive policy issues regarding the enhancement of the role of the IFSOs that had not been examined by the Committee. The Committee **accepted** Article VI of the draft Protocol with the addition only of the words “in-flight security officer” in the second sentence of paragraph 2 to Article 6.

2:124 The Committee **accepted** Articles **VII, VIII, IX** and **X** of the draft Protocol without changes. One delegation reiterated the need, in respect of Article IX on restitution, to confirm the policy position that this provision was not intended to fetter national courts.

2:125 Following the discussion above, the Committee **agreed** on the text of the draft Protocol which is set out in **Appendix G** to this Report.